FAMILY LAW AND…

The Servicemembers Civil Relief Act

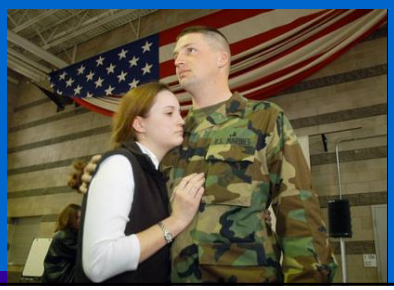
adapted from The Military Divorce Handbook, by Mark Sullivan [mark.sullivan@ncfamilylaw.com]

Overview of the SCRA

- ***Why was it passed?***
- ***What kinds of obligations does it cover?***

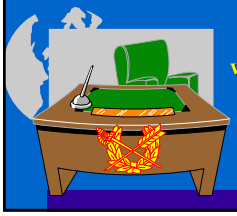
SCRA -The Soldier's Shield

50 U.S.C. App. §501 *et seq.* (formerly the Soldiers' & Sailors' Civil Relief Act –SSCRA)



Resources, Resources, Resources

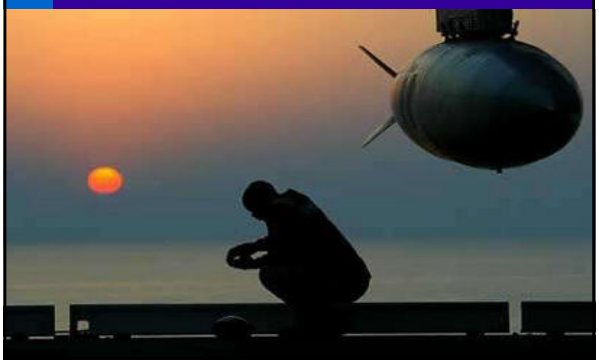
A Judge's Guide to the Servicemembers Civil Relief Act



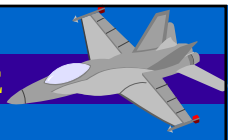
www.abanet.org/family/military

"Who ya gonna call?"

Over 150,000 troops deployed in Gulf Region

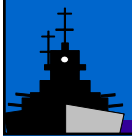


PURPOSE



"Protect those who have been obliged to drop their own affairs to take up the burdens of the nation"

Boone v. Lightner **319 U.S. 561, 575 (1943)**



LIBERAL CONSTRUCTION

The Act should be read "with an eye friendly to those who dropped their affairs to answer their country's call."

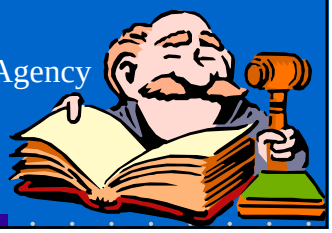
***Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).**

DEFINITIONS §101

"**Court**"=

*Court, OR

*Administrative Agency



The New Statute - SCRA

- **The SCRA became law on 12/19/03 - a complete revision of the SSCRA.**
- **It was written to:**
  - **clarify the language of the SSCRA**
  - **to incorporate many years of judicial interpretation of the SSCRA**
  - **to update the SSCRA to reflect developments in American life since 1940.**

Default judgments – the BIG picture

- What is a default?
  - No answer, counterclaim
  - No motions except:
    - "special appearance" to contest jurisdiction
    - motion for extension of time for answer

"Who's covered by the SCRA?"

- Active duty servicemember [SM]
- Mobilized Guard/Reserve
- Nat. Guard [Title 32, federal emergency & funds]
- Dependents (sometimes)

PROTECTION AGAINST DEFAULT JUDGMENTS – 50 USC App. §521

- Plaintiff's Affidavit, Certificate, etc.
  - Defendant not in military, and
    - Factual basis; or
  - Unable to determine status - court may require plaintiff to post bond
- Court-Appointed Attorney before entering default
  - Duties? Payment?

PROTECTION AGAINST DEFAULT JUDGMENTS -- 50 USC App. §521

- Court ***SHALL*** Stay Proceedings
  - Minimum 90 Days
  - Application of counsel or court's own motion
- When Court Determines
  - May be a defense that cannot be presented w/o presence of Defendant, OR
  - After due diligence counsel has been unable to contact Defendant or otherwise determine if a meritorious defense exists

Stay of Proceedings - 50 USC App 522

- Temporary delay in lawsuit till SM can appear -
  - During period of service + 90 days
  - SM has rec'd notice of proceeding
  - Applies at any stage of proceedings

PROTECTION AGAINST DEFAULT JUDGMENTS 50 USC App. §521

- Court shall reopen when…
  - SM applies on Active Duty

  or within 90 days after, and shows
  - Material effect, plus
  - Meritorious defense

Motion for Initial STAY

How to apply? What must you show??

Statement re -

- **Military duty materially affects ability of SM to appear +**
- **Date when SM can appear AND…**

What is "Material Effect"???

- No single definition
- Impairment of ability to participate in civil suit due to military duties -OR-
- Impairment of ability to pay financial obligations

Motion for Initial STAY

- How to apply? What must you show?? [cont'd]

CO statement:

- **duty prevents SM's appearance**
- **no leave allowed**

Resources,
Resources,
Resources

Sample Motion & Letter for Stay of Proceedings

"Who ya gonna call?"

STAY PROVISIONS OF SCRA

- Stay request does not constitute –
  - appearance for jurisdictional purposes
  - waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).

-- HOT TIP! --

–How to resist motion for STAY
- **–"We don't need you"**
- **–Demand LES – shows leave available, used**
- **–Use of technology**

CLIP YOUR WINGS!

STAY PROVISIONS OF SCRA 50 USC App §522

- May apply for additional stay if duties materially affect at initial application, or later if SM is unavailable to *prosecute or defend the action.*
- If court denies stay request, it must appoint counsel to represent SM

?? Attorney's duties, who pays fee??

-- HOT TIP! --

- How to resist motion for STAY
  - Good faith is implicit; read Judkins, 441 SE2d 139
  - Stay is not "forever," only so long as material effect lasts
  - See flow chart

STAY OR VACATION OF JUDGMENTS

If military service materially affects compliance with judgment or order --

- Court ***SHALL*** on application of SM
  - Stay execution; ***and***
  - Vacate or stay attachment or garnishment
- Court may also act on its own motion

Military Custody and Visitation – Twists and Turns

MILITARY FACTORS

- IRRELEGULAR CHILD CARE SCHEDULES
- "FULL-TIME DUTY"
- PCS MOVES
- ALERTS
- DEPLOYMENTS

Custody & the Military

- Single parents enlisting?

MILITARY FACTORS

- IRREGULAR CH. CARE SCHEDULES, "FULL-TIME DUTY," PCS MOVES, ALERTS, DEPLOYMENTS -

vs.-

- **QUALITY OF SCHOOLS ON BASE**
- **RECREATIONAL FACILITIES**
- **DEPENDENT YOUTH ACTIVITIES**
- **DAY CAR FACILITIES**
- **TRAVEL TO OTHER STATES & COUNTRIES -- "ENRICHMENT"**

Custody & the Military

- Can a military parent gain custody?
  - –Settlement and consent order?
  - –Trial

Custody & the Military

- Involvement of DoD and the military service branch?
- Family Care Plan… for those with dependent children
  - Designated caregiver
  - POA
- Intended to cover absence due to
  - Deployment
  - Mobilization (for Guard/Reserve)
  - TDY

Custody & the Military

- FCP isn't a court order
- Giving custody to a non-parent -
- …when the other parent is not disqualified
  - Abandonment
  - Abuse
  - Neglect
  - Other "unfit" conduct
- …or hasn't relinquished custody or waived rights

Typical Scenario (cont'd)

- When Johnny's with dad – what next?
- Child support –
  - Locating mom
  - Serving mom
  - SCRA

Typical Scenario

- Jane Doe prepares her FCP
- Does not refer to the dad
- She receives deployment orders
- She departs
- Johnny left with her new husband
- His dad, John Doe, finds out

Typical Scenario (cont'd)

- Mom returns, asks for dad to return Johnny
- Dad asks for "permanent custody" (Crouch case)
- Diffin v. Towne

Typical Scenario

- Dad gets a lawyer
- Dad files in court for return of Johnny to him
- Locating mom?
- Service on mom?
- Mom files for a stay of proceedings

Representing the Military Parent

- Temporary consent order
- Deadline and mandated return
- Detail the present circumstances
- "Satisfactory" or EXCELLENT
- Example in the Ms.

Deployment and Change of Custody

QUESTIONS FOR THE CLIENT:

- ***How long will deployment last?***
- ***Who takes care of child?***
- ***What effect on child?***
- ***State statute to protect the SM?***
- ***Consent order to protect SM?***

Custody Protections

- Absence not held against mil. parent
- In motion to change custody
- Temp. order ends within 10 days of return

Deployment and Change of Custody

OPTIONS FOR THE CLIENT:

- ***SCRA = FALSE SOLUTION?***
- ***GET CONSENT TO TEMPORARY CUSTODY ARRANGEMENT***
- ***HOPE (& PRAY) FOR SHORT DEPLOYMENT***
- ***TRANSFER CUSTODY TO OTHER PARENT (PERMANENTLY?)***

Visitation protections

- Delegation of vist. rts.
  - –to family member
  - –with close and substantial rel'nship
  - –if in best interest of child

New on the Horizon…

- NCGS 50-13.7A
- For all cases filed on/after 10/1/07
- Protections for military personnel –
  - – Custody
  - – Visitation
  - – Timing
  - – Testimony

Timing

Military orders, material effect on p'pation in court

PEREMPTORY SETTING!!

Testimony

Military orders, material effect on p'pation in court

Electronic Testimony & Evidence

Resources,

Resources,

Resources

- ***www.jagcnet.army.mil***
- ***TJAG Legal Center & School***

> *"TJAGLCS Publications"* > SCRA Guide

- **"Judge's Guide" at www.nclamp.gov >Resources**

"Who ya gonna call?"

Help is never far away…

SILENT PARTNER

"Good to Go" (and To Return Home!)

INTRODUCTION: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section and the North Carolina State Bar's military committee. Please send any comments, corrections and suggestions regarding this pamphlet to the address at the end of this Silent Partner.*

1. **My client, Sergeant Jane Doe, is about to be deployed. She has custody of her son, Johnny. Does she have to give custody over to the dad, her ex-husband?**

A. No, so long as the father has been found to be unfit in court or else he has waived his rights to custody.

2. **What do you mean? He's done nothing of the kind! She's just trying to make sure that Johnny is in the right place while she's overseas.**

A. Well, the "right place" is *probably* with dad, unless he's been excluded legally (e.g., waiver by him, consent order, termination of parental rights, finding of unfitness).

3. **Does she have to give custody of Johnny to him?**

A. Probably so – since he's not waived his rights to custody and isn't unfit.

4. **Why is that?**

A. The law in virtually every state says that you cannot exclude the other parent from custody without one of these two conditions. And – if it's unfitness – the finding must be made in a court order. That means Jane be in trouble if she tries to transfer custody of Johnny to her current husband, to her mother in San Diego, or to her cousin Flo in Florida… even if that's what she puts in her Family Care Plan.

5. **A court order? That means she'll have to file a lawsuit against him, right?**

A. Yes, if there is not a pending case already.

6. **But she already has a family care plan listing her mother as Johnny's caregiver. It's an official Army document. It's required by law and by Department of Defense regulations. It has been approved by her commanding officer. Isn't that enough?**

A. Yes – it's enough for the Army. But a Family Care Plan is not a court order. When there is no written agreement with the other parent, and when the only document is one without a judge's signature, then the client has serious exposure.

7. **Surely it's enough to have a court order granting custody to the child's grandmother in San Diego – right?**

A. Yes, that's fine, so long as there's full compliance with state law requirements. In that case, state law will probably let a judge transfer custody of the children to the grandmother if the father doesn't appear and contest, or if he consents to the transfer. The requirements of state law ordinarily would include –

- Mom has located dad and properly served him with the initial complaint and summons;
- She's also given him reasonable advance notice of the hearing; and
- She filed suit in compliance with the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act), which requires (ordinarily) that the children must have lived in your state for at least the last six months preceding the filing. In other words, you clearly have *custody jurisdiction*.

The preferable way to move forward, however, would be to get the dad's consent to a relative taking custody – if you can obtain that consent.

8. **Dad's consent if necessary? Why?**

A. This is a question of individual state law, but the general rule is that dad cannot be excluded from custody, absent his consent, unless he is unfit by reason of abandonment, abuse, neglect or other conduct inconsistent with parental rights and responsibilities. In some states, you must show "actual harm."

9. **Abandonment? Abuse or neglect? Whoa! How are we supposed to prove those charges?**

A. Look to state law and cases for elements of proof in this area. You will usually find the answers under "termination of parental rights" or a similar heading.

10. **What if dad is *not unfit* but he agrees to give custody to the maternal grandmother?**

A. Then you should file for custody, serve the father and grandmother, and prepare a consent order or "agreed order" for the transfer of custody to the grandmother. Make sure you have secured dad's *unconditional consent*. Consider getting an appearance before the judge or a notarized statement, if appropriate under state law, or if you think that dad might change his mind later.

11. **What if dad isn't unfit and won't consent to a transfer of custody?**

A. Then your client should consider transferring custody to him.

12. **What?? Give custody of Johnny to him?**

A. Yes – since he's not waived his rights to custody and he is not unfit.

13. **But this Defendant is really a bum! He drinks, he smokes heavily and he's got a gun rack in his pick-up truck. No only that, but we understand that he is also "seeing another lady" these days. We're really worried about give custody to him!**

A. So? Is he unfit? Can you prove it?

14. **But the father will probably demand child support from my client!**

A. So?

15. **But we're really, really worried that he won't return the child when the deployment's over. We think that he'll demand permanent custody!**

A. There are many factors which come into play in determining the custody of Johnny when the military absence (e.g., deployment, mobilization, TDY, remote tour) ends. For example:

- Will Johnny be thriving in the new environment, or doing poorly?
- Will he have lots of new friends, few friends, or about the same?
- Let's talk about Johnny's health. Will dad neglect his physicals, shots and dental check-ups? Or will he do a great job, better – perhaps – than *your client* did?
- Neighborhood plays a part. What are each of the neighborhoods like – that of Johnny when he was at "home," and the new neighborhood with dad? How does dad's home stack up against your client's home?
- How about Johnny's outside activities – with your client, and with the father? How do they compare?
- If Johnny's in school, then we'll need to look at his grades. What kind of progress is he making with dad? How does that compare to his academic performance when he was with your client? What about dad's participation in school activities and parent-teacher conferences, compared to *your client's* participation?
- What does <u>state law</u> say about return of the child at the end of the deployment? North Carolina and Mississippi, for example, state that a deployment cannot be held against the military custodian in a change-of-custody motion, and that any temporary custody order

during deployment ends ten days after the return of the absent military parent.

- What does <u>your temporary custody order</u> state? A *good court order* will say that Johnny's environment prior to the deployment was satisfactory in every way. It will also state that Johnny is to be returned to the mother immediately upon her return from deployment. This return to mom is to be done without delay, without the need to go to court, without the requirement of any court order to effectuate the return of custody.

The bottom line is:

1. You're the lawyer for Jane, and you owe her your best efforts to write up an airtight custody consent order – bullet-proof and rock-solid.

2. You should draft and get signed – upon trial or by consent – a foolproof temporary custody order, drafted after thinking about the possible objections and changes-of-mind that dad will have "after the fact."

3. That order should be one which states explicitly the current circumstances of the child. It needs to say that the child is in an excellent situation at present, prior to the deployment.

4. And, in addition to requiring the automatic return of the child upon the deployed mother's return home, it should also provide for the rights and protections which your client wants for herself and for her child, such as interim visitation during any leave which she has, and telephone contact with the child during her absence.

That is the key to resuming custody when your client returns from overseas.

[rev.12/1/09]

* * *

SILENT PARTNER is prepared by Mark E. Sullivan, a retired Army Reserve JAG Colonel, member of the Military Committee, ABA Family Law Section, and author of *The Military Divorce Handbook* (American Bar Association, May 2006). Revisions, comments and suggestions should be sent to him at Law Offices of Mark E. Sullivan, P.A., 2626 Glenwood Avenue, Ste. 195, Raleigh, NC 27608 (919-832-8507); e-mail – Mark.Sullivan@ncfamilylaw.com.

When Duty Calls: Military Custody – Dreams, Nightmares and Reality

Mark E. Sullivan, Author, *The Military Divorce Handbook* (Am. Bar Assn. 2006)
Law Offices of Mark E. Sullivan, P.A., Raleigh, NC

Introduction

Today our deployed troops, in Iraq, Afghanistan and elsewhere, are fighting insurgents, suicide bombers, hostile tribal militias and, increasingly, custody battles on the home front. For many of them, obeying the call to duty – mobilization for National Guard and Reserve personnel, deployment overseas for those on active duty – often means losing custody of their children. For separated, divorced or never-married military parents with custody, this is a two-edged sword; they can lose their lives in Iraq or Afghanistan, or they can lose something as precious as life – their children. A sacrifice few are willing to make, this also represent a problem which has the potential to torpedo readiness, recruiting and military morale.

This paper is a report from the latest battlefield for our servicemembers (SMs), along with along with a summary of recent changes in North Carolina law to address military custody and visitation problems.

Fighting – in Fallujah and in Family Court

To see what's happening in the trenches and the trial courts, let's take a look at some real-life stories, from new reports and from civilian and military attorneys, about the conflict between custody and country.

**6/11/07

In a June 11, 2007 story in USA Today, reporter Andrea Stone asks, "Which comes first: duty to country or maternal obligation?" Her story follows.

> Which comes first: duty to country or maternal obligation?
> That was the dilemma that led to a New Hampshire National Guard soldier being declared a deserter when she refused to return to Iraq while in a custody dispute with her ex-husband. After months battling in the courts and with her commanders, Spc. Lisa Hayes has been allowed to leave the military.
>
> Hayes, 32, turned herself in at Fort Dix in New Jersey on Tuesday with her daughter, Brystal Knight, 7, in tow after driving all night from Rindge, N.H. Army lawyers helped her renew a request for an early exit from the Guard because of a hardship, and an honorable discharge was granted within hours, her civilian lawyer, Linda Theroux, disclosed this weekend.
>
> Hayes could have faced a court-martial. Desertion during wartime is a serious offense; technically, the punishment can be as severe as execution, although in Hayes' case, the Army had been discussing only what type of discharge to consider.
>
> She will return to court Tuesday for a custody hearing. While she was at Fort Dix, Hayes' ex-husband filed to have their daughter returned to his care.
>
> Although some servicemembers refuse to go to Iraq to protest the war, Hayes' case highlights a more prosaic reason for deserting the military: problems on the home front.

Of the fewer than 1% of soldiers who desert each year, most do it "for personal, family or financial reasons," says Maj. Anne Edgecomb, an Army spokeswoman.

All military parents must have a plan designating who will care for their children if they are deployed. Sometimes plans go awry.

"We're seeing more of these custody issues" because of repeat deployments, says Joyce Raezer of the National Military Family Association. "The military is asking more of people than they signed up to provide, so what worked before in terms of child care arrangements no longer does."

Hayes has refused interviews since going to Fort Dix. "She's extremely distraught," Theroux says. "She still has no answers where this all is going."

Complicated family life

Hayes, a licensed nursing assistant, was the mother of three when she joined the Guard in 2003. Her two sons from a previous relationship are with their father. She was divorced from Tim Knight, Brystal's father.

When Hayes, a member of the 3643rd Security Forces, began her first Iraq tour in January 2004, she and Knight shared custody of their daughter, Theroux says.

Hayes left Brystal with Knight and his live-in girlfriend, Brenda Brown. Theroux says the soldier considered Brown the "stabilizing person" in the relationship and relied on her as Brystal's primary caregiver. Messages left for Knight and Brown were not returned.

Hayes returned in February 2005 and later married Jonathan Hayes, another soldier in her unit. Theroux says Hayes began proceedings to get full custody of Brystal, but the case was put on hold when she was ordered back to Iraq in August 2006. With misgivings, Hayes again left Brystal with Brown and Knight, Theroux says.

In January, unable to reach them for more than two weeks, Hayes called police and learned officers had gone to the house twice because of domestic-violence complaints. "She was hysterical, calling me on the phone about it," Theroux says.

In December, according to records at the Jaffrey-Peterborough District Court, Brown was charged with five counts of assault and false imprisonment after a fight with Knight. All but one charge was dropped Jan. 30. She pleaded guilty to criminal trespass and was given a suspended sentence of 270 days in jail and ordered to undergo a psychological exam.

Theroux says Hayes, home on a two-week leave, tried to get a custody hearing but had to return to Iraq before it could be scheduled. The lawyer says Hayes contacted the American Red Cross to help her get an emergency leave, and she was able to return to New Hampshire on Feb. 28. She won temporary custody March 2.

Theroux says the court found an "impermissible risk" to Brystal if she stayed

with Knight and Brown. A full custody hearing was still months off. Theroux says Hayes had no one to care for Brystal.

