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LEGAL NEEDS OF MILITARY VETERANS, SERVICEMEMBERS, AND THEIR FAMILIES

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ISSUES RAISED BY MILITARY SERVICE IN THE CONTEXT OF FAMILY LAW CASES

By Angela Anderson and Steve Berenson

Angela Anderson
Attorney, Officer in Charge

Legal Assistance
Marine Corps Recruit Depot San Diego
1600 Henderson Ave.
San Diego, CA 92140
619.524.4105
Angela.b.anderson@usmc.mil

Steve Berenson
Associate Professor of Law

Thomas Jefferson School of Law
2121 San Diego Ave.
San Diego, CA 92110
619.374.6925
sberenson@tjsl.edu

The ongoing military conflicts in Iraq and Afghanistan have placed unprecedented demands on the men and women who wear the military uniform in support of our country. As of the summer of 2008, approximately 1.6 million servicemembers had served in Iraq or Afghanistan, and that number continues to rise.[1] Exposés regarding scandalous conditions at Walter Reed Army Medical Center and the personal struggles of many servicemembers returning from the front have raised public awareness regarding the extraordinary sacrifices made by individual servicemembers in support of the war effort.[2] National and local bar associations and legal aid organizations have responded to this awareness by launching pro bono or reduced-fee programs to provide legal assistance to active-duty servicemembers and their families and to returning veterans.[3] Rightly much of the focus of such programs has been on soldiers returning from the field with sometimes catastrophic physical and psychological wounds. However, even those who have not suffered recognizable physical or mental health injuries may have compelling legal needs. This is particularly true of those servicemembers with families, given the tremendous strains that the frequent and extended deployments that are the hallmark of the current conflicts place on families.[4]

[1]The Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery 98 (Terri Tanilan & Lisa J. Jaycox eds., 2008).

[2]Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility,* Washington Post, Feb. 18, 2007, at A1.

[3]Two of the most prominent are the American Bar Association's Military Pro Bono Project (www.militaryprobono.org) and the Lawyers Serving Warriors project of the National Veterans Legal Services Program (www.lawyersservingwarriors.com).

[4]See Invisible Wounds of War, *supra* note 1, at 5.

Indeed, some of the most pressing needs for legal assistance on behalf of active-duty servicemembers are in the family law area. Attorneys participating in pro bono and legal aid programs to assist such servicemembers are certain to encounter family law issues. Yet even those familiar with such issues generally are likely to encounter numerous complications when one of the parties is a member of the military. Here we flag some of the most common such military family law issues that are likely to arise for the typical practitioner. We certainly do not mean to give a comprehensive treatment of all such possible issues but rather to aid the attorney in spotting relevant issues and in beginning the legal research necessary fully to deal with such issues, categorized here according to the following topics: jurisdiction; service of process; the Servicemembers Civil Relief Act; custody and visitation; family support; and military-pension division.

Jurisdiction

Even a military family with a relatively "simple" situation can present complicated jurisdictional issues. For example, Darren and Melissa Block, born and raised in Minnesota, were married there shortly after high school graduation.[5] Darren enrolled in the Army, and the couple moved to Texas pursuant to his military assignment. About a year later the couple's daughter was born. The couple bought a home in Texas. Darren was assigned to South Korea. The separation was too much for the marriage to bear, and the following year Melissa filed for divorce in Texas. Did the court have jurisdiction to grant the divorce? To divide Darren's military pension? Suppose the court granted the divorce, ordered Darren to pay child support, and allowed Melissa to return to Minnesota with the child. A few years later Darren reenlists and receives a hefty bonus for doing so. May Melissa obtain an increase in child support based on the bonus in a Minnesota court? Suppose Darren is returning to Texas for two weeks' leave and wants to be sure his daughter will spend that time with him. If Melissa does not agree, in which court must Darren file to compel such visitation?[6]

In general, a court acquires jurisdiction to dissolve a marriage based upon one of the parties having a domicile within the state in which the court sits.[7] Domicile, in turn, is defined as residency, with intent to remain indefinitely.[8] Though often a relatively straightforward concept, domicile can be complicated by the frequent and ongoing relocations required by military life. Thus the question of whether a servicemember or the servicemember's spouse is domiciled in a particular state for purposes of creating divorce jurisdiction can be a complicated one.[9] Specific federal statutes govern the determination of a servicemember's domicile for tax and voting purposes.[10] While these may be relevant factors for determining domicile for divorce purposes, they are not dispositive. The military concept of home of record is likely to be accorded little weight since it amounts to nothing more than an administrative record of where the servicemember joined the military and where the servicemember's possessions will be

[5]The following scenario is based very loosely on the unpublished decision in *Block v. Block*, No. A04-942, 2005 WL 89472 (Minn. Ct. App. Jan. 18, 2005).

[6]In the actual case the only disputed issue was child-support modification, and the Minnesota court ruled that it lacked jurisdiction to modify the Texas court's support order based on the Uniform Interstate Family Support Act (UIFSA) § 611(a) (*id.*; see *infra* note 22).

[7]See, e.g., *Estin v. Estin*, 334 U.S. 541 (1948); *Williams v. North Carolina*, 325 U.S. 226 (1945).

