ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

CLIENT SERVICES DESKBOOK 2018

The Judge Advocate General's School

United States Army

CLIENT SERVICES DESKBOOK

2018

TABLE OF CONTENTS

CHAPTER A

THE ARMY LEGAL ASSISTANCE PROGRAM

TABLE OF CONTENTS

August 2018

THIS PAGE INTENTIONALLY BLANK.

THE ARMY LEGAL ASSISTANCE PROGRAM

I. REFERENCES

A. Army Regulation 27-3, The Army Legal Assistance Program (Rapid Action Review, 13 September 2011; 21 February 1996).

B. Title 10, United States Code, Sections 1044, 1054, and 3013g.

II. ARMY LEGAL ASSISTANCE PROGRAM (ALAP) (AR 27-3)

A. Purpose.

1. Prescribes policies, responsibilities, and procedures for the Army Legal Assistance Program. Army Regulation 27-3 implements:

a) 10 U.S.C. § 1044. Authority to provide legal assistance to active and retired servicemembers and their dependents.

b) 10 U.S.C. § 3013g. Authority to provide legal assistance to other eligible clients.

2. AR 27-3 does not create any right or benefit, enforceable at law or equity, by a party against the United States, its agencies, its officers, or any other person. (AR 27-3, Paragraph 1-1.a.).

B. Overview.

1. Mission. The mission of ALAP is to assist those eligible for legal assistance with their personal legal affairs in a timely and professional manner by:

a) Meeting their needs for help and information on legal matters, and

b) Resolving their personal legal problems whenever possible.

2. ALAP directly supports the military mission. Legal services must be continuous during both peace and war, and must provide more than just referral assistance. The ALAP is a commander's program that is based on the military needs below.

a) Readiness.

b) Morale.

c) Discipline.

d) Quality Force.

C. Responsibilities.

1. Commanders are responsible for providing ALAP services on installations (resources permitting), to include office space, facilities, resources, and CLE funding for attorneys.

2. Staff Judge Advocates (SJAs), or other supervising attorneys, are responsible for the operation of ALAP, to include determining the scope of assistance provided.

3. The Chief, Legal Assistance Policy Division, Office of the Judge Advocate General (OTJAG), is responsible for promulgating legal assistance policies and procedures.

4. The Chief, Legal Assistance Policy Division, OTJAG, is given the following authority:

a) Limited authority to grant exceptions on a case-by-case basis to the provisions of AR 27-3 that govern who is authorized to provide and receive legal assistance.

b) Authority to grant exceptions as to the nature of the legal assistance that may be provided.

c) Sole authority for authorizing Reserve Component (RC) judge advocates to earn retirement points for legal assistance work performed when not on active duty.

d) Authority as the supervising attorney for RC judge advocates not assigned to a troop program unit (TPU) or the Army National Guard (ARNG) “when they are performing legal assistance work for retirement points.”

D. Scope.

1. The scope of the ALAP is defined in the following terms:

a) Case types, which are defined in terms of the subject matter of a client's legal issue.

b) Services, which are defined in terms of the actions required for the attorney to assist the client.

c) Eligible clients, which are defined by reference to the client's relationship to the Army.

2. Authority to limit the scope of the ALAP. Within each of the categories above (case types, services, and eligible clients) the regulation has both mandatory and optional provisions. Commanders and SJAs have limited authority to narrow the scope of the legal assistance program by determining that certain case types, services, or clients will not be handled by legal assistance attorneys assigned within their command.

a) Limiting case types.

(1) A commander of an active Army legal office may limit legal assistance to those case types that are required under AR 27-3 when space, facilities, or legal or supporting staff are unavailable. (Paragraph 2-6.a.(1)). See Appendix C for a listing of mandatory and optional case types.

(2) A supervising attorney may deny legal assistance for optional case types to an eligible client when available resources, personnel, or expertise are insufficient to provide the legal assistance needed. (Paragraph 3-5.c.).

(3) A commander of an RC-Army legal office may limit legal services (except those required to be provided) to certain types of legal assistance cases.

b) Limiting services.

(1) A commander of an active Army legal office may limit legal assistance to those services that are required under AR 27-3 when space, facilities, or legal or supporting staff are unavailable. (Paragraph 2-6.a.(1)).

(2) A supervising attorney may deny optional services to an eligible client when available resources, personnel or expertise are insufficient to provide the legal assistance needed. (Paragraph 3-5.c.(2)).

(3) In additional to limited types of cases, a commander of an RC-Army legal office may limit legal services (except those required to be provided) to certain types of legal assistance services.

c) Limiting client eligibility.

(1) A commander of an active Army legal office may deny legal assistance to one or more of the following categories of eligible persons: (1) RC members on active duty for less than 30 days, (2) Active Component (AC) and RC members receiving retired or disability pay, (3) surviving family members of U.S. citizens and nationals who are civilians employees or DoD and accompanying the Armed Forces outside the U.S., (4) civilian employees serving with U.S. Armed Forces in a foreign country or the legal representative of such a deceased civilian employee, (5) fiduciaries, and (6) members of other military forces serving in the United States.

(2) A commander of an RC-Army legal office may limit legal services to any of the categories of eligible persons listed under paragraph 2-5.a. of AR 27-3.

3. SJA Authority.

a) In addition to the limitations authorized above, an SJA may authorize variations in the scope of the legal assistance program for up to 30 days when necessary to ensure effective legal assistance services if not inconsistent with requirements set by statute, prescribed by executive order or required by higher authority.

b) Before exercising this authority, the SJA should determine that available resources, personnel, and expertise are insufficient to provide the assistance needed. (Paragraph 3-5.c.(2)).

c) Staff Judge Advocates authorizing temporary variations must provide notice to the Legal Assistance Division, OTJAG.