Hayes' unit extended her emergency leave but denied her request to be reassigned to New Hampshire. Finally, according to 1st Sgt. Mike Daigle, a New Hampshire Guard spokesman, her commander ordered her to return to Iraq.
He said Hayes refused.

On March 25, when Hayes didn't report for duty, the Army listed her as absent without leave. A month later, military rules turned that into desertion.

Dual commitments
"Everybody deserves some sympathy when going through something traumatic," says Lt. Col. Francine Swan, a lawyer for the New Hampshire Guard. But, she adds, "there are a lot of people who are putting their lives at stake and risking their all, and they have difficult situations to deal with as well, but they are doing their duty."

Theroux says Hayes shouldn't have had to go through the battle she did before her discharge. "The military prides itself on being family-oriented," Theroux says, "and in this case they've failed."

Eugene Fidell of the National Institute of Military Justice disagrees. "A person in the military has to be available and not attending to other matters without the management's approval," he says. "One lesson here is that people really should think twice before making the commitment to being in the service."

A similar report was filed in Kansas June 2, 2007. In a story titled "Parents at War Fear Losing Kids; Custody Can Change If a Parent Deploys," reporter Tim Potter of The Wichita Eagle wrote -

Before she leaves for war duty in Iraq this summer, Tira Bolder worries that she could become a casualty in a custody battle over her son. The 39-year-old Wichita nurse shares custody of her 15-year-old son, Teance Walton, with her ex-husband, Ronald Walton, who also lives in Wichita. Bolder has primary custody; Teance lives with her, although he stays with his father some weekends. What concerns her is that apparently under Kansas law, resident ial custody shifts to Walton during her 18-month deployment.

And she's afraid that the change will become permanent.

It's not clear how many service members find themselves in custody battles while serving overseas during the war. Matt Shelton, chief of legal assistance with Kansas' Fort Riley, said: "It is pretty common. . . . As units ramp up for deployment, we definitely see service members come in with this question." It's coming up frequently enough that a few states are considering laws to ensure military personnel that they can regain custody when they return from the war.

Two perspectives
Bolder is an Army Reserve first lieutenant and intensive care nurse at Wichita's Robert J. Dole VA Medical Center. She will deploy to Fort McCoy, Wis., later

this month, then start serving at a combat support hospital in Iraq later this summer.

Her wish - which she said is the same as Teance's - is that he be cared for by her mother, his grandmother, and stay in the same house where he has lived the past nine years. "My obligation is to serve my country," Bolder said, adding, "I don't want to lose my child in the process."

But look at it from Walton's perspective, said his lawyer, Ross Alexander. When we have a mother and a father, and they have a joint legal custody… and one is not available… then the law is the other parent should get the child unless they're deemed to be unfit." And there is no such finding against Walton, Alexander said.

Bolder can't legally transfer custody to her mother because under the law "the other parent has the right to the child above anyone else," Alexander said. "I think Ron is being extremely reasonable here. He just wants the child with him while she is gone."

"She's not really losing any custody" while she is gone, Alexander said. He said Walton declined to comment. He said Bolder had agreed that Walton would have residential custody while she is gone.

Bolder said a sticking point to any agreement is her concern that her family would lose visitation during her deployment.

Alexander said: "We agreed that when she returns, custody returns to her. That doesn't mean he couldn't request a change because of concerns or unforese en circumstances." And that is what worries Bolder: that if she doesn't assert her primary custody stance, Walton could seek a change and a court could grant permanent primary custody to him while she is gone or when she gets back. She would end up losing the custody she has fought for in court hearing after court hearing over the years.

A state-court matter

Bolder said she didn't realize until recently that she couldn't simply transfer custody to her mother while she is gone. From a military lawyer and other legal experts, she has learned that custody issues are mainly a state-court matter, that the principle guiding judges is what is in the best interest of a child and that there is no Kansas law that fully protects her position while she is deployed. Bolder has contacted the governor's office, the attorney general's office and a U.S. senator's office, seeking help or clarification of her rights.

Some states have taken steps to shield service members from custody changes while they are deployed. North Carolina legislators are considering a proposal that among other things would allow courts to transfer a soldier's visitation rights to a relative during deployment, would let service members regain custody when they return and would let soldiers appear at court hearings by telephone, teleconference or the Internet. [The passage of the statute and an explanation of its provisions are covered below.]

No guarantees

In a letter to the office of U.S. Sen. Pat Roberts, R-Kansas, Bolder wrote that she fears that Walton could "move for permanent custody of our son upon the instance of my deployment." And she added in the letter to Roberts' office: "I have also been made aware of a trend in state courts of reversing prior custody orders of military personnel and awarding permanent custody to non-deployed parents. I am therefore faced with the very real possibility that while away serving my nation, I will lose custody of my child." That possibility would loom over her, making it difficult for her not to be distracted while doing her job overseas, she said in an interview with The Eagle. "I would be stressed and depressed," she said.

Bolder's lawyer, Steven Sublett, declined to comment. Shelton, chief of legal assistance with Fort Riley, said the basic advice is for service members to get custody issues resolved, including filing proper paperwork, before they deploy.

A federal law gives service members some protection by staying civil court decisions - including custody matters - while they are deployed, Shelton said. But it's not automatic. The service member has to file the proper paperwork. And there is no guarantee that a judge - considering what is in the best interest of a child - will rule in favor of the service member. There also are news reports around that nation that state courts don't always follow the federal law - the Servicemembers Civil Relief Act.

Should there be a law?

Tuesday night, Bolder cheered as Teance, playing forward, grabbed rebounds and scored points in a summer league basketball game. She has been watching him play since he was 9. "Concentrate, baby!" she yelled as he went to the line to shoot a free throw.

During a break in the game, she noted that Teance will change in the 18 months she will be gone. He is 6 feet, 1 inch tall now and still growing. "I think he's going to sprout," she said. "When I come back, he'll be a tree over me."

Told of Bolder's situation, state Sen. Phil Journey, a Wichita-area lawyer who serves on the Senate Judiciary Committee, said he knows of no legislative proposals to deal with the issue. But, he added, "It's a public policy issue that is appropriate for the Legislature to consider."

Some experts don't think new laws are needed. Ronald Nelson, a Lenexa lawyer who specializes in child custody matters and is representing a service member in a case similar to Bolder's, said there is enough protection for service members under state and federal law. Still, he said, he understands that custody issues are especially sensitive. "Family law affects so many people in such deep, emotional ways," Nelson said.

Bolder plans to be back in court for her custody issue on Monday. She said she hopes that attention drawn to her case could help others in similar situations, especially if it leads to new legal protection for service members.

As it is, she said, "There's a real possibility that this could happen to anybody."

A third story made the Associated Press on May 5, 2007:

> "Deployed Troops Fight for Lost Custody of Kids; Children Taken from Single Parents in Uniform When They Are Mobilized"
>
> She had raised her daughter for six years following the divorce, shuttling to soccer practice and cheerleading, making sure schoolwork was done. Then Lt. Eva Crouch was mobilized with the Kentucky National Guard, and Sara went to stay with Dad.
>
> A year and a half later, her assignment up, Crouch pulled into her driveway with one thing in mind — bringing home the little girl who shared her smile and blue eyes. She dialed her ex and said she'd be there the next day to pick Sara up, but his response sent her reeling.
>
> "Not without a court order you won't."
>
> Within a month, a judge would decide that Sara should stay with her dad. It was, he said, in "the best interests of the child."
>
> What happened? Crouch was the legal residential caretaker; this was only supposed to be temporary. What had changed? She wasn't a drug addict, or an alcoholic, or an abusive mother. her only misstep, it seems, was answering the call to serve her country.
>
> Crouch and an unknown number of others among the 140,000-plus single parents in uniform fight a war on two fronts: For the nation they are sworn to defend, and for the children they are losing because of that duty.
>
> A federal law called the Servicemembers Civil Relief Act is meant to protect them by staying civil court actions and administrative proceedings during military activation. They can't be evicted. Creditors can't seize their property. Civilian health benefits, if suspended during deployment, must be reinstated. And yet service members' children can be — and are being — taken from them after they are deployed.
>
> Some family court judges say that determining what's best for a child in a custody case is simply not comparable to deciding civil property disputes and the like; they have ruled that family law trumps the federal law protecting servicemembers.
>
> Even some supporters of the federal law say it should be changed — that soldiers should be assured that they can regain custody of children.
>
> Military mothers and fathers speak of birthdays missed, bonds weakened, endless hearings.
>
> <u>Fighting insurgents and the family court</u>
> They are people like Marine Cpl. Levi Bradley, helping to fight the insurgency in Fallujah, Iraq, at the same time he battles for custody of his son in a Kansas

family court.

Like Sgt. Mike Grantham of the Iowa National Guard, whose two kids lived with him until he was mobilized to train troops after 9/11.

Like Army Reserve Capt. Brad Carlson, fighting for custody of his American-born children after his marriage crumbled while he was deployed and his European wife refused to return to the States.

And like Eva Crouch, who spent two years and some $25,000 pushing her case through the Kentucky courts. "I'd have spent a million," she says. "My child was my life ... I go serve my country, and I come back and have to go through hell and high water."

In 1943, during World War II, the U.S. Supreme Court held that the soldiers' relief law should be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." Shielding soldiers allows them "to devote their entire energy" to the nation's defense, the law itself states.

But child custody cases are different. "The minute these guys are getting deployed, the other parent is going, 'I can do whatever I want now,'" says Jean Ann Uvodich, an attorney who represented Bradley.

Bradley had already joined the Marines, and his young wife, Amber, was a junior in high school when their son Tyler came along in 2003. With Bradley in training, Amber and the baby lived with Bradley's mother, Starleen, in Ottawa, Kansas. When the marriage fell apart two years later, Bradley filed for divorce and Amber signed a parenting plan granting him sole custody and agreeing that Tyler would live with Starleen while Bradley was on duty.

In August 2005, Bradley deployed to Iraq. A month later, Amber sought residential custody of Tyler. She didn't fully understand what she had signed, she said. Bradley learned of the petition in Fallujah. He worked during the day as a mechanic, then at night called his mother to hear the latest from court.

"My mind wasn't where it was supposed to be," he says. And the distraction cost him. One day he rolled a Humvee he was test-driving. Though uninjured, Bradley was reprimanded. Uvodich sought a stay under the Servicemembers Civil Relief Act, arguing Bradley had a right to be present to testify.

But the judge said he didn't believe the case was subject to the federal law because "this Court has a continuing obligation to consider what's in the best interest of the child." The judge awarded temporary physical custody to Amber. Last summer, that order was made permanent.

Bradley, now 22, is stationed at Camp Lejeune, N.C., awaiting his second deployment to Iraq. He gets to Kansas on leave, seeing Tyler for four days at a time.

"The act states: Everything will be put on hold until I'm able to get back. It doesn't happen," he says. "I found out the hard way."

Whose best interest?

Dale Koch, president of the National Council of Juvenile and Family Court Judges, said that as state court judges, those deciding custody cases are obligated to follow their family codes — and "in most states there is language that says the primary interest is the best interest of the child."

"We recognize the competing interests," says Koch, an Oregon judge. "You don't want to penalize a parent because they've served their country. On the other hand ... you don't want to penalize the child." But what does "best interest" really mean? Koch mentions factors such as stability and considering who has been the child's main emotional provider, parameters that conflict directly with military service.

Iowa Guardsman Mike Grantham thought he was serving the best interests of his children when he arranged for his son and daughter to stay with his mother before reporting for duty in 2002. He had raised Brianna and Jeremy since his 2000 divorce, when ex-wife Tammara turned physical custody over to him.

After mobilizing, Grantham was served with a custody petition from Tammara. A trial judge temporarily placed the children with her. A year later, though Grantham had returned, the judge made Tammara the primary physical custodian.

An appeals court sided with Grantham, saying: "A soldier, who answered our Nation's call to defend, lost physical care of his children ... offending our intrinsic sense of right and wrong." But the Iowa Supreme Court disagreed, saying Tammara was "presently the most effective parent."

Now, Grantham says, his visitation rights mirror those that his ex-wife once had: every other weekend, Wednesdays, and certain holidays — Father's Day, for example.

"Being deployed, you lose your armor," he says.

Thousands of active duty single parents

Military and family law experts don't know how big the problem is, but 5.4 percent of active duty members — more than 74,000 — are single parents, the Department of Defense reports. More than 68,000 Guard and reserve members are also single parents. Divorce among service personnel is rising.

Army reservist Brad Carlson lived in Phoenix with his wife, Bianca, and three kids before deploying to Kuwait in 2003. A year later, his wife indicated she wanted to end the marriage and remain in Luxembourg, where she had moved the family and where her parents lived.

Carlson filed for divorce in Arizona, and later invoked the Servicemembers Act, but in vain. A Luxembourg court awarded custody to Bianca.

"I feel really betrayed," Carlson says.

The solution, some say, lies in amending the federal law to specify that it does apply in custody cases.

Some states aren't waiting for congressional action. In 2005, California enacted a law saying a parent's absence due to military activation cannot be used to justify permanent changes in custody or visitation. Michigan and Kentucky followed suit, requiring that temporary changes made because of deployment revert back to the original agreement once deployment ends. Similar legislation has been proposed in Arizona, Florida, Oklahoma, Texas and North Carolina.

'I can't leave my child again'

When Crouch was mobilized back in 2003, her ex-husband, Charles, wanted 9-year-old Sara with him. They drew up a temporary order, moved Sara's belongings, and Crouch headed out — to Iraq, she thought, although she wound up at Fort Knox. The fortunate assignment allowed her to visit Sara most weekends.

But when the time came for Sara to return to her mom, Charles says his daughter expressed a desire to stay with him. She liked her school, had made new friends. "I had no intention of trying to talk her into staying or anything," he says. "All I wanted was what was best for my daughter."

Last year, the state Supreme Court cited Kentucky's new law in overturning the trial judge's decision granting custody to Charles. Last September, Eva Crouch got Sara back.

Remarried now, Crouch is expecting another baby this August. But with 18 years in the military, she knows she could be mobilized again. One thing is clear to her now: Serving her country isn't worth losing her daughter.

"I can't leave my child again."

Tales from the Trenches

In addition to news media stories, there are numerous reports from families and attorneys around the country regarding the extent of this problem. In a May 15, 2007 e-mail to Representatives Grier Martin, Melanie Goodwin and Larry Hall – three of the four sponsors of new legislation in North Carolina – the wife of a career Marine poured out her feelings on why statutory protection is needed for military personnel who have custody of their children. The message (with names and cities changed) appears below:

Reps. Grier, Goodwin and Hall,

I would like to introduce myself: I am the wife of MSgt Jeremy Steele, Jr., who has served 18+ years in the Marine Corps. My husband is currently stationed in Iraq. I write to you to express my full support of House Bill 1634, and to give you our personal story, which would be so greatly impacted by the passing of this bill.

My husband was given primary physical custody of his daughter, Florence, during a divorce in Wilmington, NC. He cares for his daughter greatly, and was deeply worried when he was given unaccompanied orders to Guantanamo Bay, Cuba, in early 2005. Although his daughter had been cared for by his sister during past deployments, Florence's mother felt she would be finally capable of caring for her child during this deployment, and my husband had no choice but to place her with her mother, who was the secondary custodian.

Upon returning from Guantanamo Bay a year later, my husband negotiated with the mother for months trying to take back custody of his daughter and ensure visitation with her mother, since his orders brought us to California. He called weekly, every Sunday, because Florence's mother would not allow Florence to call her father and thus all contact was left up to him.

Finally, after Christmas, he felt he could wait no longer. In February, he flew out and picked up his daughter. Her mother was upset, but after speaking with his daughter on just the short ride to the airport, she confirmed our worst fears and reaffirmed that he had made the best decision in the nick of time. Florence relayed that the live-in boyfriend was abusing the mother, and acting inappropriately toward Florence and her older half-sister. We put her in counseling, took her to the doctor (her first doctor's visit in the nearly two years since she had been in her mother's care…) and enrolled her in school.

Florence's mother approached the courts for an ex parte order to return Florence to her custody, based on the agreement my husband had signed (per the Marine Corps Order, a family care plan ensuring her care in his absence) and claiming this agreement represented his consent to a permanent change in custody. Unfortunately, she also alleged that my husband had not contacted his daughter in the year and a half prior to his coming to pick her up. This greatly influenced the court's decision to issue an emergency order - without my husband there to defend himself and provide evidence to the contrary, the court was painted a picture of a child yanked from her home by a near-stranger and taken to another state.

We are now in the position of my husband having to defend himself to retain custody of his daughter, the very custody that the court system originally saw it fit to grant him. His wife's basis for changing custody is the change in circumstances: that his daughter had lived with her for a full year because of his military deployment, and then for the six months prior to February 2007 because she continued to delay the exchange of custody.

Despite the custody agreement set forth by the courts, in their present state, the laws of North Carolina will use my husband's military service against him. He is prepared to retire in order to prevent his military service from being a detriment in the court's eyes, but I find it sad that this would ever even be an issue. He was a wonderful father before he was called to Guantanamo Bay, and before he was called to Iraq. Having to deploy doesn't change that. The court granted him custody because of the psychiatric and stability issues of the mother, and he would never have left Florence with her mother if there were any other avenue - but without her mother's consent to have the child stay with another family

> member as she had agreed to in the past, he had no other option. After being forced into a choice he was not comfortable with, he may now be left to watch his daughter flounder and fail to flourish in the unstable and emotionally abusive home of her mother, simply because he was asked to serve his country overseas.
>
> My husband is currently serving in Iraq - he was served the ex parte order three days before he was due to depart, and had no choice but to return his daughter and have our lawyer stay the court appearance until his return in early October. I am heartened to read that, if passed, this bill will go into effect 1 October - just a few weeks before my husband will return home to defend his right to retain custody of his daughter and maintain a 19-year military career…. Our lawyer's main concern has always been that the courts will go with the status quo - the child has an established home with her mother now, even if it isn't the greatest. Also, if my husband chose to finish his current enlistment to 22 years, the courts would see his continued service as a detriment to Florence's housing situation….
>
> With great respect,
>
> Eleanor Steele

Tom Wallace, the chief of legal assistance at Naval Legal Services Office Southest, in Jacksonville, Florida, reports that –

> Our new statute was introduced through the lobbying of a Navy Reservist from West Palm Beach, Florida who was remarried and who left the child from her prior marriage with her new husband when she went on deployment. The case was a classic nightmare divorce.
>
> The ex-husband was clearly denied custody in the original divorce order because it was not in the child's best interest. Unfortunately, after the sailor deployed, the ex-husband took action to get custody while the child was living with the stepfather (sailor's new husband).
>
> The Reserve sailor was brought back from deployment to address the custody dispute, and she did get custody back. She then asked the judge about staying any further challenges to custody based on the SCRA [Servicemembers Civil Relief Act]. The judge advised he did not believe the SCRA applied. The Reserve sailor thus could not redploy and was allowed to have a job at Naval Air Station, Jacksonville, Florida instead of being deployed with her unit in Iraq. This caused friction in the Reserves and the sailor was looking at the prospect of loosing her career in the Reserves. She finally contacted her state representative, who drafted what is now the Florida statute.

Lawyers in private practice are not immune from these difficulties. Here's what Joe DeWoskin reports from Kansas City, Missouri -

> In one case, a judge advocate out of my reserve unit just got mobilized to Fort Stewart. In his divorce he got custody of his child. He has since remarried and had an additional child. Ex-wife upon learning of his impending deployment motioned the court for a change of custody, etc and received it. Now child is in

new school, new living arrangement, etc.

> I just got a phone call last week from a potential client. He has 18 years of service and is now applying for a hardship discharge. He also obtained custody of the children in the divorce. His ex-wife has filed a motion with the court seeking SOLE custody and child support. As with example number 1, he is remarried and has an additional child. Ex-wife's boyfriend or new husband (don't remember off the top of my head) had lost unsupervised visitation rights with his two girls from his previous marriage because of abuse allegations. Don't know how this one is going to play out…. [H]is unit deploys in two weeks en route to Iraq. Not much of a chance to fight this one unless he gets the discharge, which makes the custody battle moot, but then raises the issue of 18 years of service with no retirement.
>
> The problem with the temporary custody order in the case of a service member in a deployed setting is that by the time that he/she returns the minor child is now in a new routine, etc., and how likely is the court going to be to return everything to the way it was prior to the deployment. I wonder if in divorce decrees involving service members if maybe language should be inserted regarding future deployment/mobilization and who gets custody at that time.

Summing it up, Angela Martin – the deputy chief of legal assistance at Ft. Bragg – has this to say: "An unknown number of the 140,000-plus single parents in uniform fight a war on two fronts - for the nation they are sworn to defend, and for the children they are losing because of that duty.

Custody and the SCRA

The first issue which family law attorneys need to know in a military custody case isn't a custody issue at all. It involves the *delay* inherent in the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 *et seq.*), and it can be a hurdle if the attorney represents a parent who wants to move forward with a trial or hearing against a parent who is in the armed forces. Protections for the SM were granted in the SCRA, and these involve custody cases, visitation hearings, divorce lawsuits and any other civil or administrative matter.

