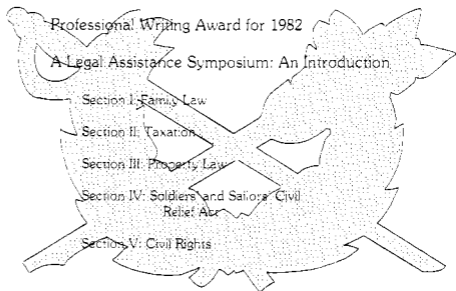


MILITARY LAW REVIEW



MILITARY LAW REVIEW—VOL. 102

The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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MILITARY LAW REVIEW

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MILITARY LAW REVIEW

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Footnotes should be double-spaced and should appear as a separate appendix at the end of the text. Footnotes should be numbered consecutively from the beginning to end of a writing, not chapter by chapter. Citations should conform to the *Uniform System of Citation* (13th ed., 1981), copyrighted by the *Columbia, Harvard, and University of Pennsylvania Law Reviews* and the *Yale Law Journal*.

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The Board will evaluate all material submitted for publication. In determining whether to publish an article, comment, note, or book review, the Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. There is no minimum or maximum length requirement.

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PROFESSIONAL WRITING AWARD FOR 1982

by Captain Stephen J. Kaczynski

I. INTRODUCTION

Each year, the Alumni Association of The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, presents an award to the author of the best article published in the *Military Law Review* during the previous calendar year. The purposes of the award are to recognize outstanding scholarly achievements in military legal writing and to encourage further writing.

The award was first given for an article published in 1963, in the sixth year of the *Review's* existence. The award consists of a citation signed by The Judge Advocate General and an engraved plaque. Selection of a winning article is based upon the article's usefulness to judge advocates in the field, its long-term value as an addition to military legal literature, and the quality of its writing, organization, analysis, and research.

II. THE AWARD FOR 1982

The award for 1982 was presented to Major Eugene R. Sullivan, JAGC, USAR, for his article entitled, "Procurement Fraud: An Unused Weapon." This article was published in volume 95, the winter 1982 issue of the *Military Law Review*. Major Sullivan, Deputy General Counsel for the Department of the Air Force, is an Individual Mobilization Augmentee to the Office of the Staff Judge Advocate, U.S. Military Academy, West Point, New York.

In his award-winning article, Major Sullivan highlights the power of the federal government to void contracts found by the President or, upon delegation, the head of any executive department or agency to have been tainted by bribery or conflict-of-interest for which a criminal conviction has been returned. After surveying the fraud problem and the powers and administrative processes available to the federal government, Major Sullivan proposes a pilot program to exercise this statutory authority. It should be noted that the program proposed has yielded an Executive Order from the President implementing those antifraud provisions government-wide. Major Sullivan's proposal has had a major impact upon the operation of the executive branch in the highly visible area of procurement fraud.

III. CONCLUSION

The award for 1982 is the twentieth presented since the Alumni Association Professional Writing Award was initiated and only the second awarded to a reservist who was not on active duty at the time the article was written. Major Sullivan's article thus represents a unique interest in building the fund of useful legal knowledge available to the military legal community.

With deep satisfaction, the *Military Law Review* congratulates Major Sullivan on his achievement. His excellent work has helped earn the respect of the military legal community for the *Review*, The Judge Advocate General's School, and the Judge Advocate General's Corps.

LEGAL ASSISTANCE SYMPOSIUM: AN INTRODUCTION*

Each year, in the Judge Advocate Officer Graduate Course, career judge advocates produce a wealth of written material concerning the various aspects of the military practice of law. A great deal of this work is published in the professional journals prepared at The Judge Advocate General's School and provides valuable insights and guidance for the practicing military attorney. For that reason, the Graduate Course students comprise the "think tank of the JAG Corps."

In this issue of the *Military Law Review* are several articles concerning legal assistance topics prepared by members of the 31st Judge Advocate Officer Graduate Course and selected for publication by the Administrative and Civil Law Division of The Judge Advocate General's School. The delivery of effective legal assistance to the service member has been decreed by The Judge Advocate General to be a top priority mission of the Corps. To familiarize the judge advocate with several aspects of that mission, this volume discusses various issues which impact significantly on the practice of law in the legal assistance field.

Section I is concerned with topics in the area of family law. The formation of the marital relationship and the regulatory strictures placed upon it in overseas commands are discussed in the lead article. Thereafter, issues surrounding the dissolution of the marriage and the attendant concerns of the division of property rights, spousal and child support, and child custody are probed, with special emphasis on recent statutory and judicial developments in the law. Finally, the legal rights and relations of those outside the traditional family unit, the illegitimate child, the unwed father, and the non-marital cohabitants are discussed.

Section II deals with issues of concern to the military taxpayer. Austerity measures in state and federal budgets have required governmental entities to maximize the collection of tax dollars. The pay and allowances of service members are, perhaps now more than ever, prime candidates for fiscal scrutiny. The first article evaluates an initially successful attempt by a state to indirectly tax a nonresident service member's military income. The degree to which this

*The opinions and conclusions expressed in this introduction, and in each of the articles which comprise this Symposium, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

action may run afoul of the Soldiers' and Sailors' Civil Relief Act is studied. Whether a recent Internal Revenue Service ruling will impact upon the deductibility of mortgage interest funded by tax-exempt allowances is discussed in the second article. Finally, the application of section 2503(b) of the Internal Revenue Code to gifts in trust of nonincome-producing property is considered in the final article of the section.

Property law issues are discussed in Section III. Whether a landlord may evict or otherwise penalize a tenant for his or her insistence upon rights guaranteed by lease or law is the subject of the first article. The extent to which the recently developed implied warranty of habitability applies to a subsequent purchaser of real property is studied in the other article of the section.

The Soldiers' and Sailors' Civil Relief Act, already noted in Section II, is evaluated in its procedural aspects in Section IV. Those provisions of the Act which delay the resolution of a standing dispute, the tolling of statutes of limitations and staying of commenced lawsuits, are discussed. Especially highlighted is how the application of the Act's provisions may have outrun the Act's original purpose and exceeded the congressional intent behind it.

Finally, Section V contains an article which concerns an area in which international and domestic law intersect, the rights, status, and duties of the dual national. This article, especially relevant for the legal assistance officer who must counsel the foreign-national spouse of an American service member, details the protections afforded the dual national under the laws of both countries to which the individual may owe allegiance.

The Editor wishes to express his appreciation to Major Paul F. Hill, USAR, Individual Mobilization Augmentee to The Judge Advocate General's School, for his assistance in preparing this issue. The organization of the volume is largely his handiwork.

STEPHEN J. KACZYNSKI
Captain, JAGC, U.S. Army
Editor, *Military Law Review*

SECTION I
FAMILY LAW
MILITARY CONSTRAINTS UPON MARRIAGES
OF SERVICE MEMBERS OVERSEAS,
OR,
IF THE ARMY HAD WANTED YOU TO HAVE A
WIFE . . .

by Captain Ross W. Branstetter*

Every year, thousands of American service personnel marry while stationed in foreign countries. As many as one out of every seven single U.S. soldiers stationed in the Republic of Korea, for example, marries a Korean national during a tour in that country.¹ Such cross-cultural marriages are plagued by a high incidence of psychological disorders, extreme financial difficulties and domestic violence. These grave personal problems often carry over to the service member's job. Additionally, up to 80 percent of Korean-American marriages end in divorce within the first two years.² The Army has an undeniable interest in the morale of its soldiers, especially when personal difficulties degrade duty performance and draw resources from the defense mission.

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¹Eighth Personnel Command letter, 16 Mar. 1982, subject: Applications for Permission to Marry. In pertinent part, this letter from Headquarters, 8th Personnel Command, in the Republic of Korea, indicates that of about 14,000 unmarried soldiers in the command, approximately 2,000 had been granted permission to marry in 1981.

²United States Forces, Korea/Eighth U.S. Army, Pamphlet 600-09, Commander's Guide to Marriage Counseling (14 Jan. 1981) [hereinafter cited as USFK/EA Pam 600-09]. USFK/EA Pam 600-09, para. 4 states:

Each month approximately 300 Korean-American couples make application to marry in the Republic of Korea. Some studies indicate that as high as 80 percent of these Korean-American (GI) marriages end in divorce within two years of their return to the United States. In lieu of or accompanying a divorce can be a high rate of domestic violence, suicide acts, psychological and sociological dysfunction, financial problems, social stigma, and problems of assimilation in society....[t]he service

In protecting this interest, the armed forces require that every service member, regardless of grade, gain command approval before marrying overseas. The process of requesting permission to marry is lengthy and intrusive; sometimes, permission is denied. Critics insist that members of the armed forces have the right to marry the person of their choice, without military interference, even if to do so is a mistake which will long be regretted.³

This article will discuss how the Army got into the business of "approving" marriages, how the present Army system works, what some of the problems are, and what improvements could readily be made in the procedures.

I. THE HISTORY OF MILITARY CONTROL OF MARRIAGES

The potential of conflict between the demands of military service and the obligations of married life has long been of concern to the military; hence, the enduring expression, "If the Army wanted you to have a wife they [sic] would have issued you one."

As early as the post-Civil War era, The Judge Advocate General of the Army was asked if it was permissible for commanders to prevent their soldiers from marrying. This question came at a time when, in European armies, soldiers were forbidden to marry and were punished for doing so and, in the United States, only unmarried men could enlist. Additionally, this was a period in which large numbers of U.S. soldiers were stationed in remote and hostile western territories. Despite these facts and the burdens created by noncombatant dependents, The Judge Advocate General declared that commanders could not prohibit soldiers from taking wives.⁴

member and the commander can be faced with increased absenteeism, inefficiency, AWOL, behavioral problems, and poor retention.

The "studies" [sic] referred to concerning Korean-American divorces appears to have been a single report from Fort Lewis, Washington. See D. Moon, Reserve Chaplain, Study of Problems of Korean Wives (1976).

³Jones, *The Right to Marry: Armed Forces Infringement*, 10 Fam. L. Q. 357 (1977).

⁴In 1879, The Judge Advocate General said:

A military commander, authorized to grant or refuse passes or furloughs to his command, may of course refuse permission to leave the post to a soldier whose purpose is to become married. A commander may also, if the interests of discipline require it, exclude the wives of soldiers from a post under his command at which their husbands are serving. But while the Army Regulations forbid the enlisting (in time of peace without special authority) of married men, there is no statute or regulation forbidding the contracting of marriage by soldiers, any more than by

The right to marry was not without some limitations even at that time. In 1888, the United States Supreme Court characterized marriage as "the most important relation in life" which had "more to do with the morals and civilization of a people than any other institution." However, the Court went on to recognize that the marriage relationship had "always been subject to the control of the Legislature."⁵

By the time American forces girded for the Great War of 1917, marriages of service members were prohibited in two situations. First, for a time, members of the Army Nurse Corps were not permitted to marry. Those who did marry were dishonorably discharged.⁶ Second, male service members, who were generally free to marry as they saw fit, could, if they knowingly married a prostitute, be punished under Article of War 96 for conduct which tended to bring discredit upon the armed forces.⁷

In 1923, the Supreme Court held that the constitutional prohibition against deprivation of "life, liberty, or property without due process of law" included within its scope "liberty" interests such as the right of the individual "to marry, to establish a home and bring up children."⁸ The Court also held that the due process clause limited the power of the state, during time of peace, to interfere with the exercise of such right.

Between World War I and World War II, a great many members of the American armed forces were stationed and married in foreign countries. Many of the alien brides were not eligible for immigration to the United States. If they were successful in entering the United

officers, while in the service. So held that, under existing law, a military commander could have no authority to prohibit soldiers, while in his command, from marrying; and that the contracting of marriage by a soldier (although his commander had forbidden him, or refused him permission, to marry) could not properly be held to constitute a military offense.

Command VA2a, Digest of Opinions of The Judge Advocate General of the Army - 1912 (1917).

⁵Maynard v. Hill, 125 U.S. 190 (1888). This was an action contesting the state's power to grant a divorce.

⁶M. Treadwell, *The Woman's Army Corps* 510 (1954).

⁷C.M. No. 121330 (1918), cited at Sec. 454(68), Digest of Opinions of The Judge Advocate General of the Army - 1912-1940 (1943).

⁸Meyer v. Nebraska, 262 U.S. 390, 399 (1923), was a case in which a teacher had been criminally prosecuted for teaching German to a student in violation of a Nebraska statute forbidding instruction of young children in any language except English. The Court appreciated that "unfortunate experiences during the late war, and aversion toward every characteristic of truculent adversaries" influenced the legislature, but held the state had exceeded its power. The conviction was reversed.

States, their marriages were sometimes declared void by state laws which forbade marriages of persons of different races. Often, the unions with persons of markedly different national and racial backgrounds were opposed by the soldier's family and friends.⁹

In this emotional and political climate, military restraints on marriages were further expanded; all soldiers, male and female, were required to have their regimental commander's approval before marrying.¹⁰ The Judge Advocate General of the Army reversed prior opinions and asserted that such a requirement was lawful where necessary to promote military efficiency.¹¹ The penalty for marrying in violation of Army regulation was denial of reenlistment in military service.

During World War II, the Supreme Court declared that marriage was one of the "basic civil rights of man."¹² However, this declaration had no impact upon the restrictions of marriages of men and women in military uniform. Prior Army permission was still required in overseas commands.

Despite the obstacles presented by World War II marriages constraints, service members married by the tens of thousands. When the GIs returned to America, public opinion demanded they be allowed to bring their foreign spouses and children with them. Congress responded and the "war brides" were granted special entry permission in 1945.¹³ During the three year life of that act, nearly 96,000 wives, husbands, and minor children of service personnel entered the United States.¹⁴ Additionally, in 1946, the Fianceses Act was passed. This Act permitted the admission of more than 5,000 intended spouses before it expired in 1984.¹⁵

⁹Jones, *supra* note 3, at 360.

¹⁰U. S. Dep't of Army, Reg. No. 615-360 (1935); U. S. Dep't of Army, Reg. No. 600-750 (1939).

¹¹The Judge Advocate General of the Army said:

[I]f in the opinion of the Secretary of War the military efficiency of foreign commands requires the prohibition of marriages by members of those commands except with special permission, a regulation [to that effect] would be subject to no legal objection. To the extent that prior opinions of this office express a contrary view, they are hereby overruled.

SPJGA 291.1, 1 June 1942, cited in Johns, *supra* note 3, at 361.

¹²Skinner v. Oklahoma, 316 U.S. 535 (1942). This decision invalidated a state law authorizing nonconsensual sterilization of incorrigible criminals.

¹³War Brides Act of 1945, Pub. L. No. 79-271, 59 Stat. 659 (1945).

¹⁴S. Rep. No. 1515, 81st Cong., 1st Sess. (1948).

¹⁵GI Fianceses Act of 1946, Pub. L. No. 79-471, 60 Stat. 339 (1946); S. Rep. No. 1515, 81st Cong., 1st Sess. (1948).

The Korean conflict saw continuation of the broad mandate that all U.S. soldiers in foreign service must have command approval before marrying. In the early stages of the hostilities, the military requirement was overshadowed by an American immigration law which made no provision for Asian wives of U.S. service members. Commanders were aware that American immigration law made it nearly impossible for GIs to take their alien spouses to the United States. As a consequence, military leaders generally made it very difficult to secure approval of requests for permission to marry. Those soldiers who surmounted command obstacles were faced with the heartache of leaving their new spouses behind, frequently in countries where their brides were ostracized and abandoned by their families because of marriage to American "foreigners."¹⁶

In 1952, President Truman urged congressional passage of a new law which would "remove racial barriers against Asians."¹⁷ Partly as a result of the President's intervention, the liberal Immigration and Nationality Act of 1952 came into being and gave continued preferred status to wives, husbands, and children of members of the U.S. armed forces. At this time the military approval requirements shifted toward the present focus on immigration concerns.

In *United States v. Nation*, the Court of Military Appeals held in 1958 that an arbitrary six-month waiting period, required as a part of the processing for requests for Navy permission to marry in the Philippines, was an "unreasonable interference" with the "free exercise of a serviceman's right to marry the woman of his choice."¹⁸ The court further held that the prosecution and imprisonment of Seaman Nation for marrying without his commander's permission must be set aside because the Navy marriage instruction, as applied to the accused, was not lawful. However, the court did *not* say that all military restrictions upon marriages of service members would be unlawful.

¹⁶See generally J. Mitchner, *Sayonara* (1953).

¹⁷Truman, Immigration Bill Veto, 1952 U.S. Code Cong. & Ad. News 921, 926.

¹⁸9 C.M.A. 724, 727, 26 C.M.R. 504, 507 (1958). In this case, the accused had sought permission from his commander to marry while stationed in the Philippines. Nation submitted the appropriate documentation, but it was not forwarded to the commander. The paperwork may have been incomplete, though this is not clear from the record. The Navy regulation mandated that the commander would, in most cases, take no approval or disapproval action until six months had passed since the date of the original application. The accused waited six months and three days from the time he submitted his written request, then he married without command approval. For this offense, Nation was convicted and sentenced to a bad-conduct discharge, partial forfeitures, confinement at hard labor for six months and reduction to seaman recruit. The Court of Military Appeals reversed the conviction.

In *United States v. Wheeler*, in 1961, another sailor was prosecuted for marrying in the Philippines without complying with the same local Navy instruction involved in *Nation*. This time, however, the military directive, which had been revised after the *Nation* decision, was upheld. The Court of Military Appeals found that "a military commander may, at least in foreign areas, impose reasonable restrictions on the right of military personnel of his command to marry."¹⁹

In the 1966 case of *Loving v. Virginia*, the U.S. Supreme Court held unconstitutional a state criminal statute prohibiting interracial marriage. Since marriage is a "fundamental" right, the state could not restrict the right to marry for less than compelling reasons.²⁰ *Loving* clearly indicated that any governmental interference to the right to marry would be subject to strict judicial scrutiny and could be justified only by a finding that the infringement was the least intrusive method of protecting a compelling government interest.

The military requirement that commander's approve marriages of service members in overseas areas remained unchanged. In the 1978 case of *United States v. Parker*, the Navy Court of Military Review considered the familiar case of a sailor who married in the Philippines without compliance with the marriage approval procedures required by local Navy instruction. Following *Wheeler*, the Navy court found the constraints upon marriage "a lawful and reasonable exercise of command authority."²¹

Also in 1978, the United States Supreme Court rendered its decision in *Zablocki v. Redhail*. Therein, the majority of the Court struck

¹⁹12 C.M.A. 387, 391, 30 C.M.R. 387, 391 (1961). The accused did not even request permission to marry before doing so: this is a feature which distinguishes this case from *Nation*, in which the service member both requested permission and waited a substantial length of time for permission to be given.

One noteworthy aspect of the court's holding in *Wheeler* was that the required counseling by a chaplain did not impermissibly intrude into the sailor's right to freedom of religious belief or free exercise of religious practices. The court found: "However high or thick the wall of separation of church and state, the interview [with a chaplain] does not breach that wall. It does not force, influence, or encourage the applicant to profess any religious belief or disbelief." *Id.* at 389; 30 C.M.R. at 389.

It should, however, be noted that there was a vigorous dissent by Judge Ferguson who asserted that marriage was so personal and so tenuously related to military affairs that "it cannot be regulated by requiring the consent of a superior officer." *Id.* at 392, 30 C.M.R. at 392 (Ferguson, J., dissenting).

²⁰388 U.S. 1 (1971). See also *Boddie v. Connecticut*, 401 U.S. 371, 750 (1971).

²¹*United States v. Parker*, 5 M.J. 922 (N.C.M.R.), petition denied, 6 M.J. 144 (C.M.A. 1978). The Navy instruction upheld in this case, Commander, U.S. Naval Forces, Philippines Instruction 1752.1H (25 Aug. 1976), is virtually identical to the directive currently in use, Commander, U.S. Naval Forces, Philippines Instruction 1752.1K (14 Mar 79) [Hereinafter cited as COMUSNAVPHILINST 1752.1K].

down a state law which required court permission for marriages where a party had minor children who were not in his custody and whom he was required to support by order of a court. The majority of the court reaffirmed the fundamental character of the right to marry, but also declared that not "every state regulation which relates in any way to the incidents of marriage must be subject to rigorous scrutiny."²²

Zablocki is, in some respects, a retreat from *Loving*. The *Zablocki* standards seems to be one of strict scrutiny for government measures which substantially interfere with the right to marry, but some, as yet unidentified, less rigorous test for government actions which are less intrusive. This is the uncertain point at which analysis of military constraints upon marriages of service members overseas must stand.

THE PRESENT MILITARY SYSTEM

The current regulatory basis for military constraints upon marriages in overseas areas is a single joint-service directive applied to members of the Army, Air Force, Navy, and Marine Corps.²³ The two-fold purpose of this regulation is to protect aliens and U.S. citizens from the "possible disastrous effects of an impetuous marriage entered into without appreciation of its implications and obli-

²²*Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). The concurring opinion of Justice Stevens focused on the magnitude of the burden upon the right to marry and urged that laws affecting marriage need not be subject to a "level of scrutiny so strict that a holding of unconstitutionality is virtually foreordained." *Id.* at 388 (Stevens, J., concurring).

Justice Powell concurred also, but asserted the Court had not yet required "the most exacting judicial scrutiny" for all laws touching upon the marriage relationship; he noted that laws prohibiting marriages that would involve incest, bigamy, and homosexuality had been assumed within the traditional pervasive scope of state power. *Id.* at 397, 399 (Powell, J., concurring).

Justice Stewart observed the statute reflected "a legislative judgment that a person should not incur new family financial obligations until he has fulfilled those he already has." "Insofar as this judgment is paternalistic rather than punitive, it manifests a concern for the economic well-being of a prospective marital household." The Justice was sympathetic though unconvinced, finding "these interest are legitimate concerns...but it does not follow that they justify absolute deprivation of the benefits of a legal marriage." *Id.* at 393, 394 (Stewart, J., concurring).

Justice Rehnquist was the sole dissenter and would have upheld the state statute by applying a rational relationship test. *Id.* at 407 (Rehnquist, J., dissenting).

²³U.S. Dept of Army, Reg. No. 600-240/BUPERSINST (Bureau of Personnel Instruction) 1752.1/AFR [Air Force Reg.] 211-18/MCO [Marine Corps Order] 1752.1C, Personnel-General, Marriage in Oversea Commands (1 June 1978) [hereinafter cited as AR 600-240]. These constraints are also applied to members of the Coast Guard in some circumstances. See COMUSNAVPHILINST 1752.1K, Marriage of Active Duty Personnel Stationed in or Visiting the Philippines, para. 3a (1 Mar 79).

gations"²⁴ and to make such parties "aware of the rights and restrictions imposed by the immigration laws...to assist in identifying and hopefully precluding the creation of U.S. military dependents not eligible for immigration to the United States who may pose a logistical burden on, and possible embarrassment to, the U.S. military service concerned."²⁵

Implementing these twin goals, the Army currently requires that all soldiers who desire to marry within the geographical boundaries of an overseas command gain the permission of the overseas commander.²⁶ This requirement applies not only to personnel stationed in a foreign country, but also to those who are merely visiting the area in a temporary duty status or on leave.²⁷

In the process of applying for permission to marry, a service member must obtain or prepare a great deal of paperwork, including: birth certificates; consent of parents, if appropriate; evidence of termination of any previous marriages; medical examinations; proof of citizenship; an investigation of the background and character of the intended spouse; in many cases, a statement of the financial capability of the service member to adequately support the intended spouse; and other documents required by the country in which the marriage is to take place.²⁸

In addition to these documentary requirements, a number of counseling sessions are specified before the soldier may be given permission to marry. He or she is required to be counseled by the unit commander concerning the "financial and moral obligations to pro-

²⁴AR 600-240, para. 1a.

²⁵AR 600-240, para. 1b; U.S. Dep't of Army, Legislative Liaison Fact Book for the 97th Congress 40-1 (1981).

²⁶AR 600-240, para. 1; U.S. Dep't of Army, Reg. No. 608-61, Personal Affairs-Application for Authorization to Marry Outside of the United States, para. 3 (1 Oct. 1978) [hereinafter cited as AR 608-61].

²⁷AR 600-240, para. 1; AR 608-61, para. 2; U.S. Army, Europe, Reg. No. 632-10, Regulated Activities of Members of the U.S. Forces, D.O.D. Components, and Dependents, para. 28 (1 Apr. 1977) [hereinafter cited as USAREUR Reg. 632-10]; U.S. Army, Europe, Supplement 1 to AR 680-61, Application for Authorization to Marry Outside of the United States, para. 2 (4 Dec. 1979) [hereinafter cited as USAREUR Suppl. 1 to AR 608-61]; U.S. Forces, Korea Reg. No. 600-240, Marriage In Overseas Commands (Korea), para. 2 (16 Mar. 1982) [hereinafter cited as USFK Reg. 600-240].

²⁸AR 600-240, para. 15c; AR 608-61, paras. 5, 6a. Additional requirements are specified by local regulations. See, e.g., USFK Reg. 600-240, para. 6; COMUSNAV-PHILINST 1752.1K, para. 5. The appendices of USAREUR Suppl. 1 to AR 608-61 set out differing specific requirements for marriage to nationals of the Federal Republic of Germany, Italy, the United Kingdom, and the other nations of Europe.

vide a home and adequate support for the prospective spouse and dependents" and, if applicable, the possible effect marriage to a foreign national would have upon the applicant's security clearance.²⁹ The service member is encouraged to seek "premarital advice and counseling from a military chaplain or a civilian clergyman" concerning "spiritual matters; adjustments because of differences of religion, language, environments, cultural backgrounds to include extended family relationships, and responsibilities and obligations pertinent to marriage."³⁰ A legal officer is required to advise the applicant of applicable immigration laws and insure that he or she is aware that permission by military authorities to marry does not necessarily mean that an alien spouse will be granted a visa and that, if a visa is issued, there is no guarantee that the spouse will be admitted into the United States.³¹

It is the policy of the military departments that "all active duty personnel have basically the same right to enter into marriage as any other citizens of the United States in the same locality."³² [Approval for applications for permission to marry] will be given in all instances where military personnel have complied with local regulations," provided that the investigation does not indicate that the intended spouse would probably be barred from entry to the United States through inability to meet statutory physical, mental, or character standards and that the service member or sponsor has demonstrated financial ability to prevent the alien spouse from becoming a public charge.³³ These two military criteria for disapproval of a request for permission to marry are based upon the Immigration and Nationality Act and parallel those used by the Department of State and the Immigration and Naturalization Service in refusing an alien spouse permission to enter the United States.³⁴ The only ground for disapproval by a military commander of a request for authority to marry while in an overseas area is that the prospective spouse would probably not be allowed by immigration authorities to enter the United

²⁹ AR 608-61, paras. 7a(2), (3); AR 600-240 paras. 5c, 5d, 15b, 15c(2); USAREUR Suppl. 1 to AR 608-61, para. 7.1.

³⁰ AR 608-61, para. 7a(1); AR 600-240, paras. 4e, 12, 15a; USAREUR Suppl. 1 to AR 608-61, para. 7a(4); COMUSNAVAFPHILINST 1752 IK, para. 5d, item 1, Encl. 1.

³¹ AR 608-61, para. 7a(4); AR 600-240, paras. 4k, 5, 8, 13a.

³² AR 600-240, para. 4a.

³³ AR 608-61, paras. 4a, d; para. 9b; AR 608-61, para. 9b.

³⁴ Immigration and Nationality Act of 1952, Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163, 8 U.S.C. §1101, 1182(a) (1976) [hereinafter cited as INA].

States.³⁵ Commanders do have discretion, but are not required, to approve applications even where the proposed foreign spouse may not be eligible for admission into the United States.³⁶ In any event, the decision is final; there is no provision for appeal from a denial of permission to marry.³⁷

Statistics vary concerning the number of service members subject to these foreign marriage procedures, but it is illuminating to note that, during the years 1976 to 1981 in the Republic of Korea alone, more than 20,000 applications for permission to marry were

³⁵It should be noted that there is an apparent conflict in the regulatory guidance on the issue of grounds for disapproval. Paragraph 4a, AR 600-240, states that "approval will be given" unless the proposed spouse would probably be barred from entry into the U.S. because of some physical, mental, or character (usually criminal background) disqualification or because the sponsor is not financially responsible. However, paragraph 4f of the regulation implies that applications may be disapproved for "security reasons." This conflict can only be resolved by interpreting the phrase "security reasons" to mean circumstances which would require exclusion of the intended spouse under paras. 4a and 5b(7), AR 600-240, as a threat to the U.S. government. The scope of this concern may be seen in the INA at 8 U.S.C. §1182a(28) (1976). See also AR 600-240, para. 7a.

³⁶AR 600-240, paras. 6a, b. These provisions allow consideration of "human aspects" and "local conditions."

³⁷The absence of direct appeal procedures in cases where authority to marry in an overseas command has been withheld does not mean the soldier is thereby absolutely denied the ability to marry. A disappointed soldier has a number of alternatives. The service member may attempt, through military channels, to have the denial changed by complaint to the service Inspector General or a request for redress from a commander higher than the approved authority, under the provisions of Article 138, Uniform Code of Military Justice, 10 U.S.C. §938 (1976). The applicant may also request a "fiancee visa" which permits the service member to bring the proposed spouse to the U.S. to marry without the necessity for command approval. INA, 8 U.S.C. §1101(a)(15)(K)(1976); AR 600-240, para. 9. In any event, if the service member married notwithstanding denial of permission, the marriage is valid if recognized in the country where it took place. Opinion of Dep't of Army Judge Advocate General, Military Affairs Div. JAGA 1965/4241 (22 June 1965); AR 600-240, para. 4m. If the soldier does marry without permission, there is a possibility of some punishment even though there are no reported Army cases of trial by court-martial in such instances and the Army regulations on the subject are not punitive as were the directives in *Nation, Wheeler, and Parker*.

initiated.³⁸ Of the 9,815 applications which were pursued to completion by the applicants, only five were denied.³⁹ The disapproval rate for that command is then only about five one hundredths of one percent. Further examination of the statistics for U.S. Forces, Korea indicates that 30 to 40 percent of the service members who begin the premarriage process change their minds before marrying.⁴⁰

There is no indication whether these service members withdrew their request due to counseling, the additional time to consider the marriage, or information disclosed during investigation of the intended spouse. The significant number of withdrawals does imply that a large number of service members were spared a statistically-likely unpleasant marital experience. The high reconsideration rate also implies that U.S. Forces, Korea acquired many fewer noncombatant dependents as a result of the premarriage procedures and thereby lessened the logistical and tactical burden that they would

³⁸United States Forces, Korea - marriage approval processing statistics:

<i>Year</i>	<i>Initiated</i>	<i>Completed</i>	<i>Disapproved</i>	<i>Withdrawn</i>
1976	2,311	-----	-----	-----
1976	3,154	-----	-----	-----
1978	4,137	2,961	0	1,176 (28%)
1979	3,717	2,545	0	1,172 (32%)
1980	3,289	2,048	3	1,241 (38%)

Eighth Army Provost Marshal, Special Investigations letter, 4 Jan. 82, subject: Premarital Investigations; Eighth Personnel Command letter, 16 Mar 82, subject: Applications for Permission to Marry Overseas.

³⁹See note 38 *supra*.

⁴⁰*Id.*

have created.⁴¹ It should be noted that the statistics cannot show the number of soldiers who never even submitted applications because they were talked out of it by concerned superiors as a result of mandatory command involvement. Additionally, the number of service members who, because of counseling received in the program, are better equipped to cope with the unique stresses of transnational marriage and will be more effective soldiers as a consequence cannot be calculated.

The experience of U.S. Forces, Korea is not necessarily indicative of similar trends in other overseas commands, but it is illustrative of some aspects of present Army premarriage procedures.

III. SOME OF THE PROBLEMS

Denial of permission to marry. The Supreme Court characterized the freedom to marry as "one of the vital personal rights"⁴² and

⁴¹Present impact of dependents in overseas areas:

<i>Type Impact</i>	<i>Non-Command Sponsored Dependents</i>	<i>Command Sponsored Dependents</i>
A. Logistical Burden During :		
1. Commissary use	No*	Yes
2. Exchange use	No*	Yes
3. Housing	No	Yes
4. Transportation	Yes**	Yes**
5. Army Post Office use	No*	Yes
6. Identification card	Yes	Yes
7. Medical care	Yes*	Yes
8. Installation access	Yes	Yes
9. Dependent Schooling	No*	Yes
B. Tactical Burden During ties:		
1. Evacuation	Yes	Yes
2. Shelter	Yes	Yes
3. Food	Yes	Yes
4. Medical care	Yes	Yes
5. Hostage potential	Yes	Yes
6. U.S. political aspects	Yes	Yes

*Dep't of Defense Directive 1315.7, Military Personnel Assignments, para. 5f (6 Dec. 1977), denies all "support services", except medical care, to non-command sponsored dependents. One of the results is that individually-sponsored dependents are barred from commissaries and exchanges. Even when the service member shops for those dependents who cannot enter these facilities, a ration control system may limit his or her spending to those amounts permitted unaccompanied soldiers.

**Dependents acquired at oversea stations may be transported to the next duty station at government expense on a space-available basis only if acquired in conformity with command marriage regulations and if immigration requirements are met. Dep't of Defense Directive No. 4515.13-R; DOD Dir. 1315.7, para. 5h.

Part A of the foregoing chart was derived from USFK Reg. 600-240, App. E.

Part B is solely the opinion of the author.

⁴²*Zablocki*, 434 U.S. at 383.

jealously guards this right against substantial government interference unless the intrusion is supported by compelling interests and is closely tailored to effectuate such interests.⁴³ Yet the Army, before granting authorization to marry, requires a soldier to endure counseling, submit his or her personal life and that of his or her intended spouse to public scrutiny, permit physical examinations, and await the decision of the commander, which may be to deny permission, without appeal. Arguably, the physical examinations and documentation requirements fall within the sphere of marriage-related matters which have traditionally been subject to government control. Similarly, the required counseling is in many respects like command information programs concerning venereal disease, drunk driving, or water safety. However, the facet of the premarriage procedures which permits unappealed denial of the right to marry seems to be clearly contrary to the pronouncements of the Supreme Court.

Not all the services adopt this position. The Navy, for example, despite its successful prosecutions in the *Wheeler* and *Parker* cases, does not authorize commanders in the Philippines to deny permission to marry at the culmination of the application process. Once a sailor or marine completes the premarriage procedures, authorization to marry is required to "be given in all instances."⁴⁴ The Navy approach seems to be that the application process garners all the paperwork necessary to a valid marriage, provides the benefits of counseling, and, where appropriate, forewarns a service member that his or her intended spouse may be prevented from entering the United States. If the service member, after considering marriage for this length of time and receipt of all this information, still wants to marry, he or she will be permitted to do so.

The Navy scheme in the Philippines is remarkably, perhaps not accidentally, reminiscent of one aspect of *Zablocki v. Redhail*. The state statute struck down in *Zablocki*, as originally introduced in the state legislature, was intended merely to establish a procedure whereby persons with support obligations from prior marriages "could be counseled before they entered into new marital relationships."⁴⁵ State "[c]ourt permission to marry was to be required, but apparently permission was automatically to be granted after counseling was completed."⁴⁶ The implication in the majority opinion was that, if required counseling had been the goal of the statute eventually passed and the possibility of disapproval after counseling had been

⁴³*Salisbury v. List*, 501 F. Supp. 105, 109 (D. Nev. 1980) (relying on *Zablocki*).

⁴⁴Paras. 4c and 6a, COMUSNAVPHILINST 1752.1K.

⁴⁵*Zablocki*, 434 U.S. at 388.

⁴⁶*Id.*

eliminated, the statute would have been upheld. Thus, the Navy procedure whereby approval is automatically given after completion of the application process is apparently on firm constitutional ground.

The Army procedure which, in some cases, denies permission, however, seems directly opposed by the holding in *Zablocki*. In view of the apparently very low disapproval rate, the counseling received by all applicants, and the fact that the premarriage process itself, quite apart from the possibility of denial of permission, seems to dissuade about a third of those service members who initially consider foreign marriage, such conflict seems unnecessary. The option of command disapproval is simply not necessary to achievement of Army goals. The unjustifiably broad reach of this aspect of the premarriage procedures impermissibly infringes upon the right of service members to marry. If challenged, the present Army regulation could be rejected as constitutionally unsound.

Involvement of the clergy. Religious practices and beliefs are highly sensitive and emotional issues even apart from their constitutional status. The injection of religious considerations into Army procedures should be done with care, due consideration, and, preferably, uniformity. Unfortunately, this is not always the case in premarriage processing.

In *United States v. Wheeler*, premarriage processing included mandatory counseling by a chaplain or civilian clergyman. Seaman Wheeler asserted that this counseling was an unlawful "intrusion into religious practices," but this claim was brushed aside by the Court of Military Appeals.⁴⁷ The present Armywide regulations concerning overseas marriages do not require such counseling, but commanders are directed to "encourage" service members to avail themselves of clerical counseling voluntarily.⁴⁸ However, as recently as February 1982, one Army command, by local regulation, did mandate counseling by a member of the clergy before the marriage application could be forwarded to the approval authority.⁴⁹ Counseling of service members contemplating entering foreign marriages with their attendant unusually high domestic risks is certainly desirable; clergymen, especially military chaplains, are frequently well qualified for such tasks, but care should be taken to

⁴⁷*Wheeler*, 12 C.M.A. at 388, 389, 30 C.M.R. at 388, 389.

⁴⁸AR 600-240, paras. 4e, 15a.

⁴⁹United States Forces, Korea/Eighth U.S. Army, Reg. No. 600-240, paras. 2c(7), 2e, App. E (17 May 1979) (superceded by USFK Reg. 600-240, para. 4b(4) (16 Mar. 1982).

insure such counseling is voluntary if the subject matter is ecclesiastical and not secular.⁵⁰

Marriages between U.S. citizens in foreign countries. Where two citizens of the United States wish to marry overseas, the issue of admissibility to the U.S. is not involved. This is also the case where a U.S. citizen desires to marry an alien who has been admitted to the U.S. for permanent residence. Yet, these categories of persons are still required to have command approval before marrying if one of the parties is in the military. In such situations, the process is abbreviated and included only evidence that the parties are legally capable of marrying, an examination for certain infectious diseases, and counseling concerning the problems and responsibilities of marriage.⁵¹ In such cases, the only ground for disapproval of an application is immigration related.⁵² If the abbreviated premarriage process is deemed necessary to insure that a valid marriage takes place and that contagious disease is not unknowingly introduced into the military community, this interest cannot support the Damoclean threat of possible denial of authorization to marry after the process is completed.⁵³

Some service members' belief that such marriages may be readily dissolved. The lengthy and pervasive premarriage processing by the Army has led some soldiers to mistakenly conclude that since the inception of foreign marriages appears so totally under the control of the military, such marriages may be easily dissolved by mere application to command authorities in a manner similar to that used in the

⁵⁰Eighth U.S. Army Judge Advocate memorandum 13 May 81, subject: Marriages of Service Members Overseas (counseling by Chaplain). This memorandum noted:

In CONUS [the continental United States] an individual considering marriage has usually had a longer courtship and has discussed marriage plans with family and friends. Acceptance or rejection of the intended spouse by relatives and peers presages future events and may influence whether or not their marriage ultimately takes place. The situation, however, is absolutely different in Korea where the courtship is compressed by a DEROS [date of estimated return from overseas]; love flowers quickly in the unaccustomed light of a foreign land and is not subject to the chill, withering effects of opposition by relatives and friends. In this context it seems appropriate that at least once before the irretrievable step is taken each service member considering this leap into a new life should see how his marriage will be viewed by observers whose vision is not subjected to the rose influences of new found love (and perhaps sexual excitement). This impartial observation should ideally be made by someone who is both trained and compassionate. The chaplain seems an ideal choice.

⁵¹AR 600-240, para. 12; USFK Reg. 600-240, para. 7.

⁵²AR 600-240, para. 4a.

⁵³Zablocki, 434 U.S. at 389.

authorization process.⁵⁴ This misconception indicates that, for these soldiers, the counseling process has gone seriously awry. This mistaken belief may foster a casual attitude toward marriage, rather than encouraging soldiers to carefully consider their decision to marry.

Determining the proposed spouse is disqualified from entering the United States. The principal focus of the premarriage procedure is to identify intended spouses who are not eligible for admission into the United States.⁵⁵ This immigration screening is tied to a federal statute of which most commanders are only vaguely aware. Yet these commanders are expected to apply the law, as reflected in Army regulation, in making determinations which will probably have far-reaching effects upon the lives of soldiers and their proposed marital partners.⁵⁶ The result of a commander's finding that the prospective spouse would probably be barred from entering the United States would most likely be denial of authorization to marry. In the European command, this technical and important finding concerning eligibility for immigration is made by officials in the U.S. Embassy if there is reason to believe the prospective alien spouse may not be allowed to enter the United States.⁵⁷ In the Republic of Korea this finding is made without discussion with U.S. immigration officials.⁵⁸ Considering the importance of this decision, the assistance of technically proficient personnel from an appropriate U.S. Embassy should be sought where possible; at present there is no uniform policy in this regard.⁵⁹

⁵⁴That such an erroneous belief could actually be held may seem unlikely. Consider, however, the following letter received by the Eighth U.S. Army Judge Advocate in early 1982:

Dear Asst. Judge Advocate I don't know who is in charge I wrote to my lawyer in the States trying to get me a divorce. My wife had deserted me for 2 years. _____ CPT Jage _____ Asst Judge Advocate was my witness when I got marriage had sign the marriages as my witness. And _____ SP5 _____ HQ USAGY APO SF 96301 Sign as her witness. I am just write try to get my divorce. The mayor of the Special City of seoul is _____ I hope that someone can help me with my divorce I pray that get answer from the Jag that in Korea I not going to say much I close for now. Write me back as soon as you get this letter. My wife name is _____ and my name is _____

⁵⁴AR 600-240, para. 4a; AR 608-61, para. 3.

⁵⁵AR 600-240, para. 4a; para. 5a, USFK Reg. 600-240, para. 5a.

⁵⁶USAREUR Supp. 1 to AR 608-61, paras. 3.1d(2), 7.1a(6).

⁵⁷Eighth U.S. Army Judge Advocate memorandum, 15 Aug. 81, subject: Overseas Marriages (Discussion with U.S. Embassy Officials) [hereinafter cited as EAJA memo (15 Aug. 1981)].

⁵⁸The marriage application documents generated in United States Forces, Korea are not made available to the U.S. Embassy in the Republic of Korea, nor are

IV. CONCLUSION

For the reason discussed above, the present Army policy of permitting commanders the option of denying authorization to marry after all premarriage requirements have been met is, at the very least, constitutionally suspect. Consideration should be given to adopting a procedure which would automatically grant approval upon completion of the application process.

Local command regulations should be reviewed to insure that premarriage counseling conducted by military chaplains is either voluntary or, if mandatory counseling by clergyman is deemed appropriate due to special qualifications, that such counseling is secular in nature.

In those situations where both parties to the prospective marriage are already eligible for admission into the United States, military intrusion into the lives of the soldier and intended spouse should be minimized. The disapproval sanction, legally questionable at best, is clearly disproportionate and unnecessary where there are no immigration concerns. Additionally, where the parties are both U.S. citizens, there will be few justifications for marital counseling. Persons whose marriage does not involve the possibility of creation of dependents who are not eligible to enter the U.S. should be considered for exemption from the premarriage requirements.

Commanders should be required to advise all applicants that Army premarriage processing has very little to do with the actual marriage ceremony which must be conducted in accordance with the laws of the country where the wedding will take place and that the Army has absolutely no power to dissolve marriages or grant divorces.

Determinations concerning likely admissibility of a proposed spouse into the United States should, where possible, be made by officials of the Department of State or the Immigration and Naturalization Service. Procedures for coordinating efforts in this regard should be developed at Department of the Army level and command participation required by regulation.

unfavorable matters disclosed in the premarriage process divulged to the Embassy. Frequently, an investigation of a prospective alien spouse's background conducted by the Army will be repeated by the Embassy. EAJA memo (15 Aug. 81). In U.S. Army Europe, on the other hand, "the premarital investigation documents, including the medical examination of the prospective alien spouse and dependents, must be...submitted to the appropriate American consulate or embassy when the applicant applies for a visa." USAREUR Suppl. 1 to AR 608-61. para. 3c.

DIVISION OF U.S. ARMY RESERVE AND NATIONAL GUARD PAY UPON DIVORCE

by Captain Karen A. MacIntyre*

On June 26, 1981, the United States Supreme Court held in *McCarty v. McCarty*¹ that federal law precluded a state court's division in a divorce action of nondisability military retired pay pursuant to the state's community property laws. In order to reverse the holding in *McCarty*, Congress passed the Uniformed Services Former Spouses' Protection Act² which became effective on February 1, 1983.

This article will examine the effect of *McCarty* and the Act on the division by state courts of military reserve retired pay in divorce actions.

I. THE RESERVE COMPONENTS

The Reserve Components of the armed forces include the Army Reserve and the Army National Guard of the United States.³ The mission of the Reserve Components is to provide trained personnel for active duty in the armed forces during wartime, a national emergency, or when required by the national security.⁴ Congress determines when reservists are to be called to active duty. Once called, they may be retained as long as needed.⁵ Retired reservists may be ordered to active duty when there are not enough other qualified reservists to meet the needs of the nation.⁶

A reservist is entitled to retired pay when he has completed twenty years of service and is at least sixty years old.⁷ Although a reservist's retired pay is calculated differently than that of a service member retiring from active duty, the source and formula for calculation of

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¹Pub. L. No. 97-252, Tit. X, §§ 1001-1006, 96 Stat. 730 (1982) (codified at 10 U.S.C. §§ 1001-1006).

²10 U.S.C. § 261 (1976).

³*Id.* at § 262.

⁴*Id.* at § 263.

⁵10 U.S.C.A. § 672 (Supp. 1982).

⁶*Id.* at §§ 1331, 1332.

the pay are the same. Both are paid by the federal government and the amount is based on the number of years served in the armed forces.