[8]See, e.g., *Mitchell v. United States*, 88 U.S. 350, 352 (1874).

[9]See, e.g., *Wamsley v. Wamsley*, 635 A.2d 1322 (Md. 1994) (Maryland is husband's domicile despite eleven-year absence due to military assignments); *Cruickshank v. Cruickshank*, 420 So. 2d 914 (Fla. Dist. Ct. App. 1982) (Florida is domicile under similar circumstances). See also George H. Fisher, Annotation, *Residence or Domicile, for Purposes of Divorce Action of One in Armed Forces*, 21 A.L.R.2d 1183 (1953).

[10]50 U.S.C. app. §§ 571(a), 595 (2005).

shipped on separation from the military.[11] Among other factors that courts consider in determining domicile are the purchase or lease of property, registering a vehicle or obtaining a driver's license or both, enrolling children in local schools, opening a local bank account, and joining local civic, religious, professional, or fraternal organizations.[12] A number of jurisdictions have statutes that create subject-matter jurisdiction to dissolve marriages based upon mere residency of military personnel rather than domicile.[13] However, there is some question whether sister states are required to give full faith and credit to such dissolutions which are not based upon domicile, and better practice would be to file in a jurisdiction where domicile can be proven.[14] In the case of Block, the couple's purchase of a home in Texas would probably indicate a change in domicile sufficient to support jurisdiction in the Texas court to dissolve the couple's marriage.

Forty-six states and the District of Columbia have adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) for purposes of determining jurisdiction to issue child custody and visitation orders.[15] According to the UCCJEA, jurisdiction to issue an initial child custody or visitation order should generally lie with the child's home state.[16] The child's home state is the last state where the child lived for six consecutive months with a parent or a person acting as a parent or, for a child less than 6 months old, where the child lived from birth with any of the aforementioned persons.[17] Periods of temporary absence do not interrupt the relevant six-month period.[18] Foreign countries are treated as states for purposes of the statute.[19] Thus the Block daughter's home state at the time of the dissolution was Texas.

The court issuing the initial child-custody determination has continuing exclusive jurisdiction to modify that order unless and until all of the interested parties (the child, the parents, or any person acting as parent) have moved from the jurisdiction, or, if only one parent remains in the issuing jurisdiction but not the child, neither the child nor the child and a parent or any person acting as a parent retains a significant connection with the issuing jurisdiction.[20] The UCCJEA does allow a court with jurisdiction to decline to exercise that jurisdiction in favor of another state with jurisdiction on grounds of convenience of the forum.[21] In the Blocks' case, Darren would likely have to seek his visitation order in Minnesota because the child and her mother

[11] *Midkiff v. Midkiff*, 562 S.E.2d 177 (Ga. 2002) (servicemember's change of home of record to his parents' state was not sufficient to change his domicile for divorce jurisdiction purposes). See Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile,* 177 Military Law Review 49, 60 (2004).

[12] See Daknis, *supra* note 11, at 78–79; Marion J. Browning-Baker, *No Service, No Divorce Case*, Family Advocate, Fall 2005, at 15.

[13] See, e.g., Mark E. Sullivan, The Military Divorce Handbook 340 (2006); Daknis, *supra* note 11, at 62; James D. Pearson Jr., Annotation, *Validity and Construction of Statutory Provision Relating to Jurisdiction of Court for Purpose of Divorce of Servicemen,* 73 A.L.R.3d 431 (2002).

[14] Sullivan, *supra* note 13, at 341.

[15] Uniform Child Custody Jurisdiction and Enforcement Act (1997) Drafted by the National Conference of Commissioners on Uniform State Laws and by It Approved and Recommended for Enactment in All the States at Its Annual Conference Meeting in Its One-Hundred-and-Sixth Year in Sacramento, California, July 25–August 1, 1997, www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm (references and annotations current through 2008) [hereinafter UCCJEA].

[16] *Id.* § 201(a)(1) & cmt.

[17] *Id.* § 102(7).

[18] *Id.*

[19] *Id.* § 105(a). See *Carter v. Carter*, 75 N.W.2d 1 (Neb. 2008) (Japan became home state of child born in Nebraska after living with both parents in Japan for two and one-half years pursuant to father's military assignment).

[20] UCCJEA § 202. See *Wallace v. Wallace*, 224 S.W.3d 587 (Ky. App. 2007) (Kentucky retained continuing exclusive jurisdiction to modify visitation order despite father's military deployment to Hawaii and mother and child's relocation to Tennessee; Kentucky remained father's residence and child had continuing significant connection to Kentucky).

[21] UCCJEA § 207.

have moved and no longer have a significant connection with Texas.