For the custody practitioner, the SCRA is all about *delay*. It may be used by the SM's lawyer who wants to postpone indefinitely the 'day of reckoning.' If you are on the other side, expect lots of dodging and weaving by opposing counsel to put off the hearing because of the SM's nonavailability. This area is truly one where delay may mean winning or losing the 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 just as well as opposing counsel, who wishes to delay the day of court. The primary issues are whether the presence of the servicemember is necessary for the hearing and whether the court should make an interim ruling on the case of the child pending a full custody hearing.

The SCRA was signed into law December 19, 2003. It not only protects those on active duty, it also affords protection for Reservists, as well as for members of the National Guard when activated under Title 10, United States Code. In their work applying and interpreting the SCRA, judges should remember the purposes of the Act. The SCRA was enacted to enable those serving in the armed forces 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 servicemembers during their military service. 50 U.S.C. App. § 502.

Stay of Proceedings

When SMs are involved in a lawsuit, it may be difficult for them to participate in the proceedings while they are involved in the defense of the nation. While some military personnel may be accustomed to months of shore duty or garrison duty at a time, working regular office hours most weeks, there are also SMs who are stationed at Camp Red Cloud in South Korea, near the Demilitarized Zone. There are sailors who serve on destroyers and submarines plying the waters of the North Atlantic for weeks on end, and there are Special Forces troops inserted deep in the mountains of South America performing drug interdiction missions. Training exercises, short or long deployments, undercover missions, duties at sea or in distant climes – all these make it unlikely that servicemembers can turn their full attention to the prosecution or defense of legal proceedings.

The primary remedy under the SCRA for halting the lawsuit is a "stay of proceedings" issued by the tribunal. This is the most important provision of the SCRA for the domestic judge or practitioner.

These stay orders are uniquely useful in domestic litigation. They provide a means for suspending a civil case until the member of the military who is a party is available to participate. This, in general, results in a fuller exploration of issues, more testimony or evidence before the court, and a fairer trial. It also benefits the armed forces in that military personnel are not constantly required to take leave from pressing operational duties in order to answer calendar call.

Deciding on a Stay Request

When the SM has not made an appearance, the court's next step is to decide on a stay of proceedings. For a military defendant, the Acts says that 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 there may be a defense to the action and a defense cannot be presented without the presence of defendant. This also applies if, after 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).

When 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), different rules apply. The Act states that 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 information required by the statute for the court to determine whether a stay is needed. 50 U.S.C. App. § 522. That information is: a statement as to how the SM's current military duties materially affect his ability to appear, and also stating a date when he will be available to appear; and a statement from his commanding officer stating that the SM=s current military duty prevents his appearance, and stating that military leave is not authorized for him at the time of the statement. A sample motion for stay of proceedings is found in "A Judge's Guide to the Servicemembers Civil Relief Act," at the website of the military committee of the North Carolina State Bar, www.nclamp.gov under "Resources." There is no requirement that either statement be an affidavit or, for that matter, in any specific format whatsoever. A letter, a formal memo or even an e-mail message should suffice. The two statements may be combined into a single statement from the individual's commanding officer.

Before the SCRA was passed, a common concern of military members and the lawyers who represented them was that the stay request would mean entering a general appearance before the tribunal, thus subjecting the member to the court's jurisdiction. This concern was addressed in the SCRA. The request, according to the SCRA, does not expose the SM to the risk of losing valid objections or defenses that may be available to him or her. A request for a stay does not constitute an appearance for jurisdictional purposes, nor does it constitute a waiver of any defense, substantive

or procedural. 50 U.S.C. App. §522(c).

Furthermore, a ninety-day stay does not exhaust the arsenal of the military member. The SM may request an additional stay based on the continuing effect of military duties on his ability to appear. He may make this request at the time of his initial request or later, 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).

The additional stay is discretionary; in order to allow the additional stay, the court must find that the member's ability to prosecute or defend is "materially affected" because of his or her active duty service. Once the court makes this finding of material effect, the member is entitled to a stay. This does not mean, however, that counsel for the servicemember should demand a stay of proceedings in each case.

Several SCRA custody cases are covered in this article. Each one is quite fact-specific. The best attorneys prepare thoroughly and take pains to develop individual facts which will motivate the judge to grant (or deny) a stay of proceedings. The major themes in these cases are lack of access to the children during the proceedings, specificity of the information provided to the court about conflicting military duties, and conduct and motivation of the moving party.

Mobilization and the Military Parent

When counseling the military parent, try to arrange an orderly transfer of custody from the deploying military parent to the other party by means of a consent order prior to the military parent's deployment. Such a custody order should specify the circumstances of the transfer, the date of departure and expected date of return, and the satisfactory nature of the departing parent's home, educational care and other custodial arrangements and care prior to leaving. It should also make findings regarding the adequacy of the new surroundings and the intention of the parties to be bound by the agreement to return the children at the end of the deployment. Provisions should be made for immediate return of the children upon the military parent's return (without the need to apply to the court for relief). The custody order should also provide for payment of attorney's fees and other expenses if resort to the court for an enforcement order becomes necessary.

The general rule illustrated by the case law is that "children come first," regardless of the rules of delay which are found in the SCRA. Courts have concluded that the Act is not to be used "as a vehicle of oppression or abuse." The courts should not allow servicemember-litigants to take advantage of it, since it was enacted to protect servicemembers, not to be employed unjustly.

Custody Through Power of Attorney

The transfer of custody to a non-parent (here a new spouse) was the issue in Lebo v. Lebo, (2004 La. App. ELXIS 1642), decided in the context of a SM-father who had been awarded primary custody and was deployed to Afghanistan. He left the child behind in the care of his new wife to the exclusion of the ex-wife, who shared joint custody with him. He used a power of attorney (apparently a guardianship power of attorney executed as part of his military Family Care Plan) to give custody to the child's stepmother.

The Court of Appeals reversed the trial court and remanded for a hearing to determine temporary custody of the minor child, sating that a parent who has primary custody (denominated here the 'domiciliary parent') may not unilaterally change custody; the power to modify a custody order belongs to the courts. In this case, the SM-father chose not to call upon the SCRA to stay the proceedings, deciding instead to hire counsel and proceed with the litigation. Lenser v. Lenser1 also involved a deployment custody dispute. Here the father was an active duty and had the child for about ten days at the end of 2003, just before his return to Ft. Hood, Texas in preparation for

1 *Lenser v. Lenser*, 2004 Ark. LEXIS 490.

deployment to Iraq. There was no custody order. Rather than returning the child to the mother, with whom she had lived since the parties' separation in November 2003, he gave her to his mother, the paternal grandmother. The trial court entered a temporary custody order in favor of the mother but stayed the remainder of the case upon the father's SCRA stay petition until his return.

The SM and his mother argued that the stay was automatic and prevented entry of a temporary custody order. The Supreme Court of Arkansas, considering the case pursuant to an extraordinary writ application, first defined what a "stay" is:

> A stay is generally defined as "suspension of the case or some designated proceedings within it. It is a kind of injunction with which a court freezes its proceedings at a particular point. It can be used to stop the prosecution of the action altogether, or to hold up only some phase of it, such as an execution about to be levied on a judgment."2

Noting that the order in which the court acts on a stay and a temporary custody order – which is entered first, which second – is immaterial, the court stated that an SCRA stay does not freeze a case, leaving it in limbo indefinitely and allowing no authority for the trial court to act. Rather, the opinion states that a trial judge may properly entertain the issue of temporary custody, even if a stay is in place when the issue is considered. The child's life cannot be put in suspended animation awaiting the return of the SM-father to proceed with the case on the merits, and the trial court has jurisdiction to consider issues such as support, custody and other similar issues which come up during the course of the stay. The court cited approvingly Jelks v. Jelks,3 a case in which the court stayed the divorce proceeding at the SM's request but granted maintenance to the SM's wife pending the stay.

TEMPORARY CUSTODY TRUMPS SCRA AND FAMILY CARE PLAN

The SM-mother in Diffin v. Towne4 also urged the court to find that a stay of proceedings barred the entry of a custody order, even on an interim basis, and that her new husband should take care of the child of her former marriage, despite the fact that her ex-husband shared joint custody with her. It is a real-life illustration of the "typical scenario" above involving activation of a custodial parent.

The mother was divorced four years previously. A member of the Army Reserve, the mother remarried and was served in April 2004 with a motion from her ex-husband asking for custody of their child in light of her upcoming mobilization to Ft. Drum, New York. She attempted to defend against the motion by asking for a stay and pointing out that she had prepared a military Family Care Plan, which is required by military regulations, that designated her new husband and her mother as guardians for the child. She argued that a stay of proceedings (requested under New York statutes which are similar to the SCRA) bars the judge from proceeding with any temporary or permanent relief. She also claimed that the stability derived from their child's continued education in the Fort Plain School District was more important in the child's life than living with her father. The new husband also petitioned for temporary custody.

The court in its opinion reminded the parties that a stay of proceedings was simply intended as a shield to protect servicemembers, not as a sword with which to deprive others of their rights.5

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2 *Id.* at 6, quoting *State Game & Fish Comm'n v. Sledge*, 344 Ark. 505, 509, 42 S.W.3d 427 (2001).
3 *Jelks v. Jelks*, 207 Ark. 475, 181 S.W.2d 235 (1944).
4 *Diffin v. Towne*, 2004 NY Slip Op 50465U, 2004 N.Y. Misc. LEXIS 622 (May 21, 2004, unpublished).
5 *Id.* at 8.

In the absence of extraordinary circumstances, such as abandonment, unfitness or persistent neglect, the court must grant custody to the other parent in a case such as this when the primary custodian cannot fulfill her custodial duties. Finding no such disqualifying circumstances, the court swept aside the mother's argument that her new husband should take care of the child pending her return from an indefinite mobilization period, stating that

> …the step-father has no legal or moral obligation to support the child, has no legal ability to obtain medical care for the child, and has no legal ability to inquire as to the education of the child.6

The court stated that

> …the mother's argument… is incorrect if she intents to argue that a non-parent is more suitable than the natural father to be the de facto physical custodian of this child while she is away on active duty.7

Noting that the father had exercised unsupervised visitation with the child for the entire summer for the past seven years in Virginia, where he lived, that he had a close and loving relationship with his son and that there had been no conflicts which required court intervention, the court found that it was reasonable for the SM-mother to have an opportunity to conduct discovery, but that there was

> …no basis on the record… to allow a non-parent, in derogation of a natural parent's rights, to care for the child pending the trial in this matter. The fact that the mother will be unavailable as a physical custodian for her son due to her military service is not an extraordinary circumstance with regard to the father's ability to be the physical custodian of his son.8

The opinion went on to explain that the court had the power to enter a temporary order pending the final resolution of the matter regardless of the entry of a stay of proceedings since

> …children of military personnel are not only entitled to receive support during their parent's tours of duty, but… they are also entitled to stability with regard to their care, upbringing and custody.9

Finally, the court noted that

> …the Court is being asked to leave the child with a step-parent until such time as the mother is able to proceed. This is not in the child's best interest and the law requires this Court to enter a temporary order pending the trial of this action. To fail to provide for the child's legal physical custody during the pendency of the stay would result in an untenable situation where the child would be living with his step-father, a legal stranger to him, and his natural father's rights would be subrogated to the step-father. The Court agrees with the father, that the child should be allowed to complete the current school year in New York and then physical custody should be transferred

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6 *Id.* at 17.
7 *Id.* at 18.
8 *Id.* at 19-20 (emphasis in the original).
9 *Id.* at 20, citing *Gilmore v. Gilmore*, 185 Misc. 535, 536, 58 N.Y.S.2d 556, 557 (1945) and *Kelley v. Kelley*, 38 N.Y.S.2d 344, 348-50 (1942) (cases providing for family support while rest of matter was stayed).

to the father, the available natural parent, until such time that the mother is no longer on active duty in the military or a trial is held on this matter.10

Similar results, granting application of the stay provisions of the SCRA but allowing placement or temporary custody of the child on an interim basis, occurred in In re Marriage of Grantham,11 in which the father attempted to give custody through his military Family Care Plan to the child's paternal grandmother, and the mother obtained temporary custody while the father pursued an appeal that was ultimately unsuccessful.

The SCRA/custody cases show the difficulties that judges have in wrestling with the reconciliation of conflicting interests, such as the need for an immediate decision on care for a child (when the custodial parent is absent) and the need for stay of proceedings when the non-moving party is in the military and unavailable. Judges find it very difficult to support a stay of proceedings under the SCRA, regardless of how 'unfair' it might seem to have the hearing without the presence of the SM, when the alternative is to defer, delay or deny the decision on what happens to the child when the parent with legal custody is gone.

Custody for the Servicemember

Can a service member ever hope to win custody? Some people claim that there is an inherent bias against military parents in custody cases. Judges, they argue, will always rule against a military parent when custody is at stake. As with everything else in the area of custody litigation, the real answer to this question is 'it depends.'

If your client is assigned to a unit that frequently deploys overseas, has irregular training schedules that often involve weeks spent 'in the field,' or has other limitations that would impact adversely on his ability to provide continuous and consistent care for a child, then he would be 'shooting himself in the foot' in asking for custody while he's on active duty. It would probably be a waste of money to go to court for custody with these challenging obstacles in the way. In such cases, it may behoove the attorney to tell the client that custody and military service are incompatible. The courts often see disruption, deployment and distance from the other parent as obstacles to the continuity and stability which are keystones for a good custody arrangement.

Custody practitioners who handle military cases recognize that military duty can be turned into a real advantage if the issues of scheduling and deployments can be addressed. Many assignments provide unique and exciting opportunities for travel and education for children. The quality of schools on base is generally good; those overseas and many in the United States are run by a Federal agency, DoDEA (Department of Defense Education Activity). In addition, most military installations have excellent recreational facilities and an active "dependent youth activities" program. There are usually good day care facilities for those with normal duty hours (and sometimes those with unusual hours, as well). There is usually a military sponsor appointed for each SM newly assigned to the base who can assist with information about the community, housing and schools. And finally, the opportunity to travel to other states and countries is a chance for learning and enrichment that most children just don't have.

If the case involves a move overseas by a military parent who has custody, you represent the

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10 *Id.* at 21.

11 *In re Marriage of Grantham*, _N.W.2d _, 2005 Iowa Sup. LEXIS 75 (Iowa 2005). For a contrary result, *see Dilley v. Dilley*, a trial-level decision granting continued custody to the SM-mother and maternal grandmother despite the mother's absence overseas, allowing the mother' stay request and denying the father's motion for temporary custody. *Dilley v. Dilley*, Chancery No. CH04-195, 2004 Va. Cir. LEXIS 235 (Cir. Ct., Shenandoah Co., November 2, 2004).

other side, and your client opposes the move, focus on gather as many facts as possible and using them in your questions at trial to enlighten the court on just how difficult it will be for the service member parent to exercise custody. Initiate discovery right away, take the other side's deposition, and get the dates and times, duties and details necessary to let you conduct a competent cross-examination.

There's no substitute for the truth, especially when it comes to hard facts about custody, care and military duties. Insist that your clients tell the judge the complete, unvarnished truth about their military assignments and duties, and then follow up with questions about how they will deal with the moves, dislocations and emergencies which will inevitable occur in military life. Such a candid approach may gain grudging admiration from the judge, who sees the witness as a good parent who is trying hard, under difficult circumstances, to provide care for the child or children.

Gathering evidence is essential in making the case for a military parent to obtain custody. Visit the website of the military base involved to obtain accurate information about dependent youth activities, recreation, on-base schools, churches, shopping and so on. If you can, visit the base itself, obtain handouts and pamphlets regarding the above activities and facilities, and take pictures of the facilities. Consider posing your client in a few of the pictures with the facility in the background. Ask the personnel at the base recreation facility or the day care center to come to court and testify.

Military Visitation

It is best to plan for long distances with military visitation, even if the parties are both 'local' at the start of the case. When drafting a visitation schedule for the children, try to set down a local schedule and a long-distance one. The local one can be 'every other weekend Friday to Sunday' or whatever your local practice suggests. The long distance one should provide in the appropriate case for visitation for several weeks in the summer and for a week or two during the Christmas holidays. It also needs to specify who pays for airline tickets, how they are provided to the custodial parent, and how a child who cannot travel alone will be transported to the non-custodial parent's residence for the visitation. Make sure there is a reasonable sharing of work in coming up with a visitation plan. It's all too easy to spend tons of money having the attorney find out about flight logistics and 'companion policies.' Put this burden – if appropriate – on the shoulders of your client. Ask her to search the internet or call the airlines to find out when children may fly unaccompanied, how much is charged when an airline flight attendant is assigned as 'companion' for the child, and so on. Usually the client will appreciate the opportunity to do part of the work in the case, especially if it means saving legal fees.

Enforcement of visitation rights and access

Due to the mobility of military personnel, enforcement of visitation and remedies for removal are frequent issues facing service members, and non-military parents. The UCCJEA gives enhanced protections for the exercise of rights of access. Under §304(a)(1), a court can issue a temporary order enforcing visitation granted by the court of another state (a visitation schedule or the visitation provisions of a custody decree).

Section 310 of the UCCJEA provides a speedy enforcement mechanism for the prompt recovery of children wrongfully taken or kept outside the original decree state. When there is a verified application alleging that a child is likely to suffer serious imminent physical harm or removal from the state, the court may issue a warrant to take physical custody of the child. The section provides for expedited hearings in such mtters.

Family Care Plans

Remember that, while judge advocate officers are available to advise service members on Family Care Plans, these JAGs are usually not licensed in the state where the service member – parent is assigned nor in the state which is the domicile of the service member – parent. They are often just out of law school, with perhaps two months of basic JAG officer training at the appropriate service's JAG school, which offers at most a few hours on domestic relations. Some have not taken a course in family law in law school, and may legal assistance attorneys learn what to do by

mentoring with senior lawyers in the legal assistance office, as well as through OJT (on-the-job) training. Particular care and attention should be given to the Family Care Plan by the private practitioner who is advising a service member parent.

The most persistent legal mistake occurring in Family Care Plans is designating as caretaker or custodian for the child someone other than the child's other parent. Whenever possible, insist on your client's including the other parent in his or her Family Care Plan. Such an exclusion from custody upon mobilization or deployment often leads to unnecessary litigation and increased legal fees for everyone. Should the other parent decline or be unable to serve as back-up custodian, the best way to protect the service member – custodian is to put that in a court order too. In order to protect the court's ability to order compliance, she should be made a party to the lawsuit.

The attorney should carefully advise the service member – parent about the need for Family Care Plan decisions regarding death, as well as mobilization; someone should be appointed to care for the child upon the death of the SM – parent. Pay close attention to the law of the state which exercises 'home state' or continuing jurisdiction over custody of the child. Sometimes the state will allow the designation of a new spouse as the guardian or the estate of the minor child but not as physical custodian.

When a situation arises in your practice, don't be shy about getting help – especially if the help is free! Partnering with a JAG officer, stateside or overseas, is the sensible thing to do when trying to obtain the return of a missing child. Contact the nearest military base and ask to speak to a legal assistance attorney. You will usually need to have available your client's ID card to establish eligibility, but you may be able to get around this requirement if your client is no longer married to the service member by carefully and patiently explaining to the military attorney that you are working for the mother, let's say, who is entitled to legal assistance on behalf of the minor children, who are in fact military dependents even though the mother is not. Be sure to have a copy of the operative court order ready for faxing to the JAG officer.

Clauses to Consider: Mobilization and Deployment

There are numerous family situations that exist in the military world. When negotiating and draft the initial custody order or separation agreement, use the following language, after the appropriate findings of fact and the usual conclusions of law regarding fitness and best interest of the child, to designate the military parent as the one with custody:

> Since Jane Doe is a member of the U.S. Navy and may be deployed in the future on an unaccompanied tour (that is, an assignment where family members are not allowed), her former husband, John Doe, is hereby designated alternate custodian of Jack Doe, the minor child of the parties, in such an event. He shall hold and exercise all the rights and responsibilities of a custodial parent during such a deployment and shall promptly return the child to Jane Doe at the deployment's end.

Some parents want to provide an additional alternate custodian, in case the primary alternate cannot or will not take over custody. Here is a clause to accomplish the third-party designation, which would be added at the end of the above clause:

> If John Doe is unwilling or unable to serve as alternate custodian, Felicia Doe, the mother of Jane Doe, may apply to this court for appointment as secondary alternate custodian of Jack Doe. The parties herein, Jane and John Doe, hereby stipulate that Felicia Doe is a fit and proper person to accept the role of secondary alternate custodian.

