American Bar Association
Section of Family Law

A Short Course in Military Family Law Issues
Wednesday, May 3, 2006

Program Materials

American Bar Association
Section of Family Law
www.abanet.org/family

American Bar Association
Section of Family Law

Wednesday, May 3, 2006

A Short Course in Military Family Law Issues

Family Law Overview

Howard I. Lipsey
Associate Justice
Rhode Island Family Court

DIVORCE AND FAMILY LAW OVERVIEW

I. Introduction

1. Divorce is the termination of a lawful marriage.

2. The divorce proceeding may include a final resolution of several issues between the parties.

   a. Custody and visitation of children
   b. Child support
   c. Division of marital assets
   d. Alimony (or spousal support)

3. A Court must have jurisdiction in order to grant the divorce and rule on the above issues.

4. There is jurisdiction ***in rem*** and jurisdiction ***in personam***.

   A Court may have jurisdiction to grant the divorce itself -- ***in rem***, but not jurisdiction to render personal orders over the party not seeking the divorce -- ***in personam***.

5. When both parties are within the jurisdiction of the Court, the Court has both ***in rem*** and ***in personam*** jurisdiction.

6. The problem often arises where one party seeks the divorce in a jurisdiction where the other spouse is not subject to the personal jurisdiction of that Court and does not in any way submit to that Court's jurisdiction This is called an ***ex parte*** divorce.

II. The Domicile Concept

1. The Uniform Divorce Recognition Act provides:

> "A divorce from the bonds of matrimony obtained in another jurisdiction in *ex parte* proceedings shall be of no force and effect in this state (R.I.), if both parties to the marriage were domiciled in this state (R.I.) at the time that the proceeding for the divorce was commenced."

2. The key word then is ***"Domicile"***.

3. Williams v. North Carolina, 317 U.S. 287 (1942) - referred to as "Williams #1"

Facts:

> Man and woman left North Carolina and went to Nevada. Nevada residence requirements were satisfied and divorces were granted to each from their North Carolina spouses. They married each other, returned to North Carolina and were convicted of bigamy. The United States Supreme Court overturned this conviction.

The United States Supreme Court held:

1. Divorce decrees are more than *in personam* judgments. They involve the marital status of the parties.

2. Each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.

   Thus, marriage is ***"in rem"***.

4. Williams v. North Carolina,325 U.S. 226 (1945) - referred to as "Williams #2"

Facts:

The parties were again convicted. The United States Supreme Court upheld the convictions.

The United States Supreme Court Held:

1. Under our system of law, judicial power to Grant a divorce -- jurisdiction, strictly speaking -- is founded on domicile.

2. While the state of the spouse's domicile has the power to grant a divorce entitled to full faith and credit, the issue of whether either spouse was, in fact, domiciled in the state of divorce is open for re-examination.

3. North Carolina found that the spouses who obtained the Nevada decrees were not domiciled there.

4. Simply because the Nevada Court found that it had the power to award a divorce decree cannot foreclose re-examination by another state.

5. In Sherrer v. Sherrer, (1948), 334 U.S. 343, the United States Supreme Court held:

1. Unlike Williams #2, jurisdictional findings were made in proceedings in which the defendant appeared and participated.

2. "We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run

the gauntlet of such collateral attack in the courts of sister states before its validity outside of the state which rendered it is established or rejected."

6. Domicile is then the key basis for jurisdiction

   a. Domicile is a jurisdictional fact.

   b. Under ***Williams***, each state is permitted to make its own inquiry as to a party's domicile and no state's determination can bind another on this issue.

   c. A Definition of Domicile

   "To establish a domicile and become a domiciled inhabitant, there must be an actual abode in the state with the intention in good faith to live here permanently and without any present intention of changing the home in the future. Actual residence without such intention does not suffice. See ***Nevin v. Nevin, 149 A.2d 722 (R.I.)***

III. The Jurisdictional Jungle in Domestic Cases

1. Where can a servicemember (SM) client file for divorce or dissolution (that is, solely the termination of the marriage)?

   a. State of legal residence, domicile? What is domicile? Domicile has been defined as:

   "...the place of one's actual residence with the intention to remain permanently, or for an indefinite time, and without any certain purpose to return to a former place of abode. Once established, a party's domicile continues until another one is acquired, regardless of changes in temporary sojourn. However, intention without the concurrence of residence is not sufficient to change or to create domicile. Both must coexist."

(1) Thus, domicile is composed of the two elements of physical presence and intent. Physical presence is where the member is presently living. Intent to remain (or return, if absent), is shown by payment of state income and property taxes, voting records, bank accounts, motor vehicle titles, registration and driver's license, and the purchase of a home.

(2) The importance of these actions, which show the intent of the individual, cannot be overstated. Many military members claim Florida or Texas, for example, as their domiciles because these states do not have an income tax. A close analysis of most of these claims, however, reveals that there are no actions to support them, such as ownership of property licensed or titled in that jurisdiction, and also that the member has never really resided in that state in the first place.

(3) Domicile is an essential element in a divorce case. One of the parties to the divorce must call Puerto Rico "home" for legal residence purposes (such as paying state taxes and voting here) if the divorce is to be valid. The Servicemembers Civil Relief Act allows military personnel the right to retain their original domicile for state taxation purposes, regardless of where they are stationed. Check closely to see which of the parties is domiciled in Puerto Rico when examining a divorce lawsuit, and be sure to inquire, when it is the SM who alleges legal residence in Puerto Rico, what indicators of domicile apply.

b. "Home of record"? "Home of record" is a technical term that the Department of Defense uses to specify the state or territory which is the home of a person upon entry on active duty or reenlistment. It is an administrative entry which is not intended to specify the domicile of the military member at any time other than when he or she enters active duty.

c. State where the SM is stationed? Some states appear to grant divorce jurisdiction based upon a SM's being stationed in the state for at least six months pursuant to military orders. For example, North Carolina appears to have a special rule granting to a SM the right to apply for a divorce here when he has been stationed in the state for six months.

G. S. 50-18. Residence of military personnel; payment of defendant's travel expenses by plaintiff.

In any action instituted and prosecuted under this Chapter, allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States army, navy, marine corps, coast guard or air force installation or reservation or any other location pursuant to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirements set for in this Chapter; provided that personal service is had upon the defendant or service is accepted by the defendant, within or without the State as by law provided.

d. Rhode Island has an interesting statute regarding a serviceperson's domicile:

"**15-5-12 Domicile and residence requirements.** -- (a) No complaint for divorce from the bond of marriage shall be granted unless the plaintiff has been a domiciled inhabitant of this state and has resided in this state for a period of one year next before the filing of the complaint; provided, that if the defendant has been a domiciled inhabitant of this state and has resided in this state for the period of one year next before the filing of the complaint, and is actually served with process, the requirement of this subsection as to domicile and residence on the part of the plaintiff is deemed to have been satisfied and fulfilled. The residence and domicile of any person immediately prior to

the commencement of his or her active service as a member of the armed forces or of the merchant marine of the United States, or immediately prior to his or her absence from the state in the performance of services in connection with military operations as defined in subsection (c) of this section, shall, for the purposes of this section, continue to be his or her residence and domicile during the time of his or her service and for a period of thirty (30) days after this. Testimony to prove domicile and residence may be received through the ex parte affidavit of one witness. (b) Every word importing the masculine gender only shall be construed in this section to extend to and include females as well as males. (c) The term "services in connection with military operations" shall be construed in this section to include persons serving with the American Red Cross, the Society of Friends, the Women's Auxiliary Service Pilots, and the United Service Organizations."

e. If one of the parties is domiciled in the jurisdiction that grants the divorce, and there is proper service and notice, then the court has the power to adjudicate the marital dissolution. If no one is domiciled there, then it's "asking for trouble" to file there. We usually advise clients against suing for divorce in Nevada, Mexico or the Dominican Republic, for example, because the parties to the marriage are almost never domiciled in these "divorce mill" jurisdictions and the client risks ending up with a fancy piece of paper that's worthless, rather than a valid divorce. For more information, see: ***Williams v. North Carolina, supra;*** Hemingway, *Foreign Divorces and the Military; Traversing the "You're No Longer Mine" Field,* Army Law., Mar. 1987, 17-20; Annot., 13 A.L.R.3d 1419 (1967).

2. What if your client also wants to file for custody? Be aware of the rules under UCCJEA, UCCJA andP0KPA, 28 U.S.C. 1738A.

a. "Home state of child"?

b. Where child is living at present? Ordinarily NO, unless residence has been for at least six months in the same state or territory.

IV. Divisible or Bifurcated Divorce

1. We have seen that the divorce itself can be granted if the Court has jurisdiction over the party seeking the divorce. ***(in rem)***

2. There may remain, however, issues such as children, property rights, and spousal support.

3. Personal jurisdiction over both parties is required in order to make these orders.

4. When the divorce has already been granted in one jurisdiction ***(in rem)***, the jurisdiction having personal jurisdiction over both partners can make personal orders (***in personam)***.

5. In ***Estin v. Estin, 334 U.S. 541, 546,*** Mr. Justice Douglas stated:

> "Marital status involves the regularity and integrity of the marriage relations. It affects the legitimacy of the offspring of the marriage. It is the basis of criminal laws as the bigamy prosecution in ***Williams v. North Carolina*** dramatically illustrates. The State has a considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized. The interest of the state extends to the domiciliaries."

Estin stands as a landmark decision, holding that no state can bind a defendant personally without lawful jurisdiction over his or her person.

6. Today's society is a mobile one. Whether civilians or military, the opportunity to reside in different jurisdictions and to seek the relief of different courts is readily available.

One jurisdiction may grant a divorce, but a separate jurisdiction will be called upon to make the personal orders.

The Rhode Island Supreme Court has described this phenomena in ***Rymanowski v. Rymanowski, 249 A.2d 407 (1969).***

> "Today, we live in a society of remarkable mobility. A Rhode Islander, besieged with wanderlust may, upon payment of the proper fee, be jet-propelled across this vast continent within a matter of hours to one of our sister states bordering the Pacific Ocean. Whether by plane, train or automobile, this increased mobility of our population has given rise to another problem. Occasionally, one who is charged with the duty of support, finds the call of the road irresistible. Prior to reciprocal support legislation, the dependents of one so irresponsible were left in a woeful state to fend for themselves. In most instances they could not afford to pursue the slacker for whom sanctuary from the rightful demands of support was assured in another state."

7. A valid *ex parte* divorce does not terminate the property rights or rights to support of the spouse who did not obtain the divorce.

8. Where a court does not have personal jurisdiction over both parties, it may grant the divorce to the person it finds it has jurisdiction (domicile) but had no power to terminate the other spouse's rights to support, property or rule on issues involving the children.

Thus, the Divisible Divorce Concept or Bifurcated Divorce

V. Foreign Divorce

1. If a divorce is obtained in the United States Court and the court has jurisdiction to grant the divorce, the Full Faith and Credit clause of the United States Constitution will require a sister state to honor that judgment of divorce.

> "Full faith and credit shall be given each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." ***Const. U.S. Art. IV Sec. 1***

2. The section requires that state courts recognize judgments of the courts of sister states, provided the sister state's court properly exercise subject matter and personal jurisdiction.

3. If a divorce is obtained in a foreign jurisdiction, the Full Faith and Credit clause is inapplicable. The concept of "*comity*" may apply.

4. In ***Perrin v. Perrin, 408 F.2d 107 (3d Ct. 1969,*** it was held with respect to a Mexican divorce:

> "1. Domicile is the basis for jurisdiction to grant a divorce in U.S.
> 2. A divorce decree may be collaterally attacked for lack of domiciliary jurisdiction if the defendant was not personally served and did not appear.
> 3. If defendant was personally served or did actually appear in the action, he is estopped from impeaching the resulting decree, whether the domiciliary jurisdiction was contested by defendant or was admitted by him.
>
> 4. This Mexican divorce was bilateral.
>
> "A balanced public policy now requires that recognition of the bilateral Mexican divorce be

given rather than withheld and such recognition as a matter of comity offends no public policy of this territory." (The territory was the Virgin Islands.)

5. Overview of Divorce

a. Jurisdictional basis -- one of the parties must be a domiciliary of the state, territory or country granting the divorce.

b. Advising your clients--

(1) Don't file for divorce where your client just happens to be stationed; make sure it's filed in the domicile of the husband or of the wife.

(2) If the other side does this (and there's no jurisdictional basis for divorce), advise the client about contesting the divorce -- cost/benefit analysis, "pro's" and "cons".

c. Advising against "foreign divorces" -- Nevada, Dominican Republic, Mexico, etc. (see Silent Partners at ATCH-1, ATCH-2 on overseas divorce, foreign divorce.)

d. Advising your clients about the two types of divorce procedures in the United States, "Types of Divorce Procedures."

(1) One Claim at a Time -"Bifurcated or Divisible Divorce" One type of jurisdiction, represented by states such as Delaware and North Carolina, allows the granting of a divorce without reference to any other claims for relief. Once the no-fault grounds exist, the plaintiff can file for divorce and, within proper time, have a divorce granted to him or her.

(2) "The Package Approach" The other type of jurisdiction, represented by New York and Wisconsin, only allows a divorce after all marital claims have been settled or tried. The resolution of these marital issues -- property division, alimony, custody and child support -- must have been accomplished by agreement or litigation before the court will grant a divorce to the parties. It is in these cases where we hear the client say, "she won't give me a divorce." This means that the other party will not settle the case thus allowing a divorce to be granted. In reality, however, it is always the judge who grants the divorce, not the other party. If the other side will not settle, then the only alternative for the one who wants the divorce is to press his case and ask for a trial.

ATCH-1

SILENT PARTNER

SHOULD I GET A DIVORCE OVERSEAS?

INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. Without being "heavily footnoted," it is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question.

* * *

Introduction

Many legal assistance clients want to know whether they can - or should - get a divorce in a foreign country. There is no easy answer to this question. In fact, the best answer to the sample question, "Should I get divorced here in Germany?" is to say to the client, "It depends. Here - take this yellow pad and let's list the PRO's and CON's."

That's exactly what is done in the table below. It's a summary of information that you need to gather to give competent and ethical advice to your client so he or she can make the right decisions. It's based on the assumption (which applies in the majority of cases) that the husband is the military member, the wife is not in the military, she is either not employed or earns less than her husband, and that there are children of the marriage. Depending on the context of the question and answer, several other assumptions may apply. For example, some parts of the custody section presume that the wife is a homemaker, that she is the primary custodian for the children, and that she intends to stay overseas with them. These assumptions are for convenience and ease of writing only; they are not meant to imply anything about real-life clients.

Another point is that this table is intended to be "all-inclusive." It's supposed to cover just about every conceivable situation. And it's written for both types of clients - mothers and fathers, husbands and wives. Not all of your clients, of course, will have children or will want alimony. Simply skip over the issues that don't apply to your client.

How to Use the Table

When you encounter one of these cases, print a copy for you and one for your client. Take your time in filling this out, and use one of these tables for each of your clients who need to know this information. Save your copy, but feel free to give a copy to your client. To be <u>really safe</u> and protect yourself, fill out your copy on the computer and save it there in your "Clients" directory using this particular client's name (and also on a back-up disk or tape). "Make a record" is some of the most important advice that can be given to the LAA. Just as doctors back up their diagnoses, treatments and prognoses with clinical notes, so legal assistance attorneys need to keep track of what they say, what they hear and how they advise their clients in a format that's portable and permanent - usually on hard drive and floppy disk. This is to be sure that there's a record of these items down the line when/if a client decides to register a complaint, be it grievance or malpractice claim.

Be sure to ask questions. This is not "easy stuff." You can often get the answers on local national law from the Army's overseas host nation attorneys - they are usually located at division-level offices or higher (and sometimes at law centers). The stateside answers will require you to do some phoning or e-mailing; it's unlikely that the kind of answers you're looking for will come from an outline, a book or similar sources.

Also do some extra "hand-holding" and helping for your clients, especially the foreign-born spouses. They often need extra assistance in getting a stateside attorney, reading legal papers,

understanding them, and dealing with the problems of separation and divorce. Some of these clients would be more likely to walk on the dark side of the moon than to select a stateside attorney, pay a retainer, keep the lines of communication open, etc. Some spouses just want to "walk away" from a dead-end marriage, not realizing that there are still important issues (financial and otherwise) to be resolved. Due to cultural differences (or simply client personalities), you may need to be more proactive with a foreign spouse than would be the case with a "typical" American client. For example, sometimes you'll have to dial the phone while the client is in the office; otherwise, giving her the phone number and advising her to call almost always means that nothing will get done!

Conclusion

After reading this, you'll easily see how much trouble a client encounters with a foreign divorce. Go the extra mile and get the word out on what problems these can be. And, when confronted with one that's already taken place, contact competent civilian counsel immediately to try to repair the damage! For more information, see the Silent Partner on "Counseling on Foreign Divorce."

QUESTIONS	TOPIC NOTES	YOUR NOTES
DIVORCE		
Does my client want a divorce?	If NO, then your client will need advice on how to contest a divorce. This should be given by the host nation attorney.	
Can my client get a divorce here in Germany [Italy, Japan, etc.]?	While there is no simple answer for overseas jurisdictions as to when and whether one can get a divorce there, the American answer, and the one that will be applied in U.S. courts, is pretty simple. If one of the parties is domiciled in the jurisdiction that grants the divorce, then the court has the power to adjudicate the marital dissolution. If no one is domiciled there, then it's "asking for trouble." We usually advise clients against suing for divorce in Nevada, Mexico or the Dominican Republic, for example, because the parties to the marriage are almost never domiciled in these "divorce mill" jurisdictions and the client risks ending up with a fancy piece of paper that's worthless, rather than a valid divorce. For more information, see: *Williams v. North Carolina*, 325 U.S. 226 (1945); Hemmingway, *Foreign Divorces and the Military: Traversing the "You're No Longer Mine" Field*, Army Law., Mar. 1987, 17-20; Annot, 13 A.L.R.3d 1419 (1967).	
Can my client get a divorce here even if neither party is domiciled here?	The answer is a definite MAYBE. If both of the parties want to get divorced in Germany, for example, and if both participate actively in the process, then probably they will both be barred from challenging the divorce later on the grounds of equitable estoppel. That doesn't mean it's a valid divorce - it may be a void or voidable one, but neither party would be allowed to later contest its validity. Is that a good idea? Probably not, unless there's absolutely nothing that could go wrong in the future (and who can say that?) regarding the parties and this "questionable	

QUESTIONS	TOPIC NOTES	YOUR NOTES
	divorce." So - best to advise against this and, once again, make a record of this advice!	
Will my client lose military benefits upon divorce?	The non-military spouse may lose certain benefits, such as the military dependent's ID card, and this should be discussed with her or him. See the table in The Army Lawyer published semiannually for a listing of benefits and requirements. Also advise about certain theater-specific benefits, such as the privilege of tax-free use of an overseas commissary or exchange when the sponsor is no longer present in the theater.	
Will my client, the wife, be allowed to resume use of her maiden name upon divorce?	This depends on the law of the place where the divorce occurs, so contact the host nation attorney for an answer. All states allow this in connection with (or subsequent to) a divorce or dissolution. Even if everything is done overseas, she can still probably do this in her state of domicile, but it'll be quite a bit more complicated when it's bifurcated like this.	
Will the court here handle all matters regarding the marriage when hearing the divorce case (i.e., child support, custody, alimony, property division, etc.)?	This depends on the law of the forum where the divorce occurs, so check with the host nation attorney for more information. In the U.S., the states are divided as to whether the divorce case encompasses all matters pertaining to the marriage (New York and Wisconsin use this approach) or whether each claim may be asserted separately (North Carolina and Delaware do it this way).	

QUESTIONS	TOPIC NOTES	YOUR NOTES
ALIMONY/SPOUSAL SUPPORT		
What if my client needs alimony?	Then you'll need to decide what court can award alimony and where the award will be enforceable.	
Will she be eligible to receive it here in court?	Check with your local host nation attorney on this.	
How much will she get here?	Same answer as above.	
Would she get more back in the States?	Could be - but you'll only know the answer if you do some phoning around or e-mailing to attorneys, Reservists or military bases back in the U.S. Some states even have guidelines for alimony (also called maintenance or spousal support). If she's thinking about returning to the States, check with an attorney in the place to which she's returning to find out the answers for her.	
Will the order from this country be enforceable if the husband returns to the States?	This depends on whether the state to which he returns will recognize the foreign judgment. And you simply don't know, in most cases, where he'll be going unless he's about to retire and return to his home state or else he has a set of orders for his next post, camp or station. States are bound to recognize each other's judgments under the "Full Faith and Credit" clause of the U.S. Constitution, and states may recognize foreign country decrees under principles of comity. See the section below on enforcement of child support for further information.	
PENSION DIVISION		
Is my client entitled to a share of her husband's military pension?	Unless the wife is not interested in sharing her husband's military pension rights upon his retirement, she has waived this, or the marital interest is so small as to be insignificant (such as a one-year marriage), the answer here is YES. Except for Puerto Rico, every territory and state allows for the division at divorce of the pension rights of spouses, although a very few states require that these rights be "vested" in order to be divided. For a full and current listing, see the JAG School's "State-by State Analysis of the Divisibility of Military Retired Pay."	
Can the court here award pension division?	The court may be able to award pension division for those pensions that are set up and maintained in the foreign country – for example, the wife's pension rights with Deutchesbank in Heidelberg, where she works, can be divided by a German court. But U.S. pensions, as a general rule, cannot be divided by a German court.	
Will DFAS honor a pension division order	DFAS will not honor a military pension division order from a foreign country. The decree must be	

QUESTIONS	TOPIC NOTES	YOUR NOTES
from this court?	from a U.S. court - a state, possession or territory.	
What if my client wants to avoid pension division?	In this case, then by all means have the foreign court exercise jurisdiction (if it thinks it can) over the client's military pension, since a foreign court cannot divide a military pension and obtain direct payments from DFAS. While this cannot guarantee that the pension will not be divisible in a state court, it will be the best argument he can make against pension division under the circumstances.	
OTHER PROPERTY DIVISION		
Is there any property to divide?	If NO, then move on to Custody/Visitation below. If YES, go to the next question.	
If so, has it already been divided?	If it has, then it is best to memorialize that agreement on division by means of a separation agreement or property division agreement. Without this, there can still be disputes about who gets what.	
Is there a valid separation agreement in place that provides for property division and waives division in court?	If so, then all issues of "other property division" have probably been settled, so long as the possession of the property has been changed to the proper person (and, if applicable, the titles as well).	
What if my client wants property division?	Try to do this by separation agreement rather than in a contested hearing overseas or state-side.	
Does the court have jurisdiction over the marital or community property of the parties?	As a general rule, the court will have jurisdiction over property within the territorial jurisdiction of the court. Asking the German court, for example, to exercise jurisdiction over an Illinois bank account may cause problems. Will the Illinois bank honor the German court order? For an answer, check with both the host-nation attorney and also an attorney in Illinois.	
CUSTODY/ VISITATION		
Will the children remain with my client in Germany till they're all 18 and never go outside the country with the other parent?	If YES, then the client will never have to worry about the enforcement of a German custody/visitation order elsewhere. You may not even need a custody order. If NO, go to the next question.	
Does my client want protection for the return of the children in case they go overseas to visit dad?	Since no one can possibly say what the future will bring, you will need to counsel your client about the enforceability of a foreign custody order in the U.S. She will be facing some risks in turning over the kids to the other parent without a valid U.S. order. What will happen ifs dad decides to keep the children and not return them? See the International Child Abduction Remedies Act, 42 U.S.C. 11601, the Hague Convention on the Civil	

QUESTIONS	TOPIC NOTES	YOUR NOTES
	Aspects of International Child Abduction, and the Silent Partner on "Custody Enforcement – International" for more detailed information on civil remedies.	
CHILD SUPPORT		
How much child support will my client pay?	You'll need to check with the host-nation attorney regarding child support rules, laws or guidelines in the country involved. Germany, for example, uses the *Dusseldorf Tabellen* ("Dusseldorf Chart") to determine child support. Each of the states has its own guidelines for the setting of child support. Compare the guideline amount for, say, Illinois to the amount that the German court would set to get an idea of where your client would fare best.	
Will the award be enforceable when dad moves back to the States?	Let's see. There are 5 possibilities for US court enforcement - - >The court always has the discretion to enforce foreign decrees under the principle of comity. This is the recognition and enforcement of a foreign judgment when the decree is final, it was entered under principles of basic fairness [i.e., notice, opportunity to be heard, impartial tribunal, etc.] and the enforcement would not be contrary to public policy. >Another source of law is international treaties and agreements, but the U.S. has not ratified any of the four major international treaties regarding international support enforcement. >The Uniform Foreign Money-Judgments Recognition Act (UFMJRA) is a potential source of enforcement power if the state which is involved has passed this statute and has made it applicable to foreign support orders, as opposed to simple money judgments in non-domestic cases. Although 28 states have passed the UFMJRA, only Florida, Iowa and Michigan have made this latter change in the Act. >Title IV-D of the Social Security Act, Section 459A, allows the US (or individual states) to enter into reciprocal agreements with foreign countries to enforce support obligations. Only Ireland, the Slovak Republic and the Canadian province of Nova Scotia have been so recognized. >And finally - UIFSA!! Yes, that statute that you thought dealt only with interstate support enforcement actually has a large role in the international enforcement of family support. Under UIFSA, a foreign nation is treated as a "state" if it has enacted a law or set up procedures for the issuance and enforcement of support orders which are substantially similar to those	

QUESTIONS	TOPIC NOTES	YOUR NOTES
	under UIFSA or URESA. There are 19 countries which qualify, including Germany, United Kingdom, France, Mexico, Czech Republic, Australia, Austria, Canada, Hungary and South Africa. A complete list is available at the IV-D Agency (child support enforcement office) for each state. So… don't despair. There is some (but not much) good news regarding foreign court orders and American court enforcement. Remember to advise your clients that it's ALWAYS easier to obtain enforcement of a U.S. court order than a foreign one. And be sure to do your research, contact an attorney in the state where your client (or the other party) will be located upon return to the U.S.	

[rev. 9/19/99]

* * *

SILENT PARTNER IS PREPARED BY COL MARK E. SULLIVAN, USAR, (Ret.), 600 Wade Avenue, Raleigh, N.C. 27605 [919-832-8507]; E-MAIL-- LAW8507@AOL.COM.

ATCH-2

SILENT PARTNER

COUNSELING ON FOREIGN DIVORCE

INTRODUCTION: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys. Without being "heavily footnoted," it is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

"I got my last divorce in Mexico, ma'am," said the client rather nonchalantly. "Quite honestly, it was a whole lot faster -- and cheaper -- than those stateside divorces some people get."

CPT Carla Krenwinkel sat back and sighed. "When will they ever learn?" she asked herself.

What is "Foreign Divorce"?

"Foreign divorce" is a phrase all too familiar to military legal assistance attorneys. It is not uncommon for a client to explain how easy it was and how very few other soldiers knew about this inexpensive alternative to a "stateside divorce." Just contact an attorney in Mexico, the Dominican Republic or even Reno, Nevada. They're listed in classified ads in most major newspapers, and you can even find them on the Internet.

Is it all that easy? And, as some clients say, is it just too good to be true?

The Jurisdictional Basis for Divorce

"Not by a long shot," answers CPT Krenwinkel. "A foreign divorce is simply this -- a fancy piece of paper that costs a lot of money and is probably worthless. That's what a Mexican divorce is... and also one from any place other than your home state or native country."

"The fact is," she continued, " if you're not a legal resident there (or your spouse doesn't reside there), you just aren't getting a divorce. You're going through a lot of paperwork that's going to have to be cleared up down the line by some lawyers... and boy, will they charge you for the mess you've made!"

Practical – and Legal – Problems with a Foreign Divorce

CPT Krenwinkel knew what she was talking about. She'd just finished helping a German national client, Mrs. Klein, get an American attorney to serve divorce papers on her husband. Only he thought he was her ex-husband!

You see, SSG Bill Klein (U.S. Army, Retired), had come to the same conclusion as many fellow soldiers. In his own words, "It's faster, simpler and less expensive to get a divorce in the Dominican Republic than to shell out $500 or even $1,000 to hire one of these local attorneys to do the divorce here in South Carolina." So he'd gotten himself a Dominican Republic divorce -- it only took three weeks -- and then he got "remarried" to his girlfriend, Frieda Rome, a danseuse at the local NCO club.

SSG Klein had been quite surprised when he was served with the "new" divorce papers by Mrs. Klein's attorney. "That idiot lawyer -- I'm already divorced!" he told Frieda when the papers came to his door courtesy of the local sheriff's deputy. But when he took them to his friend, CPT Jake Jenkins, the chief of legal assistance at a nearby Army base, he received a rude awakening.

Bad News

"You see," explained CPT Jenkins, "A foreign divorce is basically a cheap thrill. It's a paper shuffle that makes you feel like you're divorced when, in the eyes of the law, you're not. Back in 1945 the U.S. Supreme Court said so in a case called Williams v. North Carolina.[7] The case says that at least one of the parties must be domiciled in the state where the divorce proceeding takes place, or else it's just no good. Domicile, of course, means your legal residence -- and I assume that you're not a legal resident of the Dominican Republic!"

"No," answered a shaken Klein. "But does that mean that this divorce is no good?"

"I guess it depends," answered Jenkins, a savvy legal assistance attorney. "Was your wife, Mrs. Klein, somehow a Dominican Republic national? No? I didn't think so. Just one other question – did she file papers stating that she agreed with the divorce?"

A Possible Exception

American courts usually take a dim view of foreign divorces and usually refuse to recognize them. There's one possible way out for SSG Klein, however, based not on the validity of the divorce but rather on the theory of estoppel.

Here's how it works. Where both of the parties participate in the foreign dissolution action, they may be estopped to challenge its validity in a subsequent court action. This would be the case, for example, if the husband files for divorce in the Dominican Republic and then serves the wife, who responds after accepting service and notifies the court that she's in agreement and wants the divorce also.

Under these circumstances, neither party could later challenged the divorce in a collateral attack since both had participated in obtaining it. That doesn't mean it's really legal or even a good idea. It simply means that the courts won't allow a divorce that was invalid in its inception to be later attacked by either of the parties that had participated in the illegality.

It may also be argued that, even if the wife didn't participate in the divorce at the time it was granted, her acting in reliance on it would bar, by estoppel, an attack on the divorce later on. This would be the situation where she then remarries after the divorce is granted or takes some other substantial action that is inconsistent with her being married and shows that she is acting in reliance on the divorce being valid.

This is, of course, a far cry from saying that the divorce is valid. Rather, these approaches concentrate on the divorce being immune from attack by either party. The divorce can, however, be attacked by an outsider, one who's not a party to the illegal transaction.

When in Doubt, DON'T

This is the best advice to give a soldier or spouse each and every time the topic of foreign divorce comes up. "Undoing one," or dealing with the consequences after it's obtained, is ordinarily far worse than the cost and inconvenience of getting a proper divorce in the first place.

In the above case the real wife, Mrs. Klein over in Germany, will be suing her husband for pension division (which he thought was "bye-bye" after the Dominican Republic decree that he got), alimony and attorney's fees. He'll have to get a "real divorce" in South Carolina and then face the music on each of these issues. If he's not too lucky, he'll be facing a huge amount of "unpaid alimony" if the judge decides to "go retroactive" with him and impose a support obligation for Mrs. Klein since the parties' separation – which is always a possibility. And if SSG Klein happened to be on active duty, then there's always a chance that there will be a "pay problem" associated with getting a "divorce," then getting "undivorced" later on.

---

[7] 325 U.S. 226. In general, divorces granted in foreign countries to persons who are legal residents of the U.S. are not considered valid or enforceable. *See* Annot., 13 A.L.R.3d 1419 (1967) and also Hemingway, *Foreign Divorces and the Military: Traversing the "You're no longer Mine" Field,* ARMY LAW., Mar. 1987, at 17-20.

Another "Foreign Divorce" Problem

Now let's change the scenario a bit. What happens when it's Mrs. Klein who wants the divorce? She has just contacted a German attorney, and she informs CPT Krenwinkel that she's decided to file for divorce herself, right here in Germany!

At this point, CPT Krenwinkel needs to question her client about the unresolved issues to see if any of them will suffer "collateral damage" because of the upcoming German divorce action. Here are some of the questions to be asked:

- What about alimony? Can a German court award alimony to Mrs. Klein? If so, can she enforce the alimony award against SSG Klein (who, you remember, is now back in South Carolina). Is it likely that he's going to pay the alimony award voluntarily to her? Mrs. Klein needs to know that DFAS (Defense Finance and Accounting Service) will not honor a foreign court decree for alimony garnishment.

- How about custody? If the children are with Mrs. Klein in Germany, the German courts can exercise jurisdiction over them. But what if they go to the states to visit SSG Klein... and he decides to keep them there? Will a South Carolina court honor a German custody order? Probably not. This doesn't mean that Mrs. Klein should not request custody in the German courts; but it does mean that CPT Krenwinkel should advise her of the consequences of foreign visitation and parental kidnapping.

- How about child support? Will American courts recognize and enforce a German decree? Will DFAS enter a wage assignment from SSG Klein's retired pay for the child support he was ordered to pay? The answers – a resounding MAYBE for both questions. This is not too comforting to Mrs. Klein.

- Does Mrs. Klein want to ask the court for property division? Will the German court be able to exercise jurisdiction over, for example, the parties' Ford truck located in South Carolina? How about the savings account (acquired during the marriage) that's at Pentagon Federal Credit Union in Washington, D.C.? Or the mutual funds in Chicago?

- Finally, and perhaps most importantly, what about pension division? DFAS will not honor a foreign decree on the division of military retired pay. Under USFSPA (the Uniformed Services Former Spouses' Protection Act), the court order that divided military retired pay must be from an American court if DFAS is to honor it and take the pension division payments from the retiree's pay. The same goes for SBP (Survivor Benefit Plan), which would cover Mrs. Klein in case SSG Klein dies. There's no way to guarantee coverage for Mrs. Klein, regardless of what the German court decrees, if DFAS doesn't have an American court order for SBP coverage and a "deemed election letter" from her.

Conclusion

All in all, you can see how much trouble a client walks into when arranging a foreign divorce. Go the extra mile and get the word out on what problems these can be! And, when confronted with one that's already taken place, contact competent civilian counsel immediately to try to repair the damage! For more information, see the Silent Partner on "Should I Get a Divorce Overseas?"

[rev. 9/19/99]

* * *

SILENT PARTNER IS PREPARED BY COL MARK E. SULLIVAN, USAR, (Ret.), 600 Wade Avenue, Raleigh, N.C. 27605 [919-832-8507]; E-MAIL-- LAW8507@AOL.COM.

American Bar Association
Section of Family Law

Wednesday, May 3, 2006

A Short Course in Military Family Law Issues

Domestic Violence

Chapter on "Domestic Violence" is excerpted from the yet to be released ABA Section of Family Law publication "Military Divorce Handbook" by Mark Sullivan and is reprinted with permission from the American Bar Association.

CHAPTER ____: DOMESTIC VIOLENCE

[Special thanks for Raleigh, North Carolina attorney Woofer Davidian, a former Navy JAG officer, for his help in co-authoring this chapter.]

INTRODUCTION

Domestic violence cases, while not the norm, are often are the beginning stages of the family law case for the domestic practitioner. Domestic violence cases are full of emotion and involve allegations of one spouse abusing the other, often male on female, but certainly not always. Domestic violence in the military is no different. With the recent level of developments overseas, stresses on military families are at their highest level in 30 years. Within the last few years, several high-profile domestic violence cases involving military personnel have made headlines and brought the issue of domestic violence in the military to the attention of the public and our military leaders. In November 2001, Deputy Secretary of Defense Paul Wolfowitz stated, "Domestic violence is an offense against the institutional values of the Military Services of the United States of America. Commanders at every level have a duty to take appropriate steps to prevent domestic violence, protect victims and hold those who commit it accountable."[1]

So much attention was given to these military cases and the rising problem of domestic violence within the military that the Department of Defense (DoD) established the Defense Task Force on Domestic Violence (DTFDV). The DTFDV conducted a three-year comprehensive review of the military's policies and procedures for preventing and responding to domestic violence. Given the military's already unique justice system and in light of the changes adopted at the DTFDV's recommendation, a domestic violence case in the military environment can present the civilian practitioner with challenges, hard work, opportunities, and surprises.[2]

CIVIL AND CRIMINAL REMEDIES UNDER STATE LAW

The traditional remedies for any domestic violence case are found in state civil and criminal statutes. Military personnel and their families are an integral part of the local civilian economy and society. Therefore, when domestic violence occurs within a military family, in many cases a civilian remedy (criminal or civil) is all that is required. No military police or command personnel may be needed. The family law practitioner who is contacted by either the alleged abuser or the victim-spouse can proceed initially with a domestic violence case as one would with any other civilian incident. Knowing and understanding how the military response and assistance will come into play later will help place the civilian practitioner in a better position to advise the client, whether husband or wife, victim or accused.

If the offense is serious enough, requires an immediate response and occurs outside the military installation in private housing quarters, the local authorities will have jurisdiction over the offense and may be called for assistance. If a similar offense occurs in off-base

---

[1] Deputy Defense Secretary Paul Wolfowitz, Memorandum, *Domestic Violence*, November 19, 2001.

[2] Defense Task Force on Domestic Violence, http://www.dtic.mil/domesticviolence (last visited March 10, 2005)

government housing, the local authorities will also usually have concurrent jurisdiction and may be called as well. Therefore, the victim, in any off-base situation will have the option to call the local police department or sheriff's office for help. In this situation where the offender is arrested by the local authorities, he or she will most likely be charged with violation of a state criminal statue, such as assault, aggravated assault, communicating a threat, stalking or assault on a female.[3] This results in the normal criminal domestic violence case in state court, except one of the parties is in the military (or occasionally both parties are servicemembers). Once a servicemember (SM) is charged in state criminal court with a domestic violence offense, the military ramifications can range from a nominal effect to a discharge from the armed forces and even a court-martial prosecution. These results will be discussed later in the chapter.

Another option for the victim in an off-base situation is to file in the local court for a civil domestic violence restraining order (DVPO).[4] This is a civil, versus criminal, remedy for the victim of domestic violence.[5] In most states, the DVPO is a remedy available to spouses, former spouses, family members (such as a child or elderly parent), or household members (such as a roommate). Sometimes a victim of domestic violence need not employ an attorney, as help may be available from the court, from legal aid agencies, from women's organizations or from a battered women's shelter or community domestic violence project. It is always advisable to get the help of an attorney if that is available.

PRACTICE TIP

A short note is in order for cases involving an accused who is a SM and a victim who is a civilian. When the victim is not the spouse of the SM and the parties do not have a minor child, the victim's remedies will be limited to the civilian court system and the military justice system. The military will not extend the benefits discussed later in the chapter to a victim who is not the spouse or child of the SM.

If the situation is serious, the victim will need immediate protection. In addition to contacting the local law enforcement authorities, the victim in most states may file a civil complaint requesting a DVPO and receive an *ex parte* hearing on the alleged domestic violence offense. In this case, a judge, hearing officer or magistrate hears the victim's case without the offender being notified. If this judicial officer determines that it is likely that domestic violence occurred and or that protection is warranted, he or she will issue an *ex parte* DVPO.

An *ex parte* DVPO is usually based on an immediate threat of domestic violence or a recent act of bodily injury or attempt at domestic violence. Each state will have its own definition of domestic violence and of the grounds for an ex parte DVPO, but usually the

[3] For example, in North Carolina offenders are usually charged with either N.C. Gen. Stat. § 14-33 (assault) or N.C.G.S. Gen. Stat. § 14-33(a)(1) (assault on a female).

[4] For example, in North Carolina victims can file under N.C. Gen. Stat. Chapter 50B for a civil domestic violence restraining order.

[5] Sometimes the violation of a valid civil DVPO may be a criminal offense. *See, e.g.*, N.C. Gen. Stat. § 50B-4.1.

latter involves present endangerment of the plaintiff/victim. The *ex parte* DVPO prohibits any violence toward the victim, bars the accused from contacting or harassing the victim, and – if the parties have been living together - orders the separation of the parties (usually by requiring the accused to leave the premises). Usually there is a hearing scheduled in the next five to ten days following the service of the summons, complaint and *ex parte* DVPO on the accused to offer the opportunity for the accused to tell his or her side of the story and to clarify or refute the plaintiff's evidence as contained in the complaint.

PRACTICE TIP

When a civil DVPO is used, the civilian family law practitioner should be aware that the provisions of the Servicemembers Civil Relief Act (SCRA) would protect the SM, regardless if he or she is the plaintiff or the defendant. While criminal remedies may be more limited, there is no right to a stay of proceedings under the SCRA because the Act only covers civil and administrative cases.

This summarizes the civilian domestic violence system. Both the criminal and civil routes are available to the SMs, family members and others (roommates, girlfriends or boyfriends etc.). The civil court options available when the victim or the accused is in the military are the same as they are for civilians:

- Contact the local law enforcement authorities (police, sheriff's department) and ask that the offender be arrested immediately.
- Swear out criminal charges at the magistrate's office.
- File a civil domestic violence complaint or petition.
- Request an *ex parte* DVPO.
- Seek shelter from the local assistance programs.
- Call an attorney for advice.

Here is an example of how this might happen. Marine Lance Corporal Glenn Gray returns to his off-base home from a long day "in the field" and realizes that Jane Gray, his wife, has not completed several errands for him today because the children were sick. Frustrated and tired, he gets into an argument with his wife over these uncompleted tasks. This takes place in front of their two minor children. Losing his temper, CPL Gray grabs his wife by the neck, slaps her in the face and tells her he'll beat her senseless if she doesn't "straighten up."

What are Jane Gray's options? As discussed above, since she lives off-base and is a part of the local community, she can use the civilian justice system. She may both call the local authorities and file criminal charges against her husband. Additionally, she can go to the courthouse, either that evening or the next day when he goes to work, and file a criminal complaint, a DV petition or both. These actions will initiate the processes of providing Mrs. Gray with protection for herself and her family. If she files a criminal complaint, CPL Gray will be issued a criminal summons (or arrested, depending on the state law) and he will have to appear in state criminal court. If she files for an *ex parte* DVPO and the judge determines a protective order is necessary, then a DVPO will be issued and served on CPL Gray and he will have to comply with the DVPO and respond to it in court.

If she calls the police, CPL Gray may be arrested on the spot if there is evidence of a domestic incident or if the police believe her description of the incident. If he is arrested, then CPL Gray will be acutely aware that he is not to return home and will most likely be issued a "no-contact order" by the local court upon his release from jail. At this point, Mrs. Gray has the option to notify his command and begin the military responses as discussed below.

PRACTICE TIP

Even if the domestic violence case is initiated by civilian authorities and disposed of in the civilian state court, the SM may still suffer potentially severe military consequences depending on the outcome and direction of the proceedings. For example, using the CPL Gray scenario above, if CPL Gray is convicted of a violation of a criminal statute for domestic violence (for example, assault on a female), then he may face administrative separation, based on current service regulations, or other punitive action by his command. Even if the civil remedy solution includes deferred prosecution for the domestic violence offence, CPL Gray, depending on the underlying domestic violence action, might still be administratively separated based on this civilian outcome. If a civil DVPO is issued and the command is informed of the DVPO, then this will initiate a military response as well. Thus the attorney representing CPL Gray in state court may attempt to contact Mrs. Gray (if she is not represented) or her attorney in an attempt to keep the incident "off base" as long as possible and potentially work out a solution that does not involve the prosecution of CPL Gray, but still protects Ms. Gray. The attorney for Mrs. Gray will have to decide whether to advise the client to try to work out an "off-base" solution or to seek additional assistance by notifying the command (e.g., requesting a Military Protective Order, as discussed below). This decision will be based on the needs and concerns of Mrs. Gray (after she is informed of possible military remedies, punishments and consequences) and the unique facts surrounding the domestic violence incident.

What if Mrs. Gray goes to court, files for and receives a civil *ex parte* DVPO? How does CPL Gray receive notice of the order? Does the DVPO affect CPL Gray on base? Jane Gray has several options:

- She can inform him of the order and tell him not to return to the home and have him call the police for service of process;
- She can have a local law enforcement officer serve him at home.[6]
- Notify his command, the command liaison to the local authorities or the base SJA and have him served by local authorities while on duty at the base.

The first two options are examples that the family law practitioner most likely already knows are available. What about the third option?

MILITARY OPTIONS

The Armed Forces Domestic Security Act, (dealing with civilian orders of protection and their impact on military installations) states:

[6] Many local police departments and sheriff's departments have specific domestic violence units trained or designated to serve *ex parte* DVPOs and will escort the alleged offender back to the home to collect some personal items and tools of his or her trade and then escort him off the premises.

(a) Force and effect. A civilian order of protection shall have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order.

(b) Civilian order of protection defined. In this section, the term "civilian order of protection" has the meaning given the term "protection order" in section 2266(5) of title 18.
(c) Regulations. The Secretary of Defense shall prescribe regulations to carry out this section. The regulations shall be designed to further good order and discipline by members of the armed forces and civilians present on military installations.[7]

A "protection order" is:
any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court....[8]

Once a military command is notified that a civilian DVPO exists against SM, the command should counsel the SM as to the existence of the civilian DVPO and the effect and enforceable nature of the DVPO on base. This notification will most likely come from the command staff judge advocate (SJA) or a member of the SM's chain of command.[9] The command may also advise the SM to consult with a military legal assistant attorney.

If you represent Mrs. Gray in the above scenario, then you might call CPL Gray's commander or the installation provost marshal to advise of the DVPO and to offer a courtesy copy of the order. Most likely a command liaison (usually a military police officer or a member of the security detail who acts as a liaison to the local authorities) will help effect service on CPL Gray.

If you represent CPL Gray, then you should know that he cannot attempt to avoid service on base. You should advise him as to the civilian consequences for violating the DVPO. While any violation of the state DVPO will be seen as a violation of a civilian state court order and possibly charged as a criminal offense under the laws of the state, CPL Gray should be advised that nothing prevents the military from charging him under the Uniform Code of Military Justice (UCMJ) for the same violation.[10]

MILITARY REMEDIES: THE FAMILY ADVOCACY PROGRAM

The military system has adopted a "zero tolerance" policy towards domestic violence. As stated in the memo written by Deputy Secretary of Defense Wolfowitz, domestic violence "is an offense against the institutional values of the Military Services of the United States of

---

[7] 10 U.S.C. § 1561a (2002).
[8] 18 § 2266 (5) (2000)
[9] *See*, Defense Task Force on Domestic Violence-2003 Third Year Report, February 2003 at 60-61, found at http://www.dtic.mil/domesticviolence/reports/Start.pdf (last visited March 10, 2005).
[10] See Articles 128 and 134 of the UCMJ, which allow for assimilation of civilian crimes so that they can be prosecuted under the UCMJ.

America."[11] Therefore, when the military authorities are notified that a SM is accused of, a victim of or otherwise involved in a domestic violence incident, it will implement specific responsive procedures.[12] Once a report of domestic violence is made,[13] a military commander has a variety of choices, but there are basically two major avenues to choose, either the Family Advocacy Program (FAP) route or the military justice route. Either decision may lead to an offending SM's separation from the armed services with an administrative discharge or by means of court-martial.

PRACTICE TIP

When the SM is the victim of domestic violence and the accused spouse is a civilian, counsel should note that the military has very little control over the non-military party. One available protection is for the base commander to bar the offending civilian spouse from the military base completely. To request this, contact the base SJA (staff judge advocate), who is the command's attorney, and present him or her with your client's situation (and civilian protective order, if possible). The SJA can request the base commander issue a letter barring the civilian spouse from the base in order to protect the SM-victim.

The Family Advocacy Program is set up under a DoD (Department of Defense) administrative directive, DoD Directive 6400.1.[14] The Program is designed to identify, intervene and treat, not punish, SMs who have committed or are likely to commit acts of domestic violence. Intervention and treatment are also offered to at-risk military families. The primary focus of the FAP is to protect and safeguard the victim of domestic violence and to provide access to support and advocacy services. Many victims of domestic violence in the military do not realize the programs, counseling and support services available through FAP. While each branch of the armed forces operates differently and has its own set of protocols, the programs are uniformly designed to safeguard and provide services to victims and their family members.[15]

Once a report is made to the FAP concerning an incident of domestic violence, a caseworker will be assigned to investigate and interview the victim and the accused to determine what steps, if any, need to be taken. Also, if available, the victim will be assigned a Victim Advocate who, along with the FAP caseworker, will ensure that victims and their families are protected and made aware of the counseling and benefits available to them.

PRACTICE TIP

Sometimes the SM and the spouse decide that, despite an actual domestic violence incident, it is in their best interest to try to resolve their issues and work through the problems in their

[11] *Supra* note 1

[12] The military has general policies and procedures that are service-wide, and each branch of the armed forces has its own individual responses as well.

[13] Reports of domestic violence to the military system can come from a broad range of sources, including the victim, the offender, civilian law enforcement, military police, military medical personnel, the FAP, the command, co-workers, neighbors and friends.

[14] DoD Directive 6400.1, "Family Advocacy Program (FAP)", (August 23, 2004).

[15] For example, https://www.airforcefap.org/home.asp Air Force FAP website, http://www.persnet.navy.mil/pers66/fap.htm Navy FAP website

marriage or relationship. When this happens, you should strongly encourage the parties to seek private, off-base, non-military and confidential or privileged counseling. The counseling provided by FAP counselors is not confidential. FAP employees, along with other military and DoD personnel (including physicians, nurses, social workers, psychologists and other health-care providers) have a duty to report any domestic violence or suspicion of violence. This means there are no privileged communications between the SM or spouse and the local DoD or FAP personnel. In the military, only chaplains and attorneys (once a professional relationship is formed) have the right to keep communications privileged. This means that the command and others will be informed, even if the victim does not want the incident reported. Once notified, the command will initiate a military response. Also if the SM admits committing an act of domestic violence in a counseling session with any DoD or FAP personnel or during an investigation with a FAP counselor, this admission *can* be used against the SM to substantiate abuse and in any later administrative hearing, non-judicial punishment or court-martial proceeding.

When the FAP caseworker investigates the incident, he or she will normally interview the victim to determine the facts of the incident and to determine if this appears to be an ongoing situation or a one-time event. The FAP caseworker will also attempt to interview the alleged offender. Family law practitioners representing an accused SM must understand that the client does not have to talk with the FAP caseworker. As stated in the Practice Tip above, any statement that clients make can be used against them in a later proceeding.

Once the investigation is complete, the FAP caseworker will present the case to the CRC (Case Review Committee). This committee consists of command representatives, other FAP personnel, and usually the command SJA. The committee reviews the case and makes a determination concerning the incident. The committee has three categories of findings: substantiated, suspected and unsubstantiated. This is important for the civilian family law practitioner representing the offender to understand because this committee determination will be one of the factors which the commanding officer uses in deciding whether to punish the SM under the UCMJ, administratively separate the SM or refer the SM for treatment.[16]

Using the same scenario again with CPL Gray and his wife, Mrs. Gray may decide to forego civilian remedies and utilize the military remedies available to her at the local command, or she may utilize both systems. First, if she is injured and requires medical attention and she goes to the base hospital facilities, then she should know that the treating military personnel are required to report the domestic violence incident to CPL Gray's command and the local FAP. If she is not injured, she can report the incident to the FAP personnel, to her husband's command and/or to the base SJA. In any event, the military response will commence and investigations by the FAP and the command will begin.

