

Financial Support for Military Dependents Service Regulations

Your client, Mrs. Sally Smith, says that she wants a divorce from her military spouse, who is failing to provide adequate financial support to her. She's getting ready to panic, or to cave in to any of her husband's settlement demands because her meager funds are running out rapidly. Your immediate reaction is to file a petition for post separation support. You'll sue, you'll go to court, you'll get an expedited hearing and the judge will order Sgt Smith to do the right thing. Oh really? Just how are you going to effect service of process on deployed Sgt Sammy Smith, who is now scouring the mountains of Afghanistan in search of Al Queda operatives? And if by some miracle you do manage to effect service, what is likely to happen to your case when Sgt Smith goes to his friendly neighborhood judge advocate who helps him file a request for a stay of proceedings under the Servicemember Civil Relief Act (50 USC Appx 501 et seq) alleging that his military service materially affects his ability to appear and defend the action? Or perhaps you are a judge advocate representing Sgt Smith, who insists that the support order issued by his Commanding Officer is excessive. Or maybe you are drafting a marital separation agreement and you want to maximize military pay and allowances. In all of these situations, a thorough knowledge of military pay and military dependent support regulations is necessary to represent optimally the interests of your client.

This article, originally prepared for continuing legal education at the University of North Carolina, Chapel Hill, addresses such regulations, with emphasis on the Army and Marine Corps, which have an exceptionally large presence in North Carolina. This article refers to web sites where orders can be located. Because web sites sometimes change, become temporarily inoperable or otherwise unavailable, redundant web sites are provided in some cases. **The opinions expressed herein (except when quoting or paraphrasing service regulations) are those of the author alone, and do not necessarily represent the official position of the Department of Defense or any branch thereof.**

Each of the armed forces has a regulation concerning the active duty member's obligation to provide financial support to dependents. These regulations vary greatly among the services. Some of the regulations, such as those of the Army and Marine Corps, provide precise dollar amounts, specific descriptions of the support requirement, and criminal sanctions for failure to comply. Others provide only vague guidelines with little effective means of enforcement. All of these regulations can be found on line at various web sites hosted by the armed forces. Which service regulation applies depends entirely on the armed force of the supporting service member. For example, a Marine assigned to an Army Battalion must comply with the Marine Corps support regulation. None of the service support regulations authorize commander to garnish wages or otherwise divert a service member's pay to dependents. However, a commander may issue a lawful order to the service member to comply with the service regulation and may enforce that order through administrative and, in some cases, criminal sanction. If a court order for support is obtained, garnishment or involuntary allotment may be obtained through service of the appropriate order upon the Defense Finance and Accounting Service (DFAS).

The service regulations are listed below:

Army

-AR 608-99 (Oct 29, 2003)

-On line at

- <http://www.army.mil/usapa/> (Official Army Orders and Directives Site)
- <http://legalassistance.law.af.mil/> [Joint Forces Legal Assistance Site. Go to Legal Assistance Topics/Family Law / Dependent Support]

Marine Corps

- MCO P5800.16A (Legal Administration Manual, see ch 15)

-On line at:

- <http://www.marines.mil/news/Publications/Pages/orders.aspx> (Official Marine Corps Orders and Directives Site. Click on MCO P and then scroll down to the desired order.)
- <http://www.marines.mil/unit/mcieast/sja/Pages/default.aspx> (SJA Marine Corps Installations East. Go to Legal Assistance / Domestic Relations / USMC Dependent Support Regulation)
- <http://legalassistance.law.af.mil/> [Joint Forces Legal Assistance Site. Go to Legal Assistance Topics/Family Law / Dependent Support]

Air Force

-AFI 36-2906 January 1, 1998

-On line at

- <http://www.e-publishing.af.mil/otherpublishingsites.asp> (type Instruction # in search box)
- <http://legalassistance.law.af.mil/> [Joint Forces Legal Assistance Site. Go to Legal Assistance Topics/Family Law / Dependent Support]

Navy

-NAVPERS 15560 (Navy Personnel Manual, MILPERSMAN) section 1754-30

-On line at

- <http://www.navy.mil/navypublicationinstruction.html> (Click on "Personnel Manual" and go to the desired section)
- <http://www.npc.navy.mil/NR/exeres/6A7860BA-8C22-40CB-9FE5-5651311E8F1B.htm> (Naval Personnel Command)
- <http://legalassistance.law.af.mil/> [Joint Forces Legal Assistance Site. Go to Legal Assistance Topics/Family Law / Dependent Support]

Coast Guard

-COMDTINST M100.6A (Coast Guard Personnel Manual) Section 8M

-On line at:

- <http://isddc.dot.gov/OLPFiles/USCG/010564.pdf>
- <http://legalassistance.law.af.mil/> [Joint Forces Legal Assistance Site. Go to Legal Assistance Topics/Family Law / Dependent Support]

Understanding Military Pay. Understanding military pay is critical to determining the amount of support a service member is required to provide per the service regulation, to drafting an

appropriate support provision in a marital separation agreement, and to determining an appropriate court order for support. Service members receive a monthly leave and earnings statement (LES) that outlines the pay received for the previous month and predicts pay for the upcoming month. Most service members receive these statements electronically. Obtaining a current LES is probably the best way to scrutinize the military pay of the individual concerned. However, the LES is not always immediately available, particularly if you are representing the civilian spouse and the military member does not wish to provide it. Further, consistent with the Federal Privacy Act of 1974 [5 USC 552a] as implemented through pertinent military privacy regulations; e.g. DoDDir 5400.11 dtd 26 Nov 2004; SECNAVINST 5211.5E dtd 28 Dec 2005, the commander may not be authorized to provide such personal information to a requestor, even if presented with a subpoena (see, e.g., SECNAVINST 5820.8A concerning procedures for obtaining records within the possession of the Department of the Navy).

