

STATE OF HAWAII
DEPARTMENT OF DEFENSE

TESTIMONY ON HOUSE BILL 418, RELATING TO MILITARY BENEFITS

PRESENTATION TO THE
COMMITTEE ON VETERANS, MILITARY, & INTERNATIONAL AFFAIRS, & CULTURE
AND THE ARTS

BY

MR. RONALD P. HAN
DIRECTOR OF STATE OFFICE OF VETERANS SERVICES

February 02, 2017
9:30 a.m.

Good morning, Chair Ito, Vice Chair Tokioka, and members of the Committee:

I'm Ron Han, Director of the State Office of Veterans Services. I appreciate this opportunity to provide testimony **in support** of the concepts in House Bill 418.

This measure prohibits the courts from indemnifying or awarding any other income or property of a veteran to the veteran's spouse or former spouse for any pre-judgment or post-judgment waiver or reduction in military retirement or retainer pay related to receipt of disability benefits awarded the veteran.

The OVS supports the concepts and intent expressed in this measure as long as its implementation does not impact or replace the priorities set forth in the Executive Budget.

Thank you for this opportunity to provide testimony on behalf of Hawaii's Veterans and their families.

**FAMILY LAW SECTION
OF THE
HAWAII STATE BAR ASSOCIATION**

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February 1, 2017

TO: Representative Ken Ito, Chair
Representative James Kunane Tokioka, Vice Chair
House Committee on Veterans, Military, & International Affairs, &
Culture and the Arts

FROM: LYNNAE LEE, Chair
TOM TANIMOTO, Vice-Chair
Family Law Section of the Hawaii State Bar Association

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HEARING DATE: February 2, 2017 at 9:30 a.m.

RE: Testimony in Opposition of HB418 Relating to Military Benefits

Dear Chair Ito, Vice Chair Tokioka, and fellow committee members:

There is no doubt that the safety of our homes, our cities, our states, country, and perhaps even the world, are attributable in large part to the service of dedicated men and women who serve and who have served in the military. Service members deserve every penny of pay they receive during active duty and retirement. Many service members are injured during their service and/or incur disabilities that affect their lives during and after their service careers are over. For those service members who are eligible to receive a retirement pension, it is well deserved, no doubt. Things are a bit trickier however, in the divorce context where a service member's retirement is subject to division with the other spouse.

Normally, a military service member's pension is divided in accordance with what is called the "Linson" formula, named after Linson vs. Linson (1980) that established the formula. The retirement share that the service member's spouse is entitled to is a percentage of the service member's gross retired pay, with said percentage being equal to one-half of the years of service attained during the marriage divided by the total years of service. As an element of property division, this is normally something that is bargained for and can often times affect alimony awards.

The "Linson" formula applies to civilian pensions as well. The marked difference is that a service member can waive a certain amount of his retired pay in lieu of disability pay such that he or she is no longer subject to taxation on the amount received as disability pay. That is indeed a palpable benefit to the service member who was found to have sustained some degree of disability due to his service. However, there is a marked drop in the "Linson" share receivable

by the non-military spouse because the gross retired pay amount is reduced; so effectively, the spouse receives his/her same percentage share of a *smaller* principal amount.

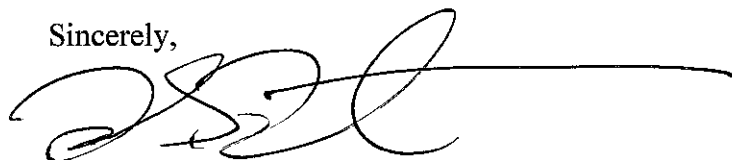
One question is whether this is fair? Military families make great sacrifices to support their loved one's military career. The non-service member spouse, very often, as a full-time parent, has to maintain the home front when the service member deploys, which is no small task. Should the non-service member spouse see his/her share of retirement dwindle only in situations when the service member waives retired pay?

If such a result is unfair, then FLS proposes that HB418 be amended such that the family court would be empowered to determine if a service member's elected waiver of retired pay and the resulting diminution to the non-military spouse's share of the military spouse's retirement is equitable under the circumstances – in other words, fairness may very well have to be determined on a case by case basis.

In addition, it goes without saying that family court practitioners are desirous of crafting divorce proposals and settlements that are as clear-cut as possible for their clients. The possibility that the former spouse's share of retirement pay *could* incur a diminution due to the service member's yet unknown disability rating and possible disability election will very likely affect their (i.e., the former spouse) trial and settlement positions. In other words, they would perhaps end up asking for more in the front end to make up for a potential loss in retirement income, which would ultimately have the effect of making settlement more difficult due to the increase in unknown factors. We would submit that the presently available concept of indemnification engenders some clarity in the settlement and litigation process.

Absent amendment, FLS respectfully opposes HB418.

Sincerely,

A handwritten signature in black ink, appearing to be 'Lynnae Lee', written over a horizontal line.