Generally a court that issues a child custody or visitation order also has subject-matter jurisdiction to issue a child-support order. All fifty states have adopted the Uniform Interstate Family Support Act (UIFSA) as the basis for determining jurisdiction to issue, enforce, and modify both child and spousal support orders.[22] The issuing state retains continuing exclusive jurisdiction to modify a child-support order unless and until all of the interested parties (i.e., child and both parents) have moved from the issuing jurisdiction.[23] If that occurs, and all of the parties reside in the same state, then that state has jurisdiction to modify.[24] For purposes of this section of the statute, the term "residence" has been equated with the legal concept of domicile. Thus two courts found that a servicemember's military assignment did not give that state the jurisdiction to modify another state's child-support award even though all of the parties lived in the new state.[25] In the case of Block, Texas most likely remains Darren's domicile. Texas would retain continuing exclusive jurisdiction to modify the child-support order. If the parents reside in two different states other than the issuing state, then the party seeking modification must file in a state other than the party's own state of residence; the state has personal jurisdiction over the nonmoving party.[26] Under the UIFSA, the issuing court always retains continuing exclusive jurisdiction to modify a spousal-support order regardless of the parties' subsequent moves.[27]

For reasons identified above, personal jurisdiction over the respondent is not required in order for a court solely to dissolve a marriage. However, personal jurisdiction over the respondent is required in order for a court to adjudicate the issue of support. The leading case is *Kulko v. Superior Court*, where the U.S. Supreme Court held that, notwithstanding that the parties were married in California during a brief stopover on the husband's military transfer to Korea, the husband's sending his children to live with their mother in California and providing some financial support for them did not satisfy the "minimum contacts" test under *International Shoe v. Washington*, required to provide for personal jurisdiction.[28]

In most dissolution cases involving a servicemember, the first or second largest asset (depending on whether the couple owns a home) to be divided is likely to be the marital share of the servicemember's military retirement pay. Thus the importance of military-pension-division issues cannot be overstated. In 1981 the Supreme Court held in *McCarty v. McCarty* that, under the U.S. Constitution's supremacy clause, state courts lacked jurisdiction to divide military retirement pay on dissolution of a marriage.[29] In response to *McCarty*, Congress enacted the Federal Uniformed Services Former Spouses' Protection Act.[30] The statute grants jurisdiction to a state court to divide military retirement pay pursuant to a dissolution of marriage, provided that the service member is (1) a resident

[22]Uniform Interstate Family Support Act (2001), www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uifsa.asp. (fact sheet).

[23]UIFSA § 205 (see Uniform Interstate Family Support Act: Last Amended or Revised in 2001: Amendments to the Uniform Interstate Family Support Act (2001) Are Indicated by Underscore and Strikeout: Approved and Recommended for Enactment in All the States at Its Annual Conference Meeting in Its One-Hundred-and-Tenth Year, White Sulphur Springs, West Virginia, August 10–17, 2001, www.law.upenn.edu/bll/archives/ulc/uifsa/final2001.htm).

[24]*Id.* § 613.

[25]See *Kean v. Marshall*, 669 S.E.2d 463 (Ga. Ct. App. 2008); *In re Marriage of Amezquita and Archuleta*, 124 Cal. Rptr. 2d 887 (Cal. Ct. App. 2003).

[26]UIFSA § 611(a).

[27]*Id.* § 211.

[28]*Kulko v. Superior Court*, 436 U.S. 84 (1978).

[29]*McCarty v. McCarty*, 453 U.S. 210 (1981).

[30]Federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (2005).

within the court's jurisdiction *for reasons other than military assignment*, or (2) domiciled within the jurisdiction of the court, or (3) consents to the court's jurisdiction to divide retirement pay.[31] In the case of Block, the Texas court likely had jurisdiction to divide Darren's military pension based on domicile. We take up issues other than jurisdiction relating to military-pension division below.

Service of Process

Even where personal jurisdiction is not required, the due process clause of the Fourteenth Amendment to the U.S. Constitution requires notice to the respondent of court proceedings affecting that person's interests so that the person has an opportunity to be heard regarding the relevant issues.[32] Such notice is normally given through service of process, which therefore becomes a critical issue in family law cases. Of course, service on a nonmilitary spouse should rarely be a complicated issue. But achieving service on an active-duty servicemember is often an arduous task. Indeed, even locating the servicemember may be a challenge. Each of the service branches has a worldwide locator service to help family members and others find military personnel. The contact information for each of these services is available online.[33] However, the information in these records often lags recent assignments, and requests may take a month to process.[34] Resourceful counsel can also employ informal methods to locate military personnel. For newer personnel, military recruiters may have information regarding assignments.[35] Legal assistance attorneys are also authorized to help the family of servicemembers regarding civil legal problems such as family law matters.[36] Some print sources may be helpful in locating military personnel.[37]

Assuming the servicemember can be located, service may remain a challenge.[38] Family law attorneys not familiar with military cases may simply assume that a servicemember's command, a military judge advocate on the base, or a legal assistance attorney will assist the attorney in completing service. However, this is not necessarily true.[39] Each of the service branches has different rules regarding service of process. A threshold question is whether the servicemember is stationed within the United States or abroad. Even if within the United States, another threshold question is whether the particular military facility to which the servicemember is assigned is located in an area of exclusive federal jurisdiction or in an area of concurrent state jurisdiction, where the state has reserved the right to serve process on the base.[40] If the area is one of exclusive federal jurisdiction, the servicemember has the right

[31] *Id.* § 1408(c)(4). See generally *In re Marriage of Tucker*, 277 Cal. Rptr. 403 (Cal. Ct. App. 1991) (consent to jurisdiction to divide military pension must be explicit—a general appearance to defend a divorce action is not sufficient); *In re Marriage of Hattis*, 242 Cal. Rptr. 410 (Cal. Ct. App. 1987) (jurisdiction to divide military pension based on domicile requires more than the "minimum contacts" required to assert personal jurisdiction).