The nature of reserve duty is different than that of active duty. Typically, a reservist spends only a small portion of his or her time on military duties. Except in the event of a call to active duty, neither a reservist nor a reservist's family are required to move pursuant to military orders. The similarities of a reservist's retirement benefits, however, make a careful analysis of the *McCarty* decision necessary to determine the current status of the division of reserve retired pay in divorce actions.

II. THE McCARTY DECISION

Richard and Patricia McCarty had been married for nineteen years when he filed suit for divorce in California. For eighteen of those nineteen years Colonel McCarty had served on active duty in the Army. In his request for dissolution of the marriage, he asked that his retirement benefits, which had not yet vested, be awarded to him as separate property. Mrs. McCarty contended that the retirement benefits were community property under California law. The Supreme Court of California held that Colonel McCarty's military retired pay was subject to division as quasicommunity property⁸ and ordered him to pay his wife a portion of his monthly pension. The decision in the case followed a line of California and other state cases which held that military pensions were subject to division as community property.⁹

In reaching its decision in *McCarty*, the United States Supreme Court examined the history of military retired pay and the California courts' treatment of it. The Court specifically limited its examination to nondisability retired pay and stated that reserve retired pay was not relevant to the case.

The Court briefly analyzed Colonel McCarty's contention that retired pay was current compensation for reduced, but currently rendered services, rather than deferred compensation for services performed while on active duty. In its analysis, the Court referred to those aspects of military retirement which differ from typical civ-

⁸The Supreme Court excerpted the definition of quasicommunity property in California as "all real or personal property, wherever situated heretofore or hereafter acquired...[b]y either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in [California] at the time of its acquisition" from Cal. Civ. Code Ann. § 4803 (West Supp. 1982).

⁹See Kalinski & Grendell, *McCarty v. McCarty: The End or the Beginning?*, *The Army Lawyer*, Aug. 1981, at 18.

ilian pension plans. The Court noted that a retired officer remains a member of the Army and remains subject to recall at any time. These conditions also apply to retired reservists¹⁰ and could be used to argue that reserve retired pay should be categorized as present compensation for reduced services.

The Court, however, did not decide this issue. It chose instead to base its holding on the conflict between the state's application of community property law and the congressional intent in establishing the military retirement system.

The Court determined that Congress had intended that military retired pay be a personal entitlement. This finding stemmed from the Court's analysis of several statutory provisions which are paralleled by statutes affecting reserve retirement. The Court first cited section 3929 of Title 10, U.S. Code, which states that a member of the Army retired from active duty "is entitled to retired pay." The Court placed emphasis on the idea of entitlement by quoting from legislative history which indicated that military pay has historically been a personal entitlement.¹¹

The provision for reserve retired pay also states that a person "is entitled to" retired pay.¹² The words "is entitled" were substituted for the words "shall be granted" when the present provision was written.¹³

As another indication that Congress intended military retirement benefits to be a personal entitlement, the Court noted that under section 2771 of Title 10, U.S. Code, a service member may designate a beneficiary to receive unpaid arrearages in retired pay upon the member's death. The Court felt this was in conflict with California's theory of retired pay as community property because a retiree could bequeath an interest in retired pay to someone other than a spouse. The provisions of section 2771 also apply to reservists and illustrate further the congressional intent as perceived by the Court to characterize reserve retired pay as a personal entitlement.

The Court then analyzed the service member's ability to elect whether to participate in the Survivor Benefit Plan¹⁴ and its predecessor, the Retired Serviceman's Family Protection Plan.¹⁵ The Court found clear congressional intent that this is a personal entitle-

¹⁰10 U.S.C.A. §§ 672, 675 (Supp. 1982).

¹¹S. Rep. No. 1480, 90th Cong., 2d Sess. 6 (1968).

¹²10 U.S.C. § 1331 (1976).

¹³10 U.S.C.A. § 1331 Note (Supp. 1975).

¹⁴10 U.S.C. §§ 1447-1455 (1976 & Supp. III 1979).

¹⁵*Id.* at §§ 1431-1446.

ment because a service member could choose to provide no annuity, or an annuity for children but not for a spouse. The same reasoning would hold true for reserve retirement; the statutory provisions analyzed also apply to reservists. The Court stated that the goals of Congress in designing the military retirement system were "to provide for the retired service member, and to meet the personnel management needs of the active military forces." Although not describing the reserve retirement system, the Court's remarks are equally applicable to it.

The Court foresaw the disruption of congressional goals for the military retirement system which would be caused if a community property interest in retired pay were found. First, the Court stated that a community property interest in retired pay would diminish the portion of that benefit Congress said should go to the retired service member. Second, the Court said that a community property interest in retired pay would upset the balanced scheme by which Congress meant to encourage a service member to provide an annuity for a spouse or children. Finally, the Court found that a community property interest in retired pay would impair the military retirement system's ability to serve as an inducement for enlistment. Retirement would be discouraged; this would interfere with orderly promotions. In analyzing retirement benefits as an inducement for enlistment, the Court emphasized that military forces are national in operation and service members may not choose their residences. Although this one line of reasoning would not apply to reservists, all other points considered by the Court would be as true for the reserve retirement system as for the nondisability retirement system examined by the Court.

In conclusion, the Court suggested that Congress might decide to provide former spouses of service members with more protection. The Court held, however, that, until Congress spoke on the matter, a state court did not have the power to treat a nondisability military pension as community property.

It is clear that the Court's reasoning in reaching its holding in *McCarty* applies also to the reserve retirement system. Case law would have shown whether state courts would have applied *McCarty* to reserve retired pay without further guidance. However, before such case law was developed, Congress accepted the Court's suggestion and acted to change any impact that *McCarty* would have had on military retired pay.

III. UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

After the *McCarty* decision, Congress held hearings on whether legislation should be passed to allow states to divide military retired pay upon divorce. Extensive testimony on the sacrifices made by military spouses was given before the Senate Committee on Armed Services¹⁶ and its Subcommittee on Manpower and Personnel.¹⁷ The Committee found that "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection."¹⁸

The protection of the military spouse was the recurring theme that led to passage of the Uniformed Services Former Spouses' Protection Act. In attempting to determine whether the Act applies to reservists, it must first be noted that rarely do spouses of reservists endure the "frequent moves and special pressures" which caused Congress to pass the Act. Neither the legislative history of the Act¹⁹ nor the legislative history of a Senate bill with similar provisions²⁰ considers the question of applicability to reservists.

The Act permits a portion of military retired pay to be considered as property in divorce settlements. Its stated purpose is to reverse the effect of the *McCarty* decision and allow the court-ordered division of property in divorce cases to include military pensions.²¹ The Act also contains provisions authorizing military medical care a commissary and exchange privileges for some former spouses as well as the opportunity for a former spouse to be designated as a beneficiary under the Survivor Benefit Plan.²²

In determining whether the Act applies to reservists, it is necessary to examine the language used by Congress in drafting the Act, the provisions of the Act itself, and its legislative history. Throughout the Act, the retiree whose benefits are affected is referred to as the "member." The Act defines "member" as including a "former

¹⁶Report of the Committee on Armed Services, S. Rep. No. 97-502, 97th Cong., 2d Sess. (1982).

¹⁷*Uniformed Services Former Spouses Protection Act: Hearings on S. 1453, S. 1648, and S. 1814 before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97th Cong., 1st and 2d Sess. (1981 and 1982).*

¹⁸*Id.* at 6.

¹⁹Conference Report to accompany S. 2248, H.R. Rep. No. 97-749, 97th Cong., 2d Sess. (1982).

²⁰Report of the Committee on Armed Services, *supra* note 19.

²¹Conference Report to accompany S. 2248, *supra* note 18, at 165.

²²See generally Grendell, *Accepting the Challenge: Congress Reverses McCarty*, *The Army Lawyer*, Nov. 1982, at 19.

member." The legislative history of the Senate bill which was a forerunner to the Act states that "The term 'member' is intended to include any person who is or was appointed or enlisted in, or conscripted into, a uniformed service."²³ "A uniformed service" is not defined by the Act, the legislative history, or Title 10, U.S. Code.

The Act contains six sections, three of which have bearing on the question of whether reservists are affected by the Act. Section 1002, with certain restrictions, authorizes a court to treat a portion of a member's retired pay for pay periods after June 15, 1981, the day before the *McCarty* decision, "either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."²⁴ This portion of the Act amends Chapter 71 of Title 10, U.S. Code by adding a new section to the end of the chapter. Significantly, Chapter 71 is the chapter dealing with computation of reserve retired pay.²⁵ Retired pay for those who retire from active duty is computed under Chapter 371 of Title 10.²⁶

Section 1003 of the Act allows a service member to designate a former spouse as a beneficiary under the Survivor Benefit Plan.²⁷ The designation must be made pursuant to a voluntary written agreement and may not be ordered by a court. This section is further evidence that the Act pertains to reservists since the Survivor Benefit Plan applies to reserve retirees as well as active duty retirees.²⁸

Section 1004 deals with the provision of military health care to former spouses. It extends health care benefits to certain unremarried former spouses who were married to the service member for at least twenty years during which the service member performed at least twenty years of creditable service towards retirement. In order to accomplish this extension of health care benefits, the Act amended section 1072 of Title 10, U.S. Code to include such a former spouse in the definition of dependents. The Act then amended section 1076(b) in a manner that made it clear that Congress intended that reservists be covered by the Act.

The general rule for eligibility of dependents for military medical

²³Report of the Committee on Armed Services, *supra* note 16, at 15.

²⁴10 U.S.C.A. § 1002(c)(1) (Supp. 1982).

²⁵10 U.S.C. §§ 1331, 1401 (1976 & Supp. III 1979).

²⁶10 U.S.C. §§ 3929, 3991 (1976).

²⁷10 U.S.C. §§ 1431-1446 (1976 & Supp. III 1979).

²⁸*Id.* at §§ 1431, 1376.

and dental care is established by section 1076(b) of Title 10, which provides:

b. Under regulations to be prescribed jointly by the Secretary of Defense and the Secretary of Health and Human Services, a dependent of a member or former member—

(1) who is, or (if deceased) was at the time of his death entitled to retired or retainer pay or equivalent pay; or

(2) who died before attaining age 60 and at the time of his death

(A) would have been eligible for retired pay under chapter 67 of this title but for the fact that he was under 60 years of age, and

(B) had elected to participate in the Survivor Benefit Plan established under subchapter II of Chapter 73 of this title;

may, upon request, be given the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff, except that a dependent of a member or former member described in clause (2) may not be given such medical or dental care until the date on which such member or former member would have attained age 60.

It is apparent that section 1076(b)(2) applies only to reservists since chapter 67, which defines the retired pay for which the member is eligible in section 1076(b)(2)(A), is the chapter governing the retired pay of reservists and does not apply to those who retire from active duty.²⁹ The Act inserts at the end of section 1076(b) the amendment: "A dependent described in section 1072(2)(F) of this title may be provided medical and dental care pursuant to clause (2) without regard to subclause (B) of such clause."

Thus, the Act has amended one section which applies only to reservists and amended other sections which apply equally to reserve and active duty retirees. Either by intent or clear language, Congress has made the Act applicable to reservists and included former spouses of reservists in the category of those to be "protected."

²⁹*Id.* at §§ 1331, 1401, 3929, 3991.

IV. CONCLUSION

Prior to *McCarty*, state courts characterized marital property including military pensions, according to state law. After *McCarty* and before the Uniformed Services Former Spouses' Protection Act, states were not able to consider military pensions as divisible assets. By passing the Act, Congress has, with certain limitations, returned to the states the right to include military benefits in the division of marital property according to the law of the state. A reservist who is contemplating divorce should be aware of the provisions of the Act for it raises the possibility that retired pay thought to belong solely to the reservist might now be required to be shared with a former spouse.

THE INVOLUNTARY ALLOTMENT PROGRAM: AN ANALYSIS

by Captain Joseph M. Ward*

I. INTRODUCTION

Legal assistance officers often face many problems stemming from divorce support settlements. A new twist is now appearing in those problems. Soldiers, having received a notice informing them that an allotment will soon be taken out of their pay to meet ordered support obligations, are seeking guidance. As a result, military attorneys are being confronted with the Army's program of involuntary child and spousal support allotments.¹

In order to assist the attorney in understanding this program, this article will explain the allotment process: how it works and some of its shortcomings. Initially, there will be a general description of the program. Thereafter, the program will be broken into three sections and each section will be described and analyzed. Finally, an overview of the program coupled with some recommendations will be discussed.

II. THE PROGRAM IN GENERAL

When Congress passed the Tax Equity and Fiscal Responsibility Act of 1982,² it added, effective 1 October 1982, section 465 to Title 42 of the United States Code.³ This amendment provided that, in certain situations, involuntary allotments could be taken from an active duty service member's pay for child or child and spousal support. Specifically, where the soldier has failed to make payments under a support order and the delinquency was in a total amount equal to the support payable for two months or longer,⁴ his or her pay was subject to the allotment. The statute outlined certain procedures that must be followed, and directed the Department of Defense (DOD) to issue regulations applicable to allotments made under the section.⁵ Pursu-

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¹47 Fed. Reg. 46, 297 (1982) (to be codified at 14 C.F.R. § 54).

²Pub. L. No. 97-248 (1982).

³*Id.* at § 172.

⁴*Id.*

⁵*Id.*

ant to this directive, DOD published in the *Federal Register* a proposed rule⁶ which provides implementing policies and prescribes procedures for the involuntary allotments.

The stated policy requires active duty military members to make involuntary allotments from pay as child support⁷ when the member has failed to make periodic payments under a support order in an amount equal to or greater than the support payable for two months.⁸ Failure to make these payments would be established by notice from a court, which has authority to issue an order against the member for support or from a state agency with responsibility for recovering amounts owed as child support.⁹ The amount of the allotment would comply with the support order and could include arrearages as well as current support, if the authorized person¹⁰ has requested it.¹¹ Once initiated, the allotment could be adjusted or discontinued only at the direction of the authorized person. No allotment could be started, however, until the service member has consulted a judge advocate to discuss the legal and other factors concerning the member's support obligation and the failure to make payments. The allotment may be initiated, however, if thirty days have elapsed since the soldier received notice of the allotment and it has not been possible, despite continuing good faith efforts, to arrange such a consultation.¹²

In order to initiate the allotment, the authorized person must serve notice on the Commander, U.S. Army Finance and Accounting Center (USAFAC) and include in the notice a certified copy of the underlying support order, a written statement of delinquent support payments signed by the authorized person, and a statement of the amount of arrearages and, if applicable, the amount to be applied

⁶47 Fed. Reg. 46, 297 (1982) (to be codified at 14 C.F.R. § 54).

⁷Unless otherwise stated the term "child support" will also mean "child and spousal support."

⁸32 C.F.R. § 54.4(a) (1982).

⁹*Id.* at § 54.3(e). This subsection states that the state agencies, in order to qualify as an "authorized person," must have in effect a plan approved under part D of Title IV of the Social Security Act, 42 U.S.C. §§ 651-664 (1976) (hereinafter these will be referred to as "authorized person").

¹⁰32 C.F.R. § 54.3(e) (1982).

¹¹The amount requested could not exceed the limits prescribed at 15 U.S.C. § 1673 (1976). These limits are:

- (a) 50% of the members aggregate disposable earnings for any month when the member is supporting a spouse or dependent child or both, other than a party in the support order.
- (b) 60% of the member's aggregate disposable earnings for any month when he or she is not supporting a spouse or dependent child or both.
- (c) An additional 5%, if the member is in arrears an amount equivalent to 12 or more weeks support.

¹²32 C.F.R. § 54.4(b) (1982)

each month toward liquidation of the arrearages.¹³ Within fifteen calendar days of receipt of the notice, the USAFAC must send to the service member written notice:

- (1) that notice has been served on the USAFAC, including copies of the documents submitted;
- (2) of the maximum limitations set forth, with a request that the member submit supporting affidavits or other documentation necessary for determining the applicable percentage limitation;
- (3) that by submitting supporting affidavits or other necessary documentation, the member consents to the disclosure of such information to the party requesting the support allotment;
- (4) of the amount or percentage that will be deducted if the member fails to submit the documentation necessary to enable the designated official of the military service to respond to the legal process within the time limits set forth;
- (5) that legal counsel will be provided by the military service and the members should contact the nearest legal services office; and
- (6) of the date that the allotment is scheduled to begin.¹⁴

The USAFAC will notify the legal services office at the member's duty station of the need for consultation with the soldier and provide the office with a copy of the original notice.¹⁵ The servicing legal office would then have a consultation with the soldier concerning the legal and other factors involved with the member's support obligation and any failure to make payment.¹⁶ The office must confirm in writing to the USAFAC within thirty days of notice that the required consultation has taken place, or that despite continuous efforts to contact the member, a consultation was unable to be arranged.¹⁷ The allotment would start with the first end-of-month payday after the USAFAC has been notified of the consultation, but not later than the first end-of-month payday after thirty days have elapsed since notice was sent to the individual.¹⁸

¹³*Id.* at § 54.6(a). Other factors must be included but are not pertinent to the focus of this article.

¹⁴32 C.F.R. § 54.6(d)(1) (1982).

¹⁵*Id.* at § 54.6(d)(2).

¹⁶*Id.* at § 54.6(d)(3).

¹⁷*Id.* at § 54.6(d)(4). This article will not deal with the possible ethical ramifications of the requirement that an attorney must notify the USAFAC of the actions of his or her client when such notice would be adverse to the client's interests.

¹⁸See 42 U.S.C.A. § 465(a)(2) (Supp. 1982)(thirty days after notice to the affected member); 32 C.F.R. § 54.6(f) (thirty days after notice to the USAFAC).

This briefly explains the process, but a closer examination must be taken of the steps involved.

III. GETTING NOTICE TO THE USAFAC

Basically there are two authorized entities¹⁹ who can give the USAFAC the required notice, a court competent to issue the order and a state agency.²⁰

A. NOTICE FROM A COURT

Both the statute and the proposed regulation define an "authorized person" as "the court which has authority to issue an order against such member for the support and maintenance of a child, or any agent of such court."²¹ Thus, if the USAFAC receives notice from a court, the Center would send out the required notice to the individual and approximately thirty days later, the allotment would begin. Depending upon the notice received from the court, this allotment could be not only for the monthly support payments but also for the recovery of the arrearages.

A question arises at this stage whether there are any protections for the service member. These protections are to be found in the state laws where the court is located. Any person coming before that court seeking an order for the amounts due will have to comply with the notice and hearing requirements of that state; thus, the service member should be afforded his or her due process rights. The court's new order, coupled with the underlying support agreement, is then sent to the USAFAC where the allotment action will begin.

To this point, the process is almost identical with the current garnishment policy²² wherein the USAFAC receives garnishment orders from the various courts and, if the order is valid on its face, the USAFAC honors it and garnishes the soldier's pay. Such is the case in involuntary allotments, where the USAFAC receives a court order directing the payment, honors it, and begins the allotment. The questions that arise concern whether the court which issued the order had the authority²³ to do so and whether the USAFAC must make that determination before paying. A similar question was presented to the Court of Claims in *Morton v. United States*.²⁴ In

¹⁹32 C.F.R. § 54.3(e) (1982).

²⁰32 C.F.R. 54.3(e) (1982). In a phone conversation on 12 April 1983, Mr. David Gagermeier and Mr. Stu Walls, of the legal office, USAFAC, indicated that of the approximately 300 involuntary allotments that have been processed the majority now appear to be coming from agencies.

²¹42 U.S.C.A. § 465(b)(2) (Supp. 1982); 32 C.F.R. § 54.3(e) (1982).

²²42 U.S.C. § 659 (1976).

²³42 U.S.C.A. § 465(b)(2) (Supp. 1982); 32 C.F.R. § 54.3(e) (1982).

²⁴No. 290-77 (Ct. Cl. Feb. 1982).

Morton, the court ordered the Air Force to repay Colonel Morton money which it had garnished from his pay based upon an Alabama writ of garnishment that was valid on its face. Colonel Morton had challenged the writ by asserting that Alabama lacked jurisdiction over him. In reaching its decision, the court held that the government was responsible to honor only writs that came from a court of competent jurisdiction and that Alabama lacked jurisdiction over Colonel Morton.²⁵ The court thus required the accounting office to look beyond the writ to determine the jurisdictional basis of the issuing court before honoring the writ.²⁶ This ruling is being appealed to a panel of claims court judges and, pending the appeal, the USAFAC policy will not change; the Center will honor writs valid on their face.²⁷

This prong of the involuntary allotment process may face the same dilemma because, although the requirement for a court order makes the state rules for notice and hearing applicable to assure appropriate due process, the question of whether the court had the jurisdiction to act becomes critical. The *Morton* rationale, if upheld, would require the USAFAC to go beyond the court order and evaluate whether the court had the requisite authority to issue the order. Since both the statute and proposed regulation require courts to have this authority, the analysis may be one which is necessary but which is currently not being done.²⁸

B. NOTICE FROM A STATE AGENCY

A state agency is also an "authorized person"²⁹ that may send the required notice to USAFAC. In this scenario, the agency has been paying child support and has thus been subrogated to the dependent's right's to the support. When this support becomes delinquent in an amount equal to or greater than two months' support, the agency can send notice to the USAFAC. This notice must contain various information, including a copy of the underlying support order and a statement of the amount of arrearages and the amount which is to be applied to those arrearages, if applicable.³⁰ When the USAFAC receives this information, it will send out the required notice to the soldier and begin the mechanics for the commencement of the allotment.

²⁵*Id.*

²⁶*Id.* See also *Legal Assistance Items*, *The Army Lawyer*, Apr. 82, at 17.

²⁷*Id.* at 16-17.

²⁸The rationale for the government's reluctance to engage in such an analysis is understandable, for it would require a tremendous amount of resources for a decision that is best left to the courts.

²⁹42 U.S.C.A. § 465(b)(1) (Supp. 1982); 32 C.F.R. § 54.3(e)(1) (1982).

³⁰*Id.* at § 54.6(a).

There is some discrepancy, however, over exactly what documentation the agency must send. If the USAFAC only receives a copy of the underlying support order and a statement from the agency that the account is delinquent with a plan for repayment, the Center will initiate an allotment only for the amount of the monthly support and not for collection of the arrearages. But, if the underlying support order is accompanied by a judgement order signed by a court, arrearages will also be covered in the allotment.³¹ The regulation merely calls for a statement of the amount of arrearages and allows this statement to come from either of the authorized persons.³² It would seem that, for an allotment for arrearages to be initiated under the regulation, an agency would merely have to send a statement certifying that the soldier was in arrears and requesting an amount to be applied to the arrearages. Indeed, the state of Georgia takes the position that sending a statement indicating that a soldier is in arrears with the plan for repayment and the other required information is sufficient.³³ In some states, the agencies have taken the matter to the courts and obtained judgment signed by the court. In these cases, the USAFAC has honored not only the allotment but also the repayment of arrearages.³⁴ This requirement imposed by the USAFAC seems to go beyond the language and intent of the regulation. The regulation indicates that either an agency or a court can send in the statement, yet the USAFAC specifies that it must be reduced to a form of judgment by the court before the Center will honor any plan for payment or arrearages.

The USAFAC policy, however, seems to have merit. If an agency can merely send in a statement and then begin receiving the allotment payment, the service member may not hear about the problem until notified by the USAFAC. However, if the agency must obtain a court judgment, the USAFAC may feel more secure that minimal due process rights have been afforded the soldier. Currently, the agency is not bound by either the statute or regulation to provide these protections.

The question as to whether such notice is required is an open one. In *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*,³⁵ the U.S. Supreme Court ruled that due process did not require that a person who "has been granted an opportunity to be heard and has had his

³¹Telephone conversation between the author and Mr. Stu Walls, Legal Office, USAFAC, 12 Apr. 1982.

³²32 C.F.R. § 54.6(a) (1982).

³³Telephone conversation between the author and Mr. Edmond Fletcher Deputy Director, Georgia Department of Human Resources, 12 Apr. 1982.

³⁴Telephone conversation between the author and Mr. Walls, 12 Apr. 1982.

³⁵266 U.S. 285 (1924).

day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment."³⁶ This suggests that, since the soldier had a chance to be heard at the hearing from which the support order issued, no future hearing in satisfaction of that order is necessary. The Court in *Griffin v. Griffin*,³⁷ however, ruled that an *ex parte* court judgment was invalid because of an absence of notice to the extent that it precluded possible defenses to arrearages that had arisen since an earlier contested judgment.³⁸ The Court did not totally reject the *Endicott-Jackson* rationale and in part stated that "due process does not require that notice be given before confirmation of rights theretofore established in a proceedings of which adequate notice was given."³⁹ This area remains unsettled, especially in light of the tenor of more recent Supreme Court decisions which require a balancing of the interest involved against the protections provided.⁴⁰ Moreover, the Court requires a notice that "is reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"⁴¹ and which includes notice of the availability of a procedure for contesting the action with a "responsible employee empowered to resolve the dispute."⁴²

In this respect, the state agency should be required to utilize a system which provides the soldier with notice and an opportunity to be heard before *any* allotment is granted, not just one covering the arrearages. This may require agencies to get a court order before obtaining the allotment or the agencies could utilize procedures which are already present in the agency system. Since the agency, to be an authorized person, must have had a plan approved under part D of Title IV of the Social Security Act,⁴³ the agency could avail itself of the notice and hearing procedures in that plan before instituting allotment action. This would preserve the soldier's right to have notice and a hearing. Other means of accomplishing this guarantee

³⁶*Id.* at 288.

³⁷327 U.S. 220 (1946).

³⁸In this case, the wife had obtained a 1936 judgment in a fully contested hearing for arrearages from a 1926 divorce decree. In 1938, the wife obtained an *ex parte* judgment without notice to the husband and cut off any defenses that may have arisen since 1936; the court found it to be invalid.

³⁹*Id.* at 233-34.

⁴⁰*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

⁴¹*Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

⁴²*Memphis Light, Gas, and Water Div. v. Craft*, 436 U.S. 1, 18 (1978).

⁴³42 U.S.C. §§651-664 (1976) (as required by 32 C.F.R. § 54.3(e) (1982)).

may be present, but, however devised, the agency should be burdened with a requirement to provide notice and hearing before it sends an allotment request to USAFAC.

IV. NOTICE FROM USAFAC TO THE SOLDIER

The last step required by regulation before the allotment takes effect is for the USAFAC to give the service member notification of the pending allotment.⁴⁴ Within thirty days of this notice, the service member is to consult with a judge advocate and discuss the legal and other factors involved with the member's support obligation.⁴⁵ If continuing efforts to arrange the consultation have proven fruitless, the legal office must notify the USAFAC⁴⁶ and the allotment would start at the first end-of-month payday after thirty days have elapsed since notice to the service member.⁴⁷ Since the notice to the individual merely advises the service member of what is about to occur and requests further information from the soldier, the value of the notice is questionable.

Whether the notice is necessary is, as discussed above, an open question. *Endicott-Johnson*⁴⁸ and to a certain extent *Jenkins*⁴⁹ both suggest that, if an individual has received prior notice and has had an opportunity to be heard prior to judgment, the person has no due process right to another notice and hearing. More recent Supreme Court cases⁵⁰ seem to retreat some from this rigid rule and suggest that a balancing of the interests involved against the protections provided is necessary before deciding whether to give additional notice and hearing.⁵¹ In light of this trend to conduct a case-by-case analysis, it would be prudent to require that notice be sent out to the soldier.

If a notice is to be sent, what should it contain? The present notice does little more than inform the service member that USAFAC has been served with notice, that legal counsel will be provided the member, and that the allotment is to begin on a certain date. This is

⁴⁴32 C.F.R. § 54.6(d)(1) (1982).

⁴⁵*Id.* at § 54.6(d)(3).

⁴⁶*Id.* at § 54.6(d)(4).

⁴⁷42 U.S.C.A. § 465(a)(2) (Supp. 1982). This is taken from the statute. See note 18 *supra*.

⁴⁸266 U.S. 285 (1924).

⁴⁹327 U.S. 220 (1946).

⁵⁰See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

⁵¹See also *Deary v. Guardian Loan Co., Inc.*, 534 F. Supp. 1178 (S.D.N.Y. 1982); *Finberg v. Sullivan*, 634 F.2d 50 (3rd Cir. 1980); *Brown v. Liberty Loan Corp. v. Duval*, 539 F.2d 1855 (5th Cir. 1976), *cert. denied*, 480 U.S. 949 (1977).

insufficient. *Mullane v. Central Hanover Trust Co.*⁵² and *Memphis Light, Gas, and Water Division v. Craft*⁵³ hold that the notice must give the person an opportunity to present objections to a responsible agent empowered to resolve the dispute. None of that is present in the current notice requirement. Indeed, no one seems certain to whom objections should actually be forwarded. The USAFAC has indicated that, if a valid defense to the allotment is present, the Center should be notified and it will in turn notify the requestor; but the USAFAC also suggests that a copy of the objection be sent directly to the requestor.⁵⁴ The notice should therefore indicate to whom challenges may be sent and such a party must be one who has the authority to act on the matter.

Additionally, some courts have required notification of the defenses available to a judgment debtor.⁵⁵ In *Nelson v. Regan*,⁵⁶ the Connecticut Department of Human Resources certified the United States Treasury the names of individuals who were delinquent in their support obligations. Later, these individuals were informed that their tax refunds might be intercepted to offset the delinquent obligations. The notice did not inform the persons of the amount of the delinquency, of any available defenses, or of any procedure to challenge the offset.⁵⁷ The district court ruled that "[a] clear and detailed predeprivation notification, specifying the possible defenses and the procedures for asserting those defenses, is necessary to afford due process protection to these individuals."⁵⁸ The same type of notice should be afforded the service members subject to involuntary allotments.

The current notice should therefore be amended by adding clear procedures for challenging the allotment, to include to whom those challenges should be presented and what type of challenge may be available.

V. CONCLUSIONS AND RECOMMENDATIONS

The involuntary allotment program became effective 1 October 1982 and it is being used with increasing frequency.⁵⁹ The system, as

⁵²398 U.S. 306 (1950).

⁵³436 U.S. 1 (1978).

⁵⁴Per conversation between the author and Mr. Walls, 12 Apr. 1982.

⁵⁵*Fibberg v. Sullivan*, 634 F.2d 50 (3rd Cir. 1980); *Deary v. Guardian Loan Co., Inc.*,

834 F. Supp. 1178 (S.D.N.Y. 1982).

⁵⁶Civ. No. X-82-173 (D. Conn. 14 Jan. 1983).

⁵⁷*Id.*, slip op. at 9.

⁵⁸*Id.*, slip op. at 13.

⁵⁹Per conversation between the author and Mr. Walls, 12 Apr. 1982. This is especially true in states such as Texas where there is no garnishment.

outlined by the proposed regulation, has some potential problem areas that should be corrected. The regulation should list exactly what documentation an agency must send for the allotment to cover arrearages. The regulation should require that state agencies utilize an administrative hearing with notice and hearing rights or that the agency go before a court before being empowered to send the notice to the USAFAC. Finally, the regulation must provide for a more detailed notice to be served on the individual soldier. The service member should be apprised of what actions may be taken, what defenses may be available, and to whom those actions or defenses should be forwarded. Without these revisions, the regulation may be subject to continuing constitutional challenge by service members who feel that their pay has been taken without the required due process.

THE NEED FOR UNIFORMITY IN NONSUPPORT REGULATIONS OF THE UNI- FORMED SERVICES

by Major Charles W. Hemingway*

I. INTRODUCTION

At present, the Army, Navy, Marine Corps, Air Force, and Coast Guard each have different regulatory requirements for circumstances where an active duty spouse is required to provide monetary support for a spouse, ex-spouse, or dependent child. These differences have always been troublesome for a military attorney, particularly the attorney of one service whose client is the spouse of dependent child of a service member who belongs to another service.

It is the purpose of this article to demonstrate that, in light of recent legislative enactments implementing the requirement for involuntary allotments where a service member fails to support his or her dependents as required, there is no longer any basis or justification for a system under which the same fact situation might generate five different outcomes based on branch of service.

It is the position of this article that all the uniformed services should adopt a substantially similar nonsupport regulation. This position is best demonstrated by the following hypothetical fact situation:

Joe Jones is an E-6 with more than ten years active duty in one of the uniformed services of this country and is three months into an unaccompanied tour outside the continental United States. When he left behind his wife and two young children, he promised to initiate an allotment for their support as soon as he got settled.

Mrs. Jones has heard from her husband only once, when he called to tell her that he was experiencing "hassles" with the pay system, and he would send her some money as soon as he could. That was several weeks ago, and she has received nothing.

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Out of desperation, she consults you, the legal assistance officer at a nearby military installation. Depending upon which branch of the uniformed services to which Jones belongs, this is what you would tell her about her support entitlement:

Air Force: "Mrs. Jones, the Air Force has no establishment guidelines on minimum amount of support. Each Air Force member is expected to provide support to his or her dependents in an amount bearing a reasonable relation to your needs, the needs of your children, and the ability of your husband to provide. If the two of you cannot reach an agreement on what constitutes a reasonable amount, it will be necessary for you to secure a court order specifying a set amount of support."¹

Coast Guard/Army: "Mrs. Jones, it would be advisable for you to have a court order which sets a specified amount of support for you and your children. In the absence of such an order, however, it is Army/Coast Guard policy that your husband should provide you with a minimum amount of support which is equal to his basic allowance for quarters (BAQ) entitlement at the "with dependents" rate. In this case, based on your husband's grade, the monthly BAQ is \$303.30."²

Marine Corps: "Mrs. Jones, as you have two minor children to support and you remain lawfully married although geographically separated from your husband, it is Marine Corps policy that your husband should provide you with a minimum amount of support which is equal to your husband's BAQ at the "with dependents" rate, plus thirty percent of your husband's basic pay. As he is an E-6 with more than ten years service, your total monthly entitlement is \$634.14."³

Navy: "Mrs. Jones, as you remain lawfully married and you have two minor children to support, it is Navy policy that as a minimum you are entitled to receive as support from your husband an amount equal to three-fifths of your husband's gross pay. Given his years in

¹U.S. Dep't of Air Force, Reg. No. 35-18, Financial Responsibility, para. 3 (1 July 1977).

²U.S. Dep't of Army, Reg. No. 608-99, Personal Affairs-Support of Dependents, Paternity Claims, And Related Adoption Proceedings, para. 2-2c (15 Nov. 1978); United States Coast Guard Personnel Manual (CG 207) (1967).

³LEGADMINMAN, para. 6003, ch. 2; 32 C.F.R. Pt. 733.3(a)(2)(i)(B) (1982).

service and his pay grade, your monthly entitlement is therefore \$834.66"⁴

Thus, if Mrs. Jones is married to an Air Force service member, she faces a regulation which is vague and general in its support requirements and which could result in her receiving no support whatsoever unless she can afford to pay for a lawyer, yet the Navy can bring pressure to bear upon the husband of a Mrs. Jones in that service for \$834.66. These disparities are troublesome and would alone serve as the basis for a shift to a more uniform and equitable standard for dependent support requirements among the uniformed services. But new legislation, enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),⁵ which permits the institution of involuntary allotment procedures against service members with a support obligation, makes it imperative that a more uniform system be adopted.

II. IMPLICATIONS OF TEFRA

These new legislative provisions specify that a service member, who has an obligation to provide spousal support or child support, or both, can have his or her pay subjected to an involuntary allotment if the service member falls behind in support payments in an amount equal to the support due for two months or longer.⁶

Under the TEFRA provisions, the support obligation is established by either court or administrative order.⁷ Notice of the amount of support past due, commonly referred to as the arrearage, and notice of the amount of current support entitlement specified in the order is sent by a representative of a state agency or by the attorney representing the spouse, ex-spouse and/or children pursuant to a court order, to the finance center of the service to which the member belongs.⁸ The finance center gives written notice to the service member that an involuntary allotment is being initiated and advises the member when the allotment will begin.⁹

⁴NAVPERSMAN 15791B (Apr. 17, 1980), para. 6210120; 32 CFR Pt. 733.3(a)(2)(1) (A) (1982). This assumes that Jones is living in a barracks-type situation and his wife is not living in government quarters. Under the Department of Defense Pay and Entitlement Manual, he would be entitled to BAQ at the with dependents rate. The computation was based solely on BAQ and Basic Pay. It did not include other payments which would go into computing gross pay, such as uniform allowances, separate rations, cost of living allowances or the Variable Housing Allowance, which would increase the minimum support amount. Were Jones not receiving BAQ, the minimum Navy support obligation would be \$661.68.

⁵Pub. L. No. 97-248, tit. I, subtit. E, sec. 465, 1982 U.S. Code Cong. & Ad. News 81.

⁶*Id.*

⁷*Id.*

⁸47 Fed. Reg. 46297 (Oct. 18, 1982).

⁹*Id.*

A legal assistance attorney who counsels a client in Mrs. Jones' situation should therefore refer her to the state or county social services office in her locality. At this juncture, it must be understood that there is no formal support order. It might be argued that the service member has a moral or regulatory duty to provide support and, perhaps under the law of the particular state, there might exist a legal obligation to provide "necessaries."¹⁰

A major change under TEFRA is that it gives an agent of a state who is not a judicial official and who is not an attorney, a great deal of authority and discretion where service members with dependents are concerned. Now, by administrative process, a legally enforceable "support order" can be obtained against an active duty service member which need only be issued by an "authorized person," whether that person is a social worker with no prior legal experience or training, or a support enforcement attorney.¹¹ This person will sit down with a client such as Mrs. Jones and will listen to her plight. Then, upon determining that a valid support obligation exists, will establish in an administrative order the appropriate amount which the absent service member must pay.

The primary requirement imposed upon this administrative official is that the administrative process afford "substantial due process" and be "subjected to judicial review."¹² What passes for "substantial due process" is a separate issue and is beyond the scope of this article. But, assuming *arguendo*, that "substantial due process" has been provided for a service member against whom a support order has been issued, how will the amount of support be determined?

This is of critical importance. Suppose Mrs. Jones and her children were living near a Navy installation at Norfolk, Virginia while her husband was on a two-year unaccompanied tour to Germany with the Army. If Mrs. Jones consults a social services agency in the Norfolk area, that caseworker might establish her support entitlement based upon the Navy's regulatory standard.

On the other hand, Mrs. Jones might live in the Washington, D.C., area and consult a social services agency near Andrews Air Force Base. Such a caseworker, if familiar with the Air Force regulation, might compute her needs as being substantially less, even though, if

¹⁰See, e.g. Ark. Stat. Ann. § 57-633 (1947), which establishes a legal obligation to provide support for children.

¹¹47 Fed. Reg. 46297 (Oct. 18, 1982).

¹²15 U.S.C. § 1673 (b)(1)(A) (1976).

she were a Navy wife and mother consulting a Navy attorney, she might eventually receive a great deal more.

On the other hand, why should a caseworker or support enforcement attorney who is familiar with the Navy regulation and its standards be prohibited from using that standard for all the other services? It provides his or her client with the greatest support entitlement and there is no legislative or regulatory history whatsoever which addresses why the regulations create such disparate results for persons similarly situated.¹³

In actuality, the local caseworker or support enforcement attorney would likely compare his or her state support guide to the particular service regulation of the service member against whom a spouse or ex-spouse has lodged a nonsupport complaint and will opt for whichever will provide the greater support amount.

For example, under the uniform support guidelines promulgated for use in Pennsylvania, a spouse in Mrs. Jones' position would be entitled to receive up to one-third of her husband's net income¹⁴ with an additional amount of support added for the benefit of the two children.¹⁵ Under the Pennsylvania guidelines, the total support requirement for E-6 Jones would be \$398.84.¹⁶

Thus, an Army attorney arguing with the Commonwealth of Pennsylvania on E-6 Jones' behalf would want to argue that his support obligation is limited to the \$303.30 BAQ. But the Pennsylvania state official would arguably use the state standard and issue an administrative order in the higher state amount. Contrast that with the result if the state "authorized official" in Pennsylvania were dealing with a Navy or Marine service member and knew of the minimum support requirements established for those services. In that case, the state official would not want to use the state guidelines (\$398.84), but would want to use the Marine (\$634.14) or Navy (\$834.66) standards.

¹³See the preamble to the Navy and Marine Corps regulations published at 44 Fed. Reg. 42190 (July 19, 1979), in which no reference is made to the reasons for separate standards for these services.

¹⁴See *Scale of Suggested Minimum Contributions for Support by Absent Parents*, 3 Fam. L. Rep. (BNA) 3101, 3102 (May 10, 1977).

¹⁵*Id.* at 3103

¹⁶This assumes that from Jones' monthly gross pay of \$1102.80, there are social security, state tax, and other required deductions of \$200, leaving net pay of \$902.80. One third of that amount is \$300.93. The Pennsylvania formula for child support uses a standard factor which increases with the number of children. For support of two children the factor is .47 multiplied by the weekly net income of the party owing the support obligation. Based on a fifty-two week calculation for a year, Jones' net weekly income is \$208.83. When multiplied by the standard .47 factor the monthly support obligation is \$97.91.

Once the administrative order or judicial order has established a support obligation, the "two month" clock begins to run for purposes of bringing the involuntary allotment procedures into play.

One would always have to question why, under the TEFRA procedures, a spouse would want to go through judicial procedures in obtaining a support order when it could be done at no cost and without lawyer representation through an administrative process. The answer depends largely upon the motives of the spouse. If the abandoned spouse truly wanted to escape the marriage, it would be in his or her best interest to pursue a formal support and separation order through the judicial process. But, where the spouse does not desire a divorce, but needs only to be rightfully supported by his or her spouse, the administrative order procedures under TEFRA constitute a remarkably powerful tool.

Once a service member in E-6 Jones' situation is notified of this order and fails to comply or fails to initiate an action to forestall the effect of the order, the following could occur:

Assume that Jones is in the Navy and the official approving the involuntary support allotment sets the support obligation at \$843.66. Jones is by this time more than three months in arrears. Therefore, the maximum amount of the involuntary allotment would be sixty-five percent of his disposable income.¹⁷ Assuming *arguendo* that, given Jones' grade and time in service, at least \$200 monthly would cover any federal and state taxes, this would be \$902.80. If sixty-five percent of this amount would constitute the involuntary allotment, it would be in the amount of \$586.82.

Jones is therefore in an incredible situation; a substantial portion of his net income is being deducted monthly to cover a support obligation, yet because the "authorizing official" used the Navy standard, an arrearage of \$256.84 is accruing each month. This could potentially mean that long after the support obligation has ceased, either due to divorce or Jones' children attaining their majority, the involuntary allotment could continue until the arrearage is exhausted.

¹⁷See Pub. L. No. 97-248, 1982 U.S. Code Cong. & Ad. News 81. The involuntary allotment provisions adopt the limitations on amounts which can be garnished which are contained in federal consumer protection statutes. Where an individual is supporting a second family, the maximum garnishable amount is 50 percent, unless there is an arrearage of three months duration or longer, in which case the garnishable amount increases to 55 percent. Where there is no second family involved, the percentages are 60 and 65 percent respectively.

III. OTHER IMPLICATIONS FOR THE MILITARY ATTORNEY

What responsibility does a legal assistance officer who counsels a person in Mrs. Jones' situation owe to the client? It can be argued that the involuntary allotment procedures increase the potential for malpractice claims against military attorneys. Before the TEFRA involuntary allotment provisions, the various service nonsupport regulations were guides only. Without a court order requiring a wage assignment under state law, it was not possible to initiate an involuntary allotment against a service member's pay account.¹⁸ Now, if a state support enforcement agency adopts a particular service's regulation as its standards, these regulatory guides become enforceable at law.

What does this mean for a legal assistance attorney whose client is a person in Mrs. Jones' situation? The Code of Professional Responsibility, which governs all attorneys, requires an attorney to represent a client zealously within the bounds of the law.¹⁹ It can be argued that this requires, at a minimum, that the legal assistance attorney refer such persons to the local state social services office.

Before the TEFRA provisions became law, there was no need for a legal assistance attorney to refer such a client to the state social services agency. There was very little these officials could do to force a service member to support his or her dependents. Now, a state agency can issue an administrative order which is wholly as effective and more simply obtained than a judicial order. This means that the legal assistance officer is potentially open to a claim of malpractice should the client not be referred.

This can be taken a step further. Does the legal assistance officer have not only the duty to refer a client in Mrs. Jones' situation to the state social services office, but also a duty to notify these state officials of the particular service's nonsupport regulation provisions? Guidance here is scant and may very well turn on how the particular attorney perceives his or her role.

If the attorney takes the position that he or she is an advocate on

¹⁸Although a commander could threaten administrative and disciplinary action against a service member for failure to support his dependents, on July 1, 1973 commanders lost the authority to initiate a support allotment under the old "Class Q" system. That system was provided for under the Dependent's Assistance Act of 1950. The statute initially provided that it would terminate on July 1 1953, but was reenacted at two-year intervals until it was permitted to expire. See 50 U.S.C. App. § 2205-09 (1976).

¹⁹Model Code of Professional Responsibility, Canon 7 (1977).

behalf of a client such as Mrs. Jones, it can be argued that a duty to advise the social services agency of the particular nonsupport regulations provisions does exist. If, however, the attorney perceives himself or herself only as an advisor, there would arguably be no such duty under the Code of Professional Responsibility. As the Ethical Considerations point out:

While serving as an advocate, a lawyer should resolve in favor of his clients doubts as to the bounds of the law. In serving a client as an advisor, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.²⁰

Thus, an attorney acting as an advocate would have to resolve any doubt as to whether he or she should advise the state agency of the nonsupport regulation provisions in favor of notification. An attorney who takes the position that he or she is acting in an advisory capacity would only be responsible for advising the client of the applicable law; *i.e.*, informing the client of her rights under the involuntary allotment procedures and referring her to the state agency.

The Code of Professional Responsibility further requires that an attorney represent the client competently²¹ and properly safeguard the interests of the client.²² A legal assistance attorney who fails to advise a client in Mrs. Jones' situation of the involuntary allotment provisions risks both a malpractice claim and a professional ethics complaint.

