CROSSING THE MILITARY MINEFIELD:

A JUDGE'S GUIDE TO MILITARY DIVORCE IN NORTH CAROLINA

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Introduction

During any period of active-duty deployments and Reserve/Guard mobilizations, there will undoubtedly be many plaintiffs or defendants who are on active duty in the armed forces. This guide highlights some of the issues related to the impact of military service on civil litigation, financial obligations, divorce, pension division, custody and family support in North Carolina.

Starting the Lawsuit – Service of Process

The best summary for serving military personnel is the North Carolina School of Government's guide to service of process on military installations, written by Mark Weidemeier. It can be found on the website of the North Carolina State Bar's military committee. Go to www.nclamp.gov and click on "Resources."

When the servicemember (SM) is stationed overseas, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters may be useful. The United States is a party to this, and so are many nations where a SM might be stationed, such as Spain, Belgium, Egypt, Germany, the Czech Republic, Italy, Japan, Turkey, the Netherlands and the United Kingdom. The School of Government has also published a summary of the Hague Service Convention, which can be found at the same website as in the preceding paragraph.

For some countries, the documents will have to be translated; see the Appendix in 28 U.S. Code for further information. Use of the Hague Convention may involve a long wait. Sometimes it may take several months to get the documents translated, serve them on the central authority and then wait for them to be served on the individual in question.

A few notes about service of process in Germany might be helpful, since there are many military personnel from the U.S. armed forces located there.

- There is no "US citizen" exception to the Hague Service Convention regarding service of U.S. state court process. The rules of the Convention apply irrespective of the nationality of the person to be served.

- Germany has very specific rules requiring personal service in the German statutes. Service can be quashed if it conflicts with the terms that Germany imposed in adopting The Hague Service Convention. One such condition is that the papers served bear a German translation. This is true even if the person to be served is an American citizen who doesn't speak a word of German; the rules must be followed even through this may be contrary to common sense. Another condition is that service be through the Central Authority, not by direct mail. The Central Authority has sixteen separate offices in Germany, one for each province.
- Information on how to serve civil process is available at the U.S. State Department's website, http://travel.state.gov. Click on "Law & Policy" tab and then look under "Judicial Assistance" at the particular country involved.

Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act (SCRA) took effect on December 19, 2003. It was a complete revision of the statute known as "The Soldiers' and Sailors' Civil Relief Act," or SSCRA.

Stay of Proceedings – Statutory Provisions

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

50 U.S.C. App. § 521 clarifies how to proceed in a case where the other side seeks a default judgment (that is, one in which the SM has not entered an appearance by filing an answer or otherwise). Where the SM has not entered an appearance, the SCRA requires a court to grant a stay of at least 90 days when the applicant is in military service and –

a. the court decides that there may be a defense to the action, and such defense cannot be presented in the absence of the SM, or
b. with the exercise of due diligence, counsel has been unable to contact the SM (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

When the SM has actual notice of the proceeding, a similar mandatory 90-day stay (minimum) of proceedings applies upon the request of the SM. At 50 U.S.C. App. § 522 are the conditions for a SM's obtaining a continuance (called a "stay of proceedings" in the Act) for 90 days or more. Here are the requirements:

- Elements of a Valid 90-Day Stay Request -

Does the request contain…

• <u>A statement</u> 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?

• <u>A statement</u> from the SM's commanding officer stating that the SM's current military duty prevents appearance…

• and stating that military leave is not authorized for the SM at the time of the statement?

Note that there are no "technical requirements" for the request. It can be in an e-mail or a letter, on an affidavit or the back of a cocktail napkin, in a phone call or through a Western Union telegram. It does not have to be on "the appropriate court form" – after all, some of these requests may be written while the SM is literally getting on the plane for a deployment at the "green ramp" at Ft. Bragg, or from primitive conditions at Forward Operating Base Cobra. The application does not have to be notarized, it doesn't have to be witnessed, and it is not required to have the court and case heading on the document (IF a document is used).

TIPS FOR THE JUDGE

Query: How does this provision affect an action for custody by the non-custodial dad when mom, who has custody, gets mobilization orders and takes off for Afghanistan, leaving the parties' child with her mother in another state? How does this section affect the custodial mom who suddenly stops receiving child support when her ex-husband is called up to active duty from the Guard or Reserve, leaving behind his "day job" and the monthly wage garnishment for support of their children? Many thousands of Guard/Reserve personnel are in "active status" every month of the year; no longer is work in the Reserve Component (or RC, as Guard/Reserve personnel are called) merely "weekend duty."

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

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Query: What is the appointed attorney supposed to do – tackle the entire representation of the SM, whom he has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm's way? And, by the way, who pays for this? There are no answers in the statute; look to local rules or state statutes for responses, if any.

An application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. § 522(c).

The SCRA does not just apply to active-duty SMs. 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.

TIPS FOR THE JUDGE

"A Judge's Guide to the Servicemembers Civil Relief Act" gives a detailed explanation of these and other provisions of the statute and includes a two-page checklist for judges to use in applying the terms and protections in the Act. Get it from the website of the North Carolina State Bar's military committee. Go to www.nclamp.gov and click on "Resources." You can also visit the home page of the Army JAG School, http://www.jagcnet.army.mil/TJAGLCS. When you get there, click on "TJAGLCS Publications" and look for JA 260, "Servicemembers Civil Relief Act Guide," written by the faculty of the Army JAG School in 2006. Another excellent source of information is the public preventive law page of the Army Judge Advocate General's Corps, found at http://www.jagcnet.army.mil/legal.

Stay of Proceedings – Practical and Case Law Considerations

The statute does not authorize playing games or abusing the system. The decision on whether or not to grant a delay must be based on the specific reasons and military exigencies advanced by the member who moves for a stay. In particular, the Act calls for fairness and equity *for both sides* when courts are considering the effects of military service. Here are some practical pointers as to the stay provisions:

- A SM who is a party, not a witness, in civil judicial proceedings may request and obtain a stay of proceedings if the specified conditions above are met.
- The request for a stay can be made by the member or on the court's own motion. It may also be in the form of a communication from the SM, his commander or first sergeant, the chaplain, his wife or his mother – anyone who has knowledge of the situation, so long as the terms above for a stay request are met.
- After the initial "90-day stay" (actually, the statute states that this is for a minimum of 90 days and may be longer), the court should make a finding that the member's ability to prosecute or defend is "materially affected" because of his or her active duty service if a further stay is to be granted.
- Once the court makes this finding of material effect, the member is entitled to a stay for such period as is necessary until the material effect is removed.
- Since courts are reluctant to grant long-term stays of proceedings, they can and should require members to act in good faith and be diligent in their efforts to appear in court.

- Examples of pre-SCRA domestic cases that are covered include divorce (*Smith v. Smith*,[1] holding that it was error to deny a stay in a divorce action where alimony was an issue), custody (*Lackey v. Lackey*,[2] 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*,[3] holding that a SM's absence in a paternity action materially affects his ability to defend, unless specific findings are made otherwise).

Pre-SCRA Cases in North Carolina and the Motion for Stay

The court may issue a stay order on its own initiative. But the judge is not expected to be a mind-reader. The court need not assume that a member is asking for a stay when no request has been brought to the judge's attention. A case on this point is *In the Matter of the Paper Writing of Sue H. Vestal*,[4] which involved a *caveat* proceeding to challenge the probate of a will. The trial court dismissed the *caveat* after finding that the caveators had willfully and blatantly ignored the court's orders for discovery compliance without reasonable excuse and that they were openly disrespectful to the court. One caveator, Colonel Weaver, contended that he was prevented from responding due to his involvement in the Gulf War.

Interrogatories were served on the caveators in March 1989. In May 1990, with the interrogatories still unanswered, the propounder filed a motion to compel. In August 1990, when Iraq's invasion of Kuwait (which would lead to the Gulf War) occurred, the caveators filed an answer to the motion to compel, requesting a two-week extension of time. At a hearing on the motion to compel, the judge granted the two-week extension and ordered the caveators to pay $150 in attorney's fees in thirty days. The propounder filed another motion to compel in September 1990. At a hearing in October 1990 the judge found that the caveators had still not answered the interrogatories and had paid the $150 two weeks late. At that point the judge struck the pleadings of the caveators and dismissed their case with prejudice.

On appeal, Colonel Weaver alleged that "he was not required to respond because of protections afforded him" by the SSCRA, the federal statute which preceded the SCRA. The North Carolina Court of Appeals found that Weaver had neither filed a motion for a stay nor an affidavit with supporting facts. Without a request for a stay by the caveator, the only remaining issue was whether the court should have granted a stay on its own motion. The Court stated that:

- The only information about Weaver's military service was found in two unverified papers signed by his attorney;
- They failed to show whether Weaver ever requested military leave to answer the interrogatories; and
- They failed to provide sufficient information to show that the trial court abused its discretion by failing to issue a stay on its own motion.

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1 *Smith v. Smith*, 222 Ga. 246, 149 S.E. 2d 468 (1966).
2 *Lackey v. Lackey*, 222 Va. 49, 278 S.E.2d 811 (1981).
3 *Mathis v. Mathis*, 236 So. 2d 755, (Miss. 1970).
4 *In the Matter of Vestal*, 104 N.C. App. 7396, 411 S.E. 2d 167 (1991).

The court quoted with approval from an Indiana case which noted that "the man in service must himself exhibit some degree of good faith and his counsel some decree of diligence."[5]

TIPS FOR THE JUDGE

The lessons in *Vestal* are several. First and foremost, the SM should always file an application seeking a stay when one is needed. As a practical matter, the SM generally shouldn't ask for a stay if he is only answering interrogatories. Phone calls and correspondence can be used to prepare answers most of the time. And the SM shouldn't have called upon the SSCRA for help when the events that led to the Gulf War occurred *18 months after* the interrogatories were served. Finally, the court need not accord protections to a party who is in the armed forces when good faith and due diligence have been lacking on his part.

Material Effect

Aside from the initial 90-day stay, any additional stay will usually revolve around the effect military service has on the member's ability to participate in the preparation and trial of his case. If a court finds there is a material effect on the ability to defend or participate in the litigation, then the court *must* order a stay. If the judge denies the request for a stay, he or she *must* make findings of fact about lack of material effect and ensure that there is sufficient evidence in the record to warrant a denial.

What is "material effect"? There is no one definition of this term. The court should make a finding of "material effect" when specific facts show that a member's ability to prosecute or defend a civil suit is impaired by military duties, such as inability to obtain leave to appear in court at the designated time and place, or to assist in the preparation or presentation of the case.

The impairment can be geographic, logistical, legal or economic. A *geographic* effect might be the member's location in a faraway assignment which makes it impossible for her to attend trial. A *logistical* problem might be the member's inability to receive and send mail or e-mail due to the nature of the assignment, or his "24/7" duties, leaving no free time to devote to the litigation. A *legal* impairment might be involved if a servicemember has classified orders which may not be lawfully released to the court for a determination of her availability. An *economic* disability would be the inability of the servicemember to hire an attorney or retain an expert. An adverse material effect might also be found when military service impairs substantially the member's ability to pay financial obligations, such as child support or alimony.

Material Effect – An Example

What should be considered "material effect" is found in a 1981 N.C. Supreme Court case, *Cromer v. Cromer*.[6] In that case the SM was ordered to pay increased child support in November 1979. Prior to that hearing, the SM attempted to obtain a stay under the SSCRA. His commander wrote a letter to the judge stating that operational requirements prevented the SM from taking leave until January 1980. He subsequently signed an affidavit on the SM's behalf

[5] *Id*., 104 N.C. App. at 744, 411 S.E.2d at 170, quoting from *Sharp v. Grip Nut Co*., 116 Ind. App. 106, 111, 62 N.E. 2d 774, 776 (1945).

[6] *Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981).

and sent it to the district court, stating that Jack Cromer, the defendant, was "Chief of the Boat," the sole interface between enlisted men and officers on the nuclear submarine *USS Skate*, that operations at sea were scheduled for the last two weeks in November 1979, and that he had advised Mr. Cromer that he would not be permitted to take leave.

Now the mystery begins. For some reason, the letter and affidavit only showed up as part of the petition for discretionary review in the Supreme Court (after the Court of Appeals had upheld the trial court's increase in child support and order of garnishment). They were not part of the record on appeal. They did not appear in any lower court file. And counsel for the defendant, in oral argument before the Supreme Court, explained that he was unaware of these documents at the time the orders were entered in the trial court.

Regardless of this irregularity -- or perhaps because of it -- the Court reversed the judge's orders, stating that "the trial court might have proceeded in another manner had it been aware of these documents." [7]

TIPS FOR THE JUDGE

The *Cromer* case shows that *it's never too late*, that the stay application can still help the SM in the appellate process to show "material effect" of military service. It also shows the value of a detailed and specific affidavit and motion requesting only a limited stay, for about two months in this case. Although not stated as such by the Supreme Court, the facts in the affidavit clearly demonstrate the *material effect* which military duties had on Jack Cromer's ability to defend himself.

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 and an opportunity to challenge the request. Perhaps she can establish that the information provided is false. Perhaps she wants to challenge a stay letter which is not signed by the commanding officer or which does not contain the necessary statements. If the SM's request applies to the initial 90-day stay, the non-moving party may want to show that 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, or that in some other way his allegation of "material effect" is false. 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 the judge inquires into "material effect" after the initial 90-day stay, there are several points to consider in arriving at a fair and just solution for all parties. The reported cases recognize that just wearing of the uniform is not, in itself, a material effect which will prejudice the member's ability to defend or prosecute.

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*:

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[7] *Id*., 303 N.C. 307, 278 S.E.2d 518 (1981).

> 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.[8]

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), some courts have stated that *both parties* may be required to produce evidence on the issues.[9]

The starting point for the court's inquiry into material effect, after the initial 90-day stay, should be the statute itself. Ordinarily a subsequent stay should be granted when the court finds that the SM's military service has a material effect on his or her ability to prosecute or defend. 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, it is the SM who is best able to explain the nature of the material effect and how it impacts detrimentally on the lawsuit's progress and his or her participation.