Jurisdictional Concerns

What follows is a clause that may prevent an interstate custody battle. It is strongly recommended that, in the vent of the mobilization or deployment of the custodial parent, a court order be entered to effectuate the transfer of custody of a minor child or children; words or written agreement are not enough. While one cannot confer jurisdiction by consent, the parties can at least stipulate to transience, rather than permanence, to avoid one parent's taking advantage of the situation. One can also save time and avoid 'changed minds' by stipulating to the parties understanding and intentions, which are often critical issues in determining the temporary or permanent nature of a child's stay with a parent in another state.

> Since Jane Doe is a member of the U.S. Navy and is being deployed to Iceland in the near future, the parties desire to establish an orderly temporary transfer of custody of Jack Doe, their minor child, during the term of the deplo9yment. He shall hold and exercise all the rights and responsibilities of a custodial parent during such a deployment and shall promptly return the child to Jane Doe at the deployment's end. The parties hereby stipulate that Kansas is the 'home state' of Jack Doe, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, and the Parental Kidnapping Prevention Act. This transfer of custody is a temporary arrangement only. It is not a change o home state for the child. The parties further stipulate that all aspects of the child's living situation (e.g., residence, environment, living situation and education) in Kansas are suitable and appropriate for the child.

Inconvenient Forum

Service members should pay particular attention to the possibility of a motion to transfer the custody case to another state when the original decree state is alleged to be an inconvenient forum.

This will occur most frequently when the service member is no longer present in the decree state and the other parent has moved. To prevent this court's allowing a motion to decline to exercise jurisdiction, counsel for the service member should consider –

* an agreement to maintain the decree state as the proper venue for the custody case, despite the later transfer of the service member:

> The parties agree that East Virginia shall remain the state where the modification and enforcement of custody and visitation shall be heard. The law of East Virginia shall apply to any such modification or enforcement proceeding. The parties specifically recognize that the minor child was born in East Virginia, has lived in this state for 11 years before this custody order, and has maternal and paternal grandparents in this state with whom he will continue to visit from time to time. In addition, since the parties have parents in the state of East Virginia, they agree that this state remains equally convenient for both of them for any modification or enforcement hearings in the future.

* the parties should also state what factual circumstances will or will not be considered concerning modification of the venue or of the custody decree itself. Such a clause might read:

> The parties acknowledge that the following circumstances may occur and that they will not be considered as a substantial change of circumstances sufficient to transfer the custody case to another state under a section of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) or to modify custody or visitation:
>
> - the remarriage of either party,

- the Navy's reassignment of John Doe,
- the transfer of Mary Doe in connection with her current employer, IBM, or any subsequent employer, and
- the attendance of Johnny Doe, the parties' minor child, at a school outside the state of East Virginia.

This clause may not prevent a determined judge from allowing a change of venue or of custody, but it will certainly narrow the scope of the inquiry and potentially protect the non-moving party.
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North Carolina has not been slow to act in the area of military custody and visitation legislation. In July 2007 the General Assembly made several important changes to the custody and visitation statutes. The revisions make North Carolina the leade**r** among all 50 states in providing fair hearings in visitation and custody cases involving servicemembers. The changes are found at G.S. 50-13.7A (see Appendix).

Our state has the third-largest troop population in the United States, and Fort Bragg and Camp Lejeune are two of the largest military bases in the country. Pope Air Force Base, Seymour Johnson Air Force Base, and the Marine Corps Air Stations at Cherry Point and New River add significant numbers of service personnel. There are over 100,000 military personnel stationed here. In addition, Reserve and National Guard mobilizations have an impact on servicemembers from big cities and small towns all around the state. The recent call-up of the N.C. National Guard's 30th Heavy Separate Brigade was the largest mobilization of state Guard personnel since World War II.

Overview of the statute

G.S. 50-13.7A applies to cases filed after October 1, 2007, and it contains four sections. The statute covers the following, in situations involving temporary duty, mobilization of Guard/Reserve servicemembers (SMs) or deployment of active-duty SMs -

- It allows expedited hearings upon the request of a servicemember.
- It lets the court use electronic testimony when the SM is unavailable.
- It allows the court to delegate the visitation rights of the SM to another family member.
- It requires that any temporary custody order entered upon a SM's deployment end within ten days of the member's return, and that the servicemember's absence due to deployment may not be used against him in a change of custody hearing.

Expedited Hearings

There are already laws which allow the stay or delay of hearings involving servicemembers. The Servicemembers Civil Relief Act, 50 U.S.C. App. 501 *et seq.* provides for discretionary and mandatory delays in military cases where the court makes certain findings.

But why should *delay* be the only option for the court? Why not consider its flip-side, the expedited hearing? Expedited hearings allow servicemembers to get their affairs in order promptly before a mobilization or deployment which will take them far away from the locale of the court. While there are laws which require expedited process for child support cases, there are no specific statutes which allow expedited hearings for visitation and custody cases when one of the parties is in the military. The new statute states:

> (e) Expedited Hearings. – Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, for good cause shown, hold an expedited hearing in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability, or anticipated ability, to appear in person at a regularly scheduled hearing.

The definitions of military temporary duty, deployment, or mobilization orders are found in Section (b) of the statute:

(b) Definitions. – As used in this section:
(1) The term 'deployment' means the temporary transfer of a service member serving in an active-duty status to another location in support of combat or some other military operation.
(2) The term 'mobilization' means the call-up of a National Guard or Reserve service member to extended active duty status. For purposes of this definition, 'mobilization' does not include National Guard or Reserve annual training.
(3) The term 'temporary duty' means the transfer of a service member from one military base to a different location, usually another base, for a limited period of time to accomplish training or to assist in the performance of a noncombat mission.

Such a prompt hearing will allow the member to participate in person, rather than delay resolution of the case until the SM's return. It allows the court to immediately enter orders for the care and custody of minor children during the member's absence. Delay in litigation almost always creates higher legal expenses for the SM, as well as the non-military parent.

Military members who need an adjustment to visitation rights or a modification of the custody award can now ask for expedited consideration of their cases. They do not have to rely on general rules for peremptory settings or the unfettered generosity or stinginess of a district court judge as to a speedy hearing. While it could be argued that judges in general have the discretion to allow a peremptory setting in certain cases, the importance of a specific statute cannot be overstated. Instead of a judge saying, "Counselor, show me a statute which says I have to bump up this hearing," the judge will have specific authority to expedite the hearing and won't need to allow delay to worsen the situation of a child with a distant military parent.

An example of the text of a motion asking for an expedited hearing might be –

The plaintiff hereby requests an expedited hearing under G.S. 50-13.7A, showing the court that:

1. *This case was filed after October 1, 2007.*
2. *Plaintiff is a staff sergeant in the U.S. Army Reserve. His unit is the 44th Training Unit, Raleigh, North Carolina.*
3. *On November 22, 2007, he received Army Reserve mobilization orders to active duty with his unit for an 8-month tour of duty at Camp Watkins, Minnesota.*
4. *Plaintiff has already requested a hearing on his motion for a custody evaluation, but the current date for that motion is December 21, 2007, at which time he will already be in Minnesota.*
5. *The testimony of plaintiff is necessary to support the custody evaluation motion.*
6. *The military duties of plaintiff will have a material and detrimental effect on his ability to participate in the court hearing on December 21. He will not be able to take leave. His only recourse is to ask this court to move up the date for the custody evaluation motion hearing.*

Wherefore the plaintiff requests an expedited hearing for his custody evaluation motion.

The expedited hearing provision parallels a similar provision in Ohio law. Recognizing the importance of providing for a speedy and fair hearing before the SM deploys, Ohio has just passed H.B. 61, effective July 1, 2007, which provides for an expedited hearing for custody and visitation modifications within 30 days of notice to the court of deployment orders.

ELECTRONIC TESTIMONY

When servicemembers cannot be in court to present testimony or evidence due to their military duties, the court should be able to obtain this information through telephone, video or other electronic means, instead of proceeding with the case without the SM's testimony or allowing a continuance. Doing without the military parent's testimony leaves the court without the benefit of potentially useful and relevant information upon which to base its decision.

The amendment was necessary because current statutes only provide limited authority for electronic testimony. When the case involves two different states, the Uniform Interstate Family Support Act (UIFSA) provides for parties to "testify by telephone, through audiovisual means or by any other electronic means." G.S. 52C-3-315(f). In interstate custody cases, 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. G.S. 50A-111.

The new statute states:

> (f) Electronic Communications. – Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, upon reasonable advance notice and for good cause shown, allow the parent to present testimony and evidence by electronic means in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability to appear in person at a regularly scheduled hearing. The phrase 'electronic means' includes communication by telephone, video teleconference, or the Internet.

There are numerous options available for taking testimony electronically. In addition to use of the telephone, servicemembers can sometimes obtain access to videoteleconference (VTC) resources at commercial facilities which allow real-time audiovisual interaction with SMs as if they 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 VTC facilities.

An example of the appropriate wording for a motion asking for this method of taking evidence would be -

The plaintiff hereby requests an expedited hearing under G.S. 50-13.7A, showing the court that:

1. *This case was filed after October 1, 2007.*
2. *Plaintiff is a chief petty officer in the U.S. Navy.*
3. *On October 29, 2007, he received deployment orders for a six-month tour of duty aboard the frigate MATILDA, to leave Norfolk, VA on December 2, 2007.*
4. *Plaintiff has filed a motion for appointment of a parenting coordinator and a motion to compel production of the minor child's medical records from defendant. The date for that motion is December 21, 2007, at which time he will already be on board ship and underway.*
5. *The testimony of plaintiff is necessary to support these motions.*
6. *The military duties of plaintiff will have a material and detrimental effect on his ability to participate in the court hearing on December 21. His commanding officer, Commander Jane Green, has refused to grant him leave. He will, however, be able to participate by use of the telephone if the court will allow that option.*

Wherefore the plaintiff requests that the court allow him to participate in the hearing and give testimony by telephone in support of the two motions.

The option of taking electronic testimony and evidence upon motion of servicemembers allows judges to facilitate the prompt disposition of the case when a prompt hearing is needed. It avoids leaving the court with only the options of default or delay.

DELEGATION OF VISITATION RIGHTS

Consider the servicemember who is deployed and unable to arrange visitation. If Major John Doe is sent some distance away from his residence on military orders, his children's contact with him is virtually terminated. This is especially true if his ex-wife, who has custody, refuses to allow their visitation with relatives, claiming that visitation belongs solely to the non-custodial parent and that the courts lack the power to grant visitation to non-parents.

The magnitude of the problem was noted by Lieutenant Colonel Francine I. Swan, Legal Advisor to the Adjutant General, New Hampshire National Guard, in her 2004 comments to an inquiry by the American Bar Association's Working Group on Protecting the Rights of Service Members:

> *Child custody/visitation: This is the single greatest area of concern -- when the servicemember is the non-custodial parent and visitation is not allowed to any other members of the non-custodial parent's family (to include siblings, step-parent and grandparents). In some cases this effectively cuts off any and all communication between the child and the non-custodial parent for the duration of the deployment. Our service members are risking their lives; they should not have to risk their families as well.*

Should the custodial parent have a veto power over the children's contact with other members of the SM's family? Or should the court consider whether MAJ Doe's children ought to be able to visit – upon court order and with a best-interest finding – with those relatives of his who have a significant connection with them, so that they can step into his shoes and see the children during his military-related absence? When there is a new spouse or there are grandparents who are close to the children, it makes sense to allow the judge (not the former spouse, as is the case without such a law) to let them exercise the visitation rights that is unavailable to the absent military parent due to his or her military assignment. The new statute allows the judicial delegation of visitation rights. It states:

> (d) Visitation. – If the parent with visitation rights receives military temporary duty, deployment, or mobilization orders that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise visitation rights, the court may delegate the parent's visitation rights, or a portion thereof, to a family member with a close and substantial relationship to the minor child for the duration of the parent's absence, if delegating visitation rights is in the child's best interest.

There is authority in other states to support the award of visitation rights to relatives in lieu of the visitation granted to a parent who is absent on military service. For example, in 1996 the Supreme Court of Mississippi upheld an order for visitation rights to paternal grandparents of a child in place of the child's father, who was unable to exercise visitation due to his Navy service. In *Settle v. Galloway*[12], the trial judge stated that:

> …it is through these grandparents that Chase [the minor child] is exposed to his father with the exchange of video tapes and other means by which the grandparents utilize during visitations with the child. But for this contact the child would have little exposure to his dad as a result of the father being in the United Stated Navy.[13]

The case was decided under the grandparent visitation statute of Mississippi.

In a 2003 Illinois case, *In re Marriage of Sullivan*[14], an Illinois appellate court reversed the

[12] *Settle v. Galloway*, 682 So. 2d 1032 (Miss. 1996).
[13] *Id.* at 1034.
[14] *In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 795 N.E. 2d 392 (2003).

trial court, which had dismissed a petition from a deployed SM-father to allow substitute visitation. There the servicemember-father petitioned the court to allow his family to have continued visitation with his son while he was on active military duty. His military service was expected to law for a one- to two-year period. He stated that it would be in the child's best interest to continue his visitation schedule with the family and that the mother, his former wife, would prevent the son from such visitation. The appellate court held that under common law Illinois courts could award visitation to a parent's family members when special circumstances were shown. Distinguishing the case from those involving grandparent visitation, the appeals court remanded for a hearing on whether it would be in the child's best interest to modify the visitation schedule as requested by the father.

The *McQuinn* case in Alabama[15], also decided in 2003, got to the same result but used a different approach. The decision allows the court-ordered delegation of visitation rights with family members with whom the child had a close connection. The trial judge ordered that the SM-father could permit his children to visit with any member of his extended family while he was absent on active duty in the Navy, and the court barred the mother's right to veto the father's choices as to whom his children could visit "without any particular reason."

Addressing the issue of constitutionality, the appeals court held

> We note that although the mother, not the father, [*8] is the primary physical custodian of the children, the father's fundamental right to direct the care, control, and association of his children is no less fundamental and protected than the right of the mother to do the same. See *Troxel v. Granville, 530 U.S. at 65, 147 L. Ed. 2d 49, 120 S. Ct. 2054*. The decision in *Troxel* does not differentiate between custodial and noncustodial parents as to their fundamental rights to determine the care, control, and association of their children.16

The court of appeals then dealt with the mother's argument that this was a "grandparent visitation case" and the judge had improperly tried to give *de facto* visitation to the father's parents and family members:

> The father correctly argues that the instant case does not involve grandparent-visitation rights pursuant to any Alabama statute; rather, this lawsuit results from the mother's decision to prevent the children from visiting their father or from developing and maintaining any continuing association with members of the father's family.
>
> The mother appears to argue that the father, during the periods in which he is entitled to direct the care, custody, and control of his children, does not have the right to allow his parents or siblings or other suitable family members to visit with the children in his stead, while asserting that she does have such rights during the periods in which she has custody of the children. In previous visitation cases, this court has reversed trial-court judgments providing for visitation, either directly or by implication, to the noncustodial parent at the sole discretion of the custodial parent. See *K.L.U. v. M.C., 809 So. 2d 837 (Ala. Civ. App. 2001)*, and *Bryant v. Bryant, 739 So. 2d 53 (Ala. Civ. App. 1999)*. The record reveals that this case is more analogous to those visitation cases than to a grandparent-visitation case.17

The Court of Civil Appeals then proceeded to review the rights of the father as to visitation and the ability to let others, during his visitation periods, care for the children:

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[15] *McQuinn v. McQuinn*, 866 So. 2d 570 (Ala. Civ. App. 2003).
16 *Id.* at 573.
17 *Id.*

> Furthermore, it is the consensus of this court that the father did not forfeit any of his fundamental parental rights when he divorced, or when he joined the armed services. Because no such forfeiture occurred, the father retains the right to allow other suitable family members to visit with his children during his visitation periods even when he is unable to be present.
>
> The mother argues that the trial court's list of "designees" who may exercise the father's visitation in his absence violates Alabama's grandparent-visitation statute, *' 30-3-4.1, Ala. Code 1975*, in part because it permits the grandparents visitation without requiring that they meet the evidentiary burdens placed upon them by the statute. What the mother misunderstands is that this case does not involve whether grandparents or third parties have a right to visitation, but instead involves the father's right, during his visitation periods, to determine with whom his children may visit. Properly viewed, the father's right does not, as the mother characterizes it, allow third-party visitation through a "back door." Nor does the recognition of the father's right to determine the care, control, and association of his children during his visitation periods amount to what the mother describes as "routinely forcing the children to visit with third parties." Instead, the mother's contentions concern whether one parent can veto the other parent's choices concerning with whom the children visit without, from what we can perceive in the record, any particular reason.
>
> As the father points out, the mother is free to leave the children in day care during her working hours, with babysitters when she has social engagements, and apparently (based upon the statement of her counsel at trial) with her sister (or other family members) in Tennessee for what her counsel described as extended "regular visitation periods," all without his approval or even his knowledge. Essentially, the mother argues that the father, as the noncustodial parent, has been stripped of the rights of a parent and that she, and only she, may exercise those parental rights. She is mistaken. The judgment properly permits the father to "take the children to such reasonable activities as [he] may determine."18

The most recent case was decided in November 2006 by the Idaho Supreme Court. In *Webb v. Webb*[19], the Court approved the decision of a trial judge to allow the delegation of visitation rights through a power of attorney to the child's grandparents while the father was deployed. The case involved a statute which allows military personnel to grant custody and visitation rights through a power of attorney:

> The plain language of *I.C. § 15-5-104* clearly provides that the parent of a child may delegate his or her powers regarding care, custody or property for a certain period of time depending on the status of the parent or designee. The plain language of the statute broadly applies to delegation of parental powers. Since the statute allows for delegations of custody, it is for us to decide whether the legislature intended this language to include delegation of visitation.
>
> We hold that it does. Neither *I.C. § 15-5-104* nor *Chapter 7, Title 32 of the Idaho Code* defines visitation for child custody purposes. Nonetheless, *Chapter 14, Title 7 of the Idaho Code* defines visitation as "custodial period, custodial schedule, residential schedule, parenting, or parenting time." *I.C. § 7-1402(10)*. Therefore, it is clear from Idaho law that visitation is a form of custody, and the plain language of

18 *Id.* at 574-575.
[19] *Webb v. Webb*, 148 P. 3d 1267 (Ida. 2006).

> *I.C. § 15-5-104* allows for the delegation of custody. As such, the magistrate did not err by allowing Christopher to delegate to the Webbs his custody rights to visitation with his daughters.20

It should be clear that this provision of the law is not "grandparent visitation." The law authorizes the delegation of the visiting parent's rights. It does not deal with granting new rights to family members in their own name. It allows MAJ Doe, the visiting parent - whose absence is not his own fault - to ask the court to let his family members step into his shoes and have contact with the children, just as he had the right to let them do so while he was present and exercising visitation rights. North Carolina already allows the delegation of custodial care (which includes visitation) under statutory powers of attorney, G.S. Chapter 32A, but the new law requires judicial approval, a best-interest determination, and a finding that the family member has a close and substantial relationship with the child, so as to safeguard the child's delegated visitation rights.

Here is an example of the wording of a motion for delegated visitation rights –

The plaintiff hereby requests an order allowing delegated visitation rights, showing that:

1. *This case was filed after October 1, 2007.*
2. *Plaintiff is a master sergeant in the N.C. Air National Guard.*
3. *On November 22, 2007, he was granted specific visitation rights with his two minor daughters.*
4. *On November 23, 2007, he received TDY (temporary duty) orders for a six-month assignment to Air Safety School, Maxwell AFB, Alabama, commencing March 12, 2008. This is a substantial distance from the plaintiff's residence, and his military duties there will impair his ability to exercise regular and frequent visitation with the daughters of the parties.*
5. *Plaintiff has remarried, and his wife Wanda Black has a close and substantial relationship with the children.*
6. *The delegation of plaintiff's visitation rights are in the best interest of the children.*

Wherefore the plaintiff requests that the court grant an order for delegated visitation rights for the minor daughters with his present wife for the duration of his absence on TDY orders.

Once again, we are not alone. Texas has enacted a law stating that, if a visiting parent is in the military (federal service or National Guard) or is reasonably expected to be, then the court shall permit that parent to designate a person to exercise visitation while the military parent is outside the United States. The visitation terms resume after the absent parent returns to the U.S. Louisiana law allows "compensatory visitation" when a servicemember on active duty is unable to exercise court-ordered visitation rights.

MILITARY CUSTODY PROTECTIONS

The new law requires the termination of a temporary custody order that was entered at deployment or mobilization of the military custodial parent within ten days of his or her return. It also requires that the absence of the member due to deployment orders cannot be held against him or her in a change of circumstances analysis during a motion to modify custody. The wording of the statute is as follows:

> (c) Custody. – When a parent who has custody, or has joint custody with primary physical custody, receives temporary duty, deployment, or mobilization orders from the military that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise custody responsibilities:

20 *Id.* at 1271.

(1) Any temporary custody order for the child during the parent's absence shall end no later than 10 days after the parent returns, but shall not impair the discretion of the court to conduct a hearing for emergency custody upon return of the parent and within 10 days of the filing of a verified motion for emergency custody alleging an immediate danger of irreparable harm to the child; and

(2) The temporary duty, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer custody from the service member.