The family law practitioner representing civilian victims should get to know the FAP personnel on the base. A base directory will provide the proper contact information. One can also contact the base SJA for guidance. The family law practitioner may also want to obtain a copy of the applicable regulations and procedures from the FAP personnel. Once a case

[16] See the Family Advocacy Program Commander's Guide located at: http://www.defenselink.mil/fapmip/tools.htm (last visited March, 24 2005).

begins, it is important to coordinate with the FAP and maintain contact with them so as to be kept "in the loop" regarding the situation, the client and the accused.[17]

MILITARY REMEDIES AND COMMAND RESPONSES

The military commander, faced with two options when a domestic violence incident is reported, may choose one or both. Nevertheless, the first obligation for the command when domestic violence is reported involving a SM or a military family member is to ensure the safety of the victim. The commanding officer is responsible for all aspects of the command's response to a domestic violence incident. If the victim is a SM and the offender is a civilian, then the command can do very little except to bar the civilian offender from the base and refer the SM to FAP for counseling, support, and additional assistance in pursuing civil and criminal remedies through the local court system. In addition, the command can refer a SM victim to the local legal assistance office for additional help and consultation with a military attorney.[18]

When the SM is the alleged offender, however, the command can issue a Military Protective Order (MPO). This can be issued at the request of the family member or upon the command's own initiative.

An MPO can be used to order the SM to stay away from the victim, not to communicate with him or her, to leave the parties' home and to refrain from doing certain things that might interfere with or further threaten the victim and family. The MPO is much like a DVPO, but it is not enforceable by civilian authorities. MPO's are not court orders, but rather administrative orders given by the SM's unit commander or the base commander to protect alleged victims and allow for an investigation to take place once a domestic violence incident has occurred. Nevertheless, MPOs are powerful weapons in the domestic violence cases. They are considered *direct orders* from the commanding officer issuing the MPO, and any violation by the SM will subject him or her to punishment under the UCMJ. An MPO is issued without notice to the offender and without a hearing.

In the CPL Gray scenario, for example once CPL Gray's command discovers that he has been charged with a domestic violence offense against his wife, his commanding officer or the base commander may issue an MPO to CPL Gray. This can confine him to the base; it can also prohibit him from harassing or otherwise contacting his wife and family. If CPL Gray violates this MPO, he may be charged with violating a lawful order in a court-martial, in addition to any civilian violation that might have occurred.

PRACTICE TIP

Victims of domestic violence often fear retaliation from the abusing spouse. When you represent a victim of domestic violence and the alleged offender is a SM, you should

[17] The Family Advocacy Program directory can be found at http://www.mfrc-dodqol.org/progDir/index.cfm (last visited March 10, 2005).

[18] The military has both military (JAG, or Judge Advocate General) attorneys and civilian attorneys on staff at legal assistance offices in all branches of the armed services where SMs and their families can receive general legal advice concerning a variety of legal issues. Legal assistance attorneys can give general legal advice in family law matters, but they ordinarily do not represent clients in state court proceedings.

consider contacting the command to help your client request an MPO. If the military response has already commenced, an MPO may bring some peace of mind to your client since most SMs will likely follow a direct order from a superior, which is what an MPO is.

Once the command has acted to protect the alleged victim via an MPO (if necessary), the command has an obligation to investigate all allegations of domestic violence. The command will inform the FAP and the FAP staff will initiate their investigation of the incident and begin providing services to the victim. The command should consult with the FAP and consider any other recommendations from the staff concerning the safety and protection of the victim. If the incident involves an alleged violation of the UCMJ (e.g., assault, battery, communicating a threat), and the accused is a SM, then the command has an additional obligation to investigate the incident.[19]

A commanding officer in the armed forces has very wide latitude and discretion in imposing punishment upon subordinates. Under the Rules for Courts-Martial (RCM) 306, a commander is required to resolve a charge of misconduct at the lowest level possible, considering all the facts and circumstances, to achieve and maintain good order and discipline among SMs within the command. RCM 306 states that each commander has discretion to dispose of offenses by members of that command, and that offenses should be disposed of in a timely manner. The commanding officer has the discretion to take no action, take administrative action, impose non-judicial punishment or initiate charges for a court-martial.[20]

PRACTICE TIP

When representing a SM in any family law matter, especially domestic violence, have the SM consult with a military defense attorney, also known as a judge advocate or "JAG officer." If your SM-client is the alleged offender and has already been charged and actually presented with a "charge sheet" explaining the offense under the UCMJ, then the SM's command should have already requested a JAG defense counsel be assigned, or "detailed," to the case. If the command is in the preliminary stages of the investigation or if the SM is facing non-judicial punishment, then the SM should have already been given the opportunity to consult with a JAG lawyer. If the SM has not taken advantage of this right and you are already involved, then have the SM make an appointment immediately at the nearest JAG office to obtain an appointment with defense counsel. The JAG officer can provide invaluable help to the civilian practitioner in explaining the military process, both criminal and administrative, and can help the SM-client to avoid potential pitfalls with the military system.

Despite Mrs. Gray's use of the civilian justice system to acquire protection from her husband, CPL Gray will now most likely face military consequences for his misconduct. First, if he is arrested on criminal charges and placed in jail, he may not be able to make bail

[19] *See* Defense Task Force on Domestic Violence-2003 Third Year Report, February 2003 (pg 23) for a detailed flow chart of command options http://www.dtic.mil/domesticviolence/reports/Start.pdf (last visited March 10, 2005).

[20] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000), R.C.M. 306.

or otherwise obtain pretrial release. If he does not report for duty or make "morning muster" on the next day of duty, he will be in violation of Article 86 of the UCMJ. This is known as AWOL (absence without leave) or UA (unauthorized absence). He will have to request and be granted leave or else he will face some form of punishment for not appearing for duty. Once this happens, his command will initiate a military response.

FIREARM POSSESSION PROBLEMS

In September 1996, the United States Congress passed an amendment to the Gun Control Act of 1968 called the Lautenberg Amendment. While the Lautenberg Amendment does not specifically address military personnel, it does have a significant impact on those SMs convicted of misdemeanor domestic violence and their superiors. Prior to the Amendment's passage, the Gun Control Act of 1968 made it a felony for persons convicted of felonies to ship, transport, possess or receive firearms and ammunition, except for federal and state government employees using firearms in their official capacity. [21] This was known as the "Government Exception" under the original Gun Control Act. Therefore, persons in either federal or state government service could be issued and carry firearms while performing their official, duty-related activities, even if they have been convicted of a felony. The Government Exception included and encompassed military personnel who were issued and using firearms in their official military capacity. [22]

With the adoption of the Amendment, the scope of the law increased to impact those people not only convicted of felonies but also those convicted of misdemeanor crimes of domestic violence[23]. 18 U.S.C. § 922(d) states:

> It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person...(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that (A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and (B) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits

---

[21] 18 U.S.C. § 925(a)(1995).

> (1) The provisions of this chapter, except for provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof. (2) The provisions of this chapter shall not apply with respect to (A) the shipment or receipt of firearms or ammunition when sold or issued by the Secretary of the Army pursuant to section 4308 of title 10, and (B) the transportation of any such firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions.

[22] Note that the original Gun Control Act of 1968 did not extend this "Government Exception" to those federal, state or military employees for the *private* use or possession of firearms.

[23] *See generally* Captain E. John Gregory, *The Lautenberg Amendment: Gun Control in the U.S. Army*, army law., Oct. 2000, at 3.

> the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or (9) has been convicted in any court of a misdemeanor crime of domestic violence.[24]

Furthermore, the Amendment restricts the Government Exception so that it does not apply to those persons convicted of misdemeanors involving domestic violence. The Government Exception now reads as follows:

> The provisions of this chapter, except for §922(d)(9) and §922(g)(9) and provisions relating to firearms subject to the prohibitions of §922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.[25]

The excepted provisions, §§ 922(d)(9) and 922(g)(9), are the sections which specifically make it illegal for persons convicted of misdemeanor domestic violence to carry firearms. This means that the Government Exemption will still allow federal, state and military personnel convicted of any felony, including domestic violence, to possess and carry a firearm in the performance of their official duties. However, it now excludes those persons convicted of misdemeanor domestic violence from the Government Exception. Therefore, following the Amendment, the Government Exception allows a government employee who is convicted of any offense, except misdemeanor domestic violence, to possess and use a firearm in his or her official capacity.

Furthermore, the Act makes it a crime for a SM's commander to issue him or her the weapon as well.[26] Once a SM's superiors learn about his or her conviction, they must prevent the offending SMs from using or carrying a firearm during the performance of official duties.

It is obvious that this can and will have an adverse effect on the SM's ability to continue with military service. Even those who do not regularly carry or use firearms , such as cooks, clerks and truck drivers, are required to be proficient in their use and to qualify regularly on the firing range as a condition of military service. They also must regularly stand guard duty, which requires the possession of weapons. The Lautenberg Amendment can be a "killer" for one's military career.

What does this mean for the civilian practitioner? First, the practitioner needs to determine if the offending SM will be immediately affected by the Amendment.[27] If this is not so, then the practitioner will be less concerned with Lautenberg Amendment issues than with other aspects of the case. At the outset, the practitioner should understand that the

---

[24] 18 U.S.C. § 922(d)(2004). *See also* 18 U.S.C. § 922(g)(2004).
[25] 18 U.S.C. § 925 (2003).
[26] 18 U.S.C. § 922(d)(2004).
[27] Here the discussion is on the effect to the SM because, presumably, civilian-offending spouses would not have their job affected by not being able to carry a firearm. If, however, the civilian-offending spouse is required to carry a firearm in the performance of his or her job, then that job will be impacted by the Amendment and should be carefully considered in the context of the representation.

prohibition against firearms and ammunition possession does not include "crew-served weapons" (such as a tank, an airplane or an artillery piece) or other major military systems.[28] The application of the Amendment to the SM starts with an analysis of the terms in the statute and how they are defined and interpreted.[29] The terms an attorney scrutinize with when trying to determine if a client or a client's spouse will be potentially impacted by this Amendment are "conviction" and "misdemeanor crime of domestic violence."

What constitutes a domestic violence conviction under the Amendment? 18 U.S.C. § 921 provides the definitions needed to determine if the conviction is or will be applicable to the service member. Specifically, § 921(33)(A) states:

> [T]he term "misdemeanor crime of domestic violence" means an offense that (i) is a misdemeanor under Federal or State law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Section 921(33)(B)(i) goes on to further restrict the definition of a qualifying conviction of domestic violence as follows:

> (B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either (aa) the case was tried by a jury, or (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

Finally, section 921(33)(B)(ii) places additional restrictions on qualifying convictions by excluding convictions that have been expunged or otherwise dismissed by the respective jurisdiction:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration

---

[28] This does not mean the SM will not be eventually administratively separated or punished under military law for the underlying domestic violence offense, but only that he or she will not be effected by the Lautenberg Amendment and separated because he or she can no longer posses a weapon in his or her official capacity.

[29] After the Amendment was enacted on September 30 1996, any early analysis of a qualifying conviction would begin with the date of the underlying conviction. Because the Amendment refers to any conviction, the Department of Defense decided not to take adverse action against those service members with qualifying convictions prior to September 30, 1996, but only to take adverse action on those persons convicted after the amendment's enactment. However, since it has been nine years since the enactment and most practitioners will be dealing with recent and current domestic violence charges, an review of the conviction date will most likely not yield a conviction prior to September 30, 1996.

of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms

Therefore, the practitioner must look at the particular state or federal law under which the service member is or will be convicted and determine if the conviction will qualify.[30] It is not surprising that the laws of different jurisdictions may yield different results. In one jurisdiction a misdemeanor offense disposed of through some form of deferred prosecution or first-offender program may not constitute a conviction under that jurisdiction's laws, but it may constitute a conviction under those of another jurisdiction. A plea of no contest or *nolo contendere* may not be a conviction under state law.[31] Thus, a careful analysis of the conviction and how that particular jurisdiction treats alternative dispositions of misdemeanor domestic violence crimes is essential in determining if the Lautenberg Amendment will effect the SM and use of his or her service-issued weapon.

From the earlier example, suppose CPL Gray is arrested by the local authorities and charged with misdemeanor assault on his wife. Since he grabbed his wife by the throat, his offense falls under the definition for a misdemeanor domestic crime under the statute.[32] Next, the district attorney offers CPL Gray some form of deferred prosecution if he successfully completes five anger management classes and successfully completes a substance abuse assessment. What happens if he takes this plea bargain? If this particular jurisdiction does not consider this type of disposition a conviction or allows for the expungement of the offense after a successful completion of the deferral program, then CPL Gray will not have a qualifying conviction under the Lautenberg Amendment and will not be prohibited, under the Amendment, from carrying and using his service-issued weapon. However, if he is in a jurisdiction where, regardless of the completion of a deferral or first-offender program, the jurisdiction still considers this a conviction and/or the jurisdiction does not allow for the expungement of the record, then CPL Gray will be prohibited from using his service-issued weapon in the official performance of his duties. This will potentially lead to his separation form the service.[33]

Additionally, SMs punished under the UCMJ for domestic violence offenses will potentially have qualifying offenses under the Lautenberg Amendment, except for punishment administered under Article 15 (non-judicial punishment) or a summary court-

---

[30] 18 U.S.C.A. § 921(33). *See also* 18 U.S.C.A.§ 921(20), which states, "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

[31] *See Gregory, supra* note 24 at 6.

[32] 18 U.S.C. § 921 (33)(A).

[33] Note that even if a SM has entered into a deferred prosecution or first-offender program and the respective jurisdiction does not consider this type of disposition a conviction, the service member may still be separated from the service based on service specific administrative procedures, for example, in the Navy the member could be separated under the MILPERSMAN 1910-144 (Misconduct-civilian conviction), which considers alternative court resolutions dispositive on the question of whether misconduct occurred.

martial. Thus, a SM may avoid a qualifying conviction depending on how the local courts and/or the military dispose of the charges.[34]

To keep all these factors in the foreground, here is a summary of what the practitioner needs to remember:

Lautenberg checklist

___1) Has the service member been convicted of a misdemeanor domestic violence crime?
___a) If so, when?
___2) Does the conviction qualify as a conviction under Lautenberg?
___a) Where was the service member convicted?
___b) State, federal or military jurisdiction?
___c) Is the conviction considered a misdemeanor under federal or state law?
___d) If military jurisdiction, is it non-judicial punishment or a summary court-martial?
___e) Does the offense have an element containing the *use* or *attempted use* of physical force, or the *threatened use* of a deadly weapon; and
___f) Was the offense committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.
___g) Was the offender represented by counsel in the case?
___h) If not, did the offender knowingly and intelligently waive the right to counsel?
___i) Did the jurisdiction allow for a trial by jury?
___j) If so, did the offender elect trial by jury or knowingly and intelligently waive a jury trail, by guilty plea or otherwise?
___3) Was the conviction expunged or is it eligible for expungement?
___4) Was the conviction deferred, set aside or otherwise disposed of?
___a) If so, does the jurisdiction consider this alternate disposition a conviction?
___5) Does the SM utilize a firearm in his or her official military capacity?

TRANSITIONAL COMPENSATION

Transitional compensation is a program established by Congress in 10 U.S.C. 1059 to provide temporary assistance to spouses and family members when a service member is court-martialed or administratively separated from the service following the abuse of a spouse or family member by the SM. The program was created to encourage dependent victims to come forward and report domestic abuse without fear that they would lose financial support should the SM be separated or discharged from the service.[35] Additionally, it is designed to allow the abused spouse and family to begin a fresh start on life away from

[34] Although it is unlikely, a SM may be prosecuted for the same offense in both the military and the local/state jurisdiction without invoking any double jeopardy concerns because they are two different sovereigns.

[35] Separation refers to administrative separation from the military service. This is not considered punishment under the military system and is akin to being fired from a job. As a part of an administrative separation, a command will be able to characterize the SM's service as honorable, general (under honorable conditions) or other than honorable. On the other hand, a SM's punitive discharge from the armed services is the result of a court-martial conviction. The two types of discharge are a bad conduct discharge and a dishonorable discharge.

the abusive SM. Transitional compensation includes some housing benefits, access to health care benefits, access to base facilities and temporary financial support. The financial support duration depends on the remaining service obligation of the offending service member and is governed by statute and Department of Defense instructions.[36]

Any spouse or former spouse and any dependent children of the offending SM are eligible to receive transitional compensation. These dependents must have been married to or residing with the offending SM at the time of the abusive incident took place. A dependent child is defined as:

> an unmarried child, including an adopted child or a stepchild, who was residing with the member at the time of the dependent-abuse offense resulting in the separation of the former member and who is under 18 years of age.[37]

Transitional compensation is available to all dependents of the armed services.[38] Department of Defense Instruction 1342.23, section 2, further clarifies eligible dependants as those persons who are dependents of members of the armed forces who have been on active duty for more than 30 days and who, after November 29, 1993, are:

- Discharged from active duty under a court-martial sentence resulting from a dependent-abuse offense;
- Administratively separated from active duty if the basis for separation includes a dependent-abuse offense; or
- Sentenced to forfeiture of all pay and allowances by a court-martial, which has convicted the member of a dependent-abuse offense.

These dependents are eligible for transitional compensation as a result of the SM's actions of domestic abuse and subsequent separation or discharge. The adverse actions by a SM that trigger transitional compensation are as stated above.[39]

What kind of offense will trigger the application of the transitional compensation program? First, the service member's offense must have involved abuse of the then-current spouse or a dependent child. Next, the crime must qualify as "dependent-abuse offenses." Such offenses include, but are not limited to, the following:

- Sexual assault
- Rape
- Sodomy
- Assault and Battery
- Murder
- Manslaughter
- Indecent Liberties

---

[36] 10 U.S.C. § 1059. Department of Defense Instruction (DODINST) 1342.23.
[37] 10 U.S.C. § 1059 (l).
[38] DODINST 2.1. This Instruction applies to...the Office of the Secretary of Defense and the Military Departments (including Coast Guard when it is operating as a Service in the Navy).

PRACTICE TIP
The practitioner representing the civilian victim spouse of domestic violence or another "dependent abuse" crime should ensure that the basis for any administrative discharge or, with a punititive discharge in a court-martial, the criminal charge clearly states that the victim of the misconduct is the dependent spouse or child. Furthermore, the attorney should make sure it is clear that the SM is being discharged because of abuse to the spouse or child who is the victim. If the basis or specification is not clear, then victim risks not being eligible for the transitional compensation program. This can most likely happen during the plea-bargaining or negotiations concerning the SM's charge. To prevent this, the victim's attorney should contact the attorney in charge of the administrative separation (usually the command SJA) or of the court-martial (the trial counsel/prosecutor assigned to the case).

It is the policy of the Department of Defense to ensure that monthly transition compensation payments are made to the dependents of members who are separated for dependent abuse. 10 U.S.C. 1059(d) specifically provides that:

> ...compensation shall be paid to the spouse or former spouse to whom the individual [offending SM] was married at that time, including an amount (determined under subsection (f)(2)) for each, if any, dependent child of the individual described in subsection (b) who resides in the same household as that spouse or former spouse.[39]

What type of financial support can a dependant-spouse or child receive as transitional compensation? For the civilian practitioner this is yet another time to make friends with the Family Advocacy Representative on base and ask for assistance with procedures and regulations. The governing statute and DoD instruction refer the practitioner to 38 U.S.C. §§ 1311(a)(1), 1311(b) and 1313, which are the dependency compensation statutes for payments to dependents after service-related deaths.[40] The calculations are the same for transitional compensation as they are under these statutes. The statutes provide an amount for the spouse and then an additional amount for each dependent child.[41]

The financial compensation will last a minimum of 12 months and a maximum of 36 months. This length of time depends on the amount of time that the SM has remaining on his or her service obligation. The duration of payments shall be:

> 36 months except, if, as of the starting date of payment, the unserved portion of the member's obligated active duty service is less than 36 months, the duration of payment shall be the greater of the unserved portion or 12 months.[42]

---

[39] 10 U.S.C. 1059(d).
[40] 10 U.S.C. 1059 (f), DoDINST 1342.24, section 6.
[41] For current rates, see, http://www.vba.va.gov/bln/21/Rates/ comp03.htm#BM01 or http://www.va.gov, then click on the "Compensation" icon; at the page "Compensation and Pension Benefits, click on "Site Map of Compensation & Pension Benefits", scroll down to "Rates Index" then click on "DIC".
[42] DODINST 1342.23, section 6.2.1.1. *See also* section 6.2.1.3 for the difference between calculations involving enlisted personnel and officers.

It should be remembered that this is temporary compensation to allow time for the dependant spouse and her family to adjust to life without the SM. Nevertheless, this temporary transitional compensation may be terminated earlier if the dependant spouse activates a terminating event under the statute and instruction. The early terminating events are:

- Remarriage: If a spouse receiving payments remarries, payments terminate as of the date of the remarriage. Payments will not be renewed if such remarriage is terminated.
- Cohabitation: If the offending SM resides in the same household as the spouse or dependent child to whom compensation is otherwise payable, payment shall terminate as of the date the SM begins residing in that household. Payments may not be renewed if the cohabitation is terminated; however compensation paid before cohabitation shall not be recouped.
- Active Participation: If the victim was a dependent child and the spouse has been found to have been an active participant in the conduct constituting the criminal offense or to have actively aided or abetted the SM in such conduct against that dependent child, then the spouse or the dependent child living with the spouse shall not be paid transitional compensation.
- Multiple Benefits: A spouse may not receive payments under both sections 1059 and 1408(h) of 10 U.S.C. (reference (b)). If a spouse is otherwise eligible for both, the spouse must elect which one to receive. [43]

The benefits granted to the dependents of the offending SM include not only financial compensation but also rights to on-base shopping privileges and health benefits. On-base shopping privileges are granted to the dependent spouse while receiving financial transitional compensation benefits as continuation of the same privileges as if the SM were still on active duty.[44] In addition, the dependent spouse and children may still be eligible for medical benefits as indicated in the applicable statutes and instructions. These medical benefits are subject to certain limitations and must involve abuse-related treatment. This entitlement is limited to only one year following the SM's separation or discharge.[45]

PRACTICE TIP:
When representing the non-military victim spouse pending discharge of the SM, make use of the FAP counselors and or victim advocates to help you and your client understand the regulations governing the start and termination of transitional compensation. These people can be very helpful in making sure your client knows about all the programs provided through the military.

The civilian practitioner representing a dependant spouse who is the victim of domestic violence, when the offending SM is being discharged or separated, must determine first if the dependant spouse is eligible for transitional compensation. Once this is determined as set forth above, the attorney should next determine when the transitional

[43] 10 U.S.C. § 1059 (g), DODINST 1342.23, section 6.3.
[44] 10 U.S.C. § 1059 (l), DODINST 1342.23, section 6.7.
[45] DODINST 1342.23, section 6.8.

compensation will start. There are only two different scenarios: (1) administrative separation and (2) discharge due to a court-martial. When a SM is being administrative separated for an offense that qualifies for the transitional compensation, the spouse's compensation begins once the commanding officer begins the administrative separation paperwork. For the SM being discharged as a result of a court-martial, the transitional compensation does not begin until the convening authority approves the sentence of the court-martial.

> Commencement and duration of payment. (1) Payment of transitional compensation under this section
>
> (A) in the case of a member convicted by a court-martial for a dependent-abuse offense, shall commence--
>
> (i) as of the date the court-martial sentence is adjudged if the sentence, as adjudged, includes a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or
>
> (ii) if there is a pretrial agreement that provides for disapproval or suspension of the dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances, as of the date of the approval of the court-martial sentence by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice) if the sentence, as approved, includes an unsuspended dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; and
>
> (B) in the case of a member being considered under applicable regulations for administrative separation from active duty in accordance with such regulations (if the basis for the separation includes a dependent-abuse offense), shall commence as of the date on which the separation action is initiated by a commander of the member pursuant to such regulations, as determined by the Secretary concerned.[46]

The SM who is being discharged as a result of a court-martial may be able to negotiate a plea bargain that prevents his pay and allowances from being reduced, so that they may subsequently be paid to his dependants for a period of six months.

For the civilian practitioner, understanding the military system can be a daunting and confusing task. It is always advisable to consult with either an FAP representative or the trial counsel (i.e., prosecutor) when representing the dependent spouse, and with the SM's military defense counsel when representing the SM.[47]

PRACTICE TIP

When representing the dependent spouse in a situation where the service member is being separated or discharged, the civilian practitioner should know that the case does not end with either the separation or the court-martial. The SM's military defense counsel will be zealously advocating for his or her client, not only in trial, in negotiating a pre-trial

[46] 10 U.S.C.A. § 1059(e). *See also* DoDINST 1342.23, section 6.2.

[47] For a good description of how transitional compensation interrelates with pay and allowances waived to dependant spouses, *see United States v. Lundy*, 60 M.J. 52 (2004).

agreement or in an administrative hearing, but also in persuading the convening authority to change the SM's sentence or separation with a clemency petition. While clemency petitions rarely produce any results of substance, they can nonetheless potentially affect the dependent spouse's transitional compensation should the convening authority for some reason modify the SM's sentence or separation.

MILITARY PENSION DIVISON

Suppose from the earlier example that CPL Gray is somehow retirement-eligible when the domestic violence incident occurs. His wife will receive transitional compensation, but what about CPL Gray's retirement? If he loses his retirement benefits, can his wife collect any of those lost benefits?

10 U.S.C. 1408(h)(2)(A) entitles Mrs. Gray to receive her share of CPL Gray's retirement pay:

> (2) A spouse or former spouse of a member or former member of the armed forces is eligible to receive payment under this subsection if
> (A) the member or former member, while a member of the armed forces and after becoming eligible to be retired from the armed forces on the basis of years of service, has eligibility to receive retired pay terminated as a result of misconduct while a member involving abuse of a spouse or dependent child (as defined in regulations prescribed by the Secretary of Defense or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Homeland Security); and
> (B) the spouse or former spouse (i) was the victim of the abuse and was married to the member or former member at the time of that abuse; or (ii) is a natural or adopted parent of a dependent child of the member or former member who was the victim of the abuse.[48]

Basically 10 U.S.C. 1408(h) provides similar yet longer lasting benefits to spouses who are the victims of domestic violence or spousal/dependant abuse by an offending SM who is, at the time of the offense, eligible for retirement. In addition to the compensation received from the retired pay of the offending SM, the spouse is able to receive medical and commissary privileges as well.

> A spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A), while receiving payments in accordance with this subsection, shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to receive any other benefit that a spouse or a former spouse of a retired member of the armed forces is entitled to receive on the basis of being a spouse or former spouse, as the case may be, of a retired member of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.[49]

[48] 10 U.S.C. § 1408 (h) (2003)
[49] *Id.*

Furthermore, the dependent children, as defined in this statute and similar to the definition under the transitional compensation program, of the offending service member are also eligible for benefits as well.

> A dependent child of a member or former member referred to in paragraph (2)(A) who was a member of the household of the member or former member at the time of the misconduct described in paragraph (2)(A) shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to have other benefits provided to dependents of retired members of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.[50]

Therefore, from our CPL Gray example, not only will his wife receive a portion of his retirement pay, but she will be entitled to base and commissary privileges as well as medical and dental care. Furthermore, the parties' two minor children will also entitled to receive medical and dental care.

CONCLUSION

For the civilian family law practitioner, representing a party in a domestic violence case where one party is a SM can and will provide some tough legal issues to solve. Nevertheless the lawyer who carefully assesses his or her client's situation, applies a "look before you leap" mentality, researches the proper directives and statutes and, most importantly, seeks assistance from the various military and civilian sources, include personnel from the SJA office the FAP, will serve his or her client well as a result of being well prepared.

[50] *Id.*

American Bar Association
Section of Family Law

Wednesday, May 3, 2006

A Short Course in Military Family Law Issues

Military Child Support

Child Support and the Military

Parts of this document are adapted and revised from Sullivan, "Child Support: Shopping for Options," *The Army Lawyer* pp. 4-13 (July 1992), and from outlines developed by the Judge Advocate General's Legal Center and School on the subjects of support and paternity.

INTRODUCTION

This chapter is intended to identify and explain the tools for establishment of support obligations. It will also cover how to support or thwart a decree involving alimony, child support or paternity.

Support problems are not as pronounced in the military as in the civilian world. Under Article 133 of the Uniform Code of Military Justice, it is a criminal offence for an officer to engage in conduct unbecoming an officer and a gentleman. For enlisted personnel and officers, Article 134 makes it a crime for any member of the armed forces to dishonorably fail to pay a just debt which has become due and payable, provided that the individual's actions were to the detriment of the armed forces or were such as to bring discredit upon the armed forces. Administrative sanctions, ranging from reprimand to separation from the service, are also available. As one author points out,

> The military default rate in cases involving support orders is one-half that of the nationwide default rate in similar cases. The military success in this area is probably due to the fact that military society is much more disciplined than the civilian community. There are rules governing a military member's conduct, including requirements to pay just debts or face criminal prosecution. These rules virtually guarantee that service members will comply with child support orders, unless they are willing to face adverse administrative or criminal actions. This unique combination of authority, that permits an employer (the military services) to take adverse administrative and criminal sanctions against its employees (military members), makes enforcement of child support orders far less problematic within the military community as compared to the civilian community.
>
> Despite the military's stronger record in child support enforcement, the public often perceives the opposite and believes that service of process is the problem. In large part, this is due to the great number of military members assigned overseas and on ships, or deployed for war or other national emergencies. Thus, it is the basic nature of military service that creates a tension between society's need for improved child support enforcement and its need for national defense.[1]

Be sure to read this chapter alongside the chapter on the Servicemembers Civil Relief Act. That statute will often be a part of a nonsupport case when the SM either has a bona fide reason for requesting a stay of proceedings, due to the conflicts of military duties, or else he wants to dodge the day of reckoning.

PRACTICE TIP

In support hearings as well as custody matters, the SCRA is all about *delay*. The party or attorney who wants to put off the inevitable, to postpone indefinitely the "day of reckoning," may put it to use. It may also be used by the SM who legitimately wants to participate in the hearing, who has claims and defenses which are legitimate, and whose military duties prevent his appearing in court to protect his interests. Sometimes *both* motives are present in the same case! The party who wants to move forward promptly must know the rules under the SCRA, the facts of the case, and the decisions which favor moving forward. The same injunction applies to opposing counsel in regard to delaying the day of in court. Pay primary attention to whether the presence of the SM is necessary for the hearing, whether the evidence can be

---

[1] Major Alan L. Cook, *The Armed Forces as a Model Employer in Child Support Enforcement: A Proposal to Improve Service of Process on Military Members*, MIL. L. REV., Vol. 155 at 161-162 (1998) (citations omitted).

presented effectively in his absence, and whether the court should make an interim ruling on support pending a full hearing to avoid financial hardship.

Don't be afraid to ask for a temporary order of support. In 1989 the Georgia Supreme Court ruled that an order which granted a temporary change in child support did not significantly affect the rights of the SM since it was an interlocutory decree and was subject to modification in the future.[2]

Also remember that bad faith may defeat the SM's attempt to slow down the case with an SCRA stay request. When a servicemember demonstrates bad faith in his dealings with the court, a stay of proceedings should be denied. In *Riley v. White,*[3] a soldier failed to submit to blood tests in a paternity action before going overseas and was aware of the court proceedings, had an attorney to represent him and was previously given a delay by the court to take the tests required; the court's denial of his stay request was upheld.

This area can be a fascinating and confusing maze. Whenever possible, ask questions, request help and associate competent co-counsel. Sometimes the assistance will come from your fellow attorneys, at other times from Child Support Enforcement Agency personnel, and sometimes from active-duty legal assistance attorneys, true "lawyers in uniform." Be courteous, be respectful, and don't wait until the last minute when you ask for help.

Recognize that there are times when the military member cannot respond quickly to a petition, motion, complaint, notice of hearing or discovery request. Field exercises, ship schedules, deployments, port calls and classified missions may make impossible the kind of prompt and timely response that we attorneys routinely expect from parties and opposing counsel.

Whenever possible, use the military command structure to assist your client. If the lowest unit commander cannot help you or does not respond, take your request to the superior of that officer. Document your requests, keep records, and use fax or e-mail transmissions whenever possible to speed your requests and communications.

Remember that you can get aid for your client at a military legal assistance office, regardless of the branch of service, if your client is eligible for legal assistance in her own name (i.e., she has a valid military ID card) or in the name of minor children who are military dependents of the SM. A JAG officer may be the best kind of co-counsel you can get, and you can't beat the price, either – the assistance is free. JAGs frequently "know the ropes" a lot better than civilian counsel, and they have tremendous resources and contact lists available to them.

PATERNITY ISSUES

In some child support cases, a preliminary consideration is the determination of paternity for the child. Counseling the servicemember (SM) on paternity matters involves three subjects: estoppel, tissue-testing, and trial procedures. This section will also apply the law regarding paternity to military personnel and the requirements of service regulations.

PATERNITY AND ESTOPPEL

Litigation as to paternity may be barred by a prior judicial determination establishing a SM as the father of a child. The most common example of this is the adjudication of paternity that is present in most

---

[2] *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989). *See also Gilmore v. Gilmore*, 185 Misc. 535, 536, 58 N.Y.S.2d 556, 557 (1945), *Jelks v. Jelks*, 207 Ark. 475, 181 S.W.2d 235 (1944), *Kelley v. Kelley*, 38 N.Y.S.2d 344, 348-50 (1942) and *Cherubini v. Cherubini* 2003 NY Slip Op 50569U; 2003 N.Y. Misc. LEXIS 114 (Supreme Court of Duchess County, February 13, 2003, unpublished) for examples of cases involving the entry of temporary support orders despite stay requests under the Soldiers' and Sailors' Civil Relief Act. Courts are very reluctant to stay a case when it means no support.

[3] *Riley v. White*, 563 So. 2d 1039 (Ala. Ct. App. 1990).

divorce decrees. It is usually an essential element of the complaint or petition for divorce; likewise it is an essential finding in the judgment of divorce or dissolution in many states. The purpose of this requirement is to bar subsequent litigation of paternity matters that should have been settled in connection with the divorce pleadings. Accordingly, the court will ordinarily deny any attempt by the former husband to open up the issue of paternity as to the children shown to be his on the face of the divorce judgment.

The servicemember may also be estopped from litigating paternity if he has signed a paternity affidavit or an acknowledgement of paternity. The same holds true for a verified complaint for dissolution or divorce that alleges that he is the father of a certain child born of the marriage, a verified answer admitting that he is the father of a certain child born of the marriage, or similar documents.

An example of estoppel in lieu of scientific testing for paternity, though it did not involve a servicemember, is found in a 2001 Massachusetts case, *Paternity of Cheryl*.[4] In *Cheryl*, a child was born out of wedlock and, several months after her birth, the state revenue department filed a paternity complaint naming a man as the child's father (based on the mother's statement identifying him as the father). The complaint also requested child support.

The revenue department advised the alleged father that he could obtain genetic marker tests to determine or eliminate paternity; he was also informed that he would have to pay for the tests if the results established his paternity. Instead of obtaining the genetic tests, the alleged father executed a document acknowledging paternity and signed a child support agreement. Thereafter a judge entered a paternity judgment based upon these documents. Following this the man paid child support, visited with the child and established a relationship with the child as her father.

Some time later the alleged father began to receive information from the mother's friends, and perhaps from the mother herself, indicating that he was not the father of Cheryl. He also learned from medical testing that he had a low sperm count. He was informed that he had infertility problems. When DOR, several years after Cheryl's birth, filed an action to raise his child support, the alleged father moved to have genetic testing. The trial court denied his motion.

The alleged father then had the testing done surreptitiously during visitation, without the mother's knowledge. The test results determined that the alleged father was excluded as Cheryl's father. When the alleged father filed a motion to amend or vacate the paternity decree, the judge ordered genetic tests for all three (Cheryl, her mother and the alleged father). Upon the mother's appeal, the Supreme Judicial Court of Massachusetts vacated the judge's order for testing. The man was barred from challenging paternity because of the prior paternity judgment. In addition, the court noted that Cheryl and her alleged father had a substantial father-child relationship, including emotional and financial support; the opinion stated that children must be protected, and that what is in a child's best interest often weighs more heavily than the biological link between parent and child.[5]

The *Cheryl* case is not unusual. Usually an order for custody or for child support will effectively bar the servicemember from reopening the issue of paternity, especially if that matter could have been litigated in connection with the custody or support issue.[6]

When the mother is faced with a denial of paternity or an attempt to open up this issue, her best tactic is to challenge immediately the right of the alleged father to raise the issue of paternity at this stage of the proceedings. In civil cases, this is by way of an affirmative defense or a "plea in bar" alleging collateral estoppel or *res judicata*.

---

[4] *Paternity of Cheryl*, 434 Mass. 23, 746 N.E.2d 488 (2001).

[5] *Id.*, 434 Mass. At 31, 746 N.E. 2d at 485.

[6] For a more detailed explanation of estoppel and preclusion, see Sullivan, "Proving Paternity by Presumption and Preclusion," 132 MIL.L.REV. 99 (1991).

From the standpoint of the member in this situation, the only course of action is to try to attack the validity of the matter asserted as estoppel. Perhaps the SM was not served (personally or by publication) with the complaint for support or the petition for divorce. Possibly he was not given sufficient time to answer before a judgment was taken by plaintiff. Maybe he has a defense under the Servicemembers Civil Relief Act, such as entry of default judgment against him without appointment of an attorney on his behalf. In rare cases, the plaintiff obtains an order or judgment adjudicating the issue of paternity by fraud, coercion, undue influence, or collusion.

PRACTICE TIP

A change of heart by the SM is seldom a defense. All too often, however, the SM's proffered defense amounts to: "She told me the kid was mine and I believed her; now that I have to pay child support, I don't believe her." Or, in the actual words of one commander replying to a complaint involving paternity and nonsupport, "We have reason now to question the legality of this child."

TISSUE TESTS

When the matter is not barred as above, then a party may move the court for paternity testing and the court may order the mother, child and alleged father to submit to tissue-typing tests, formerly known as blood tests. The moving party may be required to pay the cost in advance. Blood samples used to be collected for this testing, but it is common now to use skin cells from inside the mouth, collected with a cotton swab. For detailed information on DNA testing, check out the Department of State's website, www.travel.state.gov/dna.html.

There are numerous diagnostic laboratories that perform issue test analysis in paternity cases. These tests produce an accuracy factor of about 99 percent (some claim as accurate as 99.9%), which (when translated into non-scientific terms) means that 99 out of a hundred falsely accused men will be excluded from paternity. The cost of testing depends on the tests performed and whether the case is one handled under the IV-D Program or not. A quick call to the above phone numbers will allow the legal assistance attorney to give some guidelines to the client on costs. Once a court order is entered, servicemembers will usually cooperate in giving tissue samples, which can be taken at military hospitals and shipped to the testing laboratory. Military commanders will not, however, compel a SM to give a sample.

Accurate identification is necessary for all individuals taking the tests. The mother and child are often tested at a difference place and/or time than the alleged father. Picture ID cards are essential for all involved.

When the test results are returned, the usual situation is that the man is either excluded (zero percent probability of paternity) or he is "strongly included," meaning a probability of paternity in the range of 95-99%. Check your local statutes to see whether there are presumptions of paternity which apply when the probability of paternity is above a certain percentage. With such results available, it is now much easier to counsel the mother or the alleged father as to matters involving paternity, child support, inheritance rights, medical history, and the like.

PRACTICE TIP

It is important to remember, however, that the tissue tests do not "prove" paternity. They merely indicate whether a man is "included" in the group of men with such genetic characteristics that qualify them by blood type to be the father of the child. Pure "proof" of paternity is, in reality, in the eyes of God, at least with the tests that we have available at present. It is still possible to contest and "beat the case" in paternity matters with a probability of paternity in excess of 99 percent.

TRIAL AND PROOF

Trial techniques will vary from case to case. In addition to tissue-testing results, the alleged father may attempt to prove lack of access or that the mother was living in open and notorious cohabitation with another man, in order to show that the defendant is unlikely to be the father of the child.

The mother, on the other hand, may try to use the facial features and physical appearance of the child (especially if the child is not an infant) to show his or her resemblance to the alleged father. This data, used in conjunction with tissue-testing results, can be persuasive evidence that helps to establish paternity at trial.

Trial of a paternity and nonsupport case can be lengthy, complex and expensive. Military personnel and spouses can seldom afford such expenses. Many mothers rely on the child support enforcement agency to handle such a case, rather than relying on private counsel. The attorney who is privately retained should be sure that the size of the retainer fairly reflects the work ahead of him or her.

When counseling the alleged father, be sure to advise him of the importance of acknowledging paternity, paying support, and communicating with the mother and/or child if he wishes to prevent the termination of his parental rights and then the adoption of the child. For those fathers who do not acknowledge their children, refuse to pay support and do not remain in contact with the child, there is a significant danger of loss of parental rights, which means that the father's consent is not necessary for a step-parent adoption in the future. To stop this, certain actions are required by the father. In addition to acknowledging his paternity regarding the child, certain states require his providing reasonable and regular child support, consistent with his financial means, either to support the mother during or after pregnancy or to support the child, or both. Another requirement might be that the father has regularly visited or communicated (or attempted to visit or communicate) with the mother during or after the term of pregnancy, or with the child, or with both of them.

PRACTICE TIP
If your client doesn't want an adoption to take place, he will need to be diligent in regard to these actions. It is very important for him to acknowledge, support and communicate with the child to avoid an adoption.

You also need to be able to counsel the alleged father as to service of process and jurisdiction regarding paternity and support. For a valid judgment of paternity, *in personam* jurisdiction over the defendant must be obtained. An *in rem* jurisdiction judgment is not entitled to full faith and credit.[7]

WELFARE REFORM ACT

Many changes in the area of paternity came about when President Clinton signed the Welfare Reform Act in 1996. Here are the main ones to know:

- Voluntary acknowledgments are to be offered in all hospital births, to be signed by the child's parents.

- After 60 days, such a signed acknowledgment becomes a legal judgment; it may only be challenged for fraud, duress or material mistake of fact.

- The Department of Health and Human Services must prepare minimum requirements for an affidavit of voluntary establishment of paternity.

- To establish paternity, a father must either voluntarily acknowledge paternity or go through a legal process to include his name on the birth certificate.

- Birth record agencies must offer voluntary paternity establishment services as well as hospitals.

---

[7] For a good starting point, read *Brondum v. Cox,* 292 N.C. 192, 239 S.E.2d 687 (1977).

- A streamlined legal processes was established for determining paternity. A person seeking to establish paternity, or one opposing it, must submit an affidavit giving reasonable facts supporting the existence or nonexistence of requisite sexual ontact before genetic testing.

- In addition, states must pay costs of genetic testing ordered by a state agency with possibility of reimbursement

- States must change evidentiary rules to allow easier admission of genetic tests and voluntary acknowledgments of paternity.

- And finally, jury trials were prohibited in paternity cases.

MILITARY PATERNITY REGULATIONS

The Air Force Instruction on personal financial responsibility governs paternity claims. It states that the Air Force will not determine paternity claims. If a SM acknowledges paternity, then the Air Force will advise the member of his financial support obligations.[8] The paragraph on paternity in the Air Force Instruction reads:

> 3.3. In cases alleging paternity [the unit commander shall]:
>
> 3.3.1. Counsel the member concerning the allegations, in all cases.
>
> 3.3.2. If the member denies paternity, inform the claimant accordingly and advise that the Air Force does not have the authority to adjudicate paternity claims.
>
> 3.3.3. If a member acknowledges paternity, advise them of their financial support obligations. Refer the member to the MPF [Military Personnel Flight], Customer Service Element, for guidance on eligibility of Identification Card for the child, to the local Defense Accounting Office (DAO) for with-dependent rate financial support information, and to the legal office for advice on the member's legal rights and obligations to the child.

The paternity rules for the Army are contained in Army Regulation (AR) 608-99, which states in part:

- Soldier-mothers of children born out of wedlock are expected to provide support in accordance with court orders or the Army's interim support requirements;

- Soldier-fathers of children born out of wedlock are not required to pay support unless there is a judicial determination of paternity and an order for support;

- A signed voluntary acknowledgment of paternity done under a hospital-based paternity acknowledgment will be treated as a court order after sixty days with no further court action required. In fact, any document which has the legal effect of a court order under state law is deemed to be a court order, which may include consenting to be named the child's father on a birth certificate or acknowledging paternity in an affidavit.[9]

The other services have similar regulations which defer entirely to court orders adjudicating paternity. Paternity must be established by an order of a court, an administrative order (e.g., a county administrative law judge acting in lieu of a civil court judge to determine paternity) or a formal written acknowledgement by the SM involved.

---

[8] U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2906, PERSONAL FINANCIAL RESPONSIBILITY (1 Jan. 1998), para. 3.3.

[9] U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (29 October 2003) [hereinafter AR 608-99], Glossary, Section II.

PRACTICE TIP
When paternity is acknowledged or determined as set out above, then the branch of military service will assist in providing an ID card, access for the child to military facilities and benefits, and advice on support. The support regulations are covered below. A member *can* be entitled to a limited Basic Allowance for Housing, or BAH, payment based solely on paternity of a child born out of wedlock (and generally *all* the BAH money received solely as a result of having this child must be used to support the child).

FAMILY SUPPORT

A full and fair resolution of all support issues is one of the most important parts of any domestic relations case. Here are some tips and suggestions on how to fully advise your clients on the basics – monetary amount, medical expenses, health insurance – as well as the more advanced parts of this important topic, such as life insurance, escalator clauses, college costs, dependency exemptions and allocation of child support.

CHILD SUPPORT: MONETARY AMOUNT

How do you counsel a client on what to demand, accept or offer for child support? It is vitally important to know how to negotiate a fair result for the children. It is also important to settle on a fair amount for your client to pay. How much child support will be paid involves at least three parameters:

- Have the parties agreed on a specific amount?
- What sum is due under the state child support guidelines?
- What is the amount due under service regulations?

Not surprisingly, these three questions almost always yield three different answers.

Assume that you have just finished an interview with Mrs. Mary Doe, the wife of a servicemember, John Doe. They have just separated from each other and they have two minor children. Before the separation the family was surviving on John's $1,900 per month take-home pay and Mary's part-time paycheck of $600 net per month. Mary has the children and she asks you to tell her how much child support she needs to receive. *What she really means* is how much support the children are to get according to state or service guidelines. While you won't be able to tell her how much child support she needs, or how much she would get in court, you can still help her *estimate* how much child support she would get in court and, therefore, what is a reasonable settlement for child support.

As a practical matter, you and your client need a *baseline*. It would be advisable to help Mrs. Doe fill out a monthly budget or, if one is available, a financial affidavit or disclosure form from the court that lists her income and the expenses for her and the children. With your help she should sit down and figure out the monthly cost living. This should take into account lodging, transportation, groceries, utilities, clothing and medical expenses, along with other household expenses. In this way, she can see realistically what she and the children need for survival each month. Even if there is only time to find out some basic information, such as the cost of food, clothing, utilities, transportation and housing, it would be of significant value in judging the adequacy of child support under the approaches shown below.

MILITARY GUIDELINES WHEN THERE IS NO ORDER

Since her husband is in the military, Mrs. Doe first needs to know about military support rules. These are administrative regulations adopted by the military services which state what to do in the absence of a court order or agreement for family support. Each branch of military service has different rules for the support of family members. While the Department of Defense policy is that SMs will not use military service to avoid their family support obligations, each service implements the DOD policy through its own rules and regulations. There is no set "military allotment" for family support.

PRACTICE TIP
Here are some resources and references you may need for military family support cases:

A. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (1996).
B. Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (2002).
C. 42 U.S.C. §§ 659-663 (2002) (Garnishment), 5 C.F.R. pt. 581, Processing Garnishment Orders for Child Support and/or Alimony (2002).
D. 15 U.S.C. § 1673 (2002) (Restriction on Garnishment).
E. 42 U.S.C. § 665 (2002) (Allotments), 32 C.F.R. pt. 54, Allotments for Child and Spousal Support.
F. U.S. DEP'T OF DEFENSE, DIR. 5525.9, COMPLIANCE OF DOD MEMBERS, EMPLOYEES, AND FAMILY MEMBERS OUTSIDE THE UNITED STATES WITH COURT ORDERS (17 Aug. 1990).
G. U.S. DEP'T OF DEFENSE FINANCIAL MANAGEMENT REG. vol. 7, pt. A, ch. 26, (Basic Allowance for Housing) (BAH) (Sept. 2000).
H. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (29 Nov. 2003) [hereinafter AR 608-99].
I. U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1754-030 (Support of Family Members), art. 5800-10 (Paternity Complaints) (22 Aug. 2002).
K. U.S. MARINE CORPS, ORDER P5800.16A MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, ch. 15, (Dependent Support and Paternity) 2003.
L. U.S. DEP'T OF HOMELAND SECURITY, U.S. COAST GUARD COMMANDANT INSTR. M1000.6A, ch. 8M (Supporting Dependents) (3 May 2001).
M. Defense Finance and Accounting Service (DFAS) Website: http://www.dfas.mil/index.htm
N. ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U. S. ARMY, JA 263, FAMILY LAW GUIDE (May 1998).

AIR FORCE RULES

The Air Force has the simplest rules. A brief summary might be "Hands Off!" The basic policy is to require complainants and SMs alike to utilize civilian courts for nonsupport issues. "The Air Force has no authority to arbitrate disputed cases of nonsupport or personal indebtedness."[10] The Air Force will advise its members that they are expected to provide adequate financial support to family members.[11] If a member of the Air Force receives the Basic Allowance for Housing (BAH) at the with-dependents rate based on dependents that the SM refuses to support, then the BAH will be terminated and the Air Force will recoup the BAH with dependent rate for the periods of non-support.[12]

MARINE CORPS RULES

The Marine Corps regulation states that "The Marine Corps will not serve as a haven for personnel who fail to provide adequate and continuous support to their family members."[13] The support regulation refers to a table, which is shown below, for support obligations in the absence of an agreement or court order. The regulation states that the Marine involved shall pay the greater of either the fixed amount of support for the requesting family member as found in the middle column, or else the fraction of BAH/OHA[14] (right column) based on the total number of eligible family members that exist, as shown in the left column.

[10] *Id.* at para. 3.1.2.
[11] *Id.* at para 3.2.1.
[12] *Id.* at para. 3.2.3
[13] U.S. MARINE CORPS, ORDER P5800.16a MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, ch. 15, (Dependent Support and Paternity) 2003, para. § 15001.
[14] OHA is overseas housing allowance. It is a monthly allowance paid to SMs assigned to a duty station outside the continental United States, except for Hawaii and Alazka, who are authorized to live in private

THE MARINE CORPS POLICY
INTERIM FINANCIAL SUPPORT STANDARDS

Total # of Family Members Entitled to Support	Minimum Amount of Monthly Support per Requesting Family Member	Share of Monthly BAH/OHA per Requesting Family Member
1	$350	1/2
2	$286	1/3
3	$233	1/4
4	$200	1/5
5	$174	1/6
6 or more	$152	1/7 or etc.

The Marine Corps regulation is punitive; this means that a Marine may be punished under the Uniform Code of Military Justice by means of a court-martial or nonjudicial punishment for violation of the interim support regulation, the financial dependent support terms of a court order, or the financial support terms of a written agreement regarding dependent support.[15]

A commanding officer has the discretion to reduce or eliminate the interim financial support standards if:

- the gross income of the complaining spouse exceeds the gross military pay of the Marine,
- the interim support has been provided for a continuous and uninterrupted period of 12 months,
- the Marine has been the victim of substantiated instance of abuse by a spouse seeking support, or
- the Marine "is paying regular and recurring obligations such as rent or consumer debts of the family members requesting support of sufficient magnitude and duration as to justify a reduction or elimination of interim support.[16]

NAVY RULES

The Navy nonsupport policy states that, in the absence of an agreement or order, a unit commander may use the following as a guide for the adequacy of support:

- Spouse only: 1/3 of gross pay
- Spouse and one minor child: 1/2 of gross pay
- Spouse and two or more children: 3/5 of gross pay
- Spouse and four or more children: >3/5 of gross pay
- One minor child (no spousal support): 1/6 of gross pay
- Two minor children (no spousal support): 1/4 of gross pay
- Three minor children (no spousal support): 1/3 of gross pay.