For example, the client could allege that the attorney's failure to properly advise her of these rights has cost her support payments from the date that she should have learned of such rights up to the date when she began receiving support under the involuntary allotment provisions. Similarly, the client could allege that the attorney's failure to advise her or the state official of the higher support guidelines in the service regulation caused her to receive a lesser amount of support than that to which she might have otherwise been entitled.

At a minimum, it would appear that the legal assistance attorney will be required to work much more closely with state social service agencies under the new involuntary allotment provisions.

²⁰*Id.* at EC 7-3.

²¹*Id.* at Canon 6.

²²*Id.* at EC 6-4.

IV. CONCLUSIONS

The involuntary allotment provisions will require each service to rewrite its nonsupport regulation. To eliminate the glaring disparity which the hypothetical illustrates and to insulate legal assistance attorneys from heightened malpractice implication, it is the position of this article that the proper support standard is that contained in the Air Force regulation:

Each Air Force member is expected to provide support in an amount, or of a kind, bearing a reasonable relation to the needs of the spouse and children and the ability of the member to provide. Consideration should be given to the needs of the family (for example, lodging, food, clothing, and miscellaneous needs).²³

There are significant reasons why this should be done. Under the present regulations, each service has accorded its officials varying degrees of discretion which may be exercised when a nonsupport complaint is lodged. For example, the Navy and Marine Corps regulations permit a commander to withhold action under certain circumstances where it is alleged that a service member is not supporting his or her children. These include circumstances where the service member is unable to determine the whereabouts and welfare of the child concerned, where it is apparent that the person making the support request does not have custody of the child, or where the service member has custody of the child under a court order but lacks physical custody.²⁴ Further, the Director of the Navy Family Allowance Activity and the Commandant of the Marine Corps have the discretion to waive the obligation to support a spouse where the service member can demonstrate spousal misconduct.²⁵

The involuntary allotment provisions rob the services of any such discretion. Such considerations are now shifted to the local social services authority, which has been given the authority to enter administrative orders.

A second difficulty is that some sort of collective or cumulative equal protection argument could be lodged against the Department of Defense. Taking the hypothetical situation of Mrs. Jones, it is difficult to articulate a valid governmental interest that is served by permitting a regulatory system to exist which would provide a minimum support obligation of \$303.30 if Mrs. Jones was an Army wife.

²³U.S. Dep't of Air Force, Reg. No. 35-18, Financial Responsibility, para. 5(b)(1) (1 July 1977).

²⁴32 C.F.R. Pt. 733.3(a)(5) (1982).

²⁵32 C.F.R. Pt. 733.4 (a)(1) (1982).

but would specify \$834.66 monthly if, by some fortuity, she were a Navy wife.

Finally, state administrative or judicial officials will now determine the proper support obligation in such cases; there is no longer a need for a rigid formula which does not take into account the circumstances of the particular parties.

Although at first blush it might appear that the Air Force's non-specific guidance concerning a service member's support obligation might be harmful to dependents in light of the more rigid standards of the other uniformed services, it is the safer course in view of the TEFRA provisions. The provisions provide a perfect opportunity for the other services to get commanders and military attorneys out of the family support business.

ABSENCE OF DOMICILE IN MILITARY DIVORCES: FULL FAITH AND DUE PROCESS REQUIREMENTS

by Captain Uldric L. Fiore, Jr.*

I. INTRODUCTION

This article is designed to examine the jurisdictional basis for divorce and its impact on the service member. The analysis includes brief consideration of state military provisions and the protections of the Soldiers' and Sailors' Civil Relief Act (SSCRA)¹ in the area of divorce. The emphasis, however, is on the traditional issues of subject matter and personal jurisdiction and on the jurisdictional impact of the Uniformed Services Former Spouses' Protection Act (USFSPA).²

II. JURISDICTIONAL BASIS FOR DIVORCE

Under our system of law, judicial power to grant divorce--jurisdiction, strictly speaking--is founded on domicile.³

Domicile is the permanent relationship between the person and the state which controls the creation of significant legal relations and responsibilities.⁴ Marriage and divorce are incidents of domicile. Every person must have a domicile; however, husband and wife need not share the same domicile.

The jurisdictional import of domicile in divorce cases derives from the Full Faith and Credit Clause of the Constitution.⁵ A divorce decree issued by a court of a state where one spouse is domiciled is entitled to full faith and credit in the courts of the other states of the

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¹50 U.S. Code App. §§ 501-91 (1976).

²Pub. L. No. 97-252, Tit. X, §§ 1001-06, 96 Stat. 730 (Sept. 8, 1982).

³Williams v. North Carolina, 325 U.S. 226, 229 (1945).

⁴*Id.*

⁵U.S. Const. art. IV, § 1.

union.⁶ Residence, as distinguished from domicile, is an insufficient basis to guarantee a decree full faith and credit.⁷ This distinction is the outgrowth of the "res" theory of marriage and divorce, which classifies divorce proceedings as both *in rem*, because marriage involves a status and *in personam*, to the extent that property rights are adjudicated.⁸ Domicile is the prerequisite for subject matter jurisdiction over the "res" that is, over the marital status.

Service members, however, are rarely assigned to their state of domicile. When matrimonial problems arise, service members are frequently on the opposite side of the country or globe from their domicile. Neither entry into the armed forces nor reassignment alone operate to change the domicile of service members or dependents.⁹ Domicile is changed by establishing a new residence with the intent to remain there permanently.¹⁰ While changing domicile sounds simple, intent is one of the most difficult of proofs; this task is even more difficult for the service member, whose new residence is clearly pursuant to military orders.

The vast majority of states have divorce statutes which require durational residence rather than domicile.¹¹ The enactment of such statutes has likely resulted from the mobility of American society and not the plight of the unhappily married service member. These residence requirements are often interpreted by the courts as being synonymous with domicile¹² or creating a presumption of domicile.¹³

In most cases, duration of residence is strong evidence of intent to remain permanently. The practical effect, however, is that the overwhelming majority of divorces granted in the United States today have residence as their subject matter jurisdictional basis, with little or no thought given to domicile. The unanswered question, and probable reason for the domicile-like characterizations given residence requirements by courts, is whether these divorce decrees are entitled to full faith and credit.

Jurisdiction over the person is also required and it too has Constitutional implications. Because dissolution of the marriage is an *in*

⁶Williams v. North Carolina, 317 U.S. 287, 297 (1942).

⁷*Id.* at 298.

⁸1 J. Bishop, New Commentaries on Marriage, Divorce and Separation § 24 (1891).

⁹25 Am. Jur.2d *Domicile* §30 (1966).

¹⁰See, Josephs, *A Checklist For Determining Domicile*, 27 Prac. Law, 59 (1981).

¹¹The Judge Advocate General's School, U.S. Army, All States Marriage and Divorce Guide, ch. 5 (1982).

¹²See, e.g., Whealton v. Whealton, 67 Cal.2d 656, 432, P.2d 979, 63 Cal. Rptr. 291 (1967).

¹³See, e.g., Mills v. Mills, 153 Fla. 746, 15 So.2d 763 (1943).

rem proceeding, states can dissolve the marital status without personal jurisdiction over both parties. The property issues are *in personam*, however, and courts have no jurisdiction to adjudicate property rights without personal jurisdiction over the defendant.¹⁴ Decrees which purport to deal with property rights in the absence of such jurisdiction are not entitled to full faith and credit and risk collateral attack.

III. STATE MILITARY PROVISIONS FOR DIVORCE JURISDICTION¹⁵

Despite the widespread use of durational residence requirements, service members could not always gain access to divorce courts. The fiction of the equality of residence and domicile fades because the service member's residence is often due solely to military orders and the member fully intends to depart the location usually within three years. Specific provisions for military personnel have been enacted in most states, usually providing by statute that service members are residents for divorce purposes after residing within the state for the same, or a slightly longer duration than that required of the nonmilitary plaintiff.¹⁶

States are not required to create specific military provisions in divorce statutes. They may require the service member to establish domicile¹⁷ or to show more than mere presence pursuant to military orders.¹⁸ It is also clear from *Sosna v. Iowa*¹⁹ that a state may establish separate residence requirements for service members without violating equal protection or due process rights. The justification for such requirements extends from the state's interests in insuring genuine residence and in protecting its decrees from collateral attack.²⁰ These interests are directly relevant to the case of the service member-plaintiff. Service members, therefore, have neither due process nor equal protection rights of access to divorce court without satisfactorily establishing domicile or meeting the residence requirements of the particular state.

¹⁴*Estin v. Estin*, 334 U.S. 541 (1948).

¹⁵See Appendix to this article.

¹⁶The Judge Advocate General's School, U.S. Army, All States Marriage and Divorce Guide, ch. 5 (1982).

¹⁷*Viernes v. District Court*, 181 Colo. 294, 509 P.2d 306 (1973).

¹⁸Ark. Const. art. III, § 7.

¹⁹419 U.S. 393 (1975).

²⁰*Id.* at 407.

IV. SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

The SSCRA affords the service member only limited protections in the area of divorce. The service member-defendant can request a stay of the proceedings, up to a maximum of ninety days beyond separation. Grounds for the request are unavailability in the jurisdiction, which is materially affected by military status, and due diligence.²¹ If a divorce decree has already been entered, the service member may request a stay of execution of the decree on similar grounds.²² If the service member makes no appearance and is not represented by counsel, the court may appoint an attorney to assert the service member's SSCRA rights.²³

These protections are discretionary with the court and will not bar the proceedings. They are designed to protect the service member's due process rights when they cannot be fully exercised due to military service. They are of little value to the service member-defendant in a divorce action in the state in which he or she is assigned.

V. JURISDICTIONAL LIMITATIONS OF THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

Prior to June 26, 1981, courts in community property states considered military pension benefits as community property, subject to division in divorce proceedings. The United States Supreme Court decided *McCarty v. McCarty*²⁴ on that date, and held that federal law preempted the application of state community property law to military pension benefits.

In response, Congress enacted the USFSPA, which was signed by the President on September 8, 1982, and went into effect on February 1, 1983. The purpose of the legislation was to reverse the *McCarty* decision.²⁵ The Act authorizes state court to treat military pension benefits as separate or community property according to each state's law.²⁶ The Act also provides for direct payment of alimony, support, and property distribution awards from the service to the former spouse.²⁷

²¹50 U.S. Code App. § 521 (1976).

²²*Id.* at § 523.

²³*Id.* at § 520(3).

²⁴453 U.S. 210 (1981).

²⁵H.R. Rep. No. 749, 97th Cong., 2d Sess. 165 (1982).

²⁶Pub. L. No. 97-252 § 1002(c)(1).

²⁷*Id.* at § 1002(d)(1).

The Act places limitations on both of these provisions.

A court may not treat [military pension benefits as divisible property] unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.²⁸

Initially, this language may appear to pose a limitation on the exercise of personal jurisdiction by the state courts. It is more accurately characterized as a limitation on the subject matter jurisdiction, based on the quality of the state court's personal jurisdiction. The limitation applies only to military pension benefits and leaves state courts free to adjudicate other property rights with lesser personal jurisdiction.

McCarty, through application of the preemption doctrine, withheld subject matter jurisdiction over military pension benefits from state courts. The Act, by reversing *McCarty*, is a limited waiver of preemption and a grant of limited subject matter jurisdiction back to the state courts.

Direct payment authority is also limited by the Act. A court order must be "regular of its face", *i.e.*, issued by a court of competent jurisdiction, legal in form, and without facial defects providing "reasonable notice that it is issued without authority of law."²⁹ The order or accompanying documents must also certify that service member's rights under the SSCRA had been observed.³⁰

Is a court divorce decree awarding division of military pension benefits regular on its face if it merely recites that jurisdiction was based on the service member's residence within the state for the statutory period? What is reasonable notice to the payment agency? Agency personnel reviewing court orders for facial regularity may not be legally trained. Arguably, they can be trained to look for the additional language required by the Act that the service member's residence was other than solely pursuant to military assignment. The implementing regulations are not yet available for review. It will be interesting to learn whether the services will include this important service member protection in the review procedures or leave service members to fend for themselves.

²⁸*Id.* at § 1002(c)(1).

²⁹*Id.* at § 1002(b)(2).

³⁰*Id.* at § 1002(b)(1)(D).

The requirement of certifying SSCRA observance is one of form rather than substance. As previously discussed, the rights afforded consist only of discretionary stays and appointment of counsel to assert those rights. The requirement is probably the result of erroneous testimony before Congress by the American Bar Association, which implied that the SSCRA provided substantive protection for service members' property rights in divorce actions.³¹

Nonobservance of these limitations, however, may result in relief for the service member. An attempt to divide military pension benefits without the prescribed personal jurisdiction would be subject to collateral attack for lack of subject matter jurisdiction. Even if the limitation is not jurisdictional, a second ground exists for collateral attack. The Full Faith and Credit Clause empowers Congress to prescribe requirements for the manner of proof and effect of "proceedings" for entitlement to full faith and credit.³² Arguably, the personal jurisdiction limitations are such requirements and failure to comply deprives the decree of full faith and credit.

Failure to comply with the facial regularity and SSCRA certification requirements will deprive the former spouse of direct payment. Unless the service member returned to the state issuing the decree or the decree is modified to comply with the Act, its monetary awards would be difficult in practice to enforce.

VI. ILLUSTRATIVE HYPOTHETICAL

In June of 1982, Major Smith is reassigned from Fort Dix, New Jersey to Fort Ord, California. He is accompanied by his wife, Priscilla, and two children, and assigned on-post quarters. John and Priscilla are both New Jersey domiciliaries.

Priscilla immediately becomes enamored with California and the "good life," and disenchanted with John and military life. On February 2, 1983, she changes her state of domicile to California and files for divorce in California Superior Court. She requests, *inter alia*, division of their community property including John's military pension benefits.

A. JURISDICTION

California has a six-month residence requirement³³ and its courts

³¹*Uniformed Services Former Spouses' Protection Act: Hearings on S. 1453, S. 1648, S. 1814 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97th Cong., 1st and 2d Sess., 127-28 (1982).*

³²U.S. Const. art. VI, § 1.

³³Cal. Civil Code § 4530 (West 1970).

have characterized "residence" as synonymous with "domicile."³⁴ Priscilla has also declared a change in her domicile to California. Unless the court finds her to be a "galloping litigant in search of a forum wherein to seek a divorce,"³⁵ her declaration and satisfaction of the residence requirement are sufficient to give the California court subject matter jurisdiction over the marriage.

Because John is assigned in California, the court has personal jurisdiction over both parties and may also proceed to adjudicate property issues. The SSCRA provides no substantive protection in this situation. John is "in court" and his military pension benefits are at stake.

B. EFFECT OF USFSPA

Military pension benefits are considered divisible community property by California.³⁶ While *McCarty* preempted division of these benefits, Congress waived the preemption in the USFSPA.

In this case, however, the Act protects John, not the former spouse. The jurisdictional limitations of the Act apply since personal jurisdiction is based solely on residence pursuant to military assignment. California, therefore, has no subject matter jurisdiction over John's pension benefits. The court may, however, dissolve the marriage and adjudicate other property issues, such as alimony, child support, and the division of other community property.

VII. CONCLUSION

Domicile is absent from many military divorces. The mobility of society and almost universal use of durational residence requirements as a substitute for domicile have caused this absence of domicile from most divorces, both military and civilian. The domicile-like characterizations of residence requirements insulate most cases from collateral attack.

The USFSPA, through its jurisdictional limitations, requires a higher residence standard for the division of military pension benefits than most states would otherwise apply. By including this higher standard in the Act, Congress has not only afforded protection to former spouses, but has also extended significant protection to service members.

³⁴Wheaton v. Wheaton, 67 Cal.2d 656, 432 P.2d 979, 63 Cal. Rptr. 291 (1967).

³⁵Huntington v. Huntington, 120 Cal. App. 2d 705, 262 P.2d 104, 107 (Dist. Ct. App. 1953).

³⁶*In re Marriage of Pithian*, 10 Cal.3d 592, 596, 111 Cal. Rptr. 369, 517 P.2d 449 (1974).

APPENDIX

State Military Provisions

<i>No Specific Provision</i>	<i>Residence Requirement</i>	
Alabama	Alaska - 1 year	Mississippi - 6 months*
California	Arizona - 90 days*	Missouri - 90 days*
Florida	Delaware - 6 months*	Montana - 90 days*
Guam	Dist. Col. - 6 months*	Nebraska - 1 year*
Iowa	Georgia - 1 year	New Mexico - 6 months
Louisiana	Hawaii - 6 months	North Carolina - 6 months*
Maryland	Idaho - 6 months	North Dakota - 1 year*
Massachusetts	Illinois - 90 days*	Oklahoma - 6 months*
Michigan	Indiana - 6 months*	Tennessee - 1 year*
Nevada	Kansas - 60 days*	Texas - 6 months*
New Hampshire	Kentucky - 180 days*	Vermont - 90 days*
New York	Maine - 6 months	Virginia - 6 months*
Ohio	Minnesota - 180 days*	Washington - Residence
Oregon		
Pennsylvania	* - same requirement as nonmilitary	
Puerto Rico		
South Carolina		
Virgin Islands		
West Virginia		
Wisconsin		
Wyoming		

Other Military Provision

- Arkansas - residence based on more than orders required.
 Colorado - apply for domicile after 90 days.
 Connecticut - continuous residence if resident on entry into service.
 New Jersey - court must appoint counsel for SSCRA.
 Rhode Island - retain residence 30 days after ETS.
 South Dakota - must be stationed at filing and decree.
 Vermont - temporary military absence does not affect residence.

Source: The Judge Advocate General's School, U.S. Army, All States
 Marriage and Divorce Guide, ch. 5 (Feb. 1982).

THE CHILDREN OF DIVORCE: THE TREND TOWARD JOINT CUSTODY

by Captain David S. Gordon*

I. INTRODUCTION

"Joint custody" may mean any one of a number of legal relationships between divorced or separated parents and their children. "Alternating custody" means that each parent may live with the child for a set period of time, after which the other parent has a turn.¹ Joint custody may also refer to "joint legal custody," which is a situation in which one parent is granted physical custody of the child, i.e., the child lives in the residence of that parent, while the other parent retains the right to participate in making decisions affecting the upbringing of the child.²

Joint custody, while certainly not a new legal phenomenon, has in the past been viewed with distrust by many courts. The overwhelming tendency has been to grant sole custody to one parent and visitation rights to the other parent.³ Courts have in the past half century tended to grant custody to the mother in the majority of cases. This favoritism toward the mother was based upon the conventional wisdom that a child of tender years needs its mother more than its father and that the mother, who was normally the one who would stay home and tend to the children, would continue to do so even though she and her husband were no longer living together.⁴ However, in view of the

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¹Annot., 92 A.L.R. 2d 695, 697 (1963).

²E.g., Idaho Code § 32.717B(3) (1982).

³E.g., Beck, v. Beck, 86 N.J. 480, 432 A.2d 63 (1981).

⁴Gozansky, Renjillian, & Zuckman, *Divorce Law Practices* (Part 2), 27 Prac. Law. 207, 208 (1981).

changing roles of men and women in society, the bases underlying this tendency toward granting custody to the mother have come under attack. Many contend that fathers should have an equal chance to receive custody of their children. While many courts and legislatures have given lip service to the theory that fathers are equally qualified to be custodial parents, the courts still grant custody to the mother in ninety percent of the cases where custody is sought by both parents. Consequently, various groups of fathers have sought legislation granting them equal treatment.⁵

II. LEGISLATION

These lobbying efforts have in many cases produced legislation granting a preference to joint custody arrangements. At present, twenty-three states have enacted statutes which exhibit some form of preference for joint custody and other states have recognized joint custody in their court decisions as an equitable way of solving the problem of who gets the children.⁶

The fundamental argument for joint custody is that, in a society in which men and women have equal opportunity to seek employment and in which many divorced mothers are employed full-time outside the home, the old maxim that one parent is better able to care for the child because she can devote herself completely to child raising no longer holds true. The working father would appear no less capable of successfully rearing his children than the working mother who is out of the home for the same amount of time.⁷ Since neither parent has the advantage of being able to devote their working hours to child rearing, proponents of joint custody believe that the most equitable way to solve the problem of who gets the children is to give the children to both parents by either granting full custody and control over the child to each parent for a set period of time or by granting the parent who does not have the physical charge over the child the right to participate in decisions affecting the child.⁸

The states that have adopted some form of joint custody preference by either statute or judicial decision fall into three broad categories.

⁵Freed & Foster, *Family Law in the Fifty States: An Overview as of September 1982*, 8 Fam. L. Rep.(BNA) 4065 (Sep. 28, 1982).

⁶California, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Texas, and Wisconsin have adopted joint custody statutes. Arizona, New Jersey, and New York have recognized joint custody by court decisions. *Joint Custody Legislation Passed by 23 States*, 8 Fam. L. Rep.(BNA) 2506 (June 29, 1982).

⁷Gozansky, Renjilian, & Zuckman, *supra* note 5, at 28.

⁸See, e.g., *Coming to Terms on a Separation*, Bus. week, Oct. 15, 1979 at 168, 170.

Some states, such as North Carolina, merely mention joint custody as one of the options a court may consider in determining custody.⁹ Such jurisdictions generally do not impose a statutory requirement that the court give preference to a joint custody arrangement or that they set out reasons for not granting joint custody in a given case.¹⁰ Secondly, other statutes authorize joint custody, but only when the parents agree to the arrangement.¹¹ The third and perhaps most radical of the statutory joint custody schemes gives joint custody preferred status and requires the court to state reasons why joint custody should not be decreed in a particular case.¹² Such statutes express a public policy that joint custody is in the best interests of the child in that it assures the child will have frequent and continuing contact with both parents.¹³ Divorcing parents and the legal profession can expect to see joint custody decreed more frequently as legislatures continue to express a preference for joint custody arrangements.

III. THE CASE FOR JOINT CUSTODY

There are numerous arguments for granting joint custody. Joint custody arrangements can solve the perennial problem faced by triad judges in determining which of two loving and competent parents will receive custody. Selection of either the father or the mother to be the sole custodian frequently creates grave problems for the child and the parents. The child may be harmed by the loss of any meaningful contact with the noncustodial parent. Joint custody, on the other hand, does not deprive the child of meaningful contact with one parent, but rather insures that the child will remain in contact and under the control of both parents. Courts have expressed the hope that in such situations the child will be less damaged by the fracture of the family than would otherwise be the case.¹⁴ Likewise, joint custody can benefit both parents. In sole custody cases, the issue of who gets the child may become the issue on which all the anger, pain and frustration of the divorce are focused. The custodial parent can feel that being chosen to raise the child justifies her or his side of the marital conflict, while the losing spouse feels that he or she has been judged as unfit or at fault. The loser will frequently attempt to have the custody decree modified for personal vindication, rather than because a modification may be in the best interests of the child.

⁹N. C. Gen. Stat. § 50-13.2(b) (1975).

¹⁰*Joint Custody Legislation Passed by 23 States*, *supra* note 7, at 2506.

¹¹*E.g.*, Marriage and Dissolution of Marriage Act, Ill. Rev. Stat. §§ 603.1, 608(a) (1982).

¹²*E.g.*, Kan. Stat. Ann. § 60-1610(a)(4)(A) (1979).

¹³*E.g.*, Idaho Code § 32.717B (1982).

¹⁴*E.g.*, *In Re Wesley J.K.*, 8 Fam.L. Rep.(BNA) 2484 (Pa. Sup. Ct. May 21, 1982).

The parent with custody will resist vigorously and, in many cases acrimoniously, and change in the established arrangements. The real loser in such conflict is the child, who, in the heat of battle, becomes merely a weapon.¹⁵

Another advantage gained from joint custody is that, as many legislatures have recognized, it is normally in the best interests of the child to assure reasonable and continuing contact with both parents after separation or divorce.¹⁶ In sole custody, the noncustodial parent is relegated to the second class status of being a weekend or other short-term visitor. The child frequently does not come to know, respect, and value the noncustodial parent as a parent or as a family member and does not receive a balanced upbringing. As one court has stated, "there can be no question that the child benefits from the influence of both the father and mother in making the varied and at times stressful adjustments imposed by adolescence and its transformation to adulthood."¹⁷

Another advantage of joint custody is that it recognizes that, while the well-being of the child may be the paramount consideration in the custody decision, each parent also has both a vital personal interest in the court's decision and that there are certain rights inherent in being a parent which entitle him or her to share in the child's life.¹⁸ While most jurisdictions continually refer to the principle that the best interest of the child is the sole criterion for determining custody,¹⁹ parents do not exist solely for the benefit of their children, nor do children exist solely for the benefit of their parents. Rather, there must be a balancing of the interests of mother, father, and child or children. Joint custody can serve as a means of recognizing and balancing equitably the rights of all members of the family.

A final argument for joint custody is that it allows both parents to contribute to the decisions affecting the child, thereby making some degree of cooperation between the parents essential. While cooperation may be difficult or even almost impossible, it must always be remembered that the mother, father and child are still a family even though they no longer live together. Mother and father must thus still play a part in each other's lives. The more that they are able to

¹⁵See, e.g., Jenkins, *Planning for Children of Divorce*, in *Child Welfare Strategy in the Coming Years* 337,347 (1978).

¹⁶E.g., Cal. Civ. Code § 4600 (West 1980).

¹⁷*Gerscovich v. Gerscovich*, 8 Fam.L.Rep.(BNA) 2044, at 1045 (Fla. Ct. App. 5th Dist. Oct. 28, 1981).

¹⁸See, e.g., H. Maine, *Ancient Law*, ch. V (1861).

¹⁹See, e.g., *Korshak v. Korshak*, 8 Fam.L.Rep.(BNA) 2270 (Vt. Sup. Ct. Feb. 2, 1982).

work together in raising the child, the less acrimonious their overall divorce upon the well-being of the child.²⁰

IV. THE CASE AGAINST JOINT CUSTODY

One of the classic arguments against alternating custody is that requiring the child to move from one household to another is too disruptive of the child's life. Numerous courts have frequently expressed the view that a child should be raised in one household without being required to move back and forth to satisfy the desires of the parents.²¹ Such changes have normally been frowned upon even when the move would only be for a few miles within the same town.²² In cases where the move would require the child to change schools and give up friends and the scenes of daily life, courts have been even less in favor of alternating custody.²³ Some courts have considered the factor of disruption of the child's familiar environment to be so important that, while they have ordered alternating custody, the order has required that the children remain in the marital home while it is the parents that move when it is their turn to have physical custody.²⁴

While it is probably true that movement from one household to another would be disruptive of a child's life and possible harmful to the child's development, such movement is not unusual in contemporary society even for the child whose parents are happily married and living together. Both parents may work outside the home and the child may spend much of his or her time in the care of babysitters, day care center employees, or teachers. Families in America are also highly mobile and may relocate frequently to new towns or cities where the child will have to adjust to new schools, make new friends, and grow accustomed to new daily sights and sounds. In some cases, spending a portion of the year in a different environment may actually positively contribute to the child's maturation by exposing him or her to different places, people, and points of view.²⁵

A recent and perhaps more cogent argument against joint custody focuses on the requirement that the separated or divorced parents cooperate in making decisions affecting the child or children. An

²⁰See, e.g., *In Re Wesley R. K.*, 8 Fam.L.Rep.(BNA) 2484, 2485 (Pa. Sup. Ct. May 21, 1982).

²¹See Annot., 92 A.L.R. 2d 695, 701 (1963).

²²E.g., *Mastropole v. Mastropole*, 8 Fam.L.Rep.(BNA) 2091, 2092 (N.J. App. Div. Oct. 26, 1981).

²³E.g., *Munford v. Shaw*, 8 Fam.L.Rep.(BNA) 2080 (N.Y. App. Div. Nov. 30, 1981).

²⁴*Gerscovich v. Gerscovich*, 8 Fam.L.Rep.(BNA) 2044 (Fla. Ct. App. 5th Dist. Oct. 28, 1981).

²⁵See, e.g., L. Birnbach, *The Official Preppy Handbook* 206 (1980).

Illinois appellate court has opined that joint custody in "usually...unworkable," and that "unless the parents have unusual capacity to cooperate...substantial bickering and dispute, damaging to the children and harassing to the parent having physical custody, is likely to result."²⁶ A frequent source of disagreement between separated or divorced parents, and, in many cases, a primary source or marital breakdown, are disagreements as to how the children should be raised, disciplined, and educated.²⁷ Trial judges should therefore examine very closely the ability of separating or divorcing parents to cooperate in making child-rearing decisions before granting joint custody. If the parents are unable to cooperate in making decisions affecting the child, joint custody would clearly not be in the best interests of the child and should not be awarded.

Military personnel undergoing the trauma of separation or divorce will, like the general population, increasingly find themselves living with various forms of joint custody. Military personnel who seek some form of joint custody arrangement may have to cope with courts which follow the doctrine that the child's life should not be disrupted by being moved from place to place in alternating custody, or which believe that having a parent who does not have physical custody cannot workably contribute to child-rearing decisions. However, the military parent who is seeking joint custody can point to the fact that, while spending nine months with one parent and the other three with the other parent may be disruptive to the child's life, such an arrangement may be no more disruptive than the living arrangements of many military families where the parents are happily married. Disruptions and dislocations are common for the members of military families and the courts should not require that the child of a military family which is breaking apart have a less disrupted life than a child in a military family that has remained together. Likewise, when seeking some form of joint legal custody, the military parent may show that, due to the military member having sea duty or being sent overseas on an unaccompanied tour, the same sort of decision-making arrangement frequently exists in military families where there is no marital breakdown. Such a situation requires the spouse who remains at home to function in much the same way as would the parent with physical custody under a joint legal custody decree. In such situations, the absent

²⁶*E.g.*, *Fisher v. Fisher*, 9 Fam.L.Rep.(BNA) 2018, at 2019 (Mich. Ct. App. July 19, 1982).

²⁷*See, e.g.*, McCall, *Homecomings: They Can Be as Hard as Separations*, *The Times Magazine*, Feb. 7, 1983, at 11.

²⁸Annot., 92 A.L.R. 2d 696, 714 (1963).

military parent still participates in various child-raising decisions although he or she may not be able to participate in the daily raising and disciplining of the child.²⁸ Here, too, the military parent seeking joint custody can argue that the child of the military family which has broken apart does not need to be treated any differently or better than the child of the military family that remains together.

A final argument that the military parent may make in favor of joint custody is that his or her military service may make it impossible to exercise rights of visitation effectively if sole custody is granted to the nonmilitary parent. All jurisdictions recognize that the noncustodial parent is entitled to visit with the child unless such visitation would be harmful to the child. There is a considerable line of legal precedent indicating that alternating custody is appropriate where the geographical separation between the parents is so great that it would be difficult or impossible for the noncustodial parent to visit frequently enough to develop or continue a beneficial relationship with the child.²⁹

V. CONCLUSION

The trend in both legislatures and courts toward joint custody decrees reflects the legal system's attempt to adapt to the sweeping changes in the ways our society, and, in particular, our families, are organized and function. As in any situation where societies change their ways of doing things, the courts will outgrow outdated precedent and develop newer, and hopefully wiser, solutions to the difficult problem of who will care for the children of divorce. Joint custody arrangements may, in many cases, provide for the best interests of the child while treating both parents with equity. Military parents, who, in addition to the pains of dislocation which are common to the service, have suffered the trauma of separation from their children not only because of military orders but because of divorce decrees, may hope to preserve for themselves a share in the lives and upbringing of their children through joint custody decrees. Such decrees will only be made, however, when the parents show that they are able to cooperate with each other well enough to suspend their differences in favor of the best interests of their children.

²⁸*In Re Minnele*, 8 Fam.L.Rep.(BNA) 2695 (Ill. App. Ct. July 22, 1982).

LEGAL RIGHTS OF THE ILLEGITIMATE CHILD

by Major Robert W. Martin*

I. INTRODUCTION

This article will provide a broad overview of the legal rights of the illegitimate child. It will begin by studying some of the possible causes of the recent increase in litigation dealing with the issues of illegitimacy, followed by a brief legal history of the illegitimate child. It will then examine and analyze some of the more important United States Supreme Court cases dealing with various facets of illegitimacy in order to provide a more comprehensive understanding of this area of the law. Finally, the illegitimate child's rights to support and inheritance will be discussed as well as such child's rights to military benefits.

II. REASONS FOR INCREASE IN ILLEGITIMACY LITIGATION

The increase in litigation by and for illegitimate children is not difficult to explain. Statistics indicate that the United States has had a marked increase in the rate of illegitimate births since World War II.¹ Various explanations have been offered for the recorded increases in illegitimate births, but, as with most social phenomena, no consensus has been reached. The reasons for the increase are complex and varied, ranging from broad social changes to individual psychological reactions.² Contemporary attitudes toward marriage, sex, and the family are undoubtedly involved in many instances.³ Ignorance and carelessness in the use of contraception are also contributing factors.⁴

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¹H. Krause, *Illegitimacy: Law and Social Policy* 275-78 (1971).

²H. Clark, *Law of Domestic Relations* 155 (1968). [hereinafter cited as Clark].

³*Id.* at 157.

⁴*Id.* at 158.

In addition to the rise in illegitimacy, the Supreme Court in recent years has demonstrated a willingness to expand the scope of the Equal Protection Clause to encompass a more comprehensive scrutiny of statutory classifications.⁵ Illegitimate children, a class traditionally subject to unfavorable statutory schemes, undoubtedly saw an opportunity to benefit by increased equal protection emphasis. Accordingly, as initial judicial victories occurred, more suits were filed.

III HISTORICAL BACKGROUND

The common law of England looked upon a child born out of wedlock as the "son of nobody," *nullius filius*. Thus, the child could not be the heir to anyone, nor have heirs other than those of his own body. Parents owed it no obligation of support.⁶ The child had no inheritance rights from either parent; only the issue of its body could inherit from it. There were no statutes providing for legitimation, either by establishing paternity, by acknowledgement of paternity, or by subsequent marriage of its parents. Adoption was unknown.⁷

The rationale behind these harsh doctrines of the common law has not been clearly articulated. Rather, it is dependent upon a thorough sociological study of the history of the family unit and the mores of the members of the various races.⁸ It may be said, however, that the concept of *nullius filius* arose, not out of the difficulty of actual proof of the real father and the concurrent fear of fraudulent claims against estates, but rather because the child was the product of immoral relations. Thus, the belief of the English in the practice of monogamy and the sanctity of the marriage, especially as influenced by the church, may have been responsible to a large extent for their severe treatment of the product of illicit relations, the illegitimate child.

Another reason, however, seems to have motivated the preclusion of legitimation by intermarriage of the parents, the difficulty of proof of the identity of real father and the concurrent fear of fraudulent claims against the estates of wealthy landowners.⁹ Indeed, an

⁵J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* 517 (1978).

⁶See Note, *Constitutional Law - Equal Protection of Illegitimate Children*, 17 *Loyola L. Rev.* 170 (1979-71).

⁷See Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of Common Law*, 63 *Va. L. Rev.* 431 (1977).

⁸1 W. Blackstone, *Commentaries* 459 (1845 ed.); Robbins, *The Familial Property Rights of Illegitimate Children: A Comparative Study*, 30 *Colum. L. Rev.* 308, 316 (1930).

⁹M. Jackson, *The Formation and Annulment of Marriage* 36, 38 (1951).

example of this reasoning is to be found in the Napoleonic Code,¹⁰ which allowed the illegitimate child rights against his actual father but only when his father acknowledged him;¹¹ testimony of paternity by the child, his mother, or any third party was insufficient. Similarly, Spanish law provided that a child could become legitimated by the subsequent marriage of his parents, followed by an acknowledgment of paternity by the father. This legitimation, however, only applied to those children whose parents were capable of marrying at the time of the children's birth. Thus, a child of an adulterous relationship could not become legitimated by the subsequent marriage of its parents. Rather, the child remained an "adulterine bastard."¹² Under Roman Civil Law, an illegitimate child born of a concubine could become legitimate by the subsequent marriage of the parents, whereas a child of a prostitute could never be made legitimate. Again, the mores of the particular society played an important role; the concubine historically had a legal relation to the family which was sanctioned by the church until the Council of Trent.¹³

America accepted the common law concept of *nullius filius*. Over the years, a sense of justice appears to have found its way into this area of the law to shatter the harshness of the common law concept and pave the way for statutory modification. Abrogation has by no means been complete. In most American jurisdictions, fragments of the common law tenets still remain. Consequently, the American law on the subject is characterized by grants of various quanta of inheritance rights to and from the illegitimate. These rights are uniform in some jurisdictions, while in others the differences are not readily perceivable.¹⁴ In other areas, however, there stand examples of diametrically opposed attitudes. On the one hand, there exist very liberal and simple provisions whereby all children, legitimate or illegitimate, are treated equally. For example, Arizona¹⁵ and Oregon,¹⁶ which do not recognize any concept of illegitimacy, have succeeded in substantially eliminating legal discrimination against illegitimates. On the other hand, there are the conspicuously discriminatory provisions whereby the illegitimate's rights are confined to scarcely more than those which the child had at common law. Louisi-

¹⁰Code of Napoleon § 340, as translated in Robbins, *supra* note 8 at 321.

¹¹*Id.* at 322.

¹²M. Schmidt, *Law of Spain and Mexico* arts. 1243-59 (1959).

¹³Dickinson's Appeal, 42 Conn. 491, 501, 19 Am. Rep. 553 (1875); See also Annot., 33 A.L.R. 2d 705 (1954).

¹⁴10 Am. Jur. 2d *Bastards* § 8.

¹⁵Ariz. Rev. Stat. Ann. § 14-206 (1956).

¹⁶Or. Rev. Stat. § 109.060 (1963).

ana, for example, still retains in its code the most brutal provisions regarding the illegitimate¹⁷.

IV. CONSTITUTIONAL BACKGROUND

Since 1968, the United States Supreme Court has repeatedly reviewed the constitutionality of various disabilities imposed upon the illegitimate child by legislative or judicial action in both the state and federal arenas.¹⁸ The Equal Protection Clause of the Fourteenth Amendment has proven to be the vehicle through which arbitrary distinctions once drawn between legitimate and illegitimate children have been invalidated.¹⁹ There is also some suggestion that a denial of rights based purely on a status such as illegitimacy would be a denial of due process of law.²⁰

Classifications based on illegitimacy, though not subject to the "strictest scrutiny" test,²¹ wherein the state must show a compelling state interest before it can constitutionally discriminate between persons,²² are nonetheless subject to a scrutiny which is by no means "toothless."²³ The most widely accepted doctrine is that such a classification is vulnerable on equal protection grounds if it does not demonstrate that legislation has a rational relationship to a legitimate state objective.²⁴ The objective need not constitute a "compell-

¹⁷Article 202 of the Louisiana Civil Code provides:

Illegitimate children who have been acknowledged by their father are called natural children; those who have not been acknowledged... or whose father and mother were incapable of contracting marriage at the time of conception or whose father is unknown, are contradistinguished by the appellation of bastards.

La Civ. Code Ann. art 202 (West 1969). Article 200 states: "only those natural children can be legitimated who are the offspring of parents, who, at the time of conception could have contracted marriage."

La. Civ. Code Ann. art 200 (West 1969). Article 920 provides: "Bastard, adulterous or incestuous children shall not enjoy the right of inheriting the estate of their natural father or mother...the law allowing them nothing more than mere alimony." La. Civ. Code Ann. art. 920 (West 1969).

¹⁸See, Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477 (1967). See, Note, *Illegitimates and Equal Protection*, 10 U. Mich. J. Law Reform 543 (1977).

¹⁹See *Equal Protection*, 82 Harv. L. Rev. 1065 (1969).

²⁰See *Miller v. Laird*, 349 F. Supp. 1034 (D.D.C. 1972).

²¹See *Tyrrell v. City & County of San Francisco*, 69 Cal. App. 3d 872, 138 Cal. Rptr. 504 (1977).

²²See Note, *Constitutional Law - Equal Protection and the Inheritance Rights of Illegitimates Under Intestate Succession Laws*, 43 Mo. L. Rev. 118 (1978).

²³See *In re Minor of Martin*, 51 Ohio App. 2d 21, 365 N.E.2d 892 (1977).

²⁴See Annot., 41 L.Ed. 2d 1228 (1975).

ing" state interest.²⁶ However, a "rational relationship" to a legitimate governmental objective is often difficult to discern.

The first Supreme Court decision to significantly affect the rights of illegitimate children was *Levy v. Louisiana*.²⁶ In *Levy*, five illegitimate children were precluded from suing for their mother's wrongful death solely because of their illegitimacy. Although the Louisiana statute allowed children to sue for the wrongful death of a parent, the Louisiana courts held that only legitimate children, whether by birth or adoption, were covered by the statute.

The Court, in reversing the Louisiana Court of Appeals decision, held that the Louisiana wrongful death statute as interpreted by the Louisiana courts violated the Equal Protection Clause of the Fourteenth Amendment.²⁷ The illegitimate children involved in the case had lived with, were nurtured by, and were dependent upon their deceased mother. The Court stated that, "legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."²⁸ To discriminate against illegitimate children when "no action, conduct, or demeanor of theirs is possible, relevant to the harm that was done [to] them" was constitutionally impossible.²⁹ The Court in *Levy* held that there was no rational relationship between this statutory classification which included all legitimate children and excluded all unacknowledged illegitimate children and any legitimate state interest.

A companion case to *Levy*, *Glonn v. American Guarantee and Liability Insurance Company*,³⁰ held unconstitutional a Louisiana statute which denied recovery to the mother of an illegitimate child for the wrongful death of her child. Recognizing that this statute raised issues different from those raised in *Levy*, the Court found no rational basis for it as the statute would permit the mother of a legitimate to recover for the child's death. In a most simplified and unsatisfactory opinion, the Court discussed the only possible basis for the distinction, that it was aimed at discouraging illegitimacy, a basis which the Court found far-fetched.³¹

Three years after deciding *Levy* and *Glonn*, the Supreme Court in

²⁶See Comment, *Equal Protection and the "Middle Tier," The Impact on Women and Illegitimates*, 54 *Notre Dame Law* 303 (1978), (application of an intermediate level of scrutiny).

²⁷391 U.S. 68 (1968).

²⁸*Id.* at 71-72.

²⁹*Id.* at 72.

³⁰*Id.*

³¹391 U.S. 73 (1968).

³²*Id.* at 75.

Labine v. Vincent,³² a 5-4 decision, indicated that it was willing, in some circumstances, to tolerate classifications in state statutes which disfavored illegitimate children. Once again it was a Louisiana statute which came under attack. This statute denied acknowledged illegitimate children the right to inherit equally with legitimate children upon the death of a father who left no will. In fact, illegitimate children could inherit only to the exclusion of the state when one of the parents died intestate.³³ The Court distinguished *Labine* from *Levy* by stating that, in *Levy*, the state had created an insurmountable barrier preventing an illegitimate child from recovering for a parent's wrongful death, whereas, in *Labine*, there were at least three ways in which the illegitimate child could inherit if the deceased parent had no other relatives. In conclusion, the Court was willing to find a legitimate state interest which was rationally related to the Louisiana statute.

In deciding *Weber v. Aetna Casualty and Surety Company*³⁴ a year later, the Court held a Louisiana Workmen's Compensation law to be unconstitutional. In so doing, the Court analogized the case to *Levy*, but distinguished it from *Labine*. Both the statute in *Levy* and the statute in *Weber* involved state-created compensation schemes designed to provide close relatives and dependents of the deceased with a means of recovery for the accidental death of the relative. There was no question in *Weber* that the illegitimate children were dependent on their father who was killed. All of the asserted state interests for denying recovery to illegitimates had the effect of punishing the illegitimate child for the sins of his parents.³⁵ Ultimately, the Court held that "the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where...the classification is justified by no legitimate state interest, compelling or otherwise."³⁷

The next two important cases³⁶ decided in this area by the

³²401 U.S. 532 (1971).

³³*Id.* at 534.

³⁴*Id.* 537.

³⁵406 U.S. 164 (1972).

³⁶*Id.* at 172-76.

³⁷*Id.* at 176.

³⁸See also *Gomez v. Perez*, 409 U.S. 535 (1973); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973). In the former case, the Court held that Texas could not deny illegitimate children the right to financial support from their natural father when this right was given to legitimate children. In the latter case, the Court invalidated a program providing welfare to low income family units consisting of married couples with either natural or adopted children because family units containing illegitimate children were denied the benefits. See *Mills v. Habbutyel* 50 U.S.L.W. 4372 (U.S. Apr. 5, 1982).

Supreme Court were *Jimenez v. Weinberger*³⁹ and *Mathews v. Lucas*.⁴⁰ Both cases dealt with claims by illegitimate children under the Social Security Act. Since a federal statute was involved, the Court was required to determine if the law violated the Equal Protection component of the Fifth Amendment's due process clause. Applying the rational basis test, the Court concluded that the provision challenged in *Jimenez* unconstitutionally discriminated against illegitimates, whereas the provision challenged in *Mathews* was constitutional.⁴¹

Finally, in 1977 and 1978, the Court decided two more cases⁴² involving distinctions based on the status of illegitimacy which indicate that a different level of scrutiny might be applied in such cases. *Trimble v. Gordon*, like *Labine*, involved a state statute which prohibited illegitimate children from inheriting from their natural fathers by intestate succession. Rather than follow or overrule *Labine*, the Court, in a footnote, stated that *Labine* had limited precedential value.⁴³ As in other cases dealing with illegitimacy, the Court in *Trimble* proceeded to scrutinize the state interests which purportedly justified the Illinois intestate statute. The Court appeared to employ a slightly higher level of scrutiny than previously used and concluded that the statute was not narrowly tailored to achieve the asserted state interests.

*Lalli v. Lalli*⁴⁴ confirmed *Trimble* to the extent of the degree of scrutiny required when a classification is based on illegitimacy. According to the *Lalli* Court, "classifications based on illegitimacy... are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests."⁴⁵

These cases starting with *Levy* and ending with *Lalli* which have dealt with the rights of illegitimate children have established some

³⁹417 U.S. 628 (1974).

⁴⁰427 U.S. 495 (1976).