Lynnae Lee, Chair, Family Law Section
Tom Tanimoto, Vice-Chair, Family Law Section

NOTE: *The comments and recommendations submitted reflect the position/viewpoint of the Family Law Section of the HSBA. The position/viewpoint has not been reviewed or approved by the HSBA Board of Directors, and is not being endorsed by the Hawaii State Bar Association.*

The Uniformed Service Member's Voice in Government
NATIONAL ASSOCIATION FOR UNIFORMED SERVICES
Hawaii Chapter (HI-1)

JANUARY 31ST 2017

TESTIMONY IN SUPPORT OF HOUSE BILL 418 WITH COMMENTS
RELATING TO VETERANS DISABILITY BENEFITS

HOUSE COMMITTEE ON VETERANS, MILITARY, & INTERNATIONAL
AFFAIRS, & CULTURE AND THE ARTS

FEBRUARY 2ND 2017 HEARING IN CONFERENCE ROOM 429

Aloha Chair Ito and Vice Chair Tokioka: Mahalo for providing this opportunity to share our sentiments, in support of House Bill 418. The National Association for Uniformed Services (NAUS) is known, as "The Service Member's Voice in Government." While this voice is silent, on Capitol Hill, NAUS Hawaii Chapter (HI-1) continues to serve at the will and pleasure of our nation's largest per-capita uniformed services community.

NAUS Hawaii Chapter (HI-1) sincerely appreciates your willingness to consider exempting Federal Title 38 United States Code chapter 11 related veterans disability benefits, from indirect involuntary redistribution, through indemnification, to those who would claim access to the subject disability benefits, in a military divorce action.

In addition to this provision, we respectfully ask you to consider directing final responsibility for the determination of any apportionment award amount to the cognizant federal United States Department of Veterans Affairs' claims review process.

These new provisions, together, will most certainly strengthen Hawaii's support for United States Code, Title 38 Chapter 11, Title 42 Section 659(h)(1)(A)(ii)(V) and Title 10, Section 1408(a)(4)(B), and be much appreciated by our divorcing disabled veterans and military personnel.

Thank you for being here for us,

D Egge

Dennis Egge; NAUS Hawaii Chapter President



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TESTIMONY OF THOMAS D. FARRELL

Regarding House Bill 418 Relating to Military Benefits
House Committee on Veterans, Military & International Affairs and Culture and the Arts
Representative Ken Ito, Chair

Thursday, February 2, 2016 9:30 a.m.
Conference Room 429, State Capitol

Good afternoon, Rep. Ito and members of the Committee:

First off, I apologize for the length of this testimony, however this is a complicated issue, and there is no way to explain it all in a page.

My name is Tom Farrell. I am an attorney and former chair of the Family Law Section of the Hawaii State Bar Association. I am also the author of Chapter 10 of the Hawaii Divorce Manual, titled "Divorce and the Military." Probably half of my clientele as a divorce attorney are currently serving in the military, retired, or their spouses. I am also a veteran of over 29 years of military service, including a year in Iraq.

HB 418 would prohibit the family court from considering a veteran's disability benefits in determining alimony or property division, and specifically prohibit the court from ordering a military retiree to "indemnify" the other spouse for a future election to receive disability payments in lieu of retired pay. For the past several years, some version of HB 418 has been introduced, and veterans organizations and others show up to passionately support it. It's hard to say no to these folks.

Just the same, I always oppose it. So I oppose HB 418. And you should kill it in committee.

It's always a good idea to know what the law is before one starts trying to change it.

First, we need to be clear about what disability payments we are talking about. There are two types.

The provisions for Permanent Disability Retirement are found at 10 U.S.C. Chapter 61. To qualify, the servicemember must be found medically unfit for duty, the condition must be permanent, he must be at least 30% disabled, and must have at least twenty years of military service. Unlike regular military retirement, Permanent Disability Retirement is non-divisible in divorce. HB 418 does not affect this, as its language makes clear.

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Most servicemembers do not qualify for Permanent Disability Retirement, but many qualify for VA Disability Compensation. The enabling legislation is at 38 U.S.C. Chapter 11. VA Disability Compensation is not divisible in divorce. *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). That's what HB 418 addresses.

VA disability is intended to compensate a servicemember for future loss of earnings resulting from a service-connected disability. In contrast, military retired pay (other than disability retirement) is a form of deferred compensation for service. Even though military retired pay and VA disability are paid for two entirely different purposes, there was a perception in Congress that retirees who also received VA disability were "double dipping." That isn't really true, but Congress acts in strange ways. Therefore, federal law provides that when a servicemember retires and is rated with a disability by the Department of Veterans Affairs, the retiree is required to waive his retired pay "dollar-for-dollar" to receive VA Disability Compensation. This created an incentive for military retirees to seek a disability rating in order to shelter regular military retirement (which *is* divisible in divorce) from their former spouses.