Base Pay. The largest component of military pay is base or basic pay, determined entirely by the service member's rank and years of service. Military pay charts can be found on line at the web site of the military paymaster, the Defense Finance and Accounting Service: <http://www.dfas.mil/> This site also provides pay charts for prior years. For example, using the chart provided, you find that the 2009 base pay of a sergeant, grade E-5, with over four years of service, is \$2,334.90.

Basic Allowance for Housing. Typically, the next largest component of military pay is the Basic Allowance for Housing (BAH). The amount of BAH is determined by the service member's rank and the geographical area in which s/he resides. The BAH will be greater in those areas for those areas that have a higher cost of living, as determined by the Secretary of Defense. In addition, a service member who is supporting lawful dependents will receive BAH at a higher rate, called the "with dependents" rate (BAH /D). Service members residing on base will generally receive no cash BAH. The amount of BAH can be found on the LES and can also be determined on line, assuming one knows the service member's rank and the zip code at which he is residing. <https://www.defensetravel.dod.mil/site/bah.cfm> . BAH is not taxable income; accordingly, a service member's annual tax return may greatly understate income actually received. (Further, virtually all pay received while in the combat zone is also not taxed as income.) In the context of dependent support issues, BAH is particularly important because the amount of support a service member is required to provide is often based on BAH. Indeed, regulations of the Army, Marine Corps, and Coast Guard tie the dollar amount of obligated family support to BAH. As an illustration, the 2009 BAH for a sergeant without / with dependents for various cities is listed below:

Location	BAH	BAH/D
-Jacksonville, NC	\$873	\$1,036
-Fayetteville, NC	\$889	\$1,089
-Oceanside, CA	\$1,388	\$1,751
-San Diego, CA	\$1,680	\$2,018
-San Francisco, CA	\$2,195	\$2,763

Basic Allowance for Subsistence. Single service members living on the installation in the barracks (generally junior service members) will receive a meal card entitling them to eat at various installation mess halls. Most other service members will receive a monthly cash supplement called basic allowance for subsistence (BAS). Although designed to assist the service member to purchase food, BAS spending is not monitored and the member is free to use the money for any lawful purpose. Calendar year 2009 BAS rates are as follows:

Officers:	\$223.04
Enlisted	\$323.87

Special Duty and Incentive Pays. Service members receive special pay for performing certain hazardous or difficult duty, or duty requiring special skills and / or skills in short supply. Most members do not receive such special pay, or if they do, it is only for a temporary period. Monthly service member pay may be augmented by the following (2009 rates):

Aviation career incentive pay	\$125-\$585 depending on years of service
Career enlisted flyer incentive pay	\$150-\$400 depending on years of service
Hazardous duty incentive pay (crew member)	\$150-\$250 depending on rank
Hazardous duty (non crew member)	\$150
Dive pay	Officer max: \$240 / Enlisted max: \$340
Hostile fire / imminent danger pay	\$225
Parachute, flight deck, demolition pay	\$150-\$225
Submarine Duty	\$75-\$835 depending on rank time in service
Career sea pay	\$50-\$700 depending on rank & yrs sea duty
Variable special pay (medical officers)	\$416-\$1,000 depending on rank & yrs svc
Variable special pay (dental officers)	\$583-\$1,000 depending on rank & yrs svc
Board cert special pay (medical / dental officers)	\$208-\$500 depending on yrs of service
Additional special pay (Dental officers)	\$10K-\$15K annually depending on yrs svc
Incentive special pay (Medical officers)	\$20K-\$36K annually depending on specialty

Family Separation Allowance. Service members receive a family separation allowance (FSA) if their deployment orders cause them to be physically separated from their dependents. Members are also entitled to FSA if executing permanent change of station (PCS) orders for an unaccompanied tour of duty overseas, such as to Germany or Japan. A member with no dependent children will not receive FSA if “legally separated” from his/ her spouse, as that term is defined by regulations. The principal regulation concerning entitlement to FSA is the Department of Defense Financial Management Regulation (DoDFMR) Volume 7A, chapter 27. On line at: <http://comptroller.defense.gov/fmr/07a/index.html> (or Google “dodfmr”)

Marine Corps Support Requirement

Applicability. Chapter 15 of the Marine Corps Legal Administration Manual (MCO P5800.16A) is applicable to all active duty Marines, of any rank, including those Marines who may be assigned to a unit of some other armed force. In general, the Order provides that court orders for support and valid separation agreements addressing support take precedence over any support standards indicated in the Order. The support standards published in the Order are

applicable only if there is no court order for support and no marital separation agreement addressing support. Additionally, the support standards are not applicable until there has been a complaint of nonsupport to the Commanding Officer of sufficient rank and position as to have authority to convene a special court martial. Generally, this means that the minimum level of command is the battalion commander (or squadron commander in the air wing). The support requirement is NOT retroactive to any point prior to the receipt of such complaint. Accordingly, it is imperative that the aggrieved civilian spouse complain early and to the right level of command.

Nonsupport Complaints.

There is no required format for a nonsupport complaint; it need not even be in writing. As a practical matter, a written complaint is preferable to set forth the facts in detail and to establish the fact and timing of the complaint. The complaint should, at a minimum, set forth the basic facts: date of separation, whether the couple is residing on or off the installation, number of dependents supported by the service member, and financial support, if any, provided by the member since the date of separation. The complaint should provide other pertinent details and anticipate and address and supposed justification from the service member for failing to provide more financial support. The complaint should also indicate that it is being addressed at the outset to such a high level of authority because the Order structures the process that way. Otherwise, the Commander's first reaction is likely to be "Why are you bothering me with this?" Do not assume that the commander has a detailed knowledge of the Marine Corps support Order. In fact, it may be helpful to attach a copy of the Order to the complaint.