TIPS FOR THE JUDGE

Instead of simply presuming such an effect because the SM 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 some 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 non-moving party, for example, might request copies of the SM's current LES (Leave and Earnings Statement), his military orders, any leave request submitted by the SM to his commander, and the response thereto.

As a condition of granting a stay, the judge can require the SM to submit a detailed statement as to how his military service has a material and adverse effect on his 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 SM 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. Alternately, his duties may be 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."

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[8] *Boone v. Lightner*, 319 U.S. 561, 87 L. Ed. 1587, 63 S, Ct, 1223 (1943).

[9] *E.g., Gates v. Gates*, 197 Ga. 11, 28 S.E.2d 108 (1943).

Conclusory Statements

A case under the SSCRA illustrating the problem with broad, conclusory claims is *Booker v. Everhart*.[10] 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 a stay, 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 the following facts:

- The defendant-husband, who volunteered for naval service, was sent to the Philippines fourteen months after the lawsuit was filed;
- There was no showing in his affidavit that he requested leave or would not be able to obtain leave to be present at trial;
- 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;
- His deposition had already been taken in May 1974 by plaintiff in the presence of counsel for the defendants; and
- Defendant-husband, an attorney licensed in North Carolina, took no steps to seek a speedy determination of the case prior to going on active duty.

Based on the above, the Court 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, rather than on the necessities of military service.

TIPS FOR THE JUDGE

The lessons of the *Booker* case are that the member must present more than a vague and conclusory stay application. He should make a clear and detailed showing that 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.

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

Contested Claims, Stages

The judge may inquire regarding which claims are contested and which are not, so as 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 and support case is before the court, perhaps the absent SM will not be contesting custody but only challenging child support. Most divorces granted in North Carolina (and other states as well) are uncontested; perhaps the divorce should be severed from other claims and allowed to proceed. The defendant's request for a stay of proceedings in a case which only involves an uncontested divorce should be closely scrutinized.[11] Nothing in the Act says that a stay must apply to *all* claims and issues in a lawsuit, regardless of contested status.

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 SM. As an example, take 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 servicemember 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 which are contested.

At the outset of many domestic actions is a stage which is called "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 SM 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 generated electronically by DFAS (Defense Finance and Accounting Service) at mid-month and the end of the month for all servicemembers, and posted at the secure DFAS website for pay matters, https://MyPay.dfas.mil. Production might be difficult, of course, if the SM were patrolling the perimeter of a base camp in the Middle East or participating in a covert mission in Somalia or Peru. Except for such exigent circumstances, there should be no reason for the court to stay the initial disclosure requirements for the SM in an appropriate case.

As a further example, consider a document request under Rule 34 for production of the SM's last three federal tax returns. A SM stationed far away from his books and records might have difficulty in complying with this request. However, this might not be a valid assumption if, for example, the SM's current wife were in possession of these documents back at their home and could easily provide them to him or to the court. The court could also require the SM simply

[11] See, *e.g.*, *Palo v. Palo*, 229 N.W.2d 577, 1980 S.D. LEXIS 460 (S.D. 1980).

to request a copy of the tax returns from the Internal Revenue Service rather than producing copies which he has in storage at his now faraway home. Once again, there would be a difference in the court's response if the SM were fighting at the front lines or assigned to a secret mission.

In each scenario, the court should examine the requested action, determine whether the request is reasonable, what actions the SM must take in response, how his response may be affected prejudicially by his military duties, and whether the response is impossible or difficult. The court should, in other words, examine *whether* and *how* the SM 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 difficult or impossible, then a stay is in order. If neither of these is involved, the court may find that the response should be required but more time allowed to the SM, or perhaps that substituted actions ought to 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.

Even when the SM is able to prove that he cannot be present for a certain proceeding, the court needs to determine whether his *presence* is required. Take a contested child support case as the example. The non-custodial father's presence may not be needed if the mother can make the case without him. If he hasn't requested a variance from the child support guidelines, then the only issues under the Child Support Guidelines are parental income, the cost of work-related day care, and the child's portion of the medical insurance premium. In a military case, the Defense Department publishes all the income information necessary for the court to consider – base pay, Basic Allowance for Housing and Basic Allowance for Subsistence, as well as special pays and allowances. There is no premium for military medical insurance, known as TRICARE Standard. The mother would be able to produce evidence of her income and work-related day care. Thus the military father's presence would not be necessary (without a guideline variance request.)

TIPS FOR THE JUDGE

In cases decided under the SSCRA, some other courts have used creative approaches to avoid granting stays requested in stay motions.[12] In *Keefe v. Spangenberg*,[13] 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*,[14] the court denied an

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[12] The military member may be nominally involved but is not a "necessary party" to the contested litigation. In *Bubac v. Boston*, 600 So. 2d 1951, Miss. LEXIS 228 (Miss. 1992), the father was in the armed forces. He was found by the court, however, not to be 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. In *Shelor v. Shelor*, 259 Ga. 462, 383 S.E.2d 895 (1989), 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. These are, of course, pre-SCRA cases. There is no such distinction in the SCRA between "temporary orders" and any other kind of orders. The SCRA applies equally to all.

[13] *Keefe v. Spangenberg*, 533 F. Supp. 49, 50 1981 U.S. Dist. LEXIS 17480 (1981).

[14] *Jackson v. Jackson*, 403 N.W. 2d 248 (Minn. App. 1987).

SSCRA stay because under state law the obligor's presence was not necessary in a proceeding to review the amount of support. In *In re Diaz*,[15] the court stated that "court reporters may take depositions in Germany including videotape depositions for use in trials in this country."

Military Leave

In weighing a request for a stay, the court should keep in mind that members from all branches of military service, from the lowest sailor or airman to the highest-ranking general or admiral, are entitled to thirty days of leave each year, accruing at the rate of 2.5 days per month. The court can take judicial notice of this fact.[16] Military leave must be requested, and a commander may turn down a leave request when military necessity so dictates. Current overseas postings usually last around three years for an "accompanied tour" (with family members), and less than that for unaccompanied tours in such host countries as Turkey, Korea and Iceland. This information regarding leave is important in most cases where the SM is claiming nonavailability.

When in doubt as to whether a SM has shown material effect due to military service which prejudices him in participating in the litigation, the judge has the discretion to request a more specific statement from him or her, detailing the SM's efforts to appear in court, for example, and the next court date when he would be available. Such an affidavit should also detail the SM's attempts to obtain the assistance of counsel. In addition, it should describe just what the leave request contained; if the SM were to request two weeks of leave, effective immediately, to attend a child support hearing, the commander would probably turn it down, even though no such amount of time would be needed in reality. In order to judge the SM's good faith, the court should inquire into what was contained in the leave request, rather than relying on broad generalities, such as "My commander denied me any leave to attend this hearing." It would be a good idea to ask for a copy of the leave request. In one case, the SM said that he needed a month's leave to attend a hearing; naturally his commanding officer refused the leave request.

TIPS FOR THE JUDGE

The court should also keep in mind that SMs who are going through basic or advanced training may be unable to appear in court due to the training schedule. No extra days are built into the schedule to accommodate court dates, depositions or family emergencies. When a trainee is absent from the training program, this frequently means that he or she must repeat the same training program all over again.

Length of the Stay

After the initial 90-day stay, a further stay of proceedings may last for such period as is just, up to and including the remaining term of service of the member. The duration of the stay may be the period of service plus 60 days. But the key is reasonableness. In *Keefe v. Spangenberg*,[17] the court granted a soldier's stay request for a one-month continuance but denied his request for a stay until his expected date of discharge three years later. Some judges will grant a limited of three or four months, after which the court will review the facts again to

[15] In *re Diaz*, 82 B.R. 162, 165, No. BR-87-40517-COL (U.S. Bankruptcy. Crt. February 5, 1988).
[16] *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E.2d 905 (1982).
[17] *Keefe v. Spangenberg*, supra note 13.

determine whether a further stay is needed.

If the SM's unavailability 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 servicemember were a sailor deployed for a six-month mission on a ship or a soldier on a field exercise for several weeks. 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. If there is no reasonable and substantiated request for leave, it may be difficult for him to establish "due diligence."

TIPS FOR THE JUDGE

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 or counsel for the non-military member may 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 required the armed forces to issue regulations to facilitate the granting of leave for servicemembers to appear in court and for administrative paternity and child support hearings.[18] Department of Defense Directive 1327.5, "Leave and Liberty," 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.

Diligence, Good Faith

Most courts hold that a member must exercise due diligence and good faith in trying to arrange to appear in court.[19] In *Judkins v. Judkins*,[20] the lawsuit started in August 1988 when the wife filed for divorce from bed and board, custody, child support, alimony and equitable distribution. The defendant, an Army lieutenant colonel stationed at Ft. Bragg, filed an answer that contained counterclaims for custody, child support and equitable distribution. Discovery was initiated before April 1989 and continued through August 1990, when Iraq's invasion of Kuwait started the deployment of American armed forces that led to the Gulf War. At that time "the Court continued the matter over because of Defendant's service with the United States military in that action."[21]

But that didn't end the dispute. Although combat in the Gulf War was finished in February 1991, the plaintiff continued to attempt to obtain information from defendant through discovery and the defendant continued to resist. The plaintiff filed motions to compel discovery

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[18] *See* Pub. L. No. 104-193 § 363, 1001 Stat. 2105 (1996) and DOD Dir. 1327.5, "Leave and Liberty," Change 4 (September 10, 1997).

[19] 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), and *Palo v. Palo*, 299 N.W. 2d 577 (SD S. Ct. 1980).

[20] *Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139 (1994).

[21] *Id*., 113 N.C. App. at 734, 441 S.E.2d at 139 (1994).

responses in July 1991, December 1991 and February 1992. In February 1992, a year after the Middle East conflict ended, the judge entered an order requiring the defendant to produce documents to the plaintiff. The defendant still didn't comply with the discovery order and plaintiff's requests.

Trial was set for April of 1992. It was continued at defendant's request. The trial judge contacted the Army and was told that defendant was "on a mission" and that he would be available in July 1992. The court ordered a continuance until July 1992. When that date rolled around, defendant's attorney again requested a continuance, stating that defendant would be available to complete discovery and the pretrial order on or before August 3, 1992, and would be available for trial on August 31, 1992. The court once again granted a continuance, setting the case peremptorily for hearing on August 31, 1992.

There should be little surprise about what happened next. The defendant failed to respond to discovery, failed to complete the pretrial order and moved for a continuance on August 31, adding (apparently for the first time) a motion for a stay under the SSCRA. The trial court found that the defendant had failed to exercise good faith and proper diligence in appearing and resolving his case and then denied the motions of defendant.

The Court of Appeals framed the issue as whether the trial judge had erred in denying the defendant's motion for a stay. It stated that:

- The only evidence of defendant's unavailability was a letter from the Army stating that the defendant was to depart for Southeast Asia on August 30, 1992 for about 46 days;
- There was no evidence in the record as to whether the SM had at any time requested leave to defend the action or whether leave was likely to be granted upon request; and
- The defendant made no showing as to how his defense would be prejudiced or his rights materially affected by his absence.

The Court of Appeals accepted the trial court's determination that the SM had failed to exercise good faith and due diligence, quoting approvingly from the *Vestal* case.

TIPS FOR THE JUDGE

The *Judkins* case teaches that a stay will not be granted without a showing of good faith and proper diligence, and that the courts will usually need to see a statement from the SM as to whether leave was available and had been requested. A stay is not forever. Contrary to the popular notion of many members, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. The stay is, in fact, intended to last only as long as the material effect lasts. Once this effect is removed, the opposing party should immediately request the lifting of the stay of proceedings. In the event of further resistance by the military member, the court should require supporting affidavits for deciding the issue.

When a servicemember demonstrates bad faith in his dealings with the court, a stay of proceedings should be denied. In *Riley v. White*,[22] a soldier failed to submit to blood tests in a

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

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*,[23] 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.

Mobilization and Family Support

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

Let's look at the situation of Captain Jane Green, a member of the Marine Corps Reserve. She is divorced and pays child support to her ex-husband. In civilian life she works as a school teacher earning $35,000 a year. But with 8 years of creditable service, when she goes on active duty her base pay alone is almost $70,000 a year. Even without the Basic Allowance for Housing, or BAH, and the Basic Allowance for Subsistence, or BAS, she's already earning twice her civilian salary. She probably wouldn't get a reduction in child support when she is recalled to active duty. In fact, her ex-husband might even apply for an *increase* in child support!

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

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

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

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

If he is only asking for an amount of child support indicated by the child support guidelines, then he might hire an attorney to file the motion, provide his latest LES to the attorney, and hope for the best at time of trial. If he needs to testify, because of a variance request or for some other reason, then it may be advisable to obtain his testimony by video deposition, telephone, Internet connection, or videoteleconference.[24]

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

- What if the other parent has just lost her job?
- What if the SM has income from other sources -- such as interest, dividends or rental income?
- What if the child's needs have recently increased due to medical or educational reasons and the child needs *more*, not less, in child support?
- What if child support was set low to begin with (several years ago) and there hasn't been any increase since then?
- And finally, what about the SM's own expenses? Maybe they will be lower while he or she goes on active duty. This might be the case, for example, if the member applies for a reduction in home mortgage interest (down to 6%) and asks for a stay (that is, a suspension) of loan payments due to lower income on active duty, pursuant to the SCRA. There may also be a reduction if the SM is living in the barracks at an overseas outpost instead of an expensive apartment in a civilian environment. All of these circumstances would have to be considered by the court in ruling on a motion to reduce support.

TIPS FOR THE JUDGE

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

Mobilization and Custody/Visitation

Multiple custody and visitation problems can occur in the case of a mobilized Reserve or Guard member as well. The following case is a good example. Jane Doe is a sergeant in the Army Reserve. She has custody of Debbie Doe through a court order entered after a full hearing. John Doe, the father, was properly served, is a party to the suit and participated in the hearing. He obtained scheduled visitation rights in the hearing and he exercises them regularly.