---

housing. It helps to defray the housing costs and includes components which are equivalent to rent, utility and/or recurring maintenance expenses, and a move-in housing allowance.

[15] Id. at § 15002.

[16] *Id.* at § 15005.

For these purposes "gross pay" includes base pay and the BAH but doesn't include the basic allowance for subsistence (BAS), hazardous duty pay, sea or foreign duty pay, or incentive pay. [17]

A sailor may request a waiver of spousal support based on desertion without cause, physical abuse, or for infidelity on the part of the spouse. This waiver request shall be submitted to the Director, Navy Family Allowance Activity. It must include a complete statement of facts, the recommendation of the SM's commander, and substantiating evidence.[18]

COAST GUARD RULES

The Coast Guard policy on support of dependents provides that if, after counseling, the SM demonstrates a pattern of non-support and/or failure to obey civil court support orders, he or she is subject to administrative discharge for unfitness. Non-support that is "notorious" and discrediting to the Coast Guard can result in courts-martial or other disciplinary proceedings. Court orders for support are normally binding on members. If, however, a "member acting on good faith and on the express advice of qualified legal counsel disputes such a claim, the commanding officer may withhold disciplinary /administrative action against the member for a reasonable length of time...."[19]

When there is no order or agreement, the following support scale is used:

- Spouse only: BAH difference plus 20% of base pay
- Spouse and one minor child: BAH difference plus 25% of base pay
- Spouse and two or more minor children: BAH difference plus 30% of base pay
- One minor child: 16.7% (1/6) of base pay
- Two minor children: 25% (1/4) of base pay
- Three or more minor children: 33% (1/3) of base pay.[20]

Defenses to non-support of a spouse include infidelity or desertion. Defenses to non-support of a child are inability of the SM to ascertain the whereabouts and welfare of the child, or the facts that the person seeking support does not have physical custody of the child.[21]

ARMY RULES – AN OVERVIEW

Since the Army is the larges branch of the military, one might expect that its nonsupport regulation, Army Regulation (AR) 608-99, would be the most extensive and complex. It is.

AR 608-99 covers all members of the Army including cadets at West Point (U.S. Military Academy). Army Reserve personnel who are on active duty pursuant to orders for more than twenty-nine days and Army National Guard personnel serving on active duty under orders (pursuant to U.S. Code Title 10) for more than twenty-nine days are also covered by AR 608-99.

PRACTICE TIP

Searching for military regulations on the Internet is easy if one simply types in the number of the regulation involved into a search engine such as Google. Typing "608-99" into a search engine will usually land you at the website containing the text of AR 608-99, for example.

[17] U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1754-030 (Support of Family Members) (22 Aug. 2002), para. 4.
[18] *Id.*, para. 5
[19] U.S. DEP'T OF HOMELAND SECURITY, U.S. COAST GUARD COMMANDANT INSTR. M1000.6A, ch. 8M (Supporting Dependents) (3 May 2001).
[20] *Id.*
[21] *Id.*

"Family members," formerly known as "dependents," are defined as the soldier's current spouse, the minor children (under 18) of his or her current marriage and of past marriages (by birth or adoption).[22] The term also includes minor children born out of wedlock to female soldiers and to male soldiers *if* this is evidenced by a court order (or the functional equivalent of one) identifying the SM as the child's father, or if the soldier is providing support to the child under the terms of the regulation. "Family members" also includes a soldier's children by a prior marriage if he or she has a present duty to support them. The term includes any other individual (e.g., stepchildren, parents) that the SM has a duty to support according to applicable state law.

PRACTICE TIP
AR 608-99 provides a structure for interim support requirements which apply only when there is no agreement between the parties and no court order. This interim support amount is not intended to provide adequate support in every case, and it is not supposed to be used as a guideline for judges or administrative hearing officers or agencies in establishing family support requirements.

The prime mover behind the Army support regulation is the soldier's unit commander. He or she must become involved when the parties have not agreed on support, but the commander's duty does not arise until a family member (or an authorized representative, such as an attorney, a social worker or an agent of the child support enforcement agency) notifies the command that the SM is not providing adequate support.[23] The commander can punish a soldier under the Uniform Code of Military Justice for failing to comply with the obligations imposed by the regulation. AR 608-99 is a punitive regulation.

FIGURING SUPPORT – BAQ, VHA AND NOW... BAH!

The previous benchmark for measuring entitlement to support under Army regulations was the Basic Allowance for Quarters (BAQ). The BAQ was a nontaxable entitlement paid to service members for off-post housing based on the soldier's rank and whether he or she had dependents. The BAQ did not vary according to duty location; to compensate for different costs of living in different areas of the country, the Army also paid a Variable Housing Allowance (VHA). These two components, BAQ and VHA, have been combined effective January 1, 1998 into the BAH, or Basic Allowance for Housing. The BAH is a military housing allowance based on the SM's geographic duty location, pay grade and dependency status. Thus SMs holding the same rank receive different amounts of BAH due to their duty locations. It is computed by the Department of Defense based on median current market rent for the relevant community, or Military Housing Area, as well as average utilities (electricity, hear and water/sewer) and average renter's insurance.

To establish a constant baseline figure from the BAH, one must use the BAH II Table to determine that portion of the BAH representing the old BAQ figure. BAH II is simply the BAH stripped of any amount due to the SM's geographic duty location; it is the functional equivalent of the former BAQ.[24]

As if this weren't confusing enough, there are BAH II rates for SMs with dependents and for those without dependents, called BAH II-WITH and BAH II-WITHOUT. There is even a BAH II-DIFF. The latter is a housing allowance amount for a SM who is assigned to single-type quarters (i.e., barracks) and who is authorized a basic allowance for housing solely by reason of his payment of child support. A SM is not entitled to BAH II-DIFF if the monthly child support amount is less than the BAH-DIFF. The original BAH-DIFF amounts were calculated as the difference between BAH II-WITH and BAH II-WITHOUT for a SM's pay grade.

Under AR 608-99 a soldier need not be actually receiving BAH as a prerequisite to his or her duty to provide interim support to family members. A servicemember who is living in government quarters, for example, receives only a reduced amount of BAH if he is not married and has a legal responsibility for a

[22] AR 608-99, Glossary, Section II
[23] *Id.* at para. 2-1*b*.
[24] *Id.* at para. 1-7. Go to http://www.dfas.mil, click on "Money Matters" and then go to "Military Pay" for current BAH II rates.

dependent child. If a SM has no adjudicated or acknowledged obligation for support of a child born outside marriage and is living in the barracks, then he or she receives *no* BAH; the on-base quarters are provided *in lieu of* a housing allowance. BAH II is a measure of the SM's support obligation, rather than a necessary component of the SM's pay and allowances.

Also note that the amount of BAH II is not a ceiling on the SM's support obligation. The BAH II is only a minimum amount of support pursuant to interim support requirements in the absence of an agreement or order. The responsible SM-parent may pay more than this involuntarily (pursuant to an order) or by agreement.

COURT ORDERS AND INTERIM SUPPORT

The Army requires soldiers to obey a support order issued by a court of competent jurisdiction, which includes orders issued by administrative agencies. This includes decrees from other countries, but special rules apply here. A soldier's commander may not order him or her to obey a foreign-nation support order (alimony or child support) unless that order has been domesticated by a state court of the United States or else a treaty or international agreement requires compliance.[25] As soon as the soldier departs the foreign nation where he or she is stationed, the commander loses the authority to compel compliance with the foreign decree.[26]

In the absence of a valid and enforceable court order from a court of competent jurisdiction, a soldier is required to pay support pursuant to a written support agreement between the parties. If no such agreement exists, then the soldier must pay support according to the interim support requirement in AR 608-99.[27] The purpose of this regulation is to establish *some* family support while the parties attempt to reach an agreement or have an opportunity to resolve the matter in court. The soldier's interim support obligation starts on the date that the parties stop living together in the same residence.[28] The regulation states that, unless an agreement or order says otherwise, a soldier's support obligation starting or ending on other than the first or last day of the month will be calculated for that month based on a pro-rata daily basis.[29]

Here is what the regulation says about family support when a single family is involved:

> (1) *Family unit not residing in Government family housing.* The soldier will provide financial support in an amount equal to the soldier's BAH II–WITH to the family unit.
> (2) *Family unit residing in Government family housing.* While the soldier's family members are residing in Government family housing, the soldier is not required to provide additional financial support. When the supported family member(s) move(s) out of Government family housing, the soldier will provide BAH II–WITH.
> (3) *Family members within the family unit residing at different locations.* The soldier will provide a pro-rata share of BAH II–WITH to each family member not residing in Government family housing. The soldier is not required to provide additional support for family members residing in Government family housing.
> (4) *Soldier married to another person on active duty in one of the military services.* In the absence of a written financial support agreement or a court order containing a financial support provision, a soldier is not required to provide financial support to a spouse on active duty in one of the military services. With regard to a soldier's child or children (from that marriage or a prior marriage), a soldier will provide the following financial

---

[25] *Id.* at para. 2-4 *b*. The United States has such an agreement with Germany, which applies *only while the SM is assigned to a base in Germany.*

[26] The soldier may, however, still be subject to the foreign decree if he or she is reassigned to that country or the dependent family member registers the foreign court order in the United States for enforcement. Even in the absence of an enforceable foreign decree, the SM still must comply with AR 608-99's interim support requirements.

[27] AR 608-99, para. 2-6.

[28] *Id.* at para. 2-7*a*.

[29] *Id.* at para. 2-8.

support in the absence of a written financial support agreement or a court order containing a financial support provision:
(a) If the soldier does not have custody of any children, and the children do not reside in government quarters, the soldier will provide BAH–DIFF to the military member having custody of the child or children.
(b) If the soldier does not have custody of any children, and the children reside in Government quarters, the soldier is not required to provide financial support to the military member having custody of the child or children.
(c) If the soldier has custody of one or more children, the soldier is not required to provide financial support for a child or the children in the custody of the other military member. [30]

In military life, as in the civilian world, there are often multiple family units living in different places whom the noncustodial parent must support. Here are the Army's rules:

(1) A soldier will provide financial support for each family unit and family member in the following manner:
(a) Family members covered by court orders will be provided financial support in accordance with those court orders.
(b) Family members covered by financial support agreements will be provided financial support according to those agreements.
(c) Family members residing in Government family housing who are not covered by either a court order or a financial support agreement will not be provided additional financial support.
(d) Each family member not residing in Government family housing and who is not covered by a court order or a financial support agreement will be provided a pro-rata share of BAH II–WITH.
(e) If the soldier's present spouse is on active duty in one of the military services, the requirements of paragraph 2–6*d*(4) apply.
(2) The amount of financial support provided pursuant to a financial support agreement or a court order covering one or more family units or members does not affect the calculation of the pro-rata financial support required under this regulation for the financial support of any other family units or members not covered by such agreement or order.[31]

A flow chart illustrating Army nonsupport rules for single soldiers is found at ATCH B, and a flow chart for married soldiers is at ATCH C.[32] A client handout explaining Army nonsupport policies, written by the author and legal assistance attorneys at Ft. Bragg, North Carolina, is at ATCH D.

REMEDIES AND METHODS OF PAYMENT

These are the terms and conditions which define what a soldier's commander must do. If the interim support requirement is not sufficient (or is excessive), then the aggrieved party must obtain a court order, or else execute an agreement, to change the soldier's support obligation. The soldier's commander has no authority to vary the amount of the interim support requirement. In limited circumstances, a senior commander may release a solder from the regulation's support requirements, pursuant to para. 2-13 through 2-15 of AR 608-99 (e.g., the court had no jurisdiction to enter the order, or the supported family member is in jail).

A soldier may pay the support obligation, pursuant to AR 608-99, para. 2-7, in any of the following ways:

---

[30] *Id.* at para. 2-6*d*(1)-(4).
[31] *Id.* at para. 2-6*e*(1).
[32] Both of these charts were created by Captain Karen Kaske, a legal assistance attorney at the Office of the Staff Judge Advocate, XVIII Airborne Corps and Ft. Bragg, Ft. Bragg, NC.

- Cash (if personally delivered to an adult and a receipt is given)
- Check
- Money order
- Electronic funds transfer
- Voluntary allotment
- Involuntary allotment.
- Garnishment or wage assignment.

While payments in kind are allowed, they are strictly limited. In-kind payments are permitted if the agreement or order specifies this, or else the credit is requested for "non-government housing expenses for a dwelling where the supported family members live (provided that the soldier has a legal responsibility for this due to lease, mortgage, etc.).
The soldier must make up any shortfall between the value of the in-kind payment and the actual support obligation. For any other in-kind payment credit, such as car payments, installment contract payments, car insurance or credit card obligations, the consent of the supported family member is required. [33]

THE NONSUPPORT COMPLAINT LETTER: A LOW-COST REMEDY

One way to raise the issue of non-support by a soldier is for the client or the attorney to contact him or her to request support. If this doesn't work, or it is clear that this would be pointless, then the next point-of-contact is the soldier's immediate commander. This will ordinarily be a company commander for most Army units, but in an artillery unit it would be a battery commander and in an armored cavalry unit it would be a troop commander.

The commander's duty is to counsel the soldier, determine his or her intentions as to support, and respond to the complainant. The commander may also impose sanctions on the soldier for non-support. Sanctions for non-compliance may be:

- Administrative (e.g., reprimand, adverse information in soldier's file, bar to re-enlistment for enlisted personnel, or administrative discharge); or

- Punitive (administration of nonjudicial punishment under Article 15, Uniform Code of Military Justice, or a court-martial).

The decision to impose administrative or punitive sanctions is completely within the discretion of the soldier's commander.

PRACTICE TIP
The interim support requirements of AR 608-99, or of the Coast Guard, Marine Corps or Navy for that matter, can be a valuable tool for the private practitioner. These interim requirements can be used to get the flow of support started for the dependent client by means of a letter to the commander complaining about inadequate support. A sample nonsupport letter is at ATCH E.

MOBILIZATION AND SUPPORT

Problems frequently occur when a mobilized Reservist or Guard member is paying support. Contrary to the assumptions of some servicemembers, there is no law, federal or state, that stops or suspends payments of child support or alimony when a Reserve or Guard member is mobilized. Nor does any law require a reduction of child support or alimony upon the mobilization of the payor. Such a reduction might be logical in many cases. Frequently a payor takes a substantial cut in pay when activated in the Guard or Reserves. But the reason for no automatic reduction is that a SM doesn't necessarily have a reduction in income when returning to active duty from civilian life.

[33] *Id.* at para. 2-7*d* and *e.*

Let's look at the situation of Captain Jane Green, a member of the Marine Corps Reserve. She is divorced and pays child support to her ex-husband. In civilian life she works as a public school teacher earning $30,000 a year. But with 8 years of creditable service, when she goes on active duty her base pay alone is $45,000 a year. When you add in BAS and BAH, this comes to over $50,000 annually, almost twice her civilian salary. She probably wouldn't get a reduction in child support when she is recalled to active duty. In fact, her ex-husband might even apply for an *increase* in child support!

A more likely situation, however, would involve National Guard Sergeant John Smith, who is mobilized and takes a one-half cut in his pay. If he pays his ex-wife directly, he may decide to cut the payments in half or just stop payment while he is on active duty. If he is subject to a garnishment through his employer, then the garnishment will end when he leaves work for the National Guard. In either case, Mrs. Smith, his former wife, will need to obtain a new court order garnishing his military pay. She will face difficulties in locating him, in serving him with a motion for garnishment and in surviving his motion for stay under the SSCRA.

If, on the other hand, there is a generic garnishment, applying to the specific employer and any other full-time employer, then Mrs. Smith will not need a new hearing. Rather, she will need to transmit a certified copy of the garnishment order to Defense Finance and Accounting Service so that it can be used to attach Sergeant Smith's military pay.

If she is successful in obtaining a hearing so that the garnishment will apply to his military pay, or if she is successful in initiating a new garnishment through DFAS as shown above, there are still problems that must be addressed. Since Sergeant Smith is only earning half of his civilian pay, in effect the percentage of his pay that will be garnished has doubled. In order words, he may be paying "too much child support." He *should* file a motion to reduce child support. But how can he do this if he's patrolling the perimeter of Bagram Air Base in Afghanistan?

If he is only asking for an amount of child support indicated by the child support guidelines, then he might hire an attorney to file the motion, provide his latest LES to the attorney, and hope for the best at time of trial. If he needs to testify, because of a variance request or for some other reason, then it may be advisable to obtain his testimony by video deposition, telephone, Internet connection, or videoteleconference.

At the modification hearing, the court should note several factors. There may, on the face of it, appear to be a good case for reducing support because of a reduction in the payor's income. But it is important to remember that there are many other factors that can play a part in the judge's decision about granting a motion to reduce support.

- What if the other parent has just lost her job?
- What if the SM has income from other sources -- such as interest, dividends or rental income?
- What about the parent who is mobilized and receives from his employer – gratuitously – a continuation of pay for the first six months of active duty?
- What if the child's needs have recently increased due to medical or educational reasons and the child needs *more*, not less, in child support?
- What if child support was set low to begin with (several years ago) and there hasn't been any increase since then?
- And finally, what about the SM's own expenses? Maybe they will be lower while he or she goes on active duty. This might be the case, for example, if the member applies for a reduction in your home mortgage rate to 6% and asks for a stay (that is, a suspension) of loan payments due to lower income on

active duty, pursuant to the SSCRA.

All of these circumstances would have to be considered by the court in ruling on a motion to reduce support.

Even if none of the above applies and the member's income has been cut in half, that doesn't mean that his child support is also halved as well. When a court considers a motion to reduce support, it looks to see whether there is a *substantial change of circumstances* since the entry of the last order for support. If there isn't, then the motion is denied. If there is such a change in financial circumstances, however, then the court will usually "wipe the slate clean" and start all over again to determine a fair amount of child support.

EXPEDITING THE HEARING FOR THE SERVICEMEMBER

Clients in the Guard or Reserve who are mobilized (that is, called up to active duty) usually face immediate changes in their ability to provide family support. They leave their civilian careers and often face a substantial reduction of income.[34] Those Guard/Reserve personnel who are presently paying child support based on higher (civilian) monthly income will find that child support arrears begin to build up. Those payments made by garnishment stop as soon as the SM leaves his job to report for activation. Those payments made by check or money order usually stop when the civilian pay stops.

The first advice to give such a client is to file a motion to modify the support immediately. Federal law requires that all states enact laws that make past-due installments (under a court order) into a judgment by operation of law.[35] Court-ordered support obligations generally cannot be modified retroactively. Once a payment is due, it cannot be modified or forgiven, so promptly requesting court help, and then following up with a request for a hearing, are essential for mobilized SMs. This filing can be done through private counsel or through a child support agency. The SM should be sure to provide a copy of the mobilization orders and as much information on military pay and allowances (such as pay grade, time in service, and a recent leave-and-earnings statement) as is available. A copy of the current child support order is an important document to provide as well.

PRACTICE TIP

Be sure to file a motion for an expedited hearing when you have a case that requires prompt action. Don't let your case linger on the contested calendar to be heard "next in line." Ask for a prompt hearing, and attach an affidavit to your motion illustrating the importance of the expedited hearing.

When a SM is involved in a support case, he sometimes cannot be present in court to present testimony or evidence due to his military duties. His military assignment, for example, might take him to another base across the country or in another part of the world. When this happens, the court has the choice of proceeding with the hearing without the SM's testimony or continuing the case. Doing without the SM's testimony leaves the court without the benefit of potentially useful and relevant information upon which to base its decision. The option of a continuance, also known as a stay of proceedings under the Servicemembers Civil Relief Act, 50 U.S.C. App. § 522, only delays the progress of the case since the SM cannot participate in person.

[34] Of course, the reduction of income alone may not warrant a modification of child support (or alimony). The test for a modification is usually "a substantial change of circumstances," which requires examination of both parents' incomes, their reasonable expenses and the children's expenses. When the current support amount is low or the needs of the children have increased substantially, the court may refuse to modify the support or may even increase it. In addition, remember that mobilization may *increase* the pay of some RC members; a homemaker whose Guard position is a nurse will see a substantial pay *increase.*

[35] 42 U.S.C. §666(a)(9).

There are times when the SM will want a hearing, and to participate actively in it, rather than to delay the resolution of a controversy. Such would be the case when a SM is asking for a modification of child support or alimony due to financial difficulties imposed on him by deployment or, if he is a Guard/Reserve member, by mobilization Most Guard and Reserve personnel suffer a substantial pay decrease when called to active duty from their civilian jobs, and this frequently leads to support arrears with no ability to take leave to ask the court for an adjustment in payments. Any missed payment is "vested" and may not be modified by the court, asa general rule.

Knowing that delay often means increased legal fees for himself, a SM might also want to participate electronically in a hearing involving property division, divorce or adoption. A SM who needs an adjustment to his visitation rights or a modification of his custody award might elect to request electronic testimony rather than allow delay to worsen the situation of a child with a distant military parent. Counsel for the SM should explore the options to allow the case to go forward with electronic testimony, including the following:

- There are numerous options available for taking testimony electronically. In addition to use of the telephone, a servicemember can sometimes obtain access to videoteleconferences (VTCs) at commercial or command facilities which allow real-time audiovisual interaction with the SM as if he were in the courtroom. The use of a camera and a microphone in connection with a computer connected to the Internet makes possible testimony from locations which do not have commercial or command VTC facilities.

- Section 316(f) of the Uniform Interstate Family Support Act (UIFSA) provides for parties to "testify by telephone, through audiovisual means or by any other electronic means." Section 111 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) permits an individual to be deposed or to testify by telephone, audiovisual means or electronic means.

- When the case does not involve UIFSA or the UCCJEA, opportunities to use telephone or audiovisual testimony are limited. Florida allows testimony by telephone of non-party witnesses at trial.[36] As a general rule, telephone testimony is not allowed in a trial court.[37] Some courts have recognized that special circumstances can justify bending this rule.[38]

---

[36] *The Florida Bar: In Re Rules of Summary Procedure,* 461 So.2d 1344 (Fla. 1984).

[37] *Barry v. Lindner*, 75 P.3d 388 (Nev. 2003)(telephone testimony is inadmissible at trial unless special circumstances exist); *Rinehart v. Rinehart*, 2000 Guam 14 (2000)(disallowing telephone testimony in absence of rule allowing same); *Bonamarte v. Bonamarte*, 263 Mont. 170, 866 P.2d 1132 (1994)(allowing telephone tesimony only in "special or exigent circumstances" or when the parties agree and the court approves); *In Interest of Gust* 345 N.W.2d 42 (N.D. 1984)(barring telephone testimony of mental health expert witness in a commitment proceeding unless all parties agreed); *Archem, Inc. v. Simo*, 549 N.E.2d 1054 (Ind. App. 1990)(effective cross-examination frustrated by allowing into evidence a video deposition subject to telephonic cross-examination of a party who could not attend the deposition); *State ex rel. Juvenile Dept. of Multnoman County v. Gates*, 86 Or. App. 631, 740 P.2d 217 (1987)(in action to terminate parental rights, it was error to allow telephone testimony of out-of-state caseworkers and a psychologist, absent a statutory or procedural rule allowing same); *Sherman v. Com. Unemp. Compensation Bd. of Review*, 114 Pa. Cmwlth. 424, 539 A.2d 23 (1988)(holding that, without authorizing rules for telephonic hearings, it could not uphold evidence brought out in such a hearing when the claimant had objected thereto).

[38] *Gregg v. Gregg*, 776 P.2d 1041 (Alaska 1989)(permitting telephone testimony due to late receipt of summons by party); *Matter* of W.J.C., 124 Wis.2d 238, 369 N.W.2d 162 (Wis. App. 1985)(court-appointed psychologist and psychiatrist were allowed to testify by telephone when they had already filed their full reports with the court); *Ferrante v. Ferrante*, 127 Misc.2d 352, 485 N.Y.S.2d 960 (Sup. Ct. 1985)(in case of 92-year old plaintiff, telephone testimony was allowed since she could not travel to Florida from New York). *See also* Rule 43(a), Federal Rules of Civil Procedure (allowing telephone testimony "for good

The option of taking electronic testimony and evidence upon motion of the SM allows the SM to facilitate the prompt disposition of the case when he needs an expedited hearing, rather than leaving him with only the options of default or delay.

CALCULATING CHILD SUPPORT

The starting point for most child support cases is to determine the guideline amount of child support. When the support payor is the SM, you will need for know his or her income. In many states, the child support guidelines also require knowledge of the cost of the child's portion of medical insurance and the cost of work-related day care. How does one go about this in a military case? While federal and state tax returns may be helpful in discovering income in other cases, don't use them as the sole source for information on military income -- some entitlements are *tax-free*.

The first step is to know about military pay. For this, you will need to get a copy of the SM's monthly pay statement, known as the LES (Leave and Earnings Statement). The LES shows total *gross* income of the SM, also known at *total entitlements*. This consists of *pay* and *allowances*.[39] Pay includes the monthly base pay that a SM receives, based on his pay grade and his years of service. Pay may also include special skill pay, such as flight pay for pilots or "jump pay" for paratroopers.

Don't overlook bonuses as a source of income for support purposes. Re-enlistment bonuses these days can involve large price tags. On February 21, 2005, *USA Today* carried a story touting re-enlistment bonuses for special operations troops in the Army, Navy and Air Force of up to $150,000, for hard-to-fill specialties (e.g., truck drivers and bomb-disposal experts) of up to $50,000, for initial Army enlistees of up to $20,000, and for Army National Guard enlisted personnel of up to $15,000.

"Pay" items (as opposed to allowances) generally are taxable, but there are exceptions.[40] There are no hard-and-fast rules.[41] If you need help, sometimes a recruiter can assist; another source of information might be an officer or NCO (non-commissioned officer) at a local Guard/Reserve facility or at an ROTC (Reserve Officer Training Corps) detachment at a local college or university.

PRACTICE TIP

---

cause shown in compelling circumstances and upon appropriate safeguards"). *See generally* Michael J. Weber, *Permissibility of Testimony by Telephone in State Trials*, 85 A.L.R. 4th 476 (1991).

[39] A good guide to basic pay, the BAH and the BAS is at http://www.defenselink.mil/militarypay/pay/ (last visited November 28, 2004). This also contains a Regular Military Compensation calculator to help you determine the equivalent civilian compensation for a SM, taking into account the tax-free allowances and other benefits which DoD provides to SMs.

[40] Go to http://www.dfas.mil, click on "Money Matters" and then go to "Military Pay" for current pay and allowances information. There you will find the current amounts payable for Family Separation Allowance, Clothing Allowances, Basic Allowance for Subsistence, Aviation Career Incentive Pay, Hazardous Duty Incentive Pay, Imminent Danger Pay, Hostile Fire Pay, Diving Pay, Submarine Duty Incentive Pay, Career Sea Pay, special incentive pays for medical, dental and veterinary officers, and Guard/Reserve drill pay. Another useful source of information on all types of pay and their taxability is www.airforcetimes.com. Click on "Money" and then on "Military pay calculators and charts" or on "Pay and Benefits." This can also be done at www.armytimes.com and www.navytimes.com; all three are published by the same company.

[41] For more information on the taxability of military compensation, see [reference page numbers here for Tax chapter]

In general there is a higher rate of pay, or a pay raise, every two years, and the years of service are listed in *even years*. Thus an Army staff sergeant (E-6) "over 10" (meaning "with over 10 years of creditable service") earns more than a staff sergeant "over 8."[42] Regardless of title, however, all SMs of the same pay grade (e.g., E-6) receive the same base pay, regardless of branch of service.

THE VALUE OF THE LES

The LES also shows a SM's allowances. The primary allowance is the Basic Allowance for Housing, or BAH, which is described above and is intended to assist with the cost of a SM's lodging.[43] This allowance is exempt from taxation.

Servicemembers also receive a Basic Allowance for Subsistence, or BAS, which is also non-taxable and is an allowance for food.[44] Based on the historic tradition of the military service's providing room and board (or rations) for all SMs as part of their pay, the BAS is meant to offset the cost of a SM's meals. It is not meant to offset the costs of meals for family members. Starting in 2002, all enlisted members receive full BAS but pay for their meals (including those provided by the government). Under Title 37 U. S. Code, Section 402, all officers entitled to basic pay are entitled to BAS (with very limited exceptions). Officers must pay for all meals obtained in a government dining facility. Officers on field or sea duty continue to get BAS, but they are charged a daily rate for their government-furnished meals. The rate for officers as of 2005 is about $175 per month. Under Title 37 U. S. Code, Sections 402 and 1009, all enlisted members entitled to basic pay have a continuous entitlement to BAS except those recruits who are attending basic military training and certain other limited exceptions. The enlisted rate for 2005 is about $260 per month.

There are also entries on the LES for allotments, which are generally voluntary payments made directly out of the SM's pay (such as for car payments or utility bills), and deductions, which are mandatory payments (such as federal and state tax withholding, FICA and Medicare).

At ATCH F is a sample LES with explanations of all of the data entry fields or cells on it.[45] If you represent the SM, you can obtain an LES from your client; he or she receives one twice a month, and a downloadable copy is also available atwww.dod.mil/dfas/myPay once your client enters his login name and password. If you are on the other side of the case, ask for a copy of the LES in discovery. It is usually advisable to request several of these, such as "*All Leave and Earnings Statements issued to you (or available to you at your account onwww.dod.mil/dfas/myPay) for the three months next preceding production.*" You might also consider asking for the last LES for the preceding year to get a good idea of information for that period of time with all the year-to-date totals.

PRACTICE TIP

Once you have the LES, be sure to review carefully the discretionary allotments; they can be used for elective payments (e.g., utilities, a car payment or vehicle lease, a charity such as "Combined Federal Campaign," or an automatic savings plan). Also pay close attention to the following:

- How much leave the member has accrued and how much has been used.
- What state the SM claims as his domicile for income tax purposes; this may help to establish jurisdiction in a divorce or military pension division case.
- How many dependents are being claimed for income tax purposes; too few dependents may mean

[42] The titles for grade or rank vary between the services, and a quick guide to these interesting but confusing titles can be found on the Internet at http://www.defenselink.mil/militarypay/pay/bp/paytables/howtoread.html (last visited November 28, 2004)

[43] 37 U.S.C. § 403.

[44] 37 U.S.C. § 402.

[45] This attachment can also be found at www.dfas.mil/money/milpay/les_djms.pdf (last visited December 18, 2004).

that too much is being withheld from the SM's paycheck.

WHAT IS INCOME?

Look to your own state's law to determine what goes into "income" for child support guideline (or guideline deviation) purposes. While some states may exempt non-taxable income from consideration in setting child support,[46] most states require consideration of *all* pay and allowances in determining the support obligation, regardless of taxable status.[47] According to federal regulations, state child support guidelines must, at a minimum, satisfy certain requirements including consideration of all earnings and income of the absent parent.[48] The fact that an income item, such as BAH or BAS, is not subject to garnishment under 42 U.S.C. § 659 for the enforcement child support does not mean that it cannot be considered for the setting of child support.[49]

One author contends that, even if the SM lives on base and is not receiving BAH and BAS payments, these should be counted into his income.[50] Here is an updated summary of the argument of then-Major Mark Connor (at the time an assistant professor at the Army JAG School teaching family law), in an article in the November 1991 issue of The Army Lawyer:[51]

- All servicemembers receive BAH and BAS *or* they live in government accommodations and eat in the mess hall for free or for a modest payment.
- Assume that SGT (E-5) Andy Able lives on base at Ft. Swampy, has over eight years of creditable service, and eats at the base dining facility (known in the old days as "the mess hall"). SGT Bill

[46] *See, e.g.*, Louisiana Revised Statutes 9:315(C)(4)(d)(ii), which exempts "per diem allowances which are not subject to federal income taxation under the provisions of the Internal Revenue Code." Note, however, that Section 9:315(C)(4)(b) includes for "gross income" in setting child support "expense reimbursement or in-kind payments received by a parent in the course of employment... if the reimbursements or payments are significant and reduce the parent's personal living expenses. Such payments include but are not limited to a company car, free housing, or reimbursed meals."

[47] *See, e.g., Merkel v. Merkel*, 51 Ohio App. 110, 554 N.E.2d 1346 (Ct. App. Montgomery Co. 1988) ("Under the facts of this case, we find that the receipt of free housing [by the servicemember] is a significant benefit for the appellee and that it would be inequitable for the trial court not to consider such a factor in determining his gross income. Therefore, we hold that the trial court abused its discretion by failing to take into account the appellee's free housing when determining his gross income." *Id.*, 51 Ohio App. 112, 554 N.E.2d 1348).

[48] Laura Wish Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION, p. 1-9 (Supp. 2004). Morgan's treatise is the authoritative source of answers for any questions or problems regarding setting child support or deviating from the guidelines. At footnote 130 in the 2004 Supplement is an exhaustive list of state cases holding that the military housing allowance (formerly called BAQ and now called BAH) should be considered income for child support purposes, even though the benefit is not taxable. At footnote 132 Morgan cites cases holding that even the Voluntary Separation Incentive, though nonrecurring, is considered income for the setting of child support.

[49] *See, e.g., Hautala v. Hautala*, 417 N.W.879 (S.D. 1988), *citing Rose v. Rose,* 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 599 (1987). A court may, however, determine that an item is not "income" under the applicable state guidelines. *See, e.g., Kelly v. Kelly*, 2003 Conn. Super. LEXIS 3573 (Super. Ct. 2003) (holding that the BAS was not an employment "perk" nor a "fringe benefit" and thus not includable in the SM-father's income for purposes of calculating his child support obligation; also holding that the mother had not proven that the Family Separation Allowance [currently $250 per month] was received on a regular or recurrent basis by the SM-father and thus was not income for child support purposes).

[50] Connor, Major Mark J., *Family Law Note: Applying State Child Support Guidelines to Military Compensation*, ARMY LAW., November 1991 at 41. *See also* Major Mark J. Connor, *Resolving Child Support Issues Beyond the Scope of AR 608-99*, 132 MIL. L. REV. 67, 78 (1991).

[51] One can access past issues of THE ARMY LAWYER by going to www.jagcnet.army.mil/tjaglcs and clicking on "The Army Lawyer" on the lower left side of the page. The same procedure will yield on-line past issues of THE MILITARY LAW REVIEW.

Baker, with an equal number of years of service, lives off post and receives BAH and BAS. Both have the same number of children to support from their former marriages.

- Here is how their cash compensation looks, with approximate numbers taken from the 2004 pay tables and a hypothetical BAH:

	SGT Able (on base)	SGT Baker (off base)
Base Pay	$2000	$2000
BAH	-0-	$800
BAS	-0-	$260
Total	$2000	$3060

- Should the child support rules and guidelines require consideration of only cash income of the payor, then SGT Able will pay lower child support than SGT Baker, even though both sergeants have similar situations and thus should be treated alike. Even though SGT Baker appears to have a higher income, the subsistence and housing allowances are going to be spent obtaining food and lodging each month. An outcome that is logical and consistent would have both of them paying the same amount of child support.

- In fact, it is fairly common for "in-kind" income to be counted in calculating child support.

> The payments military personnel receive for living quarters are generally considered income, even though such benefits may not be taxable. [footnote omitted] Other military payments have been considered income as well.[52]

Many child support rules and guidelines recognize that there may be in-kind benefits given to an employee which have a substantial value, and free military housing on base is just such a benefit. The courts recognize that free lodging associated with one's employment has value and this must be credited as the equivalent of income for the paying party in the support decision rather than ignored.[53] The no-cost lodging for the on-base sergeant means that more money is available which he would otherwise spend on off-base lodging.

- When the judge assigns a value to the meals and lodging, she may take evidence on their value. Counsel may wish to tender to the court, for example, a realtor who can testify as to the value of the quarters on base occupied by the SM. If this involves a detached, single-family residence occupied by Commander Gladys Green at the naval base at fashionable Newport, Rhode Island, the cost might be justified. That would hardly be the case, however, for PFC John Doe and the single-soldier quarters at Ft. Hood, Texas. In addition to the cost of the expert's time in court for testimony, there would be practical problems in obtaining an in-person inspection of the lodging for either of the above SMs. How does one implement or enforce a request for entry on land under Rule 34 (or the equivalent) if the land is owned or occupied by the federal government? How does the real estate agent or appraiser get on base?

- A much easier way to place a price tag on the in-kind compensation is to accept the amount of the BAH and the BAS as the cash equivalent of the benefits. Equating the value of the meals and the lodging of SGT Able to the amount of the foregone BAH and BAS is much simpler for the judge. Thus the "real income" of SGT Able would include these missing allowances and be the same as that of SGT Baker.

---

[52] Morgan, *supra* note 45, p. 2-41 (Supp. 2004).

[53] *See, e.g., Stewart v. Gomez,* 47 Ca. App. 4th 1748, 55 Cal. Rptr. 2d 531 (4th App. Dist. 1996); *Carmon v. Commonwealth of Virginia ex rel. Jones,* 21 Va. App., 467 S.E.2d 815 (1996); *Norris v. Norris,* 604 So. 2d 107 (La. App. 1992).

American Bar Association
Section of Family Law

Wednesday, May 3, 2006

A Short Course in Military Family Law Issues

Servicemembers Civil Relief Act

Family Law and the Servicemembers Civil Relief Act

Mark E. Sullivan
Sullivan & Grace, P.A.
Raleigh, North Carolina

I. INTRODUCTION

II. OVERVIEW OF THE NEW STATUTE – SERVICEMEMBERS CIVIL RELIEF ACT

A. Purpose (50 U.S.C. App. § 502)

1. To enable servicemembers (SMs) to devote their entire energy to the defense needs of the Nation; and

2. to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service

B. Who is covered? (50 U.S.C. App. § 511)

1. Covered servicemembers include –

   a. Those members of the Army, Navy, Air Force, Marine Corps and Coast Guard who are on active duty under 10 U.S.C. 101(d)(1);

   b. Members of the National Guard who are called to active duty as authorized by the President or the Secretary of Defense for over 30 consecutive days under 32 U.S.C. 502(f) to respond to a national emergency declared by the President and supported by federal funds;

   c. Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration.

2. A SM is also covered for periods of time when he or she is absent from duty because of sickness, wounds, leave or other lawful cause [i.e., he is still a SM even if absent from active duty for one of the above reasons]

3. 50 U.S.C. App. § 516, the protections of the Act are extended to members of the Reserve Components (RC) – the National Guard and Reserve – from receipt of orders to report for duty to the date that they report

4. Covered individuals under certain sections of the SCRA include dependents of a SM (a spouse, a child, or anyone for whom the SM provided over half of the person's support for the 180 days immediately preceding an application for relief under the Act)

C. What tribunals are covered?

1. 50 U.S.C. App. § 511(5) – any court or administrative agency of the United States, a state or a political subdivision thereof

2. Criminal proceedings are excluded under 50 U.S.C. App. § 512(b)

3. Does this mean the Maryland Department of Environmental Protection? The Orange County Board of Housing Appeals? The Zoning Commission of Seattle? The answer is YES to all the above!

D. What about the SM's lawyer? Under 50 U.S.C. App. § 519, whenever "servicemember" is used, it includes the attorney and/or the agent (under a power of attorney) of the SM

E. Can the SM waive his rights?

1. This is covered in 50 U.S.C. App. § 517. A waiver of SCRA rights is only effective if it is made during the period of military service.

2. In addition, certain waivers must be made in writing in at least 12-point type.

3. If the court wants to have the SM execute a written waiver in connection with a stay of proceedings so that the case may go forward and there is a clear record that the SM has knowingly and voluntarily waived his or her rights under the SCRA, this form should suffice:

WAIVER OF RIGHT TO REQUEST STAY OF PROCEEDINGS

I acknowledge that I have the right to request a stay of proceedings in this case under the Servicemembers Civil Relief Act. The stay of proceedings, or continuance, would postpone a hearing in this case if it were granted.

I hereby waive and give up the right to a stay of proceedings. I want to proceed with this case.

_____ Date:_____
(signature)

_____
Printed Name

[here print acknowledgment and notarization if required]

F. A summary of the major changes in the new Act can be found at ATCH-1.

III. STAY OF PROCEEDINGS

A. Where the SM has not made an appearance, 50 U.S.C. App. § 521 governs. A stay of proceedings under 50 U.S.C. App. § 521(d) is not be controlled by the procedures under 50 U.S.C. App. § 522, which apply when the SM has received actual notice of the action.

1. The court must first determine whether an absent or defaulting party is in the military service.

a. Before entry of a judgment for the plaintiff, the court (including "agency") shall require the plaintiff to file an affidavit. The affidavit shall state "whether or not the defendant is in the military service and showing necessary facts in support of the affidavit."

b. If it appears that the defendant is a SM, then a default judgment may not be taken until after the court appoints an attorney to represent the defendant.

c. If that attorney cannot locate the SM, the actions of the attorney cannot waive any defense of the SM or otherwise bind him or her.

d. If the court cannot determine whether the defendant is in military service, then the court may require the plaintiff to post a bond as a condition of entry of a default judgment. Should the defendant later be found to be a SM, the bond may be used to indemnify the defendant against any loss or damage which he or she may incur due to the default judgment (if it should be later set aside).

e. Upon application by either side or the court, the Department of Defense must issue a statement as to military service. 50 U.S.C. App. § 582. The office in DOD to contact for information under the SCRA on whether a person is in the armed forces is:

Defense Manpower Data Center [Attn: Military Verification]
1600 Wilson Blvd., Suite 400
Arlington, VA 22209-2593
[Telephone 703-696-6762 or -5790/ fax 703-696-4156]

f. Recently the DMDC has been developing a website to help customers to perform the checks themselves on whether or not a party to a lawsuit is in the armed forces. It will be available on a 24-hour basis to accepted customers, who will in reply receive written documentation containing the Department of Defense seal and the signature of the DMDC Director on the written documentation verifying military service. To provide customer access to the website, an applicant will need to identify all employees who will be doing these checks and complete a form (shown below) by typing all the required information for each person performing a search. DMDC also requires a cover letter on firm or agency letterhead, to accompany the form, which also states that the requesting entity and employees will not be using the

information for any reason other than SCRA searches. Further information is available from DMDC at the telephone number above.

DMDC MILITARY VERIFICATION WEB APPLICATION

COMPANY NAME_____
ADDRESS_____
TELEPHONE_____
FAX_____

LAST NAME	FIRST NAME	MIDDLE INITIAL	E-MAIL	TELEPHONE NUMBER	MOTHER'S MAIDEN NAME

g. Criminal penalties are provided for filing a knowingly false affidavit.

2. Then the court must decide on a stay of proceedings. In cases where the defendant is in military service –

a. The court shall stay the proceedings for at least 90 days (upon application of counsel or on the court's own motion) if the court determines that:

(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant, or

(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

3. If a judgment has been entered against the SM during his period of military service (or within 60 days after the end of service), the court shall reopen the judgment to allow the SM to defend if

a. he was materially affected due to military service in asserting a defense, and

b. he has a meritorious or legal defense to the action or some part of it, so long as

c. the application is filed within 90 days after the end of military service. 50 U.S.C. App. § 521(g).

4. Reopening or vacating the judgment shall not impair right or title acquired by a bona fide purchaser for value under the default judgment.

B. 50 U.S.C. App. § 522 applies to a stay of proceedings where the SM has notice of the proceedings and has filed an application for stay (including an application filed within 90 days after the end of military service)

1. The court may (upon its own motion) and shall (upon motion of a SM) enter a stay of proceedings for at least 90 days if the motion includes

   a. A statement as to how the SM's current military duties materially affect his ability to appear, and stating a date when the SM will be available to appear, and

   b. A statement from the SM's commanding officer stating that

      (1) the SM's current military duty prevents his appearance and

      (2) military leave is not authorized for the SM at the time of the statement.

   c. *Caveat:* There is no indication that either of these must be in the form of an affidavit or, for that matter, in any particular format whatsoever. Apparently a letter, a formal memo or even an e-mail message would suffice.

   d. A sample motion for stay of proceedings can be found at ATCH-2.

   e. A request for a stay does not constitute –

      (1) an appearance for jurisdictional purposes, or

      (2) a waiver of any defense, substantive or procedural. 50 U.S.C. App. §522(c).

   f. The SM may request an additional stay based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. The same information as given above is required. 50 U.S.C. App. § 522(d)(1).

   g. If the court refuses an additional stay, then the court must appoint an attorney to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2).

      (1) Questions: What does this attorney do? Who pays him or her? How does the attorney get in touch with the unavailable defendant or plaintiff? How can the attorney hope to represent the SM with no information, preparation or input by the "involuntary client"? Is the attorney supposed to try the entire case in the SM's absence? Whose malpractice policy is going to cover this nightmare?

      (2) Further question: Which section applies when the SM has notice but has not made an appearance? That is, what governs when he has been served properly with the summons and complaint or petition but has not filed an answer or substantive motion? Both of them? Neither one?

IV. STAY OR VACATION OF EXECUTION OF JUDGMENTS, ATTACHMENTS AND GARNISHMENTS

A. In any action started against a SM before his period of military service, during it or within 90 after the end of service, when a SM's military duties materially affect his ability to comply with a court order or judgment, then the court may (on its own motion) and shall (on motion by the SM) –

1. stay the execution of any judgment or order entered against him, and

2. vacate or stay any attachment or garnishment of property, money or debts in the possession of the SM or a third party

3. regardless of whether it is before or after judgment. 50 U.S.C. App. § 524.

V. REQUEST FOR ANTICIPATORY RELIEF

A. The SCRA doesn't require breach or default before offering protections to covered individuals.

B. Example – the anticipatory relief provisions of 50 U.S.C. App. §591:

ANTICIPATORY RELIEF.
(a) APPLICATION FOR RELIEF.—A servicemember may, during military service or within 180 days of termination of or release from military service, apply to a court for relief— (1) from any obligation or liability incurred by the servicemember before the servicemember's military service; or (2) from a tax or assessment falling due before or during the servicemember's military service.

C. These anticipatory relief provisions can be used to request relief from pre-service obligations, such as child support or alimony, when a prospective breach is likely. For example, when the SM is earning more in his civilian job before mobilization than he will be earning on active duty, and the civilian wage garnishment will terminate upon his call to active duty, the SM should use this section to request a reduction in child support or alimony and to request a new garnishment from DFAS (Defense Finance and Accounting Service) to pay the other party on a timely basis.

VI. USING THE SCRA "STAY REQUEST" IN FAMILY LAW CASES

A. Defensive use on behalf of the servicemember – questions to ask the client:

1. Is delay necessary?

2. Is delay desirable? [e.g., build-up of arrears, citations for contempt as results]

3. If it is helpful at present, will a delay of the day of reckoning help in the long run?

B. Resisting the motion for a stay on behalf of the non-military partner or spouse:

1. Attack the stay request. Does it contain the mandatory elements?

SCRA Stay Request – a Checklist for Opposing the Initial 90-Day Stay

✔	**Elements of a Valid 90-Day Stay Request.** Does the request contain…
	A statement as to how the SM's current military duties materially affect his ability to appear?
	And stating a date when the SM will be available to appear?
	A statement from the SM's commanding officer stating that the SM's current military duty prevents his appearance?
	And stating that military leave is not authorized for the SM at the time of the statement?

2. How much leave has member accrued? Ask for a copy of the SM's LES (Leave and Earnings Statement) to find out.

3. What is the nature of the "military necessity" that prevents a hearing? Is the SM serving in Iraq, where he cannot be given leave and is facing hostile fire on a daily or weekly basis? Or is he serving as "backfill" at Ft. Bragg or Ft. Lewis so that others may deploy overseas, working a comfortable day shift of 7:30 – 4:30 with weekends off?

4. Sometimes a SM exaggerates the amount of time needed to be in court. Often a court case can be heard and resolved in a few hours or a few days. What happens if the SM complains to his commander that he will need to be gone for 30 days to take care of his case back in court? Answer – a letter from the commanding officer stating that the SM's duty requirements prevent appearance and that he is not authorized leave. Preempt this approach by specifying in the pleadings what is requested and approximately what amount of time will be required in court.

5. Is member's presence necessary?

6. What about video depositions? Use of the Internet? Is anyone truly "unavailable" any more?

   a. In *Massey v. Kim*, 455 S.E.2d 306 (Ga. Ct. App. 1995), the SM asked for a stay of proceedings to delay pending discovery until the completion of his overseas tour of duty. The court denied his request, pointing out improvements in modern communications since the passage of the SSCRA.

   b. In *Keefe v. Spangenberg*, 533 F. Supp. 49 (W.D. Okla. 1981), the court denied the SM's stay request to delay discovery, indicating that the SM should appear by videotape deposition pursuant to Fed. R. Civ. P. 30(B)(4).

   c. One court specifically pointed out that "Court reporters may take depositions in Germany including videotape depositions for use in trials in this country." *In re Diaz*, 82 B.R. 162, 165 (Bankr. Ga. 1988).

7. What about summary judgment based on affidavits?

8. Can the matter be resolved on an interim basis with a temporary hearing? In *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989), the court determined that temporary modifications of child support, in general, do not materially affect the SM's rights since they are interlocutory and subject to modification.

9. Is the SM truly unable to appear? The Welfare Reform Act of 1996 requires that the armed forces issue regulations to ease the granting of leave for SMs to appear in court and administrative paternity and child support hearings. *See* DoD Directive 1327.5, Leave and Liberty (IO 4, 10 Sep. 1997).

10. When will the temporary exigency be over? There is nothing that prevents a judge from responding to the commanding officer to ask some questions that will help determine what can be done to move the case forward. Perhaps the SM can respond to discovery while he is unavailable for a court appearance.

11. See ATCH-3, a flow chart on defending against the SCRA, adapted from one found at Hooper, "The Soldier's and Sailors' Civil Relief Act of 1940 as Applied in Support Litigation: A Support Attorney's Perspective," 112 Mil. L. Rev. 93 (1986). At ATCH-4 is a flow chart on the request for an additional stay. At ATCH-5 is a checklist for judges.

12. See ATCH-6, "Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical," for more information.

VII. INTERNET SCRA RESOURCES:

A. There's not much on the Internet at present about the SCRA since it's so new. But there's a lot about the SSCRA (Soldiers' and Sailors' Civil Relief Act, the SCRA's predecessor.

Fire up your ISP (internet service provider) and start with a visit to the home page of the Army JAG School, http://www.jagcnet.army.mil/TJAGLCS. When you get there, click on "TJAGLCS Publications" on the left side, then scroll down to "Legal Assistance" and look for JA 260, "Soldiers' and Sailors' Civil Relief Act Guide," a thorough examination of every section of the SSCRA by the faculty of the Army JAG School (updated in July 2000).

You can also find useful material on the SSCRA (still useful when dealing with the SCRA) at: Office of Child Support Enforcement's "A Caseworker's Guide to Child Support Enforcement and Military Personnel" - section on SSCRA: http://www.acf.dhhs.gov/programs/cse/fct/militaryguide2000.htm#relief.

Some new information on the SCRA can be found at:

1. "New Relief Act Provisions Protect Servicemembers" -- Department of Defense article, Armed Forces Information Service: http://www.defenselink.mil/news/Jan2004/n01072004_200401073.html

2. Coast Guard Fact Sheet on SCRA: http://www.uscg.mil/legal/la/topics/sscra/about_the_sscra.htm

3. Legal Services, http://www.jagcnet.army.mil/legal, the Army Judge Advocate General's Corps public preventive legal information site (Servicemember's Civil Relief Act information center).

4. "A Judge's Guide to the Servicemember's Civil Relief Act" is available at the website for the Military Committee of the ABA Family Law Section, www.abanet.org/family/military.