[32] See generally *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 314 (1950).

[33] U.S. Department of Defense, Requests for Military Mailing Addresses (n.d.), www.defenselink.mil/faq/pis/PC04MLTR.html.

[34] Sullivan, *supra* note 13, at 3–4.

[35] *Id.* at 1.

[36] *Id.* at 2–3.

[37] *Id.* at 3.

[38] Note that the following issues arise only to the extent that counsel wants to effectuate service on a servicemember or the spouse on military property. To the extent that service can be completed off-base, no "special" rules apply to service of process on military personnel (W. Mark C. Weidemair, *Service of Process and the Military*, Administration of Justice, Dec. 2004, at 2–3, www.ncbar.com/lamp/AOJ_Military_Service.pdf).

[39] *Id.* at 6.

[40] The latter is most commonly the case (*id.* at 7). Apparently Air Force policy differs in that it allows process servers on bases even where the bases are under exclusive federal jurisdiction (see Sullivan, *supra* note 13, at 11, quoting Weidemair, *supra* note 38, at 6).

to refuse to accept service.[41] By contrast, if the area is one of concurrent jurisdiction, military officials allow process to be served on-base consistent with relevant state law regardless of the servicemember's consent.[42] However, complications arise when the process being served is from a court in a state different from that in which the military facility sits. In such instances, military policy does not require the servicemember to accept service.[43]

Complications multiply when the military assignment is outside the United States. In such circumstances, service must comply, in order to be adequate, with both the law in the state that issued the process and the law in the country in which the military facility sits.[44] Many countries are signatories to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Signatories to the convention are required to establish a central authority within the jurisdiction for the service of foreign process. If a request for service complies with the requirements of the convention, then the central authority within the country in which service takes place effectuates service either by a method consistent with its laws for domestic service or in the manner asked for by the person requesting service, if not incompatible with the laws of the local jurisdiction.[45]

In light of all of the above, the best course of obtaining service on military personnel may be by mail and acknowledgment of receipt or by substitute service at an off-base residence if the laws of the relevant jurisdiction allows this type of service.

Servicemembers Civil Relief Act

Congress originally enacted the Soldiers and Sailors Civil Relief Act (SSCRA) in 1943 in order to allow servicemembers to devote their full attention to the defense of the nation without distraction from ongoing civil legal proceedings and transactions.[46] In 2003 Congress replaced the SSCRA with the Servicemembers Civil Relief Act (SCRA) in order to incorporate case law interpreting the earlier statute and to update its provisions to work under current conditions.[47] The SCRA applies to all active-duty military personnel and members of the National Guard and reservists called to active duty.[48] The primary relief offered to servicemembers, and of the most interest to family law attorneys, is a stay of ninety days in any civil proceeding, including administrative child-support matters. If the servicemember has entered an appearance, or is able to enter an appearance in the matter, the stay must be granted upon a presentation by the servicemember of either (1) a letter indicating the manner in which current military duty requirements materially affect the servicemember's ability to appear in the matter *and* a date on which the servicemember will be available to appear or (2) a letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance *and* that military leave is not now authorized for the servicemember.[49]

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[41]Sullivan, *supra* note 13, at 11.

[42]*Id.*

[43]*Id.*

[44]*Id.* at 12 (unless, of course, the service member voluntarily agrees to accept service through military authorities). The U.S. Department of State has information on its website regarding service-of-process rules in countries around the world (see U.S. Department of State, Service of Legal Documents Abroad (n.d.), http://travel.state.gov/law/info/judicial/judicial_680.html).

[45]Sullivan, *supra* note 13, at 22–23, quoting Alan L. Cook, *The Armed Forces as a Model Employer in Child Support Enforcement: A Proposal to Improve Service of Process on Military Members,* 155 Military Law Review 153, 192–94 (1998).

[46]Roger M. Baron, *The Staying Power of the Soldiers' and Sailors' Civil Relief Act*, 32 Santa Clara Law Review 137 (1992).

[47]50 U.S.C. app. §§ 501 *et seq.*; see also Mark E. Sullivan, The Servicemembers Civil Relief Act—an Overview 1 (2008), www.abanet.org/family/military/scra_overview.doc.

[48]Sullivan, *supra* note 47.

[49]50 U.S.C. app. § 522; Sullivan, *supra* note 47, at 2.