Sergeant Jane Doe is mobilized on short notice. She is being sent to Fort Benning, Georgia, for a month of in-processing, after which she will be deployed to Kuwait (which is

[24] *See Keefe v. Spangenberg*, supra note 13 and *In re Diaz*, supra note 15.

definitely an "unaccompanied tour"). In light of this, she decides to drop off the daughter with her parents in Raleigh for the duration of her deployment. She even gives her folks a power of attorney prepared pursuant to her Family Care Plan, a requirement for SMs with dependents.

However she does not notify John Doe. When Mr. Doe hears of the transfer, he files a motion seeking sole custody. He might even resort to self-help by going to Raleigh to pick up Debbie Doe without a court order, thereafter filing his motion. Or he might not even file a motion, leaving it up to the grandparents to seek court intervention.

Upon his filing, he may or may not request *ex parte* emergency custody of the daughter. He does, however, need to serve Jane Doe. How can he locate her? Perhaps he can obtain help from her prior Reserve unit, getting a copy of her orders. Maybe the Red Cross can help in locating her.

And then there's the problem of serving her. If she is in transit to Ft. Benning, he can get the documents to a deputy sheriff or process server for coordination with the base provost marshal to serve her there. If she's on board ship, good luck! If she's in Kuwait, he could try certified mail, return receipt requested.

Assuming Jane Doe is served, she will probably take the papers to a JAG office, speak to a legal assistance attorney there (who will likely be a young judge advocate 1-5 years out of law school), who will help by sending the appropriate communications from Jane and from her commanding officer requesting a stay of proceedings for a minimum of 90 days. There also may be a request for an extended stay, since Jane isn't due back from Kuwait for a year; the request would allege that Sergeant Jane Doe's military service has a material and prejudicial effect on her ability to defend against John's motion.

What will happen when the judge is advised of the stay motion? What should the court do? If the judge stays the proceedings, then what happens to Debbie Doe? What if Dad knows where she is and wants custody of her for the duration? Denying Mom's motion would appear to violate federal law -- the SCRA makes it clear that, if the applicant follows the procedures for requesting a 90-day stay, the court *must* grant the stay.

But granting Jane's motion means that the court cannot decide who takes care of Debbie during the deployment. It means that the decision is left to one of the parties – Jane Doe – rather than to the court. Essentially it ties the court's hands on a matter of crucial importance, the day-to-day care of a minor child. Judges *don't like that*!

TIPS FOR THE JUDGE

Possibly the judge will decide to move forward with testimony and solicit Jane's participation through electronic means, such as telephone or use of the Internet (e.g., Skype). Perhaps the judge will designate the order as "interim" or "temporary," as that might solve things on a temporary basis, without prejudice to either party. There is no "right answer" to such a problem – only difficult alternatives.

Mobilization Cases

To see how the above scenarios play out, let's take a look at some real-life cases involving mobilized and deployed SMs. The general rule illustrated by these cases is that "children come first," regardless of the rules of delay which are found in the SCRA.

Ex parte K. N. L. [25] is a case focusing on the misconduct of the SM who is the custodial parent – in this case, the mother. More and more SMs today are women. And some single mothers, putting their personal affairs aside to serve their country, attempt to put their ex-husbands and former partners aside in the arena of custody.

Here the mother, never married, shared custody with the father, who had the daughter during the school year in Alabama while the mother had her in Pennsylvania during the summer. When the father filed a custody petition in May 2002, followed by the girl's departure to live with the mother for the summer months, it should come as no surprise that the child was not returned to dad at the end of the summer for school. Instead, the mother filed a limited appearance for the purpose of moving to dismiss the father's custody petition. When that failed, she refused to allow the father to see the child and moved to challenge his paternity. When paternity tissue-testing was ruled out, based on *res judicata* (both parties had signed an affidavit of paternity at the hospital when the child was born), mom dropped "the bomb" – her Army Reserve unit was mobilized for Iraq on February 10, 2003.

The father's motion for *pendente lite* custody was heard amid allegations that the mother's unit had been activated, that she had given legal guardianship of the child to the maternal grandmother in Florida, and that one week before the scheduled hearing

> … the mother's new husband had traveled to the home of the maternal grandmother in Florida to retrieve the child and to take her back to Pennsylvania to live with him while the mother was on active duty.[26]

The mother, of course, moved to stay the *pendente lite* proceeding until she returned from her overseas assignment. The judge denied the stay and granted temporary custody to the father.

The mother appealed. The Alabama Court of Civil Appeals stated that, when a military parent requests a stay of proceedings in a custody or visitation case, "the trial judge should consider the impact of such a stay on the other parent's right to visit and communicate with the children."[27] Agreeing with the trial judge on the denial of the stay, the court pointed to the SM-mother's actions:

> The juvenile court would have been well within its discretion in determining that the mother had intentionally delayed the custody proceedings and had used her active-duty orders in a last-minute attempt to effect a long-term denial of the father's rights to visitation and custody.… The juvenile court would also have been within its discretion in deciding that the best interests of the child would be

[25] *Ex parte K.N.L.*, 872 So.2d 868 (Ala. Civ. App. 2003).
[26] *Id*. at 870.
[27] *Id*. at 871.

> served by having her reside, pending a final hearing on the merits of the custody issue, with her natural father rather than with a third party such as the maternal grandmother or the mother's new husband.[28]

The court concluded that the SSCRA, which was the law at the time, 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 them, not to be employed unjustly.

Temporary Custody Trumps SCRA

Lenser v. McGowan[29] also involved a deployment custody dispute. Here the father was on active duty and had the parties' daughter for about ten days at the end of 2003, just before his return to Ft. Hood, Texas in preparation for 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 child's 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 a stay was automatic and it should have been initially granted, thus preventing the court's 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."[30]

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*,[31] 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. Town*[32] also urged the court to find that a stay of proceedings

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[28] *Id*. at 872.
[29] *Lenser v. McGowan*, 2004 Ark. LEXIS 490 (2004).
[30] *Id*. at 6, quoting *State Game & Fish Comm'n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001).
[31] *Jelks v. Jelks*, 207 Ark. 475, 181 S.W.2d 235 (1944).
[32] *Diffin v. Towne*, 2004 NY Slip Op 50465U, 2004 N.Y. Misc. LEXIS 622 (May 21, 2004, unpublished).

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 an excellent illustration of a scenario which often occurs when the custodial parent is mobilized from the Guard or Reserve.

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. She pointed out that she had prepared a Family Care Plan, which is required by military regulations, and this document 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 local 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.[33] 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.[34]

The court stated that

> …the mother's argument… is incorrect if she intends 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.[35]

The judge pointed out 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. In addition, 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

[33] *Id*. at 8.
[34] *Id*. at 17.
[35] *Id*. at 18.

> 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.[36]

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.[37]

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 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.[38]

TIPS FOR THE JUDGE

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*[39] 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.

Custody Through Power of Attorney

The transfer of custody to a non-parent, in this case a new spouse, was the issue in *Lebo v. Lebo*,[40] 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.

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[36] *Id*. at 19-20 (emphasis in the original).

[37] *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).

[38] *Id*. at 21.

[39] In *re Marriage of Grantham*, 695 N.W.2d 43 (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's 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).

[40] *Lebo v. Lebo*, 886 So. 2d. 491, 2004 La. App. LEXIS 164 (2004).

Here the SM attempted to use 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.[41] The Court of Appeals reversed the trial court and remanded for a hearing to determine temporary custody of the minor child, stating 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.

TIPS FOR THE JUDGE

These 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 a stay of proceedings when the non-moving party is in the military and unavailable. Judges find it untenable 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.

Delegation of Visitation Rights

When a servicemember with visitation rights is deployed, sent on temporary duty (TDY) or assigned to a remote tour which is designated as "unaccompanied," how can he deal with visitation? Are his visitation rights simply forfeited, or can they be assigned to a family member, one who can step into his shoes during the military absence? Can someone replace him for visitation? Dozens of states, including North Carolina, have answered YES by passing legislation which allows the judge to delegate the visitation rights of an absent noncustodial parent to a family member with a close and substantial relationship to the child, so long as it is in the best interest of the child.[42]

The *McQuinn* case in Alabama[43] illustrates why such delegation powers are needed in family court and why a narrowly drawn statute does not involve constitutional objections. The decision allowed 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:

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[41] Note that a power of attorney is, for the military parent, an excellent means to address two of the court's concerns in *Diffin v. Towne*, namely, that "the step-father…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." The SM-parent, in anticipation of mobilization, can obviate these two concerns by executing special powers of attorney to allow the new spouse or the grandparents to have access to educational records and to make medical decisions for the child.

[42] *E.g.*, N.C. Gen. Stat. § 50-13.7A(d).

[43] *McQuinn v. McQuinn*, 866 So.2d 570 (Ala. Civ. App. 2003).

> We note that although the mother, not the father, 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.[44]

The appellate court 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.[45]

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

> 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

[44] *Id*. at 573.
[45] *Id*.

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."[46]

Paternity

For each of the military services, paternity is a civil matter to be determined by the courts. A military commander will not become involved in disputed cases, other than to refer the servicemember (or the nonsupport complainant) to the civil courts for resolution of this issue. The commander has no authority to order DNA testing or to enforce compliance with a court order to submit a tissue sample. Tissue samples may be taken at most military medical treatment facilities.

Child Support

Military regulations specify what is required for support when the parents of a child are separated (or not married) and there is no court order or agreement for child support. These are known as interim support regulations. However a court order is the best way to obtain enforceable child support. An order supersedes the interim support regulations. Each branch of the armed services requires that SMs comply with valid orders for child support, wage assignment or garnishment.

Military Pay

Military compensation consists of basic pay and other entitlements. Base pay is the wage paid to a servicemember. It is subject to the usual taxes that are deducted from anyone's paycheck – federal and state income tax withholding, Medicare, FICA, etc.

The BAH, or Basic Allowance for Housing (formerly known as Basic Allowance for Quarters), is a nontaxable housing allowance paid to all military personnel who do not live in government quarters or who are separated from their family members. The higher the rank of the SM, the higher the BAH. The amount is different if there are dependents or no dependents, but there is no increase based on *number of dependents*. The amount also varies according to the

[46] *Id*. at 574-575.

member's geographic location in recognition of the varying housing costs throughout the world. Those stationed overseas and living off-base receive a non-taxable OHA (Overseas Housing Allowance). Information on these allowances is found at:
http://militarypay,defense.gov/Pay/Allowances.html

TIPS FOR THE JUDGE
The BAH tables are available at www.defensetravel.dod.mil/site/bah.cfm.

Entitlements may also include the Basic Allowance for Subsistence (BAS), special skill pay (such as flight pay for pilots or "jump pay" for those who are on airborne status), and bonuses (*e.g.*, reenlistment bonuses). Pay received in a combat zone is tax-free, and the IRS publishes an excellent guide to the various forms of pay and allowances, as well as the tax benefits for SMs and family members, the *Armed Forces Tax Guide*, IRS Publications 3 (available at www.irs.gov)

To find out how much Sergeant John Smith is earning, review a copy of his monthly pay statement, called the Leave and Earnings Statement, or LES. It shows his Base Pay, BAH, BAS, tax withholdings, voluntary allotments to pay bills or support, and accrued leave. Carefully review his allotment deductions -- they can be used for elective payments (*e.g.*, an allotment can be for a car payment or an automatic savings plan). Also pay close attention to the following:

- How much leave has he accrued (to determine whether a further SCRA stay is justified)?
- What state does he claim as his legal residence (*i.e.*, domicile) for income tax purposes? This may be important for jurisdictional issues.

While federal and state tax returns may be helpful in discovering other income, don't use them to look for military entitlements, since some of these are *tax-free*.

TIPS FOR THE JUDGE
To find out how to read and understand the LES, simply type into your favorite search engine the phrase, "read an LES."

Setting Child Support

The court should consider *all* pay and allowances in setting the support obligation.[47] The BAH and BAS amounts should be added to the member's base pay, as the reasonable value of the "in kind" income. This would be appropriate whether the SM is actually receiving these allowances or whether the SM receives the benefit "in kind" by living in government quarters and eating at the "base dining facility," which used to be called the "mess hall."

The court should also note that these allowances are not taxable. State guidelines are based on gross pay and assume that all pay is taxable, and thus it may be appropriate to adjust

[47] See, *e.g.*, *Tamayo v. Arroyo*, 15 A3d 1031 (R.I. 2011); In *re Marriage of Stanton*, 118 Cal. Rptr. 3d 249 (Ct. App. 2010); and In *re Marriage of McGowan*, 638 N.E. 2d 695 (Ill. App. 1994).

military pay upward to factor in the nonexistent taxes. Since the Guidelines presume that all income is taxable, converting these two sums into their taxable equivalents would allow application of the Child Support Guidelines as originally intended by its drafters. The amount of the adjustment would be the actual tax rate on the member's taxable income. It would also be appropriate to add in the member's constructive share of FICA and Medicare taxes that would apply if these allowances were so taxable.

As an example of how to recalculate the taxable equivalent of the BAH and BAS, assume that John Smith earns $24,000 a year as his base pay, and that he receives $500 in nontaxable BAH and BAS. Assume also that this means that his actual tax rate is 20%. To convert the nontaxable entitlements into their taxable equivalent for federal income tax purposes, follow the steps below:

A. Find his actual tax rate. [This is 20%, as shown above]
B. Convert this to a decimal and subtract it from 1.00. [This would be 1.00 - .20, or .80]
C. Take this figure and divide it into the sum of the BAS and BAH above. [$500 ÷ .80 = $625]
D. The result will be the federal taxable equivalent of these nontaxable allowances. Thus $625 is the taxable equivalent of the BAH and BAS of $500 for federal tax purposes.

Use the same approach for state taxes if the member is from another state. If he or she is from North Carolina, the judge can use 7% as a close estimate of the tax rate. The Tennessee Court of Appeals approved this approach to "grossing up" the allowance amounts in *Wade v. Wade*.[48]

Medical Expenses

At the outset it is vital to find out whether the nonmilitary parent has private medical insurance covering the children and what is covered. A typical policy may have an annual deductible amount of $250, cover 80% of most medical expenses and exclude entirely such items as elective surgery, routine physical examinations and dental work.