Certain aspects of military life are inconsistent with custody. A deployment to another base, when the military orders specify that it is an "unaccompanied tour," will mean that the SM cannot bring a spouse or children along. Tours of duty like this include shipboard duty, duty at Camp Red Cloud (just across the Demilitarized Zone in Korea), and other "select locations" in the underdeveloped world. A mobilization of a Guard/Reserve parent sometimes means that he or she will also be deployed overseas, or may mean that the tour of duty will be at a stateside base, which would not in itself disqualify the parent from bringing a child along who is in his or her custody. TDY, or temporary duty, is usually "unaccompanied" since it often involves schools and training or else a limited-term non-combat assignment.

In any of these situations, the SM who has custody under a court order should ordinarily transfer custody to the other parent by means of a temporary consent order. The consent usually grants temporary custody to the other parent after setting out the military orders and the factual basis for the order. In other cases, it may just be a brief custody consent order with no mention of mobilization, deployment, TDY or an isolated assignment. Such consent orders often are done "on the fly" since sometimes a mobilized Guard or Reserve servicemember gets as little 72 hours' advance notice. However it is written, the purpose of the temporary consent order is virtually always the same. It provides for an alternate custodian during the temporary military assignment, after which custody resumes with the military parent.

In an ideal world, every order would be written the same way - as an interim order providing for a change of custody for a limited time, with custody reverting to the military parent at the deployment, TDY or isolated tour. The order would state that the child is doing fine at the present custodial location, and that the need for the order arises from the military travel orders. No change of circumstances would need to be shown to get the child back. In fact, no further court order would be needed. The return of custody would be immediate and automatic, and each parent who remained behind would promptly return the child upon the return of the military parent who previously had custody.

The ideal collides with the real in many military custody cases. When the military custodian leaves, occasionally the other parent changes his or her mind and decides to retain custody. Sometimes that was the other parent's intention from the beginning. Often the lure of *receiving*, rather than *paying*, child support each month is the clincher. And sometimes the child is doing better in the new environment, leading the other parent to question the wisdom of returning custody to the military parent.

For whatever reason, a number of "deployment custody cases" end up with a new custody trial at which the military parent has to fight to regain (or attempt to regain) custody. There are numerous cases in the last four years which have borne this out. For example, in *Crouch v. Crouch*[21], a 2006 Kentucky case, the mother received custody in a 1996 order. In 2003 she received a 72-hour mobilization order from the Kentucky Army National Guard, and she transferred custody by consent order to the father. But when she finished her military duties and returned to civilian life, the father denied that the order was anything other than a "permanent order," even though both

[21] *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006).

parties had intended for it to be temporary, and he argued that the mother had to prove a change of circumstances in order to retrieve custody. The case went to the state appeals court and then the Kentucky Supreme Court; both courts stated that the order was only temporary, with no requirement for the mother to show a change in circumstances to regain custody. The Supreme Court also noted briefly that this interpretation of the 2003 order was consistent with a new state statute covering the issue of custody when a parent is a member of the military and called to active duty (see below).

The new statute cannot prevent such a new hearing. In fact, such a hearing would be appropriate if the SM returned with mental or physical conditions that impaired his or her ability to parent. Such a hearing might also be proper if the child were doing poorly while with the military parent and were thriving in the care of the other parent. All the new law does is to require the termination of a temporary custody order ten days after the SM's return (which would mean in most cases that the child/children would then return to the military parent), and that the SM's military absence will not be held against him or her.

An example of a temporary custody order to implement this is as follows:

[CASE HEADING]

This matter came before the undersigned District Court Judge of Jenkins County, North Carolina, on the joint motion of the parties for entry of an order on child custody and visitation. It was shown to the Court that the parties hereto desire to confirm their settlement by the entry of this Order and that the parties consent to the entry of the same includes the following findings, conclusions and judgments. Therefore, the Court accepts the terms below and makes the following:

FINDINGS OF FACT

1. *Plaintiff is and has been, for more than six months immediately preceding the institution of this action, a resident of Ft. Swampy, North Carolina.*
2. *Defendant is a citizen and resident of Jones County, East Virginia.*
3. *The parties were married on August 15, 1996, and lived together as husband and wife until February 18, 2005 when they separated. This lawsuit for custody and visitation rights, among other matters, was filed on October 2, 2007.*
4. *There is one child born of this marriage, namely Jack Doe, born January 1, 2004.*
5. *An order was entered in this cause on October 31, 2007 granting Plaintiff custody of the minor child, with reasonable visitation rights for Defendant.*
6. *Since the entry of that order the parties have agreed that the terms of custody and visitation should be temporarily modified as set out in the Decree which follows.*
7. *Since Jane Doe is a member of the U.S. Navy and is being deployed to Iceland in the near future for about six months, the parties desire to establish an orderly temporary transfer of custody of the minor child during the term of the deployment to Defendant.*
8. *The Defendant shall hold and exercise all the rights and responsibilities of a custodial parent during such a deployment and shall promptly return the child to Plaintiff at the deployment's end.*
9. *The parties hereby stipulate that North Carolina is the "home state" of Jack Doe, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act.*
10. *This transfer of custody is a temporary arrangement only. It is not a change of home state for the child.*
11. *The parties further stipulate that all aspects of the child's living situation (e.g., residence, health care, neighborhood, and education) in North Carolina are suitable and appropriate for the child.*
12. *The Defendant is a fit and proper person to have temporary custody of the minor child as set out in the Decree herein.*

13. *This custody arrangement is in the best interest of the child.*
14. *The parties have indicated to their respective counsel their consent to the terms of this order. To the extent not expressly modified herein, the terms of the previous order shall continue in full force and effect.*

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. *The Findings above are incorporated herein to the extent that they represent conclusions of law.*
2. *This Court has jurisdiction to determine custody of the minor child who is the subject of this action pursuant to 28 U.S.C.A. 1738A (Parental Kidnapping Prevention Act) and Chapter 50A, North Carolina General Statutes (Uniform Child Custody Jurisdiction and Enforcement Act).*
3. *North Carolina remains the state where the modification and enforcement of custody and visitation shall be heard. The law of North Carolina shall apply to any such modification or enforcement proceeding. The parties specifically recognize that the minor child was born in North Carolina, has lived in North Carolina since birth, and has maternal and paternal grandparents in North Carolina with whom he will continue to visit from time to time. In addition, since the parties have parents in the state of North Carolina, they agree that this state remains equally convenient for both of them for any modification or enforcement hearings in the future.*
4. *It is in the best interest of the minor child for the Defendant to have temporary custody as set out below.*
5. *Plaintiff need not show a substantial change of circumstances to obtain the child's return. She is entitled to immediate return of the minor child, under N.C.G.S. 50-13.7A, no later ten days after her return from the deployment.*
6. *The terms in this order are in the best interest of the minor child.*
7. *The parties have knowingly and voluntarily consented to the terms of this order and its entry.*

DECREE

IT IS THEREFORE, ORDERED THAT:

1. *Defendant shall have temporary custody of the minor child from the date of transfer, November 12, 2007, until the return of Plaintiff from her deployment.*
2. *Defendant shall return the minor child to Plaintiff no later ten days after her return from the deployment.*
3. *To the extent not expressly modified herein, the terms of the prior order entered in this cause shall continue in full force and effect.*
4. *Jurisdiction of this cause is retained for the entry of further orders.*
   [signature of judge, date]
   [signatures of parties, dates, notarizations if desired, attorney's signatures]

North Carolina follows a number of other jurisdictions in this area. Some examples of states which have recognized the problem and have acted:

- The law in Arizona states that the military deployment of a child's custodian is not a change of circumstance if the military custodian has filed a military Family Care Plan with the court at the prior custody proceeding and if the deployment is for less than six months.
- Under Michigan law, if a motion to change custody is filed while a parent is on active duty, the court may not enter an order changing the prior custody order so as to change the child's placement; however, the court may enter a temporary custody order, based on clear and convincing evidence. Upon the absent parent's return from military duty, the court must reinstate the prior custody order. If a motion for change of custody is filed after a parent

returns from active duty, the court may not consider a parent's absence due to that military duty.

- Kentucky law provides that, except for consent orders, any court-ordered modification of a child custody decree – if based on a parent's deployment or Guard/Reserve service – shall be temporary and will revert back to the previous child custody decree at the end of such service.
- California law provides that a party's absence, relocation or failure to comply with custody or visitation orders shall not, by itself, be sufficient to justify changing a custody or visitation order if the reason for the above is the party's activation to military service and deployment out of state.
- Even the U.S. House of Representatives has gotten on the bandwagon; it passed an amendment May 17, 2007 stating that a SM's absence may not be used against him or her in a change of custody hearing after deployment.

CONCLUSION

North Carolina General Statutes §50-13.7A, shown at the Appendix below, provides important new protections for the family law practitioner representing a military parent. Knowing how the statute works and how to implement the rights found there are essential to providing a fair trial to servicemembers and a fair shake for the children.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

SESSION LAW 2007-175
HOUSE BILL 1634

AN ACT TO ESTABLISH CUSTODY, VISITATION, EXPEDITED HEARING, AND ELECTRONIC COMMUNICATIONS PROCEDURES WHEN A PARENT RECEIVES MILITARY TEMPORARY DUTY, DEPLOYMENT, OR MOBILIZATION ORDERS.

Whereas, currently there are six major military bases in North Carolina; and

Whereas, the military population of this State is the fourth largest in the nation, with active-duty service members numbering over 100,000; and

Whereas, temporary duty, the deployment of an active-duty service member, or the mobilization of a member of the National Guard or Reserves, sometimes with little advance notice, can have a disruptive effect on custody or visitation arrangements involving minor children of service members; and

Whereas, service members should be protected, as should their minor children, from the loss of custodial arrangements and disruption of family contact due to the service member's absence pursuant to military orders for temporary duty, deployment, or mobilization; and

Whereas, other members of a service member's family, such as parents or current spouses, can provide love, comfort, care, and continuity to the service member's child through delegated visitation when a service member is absent due to military orders; and

Whereas, the regular scheduling of hearings may be harmful to the interest of service members who, due to military orders, may need to have an expedited hearing or may need to use electronic means to give testimony when they cannot appear in person in court; and

Whereas, the use of expedited hearings and testimony by electronic means, at the request of the service member who is absent or about to depart, would aid and promote fair, efficient, and prompt judicial processes for the resolution of family law matters; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-13.7(a) reads as rewritten:

"(a) ~~An~~ Except as otherwise provided in G.S. 50-13.7A, an order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of G.S. 50-13.10. Subject to the provisions of G.S. 50A-201, 50A-202, and 50A-204, an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."

SECTION 2. Article 1 of Chapter 50 of the General Statutes is amended by adding a new section to read:

"**§ 50-13.7A. Custody and visitation upon military temporary duty, deployment, or mobilization.**

(a) Purpose. – It is the purpose of this section to provide a means by which to facilitate a fair, efficient, and swift process to resolve matters regarding custody and visitation when a parent receives temporary duty, deployment, or mobilization orders from the military.

(b) Definitions. – As used in this section:

(1) The term 'deployment' means the temporary transfer of a service member serving in an active-duty status to another location in support of combat or some other military operation.

(2) The term 'mobilization' means the call-up of a National Guard or Reserve service member to extended active duty status. For purposes of this definition, 'mobilization' does not include National Guard or Reserve annual training.

(3) The term 'temporary duty' means the transfer of a service member from one military base to a different location, usually another base, for a limited period of time to accomplish training or to assist in the performance of a noncombat mission.

(c) Custody. – When a parent who has custody, or has joint custody with primary physical custody, receives temporary duty, deployment, or mobilization orders from the military that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise custody responsibilities:

(1) Any temporary custody order for the child during the parent's absence shall end no later than 10 days after the parent returns, but shall not impair the discretion of the court to conduct a hearing for emergency custody upon return of the parent and within 10 days of the filing of a verified motion for emergency custody alleging an immediate danger of irreparable harm to the child; and

(2) The temporary duty, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer custody from the service member.

(d) Visitation. – If the parent with visitation rights receives military temporary duty, deployment, or mobilization orders that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise visitation rights, the court may delegate the parent's visitation rights, or a portion thereof, to a family member with a close and substantial relationship to the minor child for the duration of the parent's absence, if delegating visitation rights is in the child's best interest.

(e) Expedited Hearings. – Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, for good cause shown, hold an expedited hearing in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability, or anticipated ability, to appear in person at a regularly scheduled hearing.

(f) Electronic Communications. – Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, upon reasonable advance notice and for good cause shown, allow the parent to present testimony and evidence by electronic means in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability to appear in person at a regularly scheduled hearing. The phrase 'electronic means' includes communication by telephone, video teleconference, or the Internet.

(g) Nothing in this section shall alter the duty of the court to consider the best interest of the child in deciding custody or visitation matters."

The Servicemembers Civil Relief Act: A Guide for Family Law Attorneys

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Introduction

From time to time domestic lawyers encounter a lawsuit in which one of the parties is in the armed forces, either on active duty or else as a member of the Reserve or National Guard. Over 100,000 Guard and Reserve personnel are currently mobilized pursuant to military orders, and the number of active duty personnel in the Persian Gulf region is likewise over 150,000, and the operational tempo of "peacetime" military and naval missions has never been higher.

These military personnel carry no exemption from the domestic travails which visit their civilian brothers and sisters. Many of them are separated or divorced. Some have custody of their children, some wish to exercise visitation rights, some are paying too much child support (or none at all) and some need help with adoption, paternity or property division. This Guide focuses on several issues related to the impact of military service on civil litigation, financial obligations, mortgages, leases, and other matters. Its specific emphasis is on family law issues and the Servicemembers Civil Relief Act.

The Soldiers' and Sailors' Civil Relief Act (SSCRA), as the statute was initially known, was passed by Congress at the start of World War II to provide protection to those serving in the armed forces. The first major revision of the SSCRA since 1940 occurred after the 1991 Gulf War. As of 2003, however, it was still largely unchanged from the initial version. Congress passed the Servicemembers Civil Relief Act (SCRA) at the end of 2003 to clarify the language of the SSCRA, to incorporate a half-century of court interpretation of the SSCRA and to update the SSCRA to reflect changes in American life and lifestyles since 1940.

The SCRA was signed into law December 19, 2003. It not only protects those on active duty, it also affords protection for Reservists, as well as for members of the National Guard when activated under Title 10,

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United States Code.[1] The current law can be found at 50 U.S.C. App. § 501 *et seq.* As a general rule, the courts have interpreted the SSCRA liberally to protect those in the armed services, and this should continue with the SCRA. As one post-World War II U.S. Supreme Court opinion stated, the statute should be read "with an eye friendly to those who dropped their affairs to answer their country's call."[2] In their work applying and interpreting the SCRA, judges should remember the purposes of the Act. The SCRA was enacted to enable those serving in the armed forces 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 servicemembers during their military service.[3]

Stay of Proceedings

When servicemembers[4] are involved in a lawsuit, it may be difficult for them to participate in the proceedings while they are involved in the defense of the nation. While some sailors may be accustomed to months of shore duty at a time, working regular office hours most weeks, there are also members of the 10th Special Forces Group who work "24/7" in sub-Saharan Africa training the soldiers of Mauritania to identify, track and root out terrorists, and who don't see their families for months on end. Training exercises, short or long deployments, undercover missions, duties at sea or in distant climes – all these make it unlikely that servicemembers can turn their full attention to the prosecution or defense of legal proceedings. The primary remedy under the SCRA for halting the lawsuit is a "stay of proceedings" issued by the tribunal.[5] This is the most important provision of the SCRA for the domestic judge or practitioner.

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[1] The protections of the Act are extended to members of the National Guard and Reserve from receipt of orders to report for duty to the date that they report. 50 U.S.C. App. § 516.

[2] *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).

[3] 50 U.S.C. App. § 502.

[4] Servicemembers who are covered include 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), 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, and commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration. 50 U.S.C. App. § 511.

[5] A tribunal is any court or administrative agency of the United States, or of a state or a political subdivision thereof. 50 U.S.C. App. § 511(5). Criminal proceedings are excluded. 50 U.S.C. App. § 512(b). Whenever "court" or "judge" is used in this article, it means "tribunal" in the broadest sense.

These stay orders are uniquely useful in domestic litigation. They provide a means for suspending a civil case until the member of the military who is a party is available to participate. This, in general, results in a fuller exploration of issues, more testimony or evidence before the court, and a fairer trial. It also benefits the armed forces in that military personnel are not constantly required to take leave from pressing operational duties in order to answer calendar call. Examples of domestic cases that are covered include divorce (*Smith v. Smith*,[6] holding that it was an error to deny a stay in a divorce action where alimony was an issue), custody (*Lackey v. Lackey*,[7] reversing a trial court which changed custody in a case involving the servicemember's children in which he had requested a stay and then was denied same), and paternity (*Mathis v. Mathis,*[8] holding that a servicemember's absence in a paternity action materially affects his ability to defend, unless specific findings are made otherwise).

Verifying Military Status

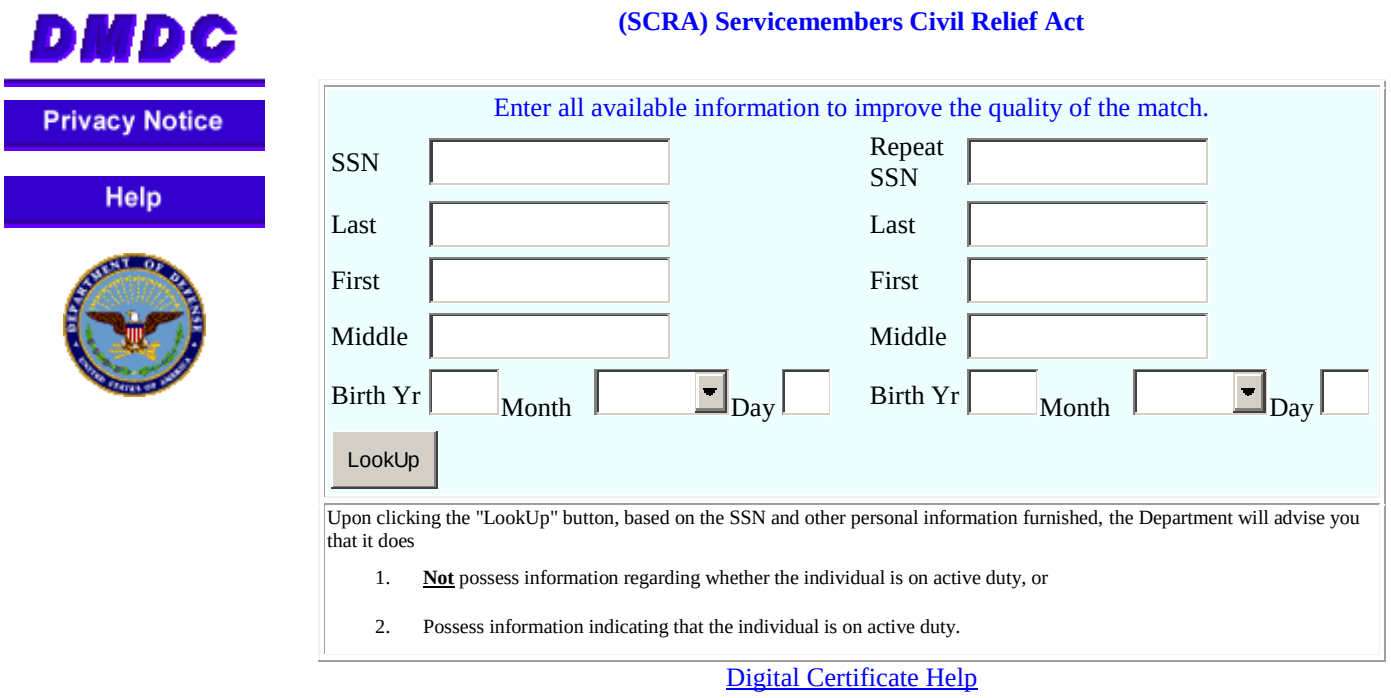
When a party has been served but has made no appearance, the first step should be to determine his military status. Is the individual is not in the military, then the SCRA is probably not applicable and the case may proceed as with other "default" cases. In order to determine whether a party is in the military, either side or the court may request information from the Department of Defense (DOD), and DOD must issue a statement as to military service.[9] 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
1600 Wilson Blvd., Suite 400
Attn: Military Verification
Arlington, VA 22209-2593
[Telephone 703-696-6762 or -5790/ fax 703-696-4156]

Go to the DMDC website for SCRA inquiries, https://www.dmdc.osd.mil/owa/scra/home, and enter the last name and Social Security number of the individual. These are mandatory entries; the form on the main page

[6] *Smith v. Smith*, 222 Ga. 246, 149 S.E. 2d 468(1966).
[7] *Lackey v. Lackey* 236 So. 2d 755 (Va. S. Ct. 1981).

also asks for a first name, middle initial and date of birth (DOB), which will help with the search. Further information is available on the "Help" section of the above website. Here is what the dialogue box looks like:



To execute a report, click on the "LookUp" button, which will open up a second window holding the report generated by DMDC. If the individual is on active duty, the report will show his or her branch of service and beginning date of active duty status. If DMDC does not have information as to whether the individual is on active duty, the generated report will only list the supplied last name, first name and middle initial (if supplied), with the text:

> "Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty."