⁴¹In *Mathews*, the challenged classification was not a strict division between legitimate and illegitimate children, and of the illegitimate children that were not entitled to the favorable presumption of dependency, all were allowed an opportunity to prove their dependency and obtain benefits. The law was upheld because it was not an attempt to burden illegitimate children but only a narrowly tailored way of easing administrative problems for establishment of dependency. See 427 U.S. at 497.

⁴²*Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977).

⁴³*Trimble v. Gordon*, 430 U.S. 762, 767 n.12 (1977) (Court carefully examined the Illinois statute involved in this case). See also *Califano v. Boles* 443 U.S. 282 (1979).

⁴⁴439 U.S. 259 (1978). In this case, the Court upheld a New York statute which required illegitimate children who would inherit from their fathers by intestate succession to provide a particular form of proof of paternity.

⁴⁵*Id.* at 265. See *United States v. Clark*, 445 U.S. 23 (1980), the Court once again confirmed the heightened level of scrutiny employed in *Trimble* and *Lalli*.

general principles which should be considered when legislating or adjudicating the rights of illegitimate children. First, although classifications based on illegitimacy are not suspect, and hence not subject to strict scrutiny, these classifications will be held invalid under the Fourteenth Amendment if they are not substantially related to permissible interests. Second, the Court has repeatedly emphasized that illegitimate children should not be unduly penalized because society does not condone the relationship of their parents. Finally, statutes which discriminate against illegitimate children with the objective of coercing or encouraging certain types of parental conduct are less favored than narrowly drawn statutes which involve presumptions of a support or dependency relationship that are supported by statistical probabilities.⁴⁶

V. RIGHT TO SUPPORT

The role at common law was that the mother of an illegitimate child, being presumptively entitled to its custody,⁴⁷ was exclusively responsible for its support.⁴⁸ This rule has been almost totally eroded by statute. In most states, the father is responsible for the support or maintenance of his illegitimate child, but in some states he has no support obligation at all.⁴⁹ The mother usually also is asked to assist in the support of the child. However, the level at which the child must be maintained is often in the court's discretion; in only a few jurisdictions is it fixed by statute.⁵⁰ Although some states provide that a judgment in a paternity action establishes an illegitimate's equality with a legitimate offspring of the father with respect to rights of support,⁵¹ the legitimate child generally has broader rights than the illegitimate sibling as to both the level of support and the duration of the obligation. This right to support can be enforced generally during the lifetime of the father and, after the death of the father, against his estate.⁵²

Finally, it should be noted that statutes which impose upon the father the duty of supporting his children usually include illegitimates.⁵³ In particular, the United States Supreme Court has held that a statute which grants to legitimate children an enforceable

⁴⁶J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 601-07 (1978).

⁴⁷See Krause, *Bringing the Bastard into the Great Society - A Proposed Uniform Act on Legitimacy*, 44 *Tex. L. Rev.* 829 (1966).

⁴⁸See Clark, *supra* note 2, at 176.

⁴⁹In Texas and Idaho the father has no obligation to support his illegitimate child.

⁵⁰See Krause, *supra* note 47, at 850-52.

⁵¹Va. Code Ann. § 20-61.1 (1975); See also *Ariz. Rev. Stat. Ann.* § 14-206 (1956).

⁵²See *Annot.*, 12 *A.L.R.* 3d 1140 (1967).

⁵³See Clark, *supra* note 2, at 162.

right to support from their biological fathers and denies the same right to illegitimate children violates the Constitution.⁵⁴

VI. RIGHT TO INHERIT

The illegitimate child's legal disabilities remain most numerous in the areas of intestate succession and the ability to sue for the wrongful death of a parent.⁵⁵ For testamentary dispositions, it has been uniformly held that a testamentary disposition in favor of illegitimate children is not prohibited by public policy and is valid when such children are sufficiently identified.⁵⁶

In line with the common law, inheritance by the illegitimate child from its mother is permitted in nearly all states.⁵⁷ One exception is Louisiana, which provides that illegitimate children acknowledged by both the mother and the father may succeed to their mother's property only if she has left no lawful children or descendants.⁵⁸

Until recently, most states followed the general rule that an illegitimate child may not inherit from its intestate father even where paternity has been adjudicated by a court.⁵⁹ Only in Arizona and Oregon are children born out of wedlock statutorily treated as if they were the legitimate children of both of his parents⁶⁰ and may succeed by intestacy to the property of the deceased putative father. Most states, however, do not expressly provide for succession on intestacy of the putative or alleged father.

VII. RIGHT TO MILITARY BENEFITS

Of extreme importance in this particular area is the possible eligibility of an illegitimate child of a service member for military benefits. Traditionally, illegitimate children were routinely barred from receiving certain benefits. In recent years, the Supreme Court has addressed the issue of whether classifications predicated on illegitimacy have violated the Equal Protection Clause of the Fourteenth Amendment. The Court found that, although such classifications are not subject to strict scrutiny, they "are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interest."⁶¹ Even though illegitimacy classifications

⁵⁴*Gomez v. Perez*, 409 U.S. 535.

⁵⁵See Clark, *supra* note 2, at 178.

⁵⁶See Annot., 34 A.L.R. 3d 8 (Supp. 1978).

⁵⁷See Clark, *supra* note 2, at 179.

⁵⁸See La. Civ. Code Ann. art 918 (West 1969).

⁵⁹See Clark, *supra* note 2, at 179.

⁶⁰See note 15 *an* 16 *supra*.

⁶¹*Lalli*, 439 U.S. at 265 (1978). See also *Trimble*, 430 U.S. 762 (1977); *Mathews*, 427 U.S. 495 (1976); (1972); *Levy*, 391 U.S. 68 (1968); *Glover*, 391 U.S. 73 (1968).

may operate unfairly on some illegitimate children, the Court has stated that its "inquiry under the equal protection clause does not focus on the abstract fairness of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment."⁶²

As a direct result of these relatively recent constitutional decisions, the Army now provides that a service member is entitled to receive basic allowance for quarters on behalf of an illegitimate child provided that the service member has been judicially decreed to be the father of the child, judicially ordered to pay support, or if he has admitted parentage in writing. It must also be demonstrated that the child is in fact dependent on the service member.⁶³ Once dependency has been established, the illegitimate child is placed on equal footing with other dependents regarding entitlement to all military benefits.⁶⁴

VII. CONCLUSION

Some ten years of Supreme Court litigation has undeniably eliminated many of the legal disabilities afflicting the illegitimate child. As a result, illegitimates cannot now be automatically excluded from the definition of "children" who are eligible under support, welfare, workmen's compensation, wrongful death, military benefits, and descent and distribution statutes which benefit children generally. The cases seem to rest on the rationale that the illegitimate child, by virtue of a status for which it is not responsible and which has no relation to its worth as an individual, has been the object of discriminatory legal doctrines having no substantial social purpose. Although the Supreme Court has not yet articulated a standard to facilitate the elimination of all legal disabilities suffered by illegitimate children, its activity has successfully served to eliminate many of the major barriers preventing illegitimate children from enjoying protection or treatment under the law.

⁶²*Lalli*, 439 U.S. at 273.

⁶³Dep't of Defense, Military Pay and Allowances Entitlements Manual sec. 30238 (C66, 9 Dec. 1981).

⁶⁴See U.S. Dep't of Army, Reg. No. 640-3, Personnel Records of Identification of Individuals - Identification Cards, Tags, and Badges, para. 3-3(c) (15 June 1980). See also U.S. Dep't of Army, Reg. No. 40-3, Medical Services - Medical, Dental, and Veterinary Care, (101, 2 Apr. 1982); U.S. Dep't of Army, Reg. No. 40-121, Medical Services - Medical Services Uniform Services Health Benefits Program, (C4 27 Sept. 1975) (medical benefits); U.S. Dep't of Army, Reg. No. 60-20, Army and Air Force Exchange Services - Exchange Services Operating Policies, (C1, 15 Feb. 1980)(PX and theater privileges).

LEGAL RIGHTS OF THE UNWED FATHER

by Major Robert W. Martin*

I. INTRODUCTION

The purpose of this article is to provide an overview of the present legal role of unwed fathers and the more common and important issues connected with counseling an unwed father in the service as to his parental rights and obligations. The following discussion attempts to briefly analyze the unwed serviceman-father's rights to adoption, custody, visitation, and certain military aspects affecting his illegitimate children.

II. CONSTITUTIONAL RECOGNITION OF THE UNWED FATHER'S PARENTAL ROLE

A starting point in examining constitutional cases which focus on the rights of unwed fathers is *Stanley v. Illinois*.¹ This is one of the most significant cases in this decade to recognize, protect, and extend the unwed father's parental role into the lives of his illegitimate children. In that case, an Illinois statute estopped an unwed father from participating in the custody proceedings of his three illegitimate children following the death of the mother, even though the father and mother had lived together intermittently for eighteen years. The United States Supreme Court, in holding the Illinois statute unconstitutional, stated that unwed fathers have a cognizable and substantial interest in retaining custody of their children.² The Illinois statute in question was found to violate both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. The Due Process Clause was violated because the statute presumed that unmarried fathers made unsuitable parents, a presumption which the Court found to violate Stanley's due process right to a prior hearing on his fitness as a parent.³ The Equal Protection Clause was violated because the statute deprived Stanley of the hearing afforded other parents on the issue of their suitability to retain custody of their children.⁴ As a result, this case guaranteed constitutional protection and safeguard to the biological father's relationship with his illegitimate children.

In 1978, some six years after the *Stanley* ruling, the Supreme Court held in *Quilloin v. Walcott* that states, in certain circumstan-

* The author's biography is noted below the preceding article.

¹405 U.S. 645 (1972).

²*Id.* at 652.

³*Id.* at 649.

⁴*Id.* at 658.

ces, may enact legislation which treats unwed fathers differently from unwed mothers.⁵ In this case, the Court upheld as constitutional a Georgia statute that denied an unwed father the right to prevent the adoption of his child by the natural mother's husband. The Georgia statute required only the consent of the mother for adoption of an illegitimate child unless the natural father had legitimized the child. The unwed father in this case made no attempt to legitimize his child or to assume any paternal responsibilities for over eleven years.⁶ In fact, the mother's husband was the only real father the child had ever known. As a result, the Court held that the state could distinguish unwed fathers from married fathers because the unwed father had not assumed responsibility for his child.⁷

In 1979, one year after *Quilloin*, the Court in *Caban v. Mohammed* held a New York statute unconstitutional because the distinction between the rights of unwed mothers and unwed fathers, an invalid gender-based distinction, was not demonstrated by be substantially related to an important state interest.⁸ In *Caban*, an unmarried father challenged the constitutionality of the New York law that gave an unwed mother, but not an unwed father, the power to prevent an adoption of the children by withholding consent. The unmarried father could prevent the child's adoption only by showing that the adoption would not be in the best interest of the child.⁹ The facts in *Caban* indicate that the father had lived with his illegitimate children and their mother, and contributed to their support for a time thereafter. The Court felt that these facts demonstrated that the father had a substantial interest in his children's welfare. Since the gender-based distinction had no substantial relationship to the alleged state interest in promoting the adoption of illegitimate children, the classification created by the New York law was found to deprive unmarried fathers of equal protection of the laws.¹⁰

One final case to be cited in the constitutional area is that of *Parham v. Hughes*, a case decided the same day as *Caban*. In this case, the Court held constitutional a Georgia law which denied unmarried fathers who had not legitimized their children the opportunity and right to bring a cause of action for their offspring's wrongful death.¹¹ The Court reasoned that, since, in Georgia, an unwed father

⁵434 U.S. 246 (1978).

⁶*Id.* at 252-53.

⁷*Id.* at 256.

⁸441 U.S. 380 (1979).

⁹*Id.* at 387.

¹⁰*Id.* at 394.

¹¹441 U.S. 347 (1979).

can voluntarily legitimize his child, the state interest in preventing or at least limiting paternity proof problems in wrongful death suits was adequate to justify the state in denying a cause of action to any unwed father who had not initiated legitimation proceedings for his child prior to that child's death.¹²

In summary, these four cases appear to stand for the proposition that, where an unmarried father takes an active interest in his child's or children's welfare and where an unmarried father's paternity is not in issue, the Supreme Court will not allow states to actively discriminate against unmarried fathers. The cases further indicate that states are not required to give unwed fathers equal standing with mothers in domestic court actions, but that, if feasible, states should treat all fathers equally.

III. PARENTAL OBLIGATIONS

Although the law once placed liability for support of illegitimate children solely on the unwed mother, all fifty states by statute currently charge the unwed father with an obligation to support his illegitimate children.¹³ Some statutes impose the primary obligation of support on the adjudicated natural father.¹⁴ However, since 1970, it appears that the majority of newly adopted state laws have imposed equal support obligations on parents of legitimate children.¹⁵

Unlike the father of the legitimate child whose legal duty to support arises at the child's birth, the unmarried father generally becomes legally liable for support only after his paternity is established in a judicial proceeding.¹⁶ Thus, the unwed father may never become legally obligated for support if he cannot be identified or located or is excluded from the definition of "parents."¹⁷

IV. ADOPTION RIGHTS

Prior to the Supreme Court's ruling in *Stanley*, the unwed father's rights in proceedings for the adoption of his illegitimate children were limited. Prior to *Stanley*, only a few appellate courts permitted the unwed father to assert an interest in his illegitimate child even

¹²*Id.* 2at 360-61.

¹³Reeves, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementations*, 13 J. Fam. L. 115, 116-17 (1973-74).

¹⁴Wingard v. Sill, 228 Kan. 661, 576 P.2d (1978).

¹⁵Foster & Freed, *Life with Father: 1978*, 11 Fam. L.Q. 321, 323 (1978).

¹⁶Wingard, 228 Kan. at 666, 576 P.2d at 621.

¹⁷Miss. Code Ann. Sec 93-17-5 (1972) (father of illegitimate child is not parent for adoption purpose).

though the mother had consented to the adoption.¹⁸ The majority of states failed to give the father either notice or an opportunity to be heard concerning the prospective adoption.¹⁹ In a majority of adoption statutes, the unwed father's consent was not a prerequisite to adoption.²⁰

Although the *Stanley* case did not elaborate upon the substantive due process rights of unwed fathers in an adoption proceeding, it has been cited as recognizing the existence of such rights. Today, it appears that adoption statutes require consent of only the unwed fathers who have asserted or established their parental role.²¹

Finally, with regard to the adoption issue, two previously discussed cases should be noted. In *Quilloin v. Walcott*, the Supreme Court held that a noncustodial, irresponsible father could be given less veto authority concerning the adoption of his child than a married father.²² Likewise, in *Caban v. Mohammed*, the Court held that a distinction between unwed mothers and unwed fathers who had not established substantial relationships with their children might be permissible. Therefore, the interest of a state in promoting the adoption of illegitimate children may justify most classifications between noncustodial, irresponsible fathers and other classes of parents. As a result of such classifications, the substantive due process rights of some unwed fathers in adoption proceedings may be limited.²³ For the unwed father to have any change of prevailing in an adoption proceeding, the father must first have asserted or established his parental role.

V. CUSTODY RIGHTS

The common law view is that the mother had the primary or natural right to custody of the illegitimate child.²⁴ As a case law developed, the unwed father was to acquire a right to custody superior to all persons except the mother.²⁵ However, the traditional role seemed to apply even where the mother's claim is opposed by the putative father who is also seeking custody. The mother's primary

¹⁸*In re Doe*, 478 P.2d 844 (Hawaii 1970); *In re Mark T.*, 8 Mich. App. 122, 154 N.W. 2d 27 (1967); *In re Brennan*, 134 N.W. 2d 126 (Minn. 1965).

¹⁹H. Clark, *Law of Domestic Relations*, §§ 18.1, 18.4 (1968).

²⁰Clark, *supra* note 19, at §§ 18.4, 18.5.

²¹*In re Gerald G. G.*, 403 N.Y.S. 2d 57 (1978) (devoted and concerned natural father has right to veto adoption in child's best interests).

²²434 U.S. 246 (1978).

²³*W.E.J. v. F.L.*, 5 Fam. 1041 Law. Rptr. (1980).

²⁴Clark, *supra* note 19, at § 5.4.

²⁵Schwartz, *Rights of a Father with Regard to His Illegitimate Child*, 36 Ohio St. L. J. 8 (1975).

right is subject always to the overriding needs of the child, so that, if she is considered to be unsuitable, she will not be given custody.²⁶

The *Stanley* cases provides little guidance for analyzing the conflicting interests of unmarried parents in a custody decision. *Stanley* forbids states from arbitrarily granting unwed mothers the exclusive right to custody of their illegitimate child, but whether that case absolutely prohibits the vesting of any preference to unwed mothers in custody decisions is not apparent from the holding.²⁷

The *Quillion* case recognized the unwed father's right to companionship, care, custody, and management of his children. The Court suggested that the kind and degree of protection to be given an unwed father's parental rights may depend upon the father's past and present relationship with his child as well as the presence or absence of substantial countervailing interests.²⁸ As a result, states may be permitted, if the child's best interests so dictate, to give judicial preference of maternal custody over the custody rights of some unwed fathers.

In light of the foregoing discussion, it should be noted that a judicial imposition of a maternal preference is always possible in any given case whether or nor a Fourteenth Amendment equal protection argument arises. What is noteworthy is that there is recent legal precedent bolstering the unwed father's constitutional rights. The Ohio Supreme Court in the recent case of *In Re Byrd* decided to accord unwed fathers powerful rights with respect to their illegitimate children.²⁹ Specifically, this case held that, when an alleged natural father of an illegitimate child who has participated in the nurturing process of the child files a complaint seeking custody of the child, the natural father has equality of standing with the mother concerning custody.³⁰

VI. VISITATION RIGHTS

Judicial cognizance of visitation rights for unwed fathers has continually evolved since the parental role of the unwed father expanded under the law.³¹ Today, many states that have taken under advisement the issue of unwed fathers' visitation rights have granted

²⁶Clark, *supra* note 19, at §§ 5.4, 5.5.

²⁷405 U.S. 645 (1972).

²⁸*Quillion v. Walcott*, 434 U.S. 246, 248 (1978).

²⁹66 Ohio St.2d 334, 421 N.E.2d 1284 (1981).

³⁰*Id.* at 337, 421 N.E.2d at 1287.

³¹Reeves, *supra* note 13, at 117.

the father a right to "reasonable visitation," if such visitation is deemed to be in the best interests of the child.³²

It is apparent from the cases of *Stanley* and *Quillion* that there exists an arguable constitutional basis for an unwed father's right to what may be considered reasonable visitation privileges.³³ In addition to these Supreme Court cases, many state court cases have held that an unwed father's visitation interests are constitutionally protected, thus further strengthening the father's rights to visitation.³⁴ In this context, it could then be deduced that the more responsible the unwed father is shown to be, the greater the opportunity of his having reasonable visitation rights granted by a court.

VII. MILITARY ASPECTS AFFECTING THE UNWED FATHER

A. MILITARY BENEFITS

The unwed military father should be cognizant of the possible eligibility of his illegitimate child or children for military benefits. Traditionally, illegitimate children were not statutorily entitled to receive certain benefits. Recently, the Supreme Court decided the issue of whether classifications based upon illegitimacy violated the Equal Protection Clause of the Fourteenth Amendment. The Court found that, although these classifications were not subject to strict scrutiny as suspect classes, they are invalid under the Fourteenth Amendment Due Process Clause if such classifications are not substantially related to permissible state interests.³⁵ Recognizing that illegitimacy classifications may unfairly burden some illegitimate children, the Court stated that it intends to focus any judicial inquiry on whether the state law's relation to the state interests intended to be promoted are so tenuous so as to lack the rational connection contemplated by the Fourteenth Amendment.³⁶

As a direct result of these recent constitutional decisions, a service member may receive a basic allowance for quarters on behalf of an illegitimate child. To receive this entitlement, the service member

³²*Gardner v. Rhtoman*, 345 N.E.2d 370 (Mass. 1976); *Taylor v. Taylor*, 299 So.2d 799 (La. 1974); *Ritchie v. Ritchie*, 58 Ill. App. 3d 1045, 374 N.E.2d 1292 (1978); *Vallera v. Rivera*, 39 Ill. App. 3d 775, 351 N.E.2d 391 (1976).

³³*Quilloin v. Walcott*, 434 U.S. 246, 248 (1978); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972). (Both cases found the unwed father's interest in the "companionship, care, custody, and management" of his children to be "cognizable and substantial").

³⁴*J.M.S. v. H.A.*, 242 S.E.2d 696 (W. Va. 1978).

³⁵*Lalli v. Lalli*, 439 U.S. 259, 265 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Cas & Sur. Co.*, 406 U.S. 164 (1972); *Leng v. Louisiana*, 381 U.S. 68 (1968).

³⁶439 U.S. at 272-73.

must have been judicially decreed to be the father of the child, judicially ordered to pay child support, or have acknowledged in writing that he is the natural parent of the illegitimate child. Furthermore, other regulatory provisions require proof that the child is actually dependent upon the support of the service member.³⁷ After the service member has accomplished the foregoing, the illegitimate child may then be entitled to all other allowable military benefits generally available to dependents.³⁸

B. ARMY REGULATION 608-99

The unwed father can be affected in his military career due solely to his status. Army Regulation 608-99 provides the military procedures for resolving any actions affecting the unwed father.³⁹ In general, provisions of this regulation are utilized when there is either an allegation of paternity or a judicial order or decree of paternity.⁴⁰ The regulation places responsibility for counseling and processing any questioned paternity complaints on the immediate commander of or the officer having general court-martial jurisdiction over the service member in question. The commander has the responsibilities of interviewing and counseling the service member, as well as the responsibility of replying to the complainant.⁴¹ Depending upon whether the service member is willing to admit or deny paternity, or whether he expresses a willingness to marry or provide support, the commander is directed by the provisions of the regulation to take action appropriate to the situation.⁴² The unwed serviceman father should be made aware of this regulation's general provisions and counseled as to what effect any subsequent action or inaction could have on his military career. Finally, the serviceman must be alerted to the specific provisions of the regulation which provide that, if the alleged paternal obligations are valid and the individual has "repeat-

³⁷Dep't of Defense, Military Pay and Allowances Manual sec. 30238 (C66, 9 Dec. 1981).

³⁸U.S. Dep't of Army, Reg. No. 60-20, Army and Air Force Exchange Service - Exchange Services Operating Policies, (C1, 15 Feb. 1980)(PX and theater privileges); U.S. Dep't of Army, Reg. No. 640-3, Personnel Records and Identification of Individuals-Identification Cards, Tags, and Badges, para 3-3(c) (15 June 1980); U.S. Dep't of Army, Reg. No. 40-3, Medical Services - Medical, Dental, and Veterinary Care, (101, 2 Apr. 1982); U.S. Dep't of Army, Reg. No. 40-121, Medical Services - Medical Services Uniform Services Health Benefits Program, (C4, 27 Sept. 1975) (medical benefits).

³⁹U.S. Dep't of Army, Reg. 608-99, Personal Affairs - Support of Dependents, Paternity Claims and Related Adoption Proceedings, chs. 3, 4 (16 Jan. 1979), [hereinafter cited as AR 608-99].

⁴⁰AR 608-99, para. 3-1(a).

⁴¹*Id.* at paras. 3-2(a), 3-2(b), 3-2(c).

⁴²*Id.* at paras. 3-3, 3-4, 3-7, 3-8(a).

edly failed to bear moral, legal, or financial obligations," the commander is authorized to place documentation of this failure in the service member's Official Military Personnel File and Military Personnel Records Jacket.⁴⁸

VIII. CONCLUSION

The parental rights and obligations of unwed fathers have been greatly enhanced. As a result of recent Supreme Court decisions, unwed fathers now enjoy unprecedented rights in the adoption, custody, and visitation of their illegitimate children. Due to this judicial advancement and recognition, unwed military fathers are now afforded military benefits on behalf of their illegitimate children, as well as directed by Army regulation to conform their conduct and lifestyle to certain minimal standards.

⁴⁸*Id.* at ch. 4.

PALIMONY: WHEN LOVERS PART

by Major Keith K. Hodges*

This article addresses the current status and future of "palimony," court ordered payments following the dissolution of a nonmarital cohabitational relationship. Part I narrows the scope of this topic by demonstrating the inapplicability of related issues regarding putative spouses, common law marriages, and child support. Part II sets the stage for exploring the legal theories for awarding palimony by focusing on the nature of palimony, rather than when it should be awarded. Part III states the prevailing judicial views. Part IV sets out the "frontier" of palimony and where the law appears to be headed. The conclusion analyzes the law and considers the social results that the new rules may bring about.

When considering how the courts resolve palimony issues, one should bear in mind that palimony is more a social issue than a legal one and turns more on reaching a socially and equitably desirable result than a legally correct one. When courts deal with the reality of rapidly changing social mores and are willing to "make" law, the facts are not as important as they would normally be. In every case, unless otherwise noted, it is the ousted female of the relationship who sues her former male paramour for palimony. Sexual relations are always involved.

PART I: SCOPE

The scope of this article is narrow and does not fully discuss some collateral issues which often confuse students of palimony law.

Where one or both parties cohabit under the mistaken belief they are legitimately married, but are not because of some infirmity, most commonly, because one of the parties is ignorant of the other's existing marriage, the law treats the mistaken party as a "putative spouse." A putative spouse will have the advantage of the jurisdic-

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tion's divorce laws as if that individual was legitimately married.¹ In that case, the putative spouse will be entitled to alimony as if that party had been lawfully married.²

Common law marriages, too, only tangentially affect unmarried cohabitants. If the parties are from one of the fourteen jurisdictions which recognizes common law marriage³ and they qualify under the statutory or common law scheme,⁴ the cohabitants will be treated like a lawfully married couple.⁵ Monetary support for children born of the relationship does not directly affect palimony cases. General paternity law places child support responsibilities on the biological father whether or not the child is legitimate.⁶

PART II:

ALIMONY VERSUS PROPERTY SETTLEMENTS

Palimony, as used here, is judicially ordered "alimony" after the dissolution of a nonmarital cohabitational relationship. Strictly speaking, such an award is not considered alimony, for it is universally recognized that alimony is awarded only upon the dissolution of a lawful marriage.⁷ Alimony historically flows from the husband's obligation to support his lawful wife.⁸ Without a previous marital relationship, alimony is available. This definitional statement would seem to for an inflexible rule that palimony cannot be recognized. Despite the historical purposes of alimony, courts have nonetheless recognized that practicality may outweigh historical precedent.

First, courts and commentators have identified reasons other than the husband's obligation to support his ex-wife as the basis for alimony. Among them are to furnish damages to the wife for the husband's wrongful breach of the marital contract,⁹ to support his child-

¹G. Douthwaite, *Unmarried Couples and the Law* § 1.6, at 14 (1979) [hereinafter cited as Douthwaite]. See *Dean v. Goldwire*, 480 S.W.2d 494 (Tex. Civ. App. 1972).

²Douthwaite, *supra* note 1.

³As of 1979, common law marriages were recognized in Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, and the District of Columbia. Comment, *Marvin v. Marvin: Five Years Later*, 65 Marq. L. Rev. 389, n. 5 (1982).

⁴For the general scheme, see Douthwaite, *supra* note 1, at § 1.5, at 12.

⁵*Id.* at 13.

⁶59 Am. Jur. 2d *Parent and Child* § 50 (1971).

⁷24 Am. Jur. 2d *Divorce and Separation* § 50 (1971).

⁸H. Clark, *The Law of Domestic Relations in the United States* 143.1, at 421 [hereinafter cited as Clark]. A less prevailing and attractive view is that alimony is to furnish damages "for the husband's wrongful breach of the marriage contract" or to penalize the guilty husband. Clark, *supra*. With the advent of no fault divorce and the Uniform Marriage and Divorce Act, fault may no longer be a consideration at all. See Clark, *supra*, at § 14.4, at 445.

⁹Clark, *supra* note 8, at 421.

ren indirectly by supporting the wife and allowing her to care for the children,¹⁰ and to keep the wife from the public welfare rolls.¹¹ With the evolution of no-fault divorce, penalizing the husband has become a lesser consideration.¹²

The other practical dilemma turns on the definition of alimony and the courts' inartful application of the term. Alimony must be distinguished from property settlements following divorce. A property settlement serves to give each spouse the property which is justly theirs.¹³ Unlike alimony, a property settlement does not turn on the continued obligation of the husband to support his wife, but rather considers how the property was acquired. Courts examine ownership rights by looking at the source of gifts, the source of the funds used to acquire property, agreements between the parties, and other factors of equitable ownership.¹⁴ The definitional difference between alimony and property settlements is not always honored by the courts.¹⁵ Comingling of awards is convenient for the courts because it allows them to give alimony and palimony under the guise of a property settlement. The decisions never award "alimony"; they award "support."

The dynamics of change in the common law have applied in palimony cases. While most courts recognize that they are considering changing social standards, one refreshing palimony case openly admits it is using the "strength and endurance of the Anglo-American judicial systems . . . as a court of equity to afford and shape individualized relief in the interest of justice where a court of law could not."¹⁶

This article will focus on "pure" palimony issues and only collaterally treat how courts avoid palimony rules through property settlements.

¹⁰*Id.* at § 14.5, at 441.

¹¹*Id.* See Note, *Beyond Marvin: A Proposal for Quasi-Spousal Support*, 30 Stan. L. Rev. 359, 366 (1978) [hereinafter cited as Stanford Note].

¹²Stanford Note, *supra* note 11, at 367.

¹³Clark, *supra* note 8, at § 14.8, at 450.

¹⁴*Id.*

¹⁵In *Diment v. Diment*, 531 P.2d 1071 (Okla. Ct. App. 1974), the court recognized that what a court may call "permanent alimony" may be either for support or as a property settlement. A minority view. See *In Re Cox*, 543 F.2d 1277 (10th Cir. 1976).

¹⁶*Glasgo v. Glasgo*, 410 N.E.2d 1325, 1330 (Ind. Ct. App. 1980).

PART III: THE RULES

Alimony may not be awarded unless pursuant to a dissolution of a legal marriage.¹⁷ A former partner to a nonmarital relationship will be entitled to "support" payments if they can be based upon an express promise which "is not explicitly and inseparably founded on sexual services. . . ."¹⁸ The rule is best illustrated by *Kozlowski v. Kozlowski*.¹⁹ For almost fifteen years, the plaintiff lived with and performed all the wifely duties for her partner. Their cohabitation began while both were married to others. After both secured divorces from their spouses, the woman pressed for marriage, but the man was evasive about a commitment. The woman (plaintiff) finally moved out. Still insisting he would not marry her, the defendant induced her to return with the promise to "support her for the rest of her life."²⁰ The court found this express promise to be enforceable.

The major impediment to court-ordered support lies in whether the contract is based in whole or part upon the plaintiff's providing illicit sexual services; that status is a "meretricious relationship." The authorities are unanimous, as *Kozlowski* recognized, in maintaining that a contract is unenforceable when the consideration for the contract or the contract itself is for illicit sex.²¹ The issue of whether such a contract has been formed or such consideration exists is at the heart of most current litigation in this area. The cases turn on whether the court will label the contract or the consideration "illicit."

In *Marvin v. Marvin*,²² an oral contract to render services as a "companion, homemaker, housekeeper, and cook"²³ was held enforceable. That sexual relations occurred between the parties was not in dispute. Cases following *Marvin*, or upon which *Marvin* is grounded, are equally as liberal in declining to describe a relationship as a meretricious. In *Latham v. Latham*²⁴ the parties agreed to live together with the plaintiff "caring for and keeping after him,

¹⁷See note 7 *supra*.

¹⁸*Kozlowski v. Kozlowski*, 403 A.2d 902, 906 (N.J. 1979). See also *Joan S. v. John S.*, 427 A.2d 498 (N.H. 1981); *Kinnison v. Kinnison*, 627 P.2d 594 (Wyo. 1981); *Kinkenon v. Hue*, 301 N.W.2d 77 (Neb. 1981); *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

¹⁹403 A.2d 902 (N.J. 1979).

²⁰*Id.* at 906.

²¹*Id.* See also *Joan S. v. John S.*, 427 A.2d 498 (N.H. 1981); *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Restatement of Contracts* 589 (1932); 6A S. Corbin, *Contracts* § 1476 (1962).

²²557 P.2d 106 (Cal. 1976).

²³*Id.*

²⁴547 P.2d 144 (Or. 1975).

and furnishing him all the amenities of married life."²⁶ The court made clear it was not "validating an agreement in which the only or primary consideration is sexual intercourse. The agreement here contemplated *all* the burdens and amenities of married life."²⁶ Courts have noted that, because parties who live together have sex, they should not thereby be incapacitated from contracting as to legitimate matters.²⁷ Consideration of or a contract based only upon illicit sexual relations will render *all* contracts unenforceable, to include those between noncohabitating persons.²⁸

A few courts have readily found the consideration illicit. The leading case is *Rehak v. Mathis*.²⁹ In *Rehak*, the complaint alleged the plaintiff "cooked for, cleaned for, and in general cared for the comforts, needs and pleasures of the defendant."³⁰ The court found that these pleadings based the cause of action on "illegal or immoral consideration."³¹ In an almost comical setting, a Tennessee chancery court³² denied a claim for return of property that the plaintiff brought into a fifteen-month long relationship. The court did not state whether there was a contractual relationship between the parties, but broadly held that, if there had been, it was for illicit and immoral consideration. Referring to the *Marvin* case as a "West coast Palimony case between the Hollywood stars,"³³ the court cautioned those in plaintiff's situation, or those who would consider a "live-in" relationship, to know the law of Tennessee "as this court understands it."³⁴ The judge declared live-in relationships illegal and immoral with a caution from "Professor Pomroy - 'He who hath committed iniquity shall not have equity and no right of action arises out of an immoral transaction.'"³⁵ *Rehak* illustrates the uncertainty of decision in a court of equity, wherein "clean hands" may lie in the eye of the judicial beholder.

When part of the consideration or the contract is illicit, but the

²⁶*Id.* at 145.

²⁷*Id.* at 147. (emphasis added.)

²⁸*Tryanski v. Piggins*, 205 N.W.2d 595 (Mich. Ct. App. 1973).

²⁹Restatement of Contracts § 589 (1982).

³⁰238 S.E.2d 81 (Ga. 1977).

³¹*Id.* (emphasis in original text).

³²*Id.* at 82. (emphasis original). The result may be less harsh than it appears. The case was not before the court on full appeal but on plaintiff's appeal from a summary judgment where the plaintiffs had failed to respond to the defendant's motion.

³³*Roach v. Button*, 6 Fam. L. Rep. 2355 (Hamilton County, Tenn. Ch. Ct. 1980).

³⁴*Id.*

³⁵*Id.*

³⁶*Id.* at 2356. Although plaintiff did not ask for palimony, the court addressed issue anyway. If the court thought that a prayer for a property settlement requested palimony, it displayed a common judicial affliction. See text accompanying notes 14-16 *supra*.

remainder is lawful, the issue of severability of the contract arises. The settled rule is that, if both legal and illicit consideration are present in the same contract, that part of the contract based upon lawful consideration will be upheld.³⁶ This was the approach of the *Latham* court when it observed the contract was for *all* the amenities of married life and not just for sex. Implicitly, the *Rehak* court refused to recognize severability. It could have well ignored that consideration it found offensive and upheld the remainder. On this point, *Rehak* is in the minority.

*Tryanski v. Piggins*³⁷ illustrates the prevailing view. In *Tryanski*, Alfred Lattavo made an oral promise to give his lover the home he built for her if she lived with him. The lover turned-plaintiff, Mrs. Tryanski, complied, but Lattavo died before the transfer was made. Mrs. Tryanski sued the estate to have the home conveyed to her. The court applied a circuitous rule to arrive at a result favorable to the plaintiff: "[Contracts] in whole or part in consideration of an illicit relationship are unenforceable [but] agreements between the parties to such a relationship with respect to money and property will be enforced if the contract is independent of the illicit relationship."³⁸

Tryanski indicates that if a court *wants* to find that the contract is not based on illicit sexual services, the applicable rules are amorphous enough to allow that result.

The law thus far appears well settled. Courts will not uphold an expres oral promise to provide support if the consideration or the contract is illicit sex *i.e.*, a meretricious relationship. Except for *Rehak*, courts will generally enforce a promise by either labeling the relationship as nonmeretricious or by severing the contract and upholding the promise as based upon that consideration which is not found illicit.³⁹

PART IV: THE PALIMONY FRONTIER AND ITS BOUNDARIES

A. The Frontier is Opened

The most notorious palimony ease, *Marvin v. Marvin*, has not generally resolved the palimony issue.⁴⁰ As noted above, resort to

³⁶6 A. S. Corbin, *Contracts* § 1534, at 816 (1962).

³⁷205 N.W. 2d 595 (Mich. Ct. App. 1973).

³⁸*Id.* at 596.

³⁹See cases cited at note 18 *supra*.

⁴⁰557 P.2d at 123 n.26.

new principles of law is unnecessary as most cases can be resolved by well established contract law principles. *Marvin* only restated most of what had been known about palimony; one commentator called the case "New Wine in an Old Bottle."⁴¹

Marvin does make its mark in two relatively virgin areas. *Marvin* reminded the courts that, just as an express contract is enforceable, so, too, is a contract implied-in-fact. Second, the case established the "expectation of the parties" as the standard for deciding whether the parties intended palimony to be paid.

Whether a contract is express or implied-in-fact is immaterial under traditional contract law; both are enforceable and they vary only in the "modes of expressing assent."⁴² In express contracts, the factfinder looks to what was said or written. In contracts implied-in-fact, the agreement of the parties is manifested by their actions. These rules had generally not been applied by courts deciding palimony issues. *Marvin* forced implied-in-fact contracts into the arena of palimony law: "In the absence of an express contract, the courts should inquire in to the conduct of the parties to determine whether that conduct demonstrates an implied contract."⁴³

This is part of the frontier that *Marvin* gives us. Any artful plaintiff's attorney can plead many tangible or uncontested facts which may show that the parties intended that the female receive support if the relationship should end. In relying upon implied-in-fact contract principles, *Marvin* removed "judicial barriers that may stand in the way of a policy based upon fulfillment of the reasonable expectations of the parties."⁴⁴ Though plaintiffs since *Marvin* had offered proof of their expectations, few have relied upon any theory of recovery other than an express promise spoken by the defendant. *Marvin* continued to expressly renounce the notion that unmarried cohabitation can become a marriage under California state statutes. The *Marvin* court thus rejected *In Re Marriage of Cary*,⁴⁵ decided by a California appellate court only three years before. The *Cary* case had held unmarried cohabitation can acquire so many of qualities of an actual family relationship as to become a "marriage" under the state Family Law Act. Once the Act was found to apply, the plaintiff was afforded full recourse to the alimony laws. The danger of leaving *Cary* intact would have been to permit a plaintiff to claim that her

⁴¹Foster & Freed, *Marvin v. Marvin: New Wine in Old Bottles* 5 Fam. L. Rep 4001 (1978-79).

⁴²1 S. Corbin, Contracts § 18, at 39 (1962).

⁴³557 P.2d at 110.

⁴⁴*Id.* at 122.

⁴⁵109 Cal. Rptr. 862 (Cal. Ct. App. 1979).

expectations were that of a legitimate spouse and that the relationship had all the qualities of a legitimate marriage. With these assertions, she might be deemed a spouse for all purposes. *Marvin* rejected that premise.

In sum, the *Marvin* court recognized the power it had to fashion new law from old to accommodate society's changing ways. Justice Tobriner began the opinion with statistics showing the substantial increases in the number of unmarried cohabitations. At the end of the decision, before perfunctorily announcing the holding of the court, the Justice reiterated the basis for the court's decision:

In summary, we believe that the prevalence of non-marital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the non-marital relationship to today to such a subject matter is to do violence to an accepted and wholly different practice.⁴⁵

If California could blaze a path on what it believed society thought was socially acceptable, the Illinois Supreme Court was equally free to disagree with it. In *Hewitt v. Hewitt*,⁴⁷ the court decided that the time was not right for the courts to legitimize unmarried cohabitation and it reacted strongly to *Marvin*. The defendant in *Hewitt* had promised to "share his life, his future, his earnings and his property"⁴⁸ if the plaintiff would live with him. *Hewitt* ultimately held that cohabitation does not prohibit the formation of a valid contract "about independent matters, for which it is said sexual relations do not from the consideration."⁴⁹ *Hewitt's* value is not its substantive result but rather its treatment of *Marvin*. *Hewitt* led its attack on *Marvin* by rejecting the application of contract to marital or quasi-marital living arrangements. The court framed the issue with moralistic high-mindedness: "[Is it] appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the state."⁵⁰ *Hewitt* refused to

⁴⁵557 P.2d at 123 n.26.

⁴⁷394 N.E.2d 1204 (Ill. 1979).

⁴⁸*Id.* at 1205.

⁴⁹*Id.* at 1208.

⁵⁰*Id.* at 1209.

grant such status to unmarried cohabitants on grounds of public policy. The court believed that such status tended to weaken the institution of marriage⁵¹ raise serious questions of the rights of a cohabitant under inheritance, wrongful death,⁵² and workmen's compensation laws, socially stigmatize the children of such relationships and otherwise affect the fabric of society. Finally, the court opined that to follow *Marvin* would resurrect common law marriage, an institution which had been abolished by the state legislature.⁵³ Thus, while *Marvin* had considered public policy and resolved the issue in favor of according some legal recognition to the reality of unmarried cohabitants faced with a possible dissolution of their cohabital relationship, the *Hewitt* court, also on public policy grounds, declined to accord such a relationship legal status.

B. THE FRONTIER IS DEFINED

The frontiers of the reach of the *Marvin* implied-in-fact contract were further defined in *Marone v. Marone*,⁵⁴ in which the New York Court of Appeals declined to "follow the *Marvin* lead."⁵⁵ Finding "an implied contract such as was recognized in *Marvin* . . . to be conceptually so amorphous as practically defying equitable enforcement, and inconsistent with the legislative intent [when common law marriages were abolished],"⁵⁶ *Marone* declared it would enforce only "express" contracts. *Marone* was not, however, a true palimony case. The plaintiff had claimed that she performed domestic duties with the expectation that she would be fully compensated for them. Two children were born of the relationship. She further claimed that the defendant had recognized the union of their economic fortunes in that they had filed joint tax returns. The plaintiff further asserted that, in consideration for furnishing domestic services, the defendant promised that he "would support, maintain and provide for plaintiff in accordance with his earning capacity, . . . to take care of her . . . and do right by her."⁵⁷ She alleged her relationship was a partnership. The court recognized that, historically, a contract is not "implied from the rendition of services"⁵⁸ and concluded with an attack on *Marvin*:

⁵¹*Id.* at 1207.

⁵²*Id.* at 1209. See also *Chiesa v. Rowe*, 486 F. Supp. 236 (W.D. Mich. 1980) (one may maintain a cause of action for loss of consortium for injuries inflicted on a betrothed.); *Bullock v. Bullock*, 487 F. Supp. 1078 (D.N.J. 1980) (one may recover for loss of consortium resulting from injuries inflicted upon unmarried cohabitant.)

⁵³*Id.* at 1210.

⁵⁴50 N.Y.2d 481, 429 N.Y.S.2d 592, 407 N.E.2d 438 (1980).

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Id.*

[I]t is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously. As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do.⁵⁹

The court determined that the risk of fraud was too great to permit a party to rely on anything other than an express promise.

Marone lay to rest the "floodgate" theory of *Marvin*. Courts should be able to enforce the expectations of the parties, but only when those expectations are known to them before the plaintiff files a complaint. There is harmony, however, between *Marvin* and *Marone*; what one court finds "express" another can find "implied." *Marvin* and *Marone* differ only in the way a party may prove his or her case. *Marone* still allows the court to decide as it deems justice demand by affixing the proper label to the type of proof offered.

C. OTHER THEORIES

When a court is unable to find a basis for palimony yet wishes to provide the plaintiff with support, it may disguise a support award within a property settlement.⁶⁰ These are not true palimony awards; brief mention is made here for completeness. Among the theories which may be used to support a property which were listed by the *Marvin* court were partnership, joint venture, constructive trust, resulting trust, or *quantum meruit*.⁶¹

⁵⁹50 N.Y.2d at 484, 429 N.Y.S.2d at 595, 407 N.E.2d at 441.

⁶⁰See notes 13, 14, & 15 and accompanying text *supra*.

⁶¹See 557 P.2d at 122 and cases cited therein. Joint venture and partnership theories are generally rejected because they lack a business-like purpose, and because the "profits" tend to be pooled for common use rather than divided as partnership and joint venture law requires. See *Latham v. Hennessey*, 535 P.2d 838 (Wash. Ct. App. 1975). In *Cooper v. Spencer* 238 S.E.2d 805 (Va. 1977), the plaintiff testified that "when man and wife live together, that is enough for me to say there was a partnership." *Id.* at 806. The court rejected that theory.

Courts impose constructive trusts on property held by the legal owner for the benefit of the equitable owner when the legal owner would be unjustly enriched by having the property for himself. Restatement of Restitution 160 (1937).

A resulting trust is created when it can be established property held by one was actually held in trust for another though the one who holds the property has sole title. Unlike a constructive trust, it does not rely upon unjust enrichment. Bruch, *Property Rights of DeFacto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 Fam. L.Q. 101, 121 (1976). Restatement (Second) of Trusts § 440 (1959).

Quantum meruit or quasi contract is an implied-in-law contract and will provide recover for the value of rendered services when it is just to do so. *Quantum meruit* does not rely upon the expectations of the parties; this remedy's purpose is only to compensate for services for which the recipient may not have contracted, but should nonethe-

PART V: CONCLUSION

There will always be unmarrieds living together. The question is the extent to which their relationship will be treated as socially acceptable and legally protected. The law is developing on three fronts.

The courts are increasingly reluctant to view unmarried cohabitation as immoral; consequently, unmarried cohabitants will not be penalized for their lifestyle. Their palimony contracts will be enforced. This trend is unmistakable and has already been achieved in many jurisdictions.