Perhaps even more important, in cases where the servicemember cannot enter or for whatever reason has not entered an appearance, the servicemember still has the SCRA's ninety-day-stay protection. Upon a finding by a court that the defendant is in military service, the court must grant the stay if it determines (1) that there may be a defense to the action and that defense cannot be presented in the defendant's absence or (2) that, with the exercise of due diligence, counsel has been unable to contact the servicemember (or otherwise determine that the servicemember has a meritorious defense).[50]

Increasingly state and local bar associations are setting up pro bono programs to assist servicemembers in exercising their rights under the SCRA. A first necessary step may be to determine whether a party is active-duty military personnel at all. The Defense Manpower Data Center's online lookup can determine current military status if the party's first and last name and either date of birth or social security number are known.[51]

Even after the ninety-day mandatory stay expires, the SCRA may allow the servicemember to obtain an additional stay if the court finds that the servicemember's prosecution or defense of the case is "materially affected" by the member's military service. Any additional stay is within the discretion of the court. The request for an additional stay may be made at the initial request or later and requires the same information as when obtaining the initial stay.[52] If the court denies the request for an additional stay, it must appoint counsel to represent the servicemember in the matter.[53] Although the statute is not clear regarding the length of any additional stay, most courts can be assumed to be willing to stay a case only until the "material effect" of military service is removed, and courts may impose obligations on servicemembers to seek leave in order to participate in the proceedings.[54]

The SCRA also protects servicemembers from having a default judgment entered against them as a result of their military service. Before entering any default judgment, the court must determine whether the defendant is a member of the armed forces. This is often accomplished by requiring the party seeking entry of a default to file an affidavit stating "whether or not the defendant is in military service and showing necessary facts in support of the affidavit."[55] If the affidavit states that the party against whom the default is sought is a member of the military, the court must appoint counsel to that party.[56] If the court cannot determine whether the defendant is in the military, the court can require the plaintiff to post a bond to indemnify the defendant against any harm that should result from the entry of a default judgment entered while the defendant is in military service.[57] The defendant can obtain relief from any default judgment upon a showing that the defendant was prejudiced in defending due to military service and that the defendant had a meritorious defense to the original claim.[58]

While a stay must be granted on a proper showing by the respondent, counsel should not hesitate to oppose a request for a stay that does not meet the requirements of the statute.[59] Of course, many

[50]50 U.S.C. app. § 521.

[51]Defense Manpower Data Center, Servicemembers Civil Relief Act (SCRA), www.dmdc.osd.mil/scra/owa/home.

[52]50 U.S.C. app. § 522(d)(2); Sullivan, *supra* note 13, at 97.

[53]50 U.S.C. app. § 522(d)(2).

[54]Sullivan, *supra* note 13, at 99–100.

[55]50 U.S.C. app. § 521(c).

[56]*Id.* § 521(b)(2).

[57]*Id.* § 521(b)(3).

[58]Sullivan, *supra* note 47, at 6.

[59]*In re Marriage of Bradley*, 137 P.3d 1030 (Kan. 2006) (servicemember's stay request denied in custody case for failure to meet requirements of the statute).

servicemembers, even during a time of war, remain stationed near the court adjudicating their case and may be working the equivalent of a nine-to-five civilian job. In this instance, appearance in the legal proceedings is not prevented by military service. Furthermore, telephonic or videoconference appearances enable servicemembers to participate in proceedings from afar. If counsel is appointed, e-mail and other forms of electronic communication allow servicemembers in many instances to give counsel the information necessary to represent the servicemember in ongoing proceedings even if the servicemember cannot appear personally. Grounds for the stay should not be assumed merely on the basis of military service.

In some instances the policies behind the SCRA's stay provisions and the exigencies that can come up in family law cases may collide head-on. In certain cases courts found that the exigency of protecting the health and safety of children in the context of temporary custody matters trumped the mandatory stay provisions of the SCRA.[60] Courts have also been willing to enter temporary child-support orders in spite of valid requests for stays.[61]

Custody and Visitation

Naturally custody and visitation issues can be extremely complex where one or both of the parents are servicemembers. The frequent and often unexpected relocations, both short- and long-term, that are inherent in military life can be extremely disruptive to custody and visitation arrangements. While disruptions and dislocations to the children involved must be minimized in such situations, the constitutional rights of both parents must be protected, and imposing any kind of punishment or penalty for the military service being performed by the parent(s) must be avoided.[62] To meet the particular challenges of custody and visitation in the military context, a number of states have enacted specific military custody and visitation statutes. Whether or not such a statute is in effect in your jurisdiction, those statutes provide a road map to the issues that may come up in a military custody or visitation dispute.[63]

First, such statutes generally provide for expedited hearings in the face of a military mobilization or deployment.[64] While the SCRA gives the servicemember an opportunity to delay responding to the custody or visitation motion, such statutes provide the opportunity for an opposite effect—to have the custody or visitation issue resolved expeditiously *before* the military assignment takes place. Such statutes also generally provide for the servicemember to appear at any hearing electronically if the servicemember's military assignment prevents a personal appearance.[65] Second, these statutes allow a military member to "delegate" visitation rights to a third party, usually a family member, for continuity of contact with the child during the military assignment.[66] Third, such statutes deal with custody in the face of

[60]See, e.g., *Lenser v. McGowan*, 191 S.W.3d 506 (Ark. 2004) (issuing temporary custody order before issuing stay); *Diffin v. Towne*, No. V-00560-04/04A, 2004 WL 1218792, at *7 (N.Y. Fam. Ct. May 21, 2004) (same under New York version of the SCRA).