It can not be stressed enough that the complaint must go to the Commanding Officer, not the sergeant supervising the lance corporal, not the master sergeant supervising the staff sergeant, not even to the captain assigned as the company commander, but to the commander authorized to convene special courts-martial. In the Marine Corps, this means generally means a battalion commander (or in the air wing, a squadron commander). Failure to go to the right level of command may result in failure to initiate the application of the regulatory support standards. Furthermore, as a practical matter, complainants are likely to receive quicker, more reasoned results by going to the right commander. The commander may well assign one of his staff officers or noncommissioned officers to work the case and to make a recommendation, but going to the CO initially complies with the procedural requirement and also ensures that the matter will not be ignored by underlings. Note that making a nonsupport complainant does not necessarily require that the complainant stomp over to the battalion area and demand to see the CO without any appointment. A phone call, an e-mail, a written complaint, or a personal interview arranged in advance suffices. The installation's legal assistance office can assist in locating the commander and his e-mail address. If the commander is deployed, email may be the only effective means of communicating. If the aggrieved spouse believes that the commander has not properly applied the Order to the facts of the case, or is otherwise not satisfied with the commander's response, then a complaint to a higher level of authority is in order. The commander exercising special court martial authority will be assigned to a larger unit that is commanded by an officer of general or flag rank. That officer will have an Inspector assigned to it. The Inspector will review allegations that a subordinate commander violated the Order or otherwise abused his/ her authority.

Dependents. The Order requires Marines to support “dependents.” For purposes of the support Order, that term refers to the Marine’s spouse, minor biological children, and adopted children. Any child born during the marriage is presumed to be the biological children of the Marine. There is no requirement to support step children that have not been adopted. In the absence of a written agreement or court order to the contrary, a Marine is not required to provide financial support an active duty spouse.

Support Amounts. The Orders set forth financial support standards applicable for those cases in which there has been a complaint of nonsupport to commander, and there is neither a court order nor a valid separation agreement establishing support. In the interim before a separation agreement or court order, the Marine is obligated to pay the amount shown in the middle column of the chart below or the percentage of BAH in the right hand column, whichever is greater, up to a maximum of one third of the Marine’s gross pay. “Gross pay” for purposes of this Order is defined as all pay and allowances before taxes or other deductions. This amount required per the Order is referred to as the “interim” support amount.

Interim Support Standards: U.S. Marine Corps

# of Dependents Entitled to Support	Minimum Amount of Monthly Support Per Requesting Family Member	Share of Monthly BAH/OHA Per Requesting Family Member
1	\$350	1 / 2
2	\$286	1 / 3
3	\$233	1 / 4
4	\$200	1 / 5
5	\$174	1 / 6
6 or more	\$152	1 / 7

Example: Sgt H is married to W, a civilian, and has one child of the marriage (X). Sgt H lives off Base in Jacksonville, NC and has a gross monthly pay of \$2,000, of which \$600 is BAH. (BAH and pay amounts in this example are used only for illustration and ease of calculation and may not reflect an E-5’s actual pay and BAH). The center column yields a minimum support requirement of \$572 (\$286 for each of two Family members entitled to support). The right hand column yields a support amount of \$400 (1 / 3 of the \$600 BAH per Family member entitled to support.) The greater of these amounts is \$572, which is the interim support obligation for Sgt H. This amount does not exceed 1 / 3 of Sgt H’s \$2,000 gross monthly pay and need not be reduced for that reason.

Effect of on base housing on the support requirement.

Perhaps the most contentious issue relating to financial support of dependents within the Marine Corps is the support required when those dependents are residing in military quarters. Consider the following hypothetical: Sgt Smith, his wife Sally Smith, and their minor child Johnny Smith all reside in military family housing on base. Sgt and Mrs. Smith decide that the marriage isn't working, so Sgt Smith moves in with a friend off base. When Mrs. Smith makes a complaint of nonsupport to the commander, Sgt Smith counters that he does not need to provide any more support. He is already forfeiting his *entire* BAH in consequence of Mrs. Smith continuing to reside in military family housing. What is the commander to do? Unfortunately, the Order is hardly a model of clarity on this point. It provides as follows:

“...interim support per supported Family member shall be the greater of the fixed amount of support reflected in the center column [of the financial support chart] or the prorated share of whatever BAH or OHA (Overseas Housing Allowance) to which the Marine is currently entitled...*Note that BAH that is credited to the Marine for government housing, but is not actually paid in cash, is not counted for purposes of this order.*” (emphasis added)

In what way is the forfeited BAH cash “not counted?” Not counted as support to dependents? Not counted in the calculation of gross pay? The Order does not say. It would seem that the intent is for the forfeited BAH not to count as BAH “to which the Marine is currently entitled,” relating to the previous sentence. Thus, the interim support obligation of our hypothetical Sgt Smith would be the amount in the middle column without regard to the right hand column regarding BAH percentages.

In any event, the calculation of support in this hypothetical would also be subject to the commander's discretionary determination of whether one of the four exemptions authorizing reduced support applies, including the exemption relating to the payment of the civilian spouse's financial obligations. See section 5 f below. If the commander fails to reduce the support requirement in consequence of the forfeited BAH, the Marine effectively pays far more support than would be required if the family resided off base. The result may be a financial hardship to the Marine, particularly for those more junior in rank. Further, failure to lower the support requirement may induce the Marine to take the next logical step; taking actions as necessary to remove his family from base quarters. On the other hand, eliminating the support requirement in consequence of the forfeited BAH may result in the dependents living in adequate quarters but with no ability to put food on the table or to purchase other necessities. Whoever said command was easy?