Military dependents are entitled to medical treatment at military hospitals and are covered for civilian health care purposes by TRICARE, which covers a portion of allowable medical expenses. This is the military equivalent of medical insurance. TRICARE is a cost-sharing program. Just like any private medical insurance program, there is an annual deductible amount and co-payments are required. Information about TRICARE can be found at the TRICARE website, www.tricare.mil.

As to coverage alternatives for the children, one option for parents who are both working is to have each parent maintain insurance. This provides "double coverage" (usually through TRICARE and a less expensive employer-sponsored plan) and reduces uncovered medical expenses to an insignificant amount. Another alternative is to have the noncustodial parent maintain medical coverage (either through TRICARE or private insurance) while both parents split the uncovered portion equally (or in some specified ratios, such as 75% for dad and 25% for

[48] *Wade v. Wade*, 115 S.W.3d 917 (Tenn. Ct. App. 2002).

mom). The advantage of this option is that it puts part of the financial burden on the custodial parent, who otherwise would not have any incentive to economize on health care expenses.

For health care coverage, it is first necessary to determine whether the child (or spouse in an alimony case) is enrolled in the Defense Enrollment Eligibility Reporting System (DEERS). If the family is intact, the military member (also known as the "sponsor") initiates the dependent's enrollment by filling out DD Form 1172. When the family is separated, the custodial parent can start the process by mail and then come in to the nearest military base to sign the final documents. With a child over ten years old, a military dependent ID card will be issued and the child's picture will be taken.

Once a child is enrolled in DEERS, he or she is eligible to receive medical care in two ways:

- Medical care and medications may be obtained from military hospitals and clinics at no charge; or
- TRICARE can be used with civilian health care providers. It is usually best to use military facilities for medical care, since it cuts down on paperwork, time and costs. The branch of service of the enrollment site doesn't have to match the branch of service of the military parent; thus although the father may be in the Air Force, the family members can get treatment at the nearest Navy facility, for example.

Children born outside marriage are entitled to medical care TRICARE if the following conditions are met:

a. The child is acknowledged and supported by the member; or
b. There is a judicial decree of paternity.
c. A military I.D. card is issued to prove eligibility. If the member will not cooperate in getting a card for the child, his or her commander can assist in obtaining an ID card.

Garnishment

Federal law allows garnishment for enforcement of periodic family support obligations.[49] The pay that is subject to garnishment includes: (1) federal civilian employee pay and retirement annuities; (2) military active duty pay (basic pay and certain bonuses, but not BAH or BAS); (3) military retired pay; (4) Reserve pay; (5) any other "remuneration for employment."[50] To obtain a garnishment[51] of military pay, one must first get a court order which directs DFAS to withhold child support from the pay of the noncustodial parent. This must then be served on DFAS. The order must include member's name, status (*i.e.*, active duty, civilian, retiree, etc.), and Social Security Number.

The amount subject to garnishment is the lower of the state or federal ceiling. The federal rule allows garnishment of 50% to 65% of net pay, depending on family situation and length of time in arrears.[52] The state ceiling is set by state law. G.S. 110-136 says that 40% of

[49] *See* 42 U.S.C. § 662(f).
[50] *See* 5 C.F.R. § 581.
[51] *See* 15 U.S.C. § 1673.
[52] 42 U.S.C. § 665; 32 C.F.R. § 54.

disposable pay (gross pay less Social Security, taxes and mandatory retirement) is the maximum for single orders. With multiple orders the maximum goes up to 45% or 50%.

A member's defenses include claims that the garnishment was for an impermissible purpose, noncompliance with 5 C.F.R. § 581, subsequent litigation enjoining the garnishment and appeal of the underlying support order if a stay was granted by the court.

Involuntary Allotment

Another way to attach military pay for support purposes is through the use of an "involuntary allotment." This is actually a wage withholding action that's enforceable against active duty servicemembers. It can be used to attach active duty military pay (basic pay plus bonuses, *plus* BAH and BAS in some cases). It's usually easier to obtain than a wage garnishment, and more money may be available.[53]

An involuntary allotment requires an initial order that establishes support. This may also be an order for alimony *and* child support. There must be an arrearage in an amount equal to or greater than *two months' support* under the order. Once this happens, the court or the state Child Support Enforcement Agency can send a notice to the military requesting initiation of an involuntary allotment. The "notice" can simply be a letter, and no prior notice to the obligor is necessary. The notice is sent to the same office as for garnishments (see below), and it is transmitted by registered or certified mail. It must include the member's name and SSN as well as a statement that the arrearage is equal to or greater than two months' support (and, if true, that the obligor is in arrears for more than 12 weeks). Also include a copy of the underlying order certified by the clerk of court, the date the allotment should stop and a statement certifying that the writer is an "authorized person" under 32 C.F.R. § 54.3 (such as a state CSE agent, clerk or judge). The allotment will be established for the amount of the monthly support obligation. If arrearages are sought, they must be requested and there must be a court order requiring the payment of accrued arrearages.

The federal limits are the same as for garnishment (50%-65%), but the amount of pay available for attachment usually is greater. A servicemember's defenses, which must be established by affidavit and evidence, are that:

- The underlying order has been vacated or modified; or
- The amount alleged to be in arrears is erroneous.

Custody and Visitation

Some people claim that there's a bias against military parents in custody cases. As with everything else in the area of custody litigation, the real answer to this question is "It depends." If the defendant, Sergeant John Smith, 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 on his ability to care for a child, then he's surely going to have an uphill battle in asking for custody while he's on active duty. These can often prove to be insurmountable obstacles when a judge is trying to find stability, continuity, predictability and security for a

[53] *See* 42 U.S.C. §665 and 32 C.F.R. Part 54.

child.

On the other hand, military duty can be a real advantage if the issues of scheduling and deployments can be addressed. The quality of schools on base is generally good, and they are run by a federal agency, DODDS (Department of Defense Dependent Schools). Most military installations have excellent recreational facilities and an active Dependent Youth Activities program. There are good day care facilities for those with normal duty hours (and sometimes those with unusual hours, as well). 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. So it's really possible to make a great argument for military custody, so long as the moving party is able and willing to provide for the children and make the sacrifices that custody involves.

Visitation can be challenging in military cases. It's best to plan for *long distances*, even if the parties are both "local" at the start of the case. Many military personnel find themselves reassigned in a PCS (permanent change-of-station) move after three to five years at one installation. Thus Sergeant Smith could be traveling to Germany or Korea in the next move.

TIPS FOR THE JUDGE

When drafting a visitation schedule for the children, the judge should 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 the local practice suggests. The long distance one, on the other hand, 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.

When there is an issue involving returning a child who is being kept in violation of an order, the court should use DOD Directive 5525.9. It requires compliance of servicemembers, employees, and family members outside the U.S. with court orders requiring the return of minor children who are subject to a court order regarding custody or visitation. The Army's regulation implementing this is found at Chapter 4 of AR [Army Regulation] 608-99.

Divorce Issues

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

A cursory reading might lead some parties to conclude that North Carolina has a special domicile rule granting to a SM the right to apply for a divorce here when he has been stationed in the state for six months:

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

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

This would appear to allow Sergeant Smith, who has been stationed here for over six months but is domiciled elsewhere, to file here for divorce against his wife who does not live in North Carolina and is not domiciled here.

But that's not the case. The statute deals with *residence*, not domicile. A 1961 decision of the N.C. Supreme Court, *Martin v. Martin*,[54] has construed the language in the statute as meaning that Sergeant Smith's living on base does not disqualify him from claiming that he is residing in this state. The Court stated that this statute is not to be interpreted to mean that true *domicile* in North Carolina is not required for the court to assert jurisdiction over the marriage of the parties. Domicile still is required, and this restrictive interpretation of G.S. 50-18 will mean that, when neither party is domiciled here, the divorce lawsuit will have to be filed elsewhere.

The only person who would be adversely affected by this interpretation of G.S. 50-18 is the servicemember who is domiciled elsewhere, wants to get a divorce here and has a spouse who is a legal resident of another state. This SM could not get a divorce in North Carolina. As the *Martin* case points out, a servicemember may still claim North Carolina as his domicile (so long as he can prove it at the hearing on divorce). A key issue if this occurs will be whether the member has been paying state income and personal property taxes. And a servicemember can still get a divorce here if the member's spouse is residing here and domiciled in North Carolina. Here is a checklist to use with domicile questions:

DOMICILE CHECKLIST FOR SERVICEMEMBERS AND SPOUSES

✓	**Question or issue**	**State(s), Years**	**Comments**
	For each item below, answer with information covering the last five years (or other period)		
	1. Physical location		
	Describe the dates, places, and circumstances of your residing here in State A in the past __ years on a separate sheet of paper.		
	2. Taxation		
	Where have you paid state income taxes?		
	(If applicable) Where have you paid local income taxes?		

[54] *Martin v. Martin*, 118 S.E.2d 29, 253 N.C. App. 704 (1961).

	Where have you paid personal property taxes?		
	Where have you paid real property taxes?		
	Where have you paid any other state-related taxes (e.g., intangibles tax)?		
	Which state have you shown as your home on DD Form 2058, State of Legal Residence Certificate?		
	Which state have you shown for your address on your Form 1040 (federal income tax return)?		
	3. Real estate		
	In what state(s) do you own residential real estate?		
	In what state(s) do you own other real estate?		
	4. Motor vehicles		
	For each motor vehicle you own (or partly own), give the state(s) of your driver's license(s).		
	Where is each motor vehicle registered?		
	Give the state of your driver's license.		
	5. Banking		
	In what state(s) do you have a checking account?		
	A savings account?		
	A safe deposit box?		
	Other investment accounts?		
	6. Voting		
	In which state(s) are you registered to vote in state, county, or local elections?		
	In federal elections?		
	7. Schooling		
	In which state(s) have your children attended school?		
	In which state(s) have you obtained resident tuition for yourself or a family member?		
	Nonresident tuition?		
	8. Other		

Military Entitlements and Divorce

The granting of a divorce in military cases will affect the privileges, legal rights and entitlements of Mrs. Smith, the nonmilitary former spouse, in several ways. First of all, she will lose her military entitlements in most cases -- ID card, base housing, commissary and post exchange privileges, medical care at on-base facilities. She will need to turn in her military ID card. Arrangements must be made for future medical care and insurance for her, since she will no longer be entitled to TRICARE coverage for herself or treatment in a military medical facility. Here's a helpful table prepared by the U.S. Army Judge Advocate General's Legal Center and School that outlines many of these issues regarding entitlements:

Uniformed Services Former Spouses' Protection Act	Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes			
	Number of Years			
Benefits for Former Spouses	0 to <10	10 to <15	15 to <20	20 or more
Division of Retired Pay	X	X	X	X
Designation as an SBP Beneficiary	X	X	X	X
Direct Payment				
Child Support	X	X	X	X
Alimony	X	X	X	X
Property Division		X	X	X
Health Care				
Transitional			X	
Full				X
Insurance	X	X	X	X
Commissary				X
PX[2]				X
Dependent Abuse				
Retired Pay Property Share Equivalent		X	X	X
Transitional Compensation	X	X	X	X

Be sure to consider carefully any issues that must be preserved in the pleadings, such as alimony and property division. If property division claims are not preserved in the divorce action, Mrs. Smith could lose her claim to a part of his military retirement rights (see below).

Military Pension Division

A 1982 federal law, the Uniformed Services Former Spouses' Protection Act, or USFSPA, allowed the division of military pensions as marital property as of June, 1981. The Act is found at 10 U.S.C. § 1408. Its primary purposes were:

- To let the states treat disposable military retired pay as marital or community property, according to each state's law;
- To allow certain former spouses to receive a share, up to 50%, of disposable military retired pay directly from the military retired pay center, which is usually DFAS (the Defense Finance and Accounting Service);[55]
- To let some former spouses continue to receive commissary, exchange, and health care benefits;
- To allow for the payment of premiums for the Survivor Benefit Plan (to cover former spouses) out of retired pay; and
- To authorize certain former spouses who are victims of abuse to receive a court-ordered share of military retired pay even though the military member was not

[55] A ten-year overlap of marriage and service is required for receipt of payments.

retired, but rather was punitively or administratively discharged because of the misconduct involving domestic abuse.[56]

The rules interpreting USFSPA are located in the Financial Management Regulation of the Defense Department.[57]

Jurisdictional Issues for Military Pension Division

State exercise of jurisdiction over a military pension must, of course, comply with state jurisdictional statutes. With a military pension, there is a whole new set of federal jurisdictional rules. The statutory conditions are set out in 10 U.S.C. § 1408(c)(4) , which specifies that a state may exercise jurisdiction over a member's pension rights *only if*:

- It is his domicile; or
- The member consents to the court's jurisdiction; or
- The member resides there *but not due to military assignment*.

These are the *exclusive federal rules* for deciding whether the court has the power to divide pension rights.

TIPS FOR THE JUDGE

Don't interpret as "domicile" any information offered to the court about "Home of Record." This is a technical term the armed services use for the state where a person enters the military for this period of service, such as the location of a reenlistment. It is an administrative entry which isn't meant to specify the *legal residence* of the military member. It also designates the place to which a SM's personal belongings will be shipped upon discharge.

Domicile, as a basis for dividing military pensions under 10 U.S.C. §1408(c)(4), means the "fixed home" of the military member, the place to which he would return if told to "go home." It is the place where a member votes, pays taxes and is eligible for in-state college tuition, the place where a person resides indefinitely and to which he intends to return after temporary absences. A member of the military may be stationed far away from his or her legal home.

The importance of the member's actions -- which are a reflection of the intent of the individual -- cannot be overstated. Many military members claim Florida or Texas, for example, as their domiciles because these states do not have an income tax. A close analysis of most of these claims, however, reveals that there are no actions to back them up, such as voting or ownership of property in that jurisdiction, and sometimes that the member has never really resided in that state in the first place.