[61]See *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989); *Gilmore v. Gilmore,* 58 N.Y.S.2d 556, 557 (1945); *Jelks v. Jelks*, 181 S.W.2d 235 (Ark. 1944); *Kelley v. Kelley*, 38 N.Y.S.2d 344, 348–50 (1942).

[62]An annotation describes dozens of cases in which courts decided custody and visitation disputes where one or both of the parents were active-duty servicemembers (see Jay M. Zitter, Annotation, *Effect of Parent's Military Service upon Child Custody*, 21 A.L.R.6th 577 (2007)). The annotation is based on the case of *Curtis v. Klimowicz*, 631 S.E.2d 464 (Ga. Ct. App. 2006), where the court held that custodial parent's deployment oversees would not warrant a change in physical custody where child could stay with servicemember's new wife. However, the court did order the servicemember not to remove the child from the United States (*id.*).

[63]As of fall 2008, special military custody or visitation provisions or both were in effect in Michigan, California, Texas, North Carolina, Colorado, Kentucky, Iowa, Virginia, Florida, North Dakota, Louisiana, Kansas, and Mississippi (see Mark E. Sullivan, *Drafting a Military Custody and Visitation Statute*, Roll Call, Fall 2008, at 1, http://bit.ly/AwnJ1).

[64]*Id.* at 2.

[65]*Id.*

[66]*Id.* at 3.

military assignments. Some such statutes provide that any orders changing custody of a child during a military assignment shall be temporary and that custody shall revert to the deployed parent upon that parent's return from the assignment.[67] Other such statutes make clear that deployment alone is not a material change of circumstances warranting a review of custody.[68]

The military requires all servicemembers who are single parents or who have a spouse in the military to have a family care plan for the children in the event of the servicemember's deployment.[69] Such a plan must take into account financial provisions for dependents, instructions to potential guardians regarding their responsibilities, and information so that guardians can access available military benefits for the dependents.[70] Of course, family care plans are not binding on civilian courts should family law litigation ensue regarding the custody of children during deployment. However, a well-structured family care plan may avoid the need for litigation and may be accorded weight in determining the best interests of the child.[71]

Family Support

Collection rates relating to support orders are significantly higher within the military population than the population at large.[72] This may be due at least in part to the nonpayment of a duly established debt, such as a child-support order, being a crime under the Uniform Code of Military Justice, and servicemembers may face administrative sanctions in addition to criminal ones for nonpayment of support.[73] Even where no support order has been established, whether due to service, jurisdiction, or other issues, military policy requires noncustodial parents to support their children.[74] Each branch of the service has different rules regarding interim family support. These range from the Navy's policy of requiring servicemembers to pay up to one-half of their gross pay in support of a spouse and children, to the Air Force's "hands-off" policy not to enforce support obligations in the absence of a court order.[75] The service branches prefer that the parties reach their own agreement as to support and will implement such an agreement if it is in writing in lieu of the default rules mentioned above.[76] A detailed description of the various policies would go beyond our scope here. Nonetheless, attorneys for custodial, nonservicemember parents may wish to contact the servicemember's command to initiate support payments prior to or in lieu of court-ordered support if there are impediments to obtaining the latter.[77] Child support will then be paid by "voluntary" allotment from the servicemember's pay.[78]

Even assuming that jurisdiction can be obtained to receive court-ordered support, calculating support under most

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[67] *Id.* at 5–6.

[68] *Id.*

[69] Army Regulation (A.R.) 600-20 para. 5-5 (2008).

[70] Darrell Baughn, *Divorce and Deployment: Representing the Military Servicemember*, Family Advocate, Fall 2005, at 8–9.

[71] See Duncan D. Aukland, *Five Tips that Pro Bono Attorneys Need to Know When a Servicemember Is a Party to a Family Law Case*, in this issue.

[72] Cook, *supra* note 45, at 161–62.

[73] *Id.*

[74] Aukland, *supra* note 71.

[75] See Navy Policy Manual (N.P.M.) 1754-030; Air Force Instruction (A.F.I.) 36-2906; Sullivan, *supra* note 13, at 212–14. The Army requires child support equivalent to the amount of the servicemember's basic allowance for housing (BAH) (A.R. 608-99 (2003)).

[76] John P. Jurden, *Family Support Policies*, 28 Family Advocate 28, 30 (Fall 2005).

[77] Sullivan, *supra* note 13, at 221–22; Baughn, *supra* note 70, at 11; Jurden, *supra* note 76, at 30.

[78] Baughn, *supra* note 70, at 11.

state child-support guidelines may be complicated by the intricacies of military pay. Again, details lie beyond our scope. Note that servicemembers may receive, in addition to basic pay, a number of types of pay and allowances which may be countable income for purposes of calculating support.[79] Perhaps the most common and largest of these is the basic allowance for housing (BAH). The amount of BAH varies with the servicemember's duty location, pay grade, and number of dependents.[80] All servicemembers also receive a basic allowance for subsistence, which is meant to cover the cost of the servicemembers' food, no longer provided for free by the military.[81] Some types of military pay are nontaxable, and this may affect the calculation of support under certain states' support guidelines.[82]

For each pay period, military members receive a leave and earnings statement (LES), which is the military equivalent of the civilian's paycheck stub. The LES reflects the different types and amounts of pay and allowances received by the servicemember and deductions for items such as taxes, thrift savings plan (TSP) contributions, Servicemen's Group Life Insurance (SGLI) premiums, and voluntary or involuntary allotments to pay back certain loans or installment contracts.[83] The LES may initially appear daunting to nonmilitary attorneys. However, a sample LES and excellent guide to reading it is at http://www.afrims.org/media/les.pdf.