Reduction of Interim Support Amounts. The Marine can request that the Commanding Officer reduce the regulatory support obligation. The Marine has no authority to himself waive or diminish any requirements of the Order. It is up to the Marine to provide the commander with sufficient information and documentation to establish a basis for reduction of the interim support requirement. Upon a factual showing that one of the exemptions applies, the commander may, but is not required to, reduce the interim support obligation. The four narrow exemptions are listed below:

(1) The spouse requesting support has an income greater than that of the supporting spouse;

(2) The service member has already provided such adequate financial support for twelve months or more and has not attempted to delay divorce proceedings by evading service of process;

(3) The service member is the victim of a substantiated instance of spouse abuse. (Such substantiation may be in the form of a criminal conviction, a permanent restraining order, or determination by the Base Case Review Committee that the incident is substantiated at a severity level of II or higher); and

(4) The Marine is paying “regular and recurring obligations (such as rent or consumer debts) of the Family members requesting support of sufficient magnitude and duration as to justify a reduction or elimination of support [specified in the interim support table]. If the commanding officer elects to give credit for such payments, they should be limited to the extent that such payments do not benefit the Marine, and should continue for so long as support is paid under this chapter.” Whether the payment of any particular bill should result in reduction of the support obligation is one of the more contentious issues relating to dependent support. Marines often make such requests. Some cases are relatively easy. A commander would be fully justified in reducing the support obligation in consequence of a Marine paying rent to an off base landlord for a house in which his spouse resides but he does not. Likewise, a commander would be justified in reducing the support obligation by \$200 where the Marine is making monthly car payments of \$200 for a car that is owned and used exclusively by his spouse. A commander is not justified in reducing the support obligation because the Marine has overextended himself by purchasing cars and consumer electronics that s/he can ill afford. And then there are the harder cases: the Marine making mortgage payments for a house s/he owns but is exclusively used by the civilian spouse; or the Marine paying off credit cards debts, claiming that a majority of the items were purchased by the civilian spouse.

In the first three instances, support to a spouse, but not to a child, can be reduced by the Commander. The burden is on the Marine to show that grounds for the exemption exist. Note that infidelity is NOT among the reasons listed as justifying diminution of support.

Duration of interim support. The interim support terminates when the requirement for financial support, or lack thereof, is established by separation agreement or court order. The interim support for a spouse may also terminate when the commander determines that the third exemption applies (the Marine has been making payments for at least one year). Finally, the interim support for a spouse terminates when the spouse ceases to be a dependent; i.e., upon final decree of divorce.

Enforcement. Failure to adhere to the regulatory support requirements may result in adverse comments in the violator’s fitness reports, reduced proficiency / conduct markings for junior Marines, and even administrative discharge from the Marine Corps, although the later is an extremely rare occurrence. Further, Chapter 15 of the Legal Administration Manual is

specifically made punitive; that is, a violation of the Order may be punished criminally as a violation of a lawful order.

Army Support Requirement

Applicability. AR 608-99 applies to active duty Soldiers, West Point cadets, Army Reservists on active duty for thirty days or more, members of the Army National Guard on active duty for thirty days or more, command sponsored Family members residing outside of the United States, and Soldiers confined at a military confinement facility receiving full or partial pay. In the absence of a written agreement or court order to the contrary, a Soldier is not required to provide financial support to an active duty spouse.

Nonsupport Complaints. The Regulation does not require any particular format for nonsupport complaints nor does it require that they be written. Inquiries concerning nonsupport are to be directed to the company commander, who will acknowledge receipt, request any additional information necessary for resolution, and personally review each one (or forward to the pertinent commander if the Soldier has been reassigned). The company commander shall make a written reply within 14 days of receipt, except when the Soldier is making a request to be released from the support requirement, in which case the company commander will forward the matter to the battalion commander for action. (See paragraph 6f below concerning action on requests for reduction of support). Army dependent support is determined with reference to BAH-II; that is, the military housing allowance without consideration of geographic duty location. BAH-II is an average of the various BAH for different locations, calculated annually by the Secretary of Defense. As used herein, the term BAH-II/WITH is the amount of BAH II at the higher, with dependents rate.

Support amounts.

Single family unit residing off base. If all of the Soldier's dependents reside in a single, off base residence, the Soldier is required to provide a monthly amount of financial support equal to BAH II-WITH, regardless of the number of dependents in that single family unit.

Single family unit residing on base. If all the Soldier's dependents are comprised of one family unit that resides in government quarters, the Soldier will be required to forfeit BAH as a consequence of the dependents' receipt of government quarters, but will owe the dependents no additional support.

Family members within the family unit residing at different locations. Each such Family member is entitled to their pro rata share of the Soldier's BAH II-WITH. The pro rata share is calculated as follows:

$$\text{pro rata share} = \frac{1}{\text{\# of supported Family members}} \times \text{BAH II-WITH}$$

For example, if the Soldier has one dependent residing off base at address #1 and another dependent residing in off base civilian address #2, each is entitled to ½ of the Soldier's BAH II-WITH. No Family member residing in government quarters is entitled to additional support. Thus, if the Soldier's spouse resides in government quarters and his child resides off post, the child must be provided with ½ BAH II-WITH and the spouse receives no additional financial support in consideration of the government quarters s/he is receiving.