The report is signed by the DMDC Director.

If the Social Security number is unavailable, the requester may request by mail a manual search, using

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[8] *Mathis v. Mathis* 236 So. 2d 755 (Miss. S. Ct. 1970).
[9] 50 U.S.C. App. § 582.

the DOB of the individual instead of the SSN. You must send a stamped, self-addressed envelope with your mail request.

Deciding on a Stay Request

When the SM *has not made an appearance*, the court's next step is to decide on a stay of proceedings. For a military defendant, the Acts says that 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 there may be a defense to the action and a defense cannot be presented without the presence of defendant. This also applies if, after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.[10]

When 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), different rules apply. The Act states that 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 information required by the statute for the court to determine whether a stay is needed.[11] This information is: a statement as to how the SM's current military duties materially affect his ability to appear, and also stating a date when he will be available to appear; and a statement from his commanding officer stating that the SM=s current military duty prevents his appearance, and stating that military leave is not authorized for him at the time of the statement. A sample motion for stay of proceedings is found at ATCH B below. While this motion contains a simple letter from the individual's commanding officer, a more detailed missive would be best since counsel wants the court to truly see and feel the difficulties which the member is facing as to his or her participation. When crucial details are left out and the letter seems to be too baic and conclusory, ask the commander for more details – or provide them in the client's own communication, which you can draft for him or her.

The request for a stay may be from the SM himself or from his legal representative, which is his lawyer

[10] 50 U.S.C. App. § 521(d).

or one who holds his power of attorney. The first statement may be from anyone with knowledge of the facts in the statement. There is no requirement that either statement be an affidavit or, for that matter, in any specific format whatsoever. A letter, a formal memo or even an e-mail message should suffice. The two statements may be combined into a single statement from the individual's commanding officer.

Before the SCRA was passed, a common concern of military members and the lawyers who represented them was that the stay request would mean entering a general appearance before the tribunal, thus subjecting the member to the court's jurisdiction. This concern was addressed in the SCRA. The request, according to the SCRA, does not expose the SM to the risk of losing valid objections or defenses that may be available to him or her. A request for a stay does not constitute an appearance for jurisdictional purposes, nor does it constitute a waiver of any defense, substantive or procedural.[12]

Furthermore, a ninety-day stay does not exhaust the arsenal of the military member. The SM may request an *additional stay* based on the continuing effect of military duties on his ability to appear. He may make this request at the time of his initial request or later, when it appears that he is unavailable to defend or prosecute. The same information as given above is required.[13]

The additional stay is discretionary; in order to allow the additional stay, the court must find that the member's ability to prosecute or defend is "materially affected" because of his or her active duty service. Once the court makes this finding of material effect, the member is entitled to a stay.

This does not mean, however, that counsel for the servicemember should demand a stay of proceedings in each case. A wise attorney will consider the procedural posture of the case and the benefits, as well as detriments, flowing from a continuance of all pending matters. Questions to ask the client include: Why is this delay necessary? Is it possible to move the case forward without a stay and still do justice to the client? Is a delay desirable, or will it lead to a further accrual of arrears, citations for contempt, orders to comply with

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[11] 50 U.S.C. App. § 522.
[12] 50 U.S.C. App. §522(c).
[13] 50 U.S.C. App. § 522(d)(1).

discovery, and so on? Even if a delay is helpful at present, will a stay of proceedings merely put off the day of reckoning in the long run, to the detriment of the client? The attorney who moves for a stay should consider the consequences carefully. What are the risks and rewards? The benefits disadvantages and dangers?

A Gap in the SCRA

Note that there is a gap between the two provisions for a stay, Sections 521 and 522 of Title 50, U.S. Code Appendix. The first of these covers members who *have not made an appearance*. Section 522 covers members who *have notice of the proceedings and have requested a stay*. These are not mutually exclusive. The drafters of the SCRA failed to account for members who have made an appearance and have not requested a stay.

How could this happen? While it is hard to imagine in the ordinary civil case, which usually proceeds in a straight line from pleadings through discovery to dismissal or entry of judgment, this is seldom the situation in a family law case. An order for custody, visitation, alimony or child support is not a final judgment, which concludes the matter. Domestic cases can remain active for years, or even decades, with the parties continuing to litigate through post-divorce motions and counter-motions for modification or enforcement of spousal support, property division, custody, child support and visitation.

Consider this scenario: A SM has already entered an appearance in a domestic case months or years previously. It does not matter whether he was in the military at that time. He has filed an answer, served and responded to motions and participated in person, all of which mean that he has entered an appearance. The litigation resulted in a divorce judgment and an order for child support and custody.

He receives orders sending him to Kuwait. While he is en route to his destination, or when he is in Kuwait, his former wife (not knowing of his deployment) files a motion to increase child support, institute a wage garnishment and modify custody and visitation. She sends the notice of hearing to her ex-husband's last known address, which is his pre-deployment location. This is perfectly legal, since is it what the state rules of civil procedure demand – first-class mail to his address for all motions, notices and orders to be served on the other party after the initial complaint or petition. She shows up for the duly calendared hearing several weeks

later and obtains from the judge the relief she has requested, all in the absence of the ex-husband SM. The judge, of course, demands to see proof of service, and the ex-wife produces her certificate of service, showing that she served her former husband in the manner shown above. Child support is increased, his pay is garnished, and her custody/visitation order is amended.

Has there been a violation of the Act? No. She was not required to notify the court of the military status of the ex-husband, as would ordinarily be required in a default situation, since he had already entered an appearance in the case. There is no general rule which requires individual appearances for each motion filed. In the absence of a federal definition of "appearance," state rules apply. Once an appearance has been initially entered, the other party is fully involved in the case and further notices of appearance are not necessary.[14] Section 521 of Title 50, U.S. Code Appendix did not apply, so there was no need to have the court enter a stay on its own or appoint an attorney if the case proceeded; all of those steps are required in a case where the SM has not entered an appearance, and that is not the situation here.

Nor is Section 522 involved. The SM did not move for a stay of proceedings, and Section 522 is triggered when a stay is requested. Under these circumstances, the first the SM would have known about the ex-wife's motions would be when his forwarded mail arrived in Kuwait some weeks later, or else when his first military paycheck was garnished for child support.

It should be pointed out that the failure to assert a stay request is *not* a waiver. Waivers are covered specifically 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.

[14] For example, in *Seeley v. Seeley*, 690 S.W.2d 626 (Tex. Ct. App. 1985), the Texas Court of Appeals reviewed a case in which the non-domiciliary SM filed a special appearance to contest the court's jurisdiction over the spouse's claim for military pension division. Before the court ruled on that motion, however, the member's attorney allowed the court to proceed with the issue of divorce. Then the court proceeded to divide the member's retired pay. On appeal, the Court of Appeals ruled that the objection to jurisdiction under 10 U.S.C. 1408 (c) (4) was waived because the SM had entered an appearance. In *Gowins v. Gowins*, 466 So.2d 32 (La. 1985), the Louisiana Supreme Court reviewed a case in which the member had consented to the court's jurisdiction over divorce, custody, visitation and child support several years before the non-military spouse brought a separate partition action for division of his military retired pay. The Court ruled that the member had impliedly consented to the court's jurisdiction over the new matter since he had consented to jurisdiction over the divorce and his consent continued over all incidental matters.

The only relief in this case for the SM might be a motion under 50 U.S.C.App. § 582, which allows the reopening of a judgment if the member can prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service (which clearly is the case here) and that he has a meritorious defense to the claim (which he might or might not have). This is, however, manifestly unfair to the SM, who is now is standing on the sandy ridges of Kuwait, trying to figure out how he can file a motion to reopen the decree during his deployment, take leave and appear in court (or hire an attorney to appear for him). In the meantime the relief granted to the ex-wife is already in place and continues in effect.

Length of Stay, Appointed Counsel

The period of the stay, according to the SCRA, may be for the period of the SM's military service or any part of that period.[15] As a practical matter, the courts usually grant a stay of proceedings for such period as is necessary *until the material effect is removed*. While there is no explicit language stating this in the SCRA, it was the rule with the SSCRA and most likely will remain so with the current Act as well. Counsel for the stay applicant must be reasonable in requesting additional time under Section 522. A stay cannot last forever.[16] In addition, since most judges would be concerned about granting lengthy stays of proceedings, they usually require a stay applicant to demonstrate good faith and due diligence in his efforts to obtain military leave in

[15] 50 U.S.C. App. § 525.

[16] In *Ensley et al. v. Carter*, 245 Ga. App. 453, 538 S.E.2d 98 (2000), counsel for the SM wrote to opposing counsel, "This case will be stayed until Slade Ensley is discharged from the military, whenever that date occurs. If my memory is correct, Slade and I discussed in past conversations that he intends to make a career of military service. Therefore, this case will probably be in a posture for trial sometime in the next 30 to 40 years." In another letter the same attorney noted that his client "expressed a desire to have a long term career in the military. Unfortunately, it appears that this case will not be tried until we are well into the 21st century." 245 Ga. App. at 455, 538 S.E.2d at 100. Needless to say, the court did not grant a 30-year stay. In light of the earlier depositions of the plaintiffs (one of whom was the SM) and the lack of evidence that the SM-plaintiff sought military leave to attend the trial, no stay was allowed. 245 Ga. App. at 456, 538 S.E.2d at 100.

order to appear in court.[17] A flow chart illustrating the process for the "additional stay" from the judge's standpoint is at ATCH A at the end of this paper.

Granting a further stay at this stage of the proceedings is often the easier of two courses for a judge to take. This is because, if the additional stay is denied, the court must appoint an attorney to represent the SM in the action or proceeding.[18] The Act, however, is silent as to what the appointed attorney is supposed to do. 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? About the only realistic option for the attorney is to renew the request for a stay. Otherwise, how can a defense be prepared and presented? It would seem obvious that a stay is mandated by this unsolvable problem.

Furthermore, there is nothing in the Act about compensation for the appointed attorney. Does the hitherto unrepresented SM pay for an attorney whom he didn't even hire? Does the court award attorney's fees from the other side to pay for the SM's attorney? Can the court tax as costs the fee of the appointed attorney? Or is the attorney supposed to embark on the course of representation, which might include motions, trial and appeal, as a *pro bono* endeavor, regardless of whether the absent SM is a private or a general, a sailor or an admiral, indigent or wealthy? Unfortunately, the SCRA provides no answers to these questions.

Default Judgments

The SCRA also spells out the rules for entry of a judgment or order in the SM'S absence. A default judgment may not be lawfully entered against a SM in his absence unless the court follows the procedures set

[17] In *Palo v. Palo*, 299 N.W.2d 577 (S.D.1980), a South Dakota divorce and property division case, the parties were both in the 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.

[18] 50 U.S.C. App. § 522(d)(2).

out in the SCRA. As noted above, when the SM *has not made an appearance*, 50 U.S.C. App. § 521 governs. There is no federal definition of "appearance" in the Act. The court must first determine whether an absent or defaulting party is in military service. Before entry of a judgment or order for the moving party (usually the plaintiff), the movant must file an affidavit. The affidavit states "whether or not the defendant is in military service and showing necessary facts in support of the affidavit." Criminal penalties are provided for filing a knowingly false affidavit.[19]

If the court cannot determine whether the defendant is in military service, then the court may require the moving party to post a bond as a condition of entry of a default judgment. Should the nonmovant 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).[20]

When the filed affidavit states that the party against whom the default order or judgment is to be taken is a member of the armed forces, no default may be taken until the court has appointed an attorney for the absent SM.

> If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.[21]

If the court fails to appoint an attorney then the judgment or decree is voidable.

The statute does not say what tasks are to be undertaken by the appointed attorney, but the probable duties are to protect the interests of the absent member, much as a guardian *ad litem* protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and to ask whether that party wants to request a stay of proceedings. Counsel for the SM should always renew the request for a stay of proceedings, given the difficulty of preparing and presenting a case without the

[19] 50 U.S.C. App. § 521(c).
[20] 50 U.S.C. App. § 521(b)(3).
[21] 50 U.S.C. App. § 521(b)(2).

client's participation.

The statute also leaves one in the dark about the limitations of the appointed attorney. Her actions may not waive any defense of the SM or bind the SM. What is she supposed to do? How can she operate effectively before the court with these restrictions? Can she, for example, stipulate to the income of her client or of the other party? Can she agree to guideline child support and thus waive a request for a variance? Without elaboration in this area, the Act could mean that she must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions for fear of violating the SCRA. Such conduct is, of course, at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.

If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections. The purpose of this is to protect those in the military from having default judgments 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 move to reopen a default judgment. To do so he must apply to the trial court that rendered the original judgment of order.[23] In addition, the default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter, and the SM must apply for reopening the judgment while on active duty or within 90 days thereafter.[24] Reopening or vacating the judgment does not impair right or title acquired by a bona fide purchaser for value under the default judgment.[25]

To prevail in his motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service.[26] In addition, he must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of judicial effort and resources in

[22] *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).
[23] *Davidson v. GFC*, 295 F. Supp. 878 (N.D. Ga. 1968).
[24] 50 U.S.C. App. § 521(g).

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 dealt with the "meritorious defense" issue in *Smith v. Davis*.[27] 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."[28]

Requirements for the Moving Party

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.[29] 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

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[25] 50 U.S.C. App. § 521(h).
[26] *Bell v. Niven*, 225 N.C. 395, 35 S.E.2d 182 (1945).
[27] *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).

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.[30] 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 did not prejudice him.[31]

Execution of Judgments

What happens when the attorney for the SM gets involved late in the lawsuit? This is typically at the stage where the court has entered an order to seize and sell the member's beautiful Pontiac Trans Am or to attach his bank account. Even when a court order or judgment has already been entered and the court is ready to proceed with execution or attachment, it is still not too late for the SM. 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) –

- stay the execution of any judgment or order entered against him, and
- vacate or stay any attachment or garnishment of property, money or debts in the possession of the SM or a third party regardless of whether it is before or after judgment.[32]

Opposing a Stay Request

It is clear from the above explanation that there are abundant protections which are afforded to the SM by the SCRA. However, domestic attorneys will be quick to recognize that these protections, especially the stay

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[28] 364 S.E.2d at 159.
[29] *Millrock Plaza Associates v. Lively*, 153 Misc. 2d 254, 580 N.Y. S. 2d 815 (1990).
[30] *Burgess v. Burgess*, 234 N.Y.S. 2d 87 (N.Y. Sup., 1962).
[31] *Wilterdink v. Wilterdink*, 81 Cal. App. 2d 526, 184 P.2d 527 (1947).
[32] 50 U.S.C. App. § 524.

of proceedings, can work a hardship in many family law cases.[33] Delays in discovery, unpaid support, custody or visitation problems – all of these and more may confront the lawyer for the nonmilitary party. What are the tools and resources available to her to challenge the SCRA's protections, to oppose the request for a stay of proceedings? For the practitioner who wants to contest a stay request, here are some questions, suggestions and strategies.

Be sure to ask 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, North Carolina or Ft. Lewis, Washington (so that others may deploy overseas), working a comfortable day shift with weekends off? Counsel for the non-moving party will sometimes hit paydirt by challenging the explanation (or lack of explanation) of military necessity.

Has the SM specified a reason why he cannot participate in the lawsuit? In *Power v. Power*,[34] the Texas Court of Appeals affirmed the trial court's denial of a stay motion for lack of evidence that the SM's military service required a stay of proceedings. The SM, responding to a motion to increase child support, filed a "plea in abatement" which stated basically that he was a major in the U.S. armed forces, he was stationed in Germany for the next three years, and that he was asserting his rights under the SSCRA and requesting that the court abate the action.

Noting that the Act was not to be used to delay the prompt resolution of lawsuits when the SM's rights would not be materially affected, the Court of Appeals stated that the trial has wide discretion in deciding whether a stay should be granted under the circumstances of a particular case and which party should bear the burden of proof as to prejudice. The Court added that "[s]uch latitude in fixing the burden of proof based on the

[33] Query: 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? 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? Note that Congress made no restrictions as to domestic cases in writing and passing the SCRA. And in January 2008, it passed the 2008 National Defense Authorization Act which emphasized that custody is included in the cases covered by Section 521 (basically, all "default cases," where the SM has not entered an appearance) and those involving an initial stay request (for at least 90 days).

facts of the case is especially appropriate where the trial court has the duty to protect the interest of children."[35]

The Court of Appeals pointed out that the SM "at all times appeared by counsel, yet he presented no admissible evidence in support of his plea."[36] Except for the bare allegation that he was in the armed forces and stationed in Germany for the next three years, he offered no proof to assist the court in the exercise of its discretion in determining whether a further stay should be granted. We note that during the 10 month pendency of appellee's motion to increase child support, appellant never presented proof that he was unable to obtain leave in order to appear at trial, or that his defense was otherwise adversely affected by reason of his military service."[37]

The Court of Appeals found that the trial court acted within its discretion in placing, under the facts of this case, the burden of proof on the SM, "who had greater access to the evidence supporting his position."[38] The SM's appeal was denied and the trial court's order, granting an increase in child support for the two children from $375 to $900 a month, was affirmed.

Counsel for the opposition may find that a SM intentionally exaggerates the amount of time needed to be in court so that his request for leave will be denied. Even if the case can be heard and resolved in a few hours, what would happen 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? The commanding officer would almost certainly refuse the request, stating that the SM's duty requirements prevent appearance and that he is not authorized leave. This might be called

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[34] *Power v. Power*, 720 S.W.2d 683 (Tex. App. 1986).
[35] *Id.* at 684.
[36] *Id.*
[37] *Id.* at 684-685. The Georgia Court of Appeals in *Vlasz v. Schweikhardt et al.,* 178 Ga. App. 512, 343 S.E.2d 749 (1986) took the opposite approach: "When the application is made it is imperative that the stay be granted unless it is made to appear further, by relevant evidence touching the question of impairment to prosecute or defend resulting from military service, that there is no material impairment…. An applicant might well rest his request for a stay upon the bare statement that he is at the time actively in the military service, and, with nothing more appearing as evidence touching the question of his impairment by virtue of his service, the trial judge would be required, as a matter of law, to grant the stay." 178 Ga. App. at 513, 343 S.E.2d at 750, quoting from *Gates v. Gates*, 197 Ga. 11, 15-16, 28 S.E.2d 108 (1943).
[38] *Id.* at 685.

"absence by design." [39] Sometimes the SM's stay request is motivated by tactical considerations instead of purely military demands. Counsel for the nonmilitary party may want to preempt this approach by specifying in the pleadings what is requested of the SM's time and approximately what amount of time will be required in court. Such a statement might read:

> The defendant will need to attend one deposition, lasting about three hours, and the plaintiff intends to schedule a hearing on temporary alimony and child support for one-half day in June or July. The final hearing on equitable distribution and support will take about two days and will be no earlier than December.

While this is practically unheard of in normal civil pleadings, it is a useful strategy in the military case. Counsel for the nonmilitary party should also conduct limited initial discovery in order to determine what information was given to the SM's commanding officer before leave was denied.

The lawyer opposing a stay should also examine whether the SM's actual presence is necessary.[40] In some hearings, the issues are presented to the court by pleadings, not by live testimony. In a hearing on summary judgment, for example, evidence is ordinarily presented to the court by affidavit, not by *viva voce* testimony.

In the alternative, when the servicemember's testimony is necessary, counsel for the nonmilitary party can argue that this does not require personal presence. It may be possible to convince the court that technology

[39] "While absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial, in some cases absence may be by design to delay the proceedings, rather than being the result of military service." *In the Matter of Day and Day*, 2003 Ohio App. LEXIS 1185 (2003).

[40] *See, e.g., In re Jesusa V.*, 32 Cal. 4th 588, 85 P.3d 2, 10 Cal. Rptr. 3d 205 (2004) (holding that an imprisoned biological father does not have a right to be personally present at a hearing on paternity).

makes testimony by videoteleconference or by use of the Internet almost as good as live testimony.[41]

Sometimes the case can proceed on an interim basis with a temporary hearing. The Georgia Supreme Court determined in 1989 that orders granting temporary changes in child support, as a general rule, do not significantly affect the rights of the servicemember since they are interlocutory decrees and subject to modification in the future.[42] Other courts have used different but likewise creative approaches to avoid granting stays requested in SSCRA motions.[43] Counsel should be careful with the argument for this approach, however. It is not correct to argue that the SCRA doesn't apply to temporary orders. The 2004 amendments to the Act added a new section to the SCRA in 50 U.S.C. App. 511 which reads as follows: "(9) JUDGMENT- The term `judgment' means any judgment, decree, order, or ruling, final or temporary." The right way to use this argument is in conjunction with inequitable conduct of the servicemember, such as wrongful removal of a minor child, failure to pay child support, or placement of the parties' children with a third party to the exclusion of the other parent. In such circumstances, counsel can show the court that some form of interim relief is necessary, that equitable considerations bar the member from raising the SCRA as a defense, that an interim order is necessary to correct an injustice that the member created, and that the order is not a final adjudication of the member's rights and thus not prejudicial.