Although military pay in general is subject to garnishment, not all types of pay are.[84] The Defense Finance and Accounting Service (DFAS) processes all military pay garnishments through a central office in Cleveland.[85] Service of garnishment orders on DFAS by facsimile is acceptable.[86]

Military-Pension Division

In general, the nonservicemember's share of the retirement pay is half of the pay based upon the number of years of the marriage concurrent with the servicemember's term of service, divided by the servicemember's total period of service. This is referred to as the marital portion or coverture method.[87] While DFAS will not garnish the nonservicemember's share of retirement pay unless the marriage lasted at least ten years that were concurrent with the servicemember's military service, a legal entitlement to share in retirement pay does not require any particular duration of marriage as long as some of the marriage years overlapped with the period of military service.[88] This is true even if the dissolution takes place before the servicemember has served the twenty years necessary to receive retirement pay, and the servicemember's ultimately collecting retirement pay remains in doubt. By one estimate, even a five-year marriage during military service would net the nonmilitary spouse approximately $84,000 in total retirement pay if the servicemember retires when

[79]For a good basic introduction to military pay, see Office of the Secretary of Defense, Military Compensation, Pay and Allowances, www.defenselink.mil/militarypay/pay/.

[80]Sullivan, *supra* note 13, at 217. For the current tables indicating the amount of BAH as well as basic pay and other types of pay and allowances, see Defense Finance and Accounting Service, Military Pay, www.dfas.mil/militarypay.html. Reenlistment and other types of bonuses may also be considered as sources of support (Sullivan, *supra* note 13, at 227).

[81]Sullivan, *supra* note 13, at 228.

[82]*Id.* at 227 & n.41.

[83]*Id.* at 229. Note that the leave and earnings statement also reflects the amount of accumulated leave, which may be a countable asset for purposes of property division (*id.* at 521).

[84]E.g., the basic allowance for subsistence is not subject to garnishment, even though it is countable income for child-support purposes (*id.* at 230).

[85]Defense Finance and Accounting Service, Garnishment, www.dfas.mil/garnishment.html.

[86]*Id.*; see also Aukland, *supra* note 71.

[87]Susan L. Darnell, *Dividing Military Retirement Benefits*, Family Advocate, Fall 2005, at 32.

[88]*Id.*

the spouse is 40 and the spouse lives another 35 years.[89] Thus, even if it does not seem worth the effort of obtaining a qualified domestic relations order to divide the retirement pay for such a short-term marriage, the nonservicemember spouse should be sure to receive adequate property or support to offset the value of any forgone share of retirement pay. Since DFAS is apparently quite picky about the language required to effectuate a division of military retirement pay, the relevant language should be drafted carefully.[90] In certain circumstances the amount of military retirement pay may be reduced by the servicemember's collection of military disability retired pay or U.S. Department of Veterans Affairs disability benefits.[91] Such issues must also be considered in relation to the division of military retirement pay and other assets.

Collecting military retirement pay ends with the servicemember's life. If the servicemember predeceases the spouse or former spouse, the latter may no longer collect the latter's share of the servicemember's retirement pay. To protect the nonmilitary spouse's reliance on the servicemember's retirement pay, the military has a survivor benefit plan (SBP).[92] The premium is deducted directly from the servicemember's retirement pay.[93] The servicemember can thereby be assured that an amount equal to approximately 55 percent of the selected amount of retirement pay will be paid to the surviving spouse or former spouse as an annuity for the survivor's lifetime.[94] To the extent that the former spouse is likely to be dependent on the former spouse's share of retirement pay to survive, it behooves the parties to require the servicemember to provide for the SBP as part of any dissolution judgment or settlement. Note that the decision to opt into the SBP is a onetime election within one year of the divorce (if the servicemember submits the request to DFAS) or within one year of the order awarding benefits to the nonmilitary spouse (if the nonservicemember submits the request to DFAS).[95]

Military retirement pay resembles a classic defined-benefit retirement plan. The amount of benefits paid does not generally change with economic circumstances, such as fluctuations in the stock market, after the beneficiary is vested. The military also offers to soldiers a defined-contribution-type retirement savings plan, similar to employment-based 401(k) plans; this is the TSP.[96] Servicemembers may contribute up to 10 percent of their base pay annually to the TSP, along with up to $15,000 annually of special pay, incentive pay, and bonus pay.[97] Contributions to the TSP are not tax-deductible to the servicemember, but any appreciation in the account's value is tax-deferred until the funds are withdrawn from the account.[98] Under most states' laws, con-

[89]See North Carolina Bar Association, Legal Assistance for Military Personnel, Legal Eagle (rev. Jan. 24, 2008), www.ncbar.com/lamp/l_fact_whacked.asp.