ATCH-1

SILENT PARTNER

SUMMARY OF SERVICEMEMBERS CIVIL RELIEF ACT

INTRODUCTION: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain basic concepts about legal assistance issues. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page. This SILENT PARTNER was adapted from an advisory memorandum, "Servicemembers' Civil Relief Act Primer," prepared by Chris Rydelek, head of the Legal Assistance Branch, U.S. Marine Corps, an information paper prepared by the Legal Assistance Policy Division, Office of the Judge Advocate General, U.S. Army and an article," Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act," by John Meixell of that office*

On December 19, 2003, President Bush signed into law the "Servicemembers Civil Relief Act" (SCRA); the Act takes effect upon the President's signature (12/19/03) for all cases which have not reached final judgment. This law is a complete revision of the statute known as "The Soldiers' and Sailors' Civil Relief Act," or SSCRA.

Up until the passage of the SCRA, the basic protections of the SSCRA for the servicemember (SM) included:

1. Postponement of civil court hearings when military duties materially affected the ability of a SM to prepare for or be present for civil litigation;
2. Reducing the interest rate to 6% on pre-service loans and obligations;
3. Barring eviction of a SM's family for nonpayment of rent without a court order for monthly rent of $1,200 or less;
4. Termination of a pre-service residential lease; and
5. Allowing SMs to maintain their state of residence for tax purposes despite military reassignment to other states.

The SSCRA, enacted in 1940 and updated after the Gulf War in 1991, was still largely unchanged as of 2003. The SCRA was written to clarify the language of the SSCRA, to incorporate many years of judicial interpretation of the SSCRA and to update the SSCRA to reflect new developments in American life since 1940. Here's an overview of what the SCRA does:

GENERAL RELIEF PROVISIONS

1. The SCRA expands the application of a SM's right to stay court hearings to include administrative hearings. Previously only civil courts were included, and this caused problems in cases involving administrative child support determinations as well as other agency determinations which impacted servicemembers. Criminal matters are still excluded. 50 U.S.C. App. § 511-512.

2. 50 U.S.C. App. § 519 defines a "legal representative" of the SM as either "[a]n attorney acting on the behalf of a servicemember" or "[a]n individual possessing a power of attorney." Under the SCRA a servicemember's legal representative can take the same actions as a servicemember.

3. The former statute referred to "dependents" and provided several protections that extended to them, but it never defined the term. 50 U.S.C. App. § 511(4) now contains a definition of the term "dependent." This includes anyone for whom the SM has provided more than half of his or her support during the 180 days before an application for relief under the SCRA. This is intended to include dependent parents and disabled adult children.

4. There are several provisions regarding the ability of a court or administrative agency to enter an order staying, or delaying, proceedings. This is one of the central points in the SSCRA and now in the SCRA – the granting of a continuance which halts legal proceedings.

5. In a case where the SM lacks notice of the proceedings, the SCRA requires a court or administrative agency to grant a stay (or continuance) of at least 90 days when the defendant is in military service and --
   a. the court or agency decides that there may be a defense to the action, and such defense cannot be presented in the defendant's absence, or
   b. with the exercise of due diligence, counsel has been unable to contact the defendant (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

6. In a situation where the military member has notice of the proceeding, a similar mandatory 90-day stay (minimum) of proceedings applies upon the request of the SM, so long as the application for a stay includes:
   a. a letter or other communication that:
      i. states the manner in which current military duty requirements materially affect the SM's ability to appear, and
      ii. gives a date when the SM will be available to appear, and
   b. a letter or other communication from the SM's commanding officer stating that:
      i. the SM's current military duty prevents appearance, and
      ii. that military leave is not authorized for the SM at the time of the letter. 50 U.S.C. App. § 522.

[Query: How does this provision affect an action for custody by the non-custodial dad when mom, who has custody, gets mobilization orders and takes off for Afghanistan, leaving the parties' child with her mother in Florida? How does this provision affect the custodial dad who suddenly stops receiving child support when his ex-wife is called up to active duty from the Guard or Reserve, leaving behind her "day job" and the monthly wage garnishment for support of their children? As of January 2004 there were about 180,000 Guard/Reserve servicemembers who had been placed on orders for active duty.]

7. An application for an additional stay may be made at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the court refuses to grant an additional stay, then the court must appoint counsel to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2)

[Query: What is the attorney supposed to do – tackle the entire representation of the SM, whom he has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm's way? And, by the way, who pays for this?]

8. An application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). Previously the recommended practice was to avoid having the military attorney or the SM request a stay out of concern that the court might consider the stay request as a general appearance. 50 U.S.C. App. § 522(c) eliminates this concern. This new provision makes it clear that a stay request "does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense."

9. 50 U.S.C. App. § 521 clarifies how to proceed in a case where the other side seeks a default judgment (that is, one in which the SM has been served but has not entered an appearance by filing an answer or otherwise) if the tribunal cannot determine if the defendant is in military service.

10. The Act clarifies the rules on the 6% interest rate cap on pre-service loans and obligations by specifying that interest in excess of 6% per year must be forgiven. The absence of such language in the SSCRA had allowed some lenders to argue that interest in excess of 6% is merely deferred. 50 U.S.C. App. § 527(a)(2). It also specifies that a SM must request this reduction in writing and include a copy of his/her military orders. 50 U.S.C. App. § 527(b)(1). Once the creditor receives notice, the creditor must grant the relief effective as of the date the servicemember is called to active duty. The creditor must forgive any interest in excess of the six percent with a resulting decrease in the amount of periodic payment that the servicemember is required to make. 50 U.S.C. App. § 527(b)(2). The creditor may challenge the rate reduction if it can show that the SM's military service has not materially affected his or her ability to pay. 50 U.S.C. App. § 527(c).

RENT, INSTALLMENT CONTRACTS, MORTGAGES, LIENS AND LEASES

11. The SSCRA provided that, absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember from a residential lease when the monthly rent is $1200 or less. 50 U.S.C. App. § 531(a) modifies the eviction protection section by barring evictions from premises occupied by SMs for which the monthly rent does not exceed $2,400 for the year 2003. The Act also provides a formula to calculate the rent ceiling for future years. Using this formula, the 2004 monthly rent ceiling is $2465.

12. A substantial change is found in 50 U.S.C. App. § 534. Previously the statute allowed a servicemember to terminate a pre-service "dwelling, professional, business, agricultural, or similar" lease executed by or for the servicemember and occupied for those purposes by the servicemember or his dependents. It did not provide help for the SM on active duty who is required to move due to military orders. Section 305 remedies these problems. Under the old SSCRA, a lease covering property used for dwelling, professional, business, agricultural or similar purposes could be terminated by a SM if two conditions were met:
    a. The lease/rental agreement was signed before the member entered active duty; and
    b. The leased premises have been occupied for the above purposes by the member or his or her dependents.

13. The Act still applies to leases entered into prior to entry on active duty. It adds a new provision, however, extending coverage to leases entered into by active duty servicemembers who subsequently receive orders for a permanent change of station (PCS) or a deployment for a period of 90 days or more.

14. It also adds a new provision allowing the termination of automobile leases (for business or personal use) by SMs and their dependents. Pre-service automobile leases may be canceled if the SM receives orders to active duty for a period of 180 days or more. Automobile leases entered into while the SM is on active duty may be terminated if he or she receives PCS orders to a location outside the continental United States or deployment orders for a period of 180 days or more.

LIFE INSURANCE

15. Article IV of the SSCRA permitted a SM to request deferments of certain commercial life insurance premiums for the period of military service and two years thereafter. If the Department of Veterans Affairs approved the request, then the US government guaranteed the payments and the policy continued in effect. The SM had two years after the period of military service to repay all premiums and interest. There was a $10,000 limit for the total amount of life insurance that this program could cover. The SCRA, 50 U.S.C. App. § 542, increases this total amount to the greater of $250,000 or the maximum limit of the Servicemembers Group Life Insurance.

TAXES

16. The SCRA adds a provision that would prevent states from increasing the tax bracket of a nonmilitary spouse who earned income in the state by adding in the service member's military income for the limited purpose of

determining the nonmilitary spouse's tax bracket. This practice has had the effect of increasing the military family's tax burden. 50 U.S.C. App. § 571(d).

FURTHER RELIEF

17. The new Act adds legal services as a professional service specifically named under the provision that provides for suspension and subsequent reinstatement of existing professional liability (malpractice) insurance coverage for designated professionals serving on active duty. The SSCRA specifically named only health care services for protection in the 1991 amendment. The insurance provider would be responsible for any claims brought as a result of actions prior to the suspension. The carrier would not charge premiums during the period of suspension, and must reinstate the policy upon the request of the professional. Legal services have been covered since 3 May 1999 by Secretary of Defense designations. The SSCRA permitted such a Secretarial designation, but 50 U.S.C. App. § 593 clarifies this area.

18. Historically, the SSCRA applied to members of the National Guard only if they were serving in a Title 10 status. Effective 6 December 2002, the SSCRA protections were extended to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the President or the Secretary of Defense. This continues in the SCRA. 50 U.S.C. App. § 511(2)(A)(ii).

The best source of information on the SSCRA, until this publication is updated to reflect the changes brought by the SCRA, is the Army JAG School's SSCRA Guide. This can be found at the School's website, www.jagcnet.army.mil/tjaglcs. Click on "TJAGLCS Publications," then scroll down to Legal Assistance, and then look for JA 260, which is the SSCRA Guide.

[rev. 1/14/04]

* * *

SILENT PARTNER IS PREPARED BY COL MARK E. SULLIVAN (USAR, RET.). FOR REVISIONS, COMMENTS OR CORRECTIONS, CONTACT HIM AT 600 WADE AVENUE, RALEIGH, N.C. 27605 [919-832-8507]; E-MAIL – Mark.Sullivan@ncfamilylaw.com.

ATCH-2

Sample motion for stay of proceedings under Servicemembers Civil Relief Act (SCRA)

[HEADING OF CASE]

MOTION FOR STAY OF PROCEEDINGS

Pursuant to the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. § 522, the defendant moves this court for [an initial 90-day stay of proceedings][a further stay of proceedings], showing that his ability to defend herein is materially affected by his military duties. In support of this motion and in compliance with the SCRA, the defendant has included --

As Encl # 1, a letter or other communication that:
states the manner in which current military duty requirements materially affect the defendant's ability to appear, and gives a date when the defendant will be available to appear; and

As Encl # 2, a letter or other communication from the defendant's commanding officer stating that:
the defendant's current military duty prevents appearance, and that military leave is not authorized for the defendant at the time of the letter.

WHEREFORE the defendant prays that this court grant him a stay of proceedings until [date] and such other relief as is just and proper.

_____ Date:
Janet A. Smith, Attorney for Defendant
123 Bartlett Street, Salisbury, NC 26799
919-555-1234

.....

[Notes: While this motion is written by the defendant's attorney, the SCRA mentions the "application of the servicemember," which means the SM or his legal representative could file the motion, application, petition or other document requesting a stay of proceedings. The "SM's legal representative" would be his lawyer (civilian or military attorney) or an individual who holds his power of attorney. It may be addressed to the court, the clerk, the presiding judge, the defendant's attorney, or the opposing counsel.

The statute appears to call for two statements, but the information required may be conveniently combined into *one* statement if that comes from the SM's commanding officer. While the examples here are two statements which give limited information, a good letter should set out the facts in detail -- not merely conclusions -- as to how the defendant's military duties adversely affect his ability to prepare and present the case, including appearances at depositions, responses to interrogatories and document requests, and appearance at trial. Although not required by the SCRA, it is a wise idea to set out how much leave the defendant has accrued, whether he has asked for leave, how much leave was requested, and whether the request has been approved or denied, including who approved or denied it, the date of such action, the limitations, if any, on an approved leave, etc. The purpose of this is to show that the defendant is exercising good faith and due diligence in his application for a stay, rather than using the stay request purely for tactical advantage.]

Encl #1

Sergeant Leopold Legume, SSN 123-45-6789
Company C, 3d Battalion, 123d Underground Balloon Regiment
V Corps, U.S. Army
APO AE 91099

[date]

TO WHOM IT MAY CONCERN:

My current military duty requirements materially affect my ability to appear in the following manner: I am currently serving as a truck driver in the above unit at Camp Bondsteel in Kosovo. My tour of duty is for 180 days, beginning February 1, 2004. I was recalled to active duty in the U.S. Army from my assignment in the Army Reserve, which is the 122d Transportation Battalion, Salisbury, North Carolina. I am in the field every day of the week, and I am unavailable to appear at my hearing on child support. I have asked for one week's leave in order to fly back to North Carolina and attend the hearing. This was denied by my commander.

I need to be personally present in court on my hearing date of May 1, 2004, to testify as to my compensation, both civilian (before the Reserve call-up) and military (a substantial reduction from my civilian pay), my reasonable living expenses (before and after the call-up) and certain bills of the plaintiff that I have taken over at her request since the last child support order herein that would constitute grounds for a variance from the Child Support Guidelines. I will be available to appear on or after September 10, 2004

[signature of defendant]

.....

Encl #2

Major Regina Richards, Commander
Company C, 3d Battalion, 123d Underground Balloon Regiment
V Corps, U.S. Army
APO AE 91099

[date]

TO WHOM IT MAY CONCERN:

1. I am the commanding officer of SGT Leopold Legume, SSN 123-45-6789.

2. His current military duty prevents his appearance in court on May 1, 2004.

3. He has requested one week's leave for this court appearance. I denied his request, and military leave is not authorized for him at this time.

[signature of commanding officer]

SCRA Flow Chart for Opposing "Additional Stay"

Is the defendant a person in the military service (or within 90 days of discharge)?

NO → Proceed under state law; SCRA does not apply in this case.

YES

Has the defendant requested an additional stay of proceedings under Section 202 of the SCRA?

NO → Proceed under state law; SCRA inapplicable.

YES

Is the request in the form of an statement showing how his/her military duties have a material effect on his/her ability to appear? And giving a date when the SM will be available to appear?

NO → Demand one. This is a requirement of the SCRA, and it is the best protection in court for the nonmilitary party as to the truth of defendant's claims.

YES

Does the request include a statement from the SM's commanding officer showing that the member's military duties prevent his appearance and that leave cannot be granted at this time?

NO → Demand this; it is also a requirement of the SCRA.

YES

Has the servicemember established nonavailability due to *military* duties (e.g., a training exercise, or deployment in a hostile zone)?

NO → Demand that defendant's request address this issue. This is required by the SCRA, and proof of inability to take leave should be required to protect the nonmilitary party.

YES

Does the request demonstrate that defendant cannot take leave (e.g., no leave remaining or the request was turned down)

NO → Demand this. Military personnel accrue 30 days of leave annually.

YES

Does this request show that defendant's presence is necessary for defense in lawsuit?

NO → Argue that the stay should be denied. The power to grant a stay is based on inability to appear in person, which implies the need either to testify or to conduct/oversee the defense.

YES

Is the defendant's presence in fact necessary in the lawsuit?

NO → See above; argue that the stay should be denied. In a child support case, argue that the member's LES* is all that is needed to determine the proper amount of support.

YES

Does the SM's statement establish a valid defense?

NO → Argue that the stay request should be denied. If there is no valid defense, then granting the stay will only prolong and delay the proceeding needlessly.

YES

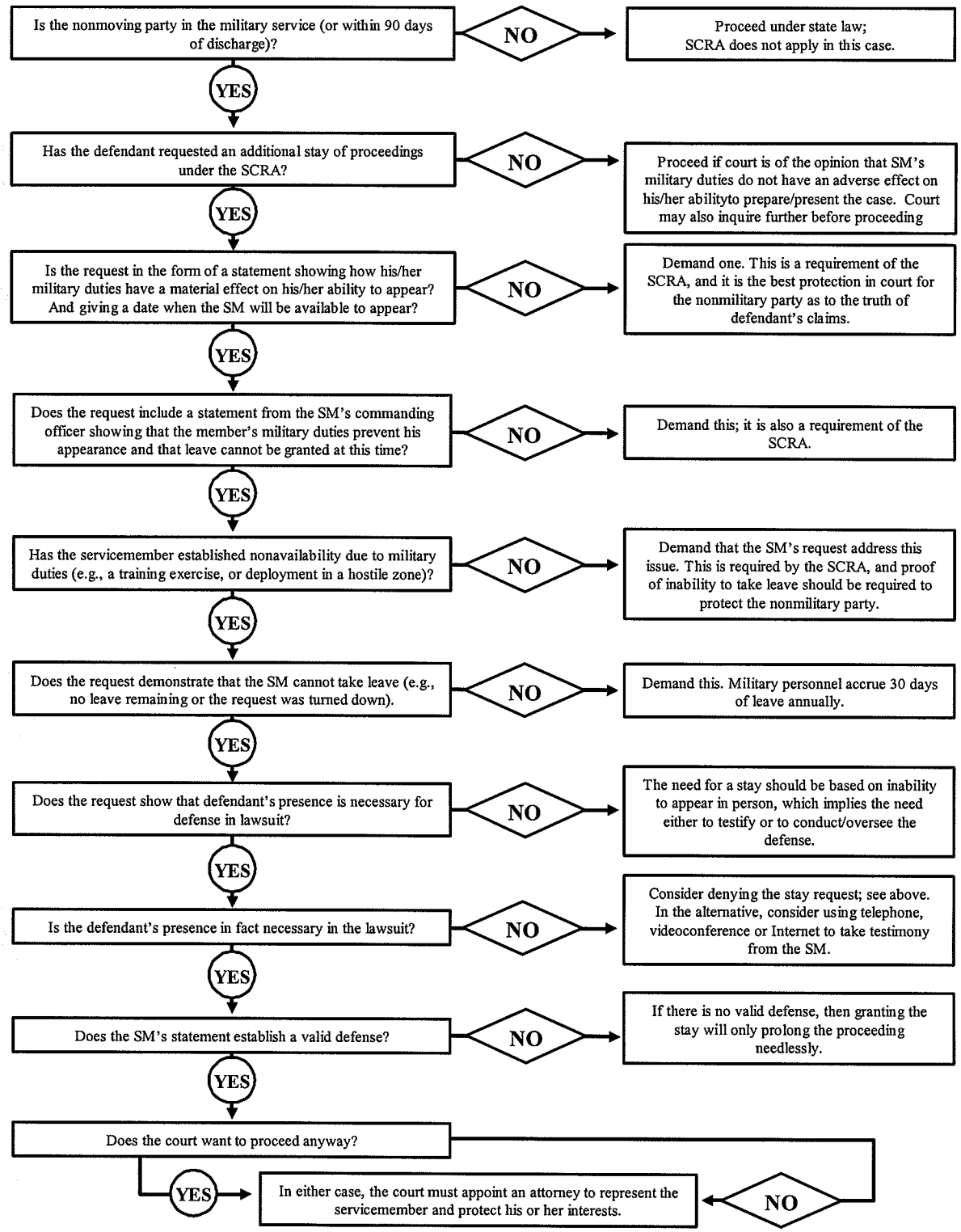
Does the court want to proceed anyway?

NO

YES → In either case, the court must appoint an attorney to represent the servicemember and protect his or her interests.

*LES=Leave and Earnings Statement

ATCH 4 - SCRA Flow Chart for "Additional Stay"



ATCH 5 – CHECKLIST

The Servicemembers Civil Relief Act: A Judge's Checklist

[NOTE: The SCRA can be found at 50 U.S.C. Appendix § 501 et seq.]

In using this checklist, keep in mind the purpose of the Act: to enable servicemembers (SMs) to devote their entire energy to the defense needs of the nation, and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service. (50 U.S.C. App. § 502)

✔ **Who is covered?** (50 U.S.C. App. § 511) Those covered include:
Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. 101(d)(1)
National Guard members called to active duty by President or Secretary of Defense for over 30 days under 32 U.S.C. 502(f) (national emergency declared by the President and supported by federal funds)
Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration

✔ **Default situation** – no appearance by SM (servicemember) (50 U.S.C. App. § 521). You must -
1. Require affidavit of military status by moving party
2. Inquire into whether missing party is in military service by requesting check of records by Dept. of Defense[1]
3. Don't enter default decree against SM – appoint an attorney to represent him/her
4. If you cannot determine whether missing party is in military, require movant to post bond to indemnify the non-movant if:
    a. there may be a defense, and presence of SM is needed to make it, OR
    b. with due diligence, appointed attorney can't contact client or otherwise determine whether defense exists

✔ **Use of bond?** (50 U.S.C. App. § 522(b)(3))
As condition of entry of default judgment, require bond if you cannot determine whether defendant is in military service.
Bond may be used to indemnify defendant against loss/damage from default judgment (if later set aside) should he/she later be found to be a SM.

✔ **Request for stay** – SM or attorney requests suspension of case (50 U.S.C. App. § 522)
Grant stay of proceedings (discretionary on court's own motion, mandatory on SM's motion) for at least 90 days if motion includes-
1. Statement as to how the SM's current military duties materially affect his ability to appear, and
2. stating a date when the SM will be available to appear, and
3. Statement from the SM's commanding officer that SM's current military duty prevents his appearance, and
4. military leave is not authorized for the SM at the time of the statement

✔ **Grant additional stay (beyond initial 90 days)?**
Yes if continuing material effect of military duty on SM's ability to appear.
Same information required as above.

✔ **Deny additional stay?**
Only if you appoint attorney to represent the SM in the action or proceeding (50 U.S.C. App. § 522(d)(2)).
Expect attorney to renew stay request since he/she cannot prepare, present case without assistance from the unavailable SM.

✔ **Unsure whether to grant or deny additional stay?**
Ask for a copy of the SM's current LES (Leave and Earnings Statement), issued twice a month, to see how much leave SM has accrued, used in the past few months.
Propound questions from the court to SM's commanding officer as to duty hours, days for the SM, his or her availability to attend court or to participate by telephone, Internet or videoteleconference

✔ **Execution of orders, judgments** (50 U.S.C. App. § 524)

---

[1] Upon application by either side or the court, the military service must issue a statement as to military service. 50 U.S.C. App. ξ 582. Contact: Defense Manpower Data Center, 1600 Wilson Blvd., Suite 400, Attn: Military Verification, Arlington, VA 22209-2593, [telephone 703-696-6762 or –5790/fax 703-696-4156]

Must stay execution of any judgment, order entered against SM if SM shows military duties materially affect his/her ability to comply with court decree

Also vacate or stay any attachment or garnishment of property, money or debts in possession of the SM or third party

✔ **Anticipatory relief** (50 U.S.C. App. § 591)

Grant relief from obligation or liability incurred by SM before his/her military service

Also for tax or assessment falling due before or during the SM's military service

✔ **Reopen judgment** (50 U.S.C. App. § 521(g))

Must reopen order, judgment against SM if –

1. SM was materially affected due to military service in asserting defense, and
2. He/she has meritorious defense

✔ **Are waivers allowed?** (50 U.S.C. App. § 517)

Only effective if made during period of military service.

Usually must be in writing.

✔ **Don't penalize SM in stay request.** (50 U.S.C. App. § 522(c))

Request for stay does not constitute appearance for jurisdictional purposes

Also doesn't constitute waiver of any defense, substantive or procedural

✔ **Statute of limitations** (50 U.S.C. App. § 526)

Period of military service may not be included in computing any limitation period for filing suit, either by or against SM.

✔ **Protect against mortgage foreclosure** (50 U.S.C. § 533)

Court may stay foreclosure proceedings until SM can answer, extend mortgage maturity date to allow reduced monthly payments, grant foreclosure subject to being reopened if challenged by SM, or extend the period of redemption by period equal to the SM's military service.

Conditions for above: if –

1. Relief is sought on security interest in real/personal property
2. Obligation originated before active duty
3. Property owned by SM or dependent before active duty
4. Property still owned by SM or dependent
5. Ability to meet financial obligation is materially affected by SM's military service
6. Action is filed during (or within 90 days after) SM's military service. (50 U.S.C. App. § 533)

✔ **Protect SM-tenant.**

If the rent is paid in advance, require landlord to refund unearned portion. The servicemember is required to pay rent only for those months before the lease is terminated. (50 U.S.C. § 535(f))

It is a misdemeanor for a landlord to seize, hold or detain the security deposit or personal property of a SM or dependent when there is a lawful lease termination under the SCRA, or to knowingly interfere with the removal of said property because of a claim for rent after the termination date. A security deposit must be refunded to the SM upon termination of the lease. 50 U.S.C. § 535(h)(1).

* * *

ATCH-6

LEGAL CONSIDERATIONS IN SCRA STAY REQUEST LITIGATION: THE TACTICAL AND THE PRACTICAL

Stays of Proceedings

Section 202 of the Servicemembers Civil Relief Act (SCRA), the successor to the Soldiers' and Sailors' Civil Relief Act (SSCRA), allows the servicemember (SM) to obtain an initial stay of at least 90 days upon production of a statement showing how the SM's current military duties materially affect his ability to appear and stating a date when the SM will be available to appear, along with a statement from the SM's commanding officer stating that the SM's current military duty prevents his appearance and that military leave is not authorized for him at the time of the statement. This Section also allows the SM to request an additional stay, based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. The same information as given above is required. 50 U.S.C. App. § 522.

After the initial mandatory stay, which must be granted upon production of the above statements, the granting of an additional stay is in the discretion of the judge. The U.S. Supreme Court has held that this provision should be "liberally construed to protect those who have been obliged to ... take up the burdens of the nation."[2]

Do the courts have to grant an additional stay? No -- it is merely the purpose of the Act to focus the court's attention on whether a military member's ability to appear is *materially effected* by military service. If the court finds no "material effect," for example, the request for stay should be denied. The court is unlikely to find material effect, for example, when the courthouse is in close proximity to the base or post and the military member has a reasonable amount of annual leave accrued that can be used in trial preparation and attendance.

A finding of "material effect" on the ability to appear is likely, on the other hand, when the member is distant from the courthouse, lacks sufficient leave that may be used for travel, preparation, and attendance in court, or is on an assignment that precludes the granting of leave to take care of one's civil legal affairs. The trial court (federal or state) *must* grant a request for a stay when it finds that the member's military service has a "material effect" on the individual's ability to appear.[3] (See flow chart on stay of proceedings.)

Here are some arguments that may succeed even if the member cannot appear:

- The member's presence at trial is not necessary. In *Keefe v. Spangenberg*[4], the court denied a stay request to delay discovery and suggested that the servicemember consider a videotape deposition under Federal Rule of Civil Procedure 30(B)(4). In *Jackson v. Jackson*,[5] the court denied an SSCRA stay because under state law the obligor's presence was not necessary in a proceeding to review the amount of support. Finally, in *In re Diaz*,[6] the court stated that "Court reporters may take depositions in Germany including videotape depositions for use in trials in this country."
- The sole issue at trial amounts to uncontested facts, and thus no stay should be granted because no actual prejudice results from the soldier's non-appearance. This

[1] *Boone v. Lightner,* 319 U.S. 561 (1943).
[2] *Boone v. Lightner, supra.*
[4] *Keefe v. Spangenberg,* 533 F. Supp. 49, 50 (W. D. Okla. 1981).
[3] *Jackson v. Jackson,* 403 N.W. 2d 248 (Minn. App. 1987).
[4] *In re Diaz,* 82 B.R. 162, 165 (U.S. Bankruptcy. Crt. 1988).

result can be obtained in uncontested divorce proceedings.[7]

- The military member is nominally involved but is not a "necessary party" to the contested litigation. In *Bubac v. Boston*,[8] the father was a military member. He was found by the court, however, not to be a necessary party to the litigation, which involved the mother's challenge to the maternal grandmother's retaining custody of the children.
- There is no "substantial prejudice," to the military member when a temporary order or an interlocutory decree is involved. In *Shelor v. Shelor*,[9] the court stated that, as a general rule, temporary modifications in child support do not materially affect the rights of a military defendant since they are interlocutory in nature and subject to future modification.

Determining 'Material Effect'

It is up to the trial judge to determine, on a case-by-case basis, what are the boundaries of "material effect." A good example can be found in *Cromer v. Cromer*.[10] In that case the defendant was serving on board a submarine that was scheduled for operations at sea during the period when his child-support case was set for trial. The Supreme Court remanded the case for consideration of the affidavit of the sailor's commanding officer in determining whether his military service and duties had a "material effect" on his ability to defend himself so as to justify a stay of proceedings under the Act.

There is no clear formulation of who has the burden of proof to show a "material effect." As stated by the U.S. Supreme Court in *Boone v. Lightner*:

> The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sense to know from what direction their information should be expected to come.[11]

Although it is logical to require the burden of proof to be on the movant (*i.e.,* the service member who is requesting a stay of proceedings), some courts have stated that *both parties* may be required to produce evidence on the issues.[12]

A stay is not forever. Contrary to the popular notion of many servicemembers and some civilian practitioners, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. Military members accrue leave at the rate of 30 days per year, and courts can take judicial notice of this fact.[13] Current overseas postings usually last around three years for an "accompanied tour" (with family members), and much less for unaccompanied tours in such host countries as Turkey, Korea and Iceland.

In fact, the stay is intended to last only as long as the material effect lasts. Once this effect is lifted, the opposing party should immediately request the lifting of the stay of proceedings. In the event

---

[7] *See, e.g., Palo v. Palo,* 299 N.W.2d 577 (S.D. 1980).
[6] *Bubac v. Boston, 600* So. 2d 951 (Miss. 1992).
[7] *Shelor v.* Shelor, 259 Ga. 462, 383 S.E. 2d 895(1989).
[8] *Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981).
[9] *Boone v. Lightner, supra.*
[10] *Gates v. Gates*, 197 Ga. 11, 25 S.E.2d 108 (1943).
[11] *Underhill v. Barnes,* 161 Ga. App. 776, 288 S.E.2d 905 (1982).

of further resistance by the military member, the court should require submissions upon affidavit for deciding the issue.

The statement of a service member -- and any other proof offered to show "material effect"--will ordinarily be scrutinized by the court to determine whether the member has exercised due diligence to secure counsel or to attend the hearing. In *Palo v. Palo*,[14] a South Dakota divorce and property division case, the parties were both in service, and both were stationed in Germany when the trial was scheduled. The wife had no leave accrued, but she borrowed money and took an advance on future leave to attend the hearing. The husband was absent at the trial and his affidavit stated that he had no money, wished to reconcile with his wife, did not have any remaining leave, and did not wish to take an advance on leave. The appellate court upheld the trial court's decision not to grant a stay to the husband because the evidence showed that the husband was unwilling, rather than unable, to attend the proceeding. The trial judge found that the husband should not be allowed to take advantage of the SSCRA's protections where the wife did not do so. The Supreme Court of South Dakota ruled that the husband failed to demonstrate due diligence in trying to attend the proceedings.

Unwritten Rules

A further rule that is applied by the courts but is not found in the Act is that the stay requested must be for a reasonable period of time. In *Plesniak v. Wiegand,*[15] the defendant requested four stays under the SSCRA between the filing of suit in 1969 and the final trial date in 1973.

When the final stay request was turned down, the court ruled that the service member had not made a reasonable effort to make himself available for trial. The court also ruled that the Act does not require indefinite continuances and that it was incomprehensible why the defendant, a commanding officer, could not take leave to attend trial.

A stay may last for such period as is just; the key is reasonableness. In *Keefe v. Spangenberg*,[16] the court granted a solder's stay request for a one-month continuance but denied his request for a stay until his expected date of discharge three years later.

If the unavailability of a servicemember is only temporary and will end at a fixed date in the near future, then the court will usually grant a stay. Such would be the case if the member were a sailor deployed for a six-month mission on a ship or if a soldier were on a field exercise for several weeks. Counsel for the member should avoid requesting stays that are unreasonably long since most courts understand the availability of leave for service personnel, even if they are stationed overseas. The courts will carefully scrutinize *extended unavailability*, particularly when it is *unexplained.* In these cases, the judge will usually demand that a member make some showing that he has attempted to delay his departure for an overseas assignment or to secure leave to return to the U.S. from an overseas duty station.

Be sure to check on whether the servicemember has requested leave to appear in court. If he hasn't, it will be impossible for him to obtain an initial 90-day stay and very difficult for him to obtain an additional stay since he won't be able to show the unwritten requirement of "due diligence." Military policy is to grant leave for the purpose of attending to important matters, which include court appearances. If leave was requested and denied, write to the commander and ask him or her when the member can be allowed to take leave.

In order to solve some of the problems associated with unavailability of military personnel, the Welfare Reform Act of 1996 requires that the military services must promulgate regulations to facilitate the granting of leave for servicemembers to appear in court and for administrative paternity and child

---

[12] *Palo v. Palo, supra.*

[13] *Plesniak v. Wiegand,* 31 I11. App.3d 923, 335 N.E.2d 131 (1975).

[14] *Keefe v. Spangenberg, supra* at note 3.

support hearings. *See* Pub. L. No. 104-193 § 363, 110 Stat. 2105 (1996) and DOD Dir. 1327.5, "Leave and Liberty," Change 4 (September 10, 1997). The Directive now states that when a servicemember requests leave to attend paternity or child support hearings, leave "shall be granted" unless the servicemember is serving in a contingency operation or unless "exigencies of service" require that leave be denied.

Counsel for the non-military party should request that the court examine whether the member has acted with "due diligence" and "in good faith." Most courts hold that a member must exercise due diligence and good faith in trying to arrange to appear in court.[17] When a servicemember demonstrates bad faith in his dealings with the court, no stay will be granted. In *Riley v. White*,[18] a soldier failed to submit to blood tests in a paternity action before going overseas and was aware of the court proceedings, had an attorney to represent him and was previously given a delay by the court to take the tests required; the court's denial of his stay request was upheld. In *Hibbard v. Hibbard*,[19] a soldier who had been in contempt for three years for refusing to comply with visitation orders was denied a stay in the ex-spouse's change of custody action. In *Judkins v. Judkins*,[20] a soldier received several continuances because of military duty during the Persian Gulf War, had an attorney, failed to comply with court discovery orders and sought additional stays or continuances after discovery order disobedience; the court denied his stay requests.

An affidavit or statement supporting the stay request should be carefully prepared by counsel with an eye toward the close scrutiny and possible skepticism of the trial court. It must also be prepared with a view toward appeal. A good affidavit will not only state that the defendant cannot be present at trial but also indicate why the defendant is unavailable, what efforts he or she has made to attend trial, and when the member will probably be able to be present.

Questions for the Servicemember

Some courts require more of such information whenever a stay application does not contain sufficient facts. One example is the set of questions used by the courts in Monterey County, California, to get information from the defendant's commander.[21] The author has added several additional inquiries, and these are formatted as interrogatories to the defendant (as opposed to questions by the court):

1. What have you done to obtain ordinary and/or emergency leave to attend any necessary hearings and/or trial in this court?
2. What results did these efforts produce?
3. How much leave did you request?
4. When did you request this leave?
5. Give the name, rank, title, address and commercial telephone number (if available) of the individual who denied your leave request.
6. Have you taken any leave in the last three months?
7. If so, how much and for what purpose?
8. How much leave do you currently have as reflected on your latest Leave and Earnings Statement (LES)?

---

[15] *See e.g.*, *Boone v. Lightner*, 320 U.S. 809, 64 S. Ct. 26, 88 L. Ed. (1943), *Plesniak v. Wiegand*, 31 Ill. App. 3d 923, 927-30, 335 N.E. 2d 131 (1975), *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E. 2d 905 (1982), *Palo v. Palo*, 299 N.W. 2d 577 (SD S. Ct. 1980), and *Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139 (1994).

[16] 563 So. 2d 1039 (AL App. 1990).

[17] 230 Neb. 364, 431 N.W. 2d 637 (1988).

[18] *Judkins v. Judkins*, *supra* at note 15.

[19] Hooper, "The Soldier's and Sailors' Civil Relief Act of 1940 as Applied in Support Litigation: A Support Attorney's Perspective," 112 MIL. L. REV. 93, 95-96 (1986).

9. Provide a copy of your last three Leave and Earnings Statements with your responses to these questions.
10. What have you done to obtain a transfer to a military installation near this court on either a temporary or permanent basis?
11. What results did these efforts produce?
12. When were you assigned to the present duty station?
13. When are you due to be transferred on normal rotation or reassignment?
14. To what station will you probably be transferred?
15. (If the SM is an enlisted person) What is the date of your present enlistment contract?
16. When does the enlistment expire?
17. Do you intent to re-enlist?
18. Does your service record contain a bar to re-enlistment?
19. Is there any likelihood that you will obtain an early release from active duty and, if so, when is this expected to occur?
20. State any and all reasons why you cannot respond to written interrogatories in this case.
21. State any and all reasons why you cannot respond to written document requests in this case, so long as the documents request are readily available to you.
22. State any and all reasons why you cannot respond to written requests for admissions in this case.
23. Give the location (and distance) of the nearest legal assistance office (JAG office or staff judge advocate office) to you.
24. State your duty hours during the week.
25. State your duty hours on weekends.
26. State what means of communication are available between you and this court, specifically including telephone, e-mail, regular mail and videoteleconference (both individually and through you JAG office).

Default Judgments

Members are further protected from default judgments under the SCRA. The purpose of this is to protect those in the military from having default judgements entered against them without their knowledge and without a chance to defend themselves.[22] The SCRA allows a member who has not received notice of the proceeding to seek the reopening of a default judgment. The requirements are as follows:

- The member must apply to the trial court that rendered the original judgment of order.[23]
- The default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter.
- The member must apply for reopening the judgment while on active duty or within 90 days thereafter.
- The member must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service.[24]
- The member must show that there is a meritorious or legal defense to the initial claim.

---

[20] *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).
[21] *Davidson v. GFC*, 295 F. Supp. 878 (N.D. Ga. 1968).
[22] *Bell v. Niven*, 225 N.C. 395, 35 S.E.2d 182 (1945).

An important requirement of the reopening of a judgment is that the moving party have a meritorious or legal defense. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of effort and resources in opening default judgments in cases where servicemembers have no defense to assert. As part of a well-drafted motion or petition to reopen a default judgment or order, the SM should clearly delineate his claim or defense so that the court will have sufficient facts upon which to base a ruling.

The North Carolina Courts of Appeals most recently dealt with the "meritorious defense" issue in *Smith v. Davis*.[25] In that case, plaintiff served defendant with a complaint that charged him with nonsupport and requested an order of child support. In response, the member sent a letter to plaintiff's attorney asking that the attorney recognize his rights under the SSCRA. Defendant failed to appear at the hearing and the court, without appointing an attorney to represent the defendant, entered an order that defendant pay child support to plaintiff on behalf of the minor child.

Defendant then filed a motion to set aside the decree under several provisions of the SSCRA. The affidavit attached to the motion alleged that defendant was on active duty in the Marine Corps in California, that his military obligations prevented his attendance at the hearing, and that he was having "pay problems"-- he had not been paid in four months. On appeal, the order was set aside because "[d]efendant has alleged facts which at the time of the child support hearing were sufficient to constitute a legal defense to plaintiff's petition."[26]

How do you take a default judgment in a military case if you want to safeguard it against reopening? There must be an affidavit or other verified pleading which supports the default judgment. It must be prepared and filed by the plaintiff (or the moving party) and it must state sufficient facts to give the court a reasonable basis to determine whether the defendant/respondent is in the military.[27] The effect of failure to file such an affidavit is that no entry of judgment is allowed until a judge determines that the defendant is not in the military and has not requested a stay.

The court is not required to set aside a default judgment if there was no prejudice by reason of service in the armed forces. A New York court, for example, refused to set aside a default separation decree against a servicemember when he was fully advised of the tendency of the action, was always accessible to the court, and refused to accept notice by certified mail of the time and place of his trial. The court in this instance held that he was not prejudiced due to his military service in defending the action.[28] In a California case, the court ruled that if a member against whom a default judgment was entered had no desire to assert a defense and had so demonstrated by his prior conduct, then his military service didn't prejudice him.[29]

Meritorious Defense

When representing a servicemember, it is important to state early and clearly the meritorious defense that is involved. In cases where a servicemember has been sued, this is usually done in a pleading under Rule 8 of the Federal Rules of Civil Procedure (or the local jurisdiction's equivalent), giving adequate notice to the plaintiff of any defenses upon which defendant will rely.

One particular area where valid defenses will usually be difficult to assert is in cases involving the initial determination of child support. A copy of the military pay tables is available from most recruiters and also from the website of the Defense Finance and Accounting Service, www.dfas.mil. The

---

[23] *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).
[24] *Id,*. 364 S.E.2d at 159.
[25] *Millrock Plaza Associates v. Lively*, 153 Misc. 2d 254, 580 N.Y. S. 2d 815 (1990).
[26] *Burgess v. Burgess*, 234 N.Y.S. 2d 87 (N.Y. Sup., October 17, 1962).
[27] *Wilterdink v. Wilterdink*, 81 Cal. App. 2d 526, 184 P.2d 527 (1947).

laws of all states and territories require "expedited process" in child support determinations.[30] Ordinarily a preliminary determination of child support must be made within 60 days of filing suit. The child support guidelines usually prescribe a formula for child support based on the incomes of one or both parents.

Even if the military member does not show up in court for the hearing due to military duties elsewhere, the trial judge can easily determine his or her income for input into the child support guidelines. Most judges add the servicemember's taxable gross base pay to the nontaxable basic allowance for housing (BAH) and the nontaxable basic allowance for subsistence (BAS) in order to arrive at the member's gross pay. With airborne troops, an additional component termed "jump pay" is added; for aviators, this is called 'flight pay.'

Base pay, BAS and BAH can all be found on the published military pay tables. A recent leave-and-earnings statement of the member will contain an accurate picture of the total entitlements, statutory deductions, voluntary deductions and year-to-date totals. In addition, it will contain a category describing total leave accrued and leave time remaining, which are invaluable pieces of information for the trial court. These pay statements are easily available to every servicemember.

With all these tools available for an expedited and straightforward determination of child support (at least on a temporary basis), it is hard to see how the trial court would grant an additional stay at this stage of the proceedings absent a very good showing by military members of their "valid defense" requiring personal attendance at court for preparation and trial of the matter.

On the other hand, some valid defenses do exist in enforcement proceedings, as shown in *Smith v. Davis*. As a general rule, "[a]bsence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial."[31] In *Smith v. Davis*, the Court of Appeals held that it was reversible error to proceed with the trial without the defendant, and that his military service did prejudice his ability to defend the child-support action.[32]

A servicemember's defense could be based, for example, on any one of the following:

- Death or emancipation of the child;
- Transfer of physical of legal custody of the child;
- Prior payment of child support (but failure of the court, agency or custodial parent to credit same); or
- Military financial error (resulting in no paycheck or substantially reduced pay).

A personal appearance for testimony would probably be essential for each of these issues. In any of the above enforcement-defense cases, a clear statement of the defense which is sufficient to give notice of same to the other side, made under oath, should be sufficient to persuade the trial court to grant a stay for a reasonable period of time.

Three additional protections may help the servicemember. The Act requires the filing of an affidavit whenever judgment is taken by default. 50 U.S.C. App. § 521(b)(1). It contains provisions for the appointment of an attorney for the absent servicemember. 50 U.S.C. App. § 521(b)(2). It also provides for the posting of a bond, in the discretion of the court, by the party requesting a default judgment. 50 U.S.C. App. § 521(b)(3).

---

[28] N.C. Gen. Stat. § 50-32.

[29] *Boone v. Lightner,* 319 U.S. at 575; *see also Chenausky v. Chenausky,*128 N.H. 116, 509 A.2d 156 (1986).

[30] *Smith v. Davis, supra* at note 23.

American Bar Association
Section of Family Law

Wednesday, May 3, 2006

A Short Course in Military Family Law Issues

Family Care Plans, Deployment Related Issues

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

A Primer for the Practitioner

All fifty states had by 1981 enacted their individual versions of the Uniform Child Custody and Jurisdiction Act (UCCJA). The UCCJA was the first comprehensive attempt at setting forth "rules of engagement" to resolve jurisdictional disputes in child custody matters and discourage the wrongful removal and retention of children for the purpose of obtaining a juridical advantage.

Nevertheless, despite the enactment of uniform law, significant difficulties in actual practice continued. In the effort to minimize conflicts in the exercise of subject matter jurisdiction, particularly for the purposes of making an initial child custody determination, the Parental Kidnapping Prevention Act (PKPA) 28 USC 1738A had been enacted in 1980 providing a federal preemptive component to interstate child custody practice. The PKPA established a "home state" jurisdictional priority in the exercise of subject matter jurisdiction when making an initial child custody determination and reiterated that child custody determinations made in conformance with the Act were entitled to full faith and credit throughout the United States. Later, the Hague Convention on the Civil Aspects of International Child Abduction was ratified by the United States in 1986 incorporating into federal legislation as the International Child Abduction Remedies Act (ICARA) (12 USC 11601 et. seq.) in 1988, a civil mechanism for the return of children removed or retained abroad. A complex matrix was created into which family law practitioners were unwittingly thrust in the increasingly common fact pattern of interstate and international child custody disputes.

In 1996 the Violence Against Women Act (VAWA) added an additional dimension in directing sister states and Native American tribal entities to enforce the protective orders of other states, many of which contained provisions which would qualify as child custody determinations.[1]

The preliminary comments which accompanied the draft of the revision of the Uniform Child Custody Jurisdiction Act sets forth a succinct review of the weaknesses of the prior Act. The inconsistencies between each State's versions of the UCCJA, often in conflict with the Parental Kidnapping Prevention Act, coupled with the cumulative effect of thirty years of adversarial litigation had produced a body of law which defied the ability of any practitioner to reasonably anticipate what could be expected to happen in the case of a jurisdictional contest. The National Conference of Commissioners on Uniform State Laws went so far as to say, "...the goals of the UCCJA were rendered unattainable in many cases." Additionally, the Uniform Interstate Family Support Act promulgated in 1992, which provided uniform rules for the enforcement of family support orders, provided the final motivation which inspired a drafting committee to address a revision of the UCCJA. The Act's text was finally completed by the Uniform Law Commissioners in 1997 and has now been adopted in 34 states[2] with additional

[1] In 2001 the National Conference of Commissions of Uniform State Laws promulgated the Uniform Interstate Enforcement of Domestic Violence Protections Order Act (UIEDVPOA). The UIEDVPOA is a full faith and credit statute that empowers states to register and enforce out-of-state domestic violence orders. The statute is enacted in Alabama, California, Delaware, District of Columbia, Idaho, Indiana, Montana, South Dakota, Nebraska, North Dakota, Texas, and has been introduced in Mississippi and Oklahoma.

[2] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois ,Iowa, Kansas, Maine, Michigan, Minnesota, Montana ,Nebraska, Nevada, New Mexico, New York,, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia.

states considering pending legislation.[3] An updated review of the status of the Uniform Child Custody Jurisdiction and Enforcement Act and other Uniform Acts addressing family law can be found on the web site of the National Conference of Commissioners on Uniform State Laws, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp.

The focus of this primer will be to briefly identify the major differences between the UCCJEA and its predecessor UCCJA. It will address what new tools are available to practitioners in the prosecution and resolution of interstate and international child custody disputes while identifying potential pitfalls associated with interstate and international child custody litigation, particularly in the context of the military family.

Part I: What's new about the UCCJEA?

A. Types of Proceedings

First, the UCCJEA expands the definition of which types of proceedings are to be subjected to the prerequisites of the new Act.

Unlike the UCCJA, the UCCJEA does not, as a general proposition, apply to adoption cases. [§102(4)] Definitions)[4].

Alternatively tribal court proceedings, which had been left in an ambiguous position because of the absence of language referring to them in both the UCCJA and the PKPA have now been addressed by provisions which a state may enact if relevant. Those provisions indicate that state courts will be required to treat tribes as if they were states and tribal court custody proceedings as if they were sister state court proceedings and to

[3] 2004 introduction: , Indiana, Kentucky, Maryland, Pennsylvania, South Carolina, Massachusetts, Mississippi, Wyoming .

[4] For the purposes of this article I will refer to the Uniform Act designations and citations understanding that each state's individual citations will be unique.

enforce tribal court custody orders. §104(b) and (c) See In re Marriage of Susan C. and Ian E., 114 Wn. App. 766; 60 P3d 644; 2002 Wash. App. Lexis 3184, Court of Appeals of Washington, decided December 31, 2002.

An area of surprising increase in litigation is the area of dependency and neglect proceedings which are now specifically included in the UCCJEA. While child custody practitioners in matrimonial cases may have a tendency to gloss over dependency proceedings as unrelated to the typical divorce case, there is an increasing number of cases in which, because of allegations of domestic violence or of sexual assault, dependency and neglect proceedings may be initiated during a matrimonial proceeding. Also, in the context of unmarried parents, some states provide separate "dependency-like" summary proceedings often referred to as "non-dissolution" proceedings.

When dependency and neglect are included, and third-party custodians are contemplated, the interrelationship between the UCCJEA and the Interstate Compact on the Placement of Children (ICPC) may be relevant. The ICPC addresses the rules regarding the out-of-state placement by a state agency of a child, either by agreement or at the direction of the court.[5] This creates potential conflict of applicable law regarding the substantive and jurisdictional prerequisites of each Act, which may be very different. See S.B. v. State of Alaska, Department of Health and Social Services, Division of Family and Youth Services, 61 P.3d 6; 2002 Alas. Lexis 171, Supreme Court of Alaska, decided December 27, 2002.

B. International Application

[5] Often when state welfare benefits are sought, the state agency must open a file – thus the ICPC may be implicated if, in addition to transferring custody, benefits are also transferred.

One of the most significant changes in the text of the UCCJEA is the complete revision of the UCCJA §23 which sets forth for state courts the treatment to be given to international jurisdictions for the purposes of the application of the act. The UCCJEA addresses the international context both in the exercise of jurisdiction for the purposes of an initial child custody determination, and the recognition and enforcement of custody determinations made by foreign courts. §105(b)(c). *Medill v. Medill*, 179 Ore. App. 630; 40 P.3d 1087; 2002 Ore. App. LEXIS 301.

C. Jurisdictional Prerequisites Tightened

The organization of the Act as a whole provides guidance for both initial child custody determinations and modification proceedings. However, the new UCCJEA makes very clear the revised jurisdictional rules, particularly prohibitions against the exercise of jurisdiction if a sister court has "continuing exclusive jurisdiction".

1. Home State Priority In Initial Child Custody Determinations

The UCCJEA tightens and enhances the jurisdictional analysis for both initial child custody determinations and modification issues. Clearly, the most important change made by the UCCJEA is establishing once and for all the priority given to "home state" jurisdiction in an initial child custody determination so that both the UCCJEA and the PKPA are in conformity.

Under the UCCJEA, a state can exercise "significant connection jurisdiction" in an initial determination only if the "home state" either declines jurisdiction in its favor or makes the determination of inconvenient forum or parental misconduct.

2. Emergency jurisdiction removed as a basis in initial determination cases.

Under the new Act, in an effort to enhance the application of the jurisdictional factors with some conformity, the independent basis of "emergency jurisdiction" is removed as a possible jurisdictional option in initial child custody determinations. This speaks to the substantive distinction which the drafters wished to impress in the minds of practitioners and judges, that addressing emergencies that impact on child custody is significantly different from engaging in a substantive analysis of who is the better permanent custodian and where the evidence and witnesses to make that determination are likely to be located. Therefore, a new separate section of the Act, covering all types of emergencies and resolving them has been added to the UCCJEA. (§204).

3. Declining jurisdiction.

The UCCJEA provides for the declination of one state in favor of another on inconvenient forum or misconduct grounds, and identifies a third basis of "more appropriate forum". Additionally, the UCCJEA makes it clear that if no other state would have jurisdiction under the preceding sections, a court may fill this vacuum and issue an initial child custody order. However, interestingly enough, the previous UCCJA language referring to the child's "best interest" has been deleted. It is clear that in determining jurisdiction the court should not be determining the merits of the case. See *Don Van Wetchel, Appellee, And Concerning Leslie Mueller, Appellant* 2003 Iowa App. Lexis 54 Court of Appeals of Iowa, No. 2-784 decided January 15, 2003.