Multiple family units. A Soldier will provide financial support to Family members where there are multiple family units as follows: (a) provide support to Family members in accordance with any applicable court orders (b) provide support to Family members in accordance with any applicable written agreement, (c) provide no support to Family members residing in base housing, and (d) provide a pro rata share of BAH II-WITH to all other Family members. Neither the written agreement or any court order for support shall affect the calculation of the pro rata share to be provided to any Family member not covered by agreement or court order.

Reduction of Interim Support Amounts. The Special Court-Martial Convening Authority (SPCMCA) may reduce the support requirement to a spouse whenever required by "fundamental fairness." Prior to such decision, the SPCMCA must also "attempt" to contact the person adversely affected for their input and must obtain a written legal opinion confirming that the reduction in support complies with the Regulation, applicable laws, court orders, and written agreements. A commander who is not empowered to convene special courts-martial but who nonetheless commands a battalion may reduce or eliminate family support only if convinced by a preponderance of the evidence that the intent of the Regulation is furthered by support reduction and that the circumstances fit within one of the seven specified situations as listed below. Such a commander must also abide by the same procedural requirements as the SPCMCA; i.e., attempt to contact the person adversely affected and obtain a confirmatory legal opinion. Instances in which the battalion commander can reduce support are described below:

Order issued by a court without jurisdiction. The battalion commander can release a Soldier from the regulatory support requirement if the issuing court "clearly" was without jurisdiction and the Soldier has been complying with the terms of another court order, a written agreement, or the interim support requirements of the Regulation. Such a decision by the battalion commander removes the threat of Army sanction for failure to obey the suspect court order. However, as to possible sanctions from civil authorities, the Soldier disobeys the court order at his own peril.

Order issued by the court has no financial support provision. If the court order is entirely silent on the issue of support to dependents, the battalion commander can release the Soldier from the support requirement if all of the following are true: a judicial proceeding concerning the marriage or the child has been initiated; the court has jurisdiction over the parties and the authority to order financial support to the persons concerned; the court has issued one or more orders none of which contains a financial support provision; there is no relevant written support agreement or court order requiring financial support of the Family members concerned;

and the Soldier is not receiving BAH based solely on support to the Family members or agrees to terminate receipt of BAH effective the date support is to terminate.

Income of the civilian spouse exceeds the income of the Soldier. This provision authorizes release from an obligation to support a spouse (other than court ordered support or support pursuant to written agreement) but does not allow the battalion commander to reduce the regulatory support obligation to a child. The battalion commander can release the Soldier from such support obligation if both of the following are true: the monthly income of the civilian spouse exceeds the monthly pay of the Soldier; and the Soldier is not receiving BAH based solely on support to the spouse or agrees to terminate BAH effective the date of termination of the support requirement. For purposes of the Regulation, military pay refers only to a Soldier's base pay prior to taxes, garnishments, voluntary or involuntary allotments, or other such matters. Military pay does not include military allowances or off duty employment. Civilian pay includes gross pay prior to any deductions, as well as any other sources of income, such as interest, dividends, or profits derived from property in the spouse's possession.

Soldier is the victim of substantial abuse. This provision authorizes release from an obligation to support a spouse (other than court ordered support or support pursuant to a written agreement), but does not allow the battalion commander to reduce the support obligation to a child. The battalion commander may release the Soldier from an obligation to support a spouse if all of the following are true: the Soldier is the victim of an incident of spousal abuse as substantiated by conviction, permanent restraining order (or temporary order then in effect) against the supported spouse, family advocacy case management team; the instance of abuse did not involve a mutual affray or act of physical violence against the spouse; and the Soldier is not receiving BAH solely based on supporting the spouse or agrees to terminate BAH effective the date spousal support terminates.

Supported Family member is in jail. This provision authorizes a commander to release the Soldier from the requirement to provide support (other than court ordered support or support pursuant to written agreement) for a Family member if all of the following are true: the supported Family member is in prison or jail, regardless of the offense (the Regulation does not require a conviction); and the Soldier is not receiving BAH solely based on supporting the imprisoned/jailed Family member or the Soldier agrees to terminate BAH effective the date of termination of support.

Regulatory support has been provided to the spouse for 18 months. This provision authorizes a battalion commander to reduce support to a spouse (other than court ordered support or support pursuant to a written agreement) , but does not allow the battalion commander to reduce the support obligation to a child, if all of the following are true: the parties have been separated for at least 18 months; the Soldier has complied with the Army support regulation during the period of separation; civilian courts are available and would have jurisdiction to order financial support; the Soldier has not attempted to dodge service of process or otherwise prevent a court from ruling on the issue of support; and the Soldier is not receiving BAH solely of the basis of supporting Family member(s) concerned or agrees to terminate BAH effective the date of termination of the support requirement.

Supported child is in the custody of another who is not the lawful custodian.

The battalion commander may release a Soldier from the obligation to provide support to a child (other than court ordered support or support pursuant to a written agreement) if all of the following are true: the Soldier is the lawful custodian of the child; the child, without the Soldier's consent, is in the custody of another person who is not the lawful custodian of the child; and the Soldier is diligently pursuing legal means to obtain custody of the child.

Duration.

Initiation of support requirement. Unless otherwise indicated in the order, court ordered support is effective the day the order is executed. Support pursuant to a written agreement is effective on the day the last required party signed the agreement, unless otherwise stated in the agreement. In the absence of agreement or court order, regulatory support commences when either party voluntarily leaves the residence or when one party is ordered out of the residence. The obligation to pay BAH II-WITH begins on the date the Family members move out of government quarters, even if the Soldier continues to reside in government quarters and is not entitled to draw BAH. Court ordered support terminates when the court order says so. Payment of BAH II-WITH must be paid on the 1st of every month.

