New York State Bar Association
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Memorandum in Opposition

FAMILY LAW SECTION

FLS # 4 May 29, 2015

S. 4967 By: Senator Croci
A. 6768 By: M. of A. Ortiz
Senate Committee: Children and Families
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the domestic relations law, in relation to child custody when a parent is deployed on military active duty.

LAW AND SECTION REFERRED TO: DRL §§ 70(1), 75-1, 240-1(a).

THE FAMILY LAW SECTION
OPPOSES THIS LEGISLATION

This bill seeks to solidify the rights of parents serving in the military in the context of custody disputes. Specifically, the Bill would prohibit courts from using the issue of military deployment as a factor to be considered in making a custody determination if the deployed parent presents a "suitable child care plan" to the Court. Moreover, the Bill would require that within thirty days of return from military deployment, the child custody order in effect -- prior to the deployment -- would be automatically reinstated.

The Family Law Section **OPPOSES** the Bill for the following reasons.

First, the Bill operates from the false premise that a comprehensive "best interests of the child" analysis can be accomplished without considering the impact that military deployment may have on a child. The "best interests of the child" analysis includes consideration of how best to maintain the child's stability, the child's wishes, the child's home environment with each parent, and which parent has been the primary emotional provider, among other things. The Bill improperly assumes that military deployment, whether for weeks, months or years, has no bearing on a child's circumstances. It also appears to diminish the role of the attorney for the child, insofar as his or her viewpoint on whether and how deployment impacts the child's best interests is seemingly removed from the Court's consideration. An appropriate modification of DRL §§ 70(1) and 240-1(a) would direct that deployment shall not be considered as the sole factor underlying any custody determination, whether in conjunction with modifying an existing custody order or otherwise.

Second, the Bill does not define what constitutes a "suitable child care plan." Such language is imprecise, and in any event could be construed as creating rights to parenting time for child care providers (or other appropriate adults designated by the deploying parent). An appropriate modification to DRL §§ 70(1) and 240-1(a) would empower the deploying parent with the right to file a motion that seeks to designate an appropriate adult (whether a family member or otherwise) to utilize his or her parenting time during the deployment if and only if the Court finds that doing so would be in the child's best interests. Further, the Bill should clarify that even if the Court grants such a motion, the rights created for the substitute provider during the deployment are temporary in nature and are expunged immediately upon the return of the deploying parent.

Third, a blanket reinstatement of a custody order entered prior to the deployment is inappropriate, again because it fails to ensure that the best interests of the child are considered. An appropriate modification to DRL § 75(1) would be to direct that the prior order is to be reinstated except in the event that the non-deploying parent establishes that reinstatement would not be in the best interests of the child. Stated differently, the Bill should provide the non-deploying parent with the right to file a motion and present evidence showing that a return to the prior custodial arrangement is not in the child's best interests. Here again, the Bill could provide that deployment alone is not a sufficient basis to prevent reinstatement of the prior order. While the return from deployment may constitute a substantial change in circumstances, as the Third Department explained in *Matter of Diffin Jr. v. Towne*, 47 A.D.3d 988, 991 (3rd Dep't 2008) (referenced in the Justification for the Bill), the question remains whether the child's best interests would be "enhanced" by ordering a change in the child's "present physical custody." If the deploying parent returns with severe injuries, and/or psychological trauma from being in combat, such facts should be considered by the Court in determining each parent's relative fitness. As drafted, the Bill dispenses with an analysis of each parent's fitness when the deploying parent returns, and instead makes the assumption that each parent is equally fit. Even if that is the case, a change in physical custody may not "enhance" the child's best interests. *Id*.

Fourth, the Bill could be more effective if it addressed mandatory access time for the deploying parent during the deployment. For example, the non-deploying parent should be required, at a minimum, to (a) make the child available for electronic/telephonic communication during the deployment; and (b) make the child available when the deploying parent is home on leave.

For the reasons stated above, the Family Law Section **OPPOSES** this legislation.

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