4. Modification and Continuing Exclusive Jurisdiction.

Regarding modification jurisdiction, the most significant contribution of the UCCJEA is the strengthening of the concept of "continuing exclusive jurisdiction". The UCCJEA rejects the earlier interpretation of some State Courts which endorsed the

possibility of concurrent modification jurisdiction (i.e. that more than one state can exercise modification jurisdiction over one child at a time). Succinctly put, exclusive jurisdiction continues in a court that has made a qualifying child custody determination until neither the child, nor either of the parties, remains in the state. Or, neither the child, parent and child, nor the child and a person acting as a parent, maintain "significant connection" with the state and, as a result, substantial evidence regarding the child is no longer available in the initiating state. While this was a result the PKPA tried to accomplish, the UCCJEA's language is, in a subtle way, different than that PKPA. The mere presence of one of the contestants does not require the continuing exercise of exclusive jurisdiction if that presence does not also carry with it some involvement or contact with the subject child. Nevertheless, only the state that entered the original child custody determination can decide if it should continue to exercise exclusive jurisdiction. A sister state cannot decide, for example, based on the child's permanent relocation or allegations that the relationship between the resident parent and the child have broken down, that the decree state is now deprived of continuing exclusive jurisdiction. The furthest the new state can go is to make a factual determination that all parties have left the original decree state, and request the sister state to decline in favor of its exercise jurisdiction. *Escobar v. Reisinger*, No. 22,869, 2003 NMCA 47; 2003 N.M. App. Lexis 6; Court of Appeals of New Mexico, decided January 3, 2003.

D. Judicial communication.

Another of the substantive changes in the UCCJEA that directly affects practitioners and judges are the provisions for judicial communication and cooperation, many of which are mandatory. The general overview of the Act specifies that a court

should communicate with the court of another involved state about any proceeding arising under the Act. That authority to communicate includes communications with foreign courts and tribal courts. However, it is important to note that some proceedings: §204 (Temporary Emergency Jurisdiction), §206 (Simultaneous Proceedings) and §307 (Expedited Enforcement) require communication. However, the means or the process for arranging it are unspecified. Although subsection 110(b) provides that courts should allow parties to participate in judicial communication, it does not mandate their participation. The act makes it clear that if the parties are not provided the opportunity at some point to participate in the communication, they must have an opportunity to present facts and legal arguments before a judicial determination on jurisdiction or forum is made. Under the precise terms of the Act oral argument is not required, although, substantive state law may provide independent authority for the right to oral argument in such a circumstance. The court is required to make a record although the type of record is unspecified of the judicial communications and to inform the parties of those communications.

E. Enforcement.

The UCCJEA, as an enforcement tool, mandates the recognition and enforcement of child custody determinations wherever they are made, when they are made in "substantial conformity" with the Act or made under factual circumstances which meet the jurisdictional standards of the UCCJEA. The primary way in which the UCCJEA changes the law of enforcement is in the provision of practical procedures available to enforce custody and visitation on an interstate and international basis. The UCCJEA creates a uniform registration process, provides for the interstate enforcement of visitation rights, provides for expedited enforcement of custody determinations (*turbo habeas*), provides for a warrant to take physical custody of a child and, if necessary, the public enforcement by law enforcement and prosecutorial staff, particularly in circumstances of recovery of an abducted child or international child custody disputes.

Part II: What are the New Tools?

While the substantive provisions and purpose of the UCCJEA in streamlining interstate and international child custody jurisdictional practice is laudatory, the practical effect on family litigation is dependent on procedures that provide individual litigants identifiable results. As such, it is in the details or "tools" that the UCCJEA provides most of the changes in practice and opportunities for family litigators.

A. Continuing Exclusive Jurisdiction:

UCCJEA §201(b) makes it clear that §201(a), (that is, the four-pronged outline of jurisdictional prerequisites), is the exclusive jurisdictional basis for making an initial

child custody determination.[6] Personal jurisdiction over a party or a child is neither necessary nor sufficient to make a child custody determination. You must have subject matter jurisdiction , and that is determined exclusively by complying with the Act. Under the new Act, a child need not be physically present in the state for the state to exercise subject matter jurisdiction, nor does a child's absence from the state defeat extended jurisdiction if a parent, or a person acting as a parent, continues to live in the state. *State of Utah in the interstate of W.A., a child under eighteen years of age, D.A., v. State of Utah, 2002 UT 127; 63 P.3d 607 463 Utah adv. Rep. 13; 2002 Utah Lexis 214 decided December 20, 2002.*

Continuing exclusive jurisdiction carries with it the greatest promise toward continuity and enforcement of child custody decrees. In the context of modification nothing can be more important, particularly given the forced relocation of military families. The "home state" of children may shift away from non-custodial parents. This is particularly frustrating when the designation of custody was a result of a negotiated agreement conferring primary residential custody merely to facilitate school enrollment or other practical considerations. The non-custodial parent may have negotiated for equal parental access time and believe that his or her involvement in the life of their child

---

[6] 201(a) Except as otherwise provided in Section 204, a court of this State has jurisdiction to make an initial child-custody determination only if: (1) this State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State; (2) a court of another State does not have jurisdiction under paragraph (1), or a court of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under Section 207 or 208, and: (A) the child and the child's parents, or the child and at least one parent or a person acting as a parent have a significant connection with this State other than mere physical presence; and (B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships; (3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under Section 207 or 208; or (4) no State would have jurisdiction under paragraph (1), (2), or (3).

would be intense and daily. Then the "custodial parent" is transferred or deployed or remarried. Very often, these cases result in protracted and difficult litigation filed by the physical custodian requesting permission to remove in which a tortured decision may be reached.[7] The court may only permit the move conditioned on precise arrangements for enforceable parental access along with the allocation of access expenses and the provision of telephone or computer contacts for the non-custodial parent.

Without the concept and provision for continuing exclusive jurisdiction as set forth by the Act, there is no way to insure that the physical move of the children does not mean that enforcement of such provisions reached by either judicial determination or agreement are illusory. By making it clear that only the decree state may determine whether it continues its superior and significant connection to this family or has lost continuing exclusive jurisdiction, it insures that at the least, the court that made the decision to let the custodial parent move (provided the non-custodial parent remains in the jurisdiction) is the one that will make a determination as to whether or not the custodial parent should be permitted to modify those conditions before a new tribunal.

This is one of the primary reasons why, in a military divorce, where the movement of one or both parents is <u>likely</u>, that the agreement be drafted in a way that denominates the process which will be employed to address the necessary changes to shared parenting agreements.

For the attorney who is representing the parent who has moved, and who is arguing that the circumstances have changed as to require a review of those access or custody components in the new state, the way the question is framed will have a

[7] Indeed, some states require the permission of the non-custodial parent or an order of the court prior to the permanent removal of the child from the state. Violation of same would result in criminal penalties.

significant impact on the choice of forum. The act would require the original decree court to make the decision to decline jurisdiction in favor of the children's new "home state" based on the inconvenience of the forum.

As a family litigator, the "trick" in moving the action to the new state will be the relationship between the evidence and the forum.

If, for example, the custodial parent who has moved alleges that it is the behavior of the parent still in the decree state and the conditions or circumstances of home life of the children while visiting that parent which require modification, it is clear that the substantial evidence and witnesses would necessarily be where that non-custodial parent resides. Thus, the argument will defeat the application to remove the forum.

In the alternative if the modification is being sought based upon changes in the needs of the children, their psychological or emotional health or other dynamics located in the new home state which make the prior parental access schedule either unworkable or untenable, then arguably, the evidence with respect to the children, the custodial parent, their peer groups or other personal issues involving their emotional support are more likely to be located in the new home state. Thus, the forum change makes sense.

As you are drafting and framing the modification issues, those considerations should be foremost in your mind.

B. <u>Emergencies/Temporary Orders:</u>

Tools that are the most helpful are those which deal with the concept of "emergency". Under the UCCJEA the term "emergency" has been defined to limit rather than expand the exercise of jurisdiction. When a child is abandoned; when a child is in need of protection because that child is threatened with mistreatment or abuse, such can

be considered an "emergency". New to the UCCJEA is the acknowledgment that if such emergency affects a sibling, the emergency can be considered applicable to the subject child as well. This is particularly helpful in circumstances in which siblings may have different parents or permanently reside with different parents. Neglect is no longer included in the definition of "emergency" under UCCJEA.

While a court can exercise "emergency jurisdiction", even when there is a simultaneous proceeding in another state, conditions for such an exercise are extremely limited. First, judicial communication is mandatory, and a precise time period for the duration of the temporary order must be determined and set forth when the order is entered.

Second, §205 makes it clear that even in the event of an articulated emergency, notice and opportunity to be heard must be given to the respondent before any order capable of being considered a child custody determination and qualifying for interstate recognition, can be made. In order for an emergency custody determination to be enforceable on an interstate basis, it must be made in compliance with the notice provisions of these acts.

Please do not confuse the concept of notice and service. Notice (that is, actual notice) as well as subsequent opportunity to be heard, are the minimum prerequisites in an order for a child custody determination to be enforceable.

It is important when drafting pleadings that contain prayers for relief that go beyond child custody and perhaps to issue of emergent child support, relief from domestic violence or complaints for divorce, that one keeps in mind that the notice requirements and the service requirements of each separate action will be very different.

An international matter may require strict compliance with international treaties if a money judgment or maintenance obligation will be sought. Your entire process will be meaningless to obtain remedy if such treaties are ignored. If your primary concern is to obtain custody, stick to it. A separate application in order to protect the custodial interest is by far the cleanest way to address multiple service and notice requirements.

In the event that a temporary emergency order is the first proceeding which has been filed by a litigant, and no other proceeding has been commenced in any other court asking for a child custody determination, the UCCJEA provides that the temporary emergency order can be converted into a final "determination" if the state that entered it becomes the child's home state and remains so for six (6) months. This would include, by way of example, domestic violence restraining orders which include child custody components.

It is important to recall that for that temporary order to be considered "final", it must have been entered with notice and opportunity to be heard. (Although the UCCJEA §108 makes it clear that notice by publication is permissible if other means are not effective in producing actual notice.)

C. Declining Jurisdiction:

There are two reasons why a court can decline jurisdiction. The first is because it determines that the forum is no longer convenient; the other is based upon the unjustifiable conduct of the party seeking the exercise of jurisdiction.

1. Inconvenient Forum.

The new provisions of the UCCJEA provide that the court may sua sponte address the issue of inconvenient forum. Inconvenient forum can be addressed upon motion of

either party or can be addressed on the formal request of a sister state court. The UCCJEA also permits the parties to submit information in support of an inconvenient forum motion and once done, requires the court to consider all of the relevant statutory factors as well as additional relevant factors, including the newly added consideration of domestic violence. See case materials *Stoneman v. Drollinger, 2003 MT 25; Mont. 139 Lexis 28, decided February 18, 2003, Supreme Court of Montana.*

Section 207(b) provides that the court is to determine, in reviewing an inconvenient forum application, whether domestic violence has already occurred or would be likely to occur in the future and, in that event, which state could "best protect" the parties and the child.

With this provision, it is clear that in the case of a domestic violence complaint, if those allegations are contested, it is critical to address the issues immediately. To contest the treatment of the domestic violence petition as an initial child custody determination, you must seek a dismissal of the custodial components of any domestic violence temporary restraining order unless the issue of forum is to be conceded.

If a court declines to exercise jurisdiction on inconvenient forum grounds the UCCJEA makes it clear that it must retain jurisdiction to transfer the case. The order is not a dismissal or declaration that the State lacks subject matter jurisdiction. It is a stay of its exercise of jurisdiction which is conditioned on a proceeding being commenced promptly in the other, more convenient state (or alternate appropriate forum, for example, in another foreign jurisdiction). Therefore, if you are addressing an international matter, it is important, to set forth precisely what will be jurisdictionally required in bringing the foreign action, including what actions each party must take, and accurately identifying

the time frame in which the application will be brought, as well as how long the prosecution of the child custody determination will take. If for example you were defending a forum application and you wanted to maintain a child custody action in what is arguably an "inconvenient forum", you might want to demonstrate that the process to accomplish a child custody determination in the alternate forum, would involve serious deficiencies in time, cost or process.

The UCCJEA removed the provisions associated with the automatic award of attorneys' fees and expenses for a filing made in a clearly inconvenient forum. The only language associated with attorneys' fees and expenses are now included under the Act's "unjustifiable conduct" provisions.

2. Unjustifiable Conduct.

The UCCJEA takes away the prior UCCJA language of 'unclean hands" in favor of describing the court's discretion, "because a person seeking to invoke [jurisdiction] has engaged in unjustifiable conduct". (§208). The court does not define "unjustifiable conduct" and further sets forth three exceptions from consideration of such conduct. (1) Where there has been acquiescence; (2) where there has been deference to the court on inconvenient forum grounds or (3) where no other court would have jurisdiction. In those three circumstances, even after finding the jurisdictions proponent to have engaged in "unjustifiable" parental conduct, the court should maintain the exercise of jurisdiction. However, in the event that unjustifiable conduct can be demonstrated, the court is "required" to assess necessary and reasonable expenses against the party who sought to evoke the jurisdiction. See *Seamans v. Seamans*, 73 Ark. App. 27; 37 S.W. 3d 693; Court of Appeals, Arkansas 2001.

If the court is determined to decline jurisdiction by reason of unjustifiable conduct, and award necessary expenses and counsel fees, it is important that it either retain jurisdiction for the purposes of transferring the case and enforcing those expenses or, in the alternative, that the court conditions the transfer of jurisdiction on the payment of such expenses or the acceptance, recognition and enforcement of the attorneys' fees and reasonable expenses portion of the order by the court to which the matter is sent.

D. Interjurisdictional Discovery Tools:

The UCCJEA consolidates and simplifies under terms loosely described as "interstate judicial cooperation" provisions for interstate discovery.

The UCCJEA permits the taking of testimony in a sister state when either a party, the child or the witnesses are located there. Section 111 permits taking of such testimony, but it should be noted that it does not distinguish between the taking of testimony for the purposes of discovery and the purposes of preserving testimony for trial. Therefore, if it is your intention to depose an out-of-state witness or party, and to use that deposition for discovery purposes, you must make it clear on the record that this is a discovery deposition since the adversary could move, under §111, to have the testimony submitted as evidence for the purposes of the Act.

The court can permit an individual to be deposed, or to testify by telephone, audio/visual means or electronic means before either an alternative court that it designates or at another location. This is strengthened by §112 which authorizes courts to seek assistance from, or give assistance to, a court of another state. Therefore, in a circumstance, for example, where a Notice for Deposition, or subpoena were issued to an out-of-state witness and subsequently ignored, judicial assistance could be sought by way

of application or sua sponte by the court. The trial court would request the court in the deponent's jurisdiction to issue an administrative subpoena under its signator, in order to produce the individual in their court, either to conduct an evidentiary proceeding in that jurisdiction or, in the alternative, to produce the party for the purposes of telephonic testimony to be offered to the court. This provision covers the production of evidence, custody evaluations or the collection of records by subpoena duces tecum.

E. Registration and Enforcement of Orders:

The tools for enforcing custody orders interstate have been vastly improved. The first is the formal registration process in which presumptions of a procedure which preserves enforceability of orders, which have been rendered by sister states, is set forth simply enough to be done without the assistance of counsel.

1. Registration of Child Custody Determination – Sister State.

The request for registration is sent to the court with certified copies of the custody order and any information required by the individual state process. The order is filed as a foreign judgment and notice is then served on any parent or person acting as parent, who has been awarded custody or rights of access. Those parties have twenty (20) days from the service of such an application to lodge a request for a hearing to contest the registration. If no request is made, the order is confirmed as a matter of law.

Even if a hearing is requested, there are only three defenses available: (1) the lack of jurisdiction on the part of the issuing court; (2) the lack of notice and opportunity to be heard in the child custody proceeding that resulted in the order or (3) the child custody determination for which recognition is sought has been vacated, stayed or subsequently modified.

Once the registration proceeding is confirmed, either by operation of law or by hearing, further contest is precluded. If there is an enforcement hearing subsequent to it, the only defense available is that the registered order has since been vacated, stayed or modified since the registration process. §205(f), §308(d) *See Harris v. Harris, 2003 Tex. App. Lexis 1913, Court of Appeals of Texas, Third District Austin denied March 6, 2003.*

2. Registration of International Child Custody Determination.

The process is precisely the same in circumstances in which there is an international child custody determination, although §105(c) of the Uniform Act requires an additional level of inquiry. A state court in the United States need not enforce a custody determination from another country if it can be demonstrated by the party opposing the registration of the order that the child custody law of that country violates fundamental principles of human rights.

3. Access Rights.

The Act provides enhanced protections for the exercise of rights of access. §304(a)(1). This allows a court to issue a temporary order enforcing a visitation schedule by the court of another state. It should be noted, that in enforcing rights of access, any permanent changes made in such an order can only be made by the court which has competent jurisdiction to do so. The enforcing state can issue temporary orders to affect the exercise of access as contemplated by the original decree. Section 304(b) embodies the remedy of providing for specific terms in enforcing a visitation order, which contemplates, for example, temporarily changing the schedule to ensure that the spirit of the order is fulfilled.

4. "Turbo Habeas".

"Turbo habeas", a colloquial term coined by the Honorable David Peeples, refers to a speedy enforcement mechanism for the prompt recovery of children wrongfully removed or retained outside of the decree state. The new procedure provides for an enforcement hearing, normally the next judicial day after service, which will result in an order authorizing the petitioner to take the immediate physical custody of the child, unless the respondent establishes one of a very few defenses available in the statute.

If there is not a previously registered order (something that should be done in every interstate or international access case), the only defenses available are (1) that the issuing court did not have jurisdiction as defined under the UCCJEA to make the order; (2) no notice was provided in accordance with the standards of the UCCJEA or (3) that the custody order advanced has been vacated, stayed or subsequently modified.

If it is an order that has already been registered, only number (3) above is available. The judge hearing the expedited process application has the mandatory duty of communicating immediately with the court that entered the original order. The UCCJEA also provides for a warrant to take physical custody of the child in aid of an enforcement application. The provisions of the process to obtain a warrant requires a verified petition and requires that the court take immediate testimony from the petitioner or other witness, either in person or by telephone, in support of the application. The allegation must set forth that there is imminent serious harm in removal from the state in which case the court may issue a warrant directing law enforcement officers to physically take custody of the child. Of course, the petitioner should not expect that the child will automatically be placed with them. Very often, the child is placed in temporary protective custody pending a hearing.

Part III: **Dangers and Pitfalls:**

The greatest potential pitfalls for practitioners exists in assumption and inadvertence.

A. Domestic Violence.

First, the technical issues presented by domestic violence practice have a number of jurisdictional pitfalls associated with them. There is already case law that addresses acquiescence when an out-of-state litigant responds to a domestic violence application in an interstate context under the UCCJA. The new statute addresses in a number of provisions the problems of domestic violence and the relationship between domestic violence and choice of forum. Additionally, it is important to remember that the UCCJEA applies when courts adjudicate custody and visitation issues that arise exclusively in the context of custody determinations in a domestic violence proceeding. [UCCJEA §102(4)] As a consequence, there are a number of considerations.

(1) The mandatory judicial communication provisions of the UCCJEA always apply to components of a domestic violence restraining orders, which qualify as a child custody determination. When there has been a prior child custody determination or the parties reside in separate states and home state may not have shifted these orders always are, by definition, "emergency orders".

(2) If notice is not given in accordance with the UCCJEA, custody and visitation portions of a domestic violence protection order would not be entitled to interstate enforcement under the UCCJEA.

(3) The custody components of a temporary restraining order which go unchallenged for six months becomes a final order for enforcement purposes under the UCCJEA.

Therefore, in both advising a litigant who is seeking protection and advising a litigant who is defending an application, or may be defending an application while in another state or deployed, where domestic violence is alleged, one should walk through the particulars of the UCCJEA as well as the content of the petition to determine whether or not an application for the resolution of custodial and access rights should be filed in the "home state" of the child during the pendency of the domestic violence litigation to protect the jurisdictional and substantive issues.

B. <u>International Litigation</u>.

The next pitfall is that associated with international litigation. Given that international orders are entitled to the same deference as sister state orders would be afforded, at least as an initial proposition, it is important to get certified translations of any order which you feel could be the subject of enforcement in the United States. You also need to understand the legal process involved in obtaining the order, and whether or not the process is one that would comply with the provisions of the UCCJEA. If the process does not comply, you may want to "cure" the foreign defects occurring in a simultaneous proceeding before seeking registration or enforcement of the order. The issues of "substantial conformity" as well as the issues associated with enforcement provide an arena for creative lawyering, but there is no substitute for understanding both the procedural and substantive law of the foreign country and setting out a strategy for either proving up your enforcement case, demonstrating the foreign law and process by

expert testimony, and providing an informative affidavit at the time at which you file your initial pleading.

C. Forum Non Conveniens.

Finally, understanding the concept of forum non-conveniens has never been more important. Forum and applicable law will now become much more meaningful in the context of an application to decline to exercise jurisdiction and the exercise of continuing exclusive jurisdiction. Dissolution and parenting agreements which intend to confer continuing jurisdiction to be maintained in the "left-behind state" should set forth not only the standard terms indicating the choice of law of, for example "the law of the State of Oregon should apply", but should set forth the current and anticipated significant contacts which will be maintained in that state and the reasoning behind the maintenance of the left behind state as the determining state for all potential modification proceedings. Further, the parties should identify what factual circumstances will not be considered changes significant enough to disturb the agreement, for example, the remarriage of the custodial parent or the deployment of a parent and temporary places of the minor child.

While such language will not completely foreclose the transfer of modification jurisdiction in the future, it can certainly narrow the scope and potentially protect the "left-behind" parent in the event of a subsequent application.

As the Act and case law makes clear, we are in new territory. While the former version of the UCCJA may have anticipated the issues of interstate and international family law, the UCCJEA clearly takes on the practical problems of actually litigating these cases. For the family lawyer it does not do so without some confusion and potential conflict. Nevertheless, it provides a framework in which attorneys should be able to

reasonably predict the process their client should take in addressing jurisdictional difficulties.

FAMILY CARE PLAN ISSUES
CHECK LIST

Status	Children	Special Circumstances	Legal effectiveness	
			Temporary Custody	Death
1. Married	All children born of marriage or adopted	Dual military	Both family care plans should designate the same temporary custodian in the event both deployed; POA in-state OK If out-of-state, consent Form preferred	Should designate same guardian of person (children) in event of dual casualty, preferably naming guardian in-state
2. Married	Children of prior relationship	Stepparent designation	If family care plan designates stepparent rather than biological non-custodial parent must establish consent Consent form: minimum Order of court or parenting agreement preferred POA: Never effective to transfer custody.	No way to legally name permanent guardianship in a stepparent absent agreement of biological parent or Probate guardianship order. Family Court Order or POA becomes legally ineffective at death of custodial parent Will should contain language with testamentary intent

Status	Children	Special Circumstances	Legal effectiveness: Temporary Custody	Legal effectiveness: Death
3. Divorced/ Separated Not remarried Custodial parent	Children born of marriage	3rd party or grandparent designate away from non-custodial biological parent	If family care plan designates anyone other than non-custodial biological parent must establish consent or Court order. Minimum: consent form Preferred: decree sets forth placement in event of deployment or post-judgment consent order or parenting agreement POA: Never effective Even if child is placed with non-custodial parent agreement Note: Should indicate temporary nature of placement, particularly when return to divorce decree contemplated	Same as above
4. Divorced/ Separated Not remarried non-custodial parent/joint custodian	Children born of marriage	Relationship between access and child support as well as ability to delegate access rights to a third party.	Can't delegate rights of access to a 3rd party, while deployed absent agreement requires consent form. Same consent should address any modification of child support based upon change of parenting schedule	N/A However, may want to reference third-party trustee of child's finances in event of casualty; otherwise could go to a former spouse.

Status	Children	Special Circumstances	Legal effectiveness Temporary Custody	Death
5. Unmarried custodial parent prior custody or support order; non custodial Parent visitation rights		Must test legal legal effectiveness of a temporary custodian for each child, subject to each separate order	If paternity and/or custody have been established in a prior order designating military member "sole custodian" still must obtain consent or court order that specifies designation of 3rd party temporary custodian Minimum: proofs of consent Preferred: Consent Order modifying prior order. Note: There is no right to Receipt of transfer child support payment to 3rd party designee absent consent as set forth above.	No way to legally designate guardianship away from biological parent absent an agreement or order. Will should contain language with testamentary intent and specify court case number.. if applicable.
6. Unmarried custodial parent no prior custody or support order; in tact relationship	Child of relationship	Preserving rights of custody in returning service member and temporary nature of custodial designation	Can be done by POA to biological parent Preferred: Consent Order or agreement with acknowledgement of paternity and/or temporary nature of custody placement documented	Regardless of whether guardian is to be biological parent or 3rd party, must be specifically designated in testamentary instrument to avoid the necessity of litigation in Probate part to establish parent-child relationship or name a temporary guardian.
7. Unmarried custodial parent no prior custody or support order no relationship with biological parent	Child of relationship		Unless there is no acknowledged father, preferred mechanism is consent form or proof that form with designated family care plan was sent and actual notice given to biological parent. Consent Order, while effective could give rise to paternity and support issues which may or may not be client's desire.	Same as above

ENLOSURE 1

State	Criminal Parental Kidnapping Statutes	Prohibitions Against Interference with Visitation	Pre-Decree Abductions	Statute
Alabama	X			ALA CODE §13A-6-45 (2004)
Alaska	X	X		ALASKA STAT §11.41.320 (2004) ALASKA STAT §11.41.330 (2004) ALASKA STAT §11.41.370 (2004) ALASKA STAT §11.51.125 (2004)
Arizona	X	X		ARIZ REV STAT ANN §13-1302 (2004) ARIZ REV STAT ANN §13-1305 (2004)
Arkansas	X	X		ARK CODE ANN §5-26-501 (2003) ARK CODE ANN §5-26-502 (2003)
California	X		X	CAL PENAL CODE §277 (2004) CAL PENAL CODE §278 (2004) CAL PENAL CODE §278.5 (2004) CAL PENAL CODE §279 (2004)
Colorado	X			COLO REV STAT §18-3-304 (2003)
Connecticut	X			CONN GEN STAT §53A-97 (2003) CONN GEN STAT §53A-98 (2003)
Delaware	X			DEL CODE ANN TIT 11:785 (2004)
District of Columbia	X	X	X	DC CODE §16-1021 (2004) DC CODE §16-1022 (2004) DC CODE §16-1023 (2004) DC CODE §16-1024 (2004)
Florida	X	X	X	FLA STAT §787.03 (2003) FLA STAT §787.04 (2003)
Georgia	X		X	GA CODE ANN §16-5-45 (2003)
Hawaii	X			HAW REV STAT §707-726 (2003) HAW REV STAT §707-727 (2003)
Idaho	X	X	X	IDAHO CODE 18-4506 (2004)
Illinois	X	X	X	720 ILL COMP STAT §5/10-5 (2003) 720 ILL COMP STAT §5/10-5.5 (2003) 720 ILL COMP STAT §5/10-7 (2003)
Indiana	X	X	X	IND CODE §35-42-3-4 (2004)
Iowa	X	X		IOWA CODE §710.6 (2003)
Kansas	X		X	KAN STAT ANN §21-3422 (2003) KAN STAT ANN §21-3422A (2003)
Kentucky	X			KY REV STAT ANN §509.070 (2003)
Louisiana	X			LA REV STAT ANN §14:45 (2004) LA REV STAT ANN §14:45.1 (2004)

Maine	X			MRS ANN TIT 17A §303 (2003)
Maryland	X			MD CODE ANN FAM LAW §9-301 (2003) MD CODE ANN FAM LAW §9-304 (2003) MD CODE ANN FAM LAW §9-305 (2003) MD CODE ANN FAM LAW § 9-306 (2003) MD CODE ANN FAM LAW §9-307 (2003)
Massachusetts	X			MASS GEN L CH 265 §26A (2004) MASS GEN L CH 265 §27A (2004)
Michigan	X	X		MICH COMP LAWS §750.350A (2004)
Minnesota	X		X	MINN STAT §609-26 (2003)
Mississippi	X			MISS CODE ANN §97-3-51 (2003)

Missouri	X	X	X	MO REV STAT § 565.149 (2003) MO REV STAT § 565.150 (2003) MO REV STAT § 565.153 (2003) MO REV STAT § 565.156 (2003) MO REV STAT § 565.160 (2003) MO REV STAT § 565.163 (2003) MO REV STAT § 565.165 (2003) MO REV STAT § 565.167 (2003) MO REV STAT § 565.169 (2003)
Montana	X	X	X	MONT CODE ANN §45-5-304 (2003) MONT CODE ANN §45-5-631 (2003) MONT CODE ANN §45-5-632 (2003) MONT CODE ANN §45-5-633 (2003)
Nebraska	X			NEB REV STAT § 28-316 (2003)
Nevada	X	X		NRS §200.257 (2003) NRS §200.359 (2003)
New Hampshire	X			NH REV STAT ANN§633:4 (2003)
New Jersey	X	X	X	NJ STAT ANN § 2C:13-4 (2003) NJ STAT ANN §2A:34-31.1 (2003)
New Mexico	X	X	X	NM STAT ANN §30-4-4 (2003)
New York	X			NY PENAL LAW §135.45 (2004) NY PENAL LAW §135.50 (2004)
North Carolina	X			NC GEN STAT §14-320.1(2003)
North Dakota	X			ND CENT CODE §12.1-18-05 (2003) ND CENT CODE §14-09-24 (2003)
Ohio	X			OHIO REV CODE ANN § 2919.23 (2003)
Oklahoma	X	X		OKLA STAT TIT 21, §891 (2004) OKLA STAT TIT 76 § 8 (2004)
Oregon	X			OR REV STAT § 163.245 (2001) OR REV STAT § 163.257 (2001)
Pennsylvania	X			18 PA CONS STAT §2904 (2003) 18 PA CONS STAT §2909 (2003)
Rhode Island	X		X	RI GEN LAWS §11-26-1.1 (2003) RI GEN LAWS §11-26-1.2 (2003)
South Carolina	X		X	SC CODE ANN §16-17-495 (2003)
South Dakota	X	X		SD CODIFIED LAWS §22-19-9 (2003) SD CODIFIED LAWS §22-19-10 (2003) SD CODIFIED LAWS §22-19-11 (2003) SD CODIFIED LAWS §22-19-12 (2003)

Tennessee	X			TENN CODE ANN §39-13-306 (2003)
Texas	X		X	TEX PENAL CODE § 25.03 (2003) TEX PENAL CODE § 25.031 (2003)
Utah	X	X	X	UTAH CODE ANN §76-5-303 (2003)
Vermont	X			VT STAT ANN TIT 13 §2451 (2003)
Virginia	X			VA CODE ANN §18.2-49.1 (2003) VA CODE ANN §18.2-50 (2003)
Washington	X	X		WASH REV CODE §9A.10.010 (2004) WASH REV CODE §9A.10.060 (2004) WASH REV CODE §9A.10.070 (2004) WASH REV CODE §9A.10.080 (2004)
West Virginia	X	X		W VA CODE §61-2-14D (2003) W VA CODE §61-2-14E (2003)
Wisconsin	X	X		WIS STAT §948.31 (2003)
Wyoming	X			WYO STAT §6-2-204 (2003)
United States	X	X		18 USCS 1204 (2004)

Enclosure 2

PROVISIONS FOR CUSTODY AGREEMENTS AND ORDERS

Military Deployment (Third party) In the event (Custodial Parent) determines that he/she is unable to care for the minor child due to military duty, temporary illness or other causes, (Custodial Parent) shall send the child to reside with his/her paternal grandparents. The parties agree that (name), the paternal grandparents, whose address is (address) shall have temporary custody of the minor child of the parties during periods in which (Custodial Parent) is unavailable to care for the child and that said temporary custody arrangement is in the best interests of the child. (Non-Custodial Parent) shall have reasonable visitation with the child while he resides with the aforementioned grandparents. Upon conclusion of the event that made (Custodial Parent) unavailable, (Custodial Parent) shall give (grandparents) written notice and custody shall revert to (Custodial Parent). (Grandparents) shall within five days of said notice return the child to (Custodial Parent). Child support payments shall continue as provided herein.

The parties anticipate that said deployment, unavailability or other cause for the unavailability of the (Custodial Parent) and resulting temporary custody to grandparents may extend for periods of up to 18 months. (limitation on the time may be a liability)

Military Deployment (Other Parent) In the event (Custodial Parent) determines that he/she is unable to care for the minor child due to military duty, temporary illness or other causes, (Custodial Parent) shall send the child to reside with (Non-Custodial Parent) at whose address is (address). (Non-Custodial Parent) shall have temporary custody of the minor child of the parties during periods in which (Custodial Parent) is unavailable to care for the child and that said temporary custody arrangement is in the best interests of the child. (Custodial Parent) shall have visitation with the child while he resides with the (Non-Custodial Parent) upon 24 hours notice to same. Upon conclusion of the event that made (Custodial Parent) unavailable, (Custodial Parent) shall give (Non-Custodial Parent) written notice and custody shall revert to (Custodial Parent). (Non-Custodial Parent) shall within five days of said notice return the child to (Custodial Parent). Child support payments shall continue as provided herein.

The parties anticipate that said deployment, unavailability or other cause for the unavailability of the (Custodial Parent) and resulting temporary custody to (Non-Custodial Parent) may extend for periods up to 18 months. (limitation on the time may be a liability)

Visitation Rights and Responsibilities. Notwithstanding any other definition, (Non-Custodial Parent) shall have liberal and reasonable visitation upon 72 hours notice to (Custodial Parent) or such other party with temporary custody prior to such visitation. Visitation shall include the right of reasonable telephone communication with the child

before 8 p.m. (Non-Custodial Parent) shall give no less than 48 hours prior notice, except as otherwise provided in this Agreement, if unable to exercise any of the visitation rights set forth herein.

Material Change in Circumstances. The parties acknowledge and agree that changes in visitation due to (Custodial Parent)'s relocation, deployment or temporary inability to care for the child have been contemplated by the parties and will not be considered a material change in circumstances. If the parties mutually agree, they may vary the terms of said visitation.

Visitation Costs. (Non-Custodial Parent) shall be responsible for costs for visitation with the child.

Notice of Relocation. Each party shall at all times keep the other apprised of his or her current permanent address and shall notify the other within 90 days of any intended change thereof. The parties acknowledge that this Agreement shall in no way limit or restrict their right to relocate within or outside of the (State of Primary residence of child).

Relocation Outside the Continental United States. The parties acknowledge that (Custodial Parent) may transfer and/or relocate for employment purposes and agree that the child will relocate with (Custodial Parent). Such relocation may include localities outside the continental United States. Both parties agree that upon written request by (Custodial Parent), (Non-Custodial Parent) shall complete and forward within 20 days of receipt all requested documents to permit said travel. Each party shall assist in obtaining necessary medical, health and dental treatments to facilitate obtaining a passport and authorization to leave the country.

The parties acknowledge and agree that this Agreement may be presented to any state or federal domestic agency or foreign agency, as authorization and authority from the (Non-Custodial Parent) for issuance of travel documents for said child. The parties agree that the child may reside with the custodial parent at locations outside the continental United States. Furthermore, the parties agree that said relocation with (Custodial Parent) would be in the best interests of the child in that the (Custodial Parent) is the primary caretaker, the travel would expose the child to new cultures, diverse educational experiences and offer the opportunity to learn new languages. (Non-Custodial Parent) shall be responsible for costs associated with visitation.

Child Support. The parties have considered the factors set forth in the (state code) in determining the amount of child support. (Non-Custodial Parent) shall provide to the (Custodial Parent) as child support, the sum of (amount) per month. Said amount, paid in a lump sum by (method) is due on the 1st day of each month, commencing upon the 1st day of _____ 20___.

In the event of the temporary unavailability of the (Custodial Parent) as considered in paragraph () the parties agree that child support payments as set forth herein shall be paid to ()

Termination of Child Support. Such child support payments as herein established or as later established or modified by a court of competent jurisdiction, shall terminate upon the happening of any of the following events for each child of the parties:

(a) The death of the child;
(b) Attaining the age of 22 years, or 23 years if the child is in college;
(c) The marriage of the child;
(d) The emancipation of the child as evidenced by self-support and living away from the home, and/or joining the armed forces, unless the child is attending college as set forth in (b) above.

Medical, Health and Dental Care Expenses. The parties agree that (Non-Custodial-Parent)/(Custodial Parent) shall maintain full medical, health and dental insurance coverage on the child. In the event, (Non-Custodial Parent)/(Custodial Parent) shall separate from the military, (Non-Custodial Parent)/(Custodial Parent) shall acquire a new medical, health, and dental insurance plan for the child. The parties agree to divide equally the costs of said medical, health, and dental insurance for the child. To the extent not covered by insurance, the child's ordinary and extraordinary medical and dental expenses shall be equally shared by the parties

Life Insurance Policies for the Child. (Non-Custodial Parent) agrees to obtain and maintain a life insurance policy in the amount of $100,000.00 and to designate (Custodial Parent) as owner and beneficiary.

UCCJEA
Adopted in 44 Jurisdictions

Prepared by National Conference of Commissioners on Uniform State Laws in 1997 to supersede U.C.C.J.A. (1968), and contains modifications suggested by the New Jersey Law Revision Commission in 1999

Slide -4-

Purposes of UCCJEA

1. Revise the law on child custody jurisdiction in light of federal enactments and almost 30 years of inconsistent law.

A. Provides the "rules of engagement" for when courts can exercise jurisdiction over an initial child custody determination

B. Enunciates a standard of continuing jurisdiction and clarifies modification jurisdiction.

Slide -5-

Purposes (cont'd):

2. Provides a remedial process to enforce child custody and parenting-time determinations

A. Brings a uniform procedure to the law of interstate enforcement that produced inconsistent results under the UCCJA

B. Provides the same uniformity to custody and parenting-time determinations that has occurred in interstate child support with the enactment of the Uniform Interstate Family Support Act (UIFSA)

Slide -6-

Federal Law

- Parental Kidnapping Prevention Act (PKPA) – enacted by Congress in 1980, 28 U.S.C.A. § 1738A
  - -enacted to address interstate custody jurisdictional problems that continued to exist after adoption of the UCCJA
  - -PKPA mandates that State authorities give full faith and credit to the custody determinations of other states, so long as those determinations were made in conformity with the provisions of the PKPA

Slide -7-

PKPA

- PKPA provisions regarding bases for jurisdiction, based upon the United States Constitutional standard of Full Faith and Credit ; Provides for restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements.
- Problems: Applicable only to states of the United States and inconsistent with the UCCJA.

Slide -8-

Jurisdictional Revisions by UCCJEA

- Home State Priority
- "Emergency Jurisdiction" no longer a basis to make a initial child custody determination
- "Exclusive Continuing Jurisdiction" for the State that Entered the Custody Decree
- Specification of What Custody Proceedings are Covered by UCCJEA
- Removes "best Interests" as a basis for the exercise of initial determination jurisdiction
- Addresses domestic violence issues

Slide -9-

Initial Custody Jurisdiction

- A court has jurisdiction to make an initial custody determination **ONLY** if:

1. The home state of the child upon commencement of the proceeding, or was the home state w/l 6 months before commencement and the child is absent from N.J. but a parent continues to reside in N.J.
2. A court of another State does not have home state jurisdiction, or a court of the home state has declined to exercise jurisdiction on the ground that this state IS the more appropriate forum, AND
   a. the child and parents, or child and at least 1 parent have a significant connection with the state beyond mere presence, and
   b. substantial evidence is available in this state concerning the child's care, protection, training and personal relationships.

Slide -11-

Initial Jurisdiction (cont'd)

3. All courts having jurisdiction under 1 or 2 have declined to exercise jurisdiction on the grounds that this state is the more appropriate forum to determine custody (Inconvenient Forum) or (Jurisdiction Declined by Conduct)
4. No other State would have jurisdiction under 1, 2, or 3

For future enforcement this is the exclusive jurisdictional basis for making an initial child custody determination

IMPORTANT POINT 1: If this isn't done right, everything that follows will be void ab initio. Jurisdiction can always be raised at any time. The result being that you start from scratch.

Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child custody determination

Slide -12-

Home State

- Definitions:

"Home state" means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Slide -13-

Rule No. 1

- Subject matter jurisdiction for an initial child custody determination can NEVER be conferred by agreement where it does not exist.
- See Medill v. Medill: 40 P.3d 1087 (Or.2002)

Rule No 2

- Do not confuse personal jurisdiction and subject matter jurisdiction .
- Unlike UIFSA this is not about service of process, personal jurisdiction is conferred because of either the current or immediate past presence of the children in the jurisdiction.
- Notice in a method "reasonably calculated to provide actual notice.

Temporary Emergency Jurisdiction under UCCJEA

- A court has temporary emergency jurisdiction if the child is present in that state and:
  - the child has been abandoned, or
  - the child, a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

Note: "sibling or parent of the child" was not included

Slide -15-

Temporary Emergency Jurisdiction

- Is not considered an initial child custody determination UNLESS it remains undisturbed or unchallenged for 6 months
- Order must specify nature and duration of the emergency
- Judge must confer with home state judge

Major pitfall

- Temporary domestic violence restraining orders containing child custody orders.

Exclusive Continuing Jurisdiction

a. **Except for temporary emergency jurisdiction , a court that has issued a custody order consistent with (initial determination) has exclusive, continuing jurisdiction until:**

1. A court of that state determines that neither the child, the child and one parent, nor the child and a person acting as parent still has a significant connection with and that substantial evidence is no longer available in concerning the child's care, protection, training and personal relationships; or

2. The "Elvis has left the building rule" the original court OR the new court in another State determines that neither the child, nor a parent, nor any person acting as a parent presently resides in the initial determination state.

Slide -17-

Exclusive, Continuing Jurisdiction

b. A court that has made a custody determination, and does not have exclusive, continuing jurisdiction may modify that determination only if it has jurisdiction to make an initial custody determination under N.J.S.A. 2A:34-65.

Slide -18-

Role of "Best Interests"

- UCCJEA eliminates the term "best interests" in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and parenting time of children.
- The jurisdictional scheme of the UCCJA was designed to promote the best interests of children whose custody was at issue by discouraging parental abduction and providing that, in general, the State with the closest connections to, and the most evidence regarding, a child should decide the child's custody.
- However, the "best interests" language in the jurisdictional section**was not intended to be an invitation to address the merits of the custody dispute in the jurisdictional determination or to otherwise provide that "best interests" considerations should override jurisdictional determinations or provide an additional jurisdictional basis.**

Slide -20-

Inconvenient Forum (Continued):

c. If a court decides it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay those proceedings upon the condition that a child custody proceeding be promptly commenced in another designated state and may impose other conditions

d. A court may decline to exercise jurisdiction under UCCJEA if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

Slide -27-

UCCJEA Jurisdiction Declined By Reason of Conduct

a. Except for temporary emergency jurisdiction, if N.J. court has UCCJEA jurisdiction because a person invoking the jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise jurisdiction unless:

(1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) a court of the state otherwise having UCCJEA jurisdiction determines that N.J. is a more appropriate forum; or

(3) no other state would have UCCJEA jurisdiction

Slide -28-

UCCJEA Jurisdiction Declined By Reason of Conduct (cont'd)

b. If N.J. court declines jurisdiction, it may fashion an appropriate remedy to ensure safety of child and prevent repetition of the wrongful conduct, including staying the proceeding until an action is initiated in the UCCJEA state.

c. If the court dismisses a petition or stays a proceeding because it declines to exercise jurisdiction, court may assess fees and costs against petitioner. (No fees assessed against a party who is fleeing as a result of an incident of domestic violence).

Slide -29-

Rule No.3

- Be careful of advice that invites someone to leave the state in a pre-judgment , pre-order status.
- In 17 states removal of child without consent, a felony.

Priority of Custody Determination

- All questions of jurisdiction under the UCCJEA shall be given priority on the calendar and handled expeditiously

Slide -32-

Modification

- In order to modify the terms and conditions of an existing order, the movant must file in the original jurisdiction, even to ask the court to recognize a new jurisdiction.

Notice to Persons Outside N.J.

a. Notice required for exercise of jurisdiction when a person is outside may be given in a manner prescribed by law offor service of process or by law of state in which service is made. Notice shall be given in a manner reasonably calculated to give actual notice, but may be by publication if other means are not effective

b. Proof of service in manner prescribed by this state's law or by law of state in which service is made.

c. Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court

Slide -33-

Appearance and Limited Immunity

a. A party to a UCCJEA proceeding is not subject to personal jurisdiction in N.J. for any other proceeding or purpose solely by reason of having participated or of having been physically present for the purposes of participating in the proceeding
b. A party who is subject to personal jurisdiction in N.J. on a basis other than physical presence is not immune from service of process in N.J. or under laws of a state to which he/she is subject to jurisdiction
c. Immunity granted under a. does not extend to civil litigation based on acts committed by an individual while present in N.J. unrelated to participation in the UCCJEA proceeding

Slide -34-

Miscellaneous General Provisions

- - Communication Between Courts
  -opportunity of parties to participate, and record made of proceedings
  -on communications concerning schedules, calendars, court records – no record required
- - Taking Testimony in Another State
- – Cooperation Between Courts

Slide -35-

Enforcement Under UCCJEA

- Simple Procedure for Registering a Custody Determination in Another State
- Advantage of Knowing in Advance whether the other State will recognize a Party's Custody – able to estimate risk of child's non-return when child sent on visitation

1. letter to clerk of court requesting registration
2. two copies (1 certified) of custody order, with certification that to the best of your knowledge and belief the order has not been modified
3. except in DV situation, name and address of person seeking registration and that of any parent or person acting as a parent who has been awarded custody or visitation in the order

Slide -37-

Enforcement (cont'd):

- on receipt of registering documents, the court shall:
  1. cause the order to be filed as a foreign judgment
  2. serve notice on other parent or person exercising custody or visitation providing him, her, or them an opportunity to contest the registration

: notice shall state:

1. a registered determination is enforceable as of the date of the registration in the same manner as if the order had been issued by a this court;
2. a hearing to contest the validity of the registered order shall be requested within 20 days after service of notice; and
3. failure to contest the registration will result in confirmation of the order and preclude further contest of that determination

Slide -38-

Enforcement (cont'd):

- A person contesting validity of registered order shall request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the contesting party establishes:
  1. the issuing court did not have jurisdiction under the UCCJEA;
  2. the order sought to be registered has been vacated, stayed or modified by a court of a state having jurisdiction under the UCCJEA; or
  3. the person contesting registration was entitled to notice but notice was not given in accordance with the standards of (Notice of Persons Outside State)

Slide -39-

Enforcement (cont'd):

- If a timely request or a hearing to contest validity of registration is not made, the registration is confirmed as a matter of law and all parties served shall be notified of the confirmation.
- Confirmation of a registered order precludes further contest of the order with respect to any matter that could have been asserted at the time of the registration.

Slide -40-

Enforcement – Hague Convention

- A court of N.J. may enforce an order for the return of a child made under the Hague Convention on Civil Aspects of International Child Abduction as if it were a child custody determination

Slide -42-

Enforcement of Registered Order

a. A court may grant any relief normally available to enforce a registered custody order or another state.

b. A court shall recognize and enforce, but may not modify, except under N.J.S.A. a registered child custody determination of another state.

Slide -44-

Expedited Enforcement Proceedings (Continued):

(1) the child custody order has not been registered and confirmed under the UCCJEA, and that:

(a) the issuing court did not have jurisdiction under the UCCJEA;

(b) the order sought to be enforced has been vacated, stayed, or modified by a court of a state having UCCJEA jurisdiction; or

(c) respondent was entitled to notice of the enforcement proceedings, but notice was not given in accordance with ; or

(2) the child custody order for which enforcement is sought was registered and confirmed, but has been vacated, stayed or modified by a court having UCCJEA jurisdiction.

Slide -49-

International Application of UCCJEA

a. N.J. courts shall treat a foreign country as if it were a state of the U.S. for purposes of applying the General Provisions (Article 1) and Jurisdictional Provisions (Article 2) of UCCJEA if the foreign court gives notice and an opportunity to be heard to all parties before making child custody determinations.

b. A foreign country child custody order issued under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA shall be recognized under Article 3 (Enforcement) .

c. A need not apply UCCJEA if the child custody law of a foreign country violates fundamental principles of human rights or does not base custody decisions on evaluation of the best interests of the child.

Slide -54-

Top five rules

- 1. subject matter jurisdiction cannot be conferred by agreement
- 2. Actual notice, not service of process
- 3. Be careful of pre-judgment removals
- 4. Agreements are not orders/language should reflect enforceable arrangements
- 5. SCRA issues.

Family Care Plans

- A POA is Never Never Never effective to transfer custody. Ever.
- Issues:
- a. dual military
- b. stepparent designation
- c.3rd party or grandparent designation of a custodian away from bio parent
- d. delegation of access rights.

Family care plans

- Test legal effectiveness for each child
- In "pre-order setting" preserve parental rights, if not documented.

PARENTAL CONSENT FORM

In accordance with this agreement the parties confirm the following stipulations of fact and terms of agreement:

(1) The Soldier* is the parent of _____, date of birth _____, born in _____;

(2) _____ is a (parent)/ (legal custodian), of the minor child.

(3) _____ is a minor child and currently resides primarily with _____at _____.;

(4) _____ is a member of the United States Army.

(5) _____ has been notified that he/she is to be temporarily deployed . The time period of deployment has been estimated to be _____ in length. As a matter of military necessity, the minor child will not be able reside with or exercise access to _____ during the deployment;

(6) The parties agree that each has reviewed the Family Care Plan as set forth in form DA 5305-R which indicates that it is their intention that for the time period that _____ is deployed, _____, is to serve as the minor child's temporary physical custodian;

(7) The parties agree that the child will for the time period of the deployment reside at _____.

(8) As such, the parties agree that each will cooperate with the execution of any additional documentation as may be necessary, to facilitate the designation of physical custody to the temporary custodian and effectuate this consent.

*In the case of Dual military couples, where either both of the signators are subject to deployment, or where the designated temporary physical custodian is a military member subject to deployment the following language should be used (note this could be a second form, up to you).

4 a)_____ is a also a member of the United States Army (or other military service) .

6a)**For army cases:** In accordance with 5-5 (13) (k) (1 d) we have deposited with our unit commanders copies of each of our Family Service Plans , accordingly, in the event that both of the parties are deployed _____is to serve as the minor child's temporary physical custodian until _**_____returns. The parties agree that the child, will for that period of deployment reside at _____.

** The dual military couple will either designate that the time period of temporary placement will cease with the return of either of the two signators, or that they together denominate a third party who will remain the custodian until the custodial parent returns .

_____ _____

_Signatures must be authenticated by a Notary.

American Bar Association
Section of Family Law

Wednesday, May 3, 2006

A Short Course in Military Family Law Issues

Military Pension Division

SECTION OF FAMILY LAW
ABA KNOWLEDGE EXPERTISE NETWORKING
SERVING AS THE NATIONAL LEADER IN THE FIELD OF MARITAL AND FAMILY LAW

SILENT PARTNER

MILITARY PENSION DIVISION: THE SERVICEMEMBER'S STRATEGY

INTRODUCTION: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

Overview of the *Military Pension Division* Series

There are five SILENT PARTNERs in this series.

- *Military Pension Division: Scouting the Terrain* is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses' Protection Act), what the Act does (and doesn't do), and how the question of "federal jurisdiction" is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember's Strategy* contains information on how to assist the servicemember (hereafter "SM") in this area, and
- *Military Pension Division: The Spouse's Strategy* covers how to help the SM's spouse.
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS.* It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- Retrieving an apparently "lost" pension benefit for the spouse/former spouse is covered in *"Lost" Military Pensions: The Ten Commandments.*

Introduction

The battlefield in military divorces is often military pension division. An overview of the battlefield is contained in "Military Pension Division: Scouting the Terrain," and the topics below expand that advice to help the pension recipient (SM or retiree) to cut corners, save money, and reduce or eliminate benefits for his (or her) spouse or ex-spouse.