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[56] When a member is eligible for retirement but receives a punitive discharge from a court-martial or is discharged via administrative separation processing, the member's retired pay is lost. In certain cases where these terminations of service were based on dependent abuse, eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. *See* 10 U.S.C., §1408(h).

[57] Department of Defense Financial Management Regulation, DOD 7000.14-R (DoDFMR), Vol. 7B, ch. 29, Former Spouse Payments from Retired Pa, available at http://comptroller.defense.gov/fmr/07b/07b_29.pdf.

How do you find out Sergeant Smith's domicile? This should be done through discovery. Counsel can take his deposition and ask him "Where's home?" The spouse's attorney can serve document requests on him and ask for a copy of his LES, which contains an entry for "State Taxes" showing what state the member has listed for state tax withholding. Counsel can demand to see his DD Form 2058, "State of Legal Residence Certificate," which is executed along with his W-4 Statement for tax withholding purposes.

If Sergeant Smith is stationed in North Carolina and domiciled here, he can be sued here for pension division. If he is domiciled elsewhere, the non-military spouse may need to move to bifurcate the equitable distribution proceeding (and sue him elsewhere) if he does not consent to the court's jurisdiction over his military retirement rights.

It is permissible for a court to divide a military pension *based upon consent* of the military member to the court's exercising jurisdiction over the pension. Although this is a very complex area, a simple rule might be: "If he joins in the lawsuit, he's consented to the court's jurisdiction." And if he joins in the part of the lawsuit concerning equitable distribution of marital or community property, there's a pretty good argument that he's subjected himself to the jurisdiction of the court by *consent*.[58]

This issue -- what constitutes consent -- is a state law question, not one of federal law. As a general rule, any responsive pleading or request for affirmative relief (except a request for a stay under the Servicemembers Civil Relief Act) can be considered a general appearance sufficient to subject the member to the court's jurisdiction. In *Judkins v. Judkins*, the Court of Appeals noted:

> A general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner or any question other than that of the jurisdiction of the court over his person." *In re Blalock*, 233 N.C. 493, 64 S.E 2d 848 (1951). Other than a motion to dismiss for lack of jurisdiction virtually any action constitutes a general appearance. *Jerson v. Jerson*, 68 N.C. App. 738, 315 S.E 2d 522 (1984).... Defendant made a general appearance thereby consenting to personal jurisdiction by seeking the affirmative relief in his answer without contesting personal jurisdiction. *Stern v. Stern*, 89 N.C. App. 689, 367 S.E. 2d 7 (1988); *Hale v. Hale*, 73 N.C. App. 639, 327 S.E. 2d 252 (1985).[59]

Dividing the Pension

The division of military retired pay is an essential task for the trial judge. There are several SILENT PARTNER info-letters on military pension division at www.nclamp.gov, the website of the North Carolina State Bar's military committee. Under the Uniformed Services Former Spouses' Protection Act, or USFSPA, the retired pay center (usually DFAS) will honor

[58] A general appearance constitutes "consent." The member need not specifically consent to jurisdiction to divide the pension. *See, e.g., Kildea v. Kildea*, 143 Wis. 2d 108, 420 N.W.2d 391 (1988).

[59] *Judkins v. Judkins*, 113 N.C. App. 734 at 737, 441 S.E. 2d 139 at 140 (1994).

orders that divide something called *disposable retired pay*.[60] According to USFSPA, "disposable retired pay" means gross retired pay minus:

- recoupments or repayments to the federal government, such as for overpayment of retired pay;
- deductions from retired pay for court-martial forfeitures;
- most disability payments; and
- Survivor Benefit Plan premiums.[61]

Federal law prohibits the division of more than 50% of the member's disposable retired pay except in limited circumstances, such as successive divorce decrees. Except for Indiana and Arkansas (which require the pension to be vested), Alabama (which requires vesting, valuation and more than 10 years of military service concurrent with 10 years of marriage) and Puerto Rico (which does not allow the division of any non-contributory retirement plan), all states and territories make *some provision* for the division of military pension rights earned during marriage. Of course if the marriage was short, the nonmilitary spouse would only be entitled to a small portion of the retired pay since the amount of the pension she receives (or, for that matter, any other property acquired *in part* during the marriage) depends on how long she was married while the pension was being earned.

The law in North Carolina allows for two different approaches to pension division, a present-value setoff against other marital property, or a fixed percentage of the pension benefit from the employer.[62] This latter approach is used in most cases, since there is seldom sufficient marital property to offset the value of the pension. It is called the "if, as and when" division of a pension. The military pension is valued at the date of separation, even if the fixed percentage approach is used, and it is error to divide the pension without evidence of the pension's present value.[63] The method for determination of the present value of a deferred compensation plan or program is found in *Cochran v. Cochran*[64] and *Bishop v. Bishop*.[65] *Seifert v. Seifert* addresses the fixed percentage method for determining the division of pension and retirement benefits. Under the fixed percentage method, the court awards to the former spouse a percentage of that portion of the pension which was earned during the marriage. The latter is determined by multiplying the pension benefit by a fraction, the numerator being the total period of marital pension service (ending at date of separation) and the denominator being the total period of the employee spouse's participation in the plan.[66] This marital share is expressed as a percentage when the SM has already retired.[67]

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[60] 10 U.S.C. § 1408(c)(1). The U.S. Supreme Court upheld this requirement in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L.Ed. 2d 675 (1989).

[61] 10 U.S.C. § 1408(a)(4).

[62] *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E. 2d 504, *aff'd*, 319 N.C. 367, 354 S.E. 2d 506 (1987).

[63] *Cunningham v. Cunningham*, 616 S.E.2d 29 (N.C. App. 2005); *Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752 (N.C. App. 1997); and *Albritton v. Albritton*, 426 S.E.2d 80 (N.C. App. 1993).

[64] *Cochran v. Cochran*, 679 S.E.2d 469 (N.C. App. 2009)

[65] *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).

[66] *Id.* at 336, 346 S.E.2d at 508.

[67] The pension is not a "fund," so you cannot refer to the account balance or the part of the fund acquired during the marriage or at the date of divorce. It is a defined benefit, governmental program (not a "qualified plan" with monthly payments to the retiree. TSP (covered below) is a fund (Thrift Savings Plan), similar to a 401K plan.

The Guard and Reserve are different. The retirement system is based on points acquired, not on months or years of service. In general retired pay starts when retiree attains age 60, and 20 "good years" are required to be retirement-eligible (50 points are needed for a "good year"). Four points of inactive duty for training are acquired for a "drill weekend," and there is one point acquired per day of active duty (*e.g.,* 14 points for two weeks' annual training or "summer camp").

If the military member is still serving in the Guard or Reserve, then the pension division formula is expressed in terms of retirement points acquired. The order for a Guard/Reserve case might state, for example, that Mrs. Smith will be paid 50% times the final retired pay of Sergeant John Smith times a fraction, the numerator of which is the military retirement points acquired between date of marriage and date of separation, or 1,403 points, divided by the total military retirement points acquired by Sergeant John Smith during his military service. DFAS and the other pay centers will accept a "formula award" such as this.[68] For information on how to write the pension order, see the SILENT PARTNER, "Getting Pension Division Orders Honored by DFAS" at www.nclamp.gov.

VA Disability Payments

As noted above, disability benefits are generally excluded from "disposable retired pay."[69] One of the biggest problems in dividing military retired pay is the retiree's election of disability benefits from the Department of Veterans Affairs (VA) after the adjudication of pension division. If Sergeant John Smith has some service-related disability, he may elect to receive monthly disability compensation payments from the VA. To qualify for these, he would have to waive an equivalent amount of his military retired pay if his disability rating is less than 50%. Almost all retirees who can make this election do so. Why? There are two distinct benefits for the retiree who is divorced:

- First, while taking this option doesn't provide an increase in gross income, it does yield a net increase in pay since the VA portion of Sergeant Smith's compensation is tax-free. Thus if Sergeant Smith's pension (without disability) were $1,000 per month and his disability (less than 50%) were evaluated as equivalent to $600 per month in VA disability compensation, he could waive the same amount of taxable longevity pension in order to receive this amount with no taxes on it. His monthly benefits still total $1,000 but only $400 of this is subject to taxes if he makes this choice.
- In addition, the VA payment is not subject to division as property. Only the longevity-based portion of the pension is subject to pension division in state court.

"What you see is what you get" is the rule - to see what's there, check the account balance.

[68] Defense Finance and Accounting Service (DFAS) is the retired pay center for Army, Navy, Air Force, Marine Corps (and Reserve Components, also Air and Army National Guard). There are separate pay centers for retirees of the Coast Guard, Public Health Service, and the National Oceanographic and Atmospheric Administration. Retired pay for all of these agencies and services is covered by USFPSA. The methods for dividing military retired pay are outlined in the Attorney Instructions at: *www.dfas.mil/garnishment/usfspa/attorneyinstructions*

[69] *See also Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994) (holding that disability benefits are the separate property of the retiree but may be considered as a distributional factor). The Bishop case contains the best explanation of how to divide a defined contribution plan.

Courts will try hard to help the spouse when there is a disability reduction after the divorce. In *White v. White*, the North Carolina Court of Appeals stated that the trial court may "reconfigure" the pension division award if a retiree reduces the former spouse's share of military retired pay by electing VA disability (or increasing his disability rating) after entry of the equitable distribution judgment.[70]

The Court of Appeals addressed the issue of pre-judgment disability pay in *Halstead v. Halstead*.[71] In that case the parties separated after they had been married for 27 years of the husband's 30 years of military service. The military pension was 88% marital. At the time the trial court heard the case, the husband was already receiving disability payments, and he had waived regular retired pay to do so. Noting this, the trial court concluded that:

> Since the amount of disability rating is deducted from retirement benefits dollar for dollar, Plaintiff will be effectively deprived of her marital share (44%) of total monthly retirement benefits due to reclassification of retirement benefits to disability benefits. Therefore, the percentage of retirement payable to Plaintiff should be increased and the percentage payable to Defendant should be decreased to account for the partial disability deduction payment made to the Defendant.[72]

The trial court also ordered the husband to indemnify the wife by paying to the Clerk of Superior Court the amount of any reduction in his retired pay, and it stated that military retired pay was deemed to include any reductions thereof, such as disability pay.

The Court of Appeals stated that disability benefits are excluded from division in equitable distribution under 10 U.S.C. 1408(a)(4)(B) and (C). The Court also stated that the USFSPA preempts the judge's actions in redefining disposable retired by specifying in the above sections what is divisible as "disposable retired pay" and that the trial court could not substitute its own definition of military retired pay in lieu of the definition of disposable retirement pay as defined by the Congress.[73]

Since the change in percentage was, in effect, an ill-disguised division of disability pay, and since it gave to the wife more than her computed share of the remaining retired pay, it was forbidden. The Court likewise invalidated the indemnification clause in the trial court's judgment.

A complete explanation of the general rules regarding military pension division and the consequences of taking disability pay (including payments from the Department of Veterans Affairs and those called Combat-Related Special Compensation, made by the Department of Defense) is found in "CRDP and CRSC: The Evil Twins," found under SILENT PARTNER at www.nclamp.gov. When faced with a "disability deduction," the court can use two ways to deal with the problem from the standpoint of the non-military spouse.

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[70] *White v. White*, 152 N.C. App. 588, 568 S.E. 2d 283 (2002), *aff'd* 357 N.C. 153, 579 S.E.2d 248 (2003).
[71] *Halstead v. Halstead*, 164 N.C. App. 543, 596 S.E. 2d 353 (2004).
[72] *Id*. at 354.
[73] *Id*. at 357.

- When the SM has already retired and elected disability compensation, the court may award an unequal division of marital property in favor of the non-military spouse, due to the existence of separate property of the retiree which cannot be divided, as well as any other factors which may be available. The use of several distributive factors is recommended, since the Court of Appeals is more likely to uphold an unequal award when there are more distributive factors than just disability pay as separate property. The court should be sure not to use an exact dollar-for-dollar set-off against the disability compensation, or else the Court of Appeals will view this as a situation similar to that in *Halstead*.
- If the SM is not yet retired (i.e., still on active duty or in the National Guard or Reserve), then he or she has not chosen disability benefits yet since that occurs, if at all, upon retirement. The court can insert an additional clause in the judgment that recognizes the rights of the non-military spouse under *White*, such as this:

  If the defendant elects after entry of this judgment to waive retired pay in favor of disability compensation, then the plaintiff may apply to this court for an amendment to reconfigure this judgment to ensure that she receives a fair and equitable share of the military retired pay in light of this judgment's terms and the unilateral conduct of the defendant post-judgment.

Concurrent Retirement and Disability Pay (CRDP)

Congress has recently taken steps to modify the VA waiver requirement. In 2003 Congress passed legislation taking effect January 1, 2004 to allow concurrent receipt of both forms of payments – retired pay and disability benefits – for certain classes of eligible retirees. The restoration of retired pay is known as Concurrent Retirement and Disability Pay, or CRDP. It is found at 10 U.S.C. § 1414.

For those who have at least 20 years of qualifying military service and have a VA disability rating of at least 50%, the law authorizes a ten-year phased elimination of the Department of Veterans Affairs offset to retired pay. The disability does not have to be combat-related. The eligible retiree will see his retirement pay increase each year until the phase-in period is complete in 2014, at which time the retiree will be receiving an additional amount that is equal to the amount of retired pay waived. There is no phase-in for those who have a disability rating of 100%.

Combat-Related Special Compensation (CRSC) was also provided by Congress for those who have a disability of at least 10% directly related to the award of the Purple Heart decoration, or else a disability rated at 10% or higher related to combat, operations or hazardous duty. It is found at 10 U.S.C. § 1413a. CRSC is not longevity retired pay. It is an additional form of compensation for certain eligible SMs, designed to replace the pay lost when military retired pay is reduced by the amount of VA disability pay. It is not divisible as property and it is non-taxable. There is no phase-in for CRSC. While CRDP is automatic, the SM must elect CRSC, and such a choice wipes out any CRDP which is being received or has been paid. CRSC is

available for support determinations and for garnishment for support.[74]

CRDP will go a long way toward ameliorating the unfairness of unilateral changes in military pension division orders by retirees who, after the property division, obtain VA disability compensation and thus reduce the share of the former spouse. It will not, however, eliminate the problem entirely. The problem of dollar-for-dollar reductions in retired pay will remain for the former spouses of those individuals whose disability rating is less than 50%.