Courts are recognizing that the quality of unmarried cohabitation can approximate the quality of lawful marriage. Yet, with the exception of common law marriage, which is a lawful form of marriage, and the *Cary* case, the courts have not generally recognized even the most stable, long term, and procreant unmarital relationship as a marriage. To follow the *Cary* case would be to offend legislative repeal of common-law marriage, those who have observed the formalities of the marriage ceremony, and the "sanctity of marriage." The marriage ceremony itself also provides a significant purpose in a complex society. Many rights, obligations, liabilities, statutory benefits, inheritance laws, and commercial expectations turn on a determination of whether a marriage exists. Unlike mere cohabitation, a lawful marriage is a documented event which can not end without court intervention. Cohabitation alone does not afford this certainty. For these reasons, *Cary* set a dangerous precedent and *Marvin* was correct in so noting.

The last front is the one which brings *Marvin* and *Marone* head to head. *Marvin* allows an implied-in-fact contract to form the basis of a palimony claim. It is submitted that, in this contest, *Marone* should and will prevail. Many nonmarital relationship do not begin with

less pay lest he be unjustly enriched. J. Calamari, Contracts 10 (1961). When the *quantum meruit* claim is based upon services rendered by a cohabitant, the rule is stated: "where a man and a woman live together, knowing that their relationship was meretricious, the law [will] not imply a promise to pay. . . the woman. . . but would presume, unless there was sufficient evidence of expectation and intent of payment to constitute a contract implied in fact, that these services were rendered gratuitously." Annot., 94 A.L.R.3d 552, 555 (1979). There are many situations where a woman initially comes to live with a man to perform legitimate housekeeping chores. After a while, the relationship includes sexual intercourse. In such a case, the issue is whether there was a "family relationship." If so, recovery is barred. See Schanz v. Estate of Terry, 504 S.W.2d 653 (Mo.Ct.App. 1974).

any expectation of long-term financial support. Unmarried cohabitants live together to cut costs, to have a trial marriage, which itself negates any expectation of future support, and for convenience. Although many relationships mature into marriage-like settings, marriage remains available to these cohabitants. When the relationship takes on those qualities of a lawful marriage, the parties must marry or make some express provision for the future. If courts are allowed to impose palimony based upon unspoken implications, the potential for fraud is too great.

The practical problem remains of couples who intend to live together "forever" but not marry. To make a viable palimony claim under those facts, an express promise should be required. The practical dilemma is in expecting cohabitants to agree to the level of support, if any, that will be paid if the relationship ends. Most couples, focused solely on the present, do not want to think about separation. This is an aspect which lawful marriage resolves; when couples marry, the question of support beyond the marriage is answered for them. In contrast, when a nonmarital relationship begins to deteriorate, the one expected to pay palimony is in a mood least conducive to agreement. If, however, one of the parties is induced to remain in the relationship only by an offer of lifetime support, an express agreement exists. If the palimony claimant is concerned for the future, he or she should extract a promise or marry.

Awarding palimony in other than the express contract setting is still in its infant stages. The growth of the law in this area may be short-lived; judges may grant appropriate relief by finding an express agreement. Even in the absence of an express agreement, judges can achieve the equitable result by hiding what is really palimony in a property settlement.⁸²

⁸²See notes 14-16 and accompanying text *supra*.

SECTION II TAXATION

INCLUSION OF NONRESIDENT MILITARY INCOME IN STATE APPORTIONMENT-OF-INCOME FORMULAS: VIOLATION OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT?

by Captain Robert L. Minor*

*The reward for saving your money is being
able to pay your taxes without borrowing.*
-Anonymous

I. INTRODUCTION

In recent years, as a result of economic conditions and a general reduction in federal assistance, many states have expanded the scope of their income tax laws.¹ In their effort to find new sources of revenue, more states are attempting to fully exercise their constitutional taxing authority.² These states impose an income tax upon the total income of every domiciliary or resident from sources outside the state as well as on income from sources within the state. These states

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¹Changes in state tax laws have increasingly impacted upon service family income. See generally The Judge Advocate General's School, U. S. Army ACIL-ST-260, Readings in Legal Assistance, Ch. 3 (1982); Curtis, *State Taxation of Servicemen*, 7 A.B.A. Law Notes 61 (1971).

²For an excellent general, though somewhat dated, discussion of the limits of state taxing power with regard to service family members, see Flick, *State Law Liability of Servicemen and their Dependents*, 21 Wash. & Lee L. Rev. 22 (1964).

³The terms "domiciliary" and "resident" can be distinguished. A domiciliary intends to make his or her true permanent home within that particular state, while a resident merely has a present place of dwelling in the state. *Fisher v. Jordan*, 116 F.2d 183, 186 (5th Cir. 1940). For purposes of this article, however, the terms domicile, residence, and "home state" will be used interchangeably. The term resident is meant to include both domiciliaries and statutory residents, unless otherwise noted. When

also impose a tax upon the income of every nonresident⁴ derived from sources within the state.⁵

Although service families are painfully aware that state taxing authorities focus upon their income, they also know of a federal statute which offers some relief, the Soldiers' and Sailors Civil Relief Act (SSCRA).⁶ Section 514 of that Act,⁷ entitled "Residence for tax purposes," provides in pertinent part:

(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, . . . such person shall not be deemed to have lost a residence or domicile in any State, . . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, . . . while and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, . . . of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State. . . .

Thus, section 514 reserves the authority to tax income earned by persons for military service to that person's "home" state. A service

discussing a service member's tax status, it is assumed that the service member is stationed in a state other than his home state. The state in which the soldier is assigned, under military orders, is referred to as the "host state" or state of "station" or "duty." U.S. Dept. of Army, Pamphlet No. 27-166, Soldiers' and Sailors' Civil Relief Act, at 6-1 (1981).

⁴Nonresident is ordinarily defined in the negative. *See, e.g.*, 1982 Kansas Individual Income Tax Booklet, para. C. ("A nonresident is an individual who is not a Kansas resident"). Some states treat certain domiciliaries, including servicemembers stationed outside the state, as nonresidents for tax purposes if a three-part test is met:

- (i) No permanent place of abode in state of domicile.
- (ii) Maintenance of permanent place of abode outside state of domicile.
- (iii) Maximum of 30 days within state of domicile during the tax year in question.

See Office of The Judge Advocate General, U.S. Air Force, All States Income Tax Guide (1983 ed. for 1982 return).

⁵*See* New York *ex rel. Whitney v. Graves*, 299 U.S. 366 (1937); *Shaffer v. Carter*, 252 U.S. 37 (1920). *See also* Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309 (1974).

⁶50 U.S.C. App §§ 500-548, 560-591 (1976). This act will remain in effect until terminated by subsequent act of Congress. 62 Stat. 623, §14, (1948), as amended 64 Stat. 1074, § 1(11), (1950).

⁷56 Stat. 777, §17, (1942), as amended, 50 U.S.C. App. § 574 (1964).

member's residence for tax purposes does not change when he or she, pursuant to orders, is assigned for duty to a given state.⁸ The income earned by a service member's dependents, however, is not protected by section 514.⁹ Even though it is now well settled that section 514 precludes the host state from directly taxing military income earned by nonresident soldiers, the statement of one commentator over 15 years ago, remains true today:

Section 514 continues to be the most frequently invoked section of the Soldiers' and Sailors' Civil Relief Act, as well as its most controversial. . . . [S]tates need revenue and, to the extent permissible, are understandably determined to include service members among the clientele named on the tax rolls; but the serviceman—who, under Section 514, has been granted a measure of federal immunity from state taxation—is justifiably anxious to assert his protected status. The result in many cases is a real or apparent clash of federal and state authority, with the serviceman-taxpayer as the protagonist in the conflict. . . .¹⁰

The broadening of state tax laws has brought section 514 into play in several contexts. Recent issues involving section 514 have included the withholding of state and local income taxes from military pay,¹¹ state taxation of military housing,¹² and state tuition charges for nonresident schoolchildren to compensate for a decline in the level of federal impact aid.¹³

One recent issue concerning section 514 provided the subject of this article. Several states presently impose a progressive income tax on the in-state income of nonresident military taxpayers and their statutory resident spouses, as well as on the total income of part-year resident soldiers.¹⁴ Basically, in levying state income taxes on a

⁸See generally Joseph, *A Checklist for Determining Domicile*, 27 *Prac. Law.* 55 (1982); Thames, *Domicile of Servicemen*, 34 *Miss. L.J.* 160 (1963).

⁹Family member nonmilitary income might be taxed by the home state, by the state where it is earned, and by the host state. Therefore, the law of the host state must be examined to determine if the family member, especially a working spouse, has become a statutory resident for tax purposes.

¹⁰Comment, *State Power to Tax the Service Member: An Examination of Section 514 of the Soldiers' and Sailors' Civil Relief Act*, 86 *Mil. L. Rev.* 123 (1967).

¹¹Cummins, *Withholding of State and Local Income Taxes from Military Pay*, 85 *Mil. L. Rev.* 137 (1979).

¹²Stuart, *State Taxation of Military Housing: A Possessory Interesting Question*, 13 *Pac. L.J.* 207 (1981).

¹³*Federal Impact Aid Ruling Due This Spring*, *Army Times*, April 4, 1983, at 42, Col. 1.

¹⁴See, e.g., Kan. Stat. Annot. §§ 79-32, 110(b), 79-32, 116, 79-32, 117 (1981 Supp.); Mo. Stat. Ann. §§ 143.191 (Vernon 1982); Utah Code Annot. §§ 59-14A-10, 59-14A-13, 59-14A-15 (1981 Supp.).

nonresident individual's income derived from sources within the state, these states require the taxpayer to reflect all income, whether earned in-state or not, as a tax base. The state statutes then provide for the reduction of the tax by the ratio of in-state income to total income. This methodology, in effect, places the taxpayer in a higher tax bracket than would be applicable if the nonresident military income were not included in the computations.

Thus, the issue becomes whether section 514 of the SSCRA bars a state from imposing a progressive income tax on nonresident income, which takes into account the nonresident's total net income from all sources, *including nonresident military income*, and then reduces the tax by the ratio of in-state income to total income. This issue is currently being litigated in a Kansas federal district court.¹⁵ The pleadings in that case have helped to clarify the arguments of both the taxpayer-soldier and the state. This article will explain the Kansas apportionment-of-income formula, discuss the arguments supporting the formula, and analyze the state's position to reach a conclusion on the issue. Although this article focuses primarily on the tax laws of the state of Kansas, the analysis is applicable to all states with similar apportionment-of-income, progressive tax schemes.

II. THE STATE APPORTIONMENT-OF-INCOME FORMULA

A. METHODOLOGY

The Kansas income tax methodology requires all nonresident taxpayers to determine their Kansas income tax on their Kansas taxable income "as if the non-resident were a resident, multiplied by the ratio of modified Kansas source income to Kansas adjusted gross income."¹⁶ Thus, if one-fourth of a nonresident's income was earned in Kansas, the nonresident pays 25 percent of the originally computed tax. In addition, Kansas requires all individuals who file joint federal

¹⁵United States v. Kansas, No. 82-4114 (D. Kan. filed May 19, 1982). The case is still in the pleadings and motions phase.

¹⁶Kan. Stat. Ann. §§ 79-32, 110(b) (1981 Supp.). Kansas adjusted gross income (AGI) is defined in K.S.A. 79-32, 177 as an individual's federal AGI with certain exceptions. K.S.A. 79-32, 117 then lists specific adjustments to federal AGI. If an income item is subtracted from federal AGI, it is not part of Kansas AGI. Kansas AGI is then reduced by standard or itemized deductions, the federal income tax deduction, and the exemption allowance. The nonresident then determines the tax imposed upon Kansas taxable income. Modified Kansas source income is "that part of a nonresident individual's Kansas AGI as set forth in K.S.A. 1978 Supp. 79-32, 177 derived from sources in Kansas." K.S.A. 79-312, 109(H). As required by the SSCRA, modified Kansas source income specifically excludes nonresident military income.

tax returns to also file joint Kansas tax returns.¹⁷ Kansas law provides that "in all cases where husband and wife file a joint Kansas income tax return, the determination of Kansas taxable income shall, unless otherwise provided, be made as if husband and wife were one individual taxpayer."¹⁸ The entire joint military and non-military income of service families in Kansas must be reported to the state for computation of income tax liability. Thus, when the military income is considered on a joint return and the required progressive tax table is used,¹⁹ a greater tax burden is imposed on the joint income than would be assessed if nonresident military income were not considered.²⁰ Kansas is not directly taxing the military income of nonresidents stationed in Kansas. Yet, Kansas is imposing a heavier tax burden on the combined income of nonresident soldiers and their wage earning spouses than would be imposed if military income were not considered. The component issues are thus brought into focus; can Kansas consider nonresident military pay to assess the income tax liability on joint returns filed by military families? Can Kansas indirectly tax income which is protected from direct taxation? Does section 514 protect the individual in military service from this type of taxation?²¹

The statutory formulations of Kansas, and those states with similar tax laws, are patterned after tax statutes in Vermont. In *Wheeler v. State*,²² the Vermont scheme withstood challenge on various Fourteenth Amendments grounds by a nonresident *civilian* taxpayer. No court has to date, however, addressed the issue of whether inclusion of nonresident *military* income to determine the tax rate on income derived in the taxing state is barred by section 514.

B. IMPACT

The apportionment-of-income schemes of Kansas and other states are perceived to conflict with the terms and intent of section 514 in at least three situations. First, a violation arguably occurs when a nonresident military taxpayer, deriving income from sources within the taxing state, is forced to combine his or her military income with

¹⁷K.S.A. 79-32, 110(b) (1981 Supp.)

¹⁸*Id.* at §§79-32, 116a.

¹⁹Nonresident Allocation Percentage Schedule, Schedule I, Form 40, Kansas Department of Revenue.

²⁰For sample illustrations of the demonstrated additional tax burden in such cases, see undated Memorandum For Information prepared by Captain Steven J. McDonald, Legal Assistance Officer, Fort Leavenworth, Kansas.

²¹*Id.* at 2.

²²*Wheeler v. State*, 127 Vt. 361, 249 A.2d 887, *appeal dismissed*, 396 U.S. 4, *reh'g denied*, 396 U.S. 949 (1969).

his in-state income for purposes of computing a tax base. Second, a violation is perceived when a nonresident soldier is forced to file a joint return with a wage earning spouse which necessarily includes the soldier's military income. Finally, a violation also allegedly occurs when a part-year-resident with both nonresident military income and resident military income must include his or her total military income for purposes of computing the tax base in the new state of residence.

The apportionment-of-income method of taxation will be analyzed with respect to the above three categories of taxpayers to determine if section 514 has been violated. The analysis will primarily discuss the permissibility of the apportionment-of-income formula and whether Congress intended section 514 to cover this method of taxation. If section 514 has been violated, the tax laws in issue are unconstitutional under the Supremacy Clause of the Constitution.²³

III. THE STATE POSITION

The arguments favoring the position of the states in this dispute are that the applicable case law fully supports this method of taxation and that the plain language of section 514 indicates that it is not applicable to the scheme in issue.

With regard to the first argument, the states note that *Wheeler v. State* specifically addressed the "indirect taxation" argument:

Plaintiff's argument is that since the addition of [out of state] income increases the tax, it must be the [out of state] income that is being taxed. However, in reality what is happening is that the [in-state] income is being taxed at an increased rate, and nothing more.²⁴

The *Wheeler* court found that the plaintiff's complaint was actually with the progressive tax rate and the United States Supreme Court has upheld progressive tax rates as being constitutional.²⁵ To further strengthen their position, the states have argued that, in the contexts of corporate income taxes²⁶ and inheritance taxes,²⁷ courts have long upheld the constitutional propriety of determining the tax rate on in-state property by including property outside the taxing state.

²³U.S. Const. art. VI, cl. 2.

²⁴*Wheeler*, 127 Vt. at 364, 249 A.2d at 890.

²⁵See, e.g., *Shaffer v. Carter*, 252 U.S. 37 (1920); *Brushaber v. Union Pacific*, 240 U.S. 1 (1913).

²⁶See, e.g., *Butler Bros. v. McCollgan*, 315 U.S. 501 (1942); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920).

²⁷See, e.g., *Maxwell v. Bugbee*, 250 U.S. 525 (1919); *Tharalson v. State*, 281 Or. 9, 573 P.2d 298 (1978); *Rigby v. Clayton*, 274 N.C. 465, 164 S.E. 2d 7 (1968); *In re Lagergren's Estate*, 276 N.Y. 184, 11 N.E. 2d 722 (1937).

The states admit that they do not have authority to tax property owned by a nonresident outside the taxing state.²⁸ In *Frick v. Pennsylvania*,²⁹ the Supreme Court partially defined the state's taxing authority in rejecting a Pennsylvania statutory taxing scheme because the tax was applied *directly* against out of state property, rather than merely to measure the tax rate on the in-state property. The states, however, can distinguish *Frick* from the current tax provisions in issue in three ways.³⁰ First, the Kansas situation does not involve the direct taxation of out-of-state property; the nonresident allocation computation merely establishes the rate of tax to be paid on Kansas-source income. Second, unlike the statute in *Frick*, the Kansas law allows for the deduction of taxes paid to the United States or other states. Finally, the Kansas nonresident allocation provision goes one step beyond the formula in *Frick*. Although the tax originally computed on a nonresident individual's income tax return includes tax on income not derived from Kansas sources, that tax is reduced by the ratio of Kansas source income to Kansas adjusted gross income. The effect is to tax the modified source income at the same tax rate as a Kansas resident would have to pay, the same formula condoned by the court in *Wheeler*.

The state position is simply that the state is not taxing property lying beyond its borders;³¹ the tax scheme is fair and nondiscriminatory as to both residents and nonresidents.

The second basic argument in Kansas is that the legislative purpose of section 514 should not be construed to bar the state from considering nonresident military income to determine the tax rate on Kansas-source income. Kansas acknowledged that the sole right to tax a soldier's nonresident military income rests with the soldier's home state.³² The state has argued, however, that, since it is not subjecting the nonresident military income to tax, section 514 is not violated.

The Utah Attorney General has opined that "the very language of the Act indicates that its purpose, vis-a-vis income, is to prohibit a *direct* income tax upon servicemen's military compensation when the servicemen are not legal residents or domiciliaries of the state."³³

²⁸See *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412 (1937).

²⁹*Frick v. Pennsylvania*, 268 U.S. 473 (1925).

³⁰The basis for these arguments is discussed in the Defendant's Response to Motion for Summary Judgement, filed November 18, 1982, in *United States v. Kansas*, No. 82-4114 (D. Kan. 1982).

³¹*Id.* at 8.

³²*Dameron v. Broadhead*, 345 U.S. 322 (1953).

³³Letter from Frank V. Nelson, Assistant Attorney General of Utah. (June 5, 1980) (discussing payment of Utah Taxes by non-resident military personnel).

If the military income is used *solely* to compute the applicable tax rate on some other properly taxable income, such treatment may not be proscribed by the Act.

The states have relied upon the interpretation given the purpose of section 514 by the Supreme Court in *Sullivan v. United States*.³⁴ The Court stated: "Section 514 does not relieve servicemen stationed away from home from all taxes of the host state. It was enacted with the much narrower design 'to prevent multiple state taxation of the property.'"³⁵

Kansas has also emphasized that it provides a credit for taxes paid to another state.

Relying on *Sullivan*, the states have argued that the SSCRA was not intended to give the service member greater benefits than his or her civilian counterpart. It is only when the service member elects to earn income in Kansas or where the service member's spouse earns Kansas income that the computation method in controversy comes into play. In this regard, Kansas treats all nonresidents in the same manner.

Finally,³⁶ the states have urged that section 513³⁷ of the Act further suggests that it is not unlawful for a state to levy an income tax upon service members, provided that there is no direct taxation of nonresident military income itself.³⁸ In support of this argument the states quote from *United States v. County of Champaign, Illinois*:

The legislative history of the 1942 enactment and the 1944 and 1962 amendments of Section 514 reveals that *Congress intended the Act to cover only annually recurring taxes on property - the familiar ad valorem personal property tax.*³⁹

IV. ANALYSIS

To determine whether section 514 precludes Kansas from including a nonresident military service member's income in its tax computations, it is necessary to look to the legislative history of the Act discussed if Congress intended section 514 to apply in such a situation.

Wheeler may now permit the use of an apportionment formula as to

³⁴*Sullivan v. United States*, 395 U.S. 169 (1969).

³⁵*Id.* at 180.

³⁶To the state's list of arguments could be added the many reasons expounded for why section 514 should be eliminated entirely.

³⁷50 U.S.C. App. § 573 (1976).

³⁸Utah Attorney General letter *supra.*, note 33 at 5.

³⁹*United States v. County of Champaign, Illinois*, 525 F. 2d 374, 377 (7th Cir. 1975) (emphasis added) (quoting *Sullivan v. United States*, 395 U.S. 169, 176-77 (1969)).

civilians. At the time of the enactment of section 514, however, such a method of taxation was not generally considered to be constitutional.⁴⁰ In all probability, Congress did not envision that the income of a service member would be included for purposes of determining the rate of tax otherwise due a state of which the member was neither a resident nor a domiciliary.⁴¹ Thus, Congress likely did not even consider this precise issue. In addition, *Wheeler* is clearly distinguishable from the issue in question because it did not involve section 514.

Therefore, the question is what Congress intended to be included within the scope of section 514? In 1942, section 514, as it is now worded, was added to the SSCRA.⁴² Although the legislative history is not completely clear, a reading of the three versions of the statute which were considered at the time arguably shows that the 1942 change was designed to convert a conditional deferral of *all* state and local income taxes⁴³ to an unconditional exemption of specified state and local income taxes. The better view is that the 1942 legislation sought to place nonresident military income outside the pale of state and local income taxes. The better view is that the 1942 legislation passed section 514 were just beginning to consider the concept of extraterritorial taxation for any purpose, least of all for purposes of taxing individuals. It is clear, however, that the amendments were intended to benefit service members. This is supported by the legislative history:

The purpose of the reported bill is to make available additional and further relief and benefits to persons in the military and naval forces and, in some instances where there has been doubt as to whether particular transactions or proceedings are within the scope of the Civil Relief Act, a new section or language has been added for the purpose of clarification only and to carry out the original intent of Congress, but with no intent to exclude from the provisions of the Act any transaction or proceeding now included.⁴⁴

A further flaw in the state's argument is the problem of double taxation of the same income. A great wealth of literature on this

⁴⁰Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, *United States v. Kansas*, No. 82-4114 (D. Kan. served July 22, 1982.)

⁴¹*Id.* at 21. See also Lowndes, *Rates and Measure in Jurisdiction to Tax*, 49 Harv. L. Rev. 756 (1936).

⁴²The provision was part of H.R. 7164, 77th Cong., 2d Sess. (1942). This bill was originally numbered H.R. 7029, 77th Cong., 2d Sess. (1942).

⁴³*Id.* at 11.

⁴⁴S. Rep. No. 1558, 77th Cong., 2d Session, 2 (1942).

subject has concluded that it is doubtful Congress intended to permit the states to reach and indirectly tax nonresident military income by including the member's spouse in the state definition of statutory resident.⁴⁵

Congress enacted and amended the SSCRA to afford those in military service a wide variety of protections.⁴⁶ The taxation of military income by any state other than a service member's home state is clearly prohibited. To assume Congress would permit duty states to indirectly collect taxes which they are barred from assessing directly pierces and diminishes the federal legislative protection. To require a nonmilitary wage earner married to a military service member to carry a greater tax burden reduces the disposable income of the one individual taxpayer and the military couple.

Sullivan and *County of Champaign, Illinois* should be limited to their facts, they involve a discussion of sales and use taxes.⁴⁷ Treating nonresident military income as any other type of nonresident income overlooks the specific intent to afford the person in service special protection.⁴⁸ Kansas can and does require taxes to be paid on income earned by nonresident, nonmilitary wage earners employed within the state. No federal statutory protection requires Kansas to afford special treatment so such income. Kansas, however, has ignored the

⁴⁵See, e.g., Birkeland, *Multi-State Taxation of Military Personnel and Their Dependents*, The Tax Magazine (CCH), Feb. 1980, at 84; Frake, *State Taxation, Serviceman, and Section 514*, 24 J.A.G.J. 27 (1969).

⁴⁶See generally Walker, *The Soldiers' and Sailors' Civil Relief Act of 1940*, 11 Colo. Law 2394(3) (1982).

⁴⁷The *Sullivan* Court's reasons for excluding sales and use taxes from section 514 protection, which do not apply in an income tax context, were that there was no evidence of congressional interest to include such taxes in section 514 coverage, that there was no risk of double taxation involved in such taxes, that the availability of commissaries and post exchanges helped alleviate the problem, and finally, that there were a number of very politically sensitive policy considerations at state. *Sullivan v. United States*, 395 U.S. 169 (1969). See also Comment, *Nonresident Servicemen not Exempt From State Sales and Use Taxes*, 74 Dickinson L. Rev. 536 (1970); Comment, *Taxation—The Immunity of Nonresident Servicemen from State Sales and Use Taxes*, 14 S.D.L. Rev. (1969).

⁴⁸See, e.g., *Plesha v. United States*, 227 F.2d 624 (9th Cir. 1955), *aff'd*, 352 U.S. 202 (1957) (construed liberally to benefit service members and veterans); *Hurwitch v. Adams*, 151 A.2d 286 (Del. Super.), *aff'd*, 155 A.2d 591 (1959) (broad interpretation for benefit of those it was designed to assist); *Application of Packard*, 187 Misc. 400, 60 N.Y.S. 2d 506 (Sup. Ct. Spec. T. Bronx County 1946) (construed liberally); *McCoy v. McSorley*, 119 Ga. App. 603, 168 S.E.2d 202 (1969) (should be liberally construed in favor of service members); *Hanson v. Crown Toyota Motors Inc.*, 577 P.2d 380 (Utah 1977) (intent to protect one's property during a period of military service). See also S. Rep. No. 1558, 77th Cong., 2d Sess. 6 (1942) "Any doubts that should arise as to the scope and application of the act should be resolved in favor of the person in military service involved".

congressional protection granted service members by using military pay in its formula for personal income taxation of the nonmilitary wage earner. In so doing, Kansas has done harm to the congressional treatment of military compensation found in section 514.⁴⁹

Supreme Court interpretation of section 514 has unequivocally conferred upon nonresident military personnel a broad immunity "from the host State's personal property and *income taxation*."⁵⁰ The Court has asserted that "[t]he very purpose of [section] 514 in broadly freeing the nonresident serviceman from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of states where he was present solely in compliance with military orders."⁵¹ In *Dameron v. Broadhead*,⁵² the Supreme Court interpreted section 514 stating:

Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any State by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence, whether or not that state exercised the right.⁵³

V. CONCLUSION

From the above discussion, it is clear that, in a civilian context, the *Wheeler* formula is constitutionally permissible. In the military context, however, it is not clear whether the formula violates section 514; there is, as of yet, no case law on the issue. The resolution of the issue necessarily hinges on an interpretation of section 514. Unfortunately, a mere reading of the specific language of section 514 is inconclusive. In addition, the legislative history is inadequate to resolve the question. Thus, resort must be made to an interpretation of the purpose of the SSCRA. Although there is room for disagreement, it appears that, based upon the above analysis, the inclusion of nonresident military income to determine the tax rate on income derived in the taxing state violates the intent of section 514 and is thus unconstitutional under the Supremacy Clause of the Constitution.

⁴⁹See, *United States v. Chester County Bd of Taxes*, 281 F. Supp. 1001 (D. Pa. 1968) (salutary purpose of statute is to relieve nonresident servicemen of burden of supporting state and local governments, whenever their presence results solely from compliance with military orders).

⁵⁰*California v. Buzard*, 283 U.S. 386, 387 (1966) (emphasis added).

⁵¹*Id.* at 393.

⁵²345 U.S. 322 (1953).

⁵³*Id.* at 326.

DEDUCTIBILITY OF MORTGAGE EXPENSES BY THE MILITARY HOMEOWNER AFTER REVENUE RULING 83-3

by Major Thomas A. Pyrz*

I. INTRODUCTION

Since 1925, the military homeowner has enjoyed the benefits of a nontaxable allowance for quarters.¹ This allowance is generally used to offset, at least in part, the service member's monthly mortgage payment. The portions of the payment which constitute interest² and taxes³ are allowable itemized deductions under current tax laws. This allows a military homeowner to use tax-exempt dollars to generate a second tax benefit in the form of itemized deductions to the extent that these deductions exceed the zero bracket amount. A recent Internal Revenue Service (IRS) Revenue Ruling, 83-3, raises doubt concerning the continued availability of this tax benefit for the military homeowner. This article will analyze Revenue Ruling 83-3 and its potential effect on the military homeowner.

II. THE RULING

Revenue Ruling 83-3 was issued in January of 1983 on the initiative of the IRS rather than at the request of a specific taxpayer. The ruling announces IRS policy that, "veterans and other students may not deduct educational expenses; and ministers may not deduct interest and taxes paid on a personal residence, to the extent the amounts expended are allocable to tax-exempt income."⁴

The ruling states that section 265(1) of the 1954 Internal Revenue Code (IRC) prohibits the deductions in question. Section 265(1) provides that no expense may be deducted for "any amount otherwise

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¹Jones v. United States, 60 Ct. Cl. 552 (1925).

²I.R.C. § 163 (1976).

³*Id.* at § 164.

⁴Rev. Rul. 83-3, 1983-1 I.R.B. 10.

allowable as a deduction which is allocable to one or more classes of income. . . wholly exempt from the taxes imposed by this title."⁵ This section of the Code is substantially unchanged from its predecessor, section 24(a)(5) of the Revenue Act of 1934.⁶

This ruling expressly overrules Revenue Rulings 62-212⁷ and 62-213⁸ which had authorized the deductions which 83-3 now denies. Ruling 62-212 dealt with the deductibility of a minister's mortgage expenses paid out of his tax-exempt "rental allowance" governed by section 107, IRC. The section of Revenue Ruling 83-3 dealing with the deductibility of a veteran's reimbursed educational expenses merely adopts the position of the Tax Court of the United States in the case of *Manocchio v. Commissioner*.⁹ Prior to any discussion of the effect of the ruling on the military homeowner we must examine the two prongs of the ruling in greater detail.

III. THE RULING AND THE MINISTERS

Section 107, IRC, provides:

In the case of a minister of the gospel, gross income does not include—

- (1) The rental value of a home furnished to him as part of his compensation; or
- (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.¹⁰

There is no statutory entitlement to a rental allowance for a qualifying member of the clergy. Congress had merely created a specific exclusion from gross income for the rental allowance to the extent it is used to offset actual or reasonable expenses. Section 107, IRC, was drawn from section 22(b)(6) of the 1939 IRC and has remained substantially unchanged since it first appeared in the Revenue Act of 1921.¹¹ The legislative history of section 107 provides no indication why Congress granted this tax benefit to the clergy.

Whatever its congressional inspiration, the "parsonage exclusion" is much less attractive after Revenue Ruling 83-3. At its broadest, the exclusion is not available to all clergy. The home or rental allo-

⁵I.R.C. § 265 (1976).

⁶Revenue Act of 1934, Pub. L. No. 216, § 24, 48 Stat. 691 (1934).

⁷Rev. Rul. 62-212, 1962-2 C.B. 41.

⁸Rev. Rul. 62-213, 1962-2 C.B. 59.

⁹*Manocchio v. Commissioner*, 78 T.C. 989 (1982).

¹⁰I.R.C. § 107 (1976).

¹¹W. Pedrick & V. Kirby, *The Study of Tax Law - Income Tax Volume 81* (1979).

wance must be provided as payment for services which are ordinarily the duties of a minister of the gospel.¹² A cash allowance can only qualify for the exclusion if it is designated as a rental allowance by an official of the employing church or organization prior to payment to the minister.¹³ A minister must be ordained, licensed, or commissioned in order to receive a qualified exclusion.¹⁴

The rental allowance includes amounts spent for rent, utilities, furnishings, repairs, and mortgage payments,¹⁵ but must be reported as income to the extent that the allowance exceeds actual or reasonable expenses.¹⁶ It is the expense which generates the tax-exempt income. Without the expense, the exclusion of section 107(2) does not come into being.

Rev. Rul. 83-3 states that the use of tax-exempt income to pay otherwise deductible mortgage expenses makes those expenses non-deductible under section 265(1). While inartfully stated, the conclusion is sound because it is the expense that creates the tax-exempt situation. Prior to Revenue Ruling 83-3, section 265(1) notwithstanding, a minister was expressly authorized this double tax benefit.¹⁷ The IRS maintains that Rev. Rul. 62-212 was simply an error of law which was not discovered until the ruling was reviewed in connection with the *Manocchio* decision.¹⁸ Since there are no provisions for periodic review of Revenue Rulings, the error remained until a similar issue caused the ruling to be reconsidered.

Because the ruling was initiated on the agency's own initiative there has been, of yet, no aggrieved minister to challenge the ruling in court. The ruling will not be enforced against any minister until the end of his current contract year or June 30, 1983, whichever occurs first.¹⁹ IRS publications for the 1982 tax year still expressly recognizes the minister's right to itemize the deductions in question.²⁰

IV. THE RULING AND THE VETERAN

Revenue Ruling 83-3 adopts the Tax Court's decision in *Manocchio v. Commissioner*. John Manocchio, an Air Force veteran, was an

¹²Treas. Reg. § 1.107-1(a), T.D. 6691 (1963).

¹³*Id.*

¹⁴1982 Fed Tax Handbook 197 (1982).

¹⁵*Id.*

¹⁶I.R.C. § 107 (1976).

¹⁷Rev. Rul. 62-212, 1962-2 C.B. 41.

¹⁸Telephone interview with Pat Baker, Personal Tax Branch, Internal Revenue Service, Feb. 9, 1983.

¹⁹Rev. Rul. 83-3, 1983-1 I.R.B. 10.

²⁰Internal Revenue Serv., *Your Federal Income Tax* 37 (Nov. 1982 ed.).

airline pilot who attended a flight-training course which maintained and improved the skills required in his profession. Pursuant to section 1677 of Title 38, U.S. Code, he received checks from the Veterans Administration (VA) covering 90 percent of his expenses. He endorsed the checks over to the training facility. These reimbursements were not taxable income to him; section 3101(a) of Title 38, U.S. Code provides a blanket exclusion from taxation for all benefit payments received pursuant to any law administered by the VA. Manocchio, properly, did not report the payments as income on his 1977 Federal Income Tax return. He nonetheless deducted the entire flight-training expense as a business expense on this return.²¹

The Tax Court found that the expense was "directly allocable" to tax-exempt income and therefore nondeductible under section 265(1), IRC. Manocchio argued that section 265(1) did not apply to his case because that section was intended to apply only to expenses incurred in producing tax-exempt income. His argument was based on the legislative history of section 24(a)(5) of the Revenue Act of 1934, the predecessor of section 265(1).²² While the court conceded that the "principal target" of the provision was expenses incurred in an active trade, business, or investment activity, it was unwilling to read the provision as limiting the scope of section 265(1) to so narrow an area.²³

The court found that section 265(1) was intended to reach all expenses "allocable to" exempt income. As such, it found the language of section 265(1) broad enough to reach situations such as Manocchio's wherein, but for the expense, there would be no tax-exempt income. The court further found that a one-for-one relationship between the reimbursement and the expenses created a sufficient nexus to consider the expense "direct allocable" to the tax-exempt income.

Manocchio's final argument was based on an equal protection theory. He argued that it was unfair discrimination for the IRS to disallow an expense deduction for recipients of benefits under section 1677 while still permitting expense deductions for recipients of VA benefits under section 1681 of the same Title, education allowance benefits. The court found that, since the section 1681 benefits were paid in the form of a "living stipend" and not paid based upon any actual training cost, the different tax treatment was not unreasonable.²⁴

²¹Manocchio v. Commissioner, 78 T.C. 989 (1982).

²²*Id.*

²³*Id.*

²⁴*Id.*

V. THE RULING AND THE MILITARY HOMEOWNER

Having now considered the effect of Revenue Ruling 83-3 on the minister's "rental allowance," and the court's decision in *Manocchio*, the skeptical military homeowner must wonder whether he or she can still deduct mortgage expenses even though BAQ and VHA are tax-exempt income. The answer lies in a closer analysis of section 265(1), its legislative history, and a study of the congressional and judicial treatment of BAQ and VHA.

At first blush, the similarity between the parsonage allowance and the military allowance for quarters is startling. In reality, the allowances are quite different in form and in their treatment by Congress.

A service member's entitlements are comprised of pay and allowances. Pay is defined as "basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances."²⁵ Military allowances are not considered compensation for services rendered.²⁶ Housing allowances have existed for the military since before the Civil War.²⁷ These allowances were determined to be nontaxable by the Court of Claims in 1925.²⁸ The IRS adopted this decision and issued Treasury Decision 3724 which announced the nontaxable nature of allowances for quarters as IRS policy.²⁹ The current BAQ was created as an entitlement by section 302 of the Career Compensation Act of 1949.³⁰ The legislative history of this Act gives no indication as to the intended tax treatment of BAQ.

Congress, however, clearly intended the BAQ and VHA to be treated differently than the ministers' rental allowance. Unlike the specific exclusion from gross income given the ministers' allowance, the BAQ is merely excluded from the definition of gross income in the IRC.³¹ While a rental allowance, by statute, must be paid to a minister as a part of regular compensation,³² BAQ, by statutory definition, is not considered a part of a service members pay. The BAQ is paid to an eligible member regardless of its resultant or intended use. The minister only receives the tax-exempt allowance if

²⁵37 U.S.C. § 101(21) (Supp. V 1981).

²⁶Weiss, *Tax Problems of the Serviceman*, 34 *Taxes* 277 (1956).

²⁷60 Ct. Cl. at 555.

²⁸*Id.*

²⁹Treas. Dec. 3724, IV-2, C.B. 136 (1925).

³⁰Career Compensation Act of 1949, Pub. L. No. 351, 302, 63 Stat. 815 (1949).

³¹Treas. Reg. 1.61-2(b), T.D. 5416, 6696 (1963).

³²I.R.C. § 107 (1976).

an expense is generated. The BAQ is a statutory entitlement to a fixed sum of money unrelated to any actual expenses incurred for private quarters. The rental allowance is not fixed by statute and is limited to a reasonable amount. These differences show that the only real similarity between the two allowances is that they are both generally related to housing. After that, any comparison of the two fails.

The importance of providing public housing to the military has been noted in the judicial attitude concerning the right to public quarters. The Supreme Court has said: "Quarters are expected to be furnished by the government. . . ; when it cannot thus furnish, it allows them to be obtained otherwise and pays a monthly compensation therefore called commutation."³³ The Court of Claims has gone further by stating: "Public quarters. . . are as much a military necessity as the procurement of implements of warfare or the training of troops"³⁴ The court added: "military quarters. . . are no more than an integral part of the organization itself. They are. . . the indispensable facilities for keeping the Army intact. . . ."³⁵

This judicial attitude that an allowance for quarters is for the benefit of the government and not the individual explains, in part, the favorable tax treatment of BAQ. The ministers' rental allowance does not enjoy this exalted position.

It could be argued that Congress has defined away BAQ from any application of section 265(1): this provision of the Code would now allow "an otherwise allowable deduction which is allocable to one or more *classes of income*. . . wholly exempt from the taxes of this subtitle. . . ."³⁶ One could argue that, BAQ is not income, section 265(1) does not apply and the deduction for interest and taxes allocable to BAQ are therefore allowable under sections 163 and 164.

This technical analysis of section 265(1) stretches a point and may leave the military homeowner uncomfortable. The definition of income is the subject of much disagreement among tax scholars;³⁷ the homeowner need not rely solely on defining the problem away.

To understand the critical difference between the ministers' rental allowance and BAQ, the Tax Court's decision in *Manocchio* must be recalled. That court's holding merely extended the prohibition of section 265(1) to cover the situation where tax-exempt dollars were

³³United States v. Phisterer, 94 U.S. 224 (1877).

³⁴See *Jones*, 60 Ct. Cl. at 569.

³⁵*Id.*

³⁶See I.R.C. § 265 (1976) (emphasis added).

³⁷See Pedrick & Kirby, *supra* note 11, at 41.

"generated" by incurring an expense. Receipt of the specific exclusion under section 107 is conditioned upon the actual expenditure of the allowance for rental or mortgage expenses. Even then, the exclusion is limited to a reasonable living expense and can never exceed the amount actually expended by the minister; it is the expense that generates the tax-exempt dollars. The exclusion is tied dollar-for-dollar to the expense and is "directly allocable to the expense."

Receipt of BAQ has no such precondition. The entitlement does not depend on whether the military recipient generates an expense. It is fixed by statute and payable whenever suitable quarters are not provided to eligible service members. A service member may live in a parent's home, pay nothing, and still receive BAQ. As such, section 265(1) does not apply because any deductible expense is not "directly allocable" to the tax-exempt income; the expense does not generate the tax-exempt dollars.

The final obstacle to the continuing deduction is found in the IRS position that the IRC shall not be read to allow a "double deduction" absent a "clear declaration" of congressional intent.³⁸ Congress has shown this intent, however, with respect to the BAQ.

The strongest indication of congressional favoritism for the BAQ is found in the statutory definition of Regular Military Compensation (RMC):

"regular compensation" or regular military compensation (RMC) means the total of . . . : basic pay, basic allowance for quarters (including any variable housing allowance or station housing allowance), basic allowance for subsistence; and *Federal tax advantages occurring to the aforementioned allowances because they are not subject to Federal income tax.*³⁹

This definition of RMC makes it clear that Congress intended the allowance to receive favorable tax treatment. The tax benefits allowed for BAQ are, no doubt, a recognition that the military housing situation is unique. The military member must occupy adequate public quarters, when available, or forfeit the allowance.⁴⁰ The service member can receive BAQ only when the government has failed to provide those quarters. Because of this unique situation, the military receives a tax advantage that is not available to Department of

³⁸Rev. Rul. 83-3, 1983-1 I.R.B. 10.

³⁹37 U.S.C.A. § 101(a) (Supp. 1982).

⁴⁰U.S. Dept of Army, Reg. No. 210-50, Installations - Family Housing Management, Para. 3-3 (1 Feb. 1982).

the Army contract surgeons,⁴¹ or to former members of the military.⁴²

VI. CONCLUSION

When the technical legal arguments have all been made, the ultimate decision as to the deductibility of the military homeowners' mortgage expenses will be decided by reference to section 265(1), IRC. If the reach of that section is broad enough to prohibit deductions for otherwise deductible expenses simply because they are paid out of tax exempt dollars, the military homeowner may become extinct. The tax benefit received because of the deductibility of these mortgage expenses would be reduced by 60 to 100 percent, depending upon mortgage terms and BAQ and VHA rates.

In the final analysis, it seems unlikely that the IRS will attempt to question the deductibility of these mortgage expenses payable from BAQ. The congressional intent to provide favorable tax treatment to military BAQ is unquestionable. The recent extension of section 265(1) to prohibit the previously allowed deductions concerned in Revenue Ruling 83-3 is not inconsistent with continued favorable treatment for the BAQ. In both the VA and rental allowance cases, the extension merely applies to the denial of expense deductions which generate tax-exempt dollars. But for the expenses, there would be no tax-exempt income in either case.

Judge Fay's concurring opinion in *Manocchio* states:

I agree petitioner's claimed deduction is disallowed by section 265(1). However, I disagree with any implication that we are deciding section 265(1) applies to expenses paid out of exempt income. . . . Given the legislative history's indication that the principle target of section 265(1) is expenses incurred in the production of exempt income, I find no reason to consider any possible reach of section 265(1) beyond that clear target.

Judge Fay's opinion was joined by two other members of the five judge panel. While the opinion does not decide the issue expressly, it seems that the Tax Court will not extend the reach of section 265(1) to deny a deduction merely because the expense is paid out of tax-exempt dollars. Given the present feeling on the court and the tremendous ramifications which an adverse decision would have on the

⁴¹Rev. Rul. 60-66, 1961-1 C.B. 21.

⁴²*Van Rosen v. Commissioner*, 17 T.C. 884 (1951).

armed services, it seems that Revenue Ruling 83-8 is no more than an initial scare for the military homeowner.

The issue discussed in this article has not yet been presented to or by the IRS. Until such time as it is raised, the military homeowner should continue to deduct the expenses on the theory that section 265(1) does not apply to expenses simply because they are paid out of tax-exempt funds.

APPLICATION OF SECTION 2503(b) OF THE INTERNAL REVENUE CODE TO GIFTS IN TRUST OF NONINCOME-PRODUCING PROPERTY

by Captain Murray B. Baxter*

I. INTRODUCTION

For reasons usually involving tax considerations or children, people frequently wish to make a gift of property to someone, yet not put that property in direct control of the donee. Therefore, the donor will desire to place the property in a trust, where the property is immune from the predilection of the spendthrift or financially immature donee. Always being mindful of possible tax advantages, the donor desires to apply section 2503(b) of the Internal Revenue Code of 1954 to the gifts of property. Problems arise, however, when trying to apply this section to gifts of property in trust which are not producing current revenues, commonly known as nonincome-producing property.

The application of section 2503(b)¹ is simple to understand.² When an amount is given to a donee, the first \$10,000 of the gift are excluded from the calculation of the gift tax. Thus, a taxpayer may give up to \$10,000 per person tax-free annually. As uncomplicated as this seems, this simple procedure becomes a formidable labyrinth

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¹I.R.C. § 2503(b) (1976).

²Section 2503 provides in part:

(b) EXCLUSIONS FROM GIFTS.—In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year, the first \$10,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year. Where there has been a transfer to any person of a present interest in property, the possibility that such interest may be diminished by the exercise of a power shall be disregarded in applying this subsection, if no part of such interest will at any time pass to any other person.

when applied to trusts. The most difficult trust to which to apply section 2503(b) is one containing nonincome-producing property. In order to understand the nature of this problem, it will be necessary to provide an overview of the application of section 2503(b) to trusts generally and the limitations placed on that application.