Termination of support requirement. Court ordered support terminates in accordance with the terms of the court order. Support pursuant to written agreement terminates pursuant to terms of the agreement, or upon the effective date of a court order terminating the marriage or establishing a financial support obligation. The regulatory support requirement shall terminate upon the effective date of a written agreement for support or upon the effective date of a court order terminating the marriage or establishing support or by action of the commander relieving the Soldier of the support requirement (see paragraph 6f above concerning circumstances in which a commander may terminate the support requirement).

Enforcement. Army Regulation 608-99 provides that failure to comply with a court order for support, a written separation agreement, or the interim support requirement set by the Regulation constitutes the violation of a punitive lawful order; in other words, violation may be on may be punished as a criminal offense under the UCMJ.

Navy Support Requirement.

Overview. The Navy support requirement is set forth at section 1754-30 of the Navy Military Personnel Manual (MILPERSMAN). It urges the parties to resolve support issues through agreement or adjudication in civil courts. It provides the commander with support guidelines to use in the absence of agreement or court order. The support standard is only a guide; it may be increased or decreased as circumstances require. Accordingly, enforcement through criminal action within the Navy is made more difficult. Administrative sanctions, also made more difficult by the lack of a definitive dollar requirement of support, may include adverse comments in the service member's service record and separation for the naval service. Under specified circumstances, a sailor may apply for a waiver of the requirement to provide support.

Navy Support Guidelines. With the caveat that the support scale is only a guideline, the Navy has promulgated the following chart for dependent support in the absence of written agreement or court order:

Supported dependents	Guideline support amount
Spouse only	1/3 gross pay
Spouse and 1 minor child	1/2 gross pay
Spouse and 2 or more children	3/5 gross pay
One minor child	1/6 gross pay
Two minor children	1/4 gross pay
Three minor children	1/3 gross pay

Waiver of Spousal Support. The Director, Dependency Claims, Navy Military Pay Operations (DFAS) may, upon request, waive a sailor's requirement to support a spouse (but not a child). Waivers may be granted where the sailor provides evidence of desertion without cause, physical abuse, or infidelity. Requests for waivers of support should be sent to:

Defense Finance and Accounting Service
Cleveland Center
Code PMMACB
1240 East Ninth Street
Cleveland, Ohio 44199

Waiver of Child Support. A commander may, but is not required to, withhold action for failure to support a child if the location and welfare of the child can not be ascertained or it is apparent that the person requesting child support does not have physical custody of the child.

Air Force Support Requirement

Overview. Air Force Instruction 36-2906 (Personal Financial Responsibility) requires all of its members to provide "adequate financial support of a spouse or child or any other relative for which the member receives additional allowances for support." Commanders who receive nonsupport complaints will advise the alleged miscreant that procedures exist within the civil courts for the initiation of garnishment / involuntary allotment of military pay; that members may not receive BAH at the with dependents rate while failing to support dependents; and that any BAH received on behalf of dependents during periods of nonsupport will be recouped. Members who continue to demonstrate "financial irresponsibility" despite appropriate counseling may be referred for administrative or disciplinary action. Complainants will also be advised that the Air Force "has no authority to arbitrate disputed cases of nonsupport or personal indebtedness." The Instruction has shockingly little to say about the amount of support that will be considered "adequate," particularly in light of detailed instruction of the other armed forces on this point. Indeed, the Instruction has virtually nothing to say on the matter, except for the recoupment of BAH/diff.

Enforcement. Although the Instruction refers to the possibility of disciplinary; i.e., criminal, action, it is difficult to see how such action can be effected in all but the most egregious cases, given the lack of standards for “adequate” support. Further, like Commanders in all the armed forces, Air Force commanders lack authority to garnish wages or to otherwise involuntarily divert the member’s wages to a Family member. It is only through the appropriate court order, and service thereof on DFAS, that the armed forces may take such action. It would therefore appear that the only potentially effective means of enforcement of AFI 36-2906 is through the fear of diminished efficiency reports and career potential for failure to provide support to dependents.

Coast Guard Support Requirement.

Overview. All members of the Coast Guard are required to provide adequate and continuous support to their lawful dependents. Accordingly, members must abide by any relevant court orders or agreements. In the absence of agreement or court order, members must provide dependents with the difference between BAH with and without dependents (BAH II-diff), in addition to a specified percentage of base pay.

Interim support amounts. In the absence of court order or agreement, Coast Guard “officers and enlisted personnel will, as a minimum, be considered obligated to provide support for their lawful dependents on a monthly basis as follows [in the chart below]”

Situation	Minimum level of support
Spouse only	BAH/Diff plus 20% base pay
Spouse and 1 minor child (or one handicapped child)	BAH/Diff plus 25% base pay
Spouse and two or more minor or handicapped children	BAH/Diff plus 30% base pay
One minor or handicapped child	1/6 base pay
Two minor or handicapped children	¼ base pay
Three or more minor or handicapped children.	1/3 base pay

Waiver of Spousal Support. The Commandant of the Coast Guard may, upon request, waive a member’s requirement to support a spouse. Waivers may be granted upon evidence of desertion without cause, physical abuse, or infidelity.

Waiver of Child Support. A commander may, but is not required to, withhold action for failure to support a child if the location and welfare of the child can not be ascertained or it is apparent that the person requesting child support does not have physical custody of the child.