While many SMs are vociferous in their resistance to division of the military pension, it is important to remember and remind the client of the cost of an aggressive and unyielding defense. Once they know the odds and the costs, few clients have the will or the pocketbook for diehard resistance. Few want to risk what's at stake in visitation, child support, alimony and other matters in a case that could be settled, just to engage in "nuclear warfare" regarding the pension. All states allow military pension

division. As will be outlined below, only a few U.S. jurisdictions limit military pension division based on years of service or years of marriage. The job of a good attorney is to guide the client with sage advice and serious judgment, rather than to be pulled along blindly by a client who wants to "set a precedent" – usually (as clients state it) "for the principle of the matter." Is it worth it? Will it help the client with the rest of his (or her) case? Advice and guidance for the "big picture" along these lines is the task of the lawyer who is truly serious about helping his or her military pension division clients.

Roadblocks and Minefields

Our client in this example is Army Colonel Bill Roberts. He's been in the Army 20 years and now he's going through a divorce. He wants to know how to stop Mrs. Roberts from getting the courts to divide his military pension rights. He also wants to know, in the event she succeeds, what his maximum exposure is.

To advise him fully, we need to first look at the roadblocks and minefields that may be placed in Mrs. Roberts' way, blocking the division of her husband's military retirement rights. Here are the obstacles that may be discussed with COL Roberts:

Constitutionality. If COL Roberts says, "They can't do that -- it's unconstitutional," don't get your hopes up. The constitutional attack on pension division will fail. This issue has been rejected in all state courts that have considered it. The same argument was also rejected by the Court of Appeals for the Federal Circuit in 1990 in *Fern v. United States*.[1]

Retroactivity. In general, the claim for military pension division must be made at a time when *both federal and state statutes* allow for such division. As to federal law, a 1990 amendment to USFSPA limits pension division to decrees entered after June 25, 1981 (the date of *McCarty v. McCarty*[2]). It states that decrees entered before this date which did not treat (or reserve for later treatment) military retired pay as marital or community property cannot be modified to reopen the issue.[3] Practitioners should check the appropriate state laws or cases to determine when military pensions became divisible.

Timeliness. The next point of analysis for COL Roberts' case is whether the claim was filed *procedurally in a timely manner*. This is a technical question of state law. Some states limit the filing of equitable distribution claims to the period up to the granting of a divorce or dissolution; if you wait till after that, you're too late. Others require the filing to occur after the separation of the parties; you can't just file suit for property division while you're still living together. Under North Carolina law, for example, the rights of the spouses to an equitable distribution of marital property are deemed to vest at the time of the parties' separation; the right to equitable distribution does not exist if the claim for it is filed before the separation of the parties. In addition, the right to equitable distribution must be asserted in North Carolina before the final divorce judgment; a divorce judgment destroys the right to equitable distribution unless that right is asserted prior to the granting of a judgment of divorce. If such parameters exist under state law and the claim of Mrs. Roberts for equitable distribution falls outside these limits, the court will have no jurisdiction to entertain her request for an equitable distribution of marital property. This defense involves complex procedural research that is best left to the expert; consult a good civilian family law attorney or refer this kind of case to a family law specialist.

Waiver. Mrs. Roberts' rights may have been waived. Did she sign a separation agreement or property settlement agreement? An antenuptial agreement can also waive property division rights. In some jurisdictions, such an agreement does not have to define specifically the property that is involved or that is exempted from division. In those states, even if there is no mention of the pension, a general clause in the

agreement which waives the marital rights of the parties can be construed as barring a claim for equitable distribution.

Nonvested Pension Benefit. There are only a few jurisdictions which provide that, by law, a military pension may not be divided. These fall into the following categories: states where there is a "vesting requirement," one state where ten years of marital military service is required (Alabama) and one jurisdiction (Puerto Rico) which bars division of any noncontributory pension plan.

A pension is vested when the employee is entitled to receive something upon termination of employment, whether that is in the form of a return of contributions or an early (and reduced) retirement benefit.[4] A service member with 11 years of service, for example, would not have a vested pension because there is no right to retire after 11 years' service. A member with 25 years of service, on the other hand, would clearly have vested retirement rights.

There are two states, Indiana and Arkansas, which clearly limit court jurisdiction over pension division to those pensions which are "vested." The Arkansas Court of Appeals held in *Holaway v. Holaway* that an unvested pension is non-divisible separate property of the party who earned it.[5] In Indiana the right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share, and the burden is on the non-employee spouse to prove that the pension is vested.[6]

The law on the issue of division of unvested pension benefits is confused in Ohio and Michigan. In Ohio, the law appears to be that unvested benefits are not divisible by the courts,[7] even though the leading case holding this, *Lemon v. Lemon*,[8] has been overruled in an unreported case.[9] By statute, Ohio considers all retirement benefits to be marital property.[10] In Michigan, pensions are considered divisible marital property only if they have an ascertainable present value, and ordinarily only vested pensions are deemed to have such a present value, leading to the conclusion that unvested pensions are not divisible by the courts.[11]

Alabama law provides a unique limitation on pension division jurisdiction. The law specifically states that retirement benefits are not divisible as marital property unless the employee or "owning spouse" has ten years of pension service during the marriage.[12]

A third jurisdiction, Puerto Rico, refuses to allow the division of noncontributory pensions at all. Puerto Rico treats these pension rights as separate property.[13] Thus a military pension would not be divisible there although the Thrift Savings Plan, being contributory, would be divisible by the courts.

There may be several states which could divide COL Roberts' military pension. To minimize his exposure, COL Roberts will want to "shop around" for a jurisdiction that will either limit pension division (as with a vesting requirement), bar pension division entirely (Puerto Rico) or will otherwise allow military pension division on the best terms for him. COL Roberts can employ these divisibility provisions to his advantage in the pension division litigation. If he is stationed in Indiana, for example, he might decide to become domiciled there and then file for divorce in that jurisdiction so as to exclude his pension benefit from division. In like manner, Mrs. Roberts and her attorney will want to examine each state or territory which may have jurisdiction where she may file for division of COL Robert's pension to see whether the laws there allow such division.

It is impossible for any individual attorney to know each of these state rules. To find out which states have vesting requirements, examine the Army JAG School's guide to the Uniformed Services Former Spouses' Protection Act, publication JA 274, which contains a "State-by-State Analysis of Divisibility," at Appendix B.[14]

The importance of this point for Mrs. Roberts' attorney is that it is vital to *shop around* for the jurisdiction that will allow military pension division on the best terms for Mrs. Roberts. For COL Roberts, the opposite approach would apply; he needs to find a jurisdiction which can hear his case but

will deny the division of his pension. How to go about this forum-shopping, which is implicitly allowed by the triple jurisdictional approach of 10 U.S.C. 1408(c)(4), is found below.

Type of Pension

The pension rights contemplated by USFSPA involve nondisability "longevity retirement" under 10 U.S.C. 1401-12, not retirement for disability under 10 U.S.C. 1201-21. In *Mansell v. Mansell*[15] the U.S. Supreme Court in 1989 held that a pension, to the extent it is based on disability retirement, is not divisible under USFSPA, and that the states may divide only "disposable retired pay" as that term is defined in USFSPA. Disability pay is a complicated issue. A member of the military can take advantage of two different systems for disability benefits.

Military Disability Retired Pay. Military disability retired pay is available for those members who are sufficiently disabled that they cannot perform their assigned duties. If a member has enough creditable service, he or she may be placed on the "disability retired list" and may begin to draw disability retired pay. If a SM is able to retire with military disability pay -- if he has been rated as disabled by the Army -- his amount of disability retired pay would be based on the higher of two different amounts of pay. There are three steps to this process. For the purposes of this example, assume that he has an active duty base pay of $3,000 per month, 20 years of creditable service and a disability rating of forty percent (40%).

- The first step is to calculate the SM's normal retired pay based on his years of service, which we will assume for this example is 2.5% times his years of service times base pay. In this case, it comes to 2.5% X 20 years X $3000, or $1500.
- The next step is to multiply his base pay times his disability rating. This is achieved by multiplying $3,000 by 40%, or $1,200.
- The SM would then receive the higher of these two amounts ($1500 per month in military disability retired pay in this example).

USFSPA makes divisible only the amount of pay that is the difference between the two above amounts, that is, the difference between his gross retired pay and his disability pay based solely on the disability rating. In this example, the difference is $1,500 minus $1,200, or only $300 as divisible military retired pay. Thus although the SM's wife might be entitled to half of $1,500, or $750 per month as her spousal share of military pension rights, a disability retirement would yield her only half of $300, or $150 per month. Her attorney should consider a provision for the agreement -- whether consent order or separation agreement -- that protects her interest in her husband's pension against a possible disability retirement in the future. This is discussed in the SILENT PARTNER, *Military Pension Division: The Spouse's Strategy.*

VA Disability Benefits. A second system of disability retirement benefits is administered by the Department of Veteran's Affairs (VA). If the extent of disability is not such as to qualify a SM for military disability retired pay, he might still elect to receive monthly payments from the VA. To qualify for these, he would have to waive an equivalent amount of his military retired pay. Almost all retirees who can make this election do so. Why? There are two distinct benefits for the military client who is contemplating a divorce:

- While taking this option doesn't provide an increase in gross income, it does yield a net increase in pay since the VA portion of the SM's compensation is tax-free. Thus if the SM's pension (without disability) were $1,500 per month and his disability were evaluated as equivalent to $1,000 per month in VA benefits, he could waive the same amount of taxable longevity pension in order to receive this amount with no taxes on it. His monthly benefits would still total $1,500, but only $500 of this would be subject to taxes if he makes this choice.
- In addition, the VA benefit is not subject to division. Only the longevity-based portion of the pension is divisible in divorce court.

This latter "benefit" for the SM was the issue involved in the *Mansell* case.[xvi] The Supreme Court, after reviewing the history of *McCarty* and USFSPA, proceeded to define the problem as one of statutory interpretation of Section 1408(c)(1), which allowed the division of military pensions, and Section 1408(a)(4), which exempted VA disability benefits from inclusion in the term, "disposable retired pay." While the courts are allowed to treat disposable retired pay as community or marital property, the Court stated that they were not allowed to treat all retired pay as such -- only disposable retired pay. Thus the Supreme Court ruled that states are preempted from dividing the retired pay that a retired military member waives in order to receive VA disability pay. As 10 U.S.C. 1408(a)(4) now reads, both these types of benefits are exempted from division to the extent stated above:

> "Disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which... (C) in the case of a member entitled to retired pay under chapter 61 of this title [10 USC 1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list) or... (D) are deducted because of an election under chapter 73 of this title [10 USC 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

Practitioners should be aware that Congress has recently taken steps to modify the VA waiver requirement. In 2003 Congress passed legislation taking effect January 1, 2004 to allow concurrent receipt of both forms of payments – retired pay and disability

benefits – for certain classes of eligible retirees. The statute is Public Law 108-136, Sections 641 and 642, and the restoration of retired pay is known as Concurrent Disability Pay, or CDP.

For those who have at least 20 years of qualifying military service and have a VA disability rating of at least 50%, it authorizes a ten-year phased elimination of the Department of Veterans Affairs offset to retired pay. The disability does not have to be combat-related. The eligible retiree will see his retirement pay increase by about 10% each year until the phase-in period is complete in 2014, at which time the retiree will be receiving an additional amount that is equal to the amount of retired pay waived.

Combat-Related Special Compensation (CRSC) is a part of the concurrent receipt law, and it includes those who have a disability of at least 10% directly related to the award of the Purple Heart decoration, or else a disability rated at 10% or higher related to combat, operations or hazardous duty. CRSC is non-taxable; retired pay is taxed. There is no phase-in for CRSC; eligible retirees will receive their full retired pay plus their full authorized disability payments.

The statute includes Guard and Reserve personnel who have at least 20 qualifying years for retirement purposes. In general, it is recommended that the former spouse reapply for the start of payments. Fax the request to DFAS at 216-522-6960 or mail it to DFAS-GAG/CL, PO Box 998002, Cleveland, OH 44199-8002.

The legislation is more complicated than the brief overview given here. Those seeking further information should click on "Search" at www.dfas.mil or at www.military.com.

Federal Jurisdiction. If a state does not have jurisdiction *under federal law*, then that state may not divide COL Roberts' pension, regardless of his wife's wishes. As set out in the USFSPA, 10 U.S.C. 1408 (c)(4), a state may only exercise jurisdiction over a military member's pension rights if:

- That state is his or her domicile; or
- The member consents to the exercise of jurisdiction; or
- The member resides there (for reasons other than military assignment in that state or territory).

These statutory provisions override the more traditional long-arm statutes which allow the exercise of jurisdiction consistent with due process if there are sufficient minimum contacts with a state. These are explained in detail in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain.*

How can the SM use these to his advantage? The primary way is not to allow "jurisdiction by consent" to pave the way to an easy division of his pension if he has truly decided on a course of complete resistance. This involves two possible situations:

Meritorious Issue. Assume that the SM is domiciled in a state where division of the pension is limited or barred (see above), and his wife has sued him in a state that has no such limits on pension division. In this situation, his not consenting to military pension division could save his pension.

- The first step, due to the complexity of this subject, is to be sure he has skilled counsel in both jurisdictions. Don't even try to make a request for a continuance (or for a stay of proceedings under the Servicemembers Civil Relief Act) while he's "out in the field" without advice from your co-counsel. This area's too complicated.
- Even then, don't assume you're "out of the woods" with the pension being defined as non-divisible. The court may decide that, because such a large asset is not divisible as marital or

community property, the rest of the property should be divided unequally in favor of the nonmilitary spouse in order to compensate for this inequity.[xvii]

- And finally, DON'T let the SM tell you that you can handle this without outside help. This is too difficult for the average (or above-average) judge advocate or civilian attorney, and it isn't worth your professional reputation (or malpractice liability) to try to disprove this.

Bluff. COL Roberts may want to make sure that his wife has to expend the maximum amount of money to get a piece of his pension. He wants to ensure a fight in two states – the state of suit and the state of his domicile -- to try to get her to back down. Or else he's sure that she won't spend the time or money to try to get counsel in State #2 to ask for a share of the pension, which means that you may have to do some hard bargaining to adjust the property division in light of his pension not being divided. Counsel for Mrs. Roberts would certainly want some concessions on other matters in exchange for not pursuing the military pension.

Dividing the Military Pension -- Crossing the Minefield

Overview. Once it is understood how to set up obstacles to pension division, the next step should be to understand how to overcome them and divide the pension once the court has acquired jurisdiction over it. There are generally two methods available for pension division.

The first is *deferred division*, often called "if, as and when" payments, which refers to shared payments when the retired SM starts receiving his pension. This is the most common way of allocating the pension between the spouse and SM. In the usual situation, a share of the SM's pension is paid to the former spouse. This can be done by DFAS through garnishment if the marriage and the length of service overlap by at least 10 years; otherwise the payment must be made by the SM.

The second involves a *present-value offset*, in which property or money is traded against the present value of the pension. In this scenario, the house and other property go to Mrs. Roberts and the pension goes to COL Roberts (if they are approximately equal in value).

Both of these topics are covered in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain.*

Opening the Attack

When dividing the military pension on a *deferred division* basis, there are four separate ways to make the division that DFAS will accept for direct payments to Mrs. Roberts. These four methods are set out in the pension division regulations.[xviii] They are explained in detail in the SILENT PARTNER, *Getting Military Pension Division Orders Honored by DFAS.*

Fixed dollar amount. A fixed dollar clause could read: *Wife is awarded $550 per month, payable from Husband's disposable retired pay.*

Percentage clause. A percentage clause might state: *Wife is granted 50% of Husband's disposable retired pay.*

Formula clause. This is an award expressed as a fraction or a ratio, and it typically used when a SM is on active duty (or a Reservist is still drilling). It might read: *Wife shall receive 50% of the Husband's disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband.* The court must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service.

Hypothetical clause. This is an award based on a rank or status which is different from that which exists when the servicemember retires. For example, the order might say: *Wife is granted 40% of*

what a major would earn if he were to retire with 18 years of military service. This is often used when state law requires that the share of the pension awarded to the spouse be determined according to the grade and years of service of the member at a specific date, such as the date of divorce or of separation (see below).

For COL Roberts, there is really only one advantageous way to allocate the pension: *fixed dollar amount.* That's because this does not grant Mrs. Roberts a COLA (cost-of-living adjustment) each year. The fixed dollar amount simply excludes a COLA – it's outside the definition of *fixed dollar amount*, in other words.

The Marital Fraction.

Assume that COL Roberts is on active duty and has 20 years of creditable service. He has been married for all 20 years. He tells his lawyer, who is inexperienced in military pension division, that he is willing to give his wife half of his pension, either because that seems fair to him or it appears to be inevitable under state law. The lawyer, taking him at his word, proceeds to draft a clause for pension division which is worded as follows:

> *Husband shall pay to Wife fifty percent (50%) of the disposable retired pay he receives from the Defense Finance and Accounting Service at retirement.*

Are there any problems with this wording?

At least from COL Roberts' point of view, the answer is yes. The clause fails to take into account the marital fraction. Defined by state law, this is usually the number of years of marital pension service divided by the years of total pension service.[xix] This fraction reflects the fact that COL Roberts will probably continue on active duty and acquire additional retired pay due to those years. These are not "marital years"—they are years after the separation or divorce. There also may be years of military service before COL Roberts married, and these non-marital years must also be taken into account.

The way to do this is with the marital fraction. In reality, Mrs. Roberts is not entitled to half of the pension; she is only entitled to half of the marital share of the pension. The above clause gives Mrs. Roberts too great a share.

How to Save a "Full Bird" $300,000

Assume, however, that the drafting lawyer is aware of the above issue and proceeds to include reference to the marital fraction in the clause, which now reads as follows:

> *Husband shall pay to wife fifty percent (50%) of his disposable retired pay times 20 divided by his total years of military pension service.*

While this may be an improvement for COL Roberts over the first example, there is a way to further "improve" the clause (from COL Roberts' viewpoint). This is by "fixing" the benefit to be divided with Mrs. Roberts to that which exists, based on his grade and years of service, at the "valuation date."

Each state has a "valuation date." This is the date specified in state law for the classification of assets (as marital or community property or as separate property) and the determination of the fair market value of the property for purposes of division or allocation between the spouses. It may be the date of separation, date of divorce, date of irretrievable breakdown of the marriage, date of summons issuance, or some other date set by statute or by case law.

As explained above, in states where the *date of divorce* is the valuation date, nonmilitary spouses are limited to pension division based on the benefit accrued at that date, that is, the rank

and years of service of the service member at the date of divorce.[xx] They do not share in any increase in pension benefits due to further promotions or additional years of service. For example, in *Grier v. Grier*, the Texas Supreme Court held that the wife of a major who was on the promotion list for lieutenant colonel at the time of divorce could only share in the retired pay of a major.[xxi]

Drafting a pension division clause (as above) without reference to COL Roberts' grade and years of service at the valuation date will result in DFAS dividing his pension according to his grade and years of service at retirement. This is the approach used by the majority of the states, which employ the *date of retirement* method of deferred division of retirement benefits.

As a result of this drafting, all post-separation service and promotions will be "tacked on" to the marital estate for pension division purposes. This gives (in COL Roberts' view) his former wife a "free ride" on the rest of his career and future promotions. Even though Mrs. Roberts may be married to a colonel (pay grade 0-6) with 20 years of service at their date of separation, Bill Roberts may be a brigadier general (pay grade 0-7) with 30 years of service by the time he retires. At the time of his 0-7 retirement with 30 years of service, Mrs. Roberts (under the above clause) would then begin to receive her marital fractional share of his pay *at a higher grade* and with more creditable service than that which COL Roberts had attained when they separated or divorced.

In COL Roberts' view, the above wording would be acceptable only if he were to remain in the same pay grade that he held at the valuation date and retired in that pay grade with the same number of years of service. This is, of course, very unlikely. Once COL Roberts agrees to deferred division of the pension, he should direct his attorney to negotiate for division based on his rank and years of service at the valuation date contained in state law.

Fixing the grade and years of service is not the majority rule, as explained above. Most jurisdictions mandate the deferred division of pension benefits based on "a fixed percentage of the benefits actually received by the employee spouse at retirement" because under this method "the non-employee spouse is permitted to share in the increases in retirement benefits due to post-separation efforts *which were built on the foundation of marital effort*."[xxii] This has the effect of letting the wife of a colonel (at separation) share in the pension pay of a general (at retirement) because she helped him to attain the rank of colonel in the first place.

But even in those states this does not limit COL Roberts and his attorney in negotiations. When negotiating, almost anything is fair game. In this case, because Bill Roberts was a colonel with 20 years of active duty upon the parties' separation, he will want to negotiate with the other side to give Mrs. Roberts her share of his pay in the grade of colonel with 20 years of service, not a future grade with future years of service.

There is a substantial financial difference between these two approaches. The following example will illustrate just how large the gap can be.

Assume that the pay of a colonel (O-6) at 20 years of service is about $7,500 a month and that the pay of a brigadier general (O-7) at 30 years is about $9,400 a month. Also assume that, with 30 years of service, Bill Roberts will be 52 years of age at retirement, with a life expectancy of about 24 years. His pension, for this hypothetical situation, is calculated by multiplying 2.5% times his years of service times his base pay.

Assume that the monthly retired pay of a brigadier general with 30 years of service is $7,050, representing base pay of $9,400 per month X 30 years of service X 2.5%. When this sum is multiplied times 12 months, it gives a yearly retired salary of $84,600. One-third of this, or $28,200, is the wife's share of the pension, assuming the parties were married 20 of the 30 years of the pension service. The wife's portion is then multiplied by 24 years, the remaining statistical life expectancy of Bill Roberts. The result is *$676,800*, which represents the sum of the payments to Mrs. Roberts over the course of Bill Roberts' life expectancy (assuming he retires as a brigadier general).

For COL Roberts, the more favorable calculations (based on 0-6 pay for 20 years of service at date of separation) are: $7,500 X 20 years X 2.5% = $3,750 per month pension. One-third of this, or $1,250 a month, is the wife's share, and the total amount of payments to her would be $1,250/mo. X 12 mo. X 24 years = *$360,000.*

The difference between these two values, $676,800 and $360,000 is *$316,800*. If the pension division clause were drawn as shown in the sample clause above, it would cost Bill Roberts an additional *$316,800* over his retired lifetime in payments to Mrs. Roberts. This is over and above what she was entitled to receive as her share of the marital part of the military pension of a *colonel* with *twenty* years of service.

What is the better wording for COL Roberts? Assuming that state law allows for the fixing of grade and years of service at a specified date or that the other side (regardless of state law) will agree to this division, the proper wording for COL Roberts might be as follows:

> *Husband shall pay to Wife fifty percent (50%) of the disposable retired pay of a colonel (O-6) with twenty (20) years of service, times 20 years of marital pension service, divided by his total years of military pension service.*

Needless to say, it is not often that one can save a full colonel over $300,000 with a single stroke of the pen.

Dividing Disposable Retired Pay

What is it that the courts divide -- gross pay or net pay? USFSPA specifies that the court can only divide *disposable retired pay*.[xxiii] The U.S. Supreme Court upheld this requirement in the *Mansell* decision. According to 10 U.S.C. § 1408(a)(4), "disposable retired pay" means gross retired pay minus:

- recoupments or repayments to the federal government, such as for overpayment of retired pay;
- deductions from retired pay for court-martial fines or forfeitures;
- disability pay benefits; and
- Survivor Benefit Plan premiums.

Note that disability benefits are deducted from gross pay in order to arrive at "disposable retired pay." Thus a retired SM can waive receipt of retired pay to receive an equivalent amount of VA disability benefits, and these latter benefits will be received tax-free. This tactic can be used by a military member to reduce the portion of retired pay that is divisible. And there's no way to stop a SM from taking disability pay! This topic is covered more fully above.

Reserve and National Guard Pension Rights

There are *two key considerations* in dividing Guards/Reserve retirement rights. First, since Guard and Reserve personnel do not begin to get paid until age 60 (regardless of when they retire), this deferral of payment must be taken into account in the negotiations and the present value calculations. Second, the pension must be calculated by using years and then again using retirement points. A full explanation is found in the SILENT PARTNER, *Military Pension Division: The Spouse's Strategy*.

Survivor Benefit Plan.

After the battle comes caring for the survivors. The equivalent of this in the area of military pension division is deciding what to do about the death of the SM and its impact on the

surviving spouse. Since the military pension ends when the SM dies, the Survivor Benefit Plan is the usual issue at stake here. This is a way to continue monthly payments to the former spouse who survives.

What is the Survivor Benefit Plan? It is a survivor annuity that pays a specified beneficiary 55% of the selected base amount (up to age 62) when the SM dies first. This topic is covered in detail in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*.

The best SBP option for the SM is, of course, *silence*. If no one says anything about SBP, then COL Roberts won't have to elect coverage, which will save him money and also retain the option for a remarriage and a new wife, if that's in his future. SBP cannot be divided between current and former spouses.

Life Insurance. If there is a discussion about SBP, then his attorney would want to deflect the conversation into *death benefits in general*, of which life insurance is the most obvious choice. Life insurance for Mrs. Roberts would probably be cheaper than SBP (spouse or former spouse coverage costs 6.5% of the selected base amount), and it has the advantage of paying Mrs. Roberts in a lump-sum cash amount at his death, rather than doling out monthly payments to her. If there's a dispute, offer to split the cost with Mrs. Roberts – each will pay half the life insurance premium. Even better, include the premium as alimony which COL Roberts pays; that way, the premium will be deductible for him at tax time each year.

Lower Base Amount. When you can't dissuade the other side from SBP, then try to let COL Roberts select a base amount that's lower than his retired pay – say 20% or 30% of it – when he's not been married to Mrs. Roberts the entire term of his service. After all, it might not make sense to him that she should get 55% of his full retired pay when he dies if she was only married to him 10 of the 20 years he served; under these circumstances, she should only get half of 50% of his retired pay during her life (or 25%), and she should get the same amount at his death, not 55%. The death benefit should mirror the life benefit, in other words. Reduce the base amount selected so that her SBP benefit reflects the same percentage as her share of the military pension.[xxiv] You'll also be saving COL Roberts money because the premium will be lower.

Who Pays the Premium? Often the SM says, "Why doesn't my wife have to pay for SBP? After all, she wants it! I'll be dead and gone by the time she gets it. She should have to pay the premium." Unfortunately for the SM, it doesn't work that way with DFAS. You can send them as many orders as you want – signed by judges, certified by clerks and approved by the highest court you can find – and they'll still pay no attention if you try to shift the premium payment to Mrs. Roberts by telling DFAS to take the premium out of her share. They just won't do it since the SBP premium, according to USFSPA, comes off the top before determining disposable retired pay. This results in the parties both paying the SBP premium in the same ratio as the pension is divided.

But you can accomplish the same thing by adjusting the percentage that Mrs. Roberts receives. Here's what to do—

- Figure out what dollar amount Mrs. Roberts would get each month as pension division, multiplying her spousal percentage times the gross retired pay of the member.
- Then figure out how much in dollars the SBP premium would be (for spouse or former spouse coverage, use 6.5% of COL Roberts' selected base amount).
- Then subtract this from Mrs. Roberts' dollar amount (or anticipated dollar amount). This yields her spousal share less the SBP premium.
- Next divide this figure by the disposable retired pay (gross pay less SBP premium) of COL Roberts and multiply it by 100.

The result is the percentage of his retired pay that she would get with *her* paying for SBP. You've effectively shifted the premium payment to her by reducing the percentage of COL Roberts' retired pay that she receives. Note that these calculations assume NO disability pay waiver or other debits from gross pay (such as court-martial fines or forfeitures, money owed to the federal government) which are subtracted from gross retired pay to arrive at disposable retired pay.

Early Out Options.

If your client has taken early retirement through VSI (Voluntary Separation Incentive), SSB (Special Separation Bonus) or a similar program, you should argue that this is not divisible as marital property under the *McCarty* decision. The analysis is set out (along with counter-arguments) in the SILENT PARTNER, "Military Pension Division: Scouting the Terrain."

Even if this argument is not successful, remind opposing counsel that, in any event, DFAS will not garnish VSI or SSB under 10 U.S.C. § 1408(d) pursuant to court orders for property division. Only military retirement pay can be garnished under this statute. Use this argument to attempt to get concessions.

A separate, but related, question is whether the benefit is separate or marital property. If the courts decide in favor of divisibility, how will they treat the property?[xxv] Some courts have held that severance pay is not marital property since it takes the place of *future* compensation, rather than being payment for *past* services (like retirement pay and other deferred compensation benefits).[xxvi]

If, on the other hand, they are seen as an economic benefit earned during the marriage and attributable to marital work, efforts and labor, they may be seen as damages for an economic loss to the marriage. This is called the "analytic approach" and is most often applied in the personal injury area.[xxvii] In an Arkansas case involving severance pay, the wife was granted one-half of the husband's lump-sum payment because the judge determined that the benefit was earned by *service during the marriage*.[xxviii] Finally, even if the payment is marital property and therefore divisible, one would need to apply the marital fraction (years of marital service over total years of service) to the lump-sum payment to arrive at the portion that is marital. This is necessary to reflect fairly the part of the pension earned during the marriage.

***

ENDNOTES

[1] *Fern v. United States*, 908 F.2d 955 (Fed. Cir. 1990).
[2] *McCarty v. McCarty*, 453 U.S. 210 (1981).
[3.] 10 U.S.C. (c) (1).
[4] Turner, EQUITABLE DISTRIBUTION OF PROPERTY (McGraw Hill), §6.09, p. 454 (2003 Supp.)
[5] *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000); s*ee also Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1991).
[6] *Dowden v. Allman*, 696 N.E.2d 456 (Ind. Ct. App. 1998); *see also Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990) and Indiana Code §31-15-7-4.
[7] *McClure v. McClure*, 98 Ohio App. 3d 27, 647 N.E.2d 832 (1994).
[8] *Lemon v. Lemon*, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988).
[9] *Siler v. Siler*, 1994 WL 386106 (Ohio App. 1994).
[10] Ohio Rev. Code Ann. §3105.171(a)(3)(A)(1) (Supp. 1992).
[11] Turner, *Id.* §6.09, n. 207, p. 333 (2d ed., 1994).
[12] Ala. Code § 30-2-51
[13] *Delucca v. Colon*, 119 P.R. Dec. 720 (1987).
[14] This can be found at the Army JAG School's website, www.jagcnet.army.mil/tjagsa. Click on "Other

Publications," scroll down the menu to "Legal Assistance", then look for JA 274, which is in Adobe Acrobat format.

[15] *Mansell v. Mansell*, 490 U.S. 581 (1989).

[xvi] *Id.*

[xvii] *See, e.g.*, *Atkinson v. Chandler*, 130 N.C. App. 561, 504 S.E.2d 94 (1998).

[xviii] Dep't of Defense, Financial Management Reg. vol. 7B, chap. 29, Former Spouse Payments from Retired Pay (Sep. 1999), *available at* http://www.dod.mil/comptroller/fmr/07b/07b29.pdf.

[xix] In a minority of states, this is years of military pension service until separation (or divorce) divided by that pension service till that date. In these states, the marital fraction is multiplied by the pension benefit earned as of separation or divorce.

[xx] *See, e.g.*, *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983) (holding that, in Texas, the valuation and apportionment of retirement benefits in divorce is to be based on the value of the community's interest at the time of divorce)

[xxi] *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987)

[xxii] *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504, 508 (1986), *aff'd on other grounds*, 319 N.C. 367, 354 S.E.2d 506 (1987)(emphasis added); *see also In re the Marriage of Hunt and Raimer*, 909 P.2d 525 (Colo. 1995).

[xxiii] 10 U.S.C. § 1408 (c) (1).

[xxiv] For example, assume that the SM's retired pay is $1,000 a month, and that he was married 10 of his 20 years of military service. The pension benefit (during the SM's life) for the former spouse would usually be 50% X 10/20 X $1000, or $250. To make the SBP death benefit the same, divide $250 by .55 to get the proposed base amount, which is $454.

[xxv] *See, e.g.*, *Boger v. Boger*, 103 N.C. App 340, 405 S.E.2d 591 (1991).

[xxvi] *See, e.g.*, *In re Marriage of De Shurley*, 255 Cal. Rptr. 150, 207 Cal. App. 3d 992 (1989) and *In re Marriage of Lawson*, 256 Cal. Rptr. 283, 208 Cal. App. 3d 446 (1989).

[xxvii] *See, e.g.*, *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).

[xxviii.] *Dillard v. Dillard*, 772 S.W.2d 355 (Ark. Ct. App. 1989). *See also Chotiner v. Chotiner*, 829 P.2d 829 (Alaska 1992).

* * *

SILENT PARTNER is prepared by COL Mark E. Sullivan (USAR, Ret.). For revisions, comments or corrections, contact him at 600 Wade Avenue, Raleigh, N.C. 27605 [919-832-8507]; E-mail – LAW8507@aol.com.

SECTION OF FAMILY LAW
ABA KNOWLEDGE EXPERTISE NETWORKING
SERVING AS THE NATIONAL LEADER IN THE FIELD OF MARITAL AND FAMILY LAW

SILENT PARTNER

MILITARY PENSION DIVISION: THE SPOUSE'S STRATEGY

INTRODUCTION: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

Overview of the *Military Pension Division* Series

There are five SILENT PARTNERs in this series.

- *Military Pension Division: Scouting the Terrain* is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses' Protection Act), what the Act does (and doesn't do), and how the question of "federal jurisdiction" is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember's Strategy* contains information on how to assist the servicemember (hereafter "SM") in this area, and
- *Military Pension Division: The Spouse's Strategy* covers how to help the SM's spouse.
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS.* It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- Retrieving an apparently "lost" pension benefit for the spouse/former spouse is covered in *"Lost" Military Pensions: The Ten Commandments.*

Introduction

The battlefield in military divorces is often military pension division. It is essential to learn and understand the unique set of rules in military pension division. The basic issues for the military spouse (usually the wife) in the divorce battlefield are the first topics covered below. An overview of the battlefield is contained in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*, and the topics below expand that advice to help protect the spouse and ensure that she receives her benefits from her marriage to the servicemember (SM). It is essential for the spouse and her counsel to understand the law, to know the rules and to be alert for minefields.

It is also essential to keep records to help the spouse make the case. This includes records of taxes (state income taxes, personal and real property taxes), voting registration, home ownership, copies of the SM's Leave and Earnings Statements, bank records and motor vehicle documents. These can help with the first part of the battle, which is the issue of domicile and residency.

Remember to help the client with costs, time and research. A fully contested equitable distribution trial or pension division trial can be costly indeed. Few clients have the will or the pocketbook for diehard resistance. Fortunately for the spouse, not many servicemembers or retirees want to risk battles over visitation, child support, alimony and other matters in a case that could be settled, just

to engage in "nuclear warfare" regarding the pension. All states allow military pension division. As will be outlined below, only a few bar the division of pensions that are not vested. The job of a good lawyer is to guide the client with sage advice and serious judgment. Advice and guidance for the "big picture" along these lines is essential for those who are truly serious about helping these clients.

Roadblocks and Minefields

Our client in this example is Mrs. Roberts, the wife of Army Colonel Bill Roberts. He's been in the Army 20 years and now they're going through a divorce. Mrs. Roberts wants her share of the military pension. Here are the arguments he'll probably use, and her responses:

Constitutionality. If COL Roberts says, "They can't do that -- it's unconstitutional," don't worry. The constitutional attack on pension division will fail. This issue has been rejected in all state courts that have considered it. The same argument was also rejected by the Court of Appeals for the Federal Circuit in 1990 in *Fern v. United States*.[1]

Retroactivity. In general, the claim for military pension division must be made at a time when *both federal and state statutes* allow for such division. Thus the first real inquiry is to decide whether Mrs. Roberts is *too late* to claim pension division. This would be the case if her divorce decree or equitable distribution judgment (without military pension division) was filed on or before June 25, 1981 or before the equivalent implementing legislation at the state level (if it was filed after this date). If she's asking *now* for the pension, rather than trying to amend a prior decree, she should prevail on this issue.

Timeliness. The next point of analysis for COL Roberts' case is whether the claim was filed *procedurally in a timely manner*. This is a very technical question of state law. Some states limit the filing of equitable distribution claims to the period up to the granting of a divorce or dissolution; if you wait till after that, you're "too late." Others require the filing to occur after the separation of the parties and before the divorce or dissolution occurs; you can't just file suit for property division while you're still living together. Under North Carolina law, for example, the rights of the spouses to marital property division vest at the time of the parties' separation; the right to equitable distribution does not exist if the claim for it is filed before the separation. In addition, the right to equitable distribution must be asserted before the final divorce judgment; a divorce judgment destroys the right to equitable distribution unless that right is asserted prior to the granting of a judgment of divorce. Be watchful for such limitations in the state where Mrs. Roberts files suit (or responds to the suit filed by COL Roberts). This defense involves complex procedural research that is best left to the expert; it is wise to consult a good family law attorney or refer this kind of case to a family law specialist.

Waiver. Be sure that Mrs. Roberts hasn't waived her rights. Did she sign a separation agreement or property settlement agreement? An antenuptial agreement can also waive property division rights. In some jurisdictions, such an agreement does not have to define specifically the property that is involved or that is exempted from division. Even if there is no mention of the pension, a general clause in the agreement which waives the marital rights of the parties can be construed as barring a claim for equitable distribution.

Nonvested Pension Benefit. There are only a few jurisdictions which provide that, by law, a military pension may not be divided. These fall into the following categories: states where there is a "vesting requirement," one state where ten years of marital military service is required (Alabama) and one jurisdiction (Puerto Rico) which bars division of any noncontributory retirement pay.

A pension is vested when the employee is entitled to receive something upon termination of employment, whether that is in the form of a return of contributions or an early (and reduced) retirement

benefit.[2] A SM with 11 years of service, for example, would not have a vested pension because there is no right to retire after 11 years'service. A member with 25 years of service, on the other hand, would clearly have vested retirement rights.

There are two states, Indiana and Arkansas, which limit court jurisdiction over pension division to those pensions which are "vested." Arkansas held in *Holaway v. Holaway*[3] that an unvested pension is non-divisible and thus the separate property of the party who earned it. In Indiana the right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share, and the burden is on the non-employee spouse to prove that the pension is vested.[4]

The law on the issue of division of unvested pension benefits is confused in Ohio and Michigan. In Ohio, the law appears to be that unvested benefits are not divisible by the courts,[5] even though the leading case holding this, *Lemon v. Lemon*,[6] has been overruled in an unreported case.[7] By statute, Ohio considers all retirement benefits to be marital property.[8] In Michigan, pensions are considered divisible marital property only if they have an ascertainable present value, and ordinarily only vested pensions are deemed to have such a present value, leading to the conclusion that unvested pensions are not divisible by the courts.

Alabama law provides a unique limitation on pension division jurisdiction. The law specifically states that retirement benefits are not divisible as marital property unless the employee or "owning spouse" has ten years of pension service during the marriage.[9]

Finally, Puerto Rico refuses to allow the division of noncontributory pensions at all. Puerto Rico treats these pension rights as separate property.[10] The military pension is noncontributory, and so it would not be divisible there. The Thrift Savings Plan, however, is divisible in Puerto Rico because it is based on marital contributions.

There may be several states which could divide COL Roberts' military pension. To minimize his exposure, COL Roberts will want to "shop around" for a jurisdiction that will either limit pension division (as with a vesting requirement), bar pension division entirely (Puerto Rico) or will otherwise allow military pension division on the best terms for him. COL Roberts can employ these divisibility provisions to his advantage in the pension division litigation. If he is stationed in Indiana, for example, he might decide to become domiciled there and then file for divorce in that jurisdiction so as to exclude his pension benefit from division. In like manner, Mrs. Roberts and her attorney will want to examine each state or territory which may have jurisdiction where she may file for division of COL Robert's pension to see whether the laws there allow such division. It is impossible for any individual attorney to know each of these state rules. To find out which states have vesting requirements, examine the Army JAG School's guide to the Uniformed Services Former Spouses' Protection Act, publication JA 274, which contains a "State-by-State Analysis of Divisibility," at Appendix B.[11] The importance of this point for Mrs. Roberts' attorney is that it is vital to *shop around* for the jurisdiction that will allow military pension division on the best terms for Mrs. Roberts. For COL Roberts, the opposite approach would apply; he needs to find a jurisdiction which can hear his case but will deny the division of his pension. How to go about this forum-shopping, which is implicitly allowed by the triple jurisdictional approach of 10 U.S.C. 1408(c)(4), is found below.

Federal Jurisdiction.

If a state does not have jurisdiction *under federal law*, then that state may not divide COL Roberts' pension, regardless of his wife's wishes. As set out in the USFSPA, 10 U.S.C. 1408 (c)(4), a state may only exercise jurisdiction over a military member's pension rights if -

- That state is his or her domicile; or
- The member consents to the exercise of jurisdiction; or
- The member resides there (for reasons other than military assignment in that state or territory).

These statutory provisions override the more traditional long-arm statutes which allow the exercise of jurisdiction consistent with due process if there are sufficient minimum contacts with a state. These are explained in detail in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*.

How can Mrs. Roberts use these to her advantage? Here are the key points for the nonmilitary spouse's attorney to remember in the jurisdiction arena:

Find the Right Place to File Suit. If COL Roberts is domiciled in Alaska, then sue him there. Bringing the suit in Virginia, where Mrs. Roberts is now residing, ensures that there will be a jurisdictional battle unless COL Roberts' attorney is asleep at the wheel or else COL Roberts doesn't care.

Consider the "Vesting" Issue. If vesting of the pension (or some other limitation on pension division) is required in the *state of suit*, and also in the *state of domicile*, then it probably would not make any difference where he's sued. Likewise if neither her state nor his domicile state has a pension division limitation, it probably won't make any difference. But if COL Roberts is domiciled in a state or territory which has a limitation on pension division (such as "vesting"), then the choice of a forum for the lawsuit could be critical if he is not vested in his pension (usually 18 or 20 years of service, depending on state law). Don't sue him in a jurisdiction that has a limitation on pension division, such as vesting, if he isn't vested. Find a way to sue him in a state that has no such pension division limitation. Here's how:

- Just because domicile is required for one of the tests above doesn't mean that you cannot sue COL Roberts in another place and acquire jurisdiction *if he consents*. So you will need to find a jurisdiction where you can sue him that doesn't have a pension division limitation. If he's domiciled in such a limiting state, consider suing him where Mrs. Roberts lives (which, hopefully, is not such a jurisdiction). If she's in such a state, consider suing him in his domicile (hopefully not a state that limits pension division).
- What is the next step? Because of the complexity of this area, get on the phone to associate competent co-counsel right away. You'll need a good attorney to go to court for Mrs. Roberts who knows military pension issues and also jurisdiction. In other words, a good military divorce attorney who's also knowledgeable on civil procedure issues.
- One issue to discuss is how to get COL Roberts to file an answer or some other pleading that will be treated as a general appearance and will result in the court's having jurisdiction over him. Consider suing first for custody and alimony, for example, to ensure that he "joins in the fight." By filing motions or responsive pleadings, he'll be calling upon the power of the court to adjudicate his case, which may (under the law of that jurisdiction) amount to *consent to jurisdiction*. Then Mrs. Roberts can amend her pleadings to add a claim for pension division (if that's necessary under the state statutes). The issue of general appearances and specific consent is covered in more depth in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain.*
- COL Roberts may make an request for a stay of proceedings under the Servicemember's Civil Relief Act (SCRA) while he's deployed in Southwest Asia or undergoing training "out in the field." This *would not* subject him to the court's jurisdiction since the SCRA specifically states that a motion for a stay does not waive any defense of the servicemember, including jurisdiction.
- Even if the pension has been defined as non-divisible because it's not vested, (or for some other reason), don't give up. The courts may decide that, because such a large asset is not divisible as marital or community property, the rest of the property should be divided unequally in favor of Mrs. Roberts in order to compensate for this inequity.[12]

Bluff. Be aware that it may be COL Roberts' strategy to make sure that his wife has to expend the maximum amount of money to get a piece of his pension. He may want to ensure a fight in two states – the *state of suit* and the *state of his domicile* -- to try to get her to back down. Or perhaps he's sure that she won't spend the time or money to try to get counsel in State #2 to ask for a piece of the pension. If this is the case, then her attorney may have to do some hard bargaining to adjust the property division in

light of his pension not being divided. As counsel for Mrs. Roberts, you would certainly want substantial concessions on other property or alimony issues in exchange for not pursuing the military pension.

The Danger of a Default Judgment. When there is a lawsuit pending for pension division and the SM has not filed an answer, be aware of one important matter regarding entry of a pension division order. Don't be tempted to get a default judgment for pension division when you're not clearly in the state of domicile of COL Roberts. If you do get one, here's what may happen:

- You probably don't have jurisdiction in State #1 (which is not his domicile) over the pension because you do not have his consent. Unless the SM consents to the court's jurisdiction, which does not occur in a default divorce and property division, the judge does not have the power to divide the military pension. The only (rare) exception to this is where the court is in a state where the member resides for reasons other than military assignment.
- DFAS will examine your "perfectly good" military pension division order and then reject it for lack of jurisdiction.
- This will probably make your client very unhappy -- in terms of lost time, lost payments of pension, and wasted attorney's fees.
- You will then probably try to sue COL Roberts in another jurisdiction, State #2, since you can't "fix" this order.
- And this will likely be his state of domicile.
- But you'll have to hire an attorney there and Mrs. Roberts will wind up paying a *second* retainer to a lawyer in order to "do it right" this time (or *you* may wind up paying the retainer if she starts talking about malpractice or a bar grievance).
- And after you've engaged the attorney, you may find out that you *cannot* get pension division there. The opposing attorney will invariably argue that Mrs. Roberts went to court in State #1 where she got the court to assert jurisdiction over the pension and to divide it.
- And therefore State #2 cannot do it over again. Exclusive jurisdiction was acquired earlier by State #1. A second state cannot also assert jurisdiction over the division of the pension after the first state has already divided it. Opposing counsel will probably succeed in her motion to dismiss, and your client will have *lost* any rights to military pension division.

Type of Pension

The pension rights contemplated by USFSPA involve nondisability "longevity retirement" under 10 U.S.C. 1401-12, not retirement for disability under 10 U.S.C. 1201-21. In *Mansell v. Mansell*[13] the U.S. Supreme Court in 1989 held that a pension, to the extent it is based on disability retirement, is not divisible under USFSPA, and that the states may only divide "disposable retired pay" as that term is defined in USFSPA. This means that COL Roberts, by electing disability pay instead of retired pay, may defeat Mrs. Roberts' claim to his pension benefits. A short summary of the system is found in the SILENT PARTNER*, Military Pension Division: The Servicemember's Strategy*.

This means that COL Roberts can, by his own actions, reduce his disposable retired pay by electing VA disability benefits if he is rated as disabled. For Mrs. Roberts' lawyer, it should be noted that the careful drafting of a marital settlement agreement is the key to indemnifying the nonmilitary spouse when this situation might occur in the future. For a good example of this, see *Owen v. Owen*, a Virginia Court of Appeals case.[14] In that case a settlement agreement provided for a guarantee/indemnification clause which required the retiree to pay the same amount of support to the spouse as was waived by the federal statute due to the retiree's receipt of VA disability pay. This was held not to violate the mandate of the *Mansell* case. Such a clause might state:

> *If the husband takes any action (such as accepting disability pay) that reduces the pay the wife receives, then he shall pay her directly the amount by which her share is reduced. In*

addition, he hereby consents to the deduction of this amount from any periodic payments he receives (such as wages) to allow this payment to wife, and this clause may be used to show said consent when this is necessary for the entry of a garnishment, wage assignment or income withholding order.

To further protect the nonmilitary spouse, it is advisable to include in the agreement, order or judgment a provision that the division of the military retirement is based on *no waivers* for disability pay and consents to the continuing jurisdiction of the court on the issue of property division (in the event that the military member still elects to apply for a waiver). These are especially important ways to insulate the spouse from conduct of the member which defeats the purpose of the award by reducing the amount of disposable retired pay that is subject to division and direct payment through DFAS.[15]

Roadblocks and Minefields - Summary

The above discussion shows clearly the need for competent and creative lawyering. It is vital to ask questions -- lots of questions -- to make sure that the case for Mrs. Roberts is on a firm factual footing. Was there a prior separation agreement? Was there a previous divorce? Is COL Roberts' domicile elsewhere? Is it in Louisiana or Arkansas? Is his pension vested or not?

It is just as important to think before one acts. If there is a valid jurisdictional objection to a pension division claim filed against COL Roberts, why file the lawsuit? What will be gained? Can Mrs. Roberts draw him out so he'll have to file an answer, which will waive the jurisdictional objection? What if he files a motion to continue instead of an answer? What about a motion to dismiss? The answer to these questions lies in the law of the states involved.

Dividing the Military Pension – Crossing the Minefield

Overview. Once it is understood how to set up obstacles to pension division, the next step should be to understand how to overcome them and divide the pension once the court has acquired jurisdiction over it. There are generally two methods available for pension division.

The first is *deferred division*, often called "if, as and when" payments. This refers to sharing payments received by the retiree. This is the most common way of allocating the pension between the spouses. In the usual situation, a share of the husband's pension is paid to the wife. This can be done by DFAS if the marriage and the length of service overlap by at least 10 years; otherwise the payment must be made by the SM. Note that this "10-year rule" is not a federal rule of divisibility; as a matter of federal law it has nothing to do with the eligibility of Mrs. Roberts for pension division. It's only a method of enforcement. It determines how she gets paid – by DFAS, rather than by COL Roberts. And this can be very important if he's likely to move to another state (or country) after retirement.

The second method of division involves a *present value setoff*, in which property or money is traded against the present value of the pension. In this scenario, the house and other property go to Mrs. Roberts and the pension goes to COL Roberts (if they are approximately equal in value).

Both of these topics are covered in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain.*

Opening the Attack

When dividing the military pension on a *deferred division* basis, there are four separate ways to allocate the division that will be accepted by DFAS for direct payments to Mrs. Roberts. These are treated at length in the SILENT PARTNER, *Getting Military Pension Division Orders Honored by DFAS*. According to the regulations on military pension division, published in the Defense Department's Financial Management regulation (at www.dod.mil/comptroller/fmr/07b/07b29.pdf), these four methods are:

Fixed dollar amount. A fixed dollar clause could read: *Wife is awarded $550 per month, payable from Husband's disposable retired pay.*
Percentage clause. A percentage clause might state: *Wife is granted 50% of Husband's disposable retired pay.*
Formula clause. This is usually used when a SM is on active duty (or a Reservist is still drilling). It is an award expressed as a percentage of a fraction. The percentage is the share Mrs. Roberts gets of the marital portion of the pension. The fraction (in the majority of states) is the period of marital pension service over the total period of pension service. For example, the order could state: *Wife shall receive 50% of the Husband's disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband.* The court must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service.
Hypothetical clause. This is an award based on a rank or status which is different from that which exists when the SM retires. For example, the order might say: *Wife is granted 40% of what a major would earn if he were to retire with 18 years of military service.* This is often used when state law requires that the share of the pension awarded to the spouse be determined according to the grade and years of service of the member at a specific date (see below). A COLA (cost-of-living-adjustment) will automatically be awarded with each of these except the first.

Note that when a Guard or Reserve pension is involved, DFAS will not only honor orders specifying division according to retirement points earned during marriage divided by total points, but it will also honor a percentage award (such as "John will pay Mary 35% of his disposable Army Reserve retired pay"). It will also accept any decree in which all the variables are filled in by the court (such as "John will pay Mary 50% of his final retired pay times a fraction, the numerator of which is 240 months of marital pension service up to the parties' date of separation, and the denominator is 280 months of total creditable military service, both active duty and National Guard").