[90]For drafting tips, see Sullivan, *supra* note 13, at 446–50, 460–64; Dalma Grandjean, *Enforcement Options: Collecting an Awarded Share of the Pension*, 28 Family Advocate 36 (Fall 2005).

[91]Sullivan, *supra* note 13, at 440–44; Darnell, *supra* note 87, at 33.

[92]10 U.S.C. §§ 1447 *et seq*.

[93]In general, the premium amount is 6.5 percent of the amount of retirement pay covered (see Sullivan, *supra* note 13, at 474–75; Darnell, *supra* note 87, at 34). The premium may not be deducted from the nonmilitary spouse's garnished share of the retirement pay but rather must be deducted before any division of the retirement pay (*id.* at 35; Grandjean, *supra* note 90, at 37). Any effort to require the nonservicemember spouse to cover the cost of survivor benefit plan (SBP) premiums must be accomplished in some other way.

[94]If the service member's monthly retirement pay is $1,000, and the servicemember chooses to apply the SBP to the full amount, the surviving former spouse receives $550 per month after the servicemember's death. The servicemember's monthly premium for the SBP is $65 (*id.*).

[95]Sullivan, *supra* note 13, at 480; Peter C. Cushing, *The Ten Commandments of Military Divorce: Representing the Nonmilitary Spouse,* Family Advocate, Fall 2005, at 20–21; Darnell, *supra* note 87, at 35.

[96]Sullivan, *supra* note 13, at 516; Marshal S. Wilick, *The Thrift Savings Plan*, Family Advocate, Fall 2005, at 40.

[97]*Id.*

[98]*Id.* at 517.

tributions to the TSP during the marriage and any increase in value of those contributions should be treated as a marital asset subject to division between the parties on dissolution of the marriage.

The military does offer a life insurance benefit to its members. However, the U.S. Supreme Court has ruled that the servicemember retains an absolute right to change the beneficiary designation under the SGLI Act, regardless of any state court order to the contrary.[99] Therefore any effort to use life-insurance proceeds as a means of securing support or payment of a property distribution should be done through private insurance rather than the SGLI.

Another variant of the military-pension-division issue relates to medical coverage for the nonservicemember spouse. Former spouses who were married to servicemembers for at least twenty years—and the servicemembers served for at least twenty years, and there was at least a twenty-year overlap between the marriage and the military service (so-called 20/20/20 former spouses), or in some cases a fifteen-year overlap (so-called 20/20/15 former spouses)—remain eligible for health care coverage through the military's Tricare program after dissolution of the marriage.[100] Even for spouses who do not satisfy these criteria, health care coverage following divorce may be available through the Continuation of Health Care Benefits Program (CHCBP).[101] If the former spouse remains "unremarried" and was covered by the military's Tricare or Transitional Assistance Management Program for at least one day prior to the final dissolution decree, the former spouse is eligible for up to thirty-six months of CHCBP coverage.[102] Moreover, the former spouse may be eligible for CHCBP coverage of unlimited duration if the former spouse (1) has not remarried by the age of 55, (2) was enrolled in CHCBP or Tricare as the dependent of an involuntarily separated service member (this also applies to retirees), and (3) is receiving a portion of the retirement pay of the service member or an SBP based on that retirement pay or has a court order for payment of retirement pay or an agreement for an SBP.[103] One point to be aware of is that the former spouse must enroll in the CHCPB within sixty days of the former spouse's loss of Tricare coverage due to the divorce.[104] The statutes and regulations governing these health insurance issues are extremely complex, and careful and thorough follow-up research is required if these issues are implicated in one of your cases.

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We hope that this introduction to military issues in family law cases impels attorneys to volunteer to join one of the many ongoing efforts throughout the country to provide legal assistance to active-duty servicemembers and their families in family law cases. Such efforts are the least we can do in return for the sacrifices of servicemembers and their families in support of our country and our way of life.

Authors' Note

The views expressed here are ours alone and do not necessarily reflect the positions, views, or opinions of the U.S. Department of Defense, Department of the Navy, or Marine Corps.

COMMENTS?

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—The Editors

[99] *Ridgway v. Ridgway*, 454 U.S. 46 (1981).

[100] See Wm. John Camp, *The Continuation of Health Care Benefits Program (CHCBP) as a Long-Term Care Option for Former Military Spouses*, Roll Call, Summer 2008, at 1, http://bit.ly/1EC54O. This coverage generally ceases if the former spouse remarries or becomes covered by employer-sponsored health insurance (*id.*) Tricare is a health care program of the U.S. Department of Defense Military Health System, providing civilian health benefits for military personnel, military retirees, and their dependents, including some members of the reserve component (see What Is Tricare?, http://bit.ly/ecPQk).

[101] See 10 U.S.C. § 1078a.

[102] Camp, *supra* note 100, at 4. Note that the CHCBP coverage is not the same as Tricare. CHCBP members may not receive services at a military medical facility but rather are limited to the Tricare Network of Civilian Providers and Civilian Pharmacies (*id.* at 2). While the CHCBP member is responsible for the payment of significant premiums in conjunction with the program, these premiums are quite competitive with those charged for individual private health insurance policies (*id.* at 3).

[103] *Id.* at 4.

[104] *Id.* at 3.

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