II. OVERVIEW

When examining a trust to determine if section 2503(b) applies, it is important to note two details. First, the trust beneficiary is considered the donee, even though the trust entity actually retains the gift. Consequently, a donor has available not just one \$10,000 exclusion,³ but as many section 2503(b) exclusions as there are trust beneficiaries. This concept greatly expands the uses of gifts to trusts. Most trusts are expensive to create and administer. It is more economical to have one trust managing a large amount of property than several trusts managing smaller amounts of property. Therefore, the concept of the beneficiary as the donee allows the application of section 2503(b) to gifts to several trust beneficiaries without the expense of creating and maintaining several trusts. Second, a gift to a trust consists of two interests, the corpus and the income interest, if any. The courts analyze the application of section 2503(b) by determining whether the exclusion is to be applied to the value of the corpus or to the value of the income interest. Having once ascertained whether the corpus or income interest is involved, the court must further determine if the gift meets the requirements for the application of section 2503(b). The two prongs of the test to determine the applicability of section 2503(b) are whether the gift is a transfer of a present interest or a future interest and whether the value of that present interest is ascertainable.⁴

III. PRESENT INTEREST PRONG

A. CORPUS

The gift to a beneficiary may be property placed in the trust, *i.e.*, the corpus, the income produced by the corpus, or both.

The purpose of placing property in a trust is that the donor does not want to give the property directly to the donee. The most common reason is that the donee is a minor when the gift is bestowed and the donor wishes to safeguard the property until the donee can properly

³The limit may double to \$20,000 if donor's spouse consents.

⁴The first prong, the present interest test, comes directly from the language of section 2503(b). The second prong, the ascertainable value test, is a judicially developed requirement. See *Stark v. United States*, 477 F.2d 131, 132 n.1 (8th Cir.), cert. denied, 414 U.S. 975 (1973).

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manage it. Section 2503(c) allows the establishment of a trust for minors and treats the corpus as a present interest if the technical provisions are met.⁵ A section 2503(c) trust corpus, however, must pass to the beneficiary when the beneficiary becomes twenty-one years old. Many donors wish to maintain the trust for a period of time *longer than would be permitted in a section 2503(c) trust.*

Whatever the reason, the donor does not want to give the property directly to the donee. Consequently, the donee's interest in and ability to use or possess the corpus is only one which exists in the future. Therefore, under Treasury Regulation section 25.2503-3(a),⁶ the gift is one of a "future interest" in the corpus and the annual exclusion does not apply. Obviously, in most gifts to trusts, section 2503(b) cannot be applied to the corpus. This results in section 2503(b) being applied exclusively to the income produced by the corpus and determining if the gift of an income interest passes the two-prong test.

B. INCOME INTEREST

The present interest prong, when applied to the income interest,

⁵Section 2503 provides in part:

(c) **TRANSFER FOR THE BENEFIT OF MINOR**—No part of a gift to an individual who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property for purposes of subsection (b) if the property and the income therefrom—

(1) may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and

(2) will to the extent not so expended—

(A) pass to the donee on his attaining the age of 21 years, and

(B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment as defined in section 2514(c).

⁶Treas. Reg. § 25.2503-3 provides in part:

(a) No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar quarter (calendar year in the case of gifts made before January 1, 1971). For the definition of "calendar quarter" see § 25.2502-1(c)(1). "Future interest" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payments in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer used in effecting a gift.

can be divided into three areas of limitation: no postponement, no restrictions, and subsequent extension transfers.

1. No Postponement.

For an income interest to qualify as a present interest, there must be no postponement of the time when the interest starts. If gift provisions delay the income flow, there is no present interest and section 2503(b) will not apply.

Example: The corpus of a trust created by J consists of certain real property, subject to a mortgage. The terms of the trust provide that the net income from the property is to be used to pay the mortgage. After the mortgage is paid in full the net income is to be paid to K during his lifetime. Since K's right to receive the income payments will not begin until after the mortgage is paid in full the transfer in trust represents a gift of a future interest in property against which no exclusion is allowable.⁷

The most fundamental requirement is that the provisions of the trust do not unnecessarily delay the distribution of income, particularly if dependent upon the donee attaining a certain age or the happening of a particular event. Revenue Ruling 75-415 disallowed the application of section 2503(b) because of a condition that the income was to start three years after the creation of the trust or the donee's termination of full-time student status, whichever was earlier.⁸ The postponement limitation is strictly applied. In *Hessenbruch v. Commissioner*,⁹ the court held a three-month waiting period before commencement of paying income made the income interest a future interest and denied application of section 2503(b).

However, administrative powers regarding payment of income, which are normally present in a trust, do not cause the income interest to be classified as a future interest because of delay. An example is a provision that the trustee may pay income at convenient times of the year, but at least once a year, to beneficiaries alive at the date of distribution.¹⁰

⁷Treas. Reg. § 25.2503-3(c), Example (5).

⁸1975-2, C.B. 374.

⁹178 F.2d 785 (3d Cir. 1950).

¹⁰*Edwards v. Commissioner*, 48 B.T.A. 815 (1942), *aff'd on another issue*, 135 F.2d 574 (7th Cir. 1943). Further, members of the class who share in the income may be determined on the date of distribution. *Commissioner v. Lowden*, 131 F.2d 127 (7th Cir. 1942). But a gift of an income interest in trust to an unborn child, including gestation period, is a gift of a future interest. Rev. Rul. 67-384, 1967-2 C.B. 348.

Gifts in trust of bonds or notes are not future interests, even though they bear no interest until maturity.¹¹ The reason is that a bond or note has contractual rights which have a realizable present value for the donee even though there is no right to payment of the interest income until the future maturity. Further, a life insurance policy is not a future interest even though the obligations are discharged by payments in the future.¹² If the life insurance policy has been given and treated as a gift of present interest, any premiums paid the donor after the policy was given also qualify for the exclusion under section 2503(b).¹³ Bonds, notes, and life insurance policies can become future interests, however, if limitations or restrictions are placed on the donee's right to possess or dispose of these contractual obligations.¹⁴

2. No Restrictions.

To be a present interest, income must be payable. A trust requirement to accumulate income disqualifies the application of section 2503(b).¹⁵ Even a provision allowing the trustee discretion to withhold income payments and accumulate the income will deny the status of present interest to a gift.¹⁶ It would be imprudent to include a provision which distributes income under a standard, which makes it unlikely that income will be paid currently in substantial amounts.¹⁷ The key to having a present interest is the required payment of income.

¹¹Treas. Reg. § 25.2503-3(a).

¹²*Id.*

¹³Treas. Reg. § 25.2503-3(c), Example (6) reads:

L pays premiums on a policy of insurance on his life, all the incidents of ownership in the policy (including the right to surrender the policy—are vested in M. The payment of premiums by L constitutes a gift of a present interest in property.

¹⁴Treas. Reg. § 25.2503-3(a).

¹⁵United States v. Pelzer, 312 U.S. 399 (1941); Hopkins v. Magruder, 122 F.2d 698 (4th Cir. 1941).

¹⁶Treas. Reg. § 25.2503-3(c), Example 1 reads:

Under the terms of a trust created by A the trustee is directed to pay the net income of B, so long as B shall live. The trustee is authorized in his discretion to withhold payments of income during any period he deems advisable and add such income to the trust corpus. Since B's right to receive the income payments is subject to the trustee's discretion, it is not a present interest and no exclusion is allowable with respect to the transfer in trust.

See also Welch v. Paine, 130 F.2d 990 (1st Cir. 1942).

¹⁷Commissioner v. Disston, 325 U.S. 442 (1945).

3. *Subsequent Extension Transfers.*

An unrestricted estate for life or term-certain qualifies as a present interest.¹⁸ However, an extended term of the income interest subsequently transferred is not a present interest. Where the donor gave away a term-certain income interest of ten years, there is a gift of present interest. Where a donor later decide to extend the term by five years, thus making the total term fifteen years, the Internal Revenue Service, in Revenue Ruling 76-179,¹⁹ held that the five-year extension is not a present interest, since it does not commence until the original gift expires. However, in *Clark v. Commissioner*,²⁰ a court held that, where the donor of a life income interest subsequently transfers all the remaining interest in the trust to the income beneficiaries, the subsequent transfer was a present interest. The subsequent transfer under local law caused a merger, resulting in the donee becoming an outright owner and acquiring a new present interest.

IV. ASCERTAINABLE VALUE PRONG

Even if the gift is one of present interest, it must have an ascertainable value for section 2503(b) to apply. Three categories which cause the most problems in ascertaining value are invasion provisions, multiple beneficiaries, and administrative powers.

1. *Invasion Provisions.*

When a trust is created, it usually contains an income and remainder interests. The income interest may be a gift characterized as a present interest, but the remainder interest is a future interest to which section 2503(b) does not apply.²¹ This concept is clear and the application is simple unless a provision allows the trustee discretion

¹⁸Treas. Reg. § 25.2503-3(b) provides:

An unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain) is a present interest in property. An exclusion is allowable with respect to a gift of such an interest (but not in excess of the value of the interest). If a donee has received a present interest in property, the possibility that such interest may be diminished by the transfer of a greater interest in the same property to the donee through the exercise of a power is disregarded in computing the value of the present interest, to the extent that no part of such interest will at any time pass to any other person (see example (4) of paragraph (c) of this section). For an exception to the rule disallowing an exclusion for gifts of future interests in the case of certain gifts to minors, see § 25.2503-4.

¹⁹1976-1 C.B. 290.

²⁰65 T.C. 126 (1975).

²¹Treas. Reg. § 25.2503-3(a).

to invade the corpus. When such an invasion provision exists, the future amount of the corpus becomes uncertain and the income which the trust can be expected to earn cannot be determined. Whether section 2503(b) can still be applied to a gift in trust with an invasion provision depends on whether the invasion is for the benefit of the beneficiary or another person. Section 2503(b) provides that invasion of the corpus on behalf of the beneficiary shall be disregarded and the exclusion will be allowed. The following example from the gift tax regulations illustrates this rule:

Example: Under the terms of a trust the net income is to be paid to F for life, with the remainder payable to G on F's death. The trustee has the uncontrolled power to pay over the corpus to F at any time. Although F's present right to receive the income may be terminated, no other person has the right to such income interest. Accordingly, the power in the trustee is disregarded in determining the value of F's present interest. The power would not be disregarded to the extent that the trustee during F's life could distribute corpus to persons other than F.²²

If the invasion provision is for the benefit of another person, the value of the income interest becomes unascertainable and section 2503(b) is inapplicable.

2. Multiple Beneficiaries

Where a trust has multiple beneficiaries, the trust provisions may render present interest income values unascertainable. The most troublesome device is the "sprinkle" or "spray" trust. Under the terms of this trust, the class of beneficiaries is usually fixed and the income must be distributed, but the trustee has the discretion to allocate the amount going to each beneficiary. Because the amount of the income interest to each beneficiary cannot be determined in advance, section 2503(b) does not apply.²³ This difficulty can be overcome by fixing the percentage of income to each beneficiary. This fixing of income interest, however, eliminates the main advan-

²²Treas. Reg. § 25.2503-3(c), Example (4).

²³Treas. Reg. § 25.2503-3(c), Example (3) reads:

Under the terms of a trust created by E the net income is to be distributed to E's three children in such shares as the trustee, in his uncontrolled discretion deems advisable. While the terms of the trust provide that all of the net income is to be distributed, the amount of income any one of the three beneficiaries will receive rests entirely within the trustee's discretion and cannot be presently ascertained. Accordingly, no exclusions are allowable with respect to the transfers to the trust.

tage of the "sprinkle" or "spray" trust, the flexibility of the trust to allocate the income.

Where the number of beneficiaries is not fixed, but may expand, the problem is exacerbated. In the case of afterborn children or grandchildren, two revenue rulings have held that the present interest is not necessarily rendered unascertainable, but the taxpayer has the burden to prove that the value of the present interest exceeds the amount of exclusion.²⁴

3. Administrative Powers

The trustee's administrative powers normally do not affect income interest value. Problems only arise when these powers over a trust cause distortion of the income interest value. The Internal Revenue Service has ruled that, where the trustee has power to allocate gains and losses realized upon disposition of corpus to the income interest, section 2503(b) is inapplicable because the value of the income interest was rendered unascertainable.²⁵ Many trusts contain such allocation provisions and should be scrutinized to determine if they affect the value of income interest.²⁶ Provisions affecting only the manner and means of distributing income do not render the income value unascertainable.

The preceding overview of the limits on applying section 2503(b) and the application of the two-prong "present interest—ascertainable valuation" test provides background information to examine the problem of gifts of nonincome-producing trust property and the application of section 2503(b).

V. NONINCOME-PRODUCING PROPERTY

When nonincome-producing property is made the corpus of a trust, the Internal Revenue Service, supported by the Tax Court,²⁷ has disallowed application of section 2503(b). However, the Fourth Circuit, in *Rosen v. Commissioner*,²⁸ allowed application of section 2503(b) to a gift in trust of nonincome-producing property. The donor transferred publicly-traded common stock of one corporation to a trust and named the donor's three children as beneficiaries. The trust provided that the entire interest income was payable at least

²⁴Rev. Rul. 55-678, 1955-2 C.B. 399; Rev. Rul. 55-679, 1955-2 C.B. 290.

²⁵Rev. Rul. 77-358, 1977-1 C.B. 342.

²⁶*Van Den Wymelenberg v. United States*, 397 F.2d 443 (7th Cir.), cert. denied, 393 U.S. 953 (1968); *Fisher v. Commissioner*, 288 F.2d 274 (3d Cir. 1961). But see *Merchandise Safe Deposit and Trust Co. v. United States*, 311 F. Supp. 670 (D. Md. 1970).

²⁷*Phillips v. Commissioner*, 12 T.C. 216 (1949).

²⁸397 F.2d 245 (4th Cir. 1968).

annually to the beneficiaries and the beneficiary's share of the corpus was payable when the beneficiary reached a certain age. The trustees named were either members of the donor's family or closely associated with the corporation. The trustees had the power to sell or reinvest the corpus, and to hold and invest in nonincome-producing property. The corporation had never paid a dividend on the stock. The donor claimed a section 2503(b) exclusion only as to the income interest of the donated shares.

The court held that the donor may use the actuarial tables in the Internal Revenue Regulations to determine the value of the income interest. The Internal Revenue Service had argued that the income interest had no ascertainable value and section 2503(b) could not be applied. The court responded:

Contrary to the government's contention we think it unreasonably unrealistic to deny value to the present interest *concededly* possessed by the donees. . . . To deny to the taxpayers here the use of the tables is to treat, for tax purposes, the donated income interests as having no value at all.

. . .

It is important to note that it has not been suggested to us that the "income interest" was valueless. Rather the *government concedes that a present income interest* [rather than a future interest] *was in fact donated. The concession seems to us near fatal.* The government entertains two inconsistent positions—on one hand conceding that valuable right was donated and on the other contending that for tax purposes the right is valueless.²⁹

It seems the Internal Revenue Service acknowledged that a present interest had been passed to the beneficiaries. With this first, prong conceded, the court held that the income interest of the stock was not without some value and the donor could, absent extraordinary circumstances, use the actuary tables promulgated by Internal Revenue Service to determine the value.

Having learned a valuable lesson, the IRS, in Revenue Ruling 69-344,³⁰ began considering gifts of nonincome-producing property to be gifts of future interest. In this case, the donor had created a trust for a grandchild beneficiary. The trust provided that all of the income must be paid to the beneficiary and the trustees had liberal

²⁹*Id.* at 247 (emphasis added).

³⁰1969-1 C.B. 225.

authority to invade the corpus for the benefit of the beneficiary. The trust also gave the trustees power to invest in any type of property which might result in a future increase in the value of the yield of the trust. The IRS interpreted the trust language as indicating the donor's intention that for trustees invest to increase the value of the trust, rather than provide for increased current income to the beneficiary. The Internal Revenue Service ruled:

Thus, the gift of the income interest does not create an unrestricted right to the income from property within the meaning of section 25. 2503-(b) of the regulations.

The purchase of life insurance policies authorized by the indenture further indicates an intention that future rather than present interests be created for life insurance policies are generally purchased for future rather than immediate use and enjoyment.

Accordingly, it is held that the *gift in trust* on the terms and conditions stated does not qualify as a *gift of a present interest* under section 2503(b) of the Code. Therefore, an annual exclusion may not be allowed in respect thereto.³¹

Further, the IRS strongly stated that it would not follow the decision in *Rosen*.³²

The matter was next litigated in *Stark v. United States*. In *Stark*, taxpayers had made gifts of stock of a closely held corporation to three trusts, one for each of the taxpayers' three grandchildren. Each grandchild was to receive the net income of the trusts until age thirty, when the grandchild could terminate the trust and receive the corpus. The stock of the corporation had never been traded publicly and no dividends had been paid on the stock since 1950. "The undisputed evidence indicates, . . . that there was little possibility that any income would be forthcoming to the beneficiaries from the trusts in question"³⁴ After having acknowledged that an issue of present interest existed, the district court ignored the first "present interest" prong by stating: "We may assume, *without deciding*, that the gifts are not gifts of a future interest."³⁵ The court then decided that the income interests had no ascertainable

³¹*Id.* at 226 (emphasis added).

³²*Id.*

³³345 F. Supp 1263 (W.D. Mo. 1972), *aff'd per curiam*, 477 F.2d 131 (8th Cir.), *cert. denied*, 414 U.S. 975 (1973).

³⁴477 F.2d at 133.

³⁵345 F. Supp. at 1264. (Emphasis added).

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value. Further, that court specifically held that the actuarial tables could not be used to determine the value, because:

[W]e think it obvious that the Congress did not authorize the Commissioner, by the promulgation of a regulation, to eliminate one of the two requirements that the parties agree a taxpayer must establish in order to be eligible to claim a gift tax exclusion. We are convinced that Congress intended that if proof of value of a particular gift could not be made in regard to the gift of a present, as distinguished from a future, interest, all taxpayers so situated simply would not be able to claim an exclusion.³⁶

Yet, in *In Estate of Irma Green*,³⁷ the specific yield of the income interest was ignored by the Internal Revenue Service in favor of an application of an actuarial table showing less income than actually realized. The question now arises that if the actuarial tables can only be used when the precise value can be determined by separate means and the separate means are preferred manner of proof, of what use are the actuarial tables. There is no definite answer to this question, although it seems the IRS in *Rosen* advanced the theory that the tables were only to be used to the benefit of the government. The court responded that:

[i]t is a difference without a distinction that in *Irma Green* use of the tables benefited the government and here their use benefits the taxpayers....

There is, of course, no justification for a double standard. Neutral principles forbid that the Commissioner be allowed to apply the tables where to do so produces greater revenue and to refuse application where it does not....

"The United States is in business with enough different taxpayers so that the law of averages has ample opportunity to work."³⁸

The district court in *Stark* concluded its reasoning by attempting to distinguish *Rosen* by using other cases to bolster its position, in both cases, without analyzing the relevant facts.

On appeal, the Eighth Circuit failed to comment upon or note the *Green* district court's assumption of present interest in the income interest. In so doing, the panel reached the factual conclusion that

³⁶*Id.* at 1265.

³⁷22 T.C. 728 (1954).

³⁸397 F.2d at 248 (quoting *Gelb v. Commissioner*, 298 F.2d 244, 552 (2d Cir. 1962)).

underpinned the whole resolution of the case without setting forth the facts upon which it is based.³⁹ The court stated:

Rosen v. Comm'r, 397 F.2d 245 (4th Cir. 1968), cited and relied upon by appellant, is distinguishable. The district court opinion recites the facts in detail and demonstrates the correctness of the Government's position in this case. We, therefore, affirm on the basis of that opinion.⁴⁰

In Revenue Ruling 76-360,⁴¹ the donors transferred stock into a trust for their children. The stock was received as a result of a merger which produced a stock transfer restriction agreement. The agreement restricted the transfer of the stock for two years, except for the creation of the trust if the trustee was similarly restricted. No dividends had been paid nor were any expected in the foreseeable future. The Internal Revenue Service ruled that, since no dividends have been declared or paid since the donors or the donees had acquired their interests and since none were anticipated, no annual exclusion was allowable with respect to an income interest in the transferred stock.⁴² There is no indication of whether the income interest failed the present interest or ascertainable value prong.

The problem was again addressed in *Berzon v. Commissioner*.⁴³ In *Berzon*, donors transferred stock in a closely held corporation to trusts between 1962 and 1968 with the donor's children and grand children listed as beneficiaries. No dividends had been paid on the stock from 1957 to 1972. The stock was subject to an agreement restricting its ability to be transferred. The Tax Court assumed, without deciding, that the income interests were present interests.⁴⁴ Thereafter, the court held that the income interests had no ascertainable value because no dividends had been paid and there was restriction on converting the corpus into income-producing property. The court specifically refused to follow *Rosen*.

On appeal the Second Circuit, unlike the Eighth Circuit, recognized the failure of the Tax Court's to address the issue of present interest, but alluded to this failure only in a footnote.⁴⁵ The Second

³⁹477 F.2d at 132. The "undisputed" evidence referred to by the Eighth Circuit seemed fairly disputed in the district court. The taxpayers did not agree on the record that there was little possibility of income, rather it was impossible to value the income interest based on the known facts, 345 F. Supp. at 1265.

⁴⁰477 F.2d at 133.

⁴¹1976-2 C.B. 298.

⁴²*Id.* at 299.

⁴³63 T.C. 601 (1975), *aff'd*, 534 F.2d 528 (2d Cir. 1976).

⁴⁴63 T.C. at 616.

⁴⁵63 T.C. at 618.

⁴⁶534 F.2d at 630 n.6.

Circuit did not further delve into the present interest issue since it reached the same conclusion that such interest had an unascertainable value.

In the balance of the opinion, the court presented the best counter argument to the Fourth Circuit's stance in *Rosen*:

Of course, a donor cannot ordinarily prove exactly how much an income interest will yield during the term of its experience, and the tables prescribed in Treas. Regs. § 25.2512-5 are an appropriate means of fixing a value for gift tax purposes in cases where they may reasonably be expected to provide a fair approximation of the typical yield generated. But the tables are not appropriate in the case of a non-income-yielding investment, for in such a case *one can predict with assurance that the income generated will be zero*, and, therefore, that the actuarial tables would produce an obviously erroneous result. With respect to the trusts in question here, the history and business undertakings of the Simons Company, whose shares formed the only trust assets, provided ample evidentiary support for the Tax Court's conclusion that the settlor of these trusts did not intend, nor was his closely-held corporation financially able, to pay any dividends in the foreseeable future as of the time each gift of stock was made. Moreover, the restrictions imposed by the stockholders' agreement made it impossible for the trustees freely to dispose of the stock and replace it with income-producing assets. In these circumstances, the use of actuarial tables failed to show that the income interests in question had any positive value.⁴⁷

The *Berzon* and *Rosen* may be reconciled on their facts. In *Rosen*, the stock was publicly traded and there was no trust provision or agreement restricting the trustees' power to dispose of the original. In *Berzon*, the stock was of a closely held corporation, making value determination difficult and marketability of the stock less attractive, and there was an agreement which made it impossible for the trustees to dispose of the original corpus. Further, all of the courts have sidestepped the present interest prong and proceeded directly to the ascertainable value prong. The Fourth Circuit in *Rosen* hinted that, if the Internal Revenue Service had not conceded the income interest as a present interest, it might have decided differently. The

⁴⁷*Id.* at 581 (emphasis added).

Second Circuit in *Berzon* also indicated that, had the Tax Court not assumed the income interest was a present interest, it would have ruled on that issue first before deciding the ascertainable value issue. In this posture, it appears that the court would have held the income interests to be future interests.⁴⁸

VI. CONCLUSION

If a person desires to create a trust and apply section 2503(b) to the gifts transferred to the trust, the property to be transferred and the trust provisions must be carefully drafted to insure that the income interest will pass both prongs of the qualifying test under section 2503(b). It is recommended that a donor avoid using nonincome-producing property as the corpus in view of the results in *Stark*, *Rosen*, and *Berzon*. This is particularly true because the courts have not addressed the issue of present interest and because *Rosen* appears to be an aberration where the court was influenced by a procedural error by the IRS in conceding a present interest.

This article is a very brief overview of a complex and confusing area of tax law and is intended to alert the local judge advocate of the problems which exist in applying section 2503(b) to gifts in trust. Any advice to clients concerning gifts to trusts, anticipating the application of section 2503(b), should be rendered with utmost caution.

⁴⁸*Id.* at 530 n.6.

SECTION III
PROPERTY LAW
THE IMPLIED WARRANTY OF
HABITABILITY AND
ITS EXTENSION TO SUBSEQUENT
PURCHASERS
OF REAL PROPERTY

by Major Robert M. Fano*

I. INTRODUCTION

The doctrine of caveat emptor¹ has dominated sales of real property in the United States and England for most of the twentieth century. While caveat emptor usually has been associated with the sale of chattel, the principle has been applied equally to the sale of realty. The doctrine was premised on the supposed arm's length negotiation and equal bargaining position between vendor and purchaser. The assumption was that the purchaser had both the resources and opportunity to gain information concerning the subject matter of the sale which were equal to those of the seller.² Absent fraud or express warranty, the seller had no obligation with respect to the quality of the property or its fitness for habitation. Caveat emptor's assumption of a sales transaction between equals may have been realistic in a stable, pre-industrial age. According to one commentator, caveat emptor

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¹"Let the buyer beware." Black's Law Dictionary 202 (5th ed. 1979).

²Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 J. Urb. L. 549 (1971).

did not adversely affect the typical buyer of a new house during the nineteenth century. In those days, after all, the home-owner-to-be was commonly in a middle-class fellow who purchased his own lot of land and then retained an architect to design a home for him. Once the plans were ready the landowner hired a contractor who built a house according to the plans. Quality control was assured because the builder was paid in stages as he completed each part of the house to the satisfaction of the architect. If the house did happen to collapse, the homeowner had a choice of lawsuits to recoup his losses: either the plans were defective, in which case the architect had been negligent, or the building job had not been workmanlike, in which case the contractor was liable.³

After World War II, the housing industry underwent a revolution. It became common for the builder to sell the house and the land together in a "package deal." The former notion of the builder as an artisan, amenable to supervision by the individual who owned the homesite, was outmoded by the onslaught of heavy machinery and prefabricated development houses.⁴

This modern approach to home construction made greater protection for the buyer a necessity. Industrialization had bred specialization; specialization has bred a population of consumers increasingly ignorant about matters outside their specialization and dependent on others to supply the basic necessities.⁵ No longer could one assume the existence of a sophisticated purchaser with a bargaining position equal to that of the vendor. As a result of the inequities surrounding the continued application of the doctrine of caveat emptor to modern realty practices, the implied warranty of habitability was developed.⁶

³Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 Cornell L.Q. 837 (1967).

⁴Note, *The Implied Warranty of Habitability of North Carolina Revisited*, 58 N.C.L. Rev. 1056 (1980) [hereinafter cited as N.C. Note].

⁵Mallor, *Extension of the Implied Warranty of Habitability to Purchasers of Used Homes*, 20 Am. Bus. L.J. 364 (1982).

⁶N.C. Note, *supra* note 4.

II. THE IMPLIED WARRANTY OF HABITABILITY

A catalyst for change derived from the evolving doctrine of implied warranties in the sale of personal property.⁷ Today, the doctrine of caveat emptor has all but disappeared in the sale of personalty, largely because of the adoption of the Uniform Sales Act and its successor, the Uniform Commercial Code. The resulting distinction between real and personal property, which one commentator had labeled a "merely fortuitous byproduct of the separate historical development of legal thinking in the two areas,"⁸ has been increasingly viewed as anomalous. The irony of this system was that the law "offer[ed] greater protection to the purchaser of a seventy-nine cent dog leash than it [did] to the purchaser of a 40,000 dollar house,"⁹ and that the buyer of a defective two-dollar fountain pen could "look to the law to get him his money back" but the person who spent his or her life's savings on a new home whose ceiling collapsed could not.¹⁰

The implied warranty of habitability was first recognized in the English case of *Miller v. Cannon Hill Estates, Ltd.*¹¹ In 1931, Miller brought suit against the builder of his house for structural defects caused by faulty workmanship. After addressing whether an express warranty existed, the court stated:

Indeed it seems to me that it is a matter of very little moment whether there was or whether there was not an express warranty as to the condition of the material or the nature of the workmanship which should be used in this house, because I think that it is plain from the whole of the facts of the case that the law will imply a warranty that the house which was to be built by the defendants for the plaintiff should be a house which was habitable and fit for human beings to live in.¹²

⁷U.C.C. § 2-314 (1978) (Implied Warranty: Merchantability: Usage of Trade).

⁸Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 Geo. L.J. 634 (1965).

⁹*Id.* at 633.

¹⁰Roberts, *supra* note 3, at 835-36.

¹¹[1931] 2 K.B. 113.

¹²*Id.* at 120.

The holding in *Miller*, however, was limited to its facts. Therefore, the implied warranty was applied only to a house that was purchased before or during its construction. A new house that was completed, but had not been occupied, did not fall within the implied warranty's protection.

The first reported case in the United States to break with the doctrine of caveat emptor was decided by a New York Supreme Court in 1956.¹³ Since it was not an appellate decision, the case had little precedential value and went largely unnoticed. One year later, the Ohio Court of Appeals decided *Vanderschrier v. Aaron*.¹⁴ This case is often cited as the first application of the *Miller* rule in the United States. Like his English counterpart, Vanderschrier had purchased the house while it was under construction. After the house was finished and Vanderschrier had moved in, the basement flooded with sewage. Furniture was damaged and the house generally rendered unsanitary. The Ohio appellate court recognized an implied warranty of habitability, but declared its continued adherence to caveat emptor when a completed home was involved.¹⁵

At the end of the 1950s, three jurisdictions in the United States had recognized an implied warranty in the builder's agreement to construct houses.¹⁶ However, none of the states expressly applied its reasoning to houses which were completed when purchased.

During the 1960s, ten more jurisdictions rejected the doctrine of caveat emptor as regards real property.¹⁷ The major development during the decade was the expansion of implied warranties to protect buyers of new houses that were completed when purchased. Colorado had adopted the narrower application to houses under construction in 1963¹⁸ but a year later, became the first state to expressly repudiate the doctrine of caveat emptor as applied to the sale of new houses.¹⁹ In *Carpenter v. Donohoe*, only four months after the purchase of a completed house, the walls began to crack and the foundation had to be shored with heavy timber to prevent the base-

¹³*Lutz v. Bayberry Huntington, Inc.*, 148 N.Y.S. 2d 762 (Sup. Ct. Nassau County 1956). The highest court of New York is the Court of Appeals.

¹⁴140 N.E. 2d 819 (Ohio App. 1957).

¹⁵*Id.* at 821.

¹⁶Washington, *Hoye v. Century Builders*, 329 P.2d 47 (Wash. 1958). See also cases cited in notes 13, 14 *supra*.

¹⁷Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 Real Est. L.J. 303, Table 1 (1980).

¹⁸*Glisan v. Smolenske*, 387 P.2d 260 (Colo. 1963).

¹⁹*Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964).

ment walls from collapsing. In extending an implied warranty to the purchaser, the Colorado Supreme Court noted that no rational basis existed for the distinction between completed and uncompleted structures:

That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot, is recognizing a distinction without a reasonable basis for it.²⁰

The *Carpenter* decision led other jurisdictions to reject the *Miller* rule and recognize an implied warranty regardless of the stage of a house's construction.

Whereas the 1960s signaled the end of caveat emptor's tenacious hold on the sale of realty, the period 1970 through 1975 saw phenomenal acceptance of implied warranties in real estate transactions. In 1970, the Arkansas Supreme Court expressed the following:

Twenty years ago one could hardly find an American decision recognizing the existence of an implied warranty in a routine sale of a new dwelling. Both the rapidity and the unanimity with which the courts have recently moved away from the harsh doctrine of caveat emptor in the sale of new houses are amazing, for law has not traditionally progressed with such speed.²¹

Prior to 1970, thirteen states had expressed acceptance of implied warranties of habitability.²² By 1975, the number of states had climbed to thirty-four.²³

Today, with the exception of a distinct minority,²⁴ most jurisdictions in the United States have adopted some form of an implied warranty of habitability to provide the purchaser with a remedy against a builder-vendor. There are many reasons given for holding the builder liable for breach of an implied warranty. The Supreme Court of Texas has summarized them as follows:

²⁰*Id.*, at 402.

²¹Wawak v. Stewart, 449 S.W.2d 922 (Ark. 1970).

²²Shedd, *supra* note 17.

²³*Id.*

²⁴Georgia still clings to the doctrine of caveat emptor. *Amos v. McDonald*, 181 S.E.2d 515 (Ga. 1971). More recently, the Virginia Supreme Court refused to apply the implied warranty of habitability theory. The court felt this issue should be left for the state legislature. *Bruce Farms, Inc. v. Coupe*, 247 S.E.2d 400 (Va. 1978).

1. A builder should be in business to construct buildings free of latent defects.
2. The buyer cannot, by reasonable inspection or examination, discern such defects.
3. The buyer cannot normally rely on his own judgment in such matters.
4. In view of the circumstances and the relation of the parties, the buyer is deemed to have relied on the builder.
5. The builder is the only one who has or could have knowledge of the manner in which the building was built.²⁵

In contrast to the sale of chattel, where the implied warranty of merchantability attaches at sale by statute, the implied warranty of habitability in the sale of realty generally arises only by judicial construction. As a result, a great deal of uncertainty remains as to the definition and scope of the warranty.

In general, however, the implied warranty of habitability is intended to protect home buyers from losses when a latent defect in the construction of the house is discovered sometime after the buyer takes possession. The courts usually look for several elements before implying a warranty. The house or structure must be new and the purchaser must be the initial occupant or owner of the structure. The builder-vendor is ordinarily required to be a person regularly engaged in the business of construction and selling of houses. Finally the builder will be liable only for those defects of which the buyer was unaware and which could not have been visible to a reasonably prudent person.²⁶

III. EXTENDING THE WARRANTY

Although the implied warranty of habitability is now well-established with respect to sales of new homes, a controversy exists over extending legal protection to a larger segment of housing consumers, purchasers of previously-occupied homes. Indiana was the first state to extend the implied warranty to subsequent purchasers. In *Barnes, v. Mac Brown and Company*,²⁷ plaintiffs were the second

²⁵*Gupta v. Ritter Homes, Inc.*, No. C-1363, 26 Tex. Sup. Ct. Jour. 224 (Feb. 12, 1983).

²⁶Note, *Buyer Protection in the Sale of New Housing in Illinois: The Implied Warranty of Habitability*, 56 Chi.-Kent L. Rev. 1133 (1980).

²⁷*Barnes v. Mac Brown and Company, Inc.*, 342 N.E.2d 619 (Ind. 1976).

buyers of a four-year-old house built by defendants. After moving into the house, they discovered leakage and cracked walls in the basement. The repair cost \$3,500. The trial court had dismissed their warranty suit against the builder for lack of privity of contract between the parties to the suit. The Indiana Supreme Court reinstated it, stating that the traditional requirement of privity between a builder-vendor and a purchaser was outmoded.²⁸ As to the standard to be applied, the court wrote:

This extension of liability is limited to latent defects, not discoverable by a subsequent purchaser's reasonable inspection, manifesting themselves after the purchase. The standard to be applied in determining whether or not there has been a breach of warranty is one of reasonableness in light of surrounding circumstances. The age of a home, its maintenance, the use to which it has been put, are but a few factors entering into this factual determination at trial.²⁹

Wyoming was the second jurisdiction to extend a builder-vendor's implied warranty of habitability beyond the first owner.³⁰ Plaintiffs were the second purchasers of a two-year-old house that had been custom built by the defendant. Within two months after moving in, plaintiffs became aware that the electrical wiring in the house was defective and dangerous. It was necessary that the house be rewired at a cost of almost \$4,000. The court pointed out that "the purpose of a warranty is to protect innocent purchasers and hold builders accountable for their work."³¹ In view of those objectives, the court found it incomprehensible to "arbitrarily interpose a first buyer as an obstruction to someone equally as deserving of recovery. . . ."³² Since the builder always has available the defense that the defect was not attributable to it, intervening sales, standing alone, should not affect an end of an implied warranty of habitability.³³ The warranty extends for a reasonable length of time and is limited to latent defects which become manifest after the purchase.³⁴

The Supreme Court of South Carolina reached the same conclusion in *Tertinde v. Neely*,³⁵ a 1980 case involving a four-year-old house

²⁸*Id.* at 620.

²⁹*Id.* at 621.

³⁰*Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979).

³¹*Id.* at 736.

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵271 S.E.2d 768 (S.C. 1980).

built for speculative sale by the defendants. Within a short time after the second owners of the house took possession, the house evidenced additional substantial settlement of its foundation. Inspection by experts indicated that the house was built on fill dirt. Estimates to repair existing damage and remedy the cause of the damage ranged from approximately \$6,000 to \$23,000.

The court noted that common experience teaches that latent defects in houses often do not become manifest for a considerable period of time, possibly after the property has been transferred by the original buyer to a subsequent unsuspecting purchaser.³⁶ Furthermore, the ordinary buyer is unable to discover these hidden defects, particularly when elaborate furnishings obscure the structural integrity of the house.³⁷ The fact that the builder was a stranger to the plaintiffs did not negate the reality of the "holding out" of the builder's expertise and reliance that occurs in the market place.³⁸ The court concluded that the implied warranty for latent defects extends to subsequent home purchasers for a reasonable length of time.³⁹

The most recent case extending warranty protection to subsequent purchasers is *Gupta v. Ritter Homes, Inc.*⁴⁰ In *Gupta*, plaintiff was the second owner of a house built by defendant, although the initial sale of the house had been only three months earlier. Shortly after his purchase, Gupta noticed cracks appearing in the wall, driveway, and garage slab. Defendant made some minor repairs to the house. Thereafter, the cracks worsened and the defendant, after inspecting the home, refused to make further repairs. The Supreme Court of Texas determined that "as between the builder and owner, it matters not whether there has been an intervening owner."⁴¹ The court reasoned that "the effect of the latent defect on the subsequent owner is just as great as on the original buyer, and the builder is no more able to justify his improper work as to a subsequent owner than to the original buyer."⁴² In extending the implied warranty protection to subsequent purchasers, the court noted that the warranty covers latent defects not discoverable by a reasonably prudent inspection of the building at the time of sale.⁴³

³⁶*Id.* at 769.

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰No. C-1363, 26 Tex. Sup. Ct. Jour. 223 (Feb. 12, 1983).

⁴¹*Id.* at 224.

⁴²*Id.*

⁴³*Id.* at 225.

Currently, a total of eight states have extended the implied warranty of habitability to subsequent purchasers.⁴⁴ Seven of the eight have done so since 1979.⁴⁵ Although major developments in the area of implied warranty have generally been initiated by the judiciary, two state legislatures have enacted a statutory warranty that protects a used home purchaser.⁴⁶

Extending the implied warranty to subsequent buyers is also consistent with the Uniform Land Transactions Act,⁴⁷ which was adopted by the National Conference of Commissioners on Uniform State Laws in August 1975. Section 2-312 of the Act provides that, notwithstanding any contrary agreement, the warranty of quality runs with the land. Although the Uniform Land Transactions Act has not yet been enacted in any state, a number of states currently have laws of varying scope and complexity dealing with home warranties.

The building industry itself, through the National Association of Home Builders, has promulgated a Home Owners Warranty Program, commonly known as HOW.⁴⁸ Under this program, qualified builders, in essence, buy the purchaser a ten-year warranty and insurance package against faulty workmanship, defective materials, and major construction defects. This policy costs two dollars per thousand of the sales price and is paid by the builder. During the first two years, the builder makes any needed repairs. The insurance company will pay for the repair of defects for the next eight years. If the builder fails to meet its obligations during the first two years, the insurance company will perform them. Because HOW coverage is incorporated into the building itself, the warranty transfers to subsequent purchasers upon sale of the house. Although the program has not yet been widely adopted, the Association "claims that the express warranty is good for the builder, good for the consumer [and] good for business."⁴⁹

⁴⁴*Blagg v. Fred Hunt Company, Inc.*, 612 S.W.2d 321 (Ark. 1981); *Hermes v. Staiano*, 437 A.2d 925 (N.J. Super. Ct. 1981); *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982). See also cases cited in notes 27 (Indiana), 30 (Wyoming), 35 (South Carolina), and 25 (Texas) *supra*.

⁴⁵Wyoming, South Carolina, Arkansas, New Jersey, Oklahoma, Illinois, and Texas.
⁴⁶Minn. Stat. Ann. § 327 A.02 (West 1980); N.J. Stat. Ann. § 46:36B-3 (West Supp. 1982-83).

⁴⁷13 Uniform Laws Annotated 545 (1980).

⁴⁸Note, *Home Owners Warranty Program: An Initial Analysis*, 28 Stan. L. Rev. 357 (1976).

⁴⁹*McDonald v. Miannecki*, 398 A.2d 1289 (N.J. 1979).

IV. CONCLUSION

The once universally accepted doctrine of caveat emptor has been replaced in the sale of new houses by the implied warranty of habitability. The movement toward adoption of the implied warranty has been remarkable. Moreover, while still in its basic formulation stage, a growing minority of states have extended the implied warranty protection to subsequent purchasers. The public policies that supported creation of the implied warranty of habitability in the sale of new homes apply with equal force to the sale of relatively new used homes. Legislation appears to be the most desirable method of providing protection to subsequent purchasers because it can more clearly define the boundaries of liability. In the absence of a statutory response, the courts should not be reluctant to impose liability through an extension of the implied warranty. In view of the rapid acceptance of the implied warranty of habitability to the sale of new homes, it is likely that extension of the warranty to subsequent purchasers will soon become the majority viewpoint.

RETALIATORY EVICTION

by Major James A. Hughes*

*Now, why am I so irritable and harsh about this whole proceeding? And you're probably correct that I'm not as kind to you as I might be, because I don't want to listen to rats. I don't want to listen to seepage, I don't want to listen to bugles, I don't want to hear about hot water, and I don't want to hear about garbage***You know I try to be patient, but I do wish that—Now, if there's a holdover situation where there's a notice to quit and surrender possession, then you have an area for reprisal***I have studied some of this stuff and I resent bitterly Rutgers and Seton Hall and the other associations coming in with the same defenses day in and day out.*

Comments by Presiding Judge of Essex County, New Jersey, District Court in response to law student representing an indigent client at a summary eviction proceeding after raising the defense of retaliatory eviction.

In Re Albano, 75 N.J. 509, 513 (1978).

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I. INTRODUCTION

In the late 1960s and early 1970s, a growing number of jurists, legal commentators, and public interest attorneys became aware of the problem of retaliatory eviction.¹ Tenants who demanded that landlords make their buildings safe and habitable, who reported safety code violations to governmental authorities, or who met with and organized other tenants to improve their living conditions often found themselves defendants in summary eviction proceedings. This practice is commonly referred to as retaliatory eviction.² Landlords have also engaged in other retaliatory practices. They raised rents, gave month-to-month tenants notice to quit, refused to renew the leases, or allowed the conditions of their buildings to deteriorate, hoping to scare off those tenants who were perceived to be a threat.

Public policy was being circumvented. Landlords were able to use legal process to punish and eliminate tenants who exercised their rights as citizens in reporting housing code violations or in demanding that minimum health and safety standards be met. This thwarted the policy in those states and municipalities that relied upon citizens to report violations of health and safety codes.³ Summary eviction proceedings were initiated against tenants who met and organized with other tenants for the purpose of improving their living conditions. Whenever summary eviction proceedings were successfully invoked by a landlord in retaliation, there was an inherent conflict between the public policies embodied in the housing codes and the summary eviction process. Constitutional issues were also raised by retaliatory practices. Commentators were particularly concerned with state action in the eviction process when a tenant had exercised First Amendment rights or rights as a citizen to invoke the protection of government.⁴

¹See opinion by Judge Skelly Wright in *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969); McElhane, *Retaliatory Evictions: Landlords, Tenants, and Law Reform*, 29 Md. L. Rev. 193 (1969). See generally Comment, *Retaliatory Eviction: A Study of Existing Law and Proposed Model Code*, 11 Wm. & Mary L. Rev. 537 (1969).

²See R. Blumberg & J. Glow, *The Rights of Tenants. The Basic ACLU Guide to a Tenant's Rights* 8087 (1979).

³For example, the Pennsylvania legislature has established a statewide hotline for reporting conditions which jeopardize public health or safety. Pa., Stat. Ann. tit. 35, sec. 7001-2 (1972).

⁴*Developments in the Law: Landlord and Tenant—Eviction—Public Policy and Congressional Purpose to Ensure Decent Housing Conditions Require Construction of Summary Eviction Statute to Prohibit Eviction In Retaliation For Tenant's Reports of Housing Code Violations to Authorities*, 82 Harv. L. Rev. 932 (1969).

This article will focus on the issue of retaliatory practices by landlords with particular emphasis on retaliatory eviction. Developments both in case law and in protective statutes will be discussed. Future trends in this area will also be noted. Appendices A and B contain a current survey of state statutes dealing with retaliatory eviction and retaliatory practices by landlords.

II. THE LANDLORD-TENANT RELATIONSHIP

The legal system of every civilized nation has recognized the landlord-tenant relationship. Roman Juristic sources reveal a complex body of landlord-tenant law that developed through the Justinian and Byzantine eras.⁵ In American jurisprudence, legal relationships between landlord and tenant are dominated by common law property concepts borrowed from England. Justice Holmes once said: "The law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke."⁶ As the law of property developed in individual states, progressive legislatures found common law inadequate for the needs of its citizens. The common law of property was gradually supplemented by various statutes. In almost every state, there is a statutory summary eviction procedure.⁷ This statutory mechanism allows the landlord to recover possession of leased premises in cases specified by statute.⁸ The proceedings are possessory in nature and usually involve only the right to possess.⁹ Typically, statutes permit a landlord to recover possession when a tenant illegally holds over, fails to pay rent or taxes, or uses the property for some unlawful purpose.¹⁰ The proceeding provides only minimal due process. Notice and an opportunity to appear at the proceeding are the usual limits.¹¹ Generally, an appeal to a court of general jurisdiction is permitted.