The legislation is more complicated than the brief overview given here. Those seeking further information should see the SILENT PARTNER info-letter, "CRDP and CRSC: The Evil Twins," at www.nclamp.gov.

Survivor Benefit Plan

An important part of military pension division is the Survivor Benefit Plan (SBP), which is an annuity that lets retired military members (both active duty and Guard/Reserve) provide continued income to specified beneficiaries at the time of the death of the retiree.[75] SBP is funded by premium payments from the retiree's paycheck. There's a slight tax break for the retiree because the amount of the SBP premium is not included in the taxable portion of retired pay.

What happens without SBP? "When the servicemember dies, the pension dies" -- the death of the member or the retired member stops all pension payments.[76] With SBP coverage, on the other hand, upon the retiree's death the designated survivor receives a lifetime annuity. SBP payments are 55% of the base amount selected. Thus, for example, if the total pension payment before division is $3,000 a month and that is the selected base amount, then the SBP payment would be $1,650 a month and the premium would be $195 paid during the lifetime of the servicemember, John Smith.

Advantages and Disadvantages

The advantages of SBP coverage for the former spouse, Mrs. Smith, are:

- Security: There is no "qualification" required; unlike commercial health insurance, no physical exam is needed for the military member and coverage cannot be refused or lapse while premiums are being paid. The member cannot terminate coverage.
- Life Payments: She will receive payments for the rest of her life upon the retiree's death (unless she remarries before age 55, which suspends benefits).

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[74] Eligible SMs may opt for CRDP or CRSC. The SM may change his selection once a year. This means that he can alternate between CRDP and CRSC yearly. "Knowing this, a claimant could receive the FSPA portion in 2004, then be told no funds are available when the member changes to CRSC. Then at a later date, the member could change it back to CRDP. The claimant would need to once again request her portion of the retirement pay. We are treating the initial switch to CRSC as a permanent termination of retired pay. In these cases, we would not make up any FSPA payments for the period after the member began to receive CRDP, but [would do so] prior to our resuming FSPA payments." E-mail, Kenneth A. Asher, Assistant General Counsel, DFAS-Cleveland, to the author, no subject (March 15, 2005) (on file with the author).

[75] 10 U.S.C. §§ 1447-1455.

[76] If the former spouse dies first, then the entire pension is restored to the retiree. Also, without the Survivor Benefit Plan, there is no deduction for the premium and thus there is more retired pay to divide between the parties.

- Tax-Free: Deductions from the husband's retired pay for SBP premiums are from his gross retired pay and thus reduce his pension income (and her share of it) for tax purposes.
- Inflation-Proof: Payments are increased regularly by cost-of-living adjustments to keep up with inflation.

The disadvantages of SBP are:

- Expense: Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive (as compared to term life insurance) and premiums do go up. Spouse of former spouse coverage is 6.5% of the selected base amount of retired pay in active-duty cases; for the Reserve Component SBP, the premium is about 10%.
- Inflexible: As a general rule, once SBP is chosen it can't be cancelled.
- No Cash Value: Unlike whole life or variable life insurance, there is no equity build-up and no cash value for SBP. And there is no return of premiums paid if Mrs. Smith dies before her husband.

TIPS FOR THE JUDGE

The court should always consider SBP coverage for the former spouse as part of marital property division. G.S. 50-20.1(f) provides that:

> In the event the person against whom the [pension division] award is made dies, the award to the recipient shall remain payable to the extent permitted by the pension or retirement system or deferred compensation plan or fund involved.

SBP Overview

For married persons on active duty, the election for SBP must be made before or at retirement.[77] Those in the Reserve or National Guard can make the election upon completion of 20 years of creditable service. If they take a pass on making the election, they have a second chance to elect SBP coverage upon reaching age 60.[78] Outside of this "second chance" for Guard and Reserve members, the choice to participate or not is generally irrevocable. A spouse loses eligibility as an SBP beneficiary upon divorce; there is no provision in the law which makes "former spouse coverage" an automatic benefit. The only means by which a divorced spouse may receive a survivorship annuity is if *former spouse coverage* is elected. A court order cannot, by itself, be used to create coverage. A signed election request must be submitted by the servicemember or retiree; if that individual fails or refuses to elect former spouse coverage, then the former spouse may submit a "deemed election" to establish coverage.

Military retirees may elect former spouse coverage for a spouse who was a beneficiary under the Plan when divorce occurred after retirement. A change in the law effective in 1986 allows state courts to order servicemembers to participate in SBP and to designate their spouses or former spouses as beneficiaries.[79] North Carolina law allows the court to distribute a survivor

[77] 10 U.S.C. § 1448(a)(2)(A).
[78] 10 U.S.C. § 1448(a)(2)(B).
[79] 10 U.S.C. § 1450(f).

annuity.[80]

A servicemember or retiree must elect former spouse coverage through DFAS within one year of the divorce. If the individual fails or refuses to make the required election, that member shall be deemed to have made such an election if the former spouse sends to DFAS: 1) a "deemed election" on DD Form 2656-1, 2) a copy of the divorce decree, and 3) a copy of the court order (if other than the divorce decree) mandating coverage. The request must be signed by the former spouse and received by DFAS *within one year of the order that grants her SBP coverage*.

SBP entitlement stops upon the former spouse's remarriage when this occurs before age 55. Annuity entitlement will be reinstated if the former spouse's marriage is terminated by death of the new spouse, divorce or annulment. There is no effect on SBP if the former spouse is 55 or older at the time of remarriage.

Receipt of a valid former spouse election terminates any existing SBP coverage of the retiree, and former spouse coverage cannot be combined with coverage for a current spouse. An election of former spouse coverage is basically irrevocable, meaning that the member may not terminate SBP coverage once it is elected; however, the law allows the member to request a change in annuity coverage if he or she remarries, or acquires a dependent child, and meets the requirements for making a valid option change. This request must be made within one year from the date of marriage or the child's birth.

A current spouse will be notified of the election to provide coverage for a member's former spouse, but she or he cannot veto that election.[81] When a separation agreement provides for SBP election, a court can order specific performance to enforce this provision.[82]

If a servicemember elects not to participate in SBP upon retirement, that decision is usually irrevocable. That decision, however, cannot be made unless the member's spouse concurs in writing.

SBP Checklist

Here is a checklist to help understand SBP and coverage for the non-military spouse.

✓	**Action or issue**	**Comments**
	SBP is a unitary benefit, cannot be divided between current spouse and former spouse	
	Election - SM on active duty is automatically covered; at retirement an election must be made, and spouse concurrence is necessary if member chooses no SBP, child coverage or coverage at base amount less than his/her full retired pay	

[80] *Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992).
[81] 10 U.S.C. § 1448(b)(2).
[82] *See, e.g., Rockwell v. Rockwell*, 77 N.C. App. 381, 335 S.E.2d 200 (1985).

	Guard/Reserve Election - There is one opportunity to make election at the 20-year mark (after 20 years of creditable Guard/Reserve service). At time of application for retired pay (about a year before SM turns 60), he/she is given another opportunity if no election made earlier. Spouse concurrence as above.	
	If representing the nonmilitary spouse, be sure to mandate former spouse coverage with SM selecting full retired pay as base amount.	SBP benefit payments equal 55% of the selected base amount, which can be $300 or above.
	Make sure that the SM/retiree is ordered to elect former-spouse SBP coverage with DFAS within one year of divorce; enclose divorce decree.	The SBP election form is DD Form 2656-1 for those on active duty or retire from active duty; those in the Guard/Reserve use DD Form 2656-5.
	If member/retiree has been ordered to make the election and he fails or refuses to do so, then former spouse may effectuate a "deemed election" to obtain coverage.	This is done on DD Form 2656-10.
	If above deadlines are exceeded, an application may be made for relief with the appropriate Board for the Correction of Military Records .	
	Send SBP documents to the address shown one the following forms: DD Form 2656-1, DD Form 2656-5 or DD Form 2656-10. Recommended to send by certified mail, return receipt requested	
	SBP is reduced by Dependency and Indemnity Compensation in certain circumstances. Go to www.vba.va.gov for full information, or call toll-free 1-800-827-1000.	

Problems with the "Mirror Benefit"

The problem with allocation of Survivor Benefit Plan coverage to a former spouse is the requirement that a survivor annuity payment (upon the death of the pensioner) may not exceed the pension share payment to the alternate payee, or former spouse, during her life. Thus the death share *mirrors* the lifetime share. This "mirror benefit" approach was the holding in *Workman v. Workman*.[83]

Here's the difficulty with applying this "mirror benefit" method to the military survivor annuity, or SBP when the trial occurs when the SM is still serving:

1. The member's final retired pay is not yet known.
2. Final retired pay is based on years of service, rank at retirement, and the average of base pay in the highest 36 months. It is also based on pay rates for military personnel, as determined by Congress.
3. None of these are known at the time of trial, and thus it is impossible to calculate a monetary amount which will be the "lifetime share" of the former spouse, which operates as the benchmark for the SBP amount that she would be awarded.
4. And therefore it is impossible to specify in the MPDO the base amount which the SM must elect at retirement, so that the resulting SBP amount (determined by multiplying 55% times the base amount) will equal the amount which the former spouse would receive as her share of the military pension.

[83] *Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992).

And here is the conundrum when the trial occurs after the SM has already retired:

1. The base amount has already been determined by the SM at retirement (and with spousal concurrence if the election is anything other than "spouse coverage" with full retired pay as the base amount).
2. The court cannot require a change in the base amount, since it will not be honored by DFAS.
3. The court must make a decision on SBP coverage since the deadline for submission to DFAS is "one year from divorce" if the SM/retiree does the election, and "one year from the date of the SBP order" when the SM/retiree fails or refuses to make the election and the former spouse effects a "deemed election."
4. Thus in most cases a court award of "former spouse" SBP coverage will mean that the former spouse will receive 55% of the retiree's full retired pay at his death, even though she cannot receive more than 50% of the pension under federal and state law.

The Thrift Savings Plan

Another component of the SM's retirement benefit is the Thrift Savings Plan (TSP). Members can contribute all or a percentage of basic pay, any special pay, incentive pay, or bonus pay they receive, up to a total of $15,000 annually. Incentive pay (e.g., flight pay, submarine pay, hazardous duty pay) and special pay (e.g., medical and dental officer pay, hardship duty pay, career sea pay) are identified and explained in Chapter 5, Title 37, U.S. Code. Bonus pay, which generally is a type of special pay, is addressed separately for election purposes because different TSP rules apply.

Contributions from pay earned in a combat zone do not count against this ceiling, but they are subject to a different limit: 25 percent of pay or $35,000, whichever is less. While a SM receives no direct tax benefit from contributing pay to the TSP that has been excluded from gross income, the earnings on those contributions are tax-deferred. When a SM makes a withdrawal, money is taken from the total account balance proportionally from taxable funds and tax-exempt funds. The amount attributable to tax-exempt contributions will not be taxable. The quarterly participant statement will show the tax-exempt balance separately.

There are several funds available, such as ones that invest in government bonds, commercial bonds, small businesses, and international companies. Contributions to the TSP come from pre-tax dollars. SMs do not pay federal or state income taxes on contributions or earnings until they are withdrawn.[84]

Dividing the TSP

A court order is required to divide the funds in a SM's Thrift Savings Plan.[85] Below is a sample order with alternate clauses:

[84] For a more complete explanation, see the TSP home page, located at http://www.tsp.gov

[85] Information about court orders and dividing TSP accounts is found at: www.tsp.gov/FormsandPublications/AllPublications/CourtOrdersandPowersofAttorney

Sample Retirement Benefits Court Order

***(Note:** A retirement benefits court order must meet the requirements found at 5 U.S.C. §§ 8435(c), 8467, and 5 C.F.R. part 1653, sub-part A. The Thrift Savings Plan will honor any court order or court-approved property settlement agreement that meets these requirements. Use of the format below is not required.)*

[court name]
In re the Marriage of:)
)
Petitioner)
)
and)
)
Respondent)

RETIREMENT BENEFITS COURT ORDER

THIS MATTER having come before the court on motion, and the court, after reviewing the motion and being otherwise fully advised of the matter:

***(Note:** Any **ONE** of the following examples would qualify to require payment from the TSP, although ambiguous or conflicting language used elsewhere could cause the order to be rejected.)*

ORDERED: [payee's name, Social Security number (SSN), and address] is awarded $_____ from the [civilian or uniformed services] Thrift Savings Plan account* of [participant's name, SSN, and address].

-OR-

ORDERED:

[payee's name, SSN, and address] is awarded ___% of the [civilian and/or uniformed services] Thrift Savings Plan account[s]* of [participant's name, SSN, and address] as of [date].

-OR-

ORDERED:

[payee's name, SSN, and address] is awarded [fraction] of the [civilian and/or uniformed services] Thrift Savings Plan account[s]* of [participant's name, SSN, and address] as of [date].

[*If the participant has both a civilian TSP account and a uniformed services TSP account, the court order must expressly identify the account to which it relates.]

***(Note:** The following optional language can be used in conjunction with any of the above examples.)*

FURTHER ORDERED: Earnings will be paid on the amount of the entitlement under this ORDER until payment is made.

Signed this [day] day of [month], [year].

BY THE COURT:

Judge

The Thrift Savings Plan is governed by U.S. Code Title 5, Chapter 84, Subchapters III–IV, as well as 5 C.F.R. Part 1653 (Subpart A for court orders dividing the TSP, and Subpart B for orders regarding alimony or child support). The website for Thrift Savings Plan orders and other forms is http://www.tsp.gov. Look for "All Publications" under *Forms and Publications*. The website contains a sample Retirement Benefits Court Order, sample language for a garnishment order for TSP funds, and "Court Orders and Powers of Attorney," a booklet for attorneys to help them prepare orders. Note that the above-mentioned pamphlet states under "Tax Treatment":

> **If payment is made to the current or former spouse of the participant,** the payment is reported to the Internal Revenue Service (IRS) as gross income for the recipient spouse for the tax year in which the payment is made.
>
> **If the payment is made to someone other than the current or former spouse of the participant (e.g., a child or a support enforcement agency),** the payment is reported to the IRS as gross income for the participant for the tax year in which the payment is made.
>
> **A payment in response to a retirement benefits court order or legal process is not subject to an early withdrawal penalty tax.** Such distributions are exempt from the early withdrawal penalty tax under the Internal Revenue Code.