Temporary Waiver of Compliance with Court Order. Court orders are presumed to be lawful and binding. However, if a member, acting on good faith and on the express advice of qualified legal counsel, disputes the order, the commanding officer may withhold disciplinary or administrative action against the member for a reasonable length of time to provide an opportunity to resolve the matter. "Good faith" means that the member's failure to comply with the court order is an element of a conscious, positive plan of action, as recommended by the member's attorney, the intent of which action is to seek a court hearing for resolution of the dispute. The member concerned must present substantive, documentary evidence which attests to a good faith course of action as described above. In determining the period to be allotted for such deferrals, the commanding officer may periodically require a statement from the member or his or her attorney stipulating that the effort for obtaining relief remains active, and indicating an approximate date upon which a court hearing may be forthcoming. While such waiver temporarily avoids adverse administrative or disciplinary action from the Coast Guard, the waiver does not preclude sanctions of the civil courts. As to potential sanctions of the civil court, the member disobeys the court order at his own peril.

Implications for Drafting Separation Agreements.

Post Separation Spousal Support. In drafting separation agreements, attorneys should be aware that the service member spouse may be subject to a regulatory requirement to provide post separation support. Particularly where there is a clear cut, enforceable military support regulation (as in the Army and Marine Corps) why agree to a waiver of such support unless there are compelling reasons to do so, or at least some quid pro quo? In many cases, the spouses are young and healthy, and the marriage of fairly short duration. These are the sort of cases not particularly likely to result in a court order for post separation support or alimony. Indeed, given the costs involved, these cases are unlikely to be litigated at all. The civilian spouse does not want to give up the support required by the Order. The military spouse does not want to pay anything more than absolutely required. The solution therefore may be to graft the support amount indicated by the pertinent order into the separation agreement. The military spouse will want to include provisions limiting the duration of post separation support. Note that a provision ending such support at divorce may provide financial incentive to the receiving party to delay divorce proceedings. A typical provision may limit the duration to the number of months the member would otherwise have to pay under the service regulation, or the decree of final divorce, whichever comes first.

Child Support. The interim child support called for by the armed forces tends to be a lesser amount than when applying state child support guidelines. [See NC Child Support Guidelines and child support calculator at <https://nddhacts01.dhhs.state.nc.us/home.jsp?TargetScreen=WorkSheet.jsp>]. On the other hand, the armed forces tend to require post separation spousal support in many cases where the court would not if the matter were litigated. Accordingly, as compared to the state requirement, the initial, pre-divorce spousal support is high and the child support low. One practical means of addressing the issue in a separation agreement is to apply the service regulation amounts until the time of divorce and the state child support guideline after divorce, when the service spousal support terminates.

Maximizing / Preserving BAH.

A service member may be entitled to BAH at the “with dependents” rate as long as that member is providing a minimum level of monthly financial support to his dependents. If the member’s monthly support drops below this floor, he is no longer eligible to receive such BAH, even if such the lack of support is based on the civilian spouse’s lawful waiver of support. If there is a waiver of support, the member need not provide financial support to the spouse, but he cannot continue to receive dependent allowances without supporting dependents. When the command learns of the receipt of such unauthorized allowances, the United States will begin action to recoup any such unjust enrichment (JFTR Ch 10, para 10106B) The recoupment will not require any court hearings; the government will simply claw the money back by shorting subsequent paychecks. The minimum support required in order to continue to receive dependents allowances is the difference between BAH with and without dependents, usually around \$200.

The DoD official website for BAH (at the Frequently Asked Questions section #28) describes BAH diff as follows:

BAH-DIFF is the housing allowance amount for a member who is assigned to single-type quarters and who is authorized a BAH solely by reason of the member's payment of child support. A member is not authorized BAH-DIFF if the monthly rate of that child support is less than the BAH-DIFF amount. The BAH-DIFF amounts, originally calculated in 1997, are updated annually based on changes in the Basic Pay tables. For more information contact your servicing finance office or consult JFTR, par. U10008.

The governing regulation defines it as follows:

BAH Diff Rates. The BAH Diff rate is defined as the difference in Basic Allowance for Quarters (BAQ) with dependents and BAQ without dependents for the member’s grade as of 31 December 1997, increased each year by the average pay raise percentage (JFTR ch 10 para 1002 and 10008)

BAH amounts vary based on rank and geographical area, and can be found at:
<http://www.defensetravel.dod.mil/perdiem/bah.html>.

Accordingly, a total waiver of support is often not the preferred provision in a separation agreement, even for the service member. Consider Marine Corps Sergeant Steve Smith. He has moved into the barracks, his wife resides off base. He has no children. Sergeant Smith receives \$1,036 as BAH, all of which he will lose if he signs a separation agreement wherein his wife waives all spousal support. If the separation agreement calls for Sgt Smith to pay monthly support of even \$163 (the difference between BAH with and without dependents for Sgt Smith) he will receive his BAH at the with dependents rate. Practitioners may wish to structure agreements such that the service member pays a little bit more than currently required to receive dependent allowances to account for future changes due to promotion, cost of living allowances, or similar factors that may otherwise cause the payments to fall below minimum required amount.

It is often the case that the parties can agree that spousal support will be minimal or nonexistent, but the civilian spouse may be adamant that the military member must pay certain marital debts. Consider once again our hypothetical Sgt Smith. A separation agreement calling for no spousal support and his payment of certain marital debts will cause the loss of any BAH he receives as a result of having dependents. The BAH may be saved with a little creative draftsmanship, couching the payment of certain marital debts in terms of post separation support.

Children and BAH.