Fixed Rank Division

Sometimes the SM's attorney will try to structure a pension division that "fixes" the rank and years of service of COL Roberts at the date of divorce or separation. Let's see what the alternatives are. With a 20-year marriage during military service, the clause Mrs. Roberts would want usually looks like this (when COL Roberts is still on active duty):

> *Husband shall pay to wife, at such time as he retires, one-half of his disposable retired pay times a fraction, the numerator of which is 20 years of marital pension service and the denominator of which is his total years of military pension service.*

But the one proposed by the SM's attorney will probably look like this:

> *Husband shall pay to wife, at such time as he retires, one-half of the disposable retired pay of a colonel with 20 years of creditable service, times a fraction, the numerator of which is 20 years of marital pension service and the denominator of which is his total years of military pension service.*

Avoid a division of pension that excludes future promotions and years of service (while retaining a denominator of total years of service for the marital fraction) unless your state law demands it. Always argue that the division should include future promotions and years of service. Why shouldn't you accept such a clause? There are two reasons:

- First of all, the husband's post-divorce promotions and continued service are based on the foundation of marital efforts in most cases. In other words, COL Roberts might never have made it to the rank of brigadier general were it not for the marital efforts of Mrs. Roberts during those years when he was a captain, a major, a lieutenant colonel and a colonel.

- The second reason is that, while we have "frozen" the rank and years of service of COL Roberts (so that Mrs. Roberts is excluded from any portion of his pay if he gets promoted to general), we have not frozen the denominator in the marital fraction. Thus the bottom part of the fraction keeps on growing, but the grade and years of service of COL Roberts are frozen, and that's not fair. To be logical, consistent and fair about this, either the grade and years of service should go up with the total years of military service (which is the denominator in the marital fraction), or else the denominator should be frozen along with the grade and years of service. Don't mix apples and oranges!

Reserve and National Guard Pension Rights

There are *two key considerations* in dividing retirement rights for members of the Reserve or National Guard. First, since Guard and Reserve personnel do not begin to get paid until age 60 (regardless of when they retire), this deferral of payment must be taken into account in the negotiations and the present value calculations.

The second consideration concerns the marital fraction. In those cases where the marriage and the service career do not exactly overlap, the nonmilitary spouse usually receives one-half of the marital fraction times the SM's pension benefit. This marital fraction should be computed twice -- once using marital years of service over total years of service, and then again using marital retirement points over total retirement points -- to determine which computation will best benefit the client.

To see what a difference this might make, let's take an example. Major Bill Smith has five years of Army active duty and 15 years of Army Reserve service. He married when he left active duty.

When dealing with Reserve or National Guard issues, be sure to ask the SM for a copy of his most recent "points statement" to see how many points have been acquired and how many were during the marriage.[16] To calculate the marital fraction using points, calculate the points he acquired during active duty by multiplying 5 times 365 to get 1825 points. Then count his Reserve points. Assume that he acquired 60 points a year (for weekend drill, "summer camp" and membership) for 15 years, or 900 points. Thus his total points at 20 years are 2725 [1825 + 900], of which 900 (or about 33%) are marital. This should mean that *33%* of his retirement pay (assuming retirement and date of separation both occur at year 20) is marital.

If we apply the marital fraction *using years* to his retirement pay, however, then his pension is *75%* marital (15 years/20 years = 75%).

What a difference! Recognition of these two ways of calculating the marital benefit, and the difference when Major Smith's pension is calculated, is essential to competent representation in the Guard/Reserve pension case. Once again, the federal statutes do not tell us what to do, what fraction to use or what results to expect. This is state-law territory, not something set out in the USFSPA.[17]

Dividing Disposable Retired Pay

What is it that the courts divide? Is it gross pay or net pay of the servicemember? The federal statute specifies that the court can only divide *disposable retired pay*.[18] The U.S. Supreme Court upheld this requirement in the *Mansell* decision. According to 10 U.S.C. § 1408(a)(4), "disposable retired pay" means gross retired pay minus:

- Recoupments or repayments to the federal government, such as for overpayment of retired pay;
- Deductions from retired pay for court-martial fines or forfeitures;
- Disability pay benefits; and

- Survivor Benefit Plan premiums.

Please note that disability benefits are deducted from gross pay in order to arrive at "disposable retired pay." Thus a retired servicemember can waive receipt of retired pay to receive an equivalent amount of VA disability benefits, and these latter benefits will be received tax-free. This tactic can be used by a military member to reduce the portion of retired pay that is divisible. And there's no way to stop a member from taking disability pay! See the prior section on VA disability pay on drafting a clause that indemnifies the spouse if the soldier chooses this option. The SILENT PARTNER, *Military Pension Division*: *The Servicemember's Strategy*, contains a useful introduction to "concurrent receipt" of retired pay and disability benefits which is mandatory reading.

Another problem arises when a soldier leaves military service for a job with the federal government before he's eligible to retire. Few civilian lawyers (and even fewer spouses!) realize that a member can "roll over" his retirement into a federal civil service job and get a year-for-year credit on civil service retirement based on the time he spent in the military. Even fewer lawyers and spouses have the foresight to anticipate this situation will occur "a few years down the road" and possess a working knowledge of the statute allowing this credit. The way to handle the problem -- by anticipatory drafting -- is to include a clause that states:

> *If Defendant fails to retire from military service and elects to "roll over" or merge the time of his military service into federal government service in order to get credit for same, then the Plaintiff shall be entitled to her share of any federal retirement pay or annuity he receives based on the parties' period of marriage during Defendant's period of military service. Defendant shall notify Plaintiff immediately upon his termination of military service, through retirement or otherwise, and shall include in said notification a copy of his military discharge certificate, (DD Form 214), and, if applicable, his retirement orders and certificate. Defendant shall also notify Plaintiff immediately if he takes a job with the federal government, and will include in said notification a copy of his employment application and his employment address.*

Caring for the Survivors: Survivor Benefit Plan and Life Insurance

After the battle comes caring for the survivors. Its equivalent in the area of military pension division is deciding on a replacement for the SM's pension at his death.

The Survivor Benefit Plan is the usual issue at stake here. An overview of this survivor annuity is covered in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*. Also found there is a summary of the benefits and disadvantages of SBP coverage.

Especially when deferred division is used, the attorney for the spouse of the servicemember should insist on SBP coverage to allow continued receipt of retirement benefits if the spouse survives the member. This is a valuable tool in planning for continued income for the nonmilitary spouse.

The most likely strategy for the SM in this area is *silence*. If no one says anything about SBP, then COL Roberts won't have to elect coverage, which will save him money and also retain this option for a remarriage and a new wife, if that's in his future. Thus you'll need to *speak up* if you want to protect Mrs. Roberts in this area.

If there is a discussion about SBP, then the SM's attorney will want to deflect the conversation into *death benefits in general*, of which life insurance is the most obvious choice. Life insurance for Mrs. Roberts would probably be cheaper than SBP (which generally cost 6.5% of the base amount selected), and it has the advantage of paying Mrs. Roberts a lump-sum cash amount at his death, rather than doling out the monthly payments to her. If there's a dispute, they may offer to split the cost with Mrs. Roberts – each will pay half the premium. Even better for him, they may propose to include the premium in the amount of alimony, if any, that COL Roberts would pay Mrs. Roberts; that way, the premium will be deductible for him at tax time each year.

Often the SM says, "Why doesn't my wife have to pay for SBP? After all, she wants it! I'll be dead and gone by the time she gets it. She should have to pay the premium." Unfortunately for the SM, it doesn't work that way with DFAS. They won't shift the premium to Mrs. Roberts since the SBP premium, according to USFSPA, comes off the top before determining disposable retired pay. This results in the parties *both* paying the SBP premium in the same ratio as the pension is divided. But the parties can accomplish the same thing by adjusting the percentage that Mrs. Roberts receives. See the SILENT PARTNER, *Military Pension Division: The Servicemember's Strategy* for information on how to do this.

When the other side tries to avoid the issue or change the subject, here are some suggested responses:

- If you want SBP and do not have any interest in alternatives, then stick to that. Don't engage in discussions about life insurance.
- If you're interested in life insurance, make sure that you don't use Servicemembers Group Life Insurance (SGLI). According to a 1983 Supreme Court decision called *Ridgway v. Ridgway*,[19] you cannot enforce a court order or separation agreement that provides for SGLI to secure the payment of a divorce settlement.
- And if you're interested in life insurance, be sure to transfer ownership of the policy to your client. Such provisions for life insurance are commonly funded or secured by "owned" policies which belong to the premium payor and build up cash value or equity (*e.g.,* whole life, variable life or universal life policies), ones which belong to the payor but build up no cash value (term life insurance), and ones which have no equity/cash value and do not belong to the person who pays the premiums (group life policies).

Remember this when drafting a clause that attempts to ensure that the premium payor will not inadvertently (or intentionally) change the beneficiary to a new spouse, for example, in lieu of the beneficiary stated in the agreement. How will the other party ever know whether the intended beneficiary remains as such when the policy and all incidents of ownership remain elsewhere--with the payor or his employer? How can one prevent the payor from signing an agreement containing a life insurance clause and then immediately breaching it by designating a new beneficiary?

The answer is through ownership of the policy. Except in the case of group life insurance policies (including SGLI), most insurance companies allow a collateral assignment of ownership of the policy to a person other than the premium payor. The owner of the policy is the one who designates the current beneficiary and who must consent to any proposed change in beneficiary. The owner must be informed by the company of any attempts to cancel the policy, and must also be advised as to nonpayment of premiums that would have the effect of canceling coverage. Finally the owner is the only one who, with life insurance that has cash value, can borrow against the policy. Since these are the very things which ought to be withdrawn from the premium payor--the power to borrow against the policy, cancel it or change the beneficiary--it makes sense to agree on transfer of ownership of the insurance policy.

Ownership of the policies can revert back to the original owner after the support terms have been satisfied. A transfer of ownership has the effect of protecting each party, preserving their promises and putting temptation out of the way.

Extra Benefits for Consideration. You'll find overview coverage of early-out options (VSI/SSB), military medical benefits and dividing accrued leave in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*. Here are some specific tips you need to know about representing the military spouse in regard to additional benefits.

Accrued Leave. When it comes time to do the division and distribution of marital property, one often-overlooked asset is accrued leave for the military member. Each person in the military service on active duty accrues 30 days of paid leave each year, regardless of rank. This leave is worth what it's equivalent would be at the monthly pay rate of the servicemember, and this can be figured out by using the pay tables available at the nearest recruiter's office or at www.dfas.mil, the DFAS website. Thus if a servicemember is paid $4,400 gross pay per month and he has 45 days of accrued leave at the point of evaluation (e.g., date of separation, date of filing, date of marital breakdown.), his accrued leave would be worth about $6,600 [45/30 x $4,400]. Since senior enlisted members and officers frequently carry as much as 60 days of accrued leave from year to year, this is a significant asset to consider in the division of marital property.

Member's Medical Benefits. A separate issue that bears mentioning is the valuation of the member's medical benefits. If Colonel Roberts retires after 20 years of service, he will receive *free* medical care at any military medical facility on a space-available basis. He also receives military medical insurance, currently called TRICARE, for most medical expenses he incurs. All of this can be evaluated by an expert, and this value can be attributed to COL Roberts as part of the retirement benefits he receives.[20] So many attorneys are concerned solely with the evaluation of retired pay that they forget the valuation of *other retirement benefits* that should be included. Since this medical care for COL Roberts is part of his retirement benefits, so the argument goes, it should be included for valuation purposes, even if the statutory benefit cannot be transferred to Mrs. Roberts. Such an approach may yield a substantially better settlement for Mrs. Roberts than the valuation of only her husband's pension payments. It should also be pointed out that this valuation approach, of course, can also be applied to Mrs. Roberts' own marital medical benefits and entitlements; these can also be valued and added to *her* share of the marital property to the extent they were acquired during marriage.

Spouse's Medical Care. Pub. L. 98-525, the Department of Defense Authorization Act of 1985, expanded the medical (and other) privileges set out in Pub. L. 97-252 to extend certain rights and benefits to unremarried former spouses of military members.

If the former spouse was married to a member or former member for at least 20 years during which he performed at least 20 years of creditable service (also called "20/20/20" spouses, which refers to 20 years of service, 20 years of marriage, and 20 years of overlap), then she is entitled to full military medical care, including TRICARE, if she is not enrolled in an employer-sponsored health plan. She is also entitled to commissary and exchange privileges.[21]

If the former spouse was married to a member or former member for at least 20 years during which he performed at least 15 years of creditable service (also called "20/20/15" spouses, for 20 years of service, 20 years of marriage and 15 years of overlap), and the former spouse is not enrolled in an employer-sponsored health plan, then the length of time that she is entitled to full military medical care, including TRICARE, depends upon the date of the divorce, dissolution or annulment, as set out below. No other benefits or privileges are available for her.

If the date of the final decree of divorce, dissolution or annulment of marriage was before April 1, 1985, then the former spouse is authorized full military medical care for life, so long as she does not remarry. If the decree date is on or after April 1, 1985, then she is entitled to full military medical care, including TRICARE, for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, she may purchase a conversion health policy[22] under the DOD Continued Health Care Benefit Program (CHCBP), a health insurance plan negotiated between the Secretary of Defense and a private insurer, within the 60-day period beginning on the later of the date that she ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe.

Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(2)(H) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.[23] Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is not part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse who qualifies for any of these benefits may apply for an ID card at any military ID card facility. She must complete DD Form 1172, "Application for Uniformed Services Identification and Privilege Card." The former spouse should be sure to take along a current and valid picture ID card (such as a driver's license), a copy of the marriage certificate, the court decree, a statement of the member's service (if available) and a statement that he or she has not remarried and is not participating in an employer-sponsored health care plan.

It is important to remember that *these are statutory entitlements*; they belong to the nonmilitary spouse if she or he meets the requirements of federal law set out herein. They are not terms that may be given or withheld by the military member, and thus they should not be part of the "give and take" of pension and property negotiations since the military member has no control over these spousal benefits.

* * *

ENDNOTES

[1] *Fern v. United States,* 908 F.2d 955 (Fed. Cir. 1990).
[2] Turner, EQUITABLE DISTRIBUTION OF PROPERTY (McGraw Hill), §6.09, p. 340 (2001 Supp.).
[3] *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000); s*ee also Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1991).
[4] *Dowden v. Allman*, 696 N.E.2d 456 (Ind. Ct. App. 1998); *see also Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990) and Indiana Code §31-15-7-4.
[5] *McClure v. McClure*, 98 Ohio App. 3d 27, 647 N.E.2d 832 (1994).
[6] *Lemon v. Lemon*, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988).
[7] *Siler v. Siler*, 1994 WL 386106 (Ohio App. 1994).
[8] Ohio Rev. Code Ann. §3105.171(a)(3)(A)(1) (Supp. 1992).
[9] Ala. Code § 30-2-51.
[10] *See Delucca v. Colon*, 119 P.R. Dec. 720 (1987).
[11] This can be found at the Army JAG School's website, www.jagcnet.army.mil/tjagsa. Click on Other Publications, then scroll down the menu to Legal Assistance, then look for JA 274, which is in Adobe Acrobat format.
[12] *See, e.g., Atkinson v. Chandler,* 130 N.C. App. 561, 504 S.E.2d 94 (1998) (affirming judge's award of larger share of marital estate to wife of servicemember's whose pension was exempt from division because it was not vested, which was a requirement for pension division in North Carolina until October 1, 1997).
[13] *Mansell v. Mansell*, 490 U.S. 581 (1989).
[14] *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).
[15] For cases allowing the reopening of a property division judgment based on a retired member's waiver of retired pay in order to receive VA disability benefits, see *Torwich v. Torwich*, 660 A.2d 1214 (N.J. Super. 1995); *Clausen v. Clausen*, 831 P.2d 1257 (Alaska 1992); and *McMahan v. McMahan*, 567 So.2d 976 (Fla.Dist.Ct.App. 1990).
[16.] The document to request in Army Reserve cases is DARP Form 249. For National Guard cases, ask for NGB Form 23. The Navy Reserve form is NRPCC Form 1070-124; and the Air Force Reserve form is AF Form 526.
[17.] For cases holding that classification of the marital part of a Reserve pension could be based on "marital points" divided by "total points," *see In re Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979) and *In re Beckman*, 800 P.2d 1376 (Colo. Ct. App. 1990). Some states, on the other hand, require calculation of the marital fraction based on time, not "points" or some other factor. *See, e.g.*, N.C. Gen. Stat. 50-20(b), which states, "The award shall be determined

using the proportion of time the marriage existed, (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment."

[18.] 10 U.S.C. § 1408 (c) (1).

[24.] *Ridgway v. Ridgway*, 454 U.S. 46, 102 S. Ct. 49, 70 L.Ed. 2d 39 (1987).

[20.] *See* W. Horbatt and A. Grosman, *Division of Retiree Health Benefits on Divorce: The New Equitable Distribution Frontier*, 28 FAM.L.Q. 327 (Summer 1994).

[21.] 10 U.S.C. § 1062.

[22.] 10 U.S.C. § 1086 (a).

[23.] 10 U.S.C. § 1078 a (g) (1) (C).

*** * ***

SILENT PARTNER SILENT PARTNER is a product of the Military Committee, Section of Family Law, American Bar Association and is prepared by COL Mark E. Sullivan (USAR, Ret.). For revisions, comments or corrections, contact him at 600 Wade Avenue, Raleigh, N.C. 27605 [919-832-8507]; E-mail – LAW8507@aol.com.

SECTION OF FAMILY LAW
ABA KNOWLEDGE EXPERTISE NETWORKING
SERVING AS THE NATIONAL LEADER IN THE FIELD OF MARITAL AND FAMILY LAW

SILENT PARTNER

MILITARY PENSION DIVISION: SCOUTING THE TERRAIN

INTRODUCTION: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

Overview of the *Military Pension Division* Series

There are five SILENT PARTNERs in this series.

- *Military Pension Division: Scouting the Terrain* is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses' Protection Act), what the Act does (and doesn't do), and how the question of "federal jurisdiction" is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember's Strategy* contains information on how to assist the servicemember (hereafter "SM") in this area, and
- *Military Pension Division: The Spouse's Strategy* covers how to help the SM's spouse.
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS.* It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- Retrieving an apparently "lost" pension benefit for the spouse/former spouse is covered in *"Lost" Military Pensions: The Ten Commandments.*

The Uniformed Services Former Spouses' Protection Act (USFSPA)

Knowing the terrain is an essential part of military intelligence. This is equally true in the field of military pension division. The basic statute covering military pension division is the Uniformed Services Former Spouses' Protection Act.[1] USFSPA was passed by Congress in 1982 to make military pensions subject to division by state courts in divorce and property division proceedings. Before the statute was passed, the states had a different approaches to the treatment of military pensions, with some considering them as divisible community (or marital) property and others refusing to recognize them or considering them as mere expectancies rather than vested benefits. The federal act was passed in the wake of *McCarty v. McCarty*,[2] in which the U.S. Supreme Court held that state property division laws were preempted by federal law regarding the military retirement scheme, and that Congress could decide to change this by appropriate legislation.

What did USFSPA do? It stated that:

1. Military pension division is neither mandated nor automatic. It is up to the states to decide whether military retirement is marital or community property that is divisible upon divorce or whether it is solely the property of the SM. [All of the states now allow the division of military pensions as marital/community property]

2. It limited pension division jurisdiction to a state where the SM was domiciled, had consented to jurisdiction, or resided *not due to military assignment*. [These are the "federal jurisdiction" rules]
3. Although a state court can subject military retirement rights to division in equitable distribution proceedings, it cannot force a SM to retire. [But it can order him/her to start paying a share of the pension to the spouse before retirement!]
4. State courts can order the direct pay of pension division awards (where there is ten years' overlap between the marriage and creditable military service) through DFAS.
5. Such direct payments may not exceed 50% of the SM's disposable retired pay (in most cases).
6. And, finally, these direct payments cease upon the death of the SM or the spouse (or former spouse).

What didn't the Act do? It didn't tell how to handle military pension division. Nowhere in USFSPA is there a clear picture of how a military pension is to be divided upon divorce.

Roadblocks and Minefields: Federal Jurisdiction

One of the roadblocks in military pension division is whether a state has jurisdiction over the SM's pension. This involves a federal law question. If a state does not have jurisdiction *under federal law*, then that state may not divide the SM's pension, regardless of the spouse's wishes. The jurisdictional basis of military pension division is not found in state long-arm statutes. Rather, it is set forth specifically in the USFSPA at 10 U.S.C. 1408 (c)(4).

Federal Jurisdictional Tests. Pursuant to this section of the Act, a state may only exercise jurisdiction over a military SM's pension rights if -

- That state is his or her domicile; or
- The SM consents to the exercise of jurisdiction; or
- The SM resides there (for reasons other than military assignment in that state or territory).

These statutory provisions override the more traditional long-arm statutes, which allow the exercise of jurisdiction consistent with due process if there are sufficient minimum contacts with a state.[3]

Residence Not Due to Military Assignment. Just what do these tests mean? The third basis for military pension division jurisdiction is probably the most difficult to understand. The court must have jurisdiction over the SM by reasons of "the member's residence, other than because of military assignment in the territorial jurisdiction of the court." How could a SM reside somewhere *other than because of military orders*, when it is almost always military orders which require his moving, cause his transfer from one installation to another and require his presence in the general vicinity of the installation to which he is assigned?

Although there are no definitive cases in this area, perhaps the following case illustrates what Congress had in mind: Colonel (COL) Bill Roberts is assigned to duty in Florida at Eglin Air Force Base (AFB), which is near the Florida-Alabama state line. Although he could live on base or, if quarters were not available, off-base but in the general vicinity of the installation, he chooses instead to reside just over the state line in Alabama, where his elderly parents reside. In this way, he can take care of them after work, and he commutes back and forth between his "home" in Alabama and the Air Force installation in Florida.

Is this not an example of a SM who resides in Alabama for reasons other than because of military assignment? Alabama probably has jurisdiction over COL Roberts' pension in this case.

Domicile. Domicile is the first stated basis for jurisdiction under U.S.C. 1408(c)(4). What is domicile? It is not, for example, the same thing as a SM's "home of record." *Home of record* is a technical term the military services use for the state where a person enters the service or reenlists. It means the place where the military must ship his or her household goods upon discharge. It is an administrative entry which is not necessarily meant to specify the *domicile* of the SM.

And domicile isn't necessarily the place where a SM is currently stationed or living, either. A SM may be stationed far away from his or her legal home. The Servicemembers Civil Relief Act[4] allows military personnel to retain their original domiciles for voting and state tax purposes while stationed in other states.

Rather than merely the physical residence of an individual, domicile is composed of two elements:

- **Physical presence** of the SM (except for temporary absences); and
- **Intent to remain** (or return if absent), as shown by payment of state income and property taxes, voting records, bank accounts, motor vehicle titles, registration and driver's license, and the purchase of a home.[5]

The importance of the latter -- actions which demonstrate the intent of the individual -- cannot be overstated. Many servicemembers claim Florida or Texas, for example, as their domiciles because these states do not have an income tax. A close analysis of most of these claims, however, reveals that there are no actions to back them up, such as ownership of property in that jurisdiction, and also that the SM has never really resided in that state in the first place.

How do you find out a SM's domicile? Here are some starting points:

- Get a copy of his Leave and Earnings Statement (LES) -- this document, which is the bimonthly pay statement for SM, contains an entry for "State Taxes" which shows what state the SM has listed for state tax withholding.
- Check with the SM's spouse—where did he file state income taxes last year? Which state imposed real estate taxes for a residence? Where did he vote?
- Get his DD Form 2058, "State of Legal Residence Certificate," which is attached to the SM's W-4 Statement for tax withholding purposes.

If the SM is stationed in your state and domiciled there, he can be sued there for pension division. If he is domiciled elsewhere, it may be necessary to bifurcate the equitable distribution proceeding if he does not consent to the court's jurisdiction over his military retirement rights. That means that the pension would be handled in the SM's state of domicile and the other domestic issues (alimony, divorce, child support, custody, visitation and all aspects of property division except the military pension) would be handled in the spouse's state of residence, so long as there is jurisdiction there for the specific claims involved.

Consent to Jurisdiction

A SM can consent to the court's jurisdiction, thus knowingly or inadvertently allowing the exercise of pension jurisdiction by the court. The test for consent to jurisdiction is a matter of state law. For example, if a defendant intends to object to personal jurisdiction under the state equivalent of federal Rule 12(b)(2), the general rule is that he may not move the court for other relief in his favor.[6] In general a motion for other affirmative relief will probably constitute a general appearance.

This rule poses real problems for the SM who wants to contest some claim of the lawsuit other than military pension division -- custody or alimony, for example, or even other aspects of equitable distribution. Can he or she do so without consenting to the court's jurisdiction? Is this a waiver of one's federal rights under 10 U.S.C. 1408(c)(4)? The courts are split over whether specific consent is necessary or whether a general "implied consent" can be used to confer jurisdiction.

As stated earlier, this is a state issue. There is no federal guideline or standard, and the states make the rules in this area. As a result, there may be fifty or more different rules as to what constitutes consent to the court's power over a military SM's pension rights.

Roadblocks and Minefields -- Summary

These problems show clearly the need for defensive lawyering. It is vital to ask questions -- lots of questions -- to make sure that the defense mounted for COL Roberts is on a firm footing. It is just as important to think before one acts. If there is a valid jurisdictional objection to a pension division claim filed against COL Roberts, will this be waived if he files an answer? What if he files a motion to continue, or to dismiss? The answer to these questions lies in the law of the states involved.

Be sure to check with competent counsel in the jurisdiction involved – don't try to "wing it" yourself when you're not licensed there. Even if you do hold a license for that state, it doesn't mean that you also hold the necessary level of expertise to answer these questions.

Dividing the Military Pension -- Crossing the Minefield

Once it is understood how to set up obstacles to pension division, the next step should be to understand how to overcome them and divide the pension once the court has acquired jurisdiction over it. There are generally two methods available for pension division. The first is deferred division, often called "if, as and when" payments, which refers to payments by the pensioner when he starts receiving his pension. The second involves a present-value offset, in which property or money is traded against the present value of the pension.

Deferred Division. These latter payments are not preferred by many courts since they are seen as an undesirable postponement of the claimant's rights to a present pension division. It is hard to reconcile future payments to a nonmilitary spouse (at a time when the divorce is long past) with the present-day division of all the other marital assets. The deferred division of military pensions is usually used when a offset or trade is unavailable. Unless the SM is retired when the division occurs, such a division will usually postpone the payments to the nonmilitary spouse until the retirement of the SM.

There is an exception, however; the postponement of payments doesn't occur in all states. Some have gotten around the postponement of payments until retirement by requiring the SM to begin present payments to the nonmilitary spouse or else suffer the accrual of interest on the unpaid pension rights. Examples of cases in this area are *Mattox v. Mattox* from New Mexico,[7] *Koelsch v. Koelsch* from Arizona,[8] and the California cases of *In re Luciano*,[9] *In re Marriage of Gillmore*[10] and *In re Marriage of Scott.*[11] The *Gillmore* case involved a civilian employee spouse whose pension had vested but who had elected not to retire. The California Court of Appeals applied this principle in a military case in *Scott*, where the court affirmed the trial court's award to an ex-spouse of the present value of the community share in the SM's retirement rights, notwithstanding the fact that he was still on active duty.

Deferred Division – Examples. An example of deferred division in a hypothetical case may help to illustrate how it works. Assume that a SM been married for 20 years and that, for all 20 years, he was on active duty in the U.S. Army. Also assume that his active duty pay with 20 years of service is *$7,200* per month, and that he can retire after 20 years of service with 50% of his base pay.[12] Thus, the monthly retired pay of the SM is *$3,600*.

The marital fraction in this case is 20/20. *Marital fraction* in most states means the number of years of pension service during the marriage before the valuation date over the total years of pension service. The valuation date is determined by state law -- it may be the date of irretrievable breakdown, the date of filing suit, the date of separation or the date of divorce. In this case, then, the marital share of the SM's monthly retired pay is calculated as below, and all of the pension is marital property:

$$\$3{,}600 \times \frac{\text{20 years' marital pension service}}{\text{20 years' total pension service}} = \$3{,}600 \text{ (marital part of pension = ALL)}$$

The law in many states presumes that the SM's spouse is entitled to one-half of the marital property. Also, in the case of military pensions, the USFSPA states that the spouse's share *may not exceed 50%* of the pension.[13] In this case, her one-half share would equal $1,800 per month. This is the amount the SM would have to send to her each month for an equal division of the marital pension. It is also the amount that DFAS would send to her directly out of his retired pay if the marriage overlapped the SM's creditable service by *ten* years or more and if the payment terms were set out in a qualifying court order.[14]

Let's take another example. Suppose the SM has served a total of 20 years in the Army, with *10* years of his service preceding his marriage. In this case, the marital fraction is:

$$\$3{,}600 \times \frac{\text{10 years' marital pension service}}{\text{20 years' total pension service}} = \$1{,}800 \text{ (marital part of pension)}$$

The above example assumes that 10 years of the marriage is concurrent with 10 years of the SM's service. Since only one-half of the pension is marital, then one-half is the SM's' separate property (since it accrued before the marriage), one-fourth is the spouse's share of the marital pension, and one-fourth is the SM's share of the marital pension. Thus the spouse would receive one-fourth of each monthly pension check under a deferred division approach, or about $900 per month. The remainder of the monthly retired pay belongs to the SM.

What happens, however, when the SM is still on active duty and remains so, rather than conveniently retiring on the date of valuation? In this case, the marital fraction cannot be expressed as an absolute number. Rather, the marital fraction looks like this –

$$\frac{\text{Years of marital pension service}}{\text{Years of total pension service}} = \frac{10}{X}$$

The numerator represents 10 years of marital pension service, and the denominator is unknown, representing the total number of years of creditable service that the SM will perform.

Present Value Offset. In addition to the future division of retired pay, all states recognize a second method of pension division called a "present value offset." This represents the present value of a series of money payments over the course of the SM's life. The money payments are, of course, his or her retired pay. The present value of this retired pay is the amount that can be used for a trade or a setoff so that the SM can keep the entire pension. This results in a complete and final accounting and division, not the postponement of property division until retirement.[15]

A good economist or CPA will advise that the sum of the payments should be adjusted for the life expectancy of the SM, the inflation rate and a discount factor which represents the rate at which money can be invested. This "discount rate" is applied to reflect the ability of money to earn interest; a small amount today, when invested, will yield a larger amount in five years and, conversely, a larger amount in the future, when discounted for the effect of interest accumulation, would become a smaller amount "in hand" today.

How is present value calculated? There are several options available. When the case is definitely going to trial, one should to promptly retain a CPA, an actuary or an economist to provide expert testimony at the hearing on the present value of future pension payments over the expected lifetime of the SM. On the other hand, when a settlement is anticipated and trial testimony will not be necessary, a "mail order" evaluation is sometimes preferable. There are several businesses nationwide that perform mail-order pension valuations for $300-500.

There is also a second method of determining present value, and this one makes no assumptions regarding interest rates, life expectancies or inflation. It involves pricing an annuity that will yield a monthly payment equal to the pension. The way to start is to contact an insurance agent or a securities broker to get a price quote for a single-premium annuity that would pay the marital benefit of, say, $3,600 per month (using our example above) for life starting now for an individual who is currently the age of COL Roberts. This is an example of the information that must be given to the professional who is obtaining the price quote.

Single-premium annuities are an excellent measure of comparison, using the actual market price of a financial product, compared to the abstract assumptions which are always present in a present-value analysis by a CPA.

When dealing with other assets in a property settlement, the court requires the fair market value to be obtained. Whether the asset happens to be a home, a parcel of land or a group of stocks, the method of valuation follows the principle of determining the current selling price or replacement cost in the open market. **Why not use the same principle in valuing a retirement plan?** After all, a pension is simply a contract to make future payments to an individual. In the financial marketplace, insurance companies sell these contracts in the form of single premium annuity policies. When taken as a group, these companies comprise an annuity market and provide an appropriate, non-theoretical source of valuing retirement benefits.[16]

Given the same information, a securities broker or an insurance agent could come up with a price that might be even more advantageous for the client's bargaining position in this case. This approach is certainly worth pursuing when there is a serious question about the present value of the pension.

Reserve and National Guard Pension Rights. There is nothing in the USFSPA to indicate that it was intended to apply only to active-duty retirement benefits, and certain amendments made by Congress to other parts of the U.S. Code dealing with Reserve retirement and benefits imply that Congress intended the Act to cover Guard and Reserve retirement also.[17] The two ways to divide Guard/Reserve pensions, and the advantages or problems involved, are contained in the two companion SILENT PARTNERs on "The Servicemember's Strategy" and "The Spouse's Strategy."

Dividing Disposable Retired Pay. What is it that the courts divide? Is it gross pay or net pay of the SM? The federal statute specifies that the court can only divide *disposable retired pay*.[18] The U.S. Supreme Court upheld this requirement in the *Mansell* decision.[19] According to 10 U.S.C. § 1408(a)(4), "disposable retired pay" means gross retired pay minus:

- recoupments or repayments to the federal government, such as for overpayment of retired pay;
- deductions from retired pay for court-martial fines or forfeitures;
- disability pay benefits; and
- Survivor Benefit Plan premiums.

Note that disability benefits are deducted from gross pay in order to arrive at "disposable retired pay." This means that a retired SM can waive receipt of retired pay to receive an equivalent amount of VA disability benefits, and these latter benefits will be received tax-free. This tactic can be used by a SM to reduce the portion of retired pay that is divisible. And there's no way to stop a SM from taking disability pay! For more information on this, see the two above-mentioned SILENT PARTNERs. These also contain information on early-out options, leaving military service for federal civil service, and drafting clauses to protect clients in these areas.

Direct Payments from DFAS

Most clients who are entitled to a portion of retired pay benefits want to get the payments direct from the source, not from an ex-spouse. Pay garnishment for division of the pension as property is available from DFAS when:

- The retired pay is divided by a final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement [Note**:** This means that an unincorporated separation agreement, a judgment in a partition case or an order of specific performance *won't get direct payment from DFAS*];
- There is a statement in the order that the SM's rights under the Sevicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) were observed;
- The amount directly payable to the former spouse as pension division is not more than 50% of the retiree's disposable retired pay;
- The "10 year test" has to be met (there must be at least 10 years of marriage which overlap 10 years of service creditable toward retirement);
- The court order must provide for payment from military retired pay, and the amount must be in an acceptable format (using one of the four methods of pension division allowed by DFAS); and
- The order must show that the court has jurisdiction over the SM in accordance with USFSPA provisions.[20]

Remember that the "10-year test" is *not a jurisdictional requirement* for dividing military pensions. Rather, it is an "enforcement requirement," meaning that pension division cannot be enforced by direct pay from DFAS unless this test is met.[21] For more information on the above points, see the SILENT PARTNER, *Getting Military Pension Division Orders Honored by DFAS*.

A Checklist for the Judge. Here is a checklist used in North Carolina for items that the judge (and the attorneys) should consider in military pension divorce cases:

Checklist for Military Pension Division Orders

✓	**Issue**	**Comments**
	Check for pension division jurisdiction – must be ONE of the following:	Required by 10 U.S.C. 1408(c)(4)
	1. Domicile in North Carolina, OR	Check on state income taxes, home ownership, voting, vehicle title, tags, driver's license, in-state tuition
	2. Consent to court's jurisdiction	General appearance – the filing of motions or pleadings which recognize the court's authority
	3. Residence in N.C. but not due to military assignment	Example – SM assigned to naval base in southeast VA but resides in nearby Duck, NC, to care for aged parents; NC has pension division jurisdiction.
	Receive evidence of period of creditable service for servicemember [SM] or retiree	Usually this is on his LES [Leave and Earnings Statement], DD 214 [discharge statement], retirement orders, or "points statement" [for Reserve/Guard personnel]
	Calculate coverture fraction	Months of marital pension service [before separation] divided by total pension service [which will be "X" – unknown – for those not yet retired]. DFAS [Defense Finance and Accounting Service] will accept an order containing total military service as an unknown, will make calculations at time of retirement.
	State formula [for SM] or percentage [for retiree]	Usually this is 50% X coverture fraction X final retired pay
	Check for "10/10" direct-pay requirements	If payment to be made from DFAS [Defense Finance and Accounting Service] directly to non-military spouse, then marriage and military service must overlap by at least 10 years
	Require direct pay by SM/retiree until DFAS begins payment	DFAS will not pay non-military spouse until 90 days after retired pay starts.
	Check on "back payments" for retiree	See if credit or recoupment needed if retiree has received pension payments since separation. Part or all of these, depending on coverture fraction, belong to the non-military spouse. DFAS will not make "back payments" through garnishment in property division cases.
	Check for "20/20/20" for medical care	Non-military spouse will be entitled to full medical care benefits if there are at least 20 years of marriage [ending at divorce, not separation], 20 years of military service, and a 20-year overlap. Granting divorce too early can defeat this entitlement.
	Provide SBP [Survivor Benefit Plan] for non-military spouse by:	Without this, pension payments stop at SM's death. In general, premiums are paid out of pension "off the top" before division between parties; premiums are 6.5% of selected base amount for spouse/former spouse coverage.
	___ordering SM to elect [or retiree to maintain] SBP coverage;	If parties are only separated, order spouse coverage (to be changed by former spouse coverage upon divorce). If parties are divorced, order former spouse coverage. Note: Court order alone does not create coverage; the application (by SM) or the service of order on DFAS (by SM or spouse) needs to be accomplished promptly.
	___at specific base amount (full retired pay or less);	SBP payments are 55% (35% when spouse turns 62) of SM's disposable retired pay if that base amount is selected; base amount can be as low as $300.

	___to be served on DFAS within one year of divorce [if by SM/retiree], or one year of order granting coverage [if by non-military spouse]; and	These are essential deadlines; if missed, coverage is lost.
	___entry of order granting <u>former spouse coverage</u> at time of divorce	DFAS will only honor title designation (i.e., <u>spouse coverage, former spouse coverage</u>), not designation by name.
	Use model military pension division order	

<u>Extra Benefits for Consideration</u>

<u>Survivor Benefit Plan</u>. An essential component of a well-structured military pension division for the nonmilitary spouse is use of the Survivor Benefit Plan (SBP). The SBP is an annuity that lets a retired SM (active duty or Guard/Reserve) provide continued income to specified beneficiaries after his death.[22] The SBP is funded by premium payments from the retiree's paycheck. There is a slight tax break for the retiree in that the amount of the SBP premium is not included in the taxable portion of his or her retired pay

The death of a military retiree terminates all pension payments. When SBP is elected, however, upon the retiree's death, the designated survivor receives a lifetime annuity for 55% of the selected base amount (full retired pay or lesser figure). In addition to spouses and former spouses there is child coverage available so long as the child is of the marriage of the SM and the former spouse. The cost for spouse or former spouse coverage is a premium during the retiree's lifetime of 6.5% of the selected base amount. Thus, for example, if the total pension payment before division is $3,000 a month, and if that were the base amount selected, then the SBP payment would be $1,650 a month and the monthly premium would be $192, to be paid out of the pension. The SBP benefit drops to 35%, or $1,050 monthly in this example, when the payee turns age 62.

Here is a checklist on the benefits and disadvantages of SBP coverage:

Checklist for SBP: Pro's and Cons

✓	**Advantages of Survivor Benefit Plan**
	<u>Security:</u> There is no "qualification" required; unlike commercial health insurance, no physical exam is required for the military member and coverage cannot be refused or lapse while premiums are being paid. The member/retiree cannot terminate coverage if established by court order sent to DFAS.
	<u>Life Payments:</u> Mrs. Roberts, the beneficiary, will receive payments for the rest of her life upon the retiree's death (unless she remarries before age 55, which stops benefits so long as she is married).
	<u>Tax-Free:</u> Deductions from the retiree's pay for SBP premiums are from his gross retired pay and thus reduce his pension income (and her share of it) for tax purposes.
	<u>Inflation-Proof:</u> Payments are increased regularly by cost-of-living adjustments to keep up with inflation.
✓	**Disadvantages of Survivor Benefit Plan**
	<u>Expense:</u> Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive (as compared to term life insurance) and premiums do go up.
	<u>Inflexible:</u> As a general rule, once SBP is chosen, it cannot be canceled.
	<u>No Cash Value:</u> Unlike whole life or variable life insurance, there is no equity build-up and no cash value for SBP. And there is no return of premiums paid if Mrs. Roberts dies before her husband.
	<u>Social Security Offset:</u> There is a reduction in benefits when Mrs. Roberts reaches age 62 (to account for Social Security benefits) or should she receive payments from the Department of Veterans Affairs.

Let's see how SBP works. For a married SM on active duty, the election for SBP must be made before or at retirement.[23] An active duty SM who is entitled to retired pay is <u>automatically</u> enrolled in SBP at the maximum authorized level of coverage unless he or she declines (before retirement) to be covered or else chooses coverage at a lower level; if the SM is married, the spouse must consent to this choice.[24] A spouse loses eligibility as an SBP beneficiary upon divorce. There is no provision in the law which makes former spouse coverage an automatic benefit.

The only means by which a divorced spouse may receive a survivorship annuity is if former spouse coverage is elected. A court order cannot, by itself, be used to create coverage. A signed election request must be submitted to DFAS by the member/retiree, or a court order by the former spouse, before coverage can be established. Reservists can make the election upon completion of 20 years of creditable service, and they have a second chance to elect SBP coverage upon reaching age 60.[25]

If a member/retiree elects former spouse coverage for a spouse who was the pre-divorce SBP beneficiary, this must be done within one year from the date the divorce becomes final. If the SM or retiree who is required to provide such coverage fails or refuses to do so, he or she shall be deemed to have made such an election if DFAS receives a written request from the former spouse asking for implementation of the election and a certified copy of the appropriate court decree. The request must be signed by the former spouse and received by DFAS within one year from the date of the decree which requires coverage. There is no form for a "deemed election" request.

Annuity entitlement stops upon the former spouse's remarriage when this occurs before age 55. It will be reinstated if the former spouse's marriage is terminated. Annuity entitlement is unaffected if the former spouse is age 55 or older at the time of remarriage.

SBP is a unitary and indivisible annuity; a valid former spouse election terminates any existing SBP coverage of the retiree, and former spouse coverage cannot be combined with coverage for a current spouse. An election of former spouse coverage is basically irrevocable, meaning that the member/retiree may not terminate SBP participation once it is elected; however, the law allows an eligible member/retiree to request a change in annuity coverage if he or she remarries, or acquires a dependent child, and meets the requirements for making a valid option change. Such a request must be made within one year from the date of marriage or the child's birth.

A copy of the final divorce decree must be sent to DFAS, since receipt of this is required before any adjustment to SBP can be completed. When only SBP is required in a court order, rather than the division of military retired pay, the order should be sent to: Defense Finance and Accounting Service, US Military Pay, PO Box 7130, London, KY 40742-7130.

State courts may order members/retirees to participate in SBP and to designate their spouses or former spouses as beneficiaries.[26] A current spouse will be notified of the election to provide coverage for a SM's former spouse, but she or he cannot veto that election.[27] When a separation agreement provides for SBP election, a court can order specific performance to enforce this provision.[28]

If a SM elects not to participate in the SBP upon retirement, that decision is usually irrevocable. However, Congress enacted an "open enrollment period" from March 1, 1999 to February 29, 2000, during which retirees could change their current level of SBP participation or could choose to participate in the program for the first time. Congress may again create other open enrollment periods in the future, and a good drafter will include a provision for this in an agreement or order prepared for the spouse of a SM who has already declined SBP coverage.[29]

Especially when deferred division is used, the attorney for the non-military spouse should insist on SBP coverage to allow continued receipt of payments if the spouse survives the member/retiree. This is a valuable tool in planning for continued income for the spouse.

Early-Out Options and Severance Pay

Sometimes the Department of Defense goes through a period of "downsizing" for budgeting or personnel management reasons. This often means service separations before retirement. For those who haven't yet served 20 years to become eligible for longevity retirement, the involuntary separation tools involve principally two early separation benefits, the Voluntary Separation Incentive (VSI) and the Special Separation Benefit (SSB).[30] The most recent Congressional enactment of VSI and SSB expired in 2001, but there are still thousands of former SM's who have left the armed forces through VSI or SSB and who may be contemplating divorce. These financial incentives are akin to severance pay and there are few reported cases interpreting them. There are two key issues which usually come up when a divorcing SM is offered one of these bonuses: Is it divisible, and is it marital property?

As to divisibility, the final answer should be that they are not divisible under federal law. The argument against division can be made as follows: The *McCarty* decision held that Congress preempted all state authority in this area when it enacted the military retirement system. USFSPA was a limited response to *McCarty*; it only allowed for the division of longevity retired pay and, in later amendments, for part of VA disability pay. The Act limits state courts to the division of "disposable retired pay" under 10 U.S.C. 1408(c)(1) and these severance pay options are not "retired pay"; they are replacements for retired pay. Their implementing statutes aren't mentioned in USFSPA. Thus they remain under the protective umbrella of *McCarty* and are exempt from division because of preemption. Representative

Patricia Schroeder even sponsored an amendment to H.R. 5006, the Department of Defense Reauthorization Bill for F.Y. 1993, which would have made the Act applicable to both VSI and SSB, but it wasn't passed.

This argument has worked in only one reported case.[31] It has been rejected in the rest of those state cases addressing the issue.[32] Even if the spouse is successful in obtaining division of VSI or SSB, however, he or she will find collection difficult. DFAS will not garnish VSI or SSB under 10 U.S.C. § 1408(d) pursuant to court orders for property division. Only military retirement pay can be garnished under this statute.

If the court decides that the VSI/SSB is divisible and akin to a retirement benefit, then the question is whether the benefit is *separate* property or *marital* property.[33] Some courts have held that severance pay is not *marital* property since it takes the place of *future* compensation, rather than being payment for *past* services (like retirement pay and other deferred compensation benefits).[34]

If, in the alternative, it is seen as an economic benefit earned during the marriage and attributable to marital work, efforts and labor, it may be viewed as damages for an economic loss to the marriage. This is called the "analytic approach" and is most often applied in the personal injury area.[35] In an Arkansas case involving severance pay, the wife was granted one-half of the husband's lump-sum payment because the judge determined that the benefit was earned by *service during the marriage.*[36]

One final point should be mentioned. Even if the payment is marital property and therefore divisible, one would need to apply the marital fraction (usually years of marital service over total years of service) to the payment to arrive at the portion that is marital.

Military Divorce Websites

Here is a list of helpful websites for military pension division:

	ABA FAMILY LAW SECTION'S MILITARY COMMITTEE: www.abanet.org/family/military/
	NC STATE BAR LAMP COMMITTEE: www.ncbar.com/home/lamp.htm
	ARMY RETIREMENT SERVICES: www.armyg1.army.mil/rso/mission.asp
	DFAS WEBSITE: www.dfas.mil
	SBP BOOKLET: www.armyg1.army.mil/rso/sbp.asp

ENDNOTES

[1] Pub. L. 97-252 [Title X, 96 Stat. 730 (1982)], found at 10 U.S. C. 1408. *See also* regulations at Dep't of Defense, Financial Management Reg. vol. 7B, chap. 29, Former Spouse Payments from Retired Pay (Sep. 1999), *available at* http://www.dod.mil/comptroller/fmr/07b/07b29.pdf.
[2] *McCarty v. McCarty*, 453 U.S. 210 (1981).
[3] *See, e.g., Kulko v. Superior Court of California*, 436 U.S. 84 (1978). In *In re Hattis*, 196 Cal.App.3d 1162, 292 Cal. Rptr. 410 (1987), for example, the court held there was no federal jurisdiction under 10 U.S.C. 1408(c)(4) to partition the military retired pay of a former domiciliary despite adequate "minimum contacts."
[4] 50 U.S.C. App. § 500-48, 560-91.
[5] *See, e.g., Andris v. Andris*, 65 N.C. App. 688, 309 S.E.2d 570 (1983).
[6] *See, e.g. Russell v. McGinnis*, 514 P.2d 658 (Okla. 1973).
[7] *Mattox v. Mattox*, 105 N.M. 479, 734 P.2d 259 (N.M.Ct.App. 1987).
[8] *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986).
[9] *In re Luciano*, 104 Cal. App.3d 956, 164 Cal. Rptr. 93 (1980).
[10] *In re Marriage of Gillmore*, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981).
[11] *In re Marriage of Scott*, 156 Cal. App. 3d 251, 202 Cal. Rptr. 716 (1984).
[12] BASE PAY times YEARS OF SERVICE times 2.5% is the formula for members entering active duty before Sept. 8, 1980. Those who entered service on or after 9/8/80 use the formula: BASE PAY [average for last three years of service] X YEARS OF SERVICE X 2.5%. Those who entered service after 1986 use the formula: BASE PAY [average for last three years of service] X YEARS OF SERVICE X 2.5%] - [1% for each year of service under 30 years, calculated by months].
[13] 10 U.S.C. 1408 (e) (1).

[14] 10 U.S.C. 1408 (d) (2).
[15] *See, e.g., Dewann v. Dewann*, 389 Mass. 754, 506 N.E.2d 879 (1987).
[16] J. Stacy and B. Danninger, "Seize Control of Property Settlements," *Case and Comment*, Vol. 93, No. 4 (August 1988), pp. 21-22 (emphasis in the original).
[17] *See* K. MacIntyre, "Division of U.S. Army Reserve and National Guard Pay upon Divorce," 102 Mil. L. Rev. 23 (1983). The formula for Reserve/National Guard retirement pay is: BASE PAY X [NUMBER OF RETIREMENT POINTS divided by 360] X 2.5%.
[18] 10 U.S.C. § 1408 (c) (1).
[19] *Mansell v. Mansell*, 490 U.S. 581 (1989).
[20] These provisions are found in the military pension division regulations, *supra* note 1.
[21] *See, e.g., Carranza v. Carranza*, 765 S.W. 2d 32 (Ky. App. 1989).
[22] 10 U.S.C. 1447-1455.
[23] 10 U.S.C. 1448 (a) (2) (A).
[24] 10 U.S.C. 1448 (a) (2) A).
[25] 10 U.S.C. 1448 (a) (2) (B).
[26] 10 U.S.C. 1450. (f).
[27] 10 U.S.C. 1448 (b) (2).
[28] *See, e.g., Rockwell v. Rockwell*, 77 N.C.App. 381, 335 S.E.2d 200 (1985).
[29] Additional resources that are helpful in understanding the Survivor Benefit Plan and the rights and entitlements of survivors of military members and retirees include Department of the Army Pamphlet 608-4, A Guide for the Survivors of Deceased Army Members (23 Feb 1989) and SBP Made Easy, The Retired Officers Association, 201 North Washington St., Alexandria, VA 22314-2529. An excellent resource for information on military compensation, health care, retirement and Survivor Benefit Plan issues is the *Uniformed Services Almanac*, published annually by USA, Inc., P.O. Box 4144, Falls Church, VA 22044; it costs about $12 with shipping and can also be ordered on-line at www.militaryalmanac.com.
[30] Servicemembers are eligible for SSB and VSI when they have served for more than six but less than 20 years before December 5, 1991. They must also have at least five years' continuous active duty immediately preceding the date of separation. There may be other specific requirements, as prescribed by the service secretary, such as years of service, skill or rating, rank and remaining period of obligated service. SSB is a one-time sump-sum payment. The amount is equal to: BASE PAY X YEARS OF CREDITABLE SERVICE X 15%. Servicemembers are eligible for the same transition benefits and services (found in 10 USC 1141-50) as members who are involuntarily separated. VSI is an annual payment made for twice the number of years of active duty service. 10 USC 1175. The amount is equal to BASE PAY X YEARS OF CREDITABLE SERVICE X 2.5%. Sometimes a member will be separated "15-year Retirement." This is an involuntary decision, not chosen by the individual; it is used as a manpower management tool. Retired pay is: BASE PAY X YEARS OF CREDITABLE SERVICE X 2.5% X [a reduction factor equivalent to 100% - (1% for each year under 20 years of service)]. For an excellent overview of this issue, the legal characterization of severance pay, see Polchek, "Recent Property Settlement Issues for Legal Assistance Attorneys," THE ARMY LAWYER, December 1992 at 4-12.
[31] *McClure v. McClure*, 647 N.E.2d 832 (Ohio 1994).
[32] *Diaz v. Babauta*, 66 Cal.App.4th 784, 78 Cal.Rptr.2d 281 (Cal. Ct. App. 1998); *In re Marriage of Heupel*, 936 P.2d 561 (Colo. 1997); *In re Marriage of Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994); *Kelson v. Kelson*, 675 S.2d 1370 (Fla. 1996); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Pavatt v. Pavatt*, 920 P.2d 1074 (Okl. Ct. App. 1996); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996). *Abernethy v. Fishkin*, 638 So.2d 160 (Fla. Ct. App. 1994). Ct. App., 1994); *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995).
[33] *See, e.g., Boger v. Boger*, 103 N.C. App 340, 405 S.E.2d 591 (1991).
[34] *See, e.g., In re Marriage of De Shurley*, 255 Cal. Rptr. 150, 207 Cal. App. 3d 992 (1989) and *In re Marriage of Lawson*, 256 Cal. Rptr. 283, 208 Cal. App.3d 446 (1989).
[35] *See, e.g., Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).
[36] *Dillard v. Dillard*, 772 S.W.2d 355 (Ark. Ct. App. 1989). *See also Chotiner v. Chotiner*, 829 P.2d 829 (Alaska 1992).