The Child Support Case

One uniquely problematic area is in cases involving the initial determination of child support. The laws

[41] 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. In *Keefe v. Spangenberg*, 533 F. Supp. 49, 50 (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) and pointing out that "Court reporters may take depositions in Germany including videotape depositions for use in trials in this country." In *In re Diaz*, 82 B.R. 162, 165 (Bankr. M.D. Ga. 1988), the court found that the debtor, stationed in Germany, was not entitled to an indefinite stay until he returned from his assignment inasmuch as videotape depositions and telephone communication were available. Servicemembers today have ready access to military-sponsored e-mail accounts at all but the most remote locations. In the Army, for example, every active duty soldier is required to have an e-mail account through AKO, or Army Knowledge Online.

[42] *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989).

of all states and territories require "expedited process" in child support determinations,[44] which is at odds with the concept of a stay of proceedings while the SM-parent is unable to appear in court due to military duties. 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. In a North Carolina child support case, for example, the absence of a request for a variance by the SM means that the only evidence needed by the court is the income of the parents, the cost of medical insurance and the cost of work-related day care.

The presence of the SM is not necessary to show what his income is; pay tables for military personnel are found at "Military Pay" on the DFAS (Defense Finance and Accounting Service) website, www.dfas.mil. 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." 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.

The custodial parent can testify to her own income and to the cost of work-related child care if she is the primary custodian. There is no premium for the military form of medical insurance, TRICARE Standard. Thus the entire guideline child support case can be made without the presence of the military member. With all these tools available for an expedited and straightforward determination of child support (at least on a temporary basis), especially where there is no present payment of child support, it is difficult to envision a judge's granting

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[43] The military member may be nominally involved but is not a "necessary party" to the contested litigation. In *Bubac v. Boston*, 600 So. 2d 951, (Miss. 1992), the father was in the military. The court found, however, that he was not a necessary party to the litigation, which involved the mother's habeas corpus challenge to the maternal grandmother's retaining custody of the children. Another court held that there is no "substantial prejudice," to the military member when a temporary order or an interlocutory decree is involved.

[44] *See, e.g.*, N.C. Gen. Stat. § 50-32.

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.

To be sure, there are some valid defenses in child support proceedings, as shown in *Smith v. Davis, supra*. As a general rule, "[a]bsence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial."[45] In *Smith v. Davis,* the N. C. 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.[46]

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 any of these issues. To persuade the judge to grant a stay of proceedings for a reasonable period, the attorney for the SM should make a clear statement of the defense which is sufficient to give notice of it to the other side.

Inquiring into "Material Effect"

Nothing in the Act requires the court to grant a stay motion without a hearing. The non-moving party is entitled to her day in court, her opportunity to challenge the request. Perhaps she can establish that the information provided is false. Perhaps she wants to challenge a stay letter, which contains only vague and conclusory statements.[47] The cases and decisions recognize that merely wearing the uniform is not, in itself, a

[45] *Boone v. Lightner,* 319 U.S. 561, 575 (1943); *see also Chenausky v. Chenausky,* 128 N.H. 116, 509 A.2d 156 (1986).
[46] *Smith v. Davis,* 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).
[47] "As such, some Courts have summarily denied requests for a stay in circumstances… where the service-person has only related that he is unable [to] defend an action, without any real evidence to support the contention." *The Antioch Co. v. Scrapbook Borders, Inc. et al.,* 210 F.R.D. 645 (D. Minn. 2002).

material effect that prejudices the member's ability to defend or prosecute.[48] Perhaps the member has exaggerated the length of time he would need for the trial in order to ensure that his leave request will be denied. Whatever the situation, the court should afford the non-moving party an opportunity to be heard in determining whether there is an adverse material effect caused by military duties.

"When will the temporary unavailability be over?" is the question most judges will ask. 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.

When the judge inquires into "material effect," there are several points that he or she ought to consider in trying to arrive at a just solution for all parties. There is no one definition of "material effect." The court should make a finding of material effect when a SM's ability to prosecute or defend a civil suit is impaired by military duties, which prevent the SM from appearing in court at the designated time and place, or from assisting in the preparation or presentation of the case. An adverse material effect might also be found when military service impairs substantially the SM's ability to pay financial obligations.[49]

The first point is burden of proof. 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,

> 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.[50]

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[48] "The mere fact of service in the armed forces of the United States does not entitle a party to a stay of proceedings against him as a matter of right." *Gross v. Williams*, 149 F.2d 84, 86 (8th Cir. 1945).

[49] If the court is not convinced of "material effect," it has the discretion to demand a copy of the SM's LES (Leave and Earnings Statement) to find out how much leave is available to the SM. A SM receives two such statements each month. The LES will show the SM's Base Pay, Basic Allowance for Housing, Basic Allowance for Subsistence, tax withholdings, voluntary allotments to pay bills or support, and accrued leave. This document can be a treasure trove of useful information.

[50] *Boone v. Lightner,* 319 U.S. 561, 569 (1943).

Although it is logical to require the burden of proof to be on the movant (*i.e.*, the SM who is requesting a stay of proceedings) because he has more information in his possession to show why he cannot be present and why his presence is necessary, some courts have stated that *both parties* may be required to produce evidence on the issues.[51]

The duty of the court is to examine the reasons why the material effect should or could have that impact, and it is within the court's power to require information and justification for the stay request from the SM. After all, the SM is the party who is best able to explain the nature of the material effect and how it impacts detrimentally on the lawsuit's progress and the member's participation.

Instead of simply presuming such an effect because the member is on active duty, the court should inquire into the nature of the material effect to ensure that justice is done for all parties. The court may allow discovery by the non-moving party for the limited purpose of uncovering facts to determine the nature and effect of the claimed material effect. The defendant, for example, might request copies of the member's current LES (Leave and Earnings Statement), his or her military orders, any leave request recently submitted by the member to his commander, and the response thereto.

As a condition of granting a stay, the judge can require the member to submit a detailed statement as to how the member's military service has a material and adverse effect on his or her ability to prosecute or defend, such as an affidavit setting out all the facts and circumstances of the alleged disability. This would be executed by the member since he would have the best knowledge of his disability, limitations and constraints in participating in the lawsuit. The court needs to know, for example, whether the member is on duty every day, including weekends, having no time for personal affairs, or whether his duties are from 7:30 to 4:30, the normal "military day," with most weekends free. Mere conclusory statements, such as "I request a stay because my military service has a material effect on my ability to participate in this lawsuit," are worth little in determining material effect. Such statements should be supported by facts, reasons and details of "how" and "why."

[51] *Id.*

The Danger of Conclusory Statements

A case under the Soldiers' and Sailors' Civil Relief Act illustrating the problem with broad, conclusory averments is *Booker v. Everhart*.[52] In March 1974 the plaintiff, an attorney who had represented the plaintiff-wife, sued for his fees on a note from defendant-husband. The husband's parents guaranteed the note. In May 1975 the defendant joined the Navy and was sent to the Philippines, where he remained through trial. In January 1976 the defendants (the husband and his parents) moved that that case be "entirely removed from the trial calendar" pursuant to the SSCRA on the ground that the husband would be absent from trial.

In response, the judge denied the motion and set the trial for April 1976. A month after that order and a month before the trial date, the defendants noticed plaintiff for the taking of the deposition of the defendant-husband *in the Philippines* two weeks before the trial. The judge granted a protective order to plaintiff, and the deposition was not taken. At the trial the court granted a directed verdict for plaintiff and the defendants appealed.

The Court of Appeals, in ruling on defendants' claim that the trial court erred in denying the stay request, noted that the Act mandates a continuance where military service would cause a party to be absent, but it also allows the judge to deny a continuance if, in his opinion, the SM's ability to conduct his defense is not materially affected by reason of his military service. The Court then noted, among other factors against granting the stay, that:

- There was no showing in the SM's affidavit that he requested leave or would not be able to obtain leave to be present at trial; and
- There was no showing in his affidavit, beyond a mere conclusory statement, that his defense would be prejudiced or his rights impaired materially by his absence.

The Court of Appeals upheld the trial judge's order, which found that the SM's absence would not materially prejudice his defense. The Court noted that the SM's use of the SSCRA was likely based on policy and strategy,

[52] *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

rather than on the necessities of military service.

The lessons of the *Booker* case are that the member must present more than a vague and conclusory affidavit; he should make a clear and detailed showing how he will be prejudiced by his inability to appear and defend. There should also be a statement as to whether leave was requested and the results of such a request.

Contested Claims, Stages

The judge may inquire regarding which claims are contested and which are not, to allow uncontested issues to be resolved, leaving for further consideration those which are contested. If there is no factual dispute, why postpone the matter? If a custody case is before the court, perhaps the absent SM will not be contesting custody but only challenging child support. Most divorces granted in every state are uncontested; the defendant who does not contest the granting of a dissolution of the marriage should not be allowed a stay of proceedings for the divorce hearing itself (as opposed to other contested claims).[53] Nothing in the Act says that a stay must apply to *all* claims and issues in a lawsuit, regardless of contested status. When a matter is uncontested, there is, by definition, no material and adverse effect on the rights of the SM in defending that claim.

Likewise, the judge may inquire into which *stages* of the lawsuit should be stayed and which should proceed, based on the facts adduced by the member. The first part of a lawsuit is "filing pleadings." After the suit is filed comes the stage of the lawsuit involving *answering the complaint.* This typically means that the member-defendant needs to respond to each factual allegation with "Admitted," "Denied," or "Denied for lack of knowledge or information sufficient to form a belief." If the member complains that he or she cannot participate in the lawsuit because of the material effect that military duties impose, it would be appropriate for the court to inquire what difficulties are imposed by the simple answering of the complaint, so that the issues may be joined and the court may know what issues are uncontested and which are in dispute. With this known, arguably the court can allow the uncontested matters to proceed and examine more closely the issues that are contested.

Another initial stage of many domestic actions is often termed "mandatory disclosure" in local or state rules. This usually involves such actions as filling out a financial affidavit, completing an inventory of marital and separate property for equitable distribution purposes, or exchanging expense and income documents. Suppose, for example, that the local rules require each party in a child support case to produce a current pay statement and serve it on the other side within thirty days of the start of the lawsuit. The applicable document for a servicemember is the LES (Leave and Earnings Statement). Whether the member is an activated Reservist who is serving in Hawaii, an active duty member performing peacekeeping duties in Kosovo, or an activated Army National Guard soldier stationed in Japan, there is usually no reason why he or she cannot produce a current LES, which is provided at mid-month and the end of the month to all servicemembers. This would not be true, of course, if the member were fighting at the front lines in Iraq or participating in a covert mission in Somalia or Peru. Thus in some cases it might be appropriate to inquire as to the specific material effect cause by military duties in complying with mandatory document disclosure and to move forward with the initial disclosure requirements for the military member if no detailed showing can be made.

Discovery and the Stay Request

Consider a document request under Rule 34 that demands production of the member's last two federal tax returns. A servicemember stationed far away from his books and records might have difficulty in complying with this request, one might assume. However, this might not be a valid assumption if, for example, the soldier's current spouse has the books and records back at their home and could easily provide them to him or to the court. The court could also require the member simply to request a copy of the tax returns from the Internal Revenue Service, rather than producing copies that he has in storage at his now faraway home. Once again, there would be a difference in the court's response if the member were fighting at the front lines or on a secret mission.

A good example of a case in which the court specifically tailored the denial of the stay request to the

[53] *See, e.g., Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980) (court allowed uncontested divorce to proceed, denying SM's

facts of the case and allowed discovery to proceed is the trial magistrate's opinion and order in *Dalenberg v. City of Waynesboro.*[54] There the court examined a fairly detailed affidavit of Captain Brown, the plaintiff's commanding officer, who stated:

> 1. "[As] recently activated reservists [which includes Plaintiff], none of the members [of the 345th military intelligence battalion] have accrued more than a few days of leave."
> 2. "The current operational tempo makes the decision to grant leave problematical. As commander, I cannot afford to release any of my personnel for any matter short of a significant family crisis."
> 3. "I must insist that all soldiers in my command exercise their rights under the Soldiers[']and Sailors['] Civil Relief Act to defer any pending civil matters until such time in the hopefully near future that we may be demobilized…. I need every man-hour I can get from members of this unit…."
> 4. "I am currently working this [plaintiff] some 12 to 14 hours every day. I cannot now release him from his duties to tend to private litigation matters. As it stands now, the work load appears to be getting more heavy, not less."[55]

The defendants filed a response opposing the plaintiff's stay request. The response pointed out that the plaintiff's mobilization had brought him closer to his attorney in Augusta, Georgia (the home of Fort Gordon, which was the mobilization site of plaintiff) from his home in White County, over 100 miles away. In addition, the defendants argued that his schedule at Fort Gordon still left him free time after he finished work at 5:00 p.m. each weekday, he did not work weekends and he was free to leave the base in his spare time. The defendants argued:

> The time commitment that would be required for Plaintiff to prosecute this case during the next several months should be sporadic and relatively light. Plaintiff would need to spend a few hours looking through documents and assisting his attorney to prepare written discovery responses and get ready for witness depositions. Plaintiff's own deposition will take less than a day and Defendants would be happy to take it on a Saturday for Plaintiff's convenience. Should a trial date arise before Plaintiff's military service ends, a continuance could be considered if appropriate.[56]

The court pointed out several facts that favored the defendants' position in the litigation. First of all, the plaintiff had not pursued discovery diligently. He filed the lawsuit in May 2001 and the defendants served their discovery requests (11 interrogatories and 16 document requests) on October 3, 2001. On October 29,

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request for a stay of proceedings).
[54] *Dalenberg v. City of Wayesboro*, 221 F.Supp. 2d 1380 (S.D. Ga. 2002).
[55] *Id.* at 1382.

2001, the plaintiff requested a six-week extension of time for responding to discovery, stating he was getting married and changing residences. The defendants agreed to an extension until December 15, 2001 but the plaintiff was notified on December 6 that he was being activated, and his reporting date was December 9. The plaintiff did not respond to the discovery requests by December 15, the plaintiff had over two months to respond to the limited discovery tendered by defendants before his activation date of December 9, and his "explanation for his failure to complete discovery is inadequate."[57]

The court further noted that, according to his affidavit, the plaintiff's commanding officer

> …appears to contemplate that he would need to "release" Plaintiff to tend to this litigation. However, Plaintiff would not need to be "released" to complete Defendants' discovery requests; Plaintiff could complete discovery when not working. Defendants assert that Brown informed them that Plaintiff finished work at 5:00 PM and that his weekends are free. Defs.' Response, p.5. Brown's affidavit is unfortunately sparse on details. The affidavit says nothing about the actual work schedule that plaintiff maintains or whether he works on weekends. [footnote omitted] Notably, Plaintiff has not submitted a work schedule or other information to supplement his own motion or Brown's affidavit…. Given that Defendants are apparently attempting to secure discovery at the convenience of Plaintiff, surely Plaintiff can (1) cooperate in attempting to arrange a time to have his deposition taken and (2) work to complete discovery interrogatories and production requests of which he has been aware for more than a half year as of the date of this Order.[58]

The court noted that the physical location of the plaintiff helped instead of hindered him, since he was now located at Fort Gordon in Augusta, Georgia, the location of his attorney and of the trial court. "Hence, Plaintiff's location is not a hindrance to his going forward with this litigation."[59]

As a last point, the court noted that the plaintiff offered no alternative suggestions for conducting discovery. In contrast to the proffered flexibility of the defendants, the plaintiff "has failed to offer an alternative solution. Hence, Plaintiff has not attempted to aid his own cause."[60]

As a result of these factors favoring the defendants, the court denied the plaintiff's motion for a stay and

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[56] *Id.* at 1383.
[57] *Id.* at 1384.
[58] *Id.* The court cited with approval *Comer v. City of Palm Bay*, 265 F.3d 1186 (11th Cir. 2001), in which the appellate court upheld the trial court's denial of a stay motion and noted that the SM-plaintiff had failed to address whether other means of conducting discovery, such as telephone depositions or written interrogatories, were available.
[59] *Id.* at 1385.
[60] *Id.*

extended the discovery period. The lessons of *Dalenberg* for those opposing stay requests are several:

- "Location is everything," as realtors constantly remind us. The close proximity of the plaintiff to the place of trial and his attorney's office tipped the scales for defendants. This case would have had a far different outcome if the plaintiff had been stationed in Germany, Iraq, Japan or, for that matter, Ft. Lewis, Washington.
- Start with discovery. Do not demand an immediate trial. Use written discovery as the starting point, since it is relatively easy to complete if the requests to the SM are modest, as in this case. Test the water and see what *limited* interrogatories and document requests produce.
- Wait, wait and wait. If there is no reply on the specific date to proffered discovery by the appointed day, do not file motions to compel and for sanctions the following week. Let the default in answering "ripen" for several weeks or months before demanding an accounting and a response. Unanswered discover is like a good cheese or a fine wine; it needs to age and mellow before it is ready for presentation. In this case, the court's order came after six months of unresponsiveness by the plaintiff, enough to upset any jurist.
- Be generous, be flexible. The defendants in *Dalenberg* agreed to the initial extension of time for responses to interrogatories and production requests. They offered to cooperate in scheduling the deposition of plaintiff on a Saturday, and they submitted that it would take less than a day.[61] They admitted that a stay might be appropriate if the trial came up while the plaintiff was still on active duty. Being reasonable helps put the one on the side of the angels when opposing a stay motion.
- File a response and ask for a hearing. Too many opponents, when faced with the unfamiliar "stay motion" filed pursuant to the unfamiliar Servicemembers Civil Relief Act, simply toss in the towel.

There is nothing in the SCRA that bars a response opposing the stay motion. Nothing in the Act forbids a hearing on the initial application of the SM so that it can be tested to determine if it complies with the statute. How can the court exercise its discretion without hearing from the non-moving party? Without their aggressive response opposing the stay, the defendants in this case would have gotten nowhere.

- Send the judge to "boot camp." Without some "basic training" for the court, most judges would not have a clue as to what a SM's daily schedule might be. The court may need to inquire as to the duty hours (and days) for the SM. For most members in the Gulf region, it would be accurate to describe their duties as "24/7," whereas a SM assigned to a garrison unit at Fort Lee, Virginia, or Shaw Air Force Base, South Carolina, might have duty from 8:00 a.m. to 5:00 p.m., with weekends free. Members of the armed forces are entitled to 30 days of leave each year (accruing at the rate of 2.5 days per month) although military necessity may limit when the leave is allowed.[62] 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. A member who is attending basic or advanced training may not be able to appear in court due to the training schedule; there are no extra days built into the schedule to accommodate court dates, depositions or family emergencies. Absence from training due to court ordinarily means that the trainee must be "recycled," or repeat the same training program from the start. Since the unavailability of the SM depends largely on his assigned duties, his duty hours, his available leave and his location, the court may want to find out whether he can respond to limited discovery, even if he is unavailable for a court appearance. Thus the court might inquire as to any and all scheduling reasons why the SM cannot respond to written

[61] The concept of cooperation and "working together" also came up in *The Antioch Co. v. Scrapbook Borders, Inc., et al.*, 210 F.R.D. 645, 649 (D. Minn. 2002). The court there denied a stay of discovery (but noted that a trial would be stayed), stating that Luis DeBonoPaula, the SM, was on active duty in the Air Force and stationed in the United States. Although he currently was absent on service missions about two weeks a months, the court pointed out that he was present in the United States at least two weeks a month. "Certainly, the parties to this action can work together so as to assure that scheduling of depositions, or discovery deadlines, provides Luis with enough time and notice to appropriately accommodate his military schedule." The court also noted that there was no showing that the SM would not be able to obtain leave for depositions.

interrogatories, document requests (if the documents are accessible to the SM) or requests for admissions in the pending case. Such responses require much less time and involvement by the SM than, say, a deposition, motion hearing or trial.

Guidelines for the Judge

The job of the judge is to demonstrate fairness to both sides, to consider liberally a proper stay request, to move the case along when this may be done in fairness to the SM, and to stay those portions of the litigation that cannot proceed due to the SM's military duties. In each stay motion presented to the court, the judge should:

- examine the contemplated action (e.g., trial, deposition of the SM, written interrogatories),
- determine whether the action or request is reasonable and necessary,
- decide what actions the member must take in response,
- scrutinize how his response may be affected prejudicially by his military duties, and
- determine whether the response is easy, difficult or impossible to accomplish under the SM's circumstances.

In other words, the court should examine *whether* and *how* the member is prejudiced by the material effect alleged in his request for a stay. If the responsive action expected of the member (such as appearance in court or obtaining documents) is shown to be difficult or impossible, then a stay may be in order. If neither of these is involved, the court may find that the response should be required but more time allowed to the member. In the alternative, perhaps substituted actions should be allowed, such as a member's executing a release to allow the non-military member to obtain bank records or tax returns directly from the institution or agency involved, rather than have the military member himself produce them. Creativity and flexibility are not forbidden by the SCRA.