Thus, if the former spouse receives funds with which to pay her attorney under the first of these paragraphs, she will be taxed on the proceeds received. If, however, the court were to order payment of attorney fees directly from the TSP account of the SM/retiree, then the tax burden would fall upon the shoulders of the latter.

Documents Needed

Documents and forms, which the court may need to understand military pay and retired pay, include the following:

a. Leave and Earnings Statement for active-duty personnel (DFAS Form 702)
b. "How to Read Your LES" on DFAS website (www.dfas.mil)
c. Retirement Points Accounting System Statement for Guard/Reserve personnel
d. Retiree Account Statement for retired personnel (DFAS-CL Form 7220)
e. "20-year letter" for Guard/Reserve personnel as to SBP election ("Notice of Eligibility")
f. DD Form 2656-1 (SBP election form for those on active duty or retired from active duty)
g. DD Form 2656-5 (election for Guard/Reserve members)
h. DD Form 2656-10 (deemed election form for former spouses)
i. If a document cannot be obtained voluntarily or through discovery from the member, then obtain from DFAS, other retired pay center (Coast Guard, Public Health Service, NOAA), the Guard/Reserve headquarters or state adjutant general's office, or other military agency, as applicable, by submitting a court order or a subpoena which has been signed by a judge.

Military Medical Coverage and Divorce

Federal law grants certain medical (and other) privileges to unremarried former spouses of military members. These are statutory entitlements; they belong to the nonmilitary spouse if she or he meets the requirements set out below. They are not benefits which can be awarded by the court or withheld.

If the former spouse was married to a member (or former member) for at least 20 years, the member performed at least 20 years of creditable service, and there was an overlap of at least 20 years between these two, then the spouse (also called a "20/20/20" spouse), is entitled to full military medical care, so long as she doesn't remarry before age 55. These "full benefits" include TRICARE (military medical insurance) and treatment at military hospitals on a space-available basis, if not enrolled in an employer-sponsored health plan. He or she is also entitled to commissary and exchange privileges.[86]

If the former spouse was married to a member or former member for at least 20 years during which he performed at least 15 years of creditable service (also called "20/20/15" spouses, for 20 years of service, 20 years of marriage and 15 years of overlap), and the former spouse is not enrolled in an employer-sponsored health plan, then there are limited benefits. If the decree date is on or after April 1, 1985, then she is entitled to full military medical care, including TRICARE, for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, she may purchase a conversion health policy[87] under the DOD Continued Health Care Benefit Program (CHCBP), a health insurance plan negotiated between the Secretary of Defense and a private insurer, within the 60-day period beginning on the later of the date that she ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe.

Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(2)(H) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.[88] Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is *not* part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse may also obtain indefinite medical coverage through CHCBP (under 10 U.S. Code 1078a) if she or he meets certain conditions. The former spouse:

- Must be entitled to a share of the servicemember's pension and SBP coverage;
- May not be remarried if below age 55;
- Must pay quarterly advance premiums; and

[86] 10 U.S.C. § 1062.
[87] 10 U.S.C. § 1086(a).
[88] 10 U.S.C. § 1078a(g)(1)(C).

- Must meet certain deadlines for initial application.

Details regarding application for this "CHCBP-indefinite" coverage may be found at www.tricare.mil/chcbp/default.cfm. The coverage is the same as that for federal employees, and the cost is the sum of the following: premium for a federal employee, plus the premium paid by the federal agency, plus 10%. This amounts to about $350-400 per month.

A former spouse who is eligible may apply for an ID card at any military ID card facility. He or she will be required to complete DD Form 1172, "Application for Uniformed Services Identification and Privilege Card." The former spouse should be sure to take along a current and valid picture ID card (such as a driver's license), a copy of the marriage certificate, the court decree, a statement of the member's service (if available) and a statement that he or she has not remarried and is not participating in an employer-sponsored health care plan. Judges may neither grant nor withhold ID card privileges; this is regulated solely by federal law.

Drafting and Submitting the Order

A military pension division order requires specific findings of fact and decretal provisions. There are also specific logistical steps required to serve the order on the finance center and get it approved for direct payment. The findings of fact in such direct-pay orders should include:

- Addresses of plaintiff and defendant
- Social Security Numbers of the parties[89]
- Statement that the member's rights under the Servicemembers Civil Relief Act were protected.
- Branch of service of military member
- Years of marriage and of service
- Grade/rank of military member
- Jurisdictional findings under 10 U.S.C. § 1408(c)(4)

The decretal portion of a direct-pay order is equally important. To be sure the order is properly served and honored, the practitioner should be sure that five steps are taken:

1) A certified copy of the order is served on DFAS, which should ordinarily be by certified mail, return receipt requested.[90]
2) The decree specifies the correct address for payment by DFAS to the spouse or former spouse.
3) Payments are to be made once a month, starting no earlier than 90 days after service of the decree on DFAS.
4) Payments shall end no later than the death of the member or spouse, whichever occurs first.

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[89] To maintain privacy, the court may enter only a portion of the SSN of each individual, such as XXX-XX-5687, reserving the full number for DD Form 2293, which is needed to submit a pension division order to DFAS.

[90] The original provisions of USFPSA required return receipt requested certified mail for all service on DFAS. As of 1997 this was amended to allow for regular mail, e-mail, fax, or certified mail service on DFAS. This should improve and simplify communications between former spouses, military members and DFAS. For record-keeping purposes, however, it is still recommended that service on DFAS be by certified mail, return receipt requested.

5) The payments shall be prospective only; no arrears are allowed.

The addresses for service of pension division orders are found on DD Form 2293, which can easily be found on the Internet by typing "2293" into any search engine.

The decree must be certified within 90 days of service on the finance center. A sample military pension division order is found below, as well as a judge's checklist for such orders.

One final point to remember is the 10/10 rule. This is the requirement of a marriage of ten years' duration concurrent with ten years of military service as the basis for pension division payments from DFAS. USFSPA only allows direct pension payments pursuant to "a final decree of divorce, dissolution, annulment, or legal separation issued by a court" or a property settlement that is ratified or approved by the court and issued incident to such a final decree.[91] This "10 year test" is *not a jurisdictional requirement* for dividing military pensions; rather, it is an "enforcement requirement," meaning that pension division cannot be enforced by direct pay from DFAS unless this test is met.[92] When there is less than ten years' service or less than ten years' marriage, the court may still divide the pension. But the retiree will have to pay the spouse directly.

A Pension Division Checklist

"One size fits all" definitely doesn't apply to military pension division orders. A good judge will check and re-check the pension division order to be sure it complies with the regulations and the statute, accomplished the needs of the client, makes sense, and will be honored by DFAS. To help with the latter task, here's a checklist for North Carolina military pension division orders:

Judge's Checklist for Preparation of Military Pension Division Orders

✓	Issue	Comments
	Check for pension division jurisdiction – must be ONE of the following:	Required by 10 U.S.C. 1408(c)(4)
	1. Domicile in North Carolina, OR	Check on state income taxes, home ownership, voting, vehicle title, tags, driver's license, in-state tuition
	2. Consent to court's jurisdiction	General appearance – the filing of motions or pleadings which recognize the court's authority
	3. Residence in N.C. but not due to military assignment	Example – SM assigned to naval base in southeast VA but resides in nearby Duck, NC, to care for aged parents; NC has pension division jurisdiction.
	Receive evidence of period of creditable service for servicemember [SM] or retiree	Usually this is on his LES [Leave and Earnings Statement], DD 214 [discharge statement], retirement orders, or "points statement" [for Reserve/Guard personnel]
	Calculate coverture fraction	Months of marital pension service [before separation] divided by total pension service [which will be "X" – unknown – for those not yet retired]. DFAS [Defense Finance and Accounting Service] will accept an order containing total military service as an unknown, will make calculations at time of retirement.

[91] 10 U.S.C. § 1408(a)(2).

[92] *See, e.g., Carranza v. Carranza*, 765 S.W. 2d 32 (Ky. App. 1989).

	State formula [for SM] or percentage [for retiree]	Usually this is 50% X coverture fraction X final retired pay
	Check for "10/10" direct-pay requirements	If payment to be made from DFAS [Defense Finance and Accounting Service] directly to non-military spouse, then marriage and military service must overlap by at least 10 years
	Require direct pay by SM/retiree until DFAS begins payment	DFAS takes up to 90 days after receipt of pension division order to begin making garnishment payments to former spouse; in the meantime, payments need to be made directly by the retiree.
	Check on "back payments" for retiree	See if credit or recoupment needed if retiree has received pension payments since separation. Part or all of these, depending on coverture fraction, belong to the non-military spouse. DFAS will not make "back payments" through garnishment in property division cases.
	Check on taxes	Any direct pension division payments between parties pursuant to written instrument will be taxable income to payee, tax deduction for payor – so don't try to "net out" the cost of taxes for the parties. Payor takes deduction for entire gross amount of payments to payee, and the former spouse who is the payee must report all such payments just like alimony.
	Check for "20/20/20" for medical care	Non-military spouse will be entitled to full medical care benefits if there are at least 20 years of marriage [ending at divorce, not separation], 20 years of military service, and a 20-year overlap. Granting divorce too early can defeat this entitlement.
	Provide SBP [Survivor Benefit Plan] for non-military spouse by:	Without this, pension payments stop at SM's death. Premiums are paid out of pension "off the top" before division between parties; premiums are 6.5% of selected base amount for spouse/former spouse coverage in active-duty cases, and about 10% in Guard/Reserve cases.
	___ordering SM to elect [or retiree to maintain] SBP coverage;	If parties are only separated, order <u>spouse coverage</u> (to be changed by <u>former spouse coverage</u> upon divorce). If parties are divorced, order <u>former spouse coverage</u>. Note: Court order alone does not create coverage; the application (by SM) or the service of order on DFAS (by SM or spouse) needs to be accomplished promptly.
	___at specific base amount (full retired pay or less);	SBP payments are 55% of SM's disposable retired pay if that base amount is selected; base amount can be as low as $300. Base amount is selected in active duty cases at time of retirement; lower base than full retired pay requires consent of spouse/former spouse. Once base amount has been chosen, in general it cannot be changed. DFAS cannot allocate premium costs between parties.
	___to be served on DFAS within one year of divorce [if by SM/retiree], or one year of order granting coverage [if by non-military spouse]; and	These are essential deadlines; if missed, coverage is lost.
	___entry of order granting <u>former spouse coverage</u> at time of divorce	DFAS will only honor title designation (i.e., <u>spouse coverage, former spouse coverage</u>), not designation by name.
	Use model military pension division order	

Sample Military Pension Division Order (MPDO)

It always helps to have an example of what the pension division order should look like. When a contested trial is involved, the text below, with its basic and optional clauses, should be sufficient to "cover all bases."

[Case caption here]

THIS CAUSE came before the undersigned judge upon Plaintiff's claim for distribution of Defendant's military retirement benefits. The court makes the following:

FINDINGS OF FACT

1. Plaintiff is a resident of *[County] [State]*. Defendant is a resident of *[County] [State]*.

2. The parties were married on *[date]*. They separated on [date] and were divorced in *[County] [State]* on *[date]*.

   Note: USFSPA requires that parties be divorced or have a "decree of legal separation" to obtain a direct-pay order for garnishment of military pension payments as property. They do not have to be divorced to enter the MPDO, just to submit it to DFAS. When branch of service is Coast Guard, Public Health Service or National Oceanographic and Atmospheric Administration (commissioned corps of either), use the appropriate finance center name instead of DFAS.

3. Plaintiff's address is 456 Green Tree Lane, Raleigh, NC 27608. Her Social Security number is 111-22-3333. Her date of birth is May 19, 1952.

4. Defendant's address is 789 Blackbird Loop, Raleigh, NC 27606. His Social Security number is 444-55-6666. His date of birth is June 12, 1950.

5. The present value of Defendant's military provision as of the date of separation is $_____. The present value of the marital share of the pension is $_____.

6. The marital portion of the uniformed services retired pay of Defendant (hereafter military pension or retired pay) is subject to marital property division. Plaintiff is entitled to a share of Defendant's military retirement benefits, as set out in the Decree below. Plaintiff's entitlement to retired pay accrues upon the retirement of Defendant. The remaining portion of Defendant's military retired pay is the sole and separate property of Defendant.

7. *[for military member not yet retired]* Defendant holds the rank of *[state rank here, such as "Staff Sergeant" or "Lieutenant Commander"]* in the *[here state branch of service, such as "U.S. Air Force" or "Utah Air National Guard"]* with *[number]* creditable years of service. His Pay Entry Base Date (PEBD) is *[here state PEBD as found on Defendant's Leave and Earnings Statement (LES)] or his Guard/Reserve retirement points statement]*. He is not yet retired. *[-OR- for retiree]* Defendant retired with the rank of *[state rank]* in the *[here state branch of service, such as "U.S. Air Force" or "Utah Air National Guard"]* with *[number]* creditable years of service and is currently receiving *[state amount of retired pay and any deductions, such as SBP premium, federal income tax, etc.]*.** He is retired as of ___ *[here give date of retirement (whether receiving retired pay or, if Guard/Reserve, awaiting age 60)]*.

***If near the end of the year, add additional sentence:* This is expected to increase of January 1, 20__ when Defendant receives a cost-of-living adjustment (COLA).