Controlling regulation. Once the court enters a judgment of divorce, the spouse will no longer be considered a dependent that entitles the member to any dependent allowances. However, under what circumstances may is a service member entitled to BAH based on support to a child? Custody of a child? The controlling order is not the DoDFMR as one might expect. Rather, that chapter of the DoDFMR dealing with BAH migrated to another order, chapter 10, Volume 1 of the Joint Federal Travel Regulations (JFTR). See especially part B, entitled "Dependency." On line at <https://www.defensetravel.dod.mil/site/bah.cfm> Click on "Programs and Services" then Travel Regulations" in the drop down box, and then "chapters 1-10" Warning: The JFTR can be an exceedingly difficult document to read. It is complex, and many of its sections refer to other sections in a seemingly unending progression.

BAH entitlement for support of children. What follows is a summary of the JFTR application to children and BAH. As long as the noncustodial parent pays child support at least equal to BAH II –Diff (the difference between BAH II amounts with and without dependents) that parent is entitled to an allowance in consideration of such support. Thus, if the member resides off base, he is entitled to BAH in his own right and, in addition he is entitled to BAH II-Diff as a result of the child support he is paying. If residing on base, he will receive only BAH II-Diff [section 10106D]. There are exceptions wherein the member will not receive dependent allowances for a child, as follows:

- the child is a member of the armed forces, (U10102B1)
- the child's whereabouts are unknown and absence unexplained, (U10102B4)
- child resides in government quarters without paying rent (U10102B6) (except that BAH *is* authorized is the child who normally resides with the estranged or former spouse visits the member in private quarters for over 90 days, in which case BAH is authorized for the entire period of the visit U10126),
- member pays child support for child residing in custody of another service member who either lives in government quarters or receives BAH II-WITH on behalf of the child (U10102B7)
- unless the parties agree otherwise, where both parents are service members, the custodial parent will receive the BAH on behalf of the child, regardless of the amount of child support the non custodial spouse is required to pay (U10206)
- the member fails to provide support as required (U10106);
- both husband and wife are active duty members and each maintains his/her private residence near their respective duty station. Both are entitled to BAH, but only one can receive BAH/D. (U10202)

Implications for separation agreements, court orders. It is advantageous to the parties to ensure that the child support is at least equal to BAH II-Diff. If so, the member will, in most instances, be entitled to an allowance for the child. If the member is to receive temporary custody for a substantial period, it will be to his advantage for such continuous periods to equal or exceed ninety days, normally entitling him to an allowance for the child. Attorneys trying to maximize the member's allowance by providing a sufficient amount of member custody should consult the source regulation.

Loss of FSA.

The military member with dependents is entitled to Family Separation Allowance (FSA) for those months in which he is deployed or which he has executed unaccompanied orders overseas. In accordance with the Department of Defense Financial Management Regulation, at Volume 7A, chapter 27, section 270201h, the member is not considered to have dependents for FSA purposes, and thus not entitled to FSA if the sole dependent has been sent to an institution for over a year or for an indefinite period that may be over a year; the court order gives the member physical custody of the child for less than 14 days during a month, the member's dependent parent does not reside in the member's home, and:

–“ *the sole dependent is a spouse legally separated or child(ren) in the legal custody of another person. The exception occurs when the member has joint physical and legal custody of the child(ren) and the child(ren) otherwise would reside with the member at least 14 days each month but for the current assignment...*”

Although the DoDFMR is several hundred pages long, nowhere does it define the term “legally separated.”

The Defense Finance and Accounting Service (DFAS) administers FSA and has promulgated regulations clarifying the term “legally separated” for FSA purposes [See PAAN 13-07/ RPAAN 11-07, PAAN 18-07 RPAAN 11-07]. Per DFAS regulation, a service member is legally separated if there is a judicially recognized separation, such as North Carolina's Divorce from Bed and Board. (NC Gen Stat 50-7). Additionally, a date specified in a divorce decree as the date of separation is the date at which FSA is cut off (or will be recouped). This interpretation, while clear, leads to anomalous results. A service member who provides his unit administration chief with a divorce decree from North Carolina will have FSA recouped back to the date of separation listed on the decree (or if no date on the decree, then the separation date on the incorporated separation agreement.) There will be a separation date because a period of one year separation is a prerequisite for absolute divorce in North Carolina. Conversely, the service member who provides his unit administration chief with a divorce decree from a no fault state such as Arizona or California will not have FSA recouped. Consequently, it may be possible to avoid recoupment of FSA if the divorce occurs in a state that does not require a period of separation and whose divorce decrees will therefore not indicate a date of separation. If no jurisdiction exists for divorce in such a state, or it is too expensive, or otherwise not feasible, the parties should at least plan for the likely recoupment of FSA upon divorce. Deploying service members should be made aware of the likely recoupment and advised to set aside any FSA received for that rainy day which is almost certainly coming.

Recommendations for the Armed Forces

The Marine Corps dependent support order needs clarity with respect to its application to the service member's forfeiture of BAH where dependents reside in government quarters and the service member does not. Does such BAH forfeiture suffice as dependent support? What additional support, if any, is required? Is this matter to be decided by the text of the regulation or will the regulation give the commander discretion? Reasonable minds will differ on the solution, but the Order needs to be clear.

New commanders should be routinely schooled on their service's respective support order and their critical role in receiving and adjudicating nonsupport complaints.

The Orders of the Navy and the Air Force should be strengthened by taking the general approach used by the other armed forces. Set a specific dollar amount for the support standard which absolutely must be met unless the commander determines that certain well defined exceptions have been met. Such Orders will be far easier to enforce, particularly through criminal sanction.

The DoDFMR should be amended such that members receive FSA whether they are "legally separated" or not. FSA is not a balm to soothe the pain of separation from loved ones; rather, it is extra cash to help the member cope with additional costs resulting from being separated from person(s) to whom he has a financial obligation. Accordingly, FSA should be terminated only when there is no such support obligation; such as when a separation agreement or a court order waives financial support.

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