There is nothing inherently evil about summary eviction proceedings. They serve a valid public purpose; the statutes facilitate the fair use and availability of rental property for the community. Landlords ought to have a forum where they can vindicate their property rights without undue delay and incurring excessive legal costs.¹² Imposing

⁵For an excellent discussion of Roman landlord tenant law, see B. Frier, *Landlords and Tenants in Imperial Rome* (1980).

⁶*Gardiner v. Wm. S. Butler and Co.*, 245 U.S. 603 (1918).

⁷Those states listed in Appendix A have some form of summary eviction process. Most states not listed also have some form of summary eviction proceeding.

⁸2A C.J.S. *Landlord and Tenant* § 752 (1968).

⁹*Id.* at § 755.

¹⁰*Id.* at § 758.

¹¹*Id.* at § 732.

¹²See generally, R. Posner, *Economic Analysis of Law* § 13.4 (2d ed. 1977).

excessive burdens on landlords in the name of public policy can have the result it has had in New York City where the Mayor has become the landlord for thousands of abandoned properties.

The summary eviction process, however, has always had the potential for abuse. In the recent past, courts had never questioned a landlord's motive for evicting a tenant. As in the common law, a landlord could terminate a tenancy at will for any reason or for no reason at all.¹³ All the landlord needed to prove was that the tenant had been given the prescribed notice to quit.¹⁴ The relevant inquiry was whether the court's jurisdiction under its enabling statute had been properly invoked. In most cases, this amounted to the question of whether the tenant was in arrears in rent or was illegally holding over. Since most enabling statutes did not provide for affirmative defenses, a tenant could not successfully raise the defense of retaliatory eviction.

III. RETALIATORY EVICTION AS A COMMON LAW AND A CONSTITUTIONAL DEFENSE

By 1968, only a handful of states had enacted statutes protecting tenants from retaliatory eviction.¹⁵ It would be four years before the National Conference on Uniform State Laws adopted the Uniform Residential Landlord and Tenant Act.¹⁶ It was in this setting that the landmark case of *Edwards v. Habib* was decided.¹⁷ Yvonne Edwards held a month-to-month tenancy in housing property belonging to Nathan Habib. Edwards complained to a government inspector of sanitary code violations. A subsequent inspection resulted in the discovery of more than forty code violations. Habib then gave Edwards 30 days notice to vacate and obtained a default judgement for possession of the premises.¹⁸ This was later set aside and Edwards was allowed to raise the defense of retaliatory eviction. At the time, only two statutes applied to the case; one required thirty days notice to terminate a month-to-month tenancy,¹⁹ the other provided for

¹³At common law, month-to-month tenancies could be terminated with thirty days notice. Most states have continued this requirement. 50 Am. Jur. 2d *Landlord and Tenant* § 1207 (1970).

¹⁴For a discussion of the development of the common law in the area of evictions, see Comment, *Retaliatory Evictions: Review and Reform*, 1 N.Y.U.L.J. 85-87 (1925).

¹⁵McElhaney, *supra* note 1, at 198.

¹⁶Uniform Residential Landlord and Tenant Act, § 5.101 (National Conference of Commissioners on Uniform State Laws 1973) [hereinafter cited as URLATA].

¹⁷397 F.2d 687 (D.C. Cir. 1968), cert. denied, 398 U.S. 1016 (1969).

¹⁸397 F.2d at 687-88.

¹⁹45 D.C. Code § 902 (1967).

summary ejection when a tenant held over after the notice period.²⁰

Edwards argued retaliatory eviction on three grounds. First, she claimed that her eviction violated the First Amendment because it interfered with her right to complain of poor sanitary conditions to governmental authorities. Since Habib was a private citizen, Edwards argued that the summary eviction proceeding by itself constituted state action in the abridgement of her First Amendment rights. Second, Edwards urged that her eviction violated her constitutionally protected right to petition the government and report violations of the law, a right inherent in the Constitution, but separate from the First Amendment. Finally, Edwards asserted that public policy prohibited her eviction in retaliation for reporting violations of the sanitary code.

In a carefully reasoned opinion by Judge Wright, the United States Court of Appeals for the District of Columbia Circuit applied two separate techniques of statutory construction to decide the case, "judicial interpretation to effectuate important public policy and the ascertainment of legislative intent."²¹ The court reasoned that allowing retaliatory evictions would defeat the congressional intent expressed in the housing and sanitary codes and would circumvent the public policy of upgrading the quality of housing in the District of Columbia.²² In effect, the court ruled that, if the primary reason for seeking an eviction is revenge, the summary forum does not have the authority to order eviction. The court addressed the constitutional issues without deciding them. The court suggested that there might be state action where summary eviction proceedings were initiated after a tenant engaged in First Amendment activity. The court also suggested that there was an inherent constitutional right to petition the government and report violations of the law.²³

One year later, the U.S. District Court for the Southern District of New York, in *Hosey v. Club Van Cortland*, held that "the 14th Amendment prohibits a state court from evicting a tenant when the overriding reason is retaliation against the tenant for an exercise of his constitutional rights."²⁴ Hosey was a week-to-week tenant who

²⁰*Id.* at § 910.

²¹*Developments in the Law: Landlord and Tenant—Eviction—Public Policy and Congressional Purpose to Ensure Decent Housing Conditions Require Construction of Summary Eviction Statute to Prohibit Eviction In Retaliation For Tenant's Reports of Housing Code Violations to Authorities*, 82 Harv. L. Rev. 932 (1969).

²²397 F.2d at 700-01.

²³*Id.* at 890-98.

²⁴*Hosey v. Club Van Cortland*, 299 F.Supp. 501, 506 (S.D.N.Y. 1969).

has resided in the Club Van Cortland for over two years. He encouraged other tenants to file complaints with the landlord and with city officials. The day after he held a meeting for tenants in his room, he was given notice that his room was being reserved for someone else the following week, presumably someone less troublesome. This was the first case to decide the issue of retaliatory eviction on constitutional grounds.

While new case law was developing in the federal system, a number of state courts approached the problem of retaliatory eviction. Initially, the state courts treated retaliatory eviction solely as an equitable defense. The published opinions expressed concern as to whether an equitable defense could be raised as a matter of procedure in a summary eviction proceeding. A New York court recognized retaliatory eviction as an equitable defense in *Portnoy v. Hill*²⁵ and held it could be raised in a summary proceeding. In *Wilkins v. Tebbets*²⁶, a Florida court in dictum suggested that equitable defenses could be raised in answer to a complaint for unlawful detainer. The court, however, never decided the issue. It dismissed the complaint after refusing to take judicial notice of a municipal housing code.

An inherent problem with retaliatory motive as an equitable defense is that the court will scrutinize the conduct of the tenant. Before a tenant can seek relief he or she must have "clean hands". In *Portnoy*, the tenant had engaged in a "rent strike" and the court refused to grant equitable relief.²⁷

After *Edwards v. Habib* was decided, state courts began deciding retaliatory eviction cases on public policy grounds. In *Alexander Hamilton Savings and Loan Ass'n. v. Whaley*, a New Jersey court held that a landlord was not entitled to evict a tenant because he signed a petition requesting city officials to inspect his building. The court reasoned that eviction would be repugnant to public policy.²⁸

The California Supreme Court addressed retaliatory actions in *Schweiger v. Superior Court of Alameda*.²⁹ Schweiger, a month-to-month tenant, demanded that his landlord make several repairs that

²⁵*Portnoy v. Hill*, 57 Misc. 2d 1097, (N.Y. Binghamton City Ct. 1968).

²⁶*Wilkins v. Tebbets*, 216 So.2d 477 (Fla. Dist. Ct. App. 1968).

²⁷57 Misc. 2d at 60.

²⁸*Alexander Hamilton Savings and Loan Ass'n v. Whaley*, 257 A.2d 7 (N.J. Dist. Ct. 1969).

²⁹*Schweiger v. Superior Court of Alameda*, 476 P.2d 97, (Cal. 1970).

were required by the California Civil Code. The landlord responded by raising Schweiger's rent by 75 percent. Schweiger continued to pay the original rent, less a deduction for the costs of repairs, which he made after the landlord failed to respond. The landlord made a demand for the additional rent and commenced an action in unlawful detainer. Citing *Edwards*, the California Supreme Court held that retaliatory motive could be raised as a defense to an eviction proceeding. The court went beyond *Edwards* by looking to the cause of the rent increase and by granting relief where a court of equity would not.³⁰

Two other state cases worthy of note are *Clore v. Friedman*³¹ and *Dickhut v. Norton*.³² In *Clore*, the Illinois Supreme Court, citing a state statute, recognized retaliatory eviction as a defense to forcible entry and detainer. A group of tenants had begun paying rent to the Peoria Director of the Department of Environmental Development when the landlord failed to correct building code violations. Under a presumption contained in the Peoria Housing Code, any eviction proceeding within six months of the tenant's reporting of a housing code violation was deemed retaliatory, provided the tenant's rent was not more than thirty days delinquent. *Clore* did not, however, expand existing case law because it relied on the Peoria Housing Code for the presumption of retaliation.³³ In *Dickhut*, the Wisconsin Supreme Court held that a month-to-month tenant who reported housing code violations to the enforcement authorities could raise retaliatory eviction as a defense when the landlord sought to terminate his tenancy. However, the court also held that the tenant would have to show that a condition existed which violated the housing code, that the landlord knew the tenant reported the condition, and that the landlord sought to terminate the tenancy solely for the purpose of retaliation.

After these decisions were rendered, the legislatures of California, New York, New Jersey, and Wisconsin passed comprehensive statutes which address retaliatory action by a landlord. Florida and Illinois have not.³⁴

³⁰One of the early legal critics of retaliatory eviction was Myron Moskowitz. One of the attorneys representing petitioner Schweiger (tenant) before the California Supreme Court, he wrote *Retaliatory Eviction—A New Doctrine in California*, 46 Cal. St. B.J. 23 (1971).

³¹*Clore v. Friedman*, 219 N.E. 2d 18 (Ill. 1974).

³²*Dickhut v. Norton*, 178 N.W. 2d 297 (Wis. 1970).

³³See Note, *Retaliatory Eviction: The Unsolved Problem—Clore v. Friedman*, 25 De Paul L. Rev. 522.

³⁴For a summary of provisions and statute citation see Appendices A and B.

Common law or constitutional defenses are inadequate by themselves; they only address one part of the problem. The issue of retaliatory motive only arises when the landlord begins eviction proceedings. A tenant has no forum or remedy when the landlord diminishes services, raises rents in retaliation, or refuses to renew a lease. The only action a tenant can take is to hold over and hope that the landlord will attempt to evict. If a tenant pursues this course, he or she cannot be assured that the court will consider the motives of the landlord or that he or she will recover legal expenses.³⁵ Even if motives are placed in issue, a tenant may find it impossible to prove the intent of the landlord if the court does not allow a shifting of the burden of proof. A tenant can show that he or she engaged in some lawful conduct or activity, such as reporting a housing code violation or participating in a tenants' organization, but will be at a disadvantage to prove what was in the landlord's mind at the time of notice of eviction.

IV. STATUTORY CONDUCT BY LANDLORDS OF RETALIATORY PROSCRIPTION

In 1972, the National Conference of Commissioners on Uniform State Laws met to adopt the Uniform Residential Landlord and Tenant Act.³⁶ Until that time, only eleven states had statutes recognizing retaliatory eviction as a defense. Only five states had statutes protecting tenants from eviction for organizing or joining a tenants' organization or similar union.³⁷ The protection provided varied from state to state. There was no uniformity among the states concerning the conduct of the tenant which should trigger special protection or what retaliatory conduct by the landlord would be proscribed. Commentators and some of the court opinions discussed above seemed to conclude that there were three kinds of activities that should receive special protection: asking a landlord to make necessary repairs, reporting violations of health, safety, or housing codes to government agencies, and organizing or joining a tenants' organization.³⁸ It

³⁵ Frequently tenants do not pursue their rights at summary eviction proceedings. Yvonne Edwards, the tenant in the landmark case of *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969), had a default judgment entered against her in the summary proceedings.

³⁶ Comment, *URLATA* § 5.101, California, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and Rhode Island have recognized retaliatory eviction as a defense. Maine, Massachusetts, New Jersey, Michigan, and Rhode Island protect tenants from eviction for organizing or belonging to a tenants' organization. Citations to relevant statutes are listed in Appendix B.

³⁷ See Appendix C.

³⁸ See notes 1, 4, 29, 30 *supra*. See also Comment, *Retaliatory Eviction: A Study of Existing Law and Proposed Model Code*, 11 Wm. & Mary L. Rev. 537 (1968).

was also generally agreed that the tenant should not only be protected from retaliatory eviction, but that he or she should also be protected from retaliatory rent increases, reduction in services by the landlord, and a landlord's refusal to renew a lease or continue a tenancy at will.

From the landlord's perspective, there was concern that the tenants would use these defenses as a method of avoiding rental payments. With the widespread adoption of rent control laws in urban areas, landlords were concerned with the legal costs associated with the proposed legislation and with the economic costs of holdover tenants.³⁹ Increased property taxes and limits on rent increases often left landlords in a difficult financial position.

After the adoption of the Uniform Landlord and Tenant Relations Act (URLATA), twenty-seven states either modified existing statutes or enacted new statutes which adopted substantial portions of the Act. These states protect tenants from retaliation where the tenant has reported a housing code violation to a government agency.⁴⁰ In addition, Pennsylvania protects tenants who report a reduction or termination of essential utilities.⁴¹ Twenty-five states protect tenants who report these conditions to their landlord. Only nineteen states give protection to tenants who organize or join tenants' organizations. Seventeen states award attorneys' fees or some form of damages. Fifteen states have created statutory presumptions. Typically, if a tenant proves that he or she has reported a code violation or has participated in a tenants' organization prior to initiation of the summary proceeding by the landlord, the burden of proof shifts to the landlord. The landlord must show some legitimate reason for the attempted ouster. This presumption lasts for a period of three to twelve months. Most states also require the tenant to show that rent is not in arrears at the time the tenant had received notice to quit.⁴²

A few states have provisions not contemplated by the Commissioners of the URLATA. California only allows its tenants to invoke the provisions of its retaliatory eviction statute once in a twelve-month period. Several states extend the protection to include retaliatory refusal to renew a lease. Most of the fifteen states with a statutory presumption prohibit retaliatory termination of a month-to-month

³⁹See dissenting opinion by Judge Hansen in *Dickhut v. Norton*, 173 N.W.2d 297, 302-06 (Wis. 1970) (Hansen, J., dissenting).

⁴⁰Appendices A and B.

⁴¹See note 3 *supra*.

⁴²Appendices A and B.

tenancy during the presumption period. Four states also protect tenants from any material alteration of the lease.⁴³

Of the fifty states, New York and Massachusetts provide tenants with the greatest degree of protection from retaliatory practices. California, Connecticut, Iowa, Kentucky, Michigan, Montana, New Hampshire, Ohio, and Washington rank in the next tier of states by offering substantial protection.⁴⁴

V. CONCLUSIONS

The defense of retaliatory eviction is now well established in American jurisprudence. Most retaliatory conduct by a landlord involving the legal process is closely scrutinized. While only twenty-nine states have recognized the defense in statutes or published opinions, no state has rejected the defense since *Edwards v. Habib* was decided in 1968. Whether one considers this a trend or settled law, the result is the same. Retaliatory eviction or retaliatory conduct by a landlord will not be tolerated by our legal system.

APPENDIX A

State Statutes Addressing Retaliatory Eviction⁴⁵

CL = Complaint to Landlord
CG = Complaint to Government Agency
JTO = Joining Tenant Organization
PRE = Protection from Retaliatory Eviction
PRI = Protection from Rent Increases
PSD = Protection from Service Decreases
PAL = Protection from Alteration of Lease
AF = Attorney Fees Awarded if Tenant Prevails
(xx) = Statutory Period of Presumption (months)
MISC = Other Provisions

⁴³*Id.*

⁴⁴*Id.*

⁴⁵Statutory information in Appendices A and B is current through January 1983. Format for chart adopted from Comment, *Retaliatory Eviction: The Unsolved Problem*, 25 De Paul L. Rev. 522, 532 (1972).

State	CL	CG	JTO	PRE	PRI	PSD	PAL	AFA (xx)	MISC
Alaska	x	x	x	x	x	x		x	
Cal.	x	x	x	x	x	x		x	6 a,b
Conn.	x	x	x	x	x	x			6
Del.	x	x		x	x	x			3 c
Hawaii	x	x		x	x	x		x	
Ill.		x		x					
Iowa	x	x	x	x	x	x		x	12
Ky.	x	x	x	x	x	x			12
Maine	x	x	x	x					6
Mass.	x	x	x	x	x	x	x	x	6 d
Md.	x	x	x	x	x	x		x	
Mich.	x	x	x	x	x	x			3
Minn.	x	x		x					3
Mont.	x	x	x	x	x	x		x	6
Neb.	x	x	x	x	x	x			
Nev.	x	x	x	x	x	x			e,f
N.H.	x	x	x	x		x		x	3 g
N.J.	x	x	x	x	x		x		h
N.M.		x	x	x	x	x		x	
N.Y.	x	x	x	x	x	x	x	x	6 i
Ohio	x	x	x	x	x	x		x	
R.I.	x	x		x					j
Tenn.				x		x		x	k
Texas	x	x		x	x	x			6 l
Va.	x	x	x	x	x	x		x	
Wash.	x	x		x	x	x	x	x	3
Wis.	x	x		x	x	x			m
URLATA	x	x	x	x	x	x		x	12 n

- a. (Cal.) Tenant entitled to punitive damages for each retaliatory act.
- b. (Cal.) Tenant may invoke provisions of act only once in a twelve month period.
- c. (Conn.) If actual ouster occurs, tenant may recover the greater of three months' rent or treble actual damages.
- d. (Mass.) Tenant entitled to punitive damages, the greater of actual damages or one month's rent.
- e. (Nev.) Tenant is also protected against a retaliatory refusal to renew a tenancy.
- f. (Nev.) Tenant entitled to actual damages.
- g. (N.H.) Tenant entitled to the greater of \$25 per day or double actual damages for landlord's termination of essential services or for denial of access to property.
- h. (N.J.) There is a rebuttable presumption of retaliatory motive whenever a landlord files a notice to quit or alters the terms of a lease after a tenant has complained to the landlord, a government agency or has participated in a tenants' organization. The statute does not specify a time limit for the presumption.
- i. (N.Y.) Tenant is also protected against a retaliatory refusal to renew lease for a period of one year from normal termination of tenancy.
- j. (R.I.) Tenant is protected against retaliatory eviction for any other justified lawful act.
- k. (Tenn.) Statute does not specifically mention retaliatory eviction but does prohibit unlawful ouster or exclusion.
- l. (Tex.) Limited to conditions which materially affect the physical health or safety of tenant. A chronic complaint without good cause would not be protected by statute.
- m. (Wis.) Tenant is protected against a retaliatory refusal to renew lease.
- n. Uniform Residential Landlord and Tenant Act (URLATA). Tenant entitled to punitive damages, the greater of three months rent or treble actual damages.

APPENDIX B

Retaliatory Eviction Statutes

- Alaska Stat. sec. 34.03.310 (1962 & Supp. 1982)
 Cal. Civil Code secs. 1940-1949 (West 1954 & Supp. 1982)
 Conn. Gen. Stat. Ann. secs. 47a-20, -33 (West 1978)
 Del. Code Ann. tit. 25, sec. 5516 (1975)
 Hawaii Rev. Stat. sec. 521-74 (1976 & Supp. 1981)
 Ill. Ann. Stat. ch. 80, sec. 71 (Smith-Hurd 1966)
 Iowa Code Ann. sec. 562A.36 (West 1950 & Supp. 1982)
 Ky. Rev. Stat. Ann. sec. 383.705 (1972 & Supp. 1982)
 Me. Rev. Stat. Ann. tit. 14, sec. 6001 (1980 & Supp. 1982)
 Md. Real Prop Code Ann. sec. 8-208.1 (1974)
 Mass. Gen. Laws Ann. ch. 186, sec. 18 (1977 & Supp. 1982)
 Mich. Comp. Laws Ann. sec. 600.5720 (1968 & Supp. 1982)
 Minn. Stat. Ann. sec. 566.03 (1947 & Supp. 1983)
 Mont. Code Ann. secs. 70-24-431, -442 (1981)
 Neb. Rev. Stat. sec. 76-1439 (1973 & Supp. 1981)
 Nev. Rev. Stat. secs. 118A.350, -510 (1979)
 N.H. Rev. Stat. Ann. secs. 540:13-a to 13-b, 540-A:4 (1974 & Supp. 1981)
 N.M. Stat. Ann. secs. 47-8-29, -39 (1982)
 N.J. Stat. Ann. secs. 2A:42-10.10 to -10.12 (West 1952 & Supp. 1983)
 N.Y. Real Prop. Law secs. 223-b, 234 (McKinney 1968 & Supp. 1982)
 N.C. Gen. Stat. secs. 47-37.1(a) to -37.2(b) (1982)
 Ohio Rev. Code Ann. sec. 5321.02 (Page 1981)
 R.I. Gen. Laws sec. 34-20-10 (1970)
 Tenn. Code Ann. sec. 66-28-501 to -51 (1982)
 Va. Code sec. 55-248.25, -248.26, -248.39 (1981 & Supp. 1982)
 Wash. Rev. Code Ann. secs. 59.18.240 to .18.250 (1961 & Supp. 1982)
 Wis. Stat. Ann. sec. 704.17 (1981 & Supp. 1982)
 Uniform Residential Landlord and Tenant Act sec. 5.101 (Proposed Official Draft 1972)

APPENDIX C

Uniform Residential Landlord and Tenant Act

ARTICLE V

Retaliatory Conduct

SECTION 5.101 Retaliatory Conduct Prohibited

- (a) Except as provided in this section, a landlord may not retaliate

by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after:

- (1) the tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health and safety; or
- (2) the tenant has complained to the landlord of a violation under Section 2.104; or
- (3) the tenant has organized or become a member of a tenant's union or similar organization.

(b) If the landlord acts in violation of subsection (a), the tenant is entitled to the remedies provided in Section 4.107 and has a defense in any retaliatory action against him for possession. In an action by or against the tenant, evidence of a complaint within [1] year before the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation. The presumption does not arise if the tenant made the complaint after notice of a proposed rent increase or diminution of services. "Presumption" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.

(c) Notwithstanding subsections (a) and (b), a landlord may bring an action for possession if:

- (1) the violation of the applicable building or housing code was caused primarily by lack of reasonable care by the tenant, a member of his family, or any other person on the premises with his consent; or
- (2) the tenant is in default in rent; or
- (3) compliance with applicable building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of the use of the dwelling unit.

(d) The maintenance of an action under subsection (c) does not release the landlord from liability under Section 4.101(b).

[If the tenant prevails, Section 4.107 cited above provides for attorney's fees and the greater of treble actual damages or three months rent.]

SECTION IV
SOLDIERS' AND SAILORS' CIVIL RELIEF ACT
TOLLING OF STATUTES OF LIMITATIONS
UNDER SECTION 205 OF THE
SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

by Major Thomas R. Folk*

I. INTRODUCTION

Consider the following two hypotheticals:

1. *Colonel Smith is a career Army officer who retired in 1982. In 1952, while stationed at Fort Belvoir, Virginia, but off-duty, he negligently injured John Jones, a civilian. Throughout his career, Colonel Smith spent twenty years at Fort Belvoir. In 1983, Jones sues Colonel Smith in Virginia state court for the 1952 injury. Colonel Smith's military service had no adverse effect on Jones' ability to file suit soon after the incident. Would Jones' suit be barred by Virginia's statute of limitations for personal injury actions?*¹

2. *Assume that in 1951, before Colonel Smith entered the military, a federal official acting within the scope of his duties negligently injured him. Colonel Smith's military service had no effect on his ability to file a claim for his injuries. If in 1983 Colonel Smith makes a claim under the Federal Tort Claims Act,² may the government reject it as untimely?*³

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¹Va. Code § 8.01-243 (1950) (two year statute of limitations).

²28 U.S.C. §§ 2671-80 (1976).

³Under the Federal Tort Claims Act, a tort claim against the United States is forever barred unless presented in writing to the appropriate federal agency within two years of its accrual. 28 U.S.C. § 2401(b) (1976).

Common sense dictates rejection of both of these claims as stale. Yet the prevailing interpretation⁴ of section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940⁵ requires tolling limitations periods for civil proceedings such as these during any period of military service. Under this interpretation, section 205 requires acceptance of both of these claims as timely.

The purpose of this article is to evaluate the prevailing interpretation of section 205 in terms of its consistency with congressional intent and with the policies the section should promote. In doing this, the article will also examine alternative approaches that courts have taken in applying section 205 and potential problems that automatic application of the section poses for military administrative proceedings.

II. THE STATUTORY PROVISION AND CONGRESSIONAL INTENT

Section 205 provides in part:

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of act or the right or privilege to institute such action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service. . . .⁶

Basically, this provision tolls any limitations periods, including those for administrative proceedings, during a person's term of military service. The section's tolling provision applies to actions brought by or against a service member or former service member.⁷ Because

⁴See generally U.S. Dep't of Army, Pamphlet No. 27-166, Soldiers' and Sailors' Civil Relief Act, para. 3-10 (1981) [hereinafter cited as DA Pam 27-166]; Bagley, *The Soldiers' and Sailors' Civil Relief Act - A Survey*, 45 Mil. L. Rev. 1, 18 (1969); Annot., 36 A.L.R. Fed. 420, 435-38 (1978).

⁵50 U.S.C. app. § 525 (1976).

⁶*Id.*

⁷See *id.* ("by or against any person in military service"). See also 55 Cong. Rec 7788 (1918) (statements of Rep. Fess and Rep. Webb); DA Pam 27-166 at 3-10; Bagley, *supra* note 4; Annot., 36 A.L.R. Fed. 420, 448-50 (1978).

of the section's abroad, mandatory language and lack of any qualification on its applicability, most courts and commentators view its tolling provision as nondiscretionary.⁸ Thus, most courts have not required the same showing of material effect by military service on the ability to conduct proceedings as required for other relief provisions of the Act.⁹

Yet, this prevailing interpretation is contrary to congressional intent. As the following examination of the Act's legislative history will indicate, Congress never envisioned that section 205 would toll limitations periods for prolonged periods of time when military service does not interfere with the ability to prosecute claims.

The present Act is based on the Soldiers' and Sailors' Civil Relief Act of 1918,¹⁰ which in turn resulted from experience during the American Civil War.¹¹ During the Civil War, almost every state enacted a law placing a moratorium on civil actions against service members.¹² Some of these stay laws limited their protection to while "in service and absent from the county"¹³ or "during absence from this state and while engaged in military and naval service."¹⁴ Others were broader, applying while "in service;"¹⁵ however, all ended after discharge from the service or shortly after the end of the war.¹⁶

In 1917, the War Department presented to Congress a legislative package intended to narrow and more carefully tailor the Civil War stay laws.¹⁷ Congress enacted this package as the Soldiers' and Sailors' Civil Relief Act of 1918. The package included the direct predecessor of section 205, a provision tolling statutes of limitations during periods of military service.¹⁸

⁸See DA Pam 27-166, para. 3-10; Bagley, *supra* note 4; Annot., 36 A.L.R. Fed. 420, 435-36 (1978).

⁹*Id.* Other provisions of the Act, such as 50 U.S.C. App. § 521 (1976), provide for stays of proceedings when military service materially affects their conduct.

¹⁰Act of Mar. 8, 1918, ch. 20, 40 Stat. 440 (1918).

¹¹See *Hearings and Memoranda Before the Subcomm. of the Comm. on the Judiciary, United States Senate, on S. 2859 and H.R. 6361, 65th Cong., 1st and 2d Sess. (1918)* [hereinafter cited as *1917-1918 Hearings*].

¹²See *id.* at 55-70. Congress also enacted a tolling provision to deal with the problem of inability to serve persons with process during the Civil War due to the war's interruption of judicial proceedings. See Act of June 11, 1864, ch. 118, 13 Stat. 123 (1864).

¹³*1917-1918 Hearings, supra* note 11, at 59 (Kentucky stay law).

¹⁴*Id.* at 55 (Connecticut stay law).

¹⁵*Id.* at 55-70.

¹⁶*Id.*

¹⁷See *Memoranda Before the Subcomm. of the Comm. on the Judiciary, United States Senate, on S. 2859, 65th Cong., 1st Sess. 29 (1917)* [hereinafter cited as *1917 Memoranda*]. See also 55 Cong. Rec. 7787 (1917) (statement of Rep. Webb).

¹⁸See *1917-1918 Hearings, supra* note 11, at 14, 30; 44 Cong. Rec. 7731 (1917).

Four aspects of the 1918 Act's legislative history make it clear that Congress intended that Act's tolling provision to be a limited relief measure tailored specifically to the problems created for conscripts sent overseas to fight. First, the tolling provision copied the aspect of the Civil War stay laws which made the Act of limited duration.¹⁹ Second, War Department representations and congressional debates stressed that the 1918 Act's provisions were more narrowly tailored than the Civil War stay laws²⁰ and essentially gave authority to the courts to deal flexibly with the problems created by the draft and the war.²¹ Third, in the Act itself and in all discussion of it, the one predominant theme was that the legislation was to protect soldiers and sailors while absent for duty in the war.²² Fourth, both Congress and the War Department indicated that they wanted the Act to end after the war so "that the advantages of the act shall not perchance run indefinitely in favor of a soldier who remains in the Regular Army after the termination of the war."²³

The present Act, passed by Congress in 1940, amended in 1942, and extended in 1948, is basically the same as the 1918 Act.²⁴ Several aspects of the present Act's legislative history indicate a congressional intent that the tolling provision in section 205 was to be a limited measure which directly addressed the problems of mobilization and imminent war. First, since Congress essentially reenacted the 1918 Act, its intent presumably was the same as for that Act. Second, the Act's statement of purpose²⁵ and its legislative history

¹⁹See *1917-1918 Hearings*, *supra* note 11, at 30, 55-70, 156. See also 55 Cong. Rec. 7789 (1917).

²⁰See *1917 Memoranda*, *supra* note 17, at 29; 55 Cong. Rec. 7787 (1917) (statement of Rep. Webb).

²¹See 55 Cong. Rec. 7787 (1917) ("Instead of the bill we are now considering being arbitrary, inelastic, inflexible, the discretion as to dealing out even handed justice . . . rests largely, and in some cases entirely, in the breast of the judge who tries the case.") (Statement of Rep. Webb); *id.* at 7788 (*passim*); *id.* at 7797 ("Thus it will be seen that all of these provisions seek only to preserve rights that might otherwise be impaired by reason of calling men from their several walks of life to defend their Nation's honor on the field of battle") (Statement of Rep. Caraway).

²²See *Soldiers' and Sailors' Civil Relief Act of 1918* § 101, 40 Stat. 440 (1918); *1917-1918 Hearings*, *supra* note 11, at 73, 77, 79; *1917 Memoranda*, *supra* note 17, at 29 ("The bill is intended to protect soldiers and sailors while absent for duty in the present war"); 55 Cong. Rec. 7789, 7794 (1917) (*passim*); *id.* at 7795 ("[T]he main thought running through all its provisions is that its sole purpose is to suspend proceedings and transactions during the absence of the soldier or sailor, so that he may have an opportunity when he returns to be heard and to take measures to protect his interests") (Statements of Reps. Steel, Magee, and Caraway).

²³*1917-1918 Hearings*, *supra* note 11, at 15; 55 Cong. Rec. 7789 (1917).

²⁴See S. Rep. No. 2109, 76th Cong., 3d Sess. 4 (1940); H.R. Rep. No. 3001, 76th Cong., 3d Sess. 3, 5 (1940); 86 Cong. Rec. 12,837 (1940).

²⁵*Soldiers' and Sailors' Civil Relief Act of 1940*, § 101, 54 Stat. 1178 (1940) (codified at 50 U.S.C. App. § 510 (1976)).

indicate that Congress intended "temporary suspension. . . of proceedings. . . which may prejudice the civil rights"²⁶ of persons "while absent on military duty."²⁷ Third, as originally enacted, the 1940 Act was to be of limited duration, expiring on May 15, 1945, or, if the United States were then engaged in war, six months after the war ended.²⁸ Fourth, Congress originally limited the protections of the Act to those conscripted or in mobilized National Guard units.²⁹ Congress included other persons, such as Regular Army members, under the protection of the Act because the War Department objected that there was no valid reason to discriminate against these service members during the period of emergency that the Act covered.³⁰

Examination of congressional consideration of the 1942 amendments to the Act gives further support to the view that Congress intended [section 205] to provide temporary relief to service members absent from home performing military duties. The congressional debates contain repeated references to the purpose of the Act being to protect the civil rights of conscripts absent from home to fight in the war.³¹

The source of today's problems in interpreting section 205 stem from the 1940 Act's extension in 1948 until "repealed or otherwise terminated by a subsequent Act of Congress."³² Congress made this extension in section 14 of the Universal Military Training and Service Act of 1948.³³ The only reference to the extension in this Act's legislative history is the cryptic statement that "the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 shall be applicable to persons serving in the armed forces pursuant to this act, until such time as that act shall be repealed or terminated by the Congress."³⁴

²⁶*Id.*

²⁷S. Rep. No. 2109, 76th Cong., 3d Sess. 4 (1940); H.R. Rep. No. 3001, 76th Cong., 3d Sess. 5 (1940).

²⁸Soldiers' and Sailors' Civil Relief Act of 1940, § 604, 54 Stat. 1178 (1940).

²⁹See H.R. Rep. No. 3001, 76th Cong., 3d Sess. 4 (1940).

³⁰See S. Rep. No. 2109, 76th Cong., 3d Sess. 1-2, 5-6 (1940).

³¹See 94 Cong. Rec. 5363-64 (statement of Rep. Sparkman); *id.* at 5365-66 (statement of Rep. Andrews); *id.* at 5367 (passim); *id.* at 5368 ("[I]t is necessary to protect the rights of those in our armed forces who are not in a position to act in their own behalf. . . . It will prove of great value in maintaining the morale of our soldiers and sailors while away from their homes and their businesses") (statement of Rep. Bolton); *id.* (statement of Rep. Brooks).

³²50 U.S.C. App. § 464 (1976).

³³Ch. 624, Pub. L. No. 758, 62 Stat. 604, 623 (1948).

³⁴S. Rep. No. 1268, 80th Cong., 2d Sess. 21 (1948) (emphasis added).

Thus, to the extent that Congress in 1948 considered how an indefinite extension of the Soldiers' and Sailors' Civil Relief Act would operate, its concerns were focused, as in 1917, 1940, and 1942, on the problems of the draftee temporarily uprooted from home to serve in the military.

III. COMPETING POLICY CONSIDERATIONS

As its legislative history indicates, section 205 of the Act attempts to accommodate two competing interests: that of achieving finality in legal affairs and that of protecting the rights of parties to claims involving service members.

Time limitations on legal claims further several important societal interests. These interests include encouragement of diligence in asserting claims, adjudication of claims while evidence is still fresh, in existence, and easily ascertainable, prevention of fraudulent or stale claims, protection of potential defendants from surprise and inconvenience, avoidance of accumulation of continuing liability, and the promotion of security and stability in human affairs.³⁵ Any provision that tolls a limitations period necessarily undercuts these interests to some degree.

Yet, it has been argued that, when a free country asks its citizens to serve in its armed forces, it owes them the duty of ensuring they are not prejudiced by their service anymore than military necessity demands.³⁶ A tolling provision that protects a service member while absent from home or otherwise engaged in time-consuming military duties is necessary to remove unfair burdens that military service might otherwise impose. If properly tailored, the value of such a tolling provision should outweigh the cost to society resulting from less finality in legal affairs.

Nonetheless, it is difficult to justify operation of a tolling provision during extended periods of military service when the nature of service member's military duties do not significantly interfere with the ability to prosecute claims expeditiously. Such operation not only seriously undermines the interests in finality of those citizens and government agencies against whom service members assert stale

³⁵1 Am. Jur. 2d *Limitations of Actions* §§ 17-18 (1970).

³⁶*Cf.* 55 Cong. Rec. 7794 (1918) ("To equalize the burden of war we should do everything in our power to protect the property, interests, and all the civil rights of our soldiers who are at the front. . . . We can not do too much for those who constitute our land and naval forces") (statement of Rep. Morgan regarding 1918 Act).

claims, but also of the service member who is a defendant in a stale action. At the same time, it does not add appreciably to the protections offered by the Soldiers' and Sailors' Civil Relief Act.

IV. APPROACHES TAKEN BY THE COURTS

As noted above, most courts have viewed the tolling provision of section 205 as nondiscretionary and as not requiring any showing of material effect by military service on the ability to institute proceedings.³⁷ These courts have applied section 205 automatically to toll any amount of a party's military service during the limitations period.³⁸

A few courts, however, have not applied section 205 as strictly. Their approaches fall into three categories: finding the section inapplicable to career service members, implying a material effect requirement, or applying the doctrine of laches to stale claims.

A. SECTION INAPPLICABLE TO CAREER SERVICE MEMBERS

One notable case, *Pannell v. Continental Can Co.*,³⁹ found section 205 inapplicable to career service members. *Pannell* involved a suit filed in 1974 over a dispute to title in land sold from 1923 to 1932 for nonpayment of taxes. Plaintiffs had a remainder interest in the land that vested in 1954. One of the plaintiffs, Colonel Pannell, was a career Army officer from 1942 to 1973. The defendant, Continental Can Company, claimed title to the land by prescription. Colonel Pannell contended that section 205 tolled the prescription period while he was in the military.

The U.S. Court of Appeals for the Fifth Circuit refused to apply section 205 "to a career serviceman like Colonel Pannell."⁴⁰ The court noted that Colonel Pannell's service was largely voluntary, that he had spent half of his career in the United States, and that he was not "shown to have been handicapped by his military service from asserting any claim."⁴¹

The court may have been correct in refusing to toll the limitations period in Colonel Pannell's case, given congressional intent and policies supporting section 205. Still, the court was erroneous in holding that section 205 was inapplicable to career service members. Career service members fall within the definition of those covered by its

³⁷See note 9 and accompanying text *supra*.

³⁸*Id.*

³⁹554 F.2d 216 (5th Cir. 1977).

⁴⁰*Id.* at 225.

⁴¹*Id.*

protections in section 101 of the Act.⁴² Further, the Act's legislative history indicates that Congress, at the insistence of the War Department, specifically intended to include career service members under the Act's protections.⁴³ The *Pannell* court would have been on much firmer ground had it simply held that the tolling provision did not apply to Colonel Pannell because he did not show that his military service had interfered with his ability to contest title to the land earlier.

B. REQUIREMENT OF MATERIAL EFFECT

A few cases have required that, for military service to toll a limitations period under section 205, the claimant must show that the period of military service materially affected his or her ability to proceed in the action. Several courts have applied this rationale in real estate cases similar to *Pannell*.⁴⁴ Courts have applied this doctrine in other types of cases where there appears to be a particularly strong need for finality, such as probate proceedings,⁴⁵ adoption cases,⁴⁶ and divorce cases when calculating the period for desertion.⁴⁷ Although these cases appear contrary to the Act's language,⁴⁸ they come closest to true congressional intent and best serve the policies behind the Act.

C. APPLICATION OF LACHES

In two fairly recent cases, the Court of Claims held that section 205 automatically tolls the statute of limitations in suits against the United States⁴⁹ for the period of a person's military service, but does not summarily suspend the running of time for determining whether laches⁵⁰ applies.

⁴²50 U.S.C. App. § 511 (1976).

⁴³See note 30 and accompanying text *supra*.

⁴⁴See, e.g., *Bailey v. Varranca*, 83 N.M. 90, 488 P.2d 725 (1971); *King v. Zagorski*, 207 So.2d 61 (Fla. Dist. Ct. App. 1968). *But see* Comments, *Soldiers' and Sailors' Civil Relief Act of 1940 - Effect on Certainty of Land Titles*, 24 Mo. L. Rev. 101 (1959).

⁴⁵See *McCoy v. Atlantic Coast Lines Ry. Co.*, 229 N.C. 57, 47 S.E.2d 532 (1948); *Smith v. Fitch*, 25 Wash. 2d 619, 171 P.2d 682 (1946).

⁴⁶See *Olsen v. Davidson*, 142 Colo. 205, 340 P.2d 338 (1960).

⁴⁷See *Rebar v. Rebar*, 165 Pa. Super. 341, 67 A.2d 598 (1949).

⁴⁸In addition to the lack of qualifying language in section 205, courts that automatically apply section 205 have noted that other sections of the Act explicitly require a showing of material effect, while section 205 does not. See, e.g., *Bickford v. United States*, 656 F.2d 636 (Ct. Cl. 1981).

⁴⁹28 U.S.C. § 2501 (1976).

⁵⁰The Court of Claims has explained the general role of laches as follows:

Laches is a "fairness" doctrine by which relief is denied to one who has

The first case, *Deering v. United States*,⁵¹ involved a military pay claim by former Army Lieutenant Colonel Deering. Deering was involuntarily released from active duty as an officer in 1971 and then served in an enlisted status until retirement. Deering claimed that his 1971 involuntary release was invalid because it was based on alleged deficiencies in two officer efficiency reports received in 1966 and 1969. He filed suit in 1977, one day before the statute of limitations expired. The government raised the equitable defense of laches, and Deering countered that, under the court's interpretation of section 205 in *Sidoran v. United States*,⁵² his time in military service could not be counted as laches.

Deering overruled *Sidoran* and held that "a blanket exception to laches for active duty military personnel cannot be read into the Act."⁵³ The court noted that section 205 refers "only to statutes of limitations" and is "silent as to laches"⁵⁴ and that there was no need to protect military personnel from laches since laches "includes built-in protection for military personnel unable to prosecute their claims due to the demands of military life".⁵⁵ Finally, allowing a *per se* exemption from laches for all military personnel would undercut a line of cases holding laches available as a defense in appropriate military pay cases.⁵⁶

The second case, *Bickford v. United States*,⁵⁷ involved another military pay claim. Plaintiff Bickford, a former member of the Judge Advocate General's Corps, claimed that the Army lacked authority to deny him pay and allowances while he attended law school on excess leave. Bickford did not file suit in the Court of Claims until nine years after his claim accrued. The government argued that Bickford's claim was outside the statute of limitations;

unreasonably and inexcusably delayed in the assertion of a claim. Failure to act promptly will operate as a bar to recovery where the delay results in injury or prejudice to the adverse party.

Brundage v. United States, 205 Ct. Cl. 502, 505-06, 504 F.2d 1382, 1384 (1974). Laches is "peculiarly applicable to suits in equity." 51 Am Jur. 2d *Limitations of Actions* § 6 (1970).

⁵¹223 Ct. Cl. 342, 620 F.2d 242 (1980).

⁵²213 Ct. Cl. 110, 550 F.2d 636 (1977).

⁵³223 Ct. Cl. at 345; 620 F.2d at 245.

⁵⁴*Id.* In fact, section 205 does not refer specifically to statutes of limitations but rather to "any period... limited by any law, regulation, or order..." See 50 U.S.C. App. § 525 (1976).

⁵⁵*Id.*

⁵⁶*Id.* at 344; 620 F.2d at 244.

⁵⁷656 F.2d 636 (Ct. Cl. 1981).

however, the court reaffirmed its earlier decision in *Sherengos v. United States*⁶⁸ and held that section 205 tolled the limitations period while Bickford was in the service.

The government in *Bickford* had urged that section 205 required "a demonstration that military service has handicapped the service member's ability to bring suit."⁶⁹ To support its argument, the government pointed to portions of the legislative history of the 1918 Act that evidenced congressional intent to limit the section's applicability to "those servicemen engaged in battle or otherwise handicapped from asserting their legal claims."⁶⁰ The court rejected the government's argument as relying too much on "scattered bits of legislative history."⁶¹ In the final analysis, the court decided there was no ambiguity in the section's language "and no justification for the court to depart from the plain meaning of its words."⁶²

Deering and *Bickford*, when read together, arguably achieve congressional intent in enacting section 205 and strike an acceptable balance between the needs for finality and for protection of service members unable to prosecute claims quickly due to the demands of military service. Nonetheless, the *Bickford* decision is unfortunate because it represents a very recent interpretation of section 205 that courts may tend to follow even if unable to apply the equitable doctrine of laches. It is hoped that other courts will not automatically follow *Bickford*, but will instead conduct a closer examination of congressional intent in enacting section 205 and require a showing that military service inhibited the ability to prosecute a claim before applying the section's tolling provision.

V. ADDITIONAL PROBLEM AREAS

Automatic application of section 205 may pose significant problems in achieving finality in areas such as real property, probate, family law, and military pay cases. A far more troublesome potential problem for the military practitioner involves administrative claims by service members against the government.

Section 205 by its terms applies to administrative proceedings⁶³ and covers limitations periods imposed by law, regulation, or order,

⁶⁸214 Ct. Cl. 749 (1977).

⁶⁹656 F.2d at 639.

⁶⁰*Id.* at 640.

⁶¹*Id.*

⁶²*Id.*

⁶³The section applies to "any action or proceeding in any . . . board, bureau, commission, department, or other agency of government." 50 U.S.C. App. § 525 (1976).

either before or after passage of the Act.⁶⁴ Further, with the exception of limitations periods imposed by federal internal revenue laws,⁶⁵ the section applies to all departments and agencies of the federal government.⁶⁶

Thus, applied literally, section 205 requires automatic tolling of limitations periods during military service for any claims made to a federal department or agency. The result would be a blanket exemption of service members from any limitations periods. Under this analysis, the military departments could not deny claims by service members as untimely claims statutes such as the Military Personnel and Civilian Employees' Claims Act of 1964.⁶⁷ Similarly, the military departments could not deny untimely administrative claims correction of military records⁶⁸ or appeals of punishment under Article 15, Uniform Code of Military Justice.⁶⁹ This same result would ensue for claims under the Federal Tort Claims Act;⁷⁰ indeed, several courts have ruled that section 205 tolls the statute of limitations in this context.⁷¹

Such results could wreak havoc with the administrative process within the military departments. Unfortunately, although several arguments can be made that section 205 should not toll limitations periods in the context of administrative remedies within the mil-

⁶⁴The section applies to "any period now or hereafter to be limited by any law." *Id.*

⁶⁵See 50 U.S.C. App. § 527 (1976).