The Hawaii appellate courts have had two cases since the *Mansell* decision addressing the interplay of Permanent Disability Retirement, VA Disability Compensation, and regular military retirement. In *Jones v. Jones*, 7 Haw. App. 496 (1989), the Intermediate Court of Appeals addressed the nondivisibility of VA Disability Compensation in a case involving a Navy couple. The court held that the \$335,584 cash value of husband's time-of-divorce entitlement to disability compensation post-divorce could not be used as the basis for an award to wife of other marital assets of an equal cash value. Therefore, a key feature of HB 418 is already the law in Hawaii.

In 2005, the Hawaii Intermediate Court of Appeals ruled in *Perez v. Perez*, 107 Hawaii 85, 110 P.3d 409 (2005), that a stipulated family court divorce decree in which a former servicemember agreed to compensate his former spouse if he converted his divisible military retirement into nondivisible disability retirement is enforceable and does not violate Federal law where, at the time the family court entered the decree, it did not divide disability retirement and the former servicemember could comply with the terms of the decree by utilizing funds and other assets other than his disability retirement pay. In other words, the family court can't order it, but if the former servicemember voluntarily agrees to compensate his former spouse if he converts his divisible military retirement into nondivisible disability retirement, and he does so as part of a negotiated divorce settlement, the family court can enforce that agreement.

The right answer is that you shouldn't have to wave retired pay at all in order to receive VA disability. Legislation has been introduced in every Congress to do this, and in 2004, Congress enacted a compromise, creating two new programs.

The first is *Concurrent Retirement Disability Pay (CRDP)*. Under this program, the retiree who meets certain conditions (degree of disability, etc.), will receive both VA disability compensation

and this new form of compensation (which is not related to combat injuries). See 10 U.S.C. §1414. This applies to servicemembers who are rated at 50% disabled. Because CRDP restores regular retired pay that would otherwise be offset by a waiver in favor of VA Disability Compensation, it is divisible under the Uniformed Services Former Spouses Protection Act as “disposable” military retired pay. In other words, the retiree has no diminution of retired pay, and neither does the ex-spouse.

The second program is *Combat Related Special Compensation (CRSC)* authorized by 10 U.S.C. Section §1413a. However, Section 1413(g) states: Payments under this section are not retired pay” and therefore, they cannot be added to the fund to be divided under the Uniformed Services Former Spouses Protection Act.

So the bottom line is that HB 418 could apply only to VA disability compensation and only in those cases where the servicemember is less than 50% disabled and still has to waive retired pay to get VA disability.

Although there is no reported caselaw in Hawaii on how veterans’ disability payments interact with alimony, a family court order that explicitly awarded alimony to compensate for the fact that a spouse can’t get a share of disability pay would be very unlikely to pass appellate muster, in view of *Jones v. Jones*. However, as a practical matter, most divorce decrees that contain an alimony proviso---or for that matter property division provisos---have no explanation of how it was arrived at; therefore there would be no way to know if the family court judge ignored your proposed legislation.

Permit me to explain a bit further.

A divorce decree is not an explanation. It is merely an order that says who gets what. If there is an alimony proviso it will read that Spouse 1 will pay alimony to Spouse 2 of X amount for Y duration. Property division provisions usually say “he gets the Ford, she gets the Chevy.” Somewhere in the neighborhood of 90% of divorce decrees are the product of an agreement of the parties. Only in those small numbers that actually go to trial and where alimony or property division is at issue is there any opportunity for the family court judge to make a ruling. As you know, there are thirteen statutory criteria that guide the family court judge, but most of them are rather subjective. So even if you passed a bill forbidding the family court judge from considering veteran’s disability payments in making an alimony award or property division, you’d never know whether the judge did so or not. And even if a judge were later required to state the reasons for a particular alimony or property award, if a judge is determined to award a particular amount, there are plenty of other subjective reasons that would support that award.

So, I want this Committee to be very clear on what it is that you are endorsing if you vote out HB 418. If a servicemember divorces, the divorce decree awards the non-member spouse 35% of his retired pay, and he retires and gets retired pay of \$5,000/month, the ex-spouse would normally

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get \$1,750 and the retiree would get \$3,250. However, if the servicemember waives \$1,000 of retired pay to get VA disability of an equal amount, then the ex-spouse only gets 35% of \$4,000, which is \$1,400, and the retiree would get \$3,600.

HB 418 says the family court judge can't consider that, and even if the parties agree that the servicemember will make up the \$350 difference to the ex, the court can't enforce it.

VA disability was intended to compensate servicemembers for service-connected disabilities, and not to give those who stay in long enough to qualify for a longevity retirement a way to screw their ex-spouse out of the share of the retired pay that she would otherwise be entitled to receive. That's why divorce lawyers who represent ex-spouses often insist on the indemnity proviso that HB 418 proposes to outlaw.

Thank you for the opportunity to testify this morning.