The court may request that the SM or his commanding officer file an affidavit setting out the facts and

[62] *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E.2d 905 (1982) (court can take judicial notice of annual leave allowed to

circumstances justifying the delay.[63] Such an affidavit should:

- state with specificity the efforts of the SM to participate in the case or appear in court as well as the next court date when he or she would be available;
- specify what the SM has done to obtain ordinary and/or emergency leave to attend any necessary hearings and/or trial in this court, as well as the results of these efforts;
- address how much leave the SM requested and when he requested leave; and
- identify the commanding officer who denied the leave request.

The court should also inquire as to what leave, if any, the SM has recently taken (and for what purposes). It would be manifestly unfair for the SM to regularly take leave for vacations or pleasure trips and yet declare himself unavailable when court calls.[64] Military policy is to grant leave for the purpose of attending to important matters, which include court appearances. If leave was requested and denied, the court can 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 support hearings.[65] The applicable 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.

A stay is not expected to last forever. Contrary to the opinion of some servicemembers and civilian lawyers, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. A stay is intended to last only as long as the material effect lasts. Once this effect is removed,

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servicemembers).

[63] Hooper, *The Soldiers' 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).

[64] If the LES has been provided to the court, this information as to amount of leave taken recently can easily be verified, since that is contained on the face of the LES.

[65] Pub. L. No. 104-193 § 363, 110 Stat. 2105 (1996) and DOD Dir. 1327.5, "Leave and Liberty," Change 4 (September 10, 1997).

the nonmilitary party may request that the stay be lifted. Judges usually require that the requested stay must be for a reasonable period of time. In *Plesniak v. Wiegand,*[66] 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. In *Keefe v. Spangenberg*,[67] 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.

Good faith

Counsel for the non-military party should request that the court examine whether the member has acted in good faith. Most courts hold that a member must exercise due diligence and good faith in trying to arrange to appear in court.[68] When a servicemember demonstrates bad faith in his dealings with the court, no stay will be

[66] *Plesniak v. Wiegand*, 31 I11. App.3d 923, 335 N.E.2d 131 (1975).
[67] *Keefe v. Spangenberg*, 533 F. Supp. 49, 50 (W. D. Okla. 1981).
[68] 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).

granted. This rule has been upheld in cases involving paternity,[69] contempt[70] and discovery noncompliance.[71]

An affidavit or statement supporting the stay request should be carefully prepared by counsel to survive any possible scrutiny and skepticism of the trial court. A sound affidavit will not only state that the SM cannot be present at trial but also indicate why the SM needs to be present, why he is unavailable, what steps he has taken to attend trial, and when he will probably be able to be present.

Prevention of Problems

The SCRA does not require breach or default before offering protections to covered individuals. A remedy may be found in 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.

These 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 to pay the other party on a timely basis.

Other Provisions of the SCRA

There are additional provisions of the statute that may be helpful to the SM and his or her attorney. The SCRA contains numerous other protections for those serving in the armed forces. Here are brief overviews of just a few of these:

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

[70] *Hibbard v. Hibbard*, 230 Neb. 364, 431 N.W. 2d 637 (1988) (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).

1. The SCRA allows military members to obtain an interest rate reduction for a pre-service loan or obligation, down to 6%. Any interest over 6% per year is forgiven.[72] The member must request the reduction in writing and must include a copy of his military orders.[73] Once the lender receives this notice, it must grant the relief effective as of the date on which the SM is called to active duty. This forgiveness of any interest over 6% will result in a decrease in the amount of periodic payments that SM makes.[74] The lender may challenge the rate reduction if it can show that the military member's military service has not materially affected his ability to pay.[75] The decrease in payments may be a factor in setting or modifying alimony or child support.
2. Under the SSCRA, a landlord was prohibited from evicting, without a court order, a SM or his dependents from a residential lease when the monthly rent was under $1200. 50 U.S.C. App. § 531(a) changes this protection by prohibiting evictions, without a court order, from premises occupied by military members 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 2009 monthly rent ceiling is $2,932,31. You can easily check this for the current year by doing an Internet search using "Servicemembers Civil Relief Act" and "maximum monthly rental amount" as the search terms.
3. The SCRA allows members 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.[76] It also extends coverage to leases entered into by active duty servicemembers who later get orders for a permanent change of station (PCS) or a deployment for a period

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[71] *Judkins v. Judkins*, 113 N.C.App. 734, 441 S.E.2d 139 (1994) (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).
[72] 50 U.S.C. App. § 527(a) (2).
[73] 50 U.S.C. App. § 527(b) (1).
[74] 50 U.S.C. App. § 527(b) (2).
[75] 50 U.S.C. App. § 527(c).
[76] 50 U.S.C. App. § 534.

of 90 days or more.[77]

4. Pre-service motor vehicle leases (for the business or personal of a SM or his dependents) may be terminated if the SM receives orders to active duty for a period of 180 days or longer. Motor vehicle leases entered into while the SM is on active duty may be terminated if the SM receives PCS orders to a location outside the continental United States or deployment orders for a period of 180 days or more.[78]

5. The SCRA protects servicemembers against a lender's foreclosing on a mortgage, deed of trust or similar security devices, so long as these conditions are met:

   - The security interest, on real or personal property, originated before entry upon active duty;
   - The property was owned by the SM or his dependent before entry on active duty;
   - It is still owned by the SM or dependent at the time relief is sought;
   - The ability to meet the financial obligation is *materially affected* by the member's active duty obligation.[79]

A court may issue a stay of proceedings until the SM is available to answer, extend the mortgage maturity date to allow reduced monthly payments, grant foreclosure subject to being reopened if challenged by the SM, or extend the period of redemption by a period equal to the member's military service.

Internet Resources

One good resource is the Army JAG Corps public preventive law and legal information site, http://www.jagcnet.army.mil/legal. Click on "Servicemembers Civil Relief Act." You can find a guide to the SCRA at the website of the Army JAG School, http://www.jagcnet.army.mil/TJAGLCS. When you get there, click on "TJAGLCS Publications," then scroll down to "Legal Assistance" and look for JA 260, "Servicemembers Civil Relief Act Guide," a thorough examination of every section of the SCRA by the faculty of the Army JAG School. You'll find "A Judge's Guide to the Servicemembers Civil Relief Act" at

[77] 50 U.S.C. App. § 535(b) (1) (B).
[78] 50 U.S.C. App. § 535(b) (2).
[79] 50 U.S.C. App. § 532.

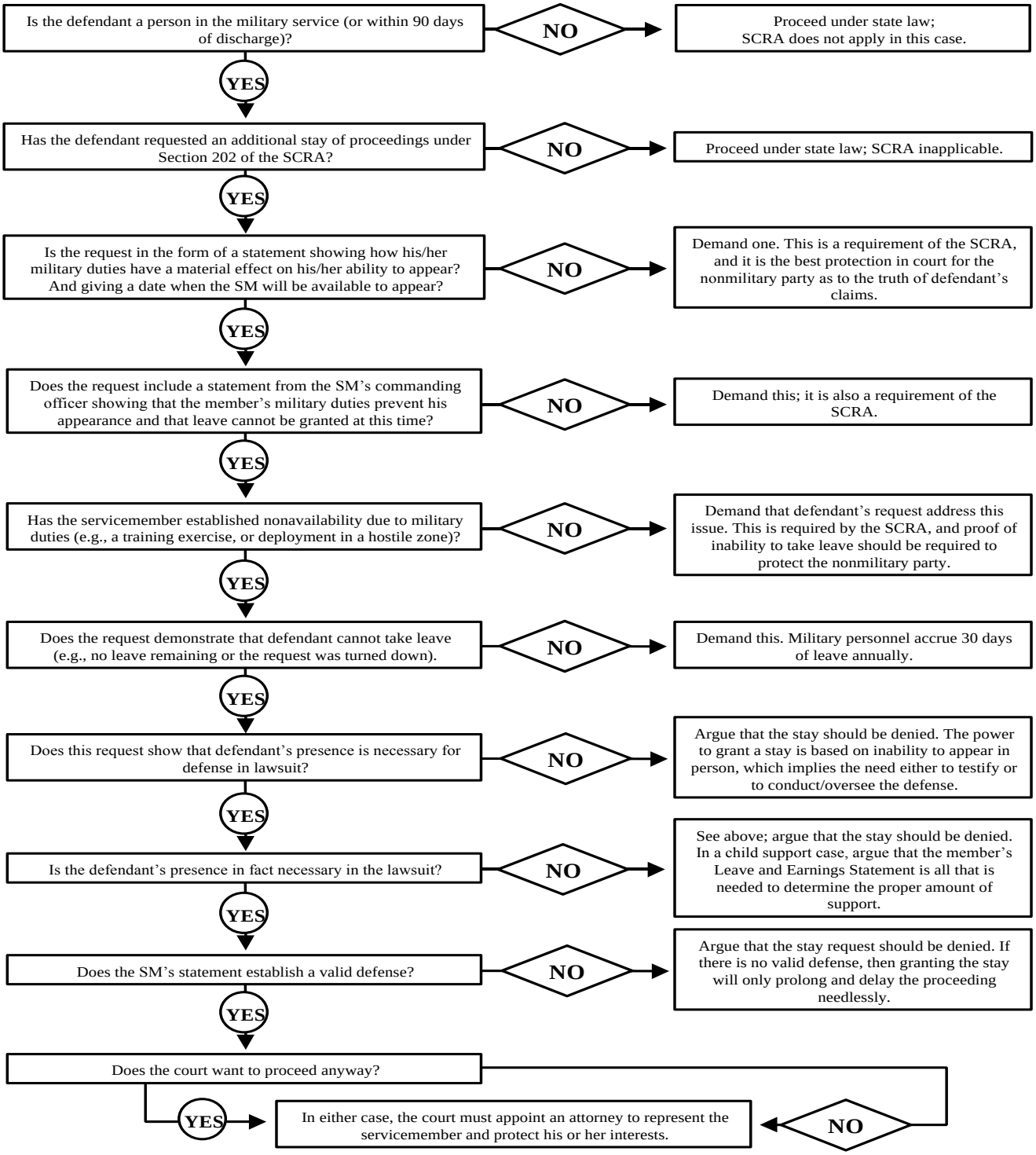
"Resources," www.nclamp.gov, the website of the North Carolina State Bar's military committee. You can also find there a "Silent Partner" info-letter on the SCRA, providing a general overview of the statute.

Conclusion

The attorney who is involved in a military case, whether representing the servicemember or the non-military party, needs help and usually needs it fast. These tips and suggestions will help to get fair and accurate information before the judge and will assist counsel for either party in understanding a new statute based on an old Act. Associating competent co-counsel, reading the statute itself, and researching the SSCRA cases in one's own jurisdiction are essential to effective advocacy in this area.

ATCH A

SCRA Flow Chart for "Additional Stay"



ATCH B

Sample motion for stay of proceedings under Servicemembers Civil Relief Act (SCRA)[80]

[CASE CAPTION]

MOTION FOR INITIAL STAY OF PROCEEDINGS [Note: for additional stay request, substitute "a further stay of proceedings" for "an initial 90-day stay of proceedings" in the text below]

The defendant moves the court, pursuant to the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. § 522, for an initial 90-day stay of proceedings, showing that his ability to defend himself in this case is materially impaired by his military duties. Attached to this motion and incorporated herein by reference are:

Exhibit 1, a communication which 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

Exhibit 2, a communication from the defendant's commanding officer stating that his military duties prevent his appearance before this court and that he is not authorized military leave.

THEREFORE the defendant requests a stay of proceedings until [date] and such further relief as this court may grant to him.

_____ Date:
Beverly Jones, Attorney for Defendant
202A Newport Drive, Bristol, RI 10234
Telephone 401-555-1234

.....

Exhibit 1[81]

Airman First Class Victor Hobgood, SSN 111-22-3333
Squadron C, 45th Fighter Wing
Bagram Air Base, U.S. Air Force Element

[80] 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.

[81] The statute appears to call for two statements, but the information required may be combined for convenience into a single statement from the SM's commanding officer. While the examples here are two statements that 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.]

APO AE 91919

[date]

TO WHOM IT MAY CONCERN:

My current military duties materially and adversely affect my ability to appear for a hearing or trial in this case in the following manner:

I am currently serving as a command vehicle driver for our Wing Commander, Colonel Alice Williams. I am on duty every day, Monday through Sunday, and it is rare when I receive a "pass" that allows me to take a day off.

I cannot appear in court on [date] for the scheduled alimony hearing. I have requested of Colonel Williams that I be granted leave for one week so as to return to Rhode Island to appear in court, but she has denied my request.

My personal presence is required for this court appearance so that I can testify about my current pay and living expenses, and also about some expenses and bills of my ex-wife that I have assumed, at her request, which should have an impact on the amount, if any, which I might have to pay as alimony. I also need to be available to assist in her cross-examination. I will be available to appear after [date] to attend the court hearing.

[signature of defendant]
.....
Exhibit 2

Colonel Alice Williams, Commander
45th Fighter Wing
Bagram Air Base, U.S. Air Force Element
APO AE 91919

[date]

TO WHOM IT MAY CONCERN:

1. I am the commanding officer of Airman First Class Victor Hobgood, SSN 111-22-3333.

2. His current military duty prevents his appearance in court on [date].

3. He has requested that I grant him one week of leave for this court appearance; due to current operational requirements, I have denied his request, and military leave is not authorized for him at this time.

[signature of commanding officer]

Family Law and the Servicemembers Civil Relief Act

Mark E. Sullivan
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 the SILENT PARTNER, "Summary of the Servicemembers Civil Relief Act," located at www.abanet.org/family/military.

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. Go to the DMDC website for SCRA inquiries, https://www.dmdc.osd.mil/owa/scra/home, and enter the last name and Social Security number of the individual. These are mandatory entries; the form on the main page also asks for a first name, middle initial and date of birth (DOB), which will help with the search. Further information is available on the "Help" section of the above website.

To execute a report, click on the "LookUp" button, which will open up a second window holding the report generated by DMDC. If the individual is on active duty, the report will show his or her branch of service and beginning date of active duty status. If DMDC does not have information as

to whether the individual is on active duty, the generated report will only list the supplied last name, first name and middle initial (if supplied), with the text:

> "Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty."

The report is signed by the DMDC Director.

If the Social Security number is unavailable, the requester may request by mail a manual search, using the DOB of the individual instead of the SSN. You must send a stamped, self-addressed envelope with your mail request.

f. 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. Further *caveat*: When you are assisting the SM and/or the commander in drafting statements to support a stay, use plain English – not "militarese." A judge cannot understand, and certainly can't sympathize with, the situation of a soldier whose commander writes: "According to the MOU between DivArty, DCSPER and the DIC, this soldier will be the ASP OIC 24/7 until REFRAD when he is not serving as SDO." *Huh???*

e. A sample motion for stay of proceedings can be found at ATCH-1.

f. 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).

g. 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).

h. 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-2, 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-3 is a flow chart on the request for an additional stay. At ATCH-4 is a checklist for judges.

12. See ATCH-5, "Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical," for more information.

VII. INTERNET SCRA RESOURCES:

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, "Servicemembers Civil Relief Act Guide," a thorough examination of every section of the SCRA by the faculty of the Army JAG School.

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).

"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. You'll also find there a SILENT PARTNER info-letter on "Summary of the Servicemembers Civil Relief Act."

ATCH-1

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 May 1, 2008. 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 June 1, 2008, 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 December 1, 2008.

[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 ↓

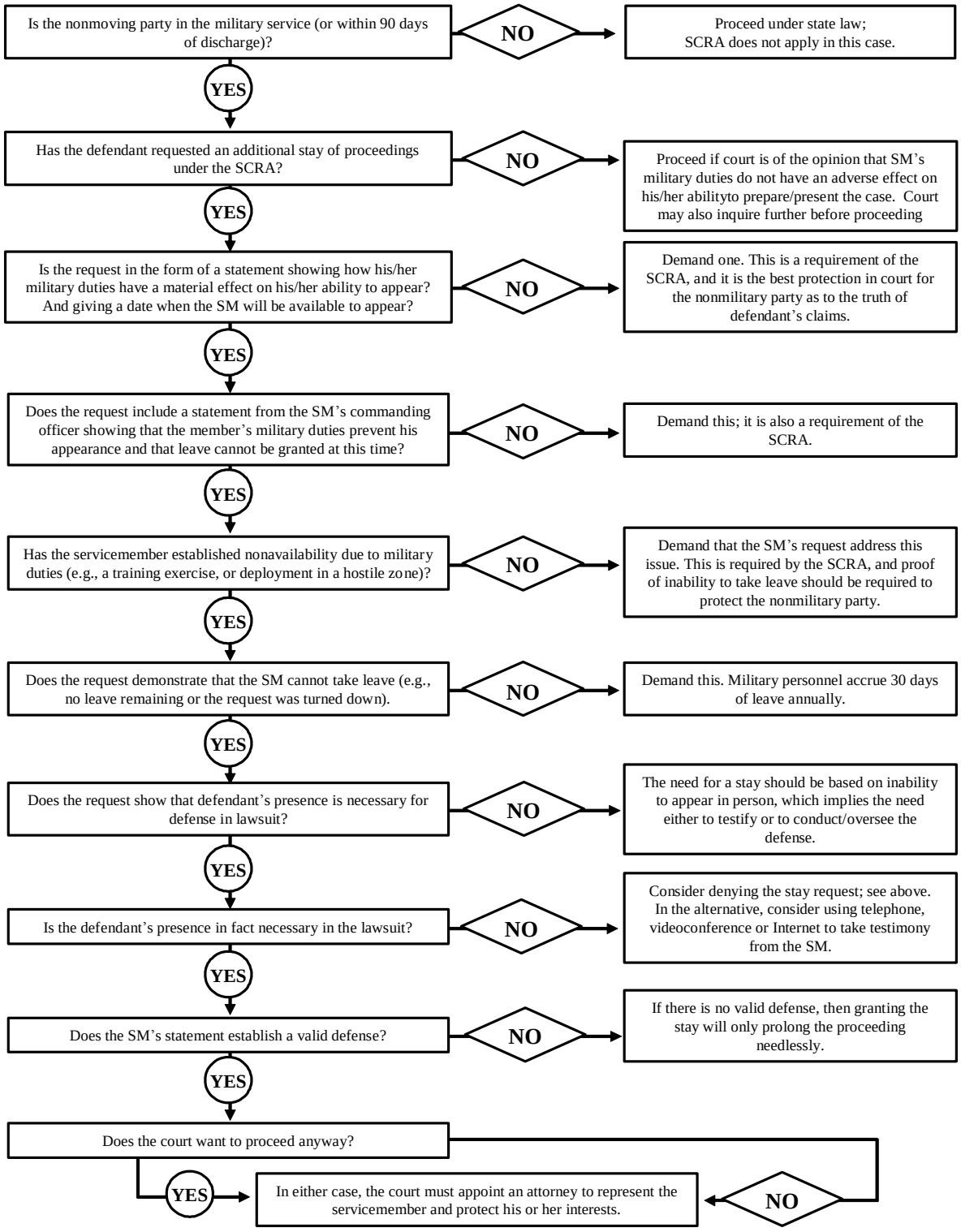
Does the court want to proceed anyway?

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 3 - SCRA Flow Chart for "Additional Stay"



ATCH 4 – 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:
o Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. 101(d)(1)
o 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)
o 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 -
o 1. Require affidavit of military status by moving party
o 2. Inquire into whether missing party is in military service by requesting check of records by Dept. of Defense[1]
o 3. Don't enter default decree against SM – appoint an attorney to represent him/her
o 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))
o As condition of entry of default judgment, require bond if you cannot determine whether defendant is in military service.
o 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)
o 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)?**
o Yes if continuing material effect of military duty on SM's ability to appear.
o Same information required as above.

✔ **Deny additional stay?**
o Only if you appoint attorney to represent the SM in the action or proceeding (50 U.S.C. App. § 522(d)(2)).
o 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?**
o 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.
o 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

[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]

✔ **Execution of orders, judgments** (50 U.S.C. App. § 524)
o 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
o 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)
o Grant relief from obligation or liability incurred by SM before his/her military service
o Also for tax or assessment falling due before or during the SM's military service

✔ **Reopen judgment** (50 U.S.C. App. § 521(g))
o 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)
o Only effective if made during period of military service.
o Usually must be in writing.

✔ **Don't penalize SM in stay request.** (50 U.S.C. App. § 522(c))
o Request for stay does not constitute appearance for jurisdictional purposes
o Also doesn't constitute waiver of any defense, substantive or procedural

✔ **Statute of limitations** (50 U.S.C. App. § 526)
o 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)
o 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.
o 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.**
o 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))
o 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-5

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

[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).

granted because no actual prejudice results from the soldier's non-appearance. This 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).

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[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.