⁶⁶40 Op. Atty Gen. 97 (1941).

⁶⁷31 U.S.C. §§ 240-243 (1976).

⁶⁸See 10 U.S.C. § 1552 (1976).

⁶⁹10 U.S.C. § 815 (1976). See U.S. Dep't of Army, Reg. No. 27-10, Legal Services - Military Justice, paras. 3-29, 3-43 (1 Sept. 82) (appeal of punishment within reasonable time, request for transfer or removal of record of punishment within three years). One might argue that appeal of an Article 15 does not fall under the tolling provision of section 205 because it is a criminal rather than a civil proceeding. *Cf.* Annot., 86 A.L.R. Fed 420, 458 (1978) (section 205 inapplicable to criminal proceedings). Yet the courts have recognized proceedings more formal than those under Article 15 to be an administrative rather than a judicial criminal proceeding. *Schlesinger v. Councilman*, 420 U.S. 738 (1975) (summary court-martial not a criminal trial).

⁷⁰28 U.S.C. §§ 2671-2680 (1976).

⁷¹See, e.g., *Stephan v. United States*, 490 F. Supp. 323 (D. Conn. 1980); *Lester v. United States*, 487 F. Supp., 1033 (N.D. Tex. 1980).

itary,⁷² such tolling seems to follow from the prevailing interpretation of section 205.

VI. CONCLUSION

The prevailing interpretation of section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 is that the section automatically tolls any limitations provisions for the entire period of military service of a party to the proceeding, regardless of whether military service affected the ability to prosecute the claim expeditiously. This works to the detriment of the service member when a defendant. In all cases it unnecessarily undercuts society's interest in finality in legal affairs. This interpretation also would cause significant problems if applied to administrative proceedings within the military departments.

An examination of the legislative history of the Act shows that the prevailing interpretation of section 205 is not consistent with congressional intent. Congress enacted, reenacted, and extended the Soldiers' and Sailors' Civil Relief Act for one principal purpose—to protect the rights of service members going overseas to fight or being mobilized for a national emergency. The Act was to be a flexible means to deal temporarily with this particular problem.

It is hoped that in the future courts will be more attuned to congressional intent and the policies at stake when construing section 205. If not, the possibility of remedial legislation to change how section 205 is applied may merit serious consideration.

⁷²One might argue that some administrative remedies offered by the military departments are not an administrative "action or proceeding." This argument is weak because it requires an interpretation of the words "action or proceeding" that is contrary to their normal usage. The brief legislative history relevant to this aspect of section 205 supports the conclusion that Congress meant these words as they are commonly understood. See 94 Cong. Rec. 5368-69 (1942).

Alternatively, it might be argued that limitations periods established by later statutes, e.g., U.S.C. § 241(c) (1976) (Military Personnel and Civilian Employees Claims Act) repeal section 205 to the extent it is inconsistent with them. Yet, under ordinary canons of statutory construction, such a repeal would take place only if express or if the two statutes were totally irreconcilable. See A. Sutherland Statutory Construction §§ 23.09-10 (4th ed. 1972).

A third possible argument is that so long as the limitations period for an administrative proceeding is flexible and discretionary, it is more in the nature of laches and not tolled by section 205. Yet administrative agencies are not courts of equity and act by "law, regulation, or order." Thus, any limitations provision, whether in the nature of laches or not, would appear to fall under the plain language of section 205.

THE IMPACT OF A REQUEST FOR A STAY OF PROCEEDINGS UNDER THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

by Major Garth K. Chandler*

I. INTRODUCTION

This article will examine the circumstances under which a request for a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act section 521¹ will be considered an appearance under section 520 of the Act, whether the result fulfills the purpose of the Act, and if a service member may obtain relief under section 521 without being found to have made an appearance.

A. HISTORICAL BACKGROUND

From the earliest periods of recorded history, service members have been granted relief from civil obligations during times of war. Such relief was granted in Europe during the Thirty Years' War, the Napoleonic Wars, the War of 1870, and the First World War.² In our country, state legislatures granted relief for service members during the Civil War and the First World War.³ Most of the state actions were far-reaching in nature, preventing creditors from taking action against the service member for the duration of his service. When Congress enacted the Soldiers' and Sailors' Civil Relief Act of 1918,⁴ it rejected the harshness of the state actions by providing for the exercise of judicial discretion in preserving the delicate balance between the conflicting claims of service members and creditors to

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¹50 U.S.C. App. § 521 (1976).

²Feller, *Moratory Legislation: A Comparative Study*, 26 Harv. L. Rev. 1061 (1933).

³Dunham, *Moratory Legislation in the United States*, an address delivered before the Association of Life Insurance Council (1917).

⁴50 U.S.C. App. §§ 101-165 (1918).

social protection. The Soldiers' and Sailors' Civil Relief Act of 1940⁵ (SSCRA) was virtually a reenactment of the 1918 Act. The SSCRA did not expire by operation of law as was originally planned, but rather has been amended and continued through today.

B. PURPOSE

The purpose of the SSCRA can best be determined from section 510:

In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force.⁶

This section has been a guide for courts in interpreting the Act; wording from the section has often been found in judicial decisions.

II. THE APPLICABLE PROVISIONS

A. SECTION 520

The purpose of the SSCRA is carried out in section 520 of the Act. This provision requires that, if there is a default of any appearance by the defendant in a civil suit, the plaintiff must file with the court an affidavit showing either that the defendant is not in the military service, that the defendant is in the military service, or that the plaintiff is unable to determine whether the defendant is in the military service. If the defendant is in the service, no judgment can be entered by the court until it has appointed an attorney to represent the absent service member. The attorney is appointed to protect the rights of the service member, but has no power to waive any rights.

When a judgment has been entered against a service member, section 520 provides that judgment may be opened if the service

⁵U.S.C. App. §§ 500-548, 560-592 (1976).

⁶50 U.S.C.A. App. §§ 510 (1976).

member shows that he or she did not make any appearance in the proceedings, that the application was filed during military service or within ninety days after separation, that he or she was prejudiced by reason of military service in making a defense, and that he or she has a meritorious or legal defense to the action.

B. SECTION 521

Another section designed to carry out the purpose of the SSCRA is section 521. This provision allows the service member or someone on his or her behalf to apply for a stay at any stage of the proceeding. The court may also order the proceedings stayed on its own motion. The court must grant the stay unless it is of the opinion that the service member's ability to prosecute the action or conduct a defense is not materially affected by reason of his military service.

Separately, sections 520 and 521 provide exactly the type of protection to service members that the Act envisioned. It is only when the sections are combined that a problem arises.

III. THE PROBLEM

A. SETTING THE STAGE

Perhaps the best way to introduce the problem is by means of a hypothetical: Service member X is stationed in Germany. He receives notice that his wife has filed an action in an Ohio state court seeking a divorce. X's duties make it difficult for him to return to Ohio for the proceedings, so he applies to the court for a stay, citing section 521. The court denies the stay request. X does not return for the case and does nothing further on his own behalf. On motion by the plaintiff, the court enters a default judgment against X. Later, X returns to Ohio from Germany and seeks to open the judgment against him under the provisions of section 520. The court refuses, however, on the basis that X's application for a stay in the proceedings constituted an appearance. Since a judgment may only be opened if entered in default of any appearance by the defendant, the judgment against X stands. X is understandably perplexed.

B. WHAT IS "ANY APPEARANCE?"

To understand the result in X's case, it is necessary to examine the meaning of the phrase "any appearance" in section 520. Courts have consistently held that service members who make an appearance are

- . See, e.g., *Flagg v. Sun Invest. & Loan Corp.*, 373 P.2d 225 (Okla., 1962); *Koser v. Koser*, 148 Neb. 277, 27 N.W.2d 162 (1947); *Allain v. Allain*, 24 Ill. App. 2d 400, 164 N.E. 2d 64 (1960); *The Guarantee & Trust Co. v. Duff*, 44 N.Y.S.2d 222 (Sup. Ct. N.Y. County 1943), *rev'd on other grounds*, 267 App. Div. 444, 46 N.Y.S. 2d 441 (1st Dep't 1944).
- ⁴*Case v. Case*, 55 Ohio Op. 317, 124 N.E.2d 856 (1955).
- ⁵*Shaffer v. Shaffer*, 69 Ohio Op. 447, 42 N.E.2d 176 (1941).
- ⁶*Augustine v. Augustine*, 32 Del. Co. 211 (Pa. 1973).
- ⁷*Cloyd v. Cloyd*, 564 S.W. 2d 387 (Mo. App. 1978).
- ⁸*Martin v. Indianapolis Morris Plan Corp.*, 400 N.E.2d 1178 (Ind. App. 1980).
- ⁹*Rodney v. Rodney*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).
- ¹⁰*Raynolds v. Raynolds*, 31 Cal. 2d 580, 134 P.2d 251 (1943).
- ¹¹*Stone v. Rudolph*, 127 W. Va. 335, 32 S.E. 2d 742 (1944).
- ¹²*Russ v. Russ*, 68 Cal. App. 2d 400, 166 P.2d 767 (1945). Note, however, that mere service of process upon service member's attorney is not enough to constitute an appearance. *Allen v. Allen*, 30 Cal. 2d 433, 132 P.2d 551 (1947); nor is the acceptance of papers by the service member's attorney an appearance. *Helmbach v. Helmbach*, 53 Pa. D. & C. 350 (1944).
- ¹³*In re Cool's Estate*, 19 N.J. Misc. 236, 18 A.2d 714 (Orphan's Ct. Warren County 1941).
- ¹⁴See discussion at 5 Am. Jur.2d *Appearance* § 24 (1962). For a list of states having abolished the special-general appearance distinction, see Annot., 62 A.L.R.2d 940, 941 (1958).

Some service members have attempted to avoid these harsh consequences by characterizing their actions as special rather than general appearances. These attempts have failed in every recorded instance, primarily for two reasons. First, there is a move underway in the states to follow the federal rule and abolish the distinction between special and general appearances.¹⁵ Second, even in states that recognize the distinction, special appearances are limited to challenges against jurisdiction; neither section 520 nor section 521 is jurisdictional in nature. Denial of any of the benefits under section 520 results merely in a voidable, not a void, judgment. Uniformly, requests for an extension of time, whether in the form of a stay

as to whether there has been an appearance.¹⁷

action of the service member's conduct in making the determination of record from a previous case.¹⁶ Courts even allow consideration,¹⁴ files through counsel a military service affidavit,¹⁵ and has an answer,¹³ makes a special appearance limited to contesting jurisdiction, gives counsel a power of attorney to act in his or her behalf,¹⁰ files a general denial,¹¹ files a motion for preferred venue,¹² files an where the service member is represented by his or her own counsel,⁹ Situations in which courts have found an appearance include

the court's jurisdiction in whatever form.⁸

not entitled to the benefits of section 520.⁷ A review of the cases reveals that courts also give the words "any appearance" their literal meaning. The words embrace the concept of voluntary submission to

request under section 521 or a general request for a continuance, are considered steps in the regular presentation of the case and, therefore, general appearances.¹⁹ As general appearances, they come within the term "any appearance" as used in section 520.

The United States Supreme Court addressed the issue in the case of *Lightner v. Boone*.²⁰ In that case the service member's counsel made an appearance seeking a continuance in what he characterized as a special appearance. The Court, however, found it to be a general appearance and held there was no "default of any appearance by defendant" within the meaning of section 520. In *Blankenship v. Blankenship*,²¹ the Supreme Court of Alabama was presented with a case in which an Army colonel had retained an attorney solely to invoke the provisions of the SSCRA in his behalf. The attorney filed an affidavit in which he moved either that the complaint be quashed or that the case be continued until the colonel's discharge from the service. The lower court denied the motion. Colonel Blankenship's attorney then withdrew and made no further appearance. The court entered judgment for the plaintiff. A year later, Colonel Blankenship sought to reopen the judgment under section 520. The lower court denied the motion. On appeal, the Supreme Court of Alabama affirmed and held that the prayer to quash the complaint or continue the case fell within the term "any appearance" as used in section 520.

The Ohio Supreme Court specifically addressed the relationship between sections 520 and 521 in *Vara v. Vara*.²² In that case, Captain Vara received notice of his wife's petition for divorce. Because he did not want to leave his Infantry Officers' Advanced Course training at Fort Benning, Georgia, Captain Vara had his attorney enter a motion, supported by an affidavit, to postpone any further hearing of the matter until his discharge from the Army, citing section 521. After hearing argument, the court denied the motion. Captain Vara's attorney next made a motion to quash service. The issue then before the court was whether Captain Vara, by seeking a stay under section 521, had entered a general appearance which would prevent

¹⁹See generally 5 Am. Jur. 2d *Appearance* § 25 (1962). See also *State ex rel. Meyers v. Hodge*, 129 W. Va. 820, 42 S.E. 2d 23 (1947), in which the court stated that a request for a stay of proceedings contemplates a judicial proceeding where an appearance by all the parties is made and a judicial hearing is had; *Stone v. Rudolph*, 127 W. Va. 335, 338 32 S.E. 2d 742, 745, where the court said, "It is well settled and no authority is needed for the proposition, that an appearance in a suit or action for any purpose other than one to test the jurisdiction of the court, or the sufficiency and service of process, is a general appearance."

²⁰222 N.C. 205, 22 S.E. 2d 426, *aff'd*, 319 U.S. 561, *reh'g denied*, 320 U.S. 809 (1942).

²¹263 Ala. 297, 82 So.2d 335 (1955).

²²14 Ohio St. 2d 261, 171 N.E. 2d 384 (1961).

him from objecting to jurisdiction. The court concluded:

It must be noted that Section 520 and Section 521 are related and successive sections of the same act, and have a common object, policy, and spirit relating to one subject, and therefore must be considered and regarded as being in *pari materia*. It is a fundamental rule of statutory construction that sections in *pari materia* should be construed together as if they were a single statute. (See paragraph 2 of syllabus in *State, ex rel. Pratt v. Weygandt*, 164 Ohio St., 463.) In the light of all undisputed facts and circumstances of record herein and the statute for the case law hereinabove set forth and discussed, this court is compelled to conclude: 1. That defendant's initial appearance in this cause, by the filing of a motion for relief under Section 521 of the Act, by the filing of his affidavit in support of said motion, and by the representations and arguments of his attorney, was an appearance by defendant for a purpose other than to test the court's jurisdiction and for a purpose other than to test the sufficiency and service of process, and that such appearance by and on behalf of defendant constituted a general appearance; and 2. That, by reason of such general appearance by and on behalf of defendant, defendant's subsequent motion to quash service is not well made and should be overruled and denied.²³

It would seem, then, that the courts will interpret the words "any appearance" to literally constitute any appearance.²⁴

C. WHAT ABOUT THE PURPOSE OF THE SSCRA?

At this point a question may arise as to whether these court decisions erode the purpose of the SSCRA to protect "those who dropped

²³*Id.* at 268, 171 N.E.2d at 392.

²⁴It should be noted that there are two recorded cases in which the court chose to ignore the issue. In *Martin v. Rolfe*, 207 Ark. 1072, 184 S.W.2d 70 (1944), the Supreme Court of Arkansas, without meeting the legal obstacle presented by the language of section 520, simply refused to impose such a drastic consequence upon an absent service member. The court in *Bowery Savings Bank v. Pellegrino*, 185 Misc. 912, 58 N.Y.S.2d 771 (Sup. Ct. Queens County 1945), refused to find an appearance where the service member's request for a stay of proceedings was prepared by the legal assistance officer at the post where the service member was stationed. The court essentially disregarded the request and on its own motion appointed an attorney to represent the service member.

their affairs to answer their country's call."²⁶ The answer is that they do not.

The provisions of sections 520 and 521 were designed to protect essentially two classes of service members: those against whom default judgments are entered without their knowledge²⁶ and those who are unable, as a result of military service, to appear in court either personally or through counsel.²⁷ In this regard, it is important to note that these SSCRA sections give no substantive remedies; they provide procedural relief only. They are to be used as a shield for defense and not as a sword for the oppression of opposing parties.²⁸ Indeed, service members by their misconduct may waive their rights to a stay of proceedings under section 521.²⁹

Even under the 1918 Act,³⁰ courts did not tolerate abuse of sections 5230 and 521.³¹ This is not surprising when it is recalled that Congress rejected the rigidity of those relief provisions in effect during the Civil War in favor of a grant of judicial discretion when it passed the 1918 Act. At the time that the 1940 Act was being considered, Senator Gurney of South Dakota quoted on the Senate floor from the report of the 1918 Judiciary Committee: "The lesson of the stay laws of the Civil War teaches that an arbitrary and rigid protection against suits is as much a mistaken kindness to the soldiers as it is unnecessary. A total suspension for the period of the war of all rights against a soldier defeats its own purpose."³² This was for two primary reasons. First, experience had shown the rigid type of legislation to be unfair in many instances; the service member received little benefit, but at great hardship to the creditor. Second, service members often found, as a result of such rigid provisions, that credit was unavailable to them at a time when they needed it most. To help further eliminate these problems, Congress made an important change in the wording of section 520 when it passed the 1940 Act. This change was discussed by the New Jersey Supreme Court in the case of *In re Cool's Estate*:

Consideration of the meaning of the phrase "any appear-

²⁶*Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).

²⁸*Burgess v. Burgess*, 234 N.Y.S. 2d 87 (Sup. Ct. Westchester County 1962); *Title Guarantee & Trust Co. v. Duffy*, 44 N.Y.S. 2d 222 (Sup. Ct. N.Y. County 1943), *rev'd on other grounds*, 267 App. Div. 444, 46 N.Y.S. 2d 441 (1st Dep't 1944).

²⁷*In re Realty Associates Securities Corporation*, 53 F. Supp. 1015 (E.D.N.Y. 1944).

²⁹*Luckes v. Luckes*, 71 N.W.2d 850 (Minn. 1955); *State ex rel. Swanson v. Heatori*, 237 Iowa 564, 22 N.W.2d 815 (1946).

³⁰*Semler v. Oertwig*, 12 N.W.2d 265 (Iowa 1943).

³¹50 U.S.C.A. App. §§ 101-165 (1918).

³²*See, e.g., Dollister v. Pilkington*, 185 Iowa 815, 171 N.W. 127 (1919).

³³76 Cong. Rec. 19,364 (1940).

ance" is sometimes required. The 1918 Act used the words "an appearance" but in the 1940 Act the phrase was broadened to read "any appearance". The word "appearance" is defined in Webster's New Int. Dict. 2d Ed., 1940, as meaning in law, "the coming into court of a party summoned in action either by himself or by his attorney." Technically there are several different kinds of methods of appearance. See Am Jur, appearances, section 1, etc. A default of any appearance. "Any" applies to every individual part without distinction.³³

There are strong policy reasons for protecting service members from prejudice in legal proceedings as a result of their military service. It should not be forgotten, however, that courts are faced with strongly competing policy considerations such as support of spouses, ex-spouses, or children, and protection of legitimate creditor concerns. Increasingly, as service members gain in income, as travel becomes easier, and as our nation continues to enjoy freedom from war, courts can be expected to tip the balance against the service member when these policies are weighed.

IV. WHAT CAN BE DONE

A. OPTIONS

One commentator³⁴ has noted that the service member who has been served with civil process has basically two alternatives, to do nothing or to do something. If the service member does nothing, the plaintiff is supposed to file an affidavit with the court under section 520 before judgment can be entered. The danger here, of course, is that the plaintiff will either not file an affidavit or will file one which does not indicate military service. In such cases, a default judgment will likely be entered without the service member being represented by a court-appointed attorney. The author suggested that the solution to this problem is for the service member to do something. Specifically, upon receipt of process, he or she should inform the plaintiff's attorney by letter that he or she is in military service. This should insure that the appropriate affidavit is filed, counsel is appointed by the court, and the service member's interest are protected by his or her cooperation with the appointed counsel. There are serious problems with this approach, however.

³³19 N.J. Misc. 286, 288, 18 A.2d 714, 716-17 (1941).

³⁴Kerig, *The Absent Defendant and the Federal Soldiers' and Sailors' Civil Relief Act*, 33 N.Y.U.L. Rev. 975 (1958).

While it is true that informing the plaintiff's attorney of the service member's military status will likely result in the court appointing an attorney, it is less than clear what the effect of that appointment will be. Because of the inability of the appointed attorney to waive the service member's rights,³⁵ it has been held that the most the appointed attorney can do is move for a stay of proceedings.³⁶ Therefore, the author has urged service member to cooperate with the court-appointed attorney's expenses, a court found a general appearance by result in an appearance in behalf of the serviceman. The courts have not agreed.

In a case where the service member agreed to pay his court-appointed attorney's expenses, a court found a general appearance by the service member.³⁷ If the court-appointed attorney appears with instructions of the service member, the counsel has been held to become the service member's personal attorney.³⁸ Even where the service member instructed his court-appointed attorney not to appear, the court sustained a default judgment against the service member.³⁹ Finally, the service member cannot be assured of being able to open a default judgment under section 520 even if he or she does nothing. If the court knows that the service member is aware of the action, and plaintiff's attorney is certain to so inform the court, the court may find that the service member has waived the right to open the default judgment, the Arizona Court of Appeals so held in *LaMar v. LaMar*.⁴⁰

There may be two other options available to the service member. He or she may write or telegram the judge stating that he or she is in the service and ask that his or her rights be protected. One court has held such an action to be an informal communication to the judge, not the court, and therefore not an appearance.⁴¹ Another option may be for the service member to have a legal assistance officer prepare a document for presentation to the court. One court has regarded such action as not amounting to an appearance by the service member.⁴² There is no guarantee that other courts will follow either option, however. The service member who pursues one or the other does so at extreme risk.

³⁵50 U.S.C.A. App. § 520(3) (1976).

³⁶*In re Ehlke's Estate*, 260 Wis. 591, 28 N.W.2d 884 (1947).

³⁷*Sanders v. Sanders*, 63 Wash. 2d 709, 383 P.2d 942 (1978).

³⁸*Heimbach v. Heimbach*, 53 Pa. D. & C. 350 (1944).

³⁹*Reeh v. Reeh*, 69 Cal. App. 2d 200, 158 P.2d 751 (1945).

⁴⁰19 *Ariz. App.* 128, 505 P.2d 566 (1973).

⁴¹*Rutherford v. Ventz*, 345 Ill. App. 582, 104 N.E.2d 343 (1952).

⁴²*See, e.g., Mays v. Thorpe and Brooks, Inc.*, 143 Ga. App. 815, 240 S.E. 2d 159 (1977); *McCoy v. McSorley*, 119 Ga. App. 603, 168 S.E.2d 202 (1969); *Roark v. Roark*, 201 S.W. 2d 862 (Tex. Ct. Civ. App. 1947).

B. RECOMMENDATION

Although simplistic, it is recommended that sections 520 and 521 be used as they were intended. Where the service member learns of a default judgment after it has been entered, he or she should immediately obtain counsel and make application to have the judgment opened. If he or she had been truly unaware of the action, there should be little trouble in getting the judgment opened. His or her ultimate success will, of course, depend on the substantive merits of the case.

Where a service member receives notice of a pending action, he or she should immediately enter an appearance and defend. If military duties interfere with the ability to defend, the service member should seek every avenue to be permitted to attend to the court action. Failing this, a stay of proceedings under section 521 should be sought. The service member risks denial of the request and subsequent loss of the right to a court-appointed attorney and may even lose the right to open a default judgment as a result of this appearance. Yet, little is really lost. It is unlikely that a court-appointed attorney can protect the service member's interest alone and participation by the service member in the proceeding will place him or her in the same position as if a stay had been sought. Further, when a service member seeks a stay under section 521, the court only looks to whether the ability to participate has been materially affected by military service. If, however, the service member does nothing in the hope of preserving his or her rights" and thereby being able to open a default judgment, the court will have to be convinced not only that the ability to participate was materially affected by military service, but also that the service member has a meritorious or legal defense to the action. Such an uphill battle has little chance of success and appeals are almost never successful in this situation.

V. CONCLUSION

A request for a stay of proceedings under section 521 will almost always be considered an appearance under section 520. Although, at first blush, this result appears to erode the purpose of the SSCRA, closer examination reveals that it is in step with the intent of Congress when courts were granted discretion in dealing with SSCRA cases. A service member has the option of doing nothing or doing something. If he or she does nothing, a waiver of rights may be found. If the service member tries to retain the right to open a default judgment by acquiring and maintaining some sort of tenuous relationship with a court-appointed attorney, he or she may still lose the right and have a bad defense as well. The best approach is to defend

quickly and ably. If he or she cannot appear or defend, a stay of proceedings under section 521 should be sought. In short, sections 520 and 521 should be used as they were intended.

SECTION V
CIVIL RIGHTS
DUAL NATIONALITY AND THE UNITED
STATES CITIZEN

by Captain David S. Gordon*

I. INTRODUCTION

The dual national is frequently both an embarrassment and a problem for both himself and his governments, for he is a man of divided, and often conflicting, loyalties and duties. He owes allegiance to two governments, two legal systems, two political systems, and two cultures. When these two worlds are in conflict, the dual national is frequently caught in the middle. On the other hand, he can sometimes enjoy unique advantages in terms of freedom of movement and of economic establishment, and can sometimes benefit from the international protection of both governments. Since most nations would prefer that anyone for whom they bear responsibility also be undividedly loyal to that nation alone, the issue of the legal rights and liabilities of the dual national to his other state is frequently skirted by municipal law. This article will discuss the nature and pitfalls of dual nationality in international and American law.

II. THE DUAL NATIONAL IN
INTERNATIONAL LAW

There are three widely accepted ways of obtaining nationality: *jus solis* ("law of the place"), *jus sanguinis* ("law of blood"), and naturalization. Under *jus solis*, individuals become nationals of a state by being born in the territory of that state. Normally, children born to diplomatic personnel serving abroad do not become nationals of the state of birth, but the children of other aliens receive the nationality of the birth state. Under *jus sanguinis*, children born abroad receive the nationality or nationalities of one or both parents. "Naturalization" is a term which is usually applied to all cases in which an individual takes on a new nationality after birth. Naturalization may be the result of a specific request by the individual, or may be action of domestic law, as when children of naturalized parents are deriva-

* The author's biography is set forth below *The Children of Divorce: The Trend Toward Joint Custody*, this issue.

Masculine pronouns appearing in this article refer to both genders unless the context indicates another use.

tively naturalized, in naturalization by marriage, or in naturalization by annexation of territory.¹

A dual national located in either of his countries is usually treated by that country as if he were totally its citizen. He generally may not appeal to his other state for diplomatic intervention or protection.² If he is located in a third state, he may appeal to either or both of his states for aid. If there arises a conflict between the way the third state is required by international law to treat a national of one state and nationals of the other, *e.g.*, one state is a neutral and the other is an enemy, the effective nationality of the person must be determined. "Effective nationality," according to the International Court of Justice, is the nationality to which the person has the greatest connection. Thus, if a man is a German national, has strong economic and social ties to Germany, and has only tenuous ties with Liechtenstein, the other country which classifies him as its national, a third state could treat him as being solely a German national.³ There have been a number of attempts to reduce the numbers of dual nationals by conventions requiring a dual national to lose one or the other of his nationalities,⁴ together with various bilateral and multilateral conventions which eliminate any possible double liability for military service.⁵ In such dual national situations, neither state contests the legal conclusion that the individual is the national of the other state, but rather looks exclusively to its own domestic law in its dealings with that individual. Dual nationality is therefore not a matter of status disputed between two states, but is rather a duality of status.

III. UNITED STATES DUAL NATIONALS

There is no U.S. statutory demand that a dual national elect to hold only one of the nationalities to which he is entitled. The United States Supreme Court has, however, stated that such a statutory requirement of election would probably not be unconstitutional.⁶ Such an election requirement is favored by many international jurists who consider dual nationality to be a burden on both the states concerned and the individual.⁷ However, there are under the Immigration and Nationality Act a number of ways in which a U.S. citizen who is a

¹See generally P. Weis, *Nationality and Statelessness in International Law* 97-102 (1956).

²N. Leach, C. Oliver, & J. Sweeney, *The International Legal System* 542-47 (1973).

³Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4.

⁴*E.g.*, Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, April 12, 1930, L.N.T.S. No. 4137.

⁵Protocol Relating to Military Obligations in Certain Cases of Double Nationality, April 12, 1930, 50 Stat. 1317 (1930) T.S. No. 913 L.N.T.S. No. 4117.

⁶Rogers v. Bellef, 401 U.S. 815, 832-33 (1971).

⁷See N. Bar-Yaacov, *Dual Nationality* 78 (1961).

dual national can endanger his United States citizenship. Since the methods by which a dual national can be deprived of his United States citizenship vary according to the means by which he acquired U.S. citizenship, the discussion that follows will be divided according to the various methods of acquiring U.S. nationality.

IV. UNITED STATES BORN DUAL NATIONALS

By far the most secure dual nationals are those who are born in the United States and obtain their foreign nationality by *jus sanguinis*.⁸ *Afroyim v. Rusk*⁹ reiterated a long-standing principle of United States constitutional law that such persons are protected by the Constitution and cannot have their citizenship taken away by Congress¹⁰ unless they perform some voluntary expatriative act.¹¹ In the light of *Afroyim v. Rusk* and *Vance v. Terrazas*,¹² such a voluntary renunciation can only be accomplished by making a formal renunciation of nationality¹³ or by some other expatriative act done with the intent to renounce United States citizenship.¹⁴

V. THE NATURALIZED UNITED STATES CITIZEN

The naturalized citizen is likewise protected by the Constitution and can only lose his citizenship by a voluntary renunciation.¹⁵ Strictly speaking, a person who goes through the statutory naturalization process renounces his former citizenship and is therefore not a dual national in the view of the United States government. The oath of allegiance which is taken as part of the naturalization process requires that the petitioner "absolutely and entirely renounce and abjure all allegiance and fidelity to any prince, potentate, state, or sovereignty of whom of which [he has] heretofore been a subject or citizen."¹⁶ Thus, any voluntary exercise of the rights of prior citizenship of the state of which he was a citizen prior to naturalization would evidence a lack of intent to renounce the prior allegiance and assume the new allegiance to the U.S. in taking the oath. The individ-

⁸U.S. born citizens may also become dual nationals by the derivative naturalization of a parent, *Perkins v. Elg*, 307 U.S. 325 (1939) and by marriage to an alien, *Schioler v. Secretary of State*, 175 F.2d 402 (7th Cir. 1949).

⁹387 U.S. 253 (1967).

¹⁰*United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

¹¹*Afroyim v. Rusk*, 387 U.S. 253 (1967).

¹²444 U.S. 252 (1980).

¹³Immigration and Nationality Act of 1952, as amended, § 349(a)(6), 8 U.S.C. § 1481(a)(6) (1976).

¹⁴*Terrazas*, 444 U.S. at 253.

¹⁵*Afroyim*, 387 U.S. at 261.

¹⁶INS Form N-405, reprinted in 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* 22-5 (rev. ed. 1982).

ual could thereby would lose his U.S. naturalization because of having procured it fraudulently.¹⁷ The Supreme Court has stated in dictum that it was constitutional and not contrary to *Afroyim* to deprive a person of United States citizenship when that citizenship was the result of a fraudulently procured naturalization.¹⁸

Cases may also arise where the naturalized citizen's former state either refuses to acknowledge the validity of his United States naturalization or does not, under its domestic law, treat foreign naturalization as terminating his original nationality and continues to treat him as a citizen of that state.¹⁹ Under such circumstances, his status as a United States citizen would not be affected under United States law. Indeed, the U.S. government would view him as a U.S. citizen who was being subjected to duress by a foreign government. He should therefore be able to receive the same sort of aid any other American citizen would be able to receive from United States diplomatic and consular authorities.

In some cases, the United States has negotiated special arrangements for the protection of dual nationals. For example, an exchange of letters with Bulgaria relating to consular protection for dual nationals guarantees that the receiving state will grant consular officers the protective rights enumerated in a consular convention to persons who enter the country with a valid passport of the other nation and a valid visa or other document authorizing entry into the receiving state. This guarantee is extended regardless of whether the individual in question is also considered a national of the receiving state.²⁰ The consular convention requires that the receiving state notify the consular officers of the sending state within three days of any deprivation of liberty of a national of the sending state, including dual nationals, and permit consular officials to visit the detainee within four days of detention.²¹ Another example involves U.S.-Polish dual nationals, where notes between the United States and Poland have established that dual nationals who possess ending state passports and valid receiving state visas would, for the purpose of insuring sending state consular protection and the right of departure without further documentation, be regarded exclusively as nationals of the sending state.²²

¹⁷*Knauer v. United States*, 328 U.S. 654 (1946).

¹⁸*Rogers v. Bellei*, 401 U.S. 815, 835 (1971).

¹⁹See e.g., Nationality Act of Jan. 8, 1951, art. 11 (Poland).

²⁰U.S. Dep't of State, Digest of U.S. Practice in International Law 1975, at 256.

²¹Consular Convention between the United States and Bulgaria, April 15, 1974, (May 29, 1975), 26 U.S.T. 687, T.A.I.S. No. 8067.

²²U.S. Dept. of State, Digest of U.S. Practice in International Law 1978, at 72.

VI. THE UNITED STATES CITIZEN BY DERIVATIVE NATURALIZATION

The Immigration and Naturalization Act provides that minor children of parents who are naturalized in the United States shall likewise become United States citizens.²⁵ It is therefore possible for such a person to qualify as a dual citizen even though his parents could not; the derivatively naturalized child is not required to take an oath renouncing his prior allegiance. The child can exercise citizenship rights in his other state without risk to his United States citizenship since such exercise does not show a lack of requisite intent in taking an oath which would be needed to overthrow the naturalization as fraudulent. Since the child would be validly naturalized, he would have all the constitutional protections set forth in *Afroyim*.²⁴

VII. THE DUAL NATIONAL BY SUBSEQUENT NATURALIZATION

Afroyim makes it possible for dual national status to be obtained through naturalization in another state after obtaining United States citizenship through naturalization. *Afroyim* was born in Poland and immigrated to the United States where he became a naturalized citizen. He then moved to Israel where he became an Israeli citizen under the Israel Nationality Law of 1952 which confers Israeli citizenship automatically upon any Jew who immigrates to Israel.²⁶ Because, under the Immigration and Nationality Act of 1952, any conferring of nationality by a state upon a person after birth is naturalization for the purposes of § 349(a)(1),²⁷ the failure of the court to find or even consider expatriation on the grounds of a subsequent naturalization greatly reduces the effect of § 349(a)(1). The decision also makes it possible for any United States citizen to be naturalized in another state, provided the government cannot carry the burden of proof that such naturalization showed an intent to renounce U.S. citizenship.²⁸

VIII. FOREIGN-BORN DUAL NATIONALS

The foreign-born dual national who obtains his U.S. citizenship by *jus sanguinis* is much more vulnerable to expatriation than is the dual national born in the United States. In *Rogers v. Bellei*,²⁹ the

²⁵8 U.S.C. § 1433 (1976); 8 M. Whiteman, Digest of International Law 151-52 (1967).

²⁴*Afroyim*, 387 U.S. at 255.

²⁶Nationality Law of April 1, 1952 § 2(b)(2) (Israel).

²⁷*Id.* at § 2(c)(2).

²⁸8 U.S.C. §§ 1101(a)(23), 1481(a)(1) (1976).

²⁹*Terrazas*, 444 U.S. at 258.

³⁰401 U.S. 815, 827 (1971).

Supreme Court held that such a foreign-born citizen is not protected by the Constitution because he was neither born in the United States nor naturalized in the United States. The Court stated in *Bellei*:

The central fact in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship was that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States.³⁰

His citizenship was not constitutionally grounded, but was rather the creation of Congress. Congress could therefore impose conditions upon that citizenship, such as a required period of U.S. residency. Failure to comply with those conditions could result in divestiture of citizenship.³¹ If the foreign-born citizen is not constitutionally protected from divestiture of citizenship because of a failure to meet the statutory residence requirements, other methods of losing one's citizenship such as those originally set forth in the Immigration and Nationality Act which have been held unconstitutional when applied to United States born and naturalized citizens could still be constitutional if applied to foreign-born American citizens.³² Thus, in the wake of *Bellei*, the dual national who was born abroad could be considerably more restricted in the exercise of citizenship rights in his other nation than is the American-born dual national.

However, such drastic treatment of the foreign born is not necessarily mandated by *Bellei*. The *Bellei* case supports the thesis that, in order to have meaningful citizenship, there must be a sufficient nexus between the individual and the state in which citizenship is claimed. For the purposes of United States law, such nexus is established by either the Fourteenth Amendment criteria, birth or naturalization within the United States and subject to United States jurisdiction, or, in the case of those born abroad, by *jus sanguinis* and the statutory period in residence within the United States. Once the residence requirement has been met, it would seem inevitable that

³⁰*Id.*

³¹*Id.* at 834.

³²Various provisions in the original Immigration and Nationality Act of 1952 dealing with loss of citizenship for voting in foreign elections, deserting from the armed forces in time of war, committing treason or bearing arms against the United States, leaving the country to avoid military service, and, for dual nationals, residing in the other country of nationality for more than three years without making a declaration of allegiance to the United States have been declared unconstitutional and have been eliminated from the Act by subsequent amendments. Arguably these provisions could have passed constitutional muster if they had been applied to U.S. citizens born outside the U.S. and who were not naturalized.

the foreign-born citizen could not be rationally classified as being different than any other citizen. Since citizenship is a fundamental constitutional right, any legislation which proposes to interfere with that right should be subjected to close scrutiny.⁸⁵

IX. EXPATRIATION LEGISLATION IN THE LIGHT OF AFROYIM

Afroyim held that the Fourteenth Amendment protects every United States citizen against a forcible destruction of his citizenship by Congress without his assent. The Fourteenth Amendment creates a "constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."⁸⁴

The exact significance of the requirement of "voluntary relinquishment" was not made clear in the *Afroyim* decision. Consequently, in 1969 the Justice Department issued an Attorney General's Statement of Interpretation designed to establish an interpretation of *Afroyim* for use by administrative agencies.⁸⁶ According to the Statement, officials are, in the light of *Afroyim*, to apply the 1952 Act subject to certain delineated guidelines. "Voluntary relinquishment" is not confined to a written renunciation, but can "also be manifested by other actions declared expatriative under the Act, if such actions are in derogation of allegiance to this country." However, even if the alleged expatriative act is, by a preponderance of the evidence, in derogation of allegiance to this country, *Afroyim* allows the individual to raise the issue of intent. When the issue of intent is raised, the Act places the burden of proof on the party asserting that expatriation has occurred.⁸⁶ The Attorney General stated that, under any reading of *Afroyim*, it seems clear that "an act which does not reasonably manifest an individual's transfer or abandonment of allegiance to the United States cannot be made a basis for expatriation."⁸⁷

Proving such an expatriating act is not easy. In *Nishikawa v. Dulles*, the Court held that, because the consequences of denaturalization are so severe, the heavy burden of proof is on the government

⁸⁵While the majority opinion in *Vance v. Terrazas*, 444 U.S. 252, 266 (1980), indicates that "expatriation proceedings are civil in nature and do not threaten a loss of liberty," Justice Stevens pointed out in his dissenting opinion "a person's interest in retaining his American citizenship is surely an aspect of 'liberty' of which he cannot be deprived without due process of law." *Id.* at 274 (Stevens, J., dissenting).

⁸⁶387 U.S. at 268.

⁸⁷Attorney General's Statement of Interpretation, 34 Fed. Reg. 1079, 42 Op. Atty Gen. No. 34 (1969).

⁸⁸8 U.S.C. § 1481(c) (1976).

⁸⁹Attorney General's Statement, *supra* note 34, at 1079.

⁹⁰356 U.S. 129 (1958).

to show that the expatriating act did occur and that the act was voluntary. However, this standard of proof was later modified by statute so that a preponderance of the evidence was required to show that an expatriating act had occurred, and a presumption was created that such expatriating act was voluntary; this presumption could be rebutted by a preponderance of evidence.³⁹ In *Terraza v. Vance*,⁴⁰ the Supreme Court held that, while the expatriating act set forth in the statute may be presumed to be voluntary, the burden is still upon the government to prove that the individual intended to relinquish U.S. citizenship by that act.⁴¹ The Court also held that Congress did not exceed its powers by requiring proof of an intentional expatriating act by only a preponderance of the evidence.⁴²

X. THE RIGHTS AND LIABILITIES OF DUAL NATIONALITY

Dual nationals may take actions affirming their citizenship in the second state, such as registration as a citizen or obtaining a certificate of nationality, without such action being an implied rejection of United States citizenship. In *United States v. Kawakita*,⁴³ petitioner was a United States citizen by birth and a Japanese national under Japanese law. During World War II, while petitioner was residing in Japan, he had his name removed from the list of aliens and placed on the Japanese family register. The Japanese Attorney General had established that such registration was not necessarily a formal declaration of allegiance, but could be merely an affirmation of an allegiance which already existed. The Supreme Court held that such a registration did not act as a renunciation of United States citizenship, but was ambiguous and therefore open to the interpretation that it served merely as a reaffirmation of an already existing allegiance. The petitioner, as a dual national, was entitled to affirm allegiance without affecting his United States citizenship.⁴⁴ The Court did, however, indicate that such registration might in some cases be equivalent to "naturalization" within the meaning of the Nationality Act of 1940⁴⁵ and, therefore, could presumably act to expatriate a registrant.⁴⁶

A dual national may take an oath of allegiance to his other country without losing his United States citizenship in the process, provided

³⁹8 U.S.C. § 1481(e) (1976).

⁴⁰444 U.S. 252 (1980).

⁴¹*Id.* at 268.

⁴²*Id.* at 265.

⁴³343 U.S. 717 (1952).

⁴⁴*Id.* at 724.

⁴⁵Nationality Act of 1940 § 401(a), (b).

⁴⁶*Kawakita v. United States*, 343 U.S. 717 (1952).

that such oath does not place the person taking it in complete subjection to the state to which it is taken; the oath may not renounce loyalty to the United States by its terms.⁴⁷

The question of whether a dual national can serve in the armed forces of his other country is somewhat more complicated. It is clear that a dual national's United States citizenship will not be jeopardized if he is conscripted to involuntarily serve in the foreign state's military forces, even if those armed forces are actively engaged in hostilities against the United States.⁴⁸ Voluntary service is another question. Such an action as enlisting in the armed forces of another nation could be treated as a voluntary renunciation of United States citizenship, particularly if the foreign state involved were considered a hostile power.⁴⁹ In any case, the dual national would be well advised to obtain prior permission from the United States government, as is required by the Immigration and Nationality Act.⁵⁰

Another subsection provides for loss of nationality if a person accepts, serves, or performs the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof, if he has the nationality of that state.⁵¹ The constitutionality of this provision has not been settled. The Supreme Court has held that a person born in the United States with derivative Japanese citizenship could take the position of a public school teacher in Japan without losing United States citizenship; the oath required for the position did not demand exclusive allegiance to Japan.⁵² However, if the post were a cabinet-level position in Korea, the person taking that position might well be deemed to have voluntarily renounced United States citizenship.⁵³

Accepting nonmilitary employment in the service of the government of the other state may in general be permissible, provided that the individual is not required to swear an oath of exclusive allegiance to that foreign power.⁵⁴ Such service may, however, be treated as a voluntary renunciation of United States citizenship if the foreign power is hostile to the United States.⁵⁵ It is possible for the dual national to be tried for and convicted of treason, even though the

⁴⁷See *United States v. Matheson*, 532 F.2d 809 (2d Cir.), cert. denied 429 U.S. 823 (1976).

⁴⁸*Nashikawa v. Dulles*, 356 U.S. 129 (1958).

⁴⁹Attorney General's Statement, *supra* note 34, at 1080.

⁵⁰8 U.S.C. § 1481(a)(3) (1976).

⁵¹*Id.* at § 1481(a)(4).

⁵²*Dulles v. Katamoto*, 256 F.2d 545 (9th Cir. 1958).

⁵³Attorney General's Statement, *supra* note 34.

⁵⁴*Dulles v. Katamoto*, 256 F.2d 545 (9th Cir. 1958).

⁵⁵Attorney General's Statement, *supra* note 34, at 1080.

treasonous acts were committed in the service of the other state of which he is a national; he does not lose his United States nationality thereby.⁵⁶ If a dual national leaves the country to avoid military service, he does not lose his United States citizenship, but is subject to the same penalties as any American citizen.⁵⁷ Obtaining a passport from the other country and using it, even for a purpose of travel to the United States, is for the dual national a routine privilege of his other citizenship and does not conflict in any way with any responsibility of United States citizenship.⁵⁸

XI. CONCLUSION

It was stated in *Kawakita* that:

[t]he concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other.⁵⁹

Afroyim has opened the door to United States citizens becoming dual nationals by choice rather than by accident of birth. Although *Bellei* shows a concern for insuring the existence of a sufficient nexus between the United States and its citizens, it does not limit dual nationality *per se*. While there has frequently been expressed a concern that a dual national will have divided loyalties and therefore be an unreliable citizen, it would seem that such divided loyalty is hardly a threat to the United States, at least where the citizen's other allegiance is to a country which shares the same ideals and aspirations that are basic to American society.

As Lord Denning has stated: "the best and only ultimate assurance of a sound and loyal body politic of a nation is the spirit of the people who comprise it, and this cannot be legislated."⁶⁰

⁵⁶*Kawakita v. United States*, 343 U.S. 717 (1952).

⁵⁷*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962).

⁵⁸*Jalbuena v. Dulles*, 254 F.2d 381 (8d Cir. 1958); 8 M. Whiteman, *supra* note 22, at 78.

⁵⁹343 U.S. at 724.

⁶⁰See Duvall, *Expatriation Under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 Va. L. Rev. 408, 456 (1970).