8. Currently, there is no waiver in place for disability payments, and the court bases the award to Plaintiff set out below on these facts. -OR- *[for retiree with disability rating]* Defendant currently has a disability rating of *[state percentage]* and his election of disability compensation has reduced his military retired pay by *[dollar amount]*.** [*Use if parties are still married and divorce will be entered simultaneously with MPDO]* This amount is based on the VA compensation table rates for veteran and spouse in effect at the time this Order is entered. Upon the parties' divorce, the VA compensation should be recalculated based on the veteran only. This rate is currently *[dollar amount]*.

***If near the end of the year, add additional sentence:* This amount is expected to increase to $_____ as of December 1, 20__ when the new disability compensation rates go into effect.

Note: this clause helps the spouse to establish a baseline for the present facts and the court's expectations and intentions in case the SM decides to waive additional military pension payments for more disability compensation in the future.

9. *[Note: It is probably best to insert this into all orders, for SMs and retirees, although the SCRA generally does not apply to retirees]* Defendant's rights under the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*, have been observed and honored.

10. [*This clause is to protect the non-military spouse in cases where her pension share, for any number of reasons, is dependent upon the servicemember's gross pay or when the retiree is in receipt of disability pay and he is to indemnify former spouse for difference.*] The terms below require Plaintiff to have knowledge of Defendant's military retired pay on a regular basis. To avoid the inconvenience of monthly mail or e-mail exchanges of this information, the parties can use the *myPay* system available on the Defense Finance and Accounting Service (DFAS) website (https://mypay.dfas.mil/mypay.aspx). Defendant has the ability to set up a Limited Access Password for Plaintiff which, along with a proper Login ID, will allow her to view his pay information (but not to make changes). Defendant can locate instructions on how to set up a Limited Access Password for Plaintiff on-line at https://mypay.dfas.mil/FAQ.htm.

11. Plaintiff is eligible for former spouse coverage as the beneficiary of Defendant's Survivor Benefit Plan (SBP) as set out below.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action and the parties hereto. [*in non-consent order (i.e., trial or default), be sure to include facts in the above section that support court's jurisdiction under 10 USC 1408(c)(4). This usually means evidence of domicile in the state or general appearance.*]

2. Plaintiff is entitled to an assignment of Defendant's military retirement benefits as set forth herein, subject to the conditions set forth in the Decree below.

3. The facts above are incorporated herein by reference to the extent that they represent conclusions of law.

4. The terms of this order are fair, reasonable, adequate and necessary.

5. The parties are entitled to the relief granted below.

DECREE

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. For all uniformed services retired pay received after [date], Defendant shall pay Plaintiff [*choose an Option from below and insert here*]

[Option A: Use for retiree cases, where defendant is no longer serving. The non-military spouse receives a specified percent, not to exceed 50%, of the retired pay. This increases with cost-of-living adjustments (COLA) for retiree, and that is automatic under the regulations; it need not be mentioned. This award is used when member has retired, and it is based on the final retired pay of SM, including post-divorce raises and grade increases.] __% of his military retired pay each month. This percentage is based upon plaintiff's entitlement to 50% of the marital share of the pension, which is *[here state basis for marital share]*. *[DFAS will accept percentages carried out to four decimal places.]*

[Option B: Use for active-duty cases, when defendant is still serving. The spouse gets a percentage, usually 50%, of the marital share of member's retired pay. This increases with COLAs for retiree, and that is automatic; it need not be mentioned. It is based on the final retired pay of member, including post-divorce raises and grade increases.] __% of the marital share of his military retired pay each month, not to exceed 50% of retired pay. The marital share is a fraction made up of ___ *[insert #]* months of marital pension service until the date of separation, divided by the total months of Defendant's military service. *[Note: Order must contain number of months for numerator – DFAS will not fill that in, although DFAS will complete the denominator when calculating final retired pay.]*

[Option C: Use for Guard/Reserve cases, when defendant is still serving. The spouse gets a percentage, usually 50%, of the marital share of member's retired pay. This increases with COLAs for retiree, and that is automatic; it need not be mentioned. It is based on the final retired pay of member, including post-divorce raises and grade increases.] __% of the marital share of his military retired pay each month, not to exceed 50% of retired pay. The marital share is a fraction made up of ___ retirement points acquired during the marriage until the date of separation, divided by the total retirement points of defendant during his military service. *[Note: Order must contain number of points for numerator – DFAS will not fill that in, although DFAS will complete the denominator when calculating final retired pay.]*

2. *[Use the following clause to obtain direct-pay garnishment from DFAS]*. Defendant has served at least ten years of creditable service concurrent with at least ten years of marriage to Plaintiff. Plaintiff is entitled to direct payments from DFAS.

[use one of the following clauses if there is no 10-year/10-year overlap as stated therein] Defendant will pay Plaintiff directly the amount/share specified in the preceding paragraph. Payments will be due on the first of each month, beginning *[date]*. -OR- Defendant will pay Plaintiff by a voluntary allotment from his retired pay the amount specified in the preceding paragraph.

3. Plaintiff shall receive payments at the same time as Defendant. The parties acknowledge that DFAS is not required to begin payments to the former spouse until 90 days after receipt of an acceptable order or the start of retired pay, whichever is later. Defendant shall be responsible for making these payments each month to Plaintiff until DFAS begins making these payments to her, and during this interim, Defendant will pay Plaintiff directly her full share. Payments are due on the first day of each month. Pursuant to *Pfister v. Comm'r*, 359 F.3d 352, *Proctor v. Comm'r*, 129 T.C. 92 (2007), *Mitchell v. Comm'r*, T.C. Summary Opinion 2004-160, *Mess v. Comm'r*, 79 T.C.M. (CCH) 1443 and *Eatinger v. Comm'r*, 59 T.C.M. (CCH) 954, the parties agree that the periodic payments made by Defendant to Plaintiff for this interim period of time until direct payments commence from DFAS shall be included in Plaintiff's income under Section 61 of the Internal Revenue Code, and these payments are likewise deductible from Defendant's gross income.

4. Defendant shall provide to Plaintiff a Limited Access Password and Login ID which she can use to access the *myPay* system so that she can verify that she is, in fact, receiving her full share of Defendant's retired pay each month. Defendant shall set up Plaintiff's access to *myPay* and provide the Limited Access Password and corresponding Login ID to her simultaneously with the signing of this Order. Defendant shall not delete Plaintiff's Limited Access Password without specific written approval from Plaintiff or by court order. If Defendant breaches this provision, attorney's fees shall be assessed against him under the enforcement clause below.

5. When DFAS has determined that this order meets the requirements of the applicable federal law as a military pension division order, then it shall carry out the provisions of this order and shall give written notice to Plaintiff (at her address set out above) and to her attorney, *[name and address]*, that this order complies with said requirements.

6. Plaintiff shall notify DFAS in writing about any changes in her address or in this document affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.

7. Defendant shall provide promptly to Plaintiff any information that she needs in order to have this order honored for direct payment of military pension benefits and shall keep her informed at all times of his current address.

8. If Defendant receives any amount that belongs to Plaintiff, he shall reimburse her immediately.

9. In order to effectuate direct payments from DFAS, Plaintiff shall tender a certified copy of this order to DFAS along with a certified copy of the parties' divorce decree and an executed DD Form 2293. *[This is a requirement if Plaintiff wants to receive direct payments from DFAS.]*

10. *[If order is based on trial, not consent, use this to protect non-military spouse from unexpected reductions due to Defendant's election of disability pay.* The parties are responsible and accountable to this court for good faith and fair dealing in complying with the terms of this order. Defendant shall not unilaterally undertake any course of action which undermines this order or frustrates the intent of the court. He shall release, hold harmless and indemnify Plaintiff as to any actions he takes which reduce her allocated benefits. The court will retain continuing jurisdiction to modify the pension division, if Defendant should waive military retired pay in favor of disability payments or take any other action (such as receipt of severance pay, bonuses or an early-out payment) which reduces the amount or share Plaintiff is entitled to receive. In addition, the court retains authority over this award to ensure that Plaintiff shall receive her proper share, that such other remedies as may be necessary are still available to Plaintiff, that Defendant acts in good faith in carrying out the terms of this order, that he indemnifies her in the event of any reduction of her amount or share due to his actions, and that the intent of this order will be carried out by both parties in full.

11. If Defendant shall attempt to waive or convert any portion of his military service, whether active-duty or Guard/Reserve, into federal or state civil service time, without first obtaining Plaintiff's consent, and the effect of this action is that her benefits would be reduced, then

    a. Plaintiff shall receive a portion of the federal retirement annuity (FERS) that provides Plaintiff an amount equal to what she would have received as her share of the military pension had there been no waiver to obtain an enhanced federal retirement annuity.

    b. In the event of such conversion, pursuant to 5 U.S.C. § 8411(c)(5), Defendant shall authorize the Director of the Office of Personnel Management to deduct and withhold (from the annuity payable to Defendant) an amount equal to the amount that, if the annuity payment were instead a payment of Defendant's military retired pay, would have been deducted, withheld, and paid to Plaintiff under the terms of this Order. The amount deducted and withheld under this subsection shall be paid to Plaintiff.

    c. If the waiver of military pension for federal civil service retirement prevents Plaintiff's coverage under the Survivor Benefit Plan, then Defendant will –

i. Designate Plaintiff as beneficiary under the equivalent federal retirement survivor annuity plan and provide equivalent coverage; or

ii. Obtain life insurance (with Plaintiff as the owner) covering his life with a death benefit equal to full SBP coverage; or

iii. Purchase a single-premium annuity (with Plaintiff as the owner) that is equal to the benefits payable for full SBP coverage.

d. Defendant shall also notify Plaintiff immediately if he accepts employment with the federal government, and shall include in said notification a copy of his employment application and his employment address. Any subsequent retirement system of Defendant is directed to honor this court order to the extent of Plaintiff's interest in the military retirement and to the extent that the military retirement is used as a basis of payments or benefits under the other retirement system, program, or plan.

-OR-

[Use if the retiree is already employed by the federal government] Since Defendant is currently employed by the U.S. Civil Service, the terms of this paragraph are made with the purpose of ensuring that nothing involving that employment shall diminish the amount or share of Plaintiff's pension benefit as specified in Paragraph 1 of this decree. Defendant shall not attempt to waive military retired pay to obtain credit for civil service retirement (CSRS or FERS). If he should do so, then the United States Office of Personnel Management is directed to pay Plaintiff's share (as set out in Paragraph 1 of this decree) directly to her. The court retains authority over this award to ensure that Plaintiff shall receive her proper share, that such other remedies as may be necessary are still available to Plaintiff, that Defendant acts in good faith in carrying out the terms of this order, that he indemnifies her in the event of any reduction of her amount or share due to his actions, and that the intent of this order will be carried out by both parties in full.

12. The monthly payments herein shall be paid to Plaintiff regardless of her marital status and shall not end at remarriage. Any future overpayments to Plaintiff by DFAS are recoverable and subject to involuntary collection from Plaintiff or from the estate of Plaintiff.

13. *[This is not necessary but the SM/retiree usually wants to see this in writing.]* Plaintiff shall be responsible for the taxes on her share of Defendant's military retired pay received from DFAS (or from Defendant directly). Plaintiff shall not be entitled to any portion of retired pay upon the death of either party.

14. Defendant shall provide coverage for Plaintiff through the Survivor Benefit Plan (SBP) as follows:

a. Defendant shall immediately elect plaintiff as the former spouse beneficiary of his SBP upon their divorce. He shall do nothing to reduce or eliminate her benefits.

b. Plaintiff shall effectuate a deemed election for former spouse coverage within one year of the entry of this order by sending a certified copy of this order to DFAS along with a certified copy of the divorce decree and an executed DD Form 2656-10.

[If Defendant is not yet retired, he may elect coverage at less than the full amount of his monthly retired pay, then use the following clause:] Upon his retirement, Defendant shall elect former spouse coverage, choosing as the base amount $_____. *[This may be any amount down to $300 a month.]*

c. If Defendant does anything that changes the former spouse election, then an amount equal to the present value of SBP coverage for Plaintiff shall, at the death of Defendant, become an obligation of his estate. In addition, Plaintiff shall be entitled to such remedies for breach as are available to her in a court of law.

[The premium for SBP coverage is deducted from the member's gross retired pay before it is divided between the parties. This "off-the-top" deduction means that the parties share in the premium payment (in the same ratio as the division of military retired pay). If the parties desire to allocate SBP costs entirely to the non-military spouse, this can be difficult. DFAS will not honor such a clause under current law. One can allocate the cost of SBP premiums to the non-military spouse by requiring the former spouse to reimburse the retiree each month for the retiree's part of the premium.

15. [*Use this clause when Plaintiff's share of pension is reduced to allocate to her the full SBP premium under the prior clause]*. The reimbursement for SBP premium costs shall end upon either of the following two events, either of which would result in no premium payable for SBP:

a. Plaintiff's remarriage before age 55 (which suspends SBP coverage for her), or

b. The continuous payment of SBP premiums for 360 months and Defendant's attainment of age 70 (which results in paid-up SBP).

16. *[Use this clause to attempt to give Plaintiff some protections against reduction of disposable retired pay due to election of VA disability compensation or CRSC by SM/retiree]* The parties shall comply with the terms of this order in good faith and shall notify the court and the other party if there are any substantial changes which would impact the retired pay of the Defendant. Examples of this include the remarriage of Plaintiff before age 55, which disqualifies her for SBP coverage (thus justifying termination for Defendant of the SBP premium deduction) and election by Defendant of VA disability compensation or Combat-Related Special Compensation, either of which would diminish the available retired pay of Defendant (thus reducing the share for Plaintiff). If the Defendant takes any action to diminish the share of Plaintiff of his military retired pay, then this court reserves jurisdiction to amend the pension division

terms to increase Plaintiff's share of Defendant's retired pay, pursuant to *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (2002).

_____ Date: _____
District Court Judge

Additional Resources

Help is not far away for the judge who needs to learn more about military divorce issues. Here is a list of useful websites:

Military Family Law Websites

	ABA Family Law Section's Military Committee: **www.abanet.org/family/military/**
	Military Committee, N.C. State Bar: **www.nclamp.gov**
	Defense Finance and Accounting Service: **www.dfas.mil**

(Rev. 7.9.12)

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