* * *

SILENT PARTNER is a product of the Military Committee, Section of Family Law, American Bar Association and is prepared by COL Mark E. Sullivan (USAR, Ret.). For revisions, comments or corrections, contact him at 600 Wade Avenue, Raleigh, N.C. 27605 [919-832-8507]; E-mail – LAW8507@aol.com.

SECTION OF FAMILY LAW
ABA KNOWLEDGE EXPERTISE NETWORKING
SERVING AS THE NATIONAL LEADER IN THE FIELD OF MARITAL AND FAMILY LAW

SILENT PARTNER

GETTING MILITARY PENSION DIVISION ORDERS HONORED BY DFAS

INTRODUCTION: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

Overview of the *Military Pension Division* Series

There are five SILENT PARTNERs in this series.

- *Military Pension Division: Scouting the Terrain* is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses' Protection Act), what the Act does (and doesn't do), and how the question of "federal jurisdiction" is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember's Strategy* contains information on how to assist the servicemember (hereafter "SM") in this area, and
- *Military Pension Division: The Spouse's Strategy* covers how to help the SM's spouse.
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS.* It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- Retrieving an apparently "lost" pension benefit for the spouse/former spouse is covered in *"Lost" Military Pensions: The Ten Commandments.*

*****

Getting a pension division order honored by DFAS can sometimes be a daunting task. Located in Cleveland, Ohio, DFAS has numerous lawyers and paralegals reviewing legal documents that arrive there by the truckload everyday. They also have a rejection rate of over 30% for military pension division orders. Here are some basic tips on how to get your property division decree or clause accepted.

1. **KNOW YOUR RESOURCES.**

Read closely the provisions of 10 U.S.C. 1408 to understand what the law requires for military pension division. The SBP (Survivor Benefit Plan) statute is found at 10 U.S.C. 1447 *et. seq.* You will also need to look at the pension division implementing regulation.[1] Did you know that DFAS has a website? It's located at **www.dfas.mil**, and it generates over 3,000 "hits" a month. All of the DFAS fact sheets are on it,

and the application form as well -- why not go there and pick up some information straight from the source? Go to the website, click on "Money Matters," then "Garnishment," then look for the USFSPA heading and click on "fact sheet" for information regarding DFAS' processing of applications for the direct payment of benefits. In addition, two excellent articles that explain military pension division can be found at **http://www.dfas.mil/money/garnish/fsfact.htm** and **http://www.dfas.mil/money/garnish/fs-qa.htm**.

The DFAS Customer Service Department may be reached at 1-866-859-1845. Be sure to include the SM's Social Security Number (SSN) in all correspondence and phone calls with DFAS. Providing this will ensure a more rapid response. Without the SSN, documents will be rejected.

2. **USE THE RIGHT DOCUMENT.**

A separation agreement, standing alone, is not the way to accomplish military pension division. While you can attempt to divide a military pension in only a separation agreement, that document alone won't suffice; there will be insurmountable problems when there is a marriage of over ten years' duration and the nonmilitary spouse wants to receive direct pension payments from DFAS. USFSPA only allows direct pension payments pursuant to a "final decree of divorce, dissolution, annulment, or legal separation issued by a court" or a property settlement that is ratified or approved by the court and issued incident to such a final decree. Since an unincorporated or unmerged separation agreement is not a court order, it will not be sufficient to institute direct pension payments for the ex-spouse. You must have one of the above court documents. You can either:

- Prepare a separate military pension division order, judgment, or decree, which will then be submitted to the court at the appropriate time. This would be when the divorce occurs, or when the hearing on property division takes place. An example is shown below.

- In the alternative, prepare a separation agreement that can then be incorporated or merged into a divorce decree.

3. **CAN YOU GET DIRECT PAYMENTS FROM DFAS?**

A pension division order can only be used for direct payments if a unique jurisdictional requirement is met. Under 10 U.S.C. 1408(c)(4), direct payments are allowed only when the military member:

- is domiciled in the state in which the suit for the divorce or property division occurs; or

- resides in the state in which the lawsuit occurs (other than because of military assignment); or

- consents to the jurisdiction of the court in which the lawsuit occurs.

For more detailed information on these jurisdictional tests, see the first SILENT PARTNER in this series, *Military Pension Division: Scouting the Terrain.*

In addition, in property division cases involving the division of military retired pay incident to a divorce or separation, there is a requirement that the parties be married for at least 10 years during which time the military member performed at least 10 years of creditable military service. Without this, DFAS cannot honor an application for the direct payment of any court-ordered division of retired military pay as property.

The Servicemembers Civil Relief Act (SCRA)[2] offers protection for military members who are on

active duty at the time of the divorce, and in such a case there must be proof that the military member's rights pursuant to the SCRA were observed and honored. This requirement does not apply in cases where the member is retired or not on active duty at the time the decree was entered.

When the application is approved, DFAS will notify the member that payments will start not later than 90 days after the service date of the approved application or the start of retired pay, whichever is later. When the court order divides military retired pay as property, no more than 50% of the member's disposable retired pay (DRP) may be deducted. The military member remains liable for any amount still owing. In cases where there is an application for the direct payment of court-ordered division of military retired pay and a garnishment issued pursuant to 42 U.S.C.§ 659 (child or spousal support), DFAS is authorized to deduct up to 65% of the military member's disposable earnings.

If the decree was filed prior to February 3, 1991, the calculation of DRP is different than for later cases. DFAS refers to the earlier orders as "old law" cases, and the more recent cases as "new law" cases.

In "old law" cases, federal income tax, state income tax, amounts of military retired pay waived in lieu of receiving VA or military disability pay, the costs of the Survivor Benefit Plan (SBP) premiums (if the former spouse is the designated beneficiary), amounts waived for civil service employment, and debts owed the federal government are deducted in calculating DRP.

In "new law" cases, taxes are not deducted but the other deductions shown above apply. The parties have taxes deducted from their respective shares.

4. **USE THE RIGHT LANGUAGE.**

Even if it were incorporated into a court order or a divorce decree, the separation agreement or property settlement document would have to contain all of the language that is required for court orders to be honored by DFAS. The pension division clauses must include:

a. The names and addresses of the parties, as well as their SSN's;

b. The years of marriage and of military service;

c. The military member's grade or rank;

d. A statement that the SCRA rights of the member have been honored (if the member is on active duty when the decree is entered)

e. Jurisdictional findings (domicile, consent, or residence) under 10 U.S.C. 1408 (c)(4);

f. A statement that DFAS should pay the spouse at his/her address as shown therein.

g. A statement as to what DFAS will pay the spouse (see "KNOW WHAT YOU WANT" below). Payments are made once a month, starting no earlier than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later. The payments end no later than the death of the member or spouse, whichever occurs first. Payments are prospective only; no arrears are allowed. The USFSPA does not provide for garnishment of payments missed prior to the approval of the application by DFAS.

5. **KNOW WHAT YOU WANT.**

The order may award a percentage or a fixed dollar amount to the former spouse of the military member. For example, a percentage clause might state: "Wife is granted 43% of Husband's disposable retired pay." Alternatively, a fixed dollar clause could read: "Wife is awarded $550 per month." A percentage clause automatically provides for cost-of-living adjustments (COLAs). The spouse does not get any COLAs if a fixed dollar amount is awarded.

Regulations also allow DFAS to accept awards that are not percentages or fixed dollar amounts.[3] DFAS will honor a court award that is expressed as a formula or a hypothetical. These are usually used if the service member is still on active duty.

A formula is an award expressed as a ratio. For example, the order could state: "Wife shall receive 37% of the Husband's disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband." The court must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service. DFAS cannot guess or interpret what the court and parties have determined to be the months of service during marriage (the numerator); however, DFAS can provide the total months of service (the denominator). Note that if the court also provides the total months of service, DFAS will honor that number regardless of its accuracy.

A hypothetical is an award based on a rank or status which is different from that which exists when the SM retires. For example, the order might say: "Wife is granted 40% of what a staff sergeant (E-6) would earn if he were to retire with 18 years of military service." Since there's no table that shows this type of pay, DFAS would calculate the hypothetical pay amount and compute a ratio to the actual retired pay in order to calculate the amount to which the wife in this example should receive. Note that if the court order fails to specify the year of retirement, DFAS assumes the year to be the actual year of retirement, and that year's pay scale would be utilized. A COLA will automatically be awarded with a hypothetical clause. Finally, be sure to include the rank and years of service of the member when submitting a hypothetical award.

When a Guard or Reserve pension is involved, DFAS will not only honor orders specifying division according to retirement points earned during marriage divided by total points, but it will also honor a percentage award (such as "John will pay Mary 35% of his Army Reserve disposable retired pay"). It will also accept any decree in which all the variables are filled in by the court (such as "John will pay Mary 50% of his final retired pay times a fraction, the numerator of which is 240 months of marital pension service up to the parties' date of separation, and the denominator is 280 months of total creditable military service, both active duty and National Guard").

6. **SBP CHECKLIST**

Here is a checklist to help understand the Survivor Benefits Plan (SBP) and get coverage for the non-military spouse.

✔	Action or issue	Comments
	SBP is a unitary benefit, cannot be divided between current spouse and former spouse	
	Election: Servicemember on active duty is automatically covered; at retirement an election must be made, and spouse concurrence is necessary if member chooses no SBP, child coverage or coverage at base amount less than his/her full retired pay	
	Election - Guard/Reserve: There is one opportunity to make election at the 20-year mark (after 20 years of creditable Guard/Reserve service). At time of application for retired pay (about a year before member turns 60), he/she is given another opportunity. Spouse concurrence as above.	
	If representing the nonmilitary spouse, be sure to mandate former spouse coverage with member selecting full retired pay as base amount	SBP benefit payments equal 55% of the selected base amount, which can be $300 or above, till the beneficiary turns age 62, when it reduces to 35%
	If representing the member/retiree, make sure that the base amount selected yields about the same death benefit as the lifetime benefit, so that spouse doesn't profit by retiree's death	
	If representing the member/retiree, try to negotiate a reduction of the spouse's share of the military pension to reflect the additional cost of the SBP premium, which is taken out of the retired pay	SBP premium is 6.5% of selected base amount, payable out of retired pay, and it is "taken off the top" and deducted before division of disposable retired pay, so both parties pay in same shares as their shares of the retired pay
	If member/retiree is to submit SBP election to DFAS, make sure this is done within one year of divorce; enclose divorce decree and SBP application form titled Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage (DD Form 2656-1)	
	If spouse/former spouse applies, be sure to enclose copy of divorce decree, order for SBP coverage and "deemed election letter" within one year of order granting SBP coverage [different deadline from one year after divorce, in some cases]	There is no specific form for the letter - it just needs to explain that what is enclosed and that, since the member did not elect coverage, the enclosed order mandates SBP "former spouse" coverage
	If above deadlines are exceeded, apply to the appropriate Board for the Correction of Military Records for relief (may be available if retiree has not remarried)	
	Send SBP documents to: Defense Finance and Accounting Service, U.S. Military Retirement Pay, P.O. Box 7130, London, KY 40742-7130. Recommended to send by certified mail, return receipt requested	
	SBP is reduced by Dependency and Indemnity Compensation in certain circumstances. Go to http://www.vba.va.gov/bln/21/Milsvc/Docs/DICDec2002Eng.doc for full information, or call toll-free 1-800-827-1000	

7. **WHERE AND HOW TO SERVE THE ORDER**

For service on DFAS of the military pension division order,[4] the addresses of the military finance centers are:

ARMY, NAVY, AIR FORCE, MARINES: Defense Finance and Accounting Service - Cleveland, ATTN: DFAS-GAL/CL, P.O. Box 998002, Cleveland, OH 44199-8002; (216) 522-5301.

COAST GUARD: Commanding Officer (LGL), United States Coast Guard, Human Resources Service and Information Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591; (785) 339-3415.

PUBLIC HEALTH SERVICE: ATTN: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001; (800) 638-8744.

Note that the decree must be certified by the clerk of court within 90 days of service on DFAS.

The application form for direct payments from DFAS, signed by the spouse, must also be included, with a certified copy of the order and divorce judgment (if separate order). A copy of the form (DD Form 2293) can be obtained from the DFAS website. Only the recipient may sign the application, but anyone may serve the completed application upon DFAS. While you should ensure delivery by sending the documents by certified mail, return receipt requested, this is not a requirement.

8. **A HELPFUL CHECKLIST.**

"One size fits all" definitely doesn't apply to military pension division orders. A good practitioner will check and re-check the pension division order to be sure it complies with the regulations and the statute, accomplishes the needs of the client, makes sense, and will be honored by DFAS. To help with the latter task, here's a checklist from DFAS:

DFAS CHECKLIST FOR MILITARY PENSION DIVISION ORDERS

✔	QUESTION	
	General Validation Questions	
	Is the member active duty, reserve/guard, or retired?	
	If retired, what is the member's retirement date?	
	Is the member receiving temporary or permanent disability retired pay?	
	Was a final decree of divorce, dissolution, annulment or legal separation submitted?	
	Did the clerk of court certify the order within 90 days of the date DFAS received it?	
	What is the date of divorce?	
	Has the appeal time expired?	
	Was a fully completed DD Form 2293 submitted?	
	Are any additional documents required (such as a marriage certificate), or is the order/application invalid for any reason?	
	For members on active duty at time of divorce, were the member's rights under the Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) complied with?	
	What award(s) is the former spouse attempting to enforce -- child support, alimony and/or retired pay as property?	
	Validation Questions for Retired Pay as Property Awards	
	Does the order divide military retired pay?	
	What is the member's PEBD (pay entry base date)?	
	Was the marriage date provided? (If so, the system will automatically calculate whether the 10 year overlap of marriage and service requirement was met).	

	Does the court have 10 USC 1408 (c)(4) jurisdiction over the member -- by reason of residence (not due to military assignment), domicile or consent?	
	Does the order provide for the payment of a percentage, fixed dollar amount, formula, or hypothetical award?	
	If the division of retired pay is based on a formula (i.e., marital fraction), does the order provide the numerator? For Reserve/Guard members, is the formula expressed in reserve retirement points?	
	If the division of retired pay is based on a hypothetical retired pay award, is the award language valid? Are all the variables provided?	
	A. For active duty members entering service before September 8, 1980, the variables are:	
	1. Percentage awarded.	
	2. Rank for hypothetical retired pay calculation.	
	3. Number of years of service for hypothetical retired pay calculation.	
	4. Hypothetical retirement date.	
	-OR-	
	1. Percentage awarded.	
	2. Hypothetical retired pay base (base pay figure to be used in hypothetical retired pay calculation).	
	3. Number of years of service for hypothetical retired pay calculation.	
	B. For active duty members entering service on or after September 8, 1980 ("high 36" retirees):	
	1. Percentage awarded.	
	2. Hypothetical retired pay base (base pay figure to be used in retired pay calculation).	
	3. Number of years of service for hypothetical retired pay calculation.	
	C. For Reserve/Guard members:	
	1. Percentage awarded.	
	2. Rank for hypothetical retired pay calculation.	
	3. Number of reserve retirement points for hypothetical retired pay calculation.	
	4. Number of years of service for basic pay to be used in hypothetical retired pay calculation.	
	5. Hypothetical date of eligibility to receive retired pay.	

The additional checklist below contains some practical tips which need to be included in the pension division order.

MILITARY PENSION DIVISION CHECKLIST

____ SERVICE OF APPLICATION (recommend this be done by certified or registered mail, return receipt requested)

____ FINAL DECREE OF DIVORCE, SEPARATION OR ANNULMENT --AUTHENTICATED OR CERTIFIED WITHIN 90 DAYS PRIOR TO SERVICE OF PENSION ORDER

____ NAME, ADDRESS, AND SSN OF MILITARY MEMBER?

____ NAME, ADDRESS, AND SSN OF FORMER SPOUSE?

____ ORDER HAS NOT BEEN AMENDED, SUPERSEDED, OR SET ASIDE

____ ORDER IS FINAL DECREE, NO APPEAL MAY BE TAKEN, NO APPEAL HAD BEEN TAKEN WITHIN TIME PERMITTED

____ FORMER SPOUSE MARRIED TO MEMBER AT LEAST 10 YEARS DURING AT LEAST 10 YEARS CREDITABLE SERVICE:

START OF SERVICE DATE: _____
RETIRED DATE: _____
MARRIAGE DATE: _____
DIVORCE DATE: _____

9. **SUGGESTED MILITARY PENSION DIVISION ORDER/CLAUSES**

Set out below is a set of model clauses to use in a military pension division order.

[Case caption here]

THIS CAUSE came before the undersigned judge upon the Plaintiff's claim for distribution of the Defendant's military retirement benefits. The parties agree to the entry of the following military pension division order to assign to Plaintiff a portion of those benefits. The court makes the following:

FINDINGS OF FACT

1. Plaintiff (hereinafter also referred to as Wife) is a resident of *[County] [State]*. Defendant (hereinafter also referred to as Husband) is a resident of *[County] [State]*. The parties were married on or about *[date]* and were divorced in *[County] [State]* on *[date]*.

2. The marital portion of Defendant's military retired pay is subject to marital property division. Plaintiff is entitled to a share of the Defendant's military retirement benefits, as set out in the Decree below. The Plaintiff's entitlement to retired pay accrues upon the retirement of Defendant. The remaining portion of Defendant's military retired pay is the sole and separate property of Defendant.

3. *[for military member not yet retired]* Husband holds the rank of *[state rank here, such as "Staff Sergeant" or "Lieutenant Commander"]* with *[number]* creditable years of service. -OR- *[for retiree]* Husband retired with the rank of *[state rank]* and is receiving *[state amount of retired pay and any deductions, such as SBP premium, federal income tax, etc.]*.

4. *[for non-retired member or for retiree with no disability at present]* There is no waiver in place at present for disability compensation, and the court bases the award to Wife set out below on these facts. -OR- *[for retiree with disability rating]* Husband has a disability rating of *[state percentage]* and this has reduced his military retired pay by *[dollar amount]*.

5. Pursuant to state and federal law, Wife is entitled to a share of the Husband's military retirement benefits, as set out in the Decree below.

6. Wife's address is 456 S. East Dr., Raleigh, NC 23546. Her Social Security number is 111-22-3333. Her date of birth is May 19, 1952.

7. Husband's address is 789 West St., Goldsboro, NC 23654. His Social Security number is 444-55-6666. His date of birth is June 12, 1950.

8. Husband's branch of military service is *[here state branch of service, such as "U.S. Air Force" or "Utah Air National Guard"]*. His Pay Entry Base Date (PEBD) is *[here state PEBD as found on Husband's Leave and Earnings Statement (LES)] or his Guard/Reserve retirement points statement]*. He is *[here state "retired" and give date of retirement if the member has retired, whether in pay status or not, or "not yet retired" if he is still serving and not retired]*.

9. *[for member who is not yet retired]* Husband's rights under the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*, have been observed and honored.

10. *[use this clause to protect spouse from unexpected reduction in payments due to electing disability compensation]* It is intended that the Wife shall receive her full share of Husband's military retired pay, calculated as set out below and without reduction for disability compensation (VA disability pay or military disability retired pay) or any other reason. Military retired pay is deemed by the court to include retired pay actually paid or to which Husband would be entitled based only on length of his creditable service.

11. Wife is entitled to former spouse coverage as the beneficiary of Husband's Survivor Benefit Plan as set out below. *[-OR-* Wife is not entitled to former spouse coverage as the beneficiary of Husband's Survivor Benefit Plan.*]*

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action and the parties hereto.

2. Plaintiff is entitled to an assignment of Defendant's military retirement benefits as set forth herein, subject to the conditions set forth in the Decree below.

3. The facts above are incorporated herein by reference to the extent that they represent conclusions of law.

4. The terms of this order are fair, reasonable, adequate and necessary.

5. The parties have knowingly and voluntarily consented to this order.

6. The parties are entitled to the relief granted below.

DECREE

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. Effective *[date]*, as division of marital property, Husband shall pay Wife [*input an Option from below and insert here*]. The parties acknowledge that DFAS generally does not begin payments to the former spouse until 90 days after receipt of the pension division order or the start of retired pay, whichever is later. Until DFAS begins making these payments to Wife, Husband shall be responsible for making these payments each month to her.

[Option A: spouse receives a specified percent, not to exceed 50%, of member's retired pay; this increases with cost-of-living (COLA) adjustments for member; based on final retired pay of member, including raises and grade increases; this favors spouse] _____% of his disposable retired pay each month.

[Option B: spouse gets 50% -- or other percent -- of marital share of member's retired pay; increases with cost-of-living (COLA) adjustments for member; based on final retired pay of member, including raises and grade increases; this favors spouse] ____% of the marital share of his disposable retired pay each month. The marital share is a fraction made up of ____ months of marital pension service, divided by the total months of Husband's military service.

[Option C: spouse gets fixed dollar amount, which may not exceed 50% of disposable retired pay; no COLA adjustments for spouse; this favors member] $____ per month.

[Option D: spouse receives a hypothetical amount, based on the grade and years of service of member at time of separation, divorce or other date; no COLA unless specified; this clause favors the member] ____% of the disposable retired pay of a *[grade or rank]* with ____ years of creditable service. – OR -- ____% of the marital share of the disposable retired pay of a *[grade or rank]* with ____ years of creditable service each month. The marital share is a fraction made up of ____ months of marital pension service, divided by the total months of Husband's military service at date of *[divorce, separation, etc., according to state law]*.

2. Husband has served at least ten years of creditable service concurrent with at least ten years of marriage to Wife. Wife is entitled to direct payments from DFAS and shall receive payments at the same time as the Husband.

[use one of the following clauses if there is no 10-year/10-year overlap as stated therein] Husband will pay Wife directly the amount specified in the preceding paragraph. Payments will be due on the first of each month, beginning *[date]*. -OR- Husband will pay Wife by a voluntary allotment from his retired pay the amount specified in the preceding paragraph. Wife shall receive payments at the same time as the Husband.

[as another alternative, the parties may agree to payment from Husband to Wife of alimony, which is not limited by the 10/10 overlap above; in this case, an alimony clause should be utilized]

[use this in the event federal law changes to allow direct payments without the 10/10 overlap] In the event that federal law changes to allow direct payments from DFAS to Wife, then this order

shall be submitted to DFAS by Wife to accomplish this.

3. Any amounts not paid to Wife by DFAS in any given month, regardless of the reason, shall be paid by the Husband directly to her.

4. When DFAS has determined that this order meets the requirements of the applicable federal law and is a military pension division order, then it shall carry out the provisions of this order and shall give written notice to Wife (at her address set out above) and to her attorney, *[name and address]*, that this order meets the requirements of federal law as a direct-pay military pension division order.

5. The Wife shall notify DFAS in writing about any changes in the her address or in this document affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.

6. Husband shall provide promptly to Wife any information that she needs in order to have this order honored for direct payment of military pension benefits and shall keep her informed at all times of his current address.

7. Wife shall tender a certified copy of this order to DFAS along with an executed DD Form 2293.

8. The parties have agreed upon a set level of payments to Wife to guarantee income to her, based upon military retired pay without any deductions for disability compensation or any other reason. *[-OR- if Husband is retired and already receiving reduced retired pay because of disability compensation, use this sentence:* The parties have agreed upon a set level of payments to Wife to guarantee income to her, based upon Husband's military retired pay without any additional deductions for disability compensation, over and above his present percentage disability rating, or any other reason.*]* They consent to the court's retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if Husband should waive military retired pay in favor of disability compensation or take any other action which reduces Wife's share or amount of his retired pay as set out herein. This retention of jurisdiction is to allow the court to adjust the Wife's share or amount to the pre-reduction level or to require payments or property transfers from Husband that would otherwise adjust the equities between the parties so as to carry out the intent of the court.

9. If Husband fails to retire from military service and elects to "roll over" time in his military service into other federal government service in order to get credit for same, then the Wife shall be entitled to her share if any federal retirement pay or annuity he receives based on the parties' period of marriage during Husband's period of military service. Husband shall notify Wife immediately upon his termination of military service, through retirement or otherwise, and shall include in said notification a copy of his military discharge certificate, DD Form 214. Husband shall also notify Wife immediately if he takes a job with the federal government, and shall include in said notification a copy of his employment application and his employment address. Any subsequent retirement

system of Husband is directed to honor this court order to the extent of Wife's interest in the military retirement and to the extent that the military retirement is used as a basis of payments or benefits under the other retirement system, program, or plan.

10. *[to protect spouse if future information is needed regarding member's status, location or benefits for modification or enforcement purposes]* If Husband breaches this order and also fails to provide Wife with his date of retirement, last unit of assignment, final rank or grade, final pay, present and past retired pay and current address, then he authorizes Wife to request and obtain this and other information from the Department of Defense and from any department or agency of the U.S. Government.

- OR - [*if Husband will not agree with the above clause*]

If Husband shall breach any terms in this document, then the court shall award to Wife any and all attorney's fees she may incur in obtaining information on the Husband from the Department of Defense and in enforcement of the provisions herein.

11. If either party shall violate this court order, then the court shall indemnify the party seeking enforcement and shall award reasonable attorney's fees to the party requesting enforcement.

12. The monthly payments herein shall be paid to Wife regardless of her marital status and shall not end at remarriage. Any future overpayments to Wife by DFAS are recoverable and subject to involuntary collection from Wife or from the estate of Wife. Wife shall be responsible for the taxes on the share received from DFAS of Husband's military retired pay. Wife shall not be entitled to any portion of retired pay upon the death of either party.

13. As to coverage of Wife by Husband's Survivor Benefit Plan (SBP):

    a. Wife shall be the beneficiary of Husband's SBP. Upon their divorce, Wife shall be his former spouse beneficiary, with his monthly retired pay as the base amount and he shall do nothing to reduce or eliminate her benefits.

    b. Wife shall effectuate a deemed election for former spouse coverage within one year of the entry of this order by sending this order to DFAS with a certified copy of the divorce decree and a cover letter requesting a "deemed election."

[if Husband may elect coverage at less than the full amount of his monthly retired pay, then use the following clause] Upon their divorce Husband shall elect former spouse coverage, choosing as the base amount $_____ [or] _____% of his monthly retired pay.

14. If Husband does anything that changes the former spouse election, then an amount equal to the present value of SBP coverage for the Wife shall, at the death of Husband, become an obligation of his estate. In addition, the Wife shall be entitled to such remedies for breach as are available to her in a court of law.

[The premium for SBP coverage is deducted from the member's gross retired pay before it is divided between the parties. This "off-the-top" deduction means that the parties share equally in the premium payment or unequally if the division of military retired pay is other than 50-50). If the parties desire to allocate SBP costs entirely to the non-military spouse, this can be difficult. DFAS will not honor such a clause under current law. One can allocate the cost of SBP premiums to the non-military spouse by the following steps:

- *Figure out what dollar amount the wife would get each month as pension division.*
- *Then figure out how much in dollars the SBP premium would be (for spouse or former spouse coverage, use 6.5% of the member's selected base amount).*
- *Then subtract this from wife's dollar amount or anticipated dollar amount. This gives her net share less the SBP premium.*
- *Next divide this figure by the disposable retired pay of the husband (gross pay less SBP premium) and multiply it by 100.*

The resulting percentage is approximately what she should receive to have her pay for the full SBP premium. Go back to #1 of the Decree above and insert the revised percentage in place of 50% (or other fraction) of his disposable retired pay.] [-OR- This clause sets out a way for the retired servicemember to be reimbursed by the spouse for the cost of SBP: Wife shall reimburse Husband within 10 days of each monthly premium payment for the full cost of her SBP coverage.*]*

_____ Date:_____

Judge Presiding

WE CONSENT:

[signatures of parties, preferably with acknowledgments]

[signatures of attorneys]

ENDNOTES

[1] Dep't of Defense, Financial Management Reg. vol. 7B, chap. 29, Former Spouse Payments from Retired Pay (Sep. 1999), *available at* http://www.dod.mil/comptroller/fmr/07b/07b29.pdf.

[2] 50 U.S.C. App. 501-548, 560-593.

[3] *Supra* note 1.

[4] There is a separate address for submitting a SBP deemed election. See the SBP checklist within this SILENT PARTNER.

[revised 7-7-04]

* * *

SILENT PARTNER is a product of the Military Committee, Section of Family Law, American Bar Association, and is prepared by COL Mark E. Sullivan (USAR, Ret.). For revisions, comments or corrections, contact him at 600 Wade Avenue, Raleigh, N.C. 27605 [919-832-8507]; E-mail – LAW8507@aol.com.

Dividing Military Retirement Benefits

By Major Susan L. B. Darnell, USAF (Ret.)

Major Susan L.B. Darnell, retired from the United States Air Force, and is an attorney in practicing in Newport, Rhode Island. She is a member of the ABA Section of Family Law Military Law Committee.

Welcome to Military Retirement Division 101. Prepare to be amazed! Dividing military pensions is not for the faint of heart, but it is well worth following along, because to err in dividing what is likely to add up to $2 or $3 million over the lifetime of a service member--possibly one of the most generous defined benefit plans remaining in the U.S.--is to court serious problems that may not be apparent for years to come.

The most important source of information about division of military retirement pay is 10 U.S.C. § 1408, The Uniformed Services Former Spouse Protection Act (USFSPA), which gives states the authority to divide military retirement benefits when members divorce. Passed in 1982, the USFSPA is a constant source of conflict between veterans' groups, who feel that military retired pay should not be subject to division, and those advocating on behalf of former spouses. Although the original law was elegant in its brevity, it is subject to annual revisions tacked onto defense spending bills each year. No previous period can match the last three years for creating huge headaches for those attempting to apply those changes (read: you and me).

Jurisdiction

Because the USFSPA is a federal law, the jurisdictional requirements for dividing marital property are more exacting than those required by a state. The court in question must

have jurisdiction over the *military retirement* to be able to award a portion of it to a spouse. This generally is different from state jurisdictional requirements needed to obtain a divorce. In general, the member's retirement can be divided one of two ways: by filing in the member's home state, which is usually the state the member designates as "home" on his or her state tax returns, or by the member initiating or answering a complaint for divorce and thereby submitting to the jurisdiction of the court.

Because federal law doesn't usually intrude on family law, nasty surprises can await practitioners who are unaware of these requirements. A member can specially appear to refute jurisdiction, have the request denied by the court and the divorce granted, but still be successful in preventing division of the retirement because USFSPA says it can be so. In addition, never make the mistake of thinking that you have jurisdiction over the military retirement just because an active duty military member is stationed where the court is. The member's presence due to military duties alone does not constitute residency; however, on closer examination, the member could indeed be a resident of the state in which he or she is stationed. Bottom line: It is essential to know where the military member resides legally prior to filing. In some contested matters, it is safest for the spouse to file in another state.

One final point on jurisdiction involves default judgments involving an active duty military member. Under the Servicemembers Civil Relief Act of 2003 (which replaced the old Soldiers' and Sailors' Civil Relief Act), members can reopen default judgments up to 90 days after they retire unless certain procedures are carefully followed during the divorce. Rule of thumb: Avoid defaulting on an active duty member if at all possible; however, if there is no other choice, follow provisions of the law exactly, and be sure to sue in the member's state of legal residence.

How it works

Most divisions are accomplished using the marital portion or coverture method. This method creates a mathematical formula with the years (or months) of marriage that overlap the member's service, divided by total years (or months) of service. In the case of Guard or Reserve members, "points" are the units of service time and are earned yearly. Points can be matched year by year to the exact period the parties were married to determine overlapping "marital points" over total service points. This method of division is by no means the only one. A set dollar amount can be named or the percentage can be influenced up or down by other trade-offs. The law merely states that the pension can be divided, but does not provide rules about how much can be awarded.[1]

Consider two major points regarding what *cannot* be done.

First, language that divides the pension must be crystal clear to the Defense Finance and Accounting Service (DFAS) or you will find yourself amending orders and judgments. DFAS has recently updated its guide entitled "Dividing Military Pay," which is available at http://www.dod.mil/dfas/money/garnish/speech5.pdf. This document includes sample language and what to avoid. Read and understand these rules before you file any court documents. Often parties will agree to something that DFAS doesn't permit. Since DFAS also can't pre-approve an order to divide retirement pay, the error is often caught just as the hapless attorney is closing the file.

Second, it is important to understand the "ten-year" rule. In 1982, when the USFSPA was being debated (and heavily protested), Congress threw in a provision designed to assuage those vehemently protesting any division of military retirement

[1] However, there *is* a limit on how much DFAS will pay directly to the former spouse.

benefits. The provision states that DFAS can pay the former spouse only her portion of retirement pay directly if the marriage was at least 10 years and it overlapped at least 10 years of military service. This small clause has triggered many extra trips to court to enforce awards, because although DFAS can't pay benefits directly to the former spouse when the marriage-service overlap was less than ten years, the former spouse can still be awarded a portion of benefit. The problem with an under-ten-year award is that it requires the retired member to write a check (or make some other transfer arrangement) to the former spouse each and every month for life. Trouble seems to track this arrangement. Often alimony is awarded in lieu of a portion of retirement when the marriage-service overlap is under ten years, because alimony is not subject to the ten-year direct award restriction.

Because the ten-year rule has no parallel in the civilian world, ongoing pressure has been exerted to get rid of this troublesome clause. Make sure that any order you write includes considerations for future changes in the law so that an under–ten former spouse could receive direct payment of a retirement award if it should become available in the future.

New, new, new!

Let's start with an issue that has been out there for awhile, but is just now "ripening": The three methods of calculating final pay.

Final Basic Pay—Very easy. If the member served 20 years, the "basic pay" earned on the last day of duty is divided in half. For every year over 20, 2.5 percent is added, up to a maximum of 75 percent of basic pay at thirty years. However, this final calculation is nearing its end because everyone who entered

military service after September 8, 1980, and before August 1, 1986, falls under the next system—High 3. Theoretically, the last Final Basic Pay retirees will leave service no later than September 8, 2010 (unless they had a break in service, but that's another headache).

High 3--There are many civilian versions of High 3, so this is also not too tough. Basic pay for the last three years of service is averaged, resulting in a reduction of total benefits. Other than the High 3-year average, the remaining calculation is the same as for Final Basic Pay. These members are already retiring, so the member/client in your office could be subject to either Final Basic Pay or High 3. Don't be surprised if your client doesn't know which applies to him or her. The information is easily located on the members' leave and earnings statement (pay statement).

Redux--Anyone entering service after August 1, 1986, must make a choice in their fifteenth year of service to (1) retire under High 3 or (2) receive a $30,000 career retention bonus and then at retirement receive a variation of High 3. Redux members retiring at 20 years of service will receive 40 percent of basic pay, and for every year served beyond 20, an additional 3.5 percent, thus encouraging members to stay for 30 years of service when 75 percent of basic pay (equivalent to High 3 retirement at 30 years) has been earned. This group will become retirement-eligible in 2006. Questions about the timing of the member's retirement, the percentage available for division, and how the $30,000 retention bonus has been used are certain to crop up and need careful thought.

As previously mentioned, over the last three years massive statutory changes have affected military retirement pay and benefits. Here is the alphabet soup of the Big Three:

Concurrent Receipt of Disability Pay (CRDP)

Combat Related Special Compensation (CRSC)

Survivor Benefit Program (SBP) (old program, big new change)

Concurrent Receipt of Disability Pay (CRDP) and Combat Related Special Compensation (CRSC) are related in a unique way, seemingly designed to make drafting an accurate retirement division order nearly impossible. Both affect military members with VA disability ratings and are easily confused.

Concurrent Receipt of Disability Pay (CRDP)--Military members' duties often require them to put the mission ahead of prudent care for their bodies, resulting in permanent injuries or lingering illnesses. Upon retirement, members are entitled to a medical evaluation by the VA to determine the nature and extent of permanent damage. The VA then rates the effect on the member's future. This "disability rating" is applied to the member's retirement pay to determine tax-free disability pay. In years past, the catch was that disability pay was offset from retirement pay, before being paid back tax-free. Because VA disability payments are both tax-free and exempt from division under USFSPA, a divorcing military retiree who received disability payments had less retirement pay to split with the former spouse and also retained all their disability pay . However advantageous this system of disability compensation was to the military member who divorced, it still treated retired disabled military members differently. Other military veterans who were injured and awarded disability pay, but who left the service prior to retirement, could collect their civilian retirement pay *and* VA disability pay. This

included those who eventually retired from the civil service, which seemed grossly unfair.

After years of lobbying by both retirees and former spouses, military retirees with a 50 percent or greater disability rating now receive concurrent retirement and disability pay under the 2004 Defense Authorization Act. Full payments are being phased in over ten years, with full retirement and disability pay being authorized by 2014.[2]

Under CRDP, the pay that is being returned to disabled military retirees is retirement pay—the very pay that the USFSPA allows states to divide with former spouses. Because many awards are stated as a percentage of the military member's retirement, those awards to former spouses should now include a percentage of the additional money. However, DFAS is currently paying those new amounts as a separate payment, and the new funds are not likely to be automatically divided and distributed according to a previously submitted division order. In such cases, contact DFAS and request a review of the division. Tracking the disability award of a former spouse is difficult enough, but a second program for disabled retirees, Combat Related Special Compensation (CRSC), further complicates the matter.

Combat Related Special Compensation (CRSC)—A member's overall disability rating can be based on the combined value of several medical problems. If any of these disabilities is rated individually at 10 percent or more, and are related to combat (including training for combat), the member is entitled to apply for Combat Related Special Compensation (CRSC). The procedures for applying vary by service (and are available at the DFAS Web site at http://www.dod.mil/dfas/retiredpay/combat-relatedspecialcompensationcrsc/howtoapply.html). If CRSC is awarded, payment is

retroactive, tax-free, and immediately payable in full (versus the 10-year phase-in for CRDP). If a member qualifies for CRSC, he or she is often also qualified for CRDP, but the member may select only one program to participate in each year. The choice must be made carefully, because benefit amounts are dependent on the individual circumstances affecting the particular military retiree's pay during a given year. The critical part for practitioners is that the member retains the ability to switch programs each year as the benefit calculation changes. This benefit shell game will continue through 2014 when CRDP is fully restored.

Obtaining CRSC payments requires an application process and an award determination making it difficult to predict, however it is easy to calculate the yearly CRDP payment if you know the military member's overall disability percentage rating.

VA Rating	2004	2005	2006	2007	2008
100%	$750	$2,193	$2,193	$2,193	$2,193
90%	$500	$582	$729	$905	$1,317
80%	$350	$432	$580	$757	$1,171
70%	$250	$326	$462	$626	$1,008
60%	$125	$193	$314	$460	$801
50%	$100	$153	$249	$364	$633

[2] Still undecided is the fate of concurrent receipt for disabled retirees with a less than 50 percent disability rating. Pressure is being exerted to include these retirees in future amendments to the law.

So how does this work in real life?

Example: If I have a 50-percent disability rating, I am qualified for CRDP. Using the chart above, I can determine that in 2004 my CRDP concurrent retirement pay (divisible) was $100 per month, and in 2005 it increased to $153 per month. If I now decide to apply for CRSC because 20 percent of my disability is based on a parachuting back injury (combat training), I may learn that I will receive $250 per month[3] in additional disability pay (nondivisible) tax-free and retroactive. I can elect retroactive CRSC and continue to elect it through 2006, because with the tax advantage I will get more money each month. However, in 2007, I will change back to CRDP, because after 2006 I will get more money under that program.

That wasn't too tough, but should I divorce, a multitude of retirement division problems arise. If I wish, I can elect to get only CRSC so that there will be no additional money going to my former spouse. If I change now to the retroactive nondivisible CRSC and my spouse had been getting a portion of my CRDP, is any of that money (which has now become nondivisible disability pay) recoverable? Can a former spouse protect his or her interest in the CRDP payment? How does one get up-to-date information about the military member's yearly disability program elections, which may be in annual flux until 2014?

DFAS is still working out these details. In the meantime, suffice it to say that representing the former spouse in a military division just became a lot more difficult due to the need for information controlled by the military member. A carefully drafted military division order should require cooperation and information flow in order to protect the

[3] $250 is purely a hypothetical number and should NOT be used to predict benefits!

former spouse from unexpected fluctuations in payments due to the military member's annual compensation program elections.

Following is an excellent chart produced by the Army that summarizes key qualifications for CRSC and CRDP and the advantages to the military retiree. (Bear in mind that the implications for the former spouse are quite different.)

CRSC vs. CRDP (cannot receive both)

2005 Example	CRSC	CRDP
Full Concurrent Receipt	YES	NO - 10 yr phase in (except 100% rating)
Payment at 50% combined rating	**$663**	**$153**
VA Rating Starts At	**10%**	**50%**
Compensation	**Retroactive**	**Not Retroactive**
Taxable	**TAX FREE**	**TAXABLE**
Individual Unemployment (IU)	**YES**	**NO**
Survivor Benefit	**NO**	**NO**
File Claims	**YES**	**NO - Automatic**
Qualified Injury	**Combat - Linked**	**Service Connected**

This chart was created by the US Army.

No doubt about it, these two new programs change everything in the world of military retirement division. But wait! There's more!!

The Survivor Benefit Program (SBP)--An annuity for the retiree's surviving beneficiary, SBP provides the survivor with 55 percent of the selected base amount, from $300 up to the member's full retirement, prior to the beneficiary's attaining age 62, which has been the age for early receipt of reduced Social Security benefits. Under the offset rules, when Social Security commenced for an SBP beneficiary, SBP payments were reduced

to 35 percent of the deceased military member's retirement pay at a time when aging survivors were often experiencing increases in out-of-pocket health care costs.

Derided as the "widow's tax," it was so unpopular that many members opted out of the program altogether. With the passage of the 2005 Defense Authorization Act, the "Social Security offset" will soon be history—but once again, not immediately. The offset will be phased out in yearly 5-percent increments from October 2005 through October 2008, when the Social Security offset will end. Because this change is anticipated to make the SBP program much more popular, a one-year open season will commence in October 2005 to allow an opportunity to buy into the program to military retirees who previously declined (or neglected) to elect SBP at retirement.

If you are wondering how this affects military retirement divisions, it has mostly to do with righting wrongs. SBP is not addressed in the USFSPA, but is available as an option for retirees, service members, and former spouses under 10 U.S.C. § 1447 *et seq.* and 5 C.F.R. § 843. There is no legal presumption that SBP should be awarded to former spouses as part of a marital property division; however, the availability of this protection provides an important bargaining tool during settlement negotiations. When awarded, SBP has its own specific set of rules for implementing the award. Normally, DFAS must be served with the SBP order within one year of divorce (if the member submits the order) or within one year of the order awarding benefit to the former spouse (if the former spouse submits the order to DFAS). The military member can elect the benefit at retirement, or the former spouse can personally deem the election if the award is specifically included in the final judgment or military retirement division order.

Unfortunately, for various reasons, this one-year deadline often gets missed. The upcoming SBP open season will allow those who have an order awarding an SBP, but

somehow missed electing the option within the one-year window, an opportunity to buy in by paying the missed premiums. My purely anecdotal observations lead me to conclude that there are quite a few of these situations out there in need of a cure. This is bound to be less painful and expensive for all than going back to court.

The DFAS Web site is a good source of SBP information. Start with the FAQs at http://www.defenselink.mil/dfas/retiredpay/frequentlyaskedquestions.html. This section includes instructions for a former spouse to "deem the election" of the SBP and thereby avoid having to rely on the military member to make the appropriate election. Be sure that you understand and heed the terminology. Two of the more common mistakes are:

1) Including a provision directing the member to elect "spouse coverage" upon retirement. According to DFAS, "SBP coverage for 'spouse' is not specific for an individual. Coverage does not continue for a spouse who subsequently becomes a former spouse unless the election is changed to 'former spouse.'" The correct language should mandate "spouse" coverage until the divorce, followed by "former spouse" coverage.

2) Using language that directs that only one of the parties will pay the entire SBP premium. By law, the SBP premium is taken "off the top" of retirement benefits, and any division of retirement pay occurs after this. The only way to accomplish having one party "pay" for the SBP benefit is to adjust the percentage awarded.

Dividing any pension requires zealous attention to the rules of the pension plan and obsessive attention to the details of the owner's career and marital timeline. With regard to military retirement divisions, practitioners also must make certain that the intended action is timed correctly (possibly delaying or accelerating actions slightly to

account for the “ten-year” requirements), filed in the proper forum, and that all paperwork is completed and filed with the proper office expeditiously. Language must contemplate the military member’s receiving disability benefits in the future. And most of this information is needed prior to even filing the divorce to avoid the very real danger of losing jurisdictional control of this multimillion dollar asset.

On the upside, if you like having an excuse to spend chunks of time surfing military Web sites and keeping abreast of the latest legislative action, this is a fabulous time to be involved in this work. If you don’t care to get that enmeshed, consult with someone who specializes in this work--for referral or association as co-counsel--and be sure to do so early in the process.

Susan L. B. Darnell, Esq.
Darnell Law
Admiral's Gate Tower
221 Third Street, 5th Floor
Newport, RI 02840
Phone (401) 608-3087
Fax (401) 608-3088
SDarnell@DarnellLaw.net
www.DarnellLaw.net

American Bar Association
Section of Family Law

Wednesday, May 3, 2006

A Short Course in Military Family Law Issues

Speaker Biographies

AMERICAN BAR ASSOCIATION
SECTION OF FAMILY LAW
SHORT COURSE IN MILITARY FAMILY LAW
MAY 3, 2006
ARLINGTON, VIRGINIA

SPEAKER BIOGRAPHIES

Patricia Apy
Paras, Apy and Reiss
Red Bank, New Jersey

Patricia Apy is a partner in the law firm of Paras, Apy & Reiss, practicing exclusively in the area of Family law. She served from 1991 through August of 2002 as the Chair of the International Law and Procedure Committee of the Family Law Section of the ABA. She now serves as the liaison from that Section to the ABA Standing Committee on Legal Assistance for Military Personnel (LAMP), and has been recently appointed by the Chair of that Section to serve as a Family Law Representative to the ABA Working Group on Protecting the Rights of Service Members. She formerly served as legal advisor to the United States Delegation to the Hague in 1995 during the preliminary negotiations on the Convention for Maintenance Obligations abroad, and returned in 1996 as a delegate for the negotiation of the Hague Convention for the Protection of Minors. She serves as a consultant to the United States Department of State and the United Nations on issues involving families and children. In addition to serving as an instructor at the Naval Justice School and both the Army and Air Force Judge Advocate General Schools for advanced family law; she has provided onsite training to JAG and legal services attorneys at military facilities around the world. She has a particular experience in the litigation of international and interstate child custody disputes particularly those involving the application of Islamic law.

Major Susan L.B. Darnell
Darnell Law
Portsmouth, RI

Major Susan L. B. Darnell, USAF (Ret) is the proprietor of Darnell Law located in Newport Rhode Island, which specializes in military and civilian family law. She routinely consults with other attorneys on the intricacies of military family law and particularly military retirement divisions. Major Darnell retired in 1999 after a twenty-year career in the United States Air Force and the United States Army. She was an AWACS Master Navigator and a navigation instructor. Her final assignment was with Joint Interagency Task Force South as the head of airborne counter-drug strategic planning for South America. Major Darnell holds a Bachelor of Science degree in Nursing from the University of Maryland and a Masters degree in Systems Management from the University of Southern California. Following her military career she attended Roger Williams University School of Law graduating from their honors program in 2004. She is a member of the Rhode Island Bar, an associate member of the Edward P. Gallogly Inn of Family Courts, and a member of the ABA Section of Family Law Committee on Military Family Law. Major Darnell published an article entitled "Dividing Military Retirement Benefits" in the Fall 2005 ABA Section of Family Law journal, Family Advocate, has presented CLEs on this topic and has been accepted by the courts as an expert witness in military family law issues. In addition to her family law practice, Major Darnell is a national volunteer for Girl Scouts of the USA, in which capacity she currently works throughout the country as a negotiator and facilitator for mergers and

consolidations of Girl Scout councils. She is listed in "Who's Who among American Women, Who's Who in America, and Who's Who in the World".

Vartan A. Davidian III
Sandlin & Davidian, PA
Raleigh, NC
Vartan A. Davidian III, practices family law in Raleigh, North Carolina with the law firm of Sandlin & Davidian, PA. He served as a Navy JAG lieutenant in Groton, Connecticut from 1999 until 2002 where he served a legal assistance and defense attorney. He is a member of the American Bar Association Section of Family Law.

James N. Higdon
Higdon, Hardy & Zuflacht, LLP
San Antonio, TX
James Higdon is a partner in Higdon, Hardy & Zuflacht, LLP of San Antonio, Texas. Board Certified in Family Law and Civil Appellate Law by the Texas Board of Legal Specialization, he deals primarily with family law matters, particularly clients with military-related family law issues, especially in the division of military retirement. He is a member of the Texas Chapter, American Academy of Matrimonial Lawyers (AAML), as well as the Family Law Sections of the State Bar of Texas, American Bar Association and San Antonio Bar Association, the latter of which he was the founding chair. A retired Navy Reserve Captain and naval aviator, Higdon is a frequent speaker for the State Bar of Texas, the ABA, local area Bar Associations, as well as several "for-profit" CLE organizations, for whom he has published articles on predominately military-related Family Law topics. He is recognized as the "Go-to Guy" for military related family law matters in the State of Texas, as well as in other parts of the U.S., having represented clients in a number of other states in drafting of military retirement language for divorce decrees or the prosecution/defense of enforcement post-divorce retirement matters. Higdon has served as an officer and/or president/chair of numerous Bar-related, as well as non-related organizations. Currently, he serves as Chair of the Military Law Section of the State Bar of Texas.

Mark E. Sullivan
Sullivan & Grace, P.A.
Raleigh, NC
Mark E. Sullivan is a board-certified specialist in family law and past president of the North Carolina Chapter of the American Academy of Matrimonial Lawyers. He is the Chair of the Military Committee of the ABA Section of Family Law and he practices with Sullivan & Grace, P.A. in Raleigh, NC. He is a retired Army Reserve JAG colonel who has written extensively on military family law and legal assistance. He founded Operation Stand-By, the Family Law Section's resource list of over 100 attorneys nationwide who provide help for free to JAG officers in the field of family law, and is author of numerous articles and information letters on family law and the military.