III. PERSONS AUTHORIZED TO PROVIDE LEGAL ASSISTANCE

A. Active Duty (AD) judge advocates. Active duty judge advocates may provide legal assistance if not inconsistent with their assigned duties.

B. Judge advocates on active duty regardless of component.

C. Army National Guard (ARNG) judge advocates assigned to judge advocate positions, even while in non-duty status when providing legal assistance pursuant to AR 27-3.

D. US Army Reserve (USAR) judge advocates assigned to judge advocate positions in troop program units (TPUs), even while in non-duty status when providing legal assistance pursuant to AR 27-3.

E. Other RC judge advocates not assigned to the ARNG or USAR TPU who are authorized to provide legal assistance by the Chief, Army Legal Assistance Division.

F. Department of Army (DA) civilian attorneys.

G. Foreign licensed attorneys employed by DA who work under direction of a supervising attorney while providing legal assistance on foreign law matters.

H. Reserve Component attorneys while not in IDT, AT, or ADT status may earn retirement points for certain pre-approved legal assistance work. (See AR 27-3, Paragraph 2-2.b.).

IV. PERSONS ELIGIBLE TO RECEIVE LEGAL ASSISTANCE

A. Active component servicemembers and their dependents.

B. Reserve Component servicemembers who:

1. Are serving on active duty pursuant to orders for more than 29 days (and their dependents), or

2. Are serving on active duty pursuant to orders for 29 days or less (and their dependents). Supervising attorneys may limit legal assistance to emergencies or certain categories of cases based on resources.

3. Are undergoing Premobilization Legal Preparation (PLP) (and their dependents). Supervising attorneys may limit legal assistance to emergencies or certain categories of cases based on resources.

C. Reserve Component members, other than those above, on military administrative matters, personal legal problems that may adversely affect readiness or that arose or were aggravated by military service, legal assistance will generally be limited to that provided by RC judge advocates to RC members.

D. Active and reserve servicemembers receiving retirement or disability pay (and their families).

E. Surviving family members of active, reserve, and retired servicemembers who would have been eligible for legal assistance if the service or retired member were alive.

F. DoD civilian employees (includes DA employees).

1. Against whom pecuniary liability has been recommended under AR 735-5 with regard to presenting matters in rebuttal to, or an appeal from, such charges, and/or

2. Serving with the military in a foreign country (and their accompanying family members).

3. Who are employed overseas by the U.S. government (services are limited).

4. Who are employed in the continental United States, classified as "mission essential" or "emergency-essential", and are being deployed (services are limited).

5. Who are neither “mission-essential” or “emergency essential,” but who work in the U.S., its possessions, or territories, and who are notified that they are to deploy to a combat zone or on a contingency operations (services are limited).

G. DoD civilian contract employees accompanying U.S. Armed Forces outside the United States when DoD is contractually obligated to provide assistance.

1. Eligibility must be verified by examining the DoD contract or by consulting with the government contracting officer.

2. Legal assistance provided pursuant to a DoD contract is limited to ministerial services, legal counseling, legal document preparation (limited to powers of attorney and advanced medical directives), and help on retaining a civilian lawyer.

H. Primary next of kin (PNOK), executors, personal representatives, administrators, and estate representatives for matters relating to settling estates of:

1. Active or reserve servicemembers who die in a military duty status.

2. U.S. citizens and nationals employed by DoD and serving with or accompanying US forces outside the United States at the time of death.

I. Fiduciaries of:

1. Active or reserve servicemembers serving in combat zone.

2. U.S. citizens and nationals employed by DoD and serving with or accompanying U.S. forces in a combat zone.

J. Members of other military forces while serving in the United States (and their accompanying dependents).

K. Prisoners confined at U.S. military facilities, even though discharged.

V. DENIAL OF LEGAL ASSISTANCE SERVICES

A. Except for active duty servicemembers and reserve servicemembers on ADT for 30 days or longer, active component commanders may deny services to certain categories of clients listed in AR 27-3, Paragraph 2-6, based on the availability of space and facilities and the capabilities of the legal assistance staff. This includes sister-service personnel if their department does not routinely provide such services.

B. Individual clients (for up to 1 year) due to abuse of legal assistance services, including, but not limited to:

1. Missing two or more appointments without good cause or prior notification.

2. Misconduct, dishonesty, or other unbecoming conduct during course of seeking, receiving, or using legal assistance.

3. Knowingly using legal assistance services for a purpose prohibited by law or regulation.

4. Supervising attorneys may request, through MACOM SJA, to limit or deny services beyond a year.

VI. TYPES OF LEGAL ASSISTANCE CASES

A. Family Law (AR 27-3, Paragraph 3-6.a.).

1. Cases which must be given assistance.

a) Marriage.

b) Annulment.

c) Paternity.

d) Child custody.

e) Financial nonsupport.

f) Legal separation.

g) Divorce.

2. Cases which may be given assistance depending on available resources and expertise.

a) Adoption.

b) Other family law cases.

B. Estate Planning (AR 27-3, Paragraph 3-6.b.).

1. Cases which must be given assistance.

a) Wills.

b) Life insurance. In conjunction with estate planning the legal assistance attorney should discuss the SGLI beneficiary designation and advise on the effect of a "by law" designation. Army prohibits "by law" designation where insured is a Soldier.

c) Testamentary trusts for minors.

d) Guardianships.

e) Health care directives, including living wills, durable powers of attorney for health care, and anatomical gift designations.

2. Other aspects of estate planning may be given assistance depending on available resources and expertise.

C. Real Property (AR 27-3, Paragraph 3-6.c.).

1. Cases which must be given assistance: landlord-tenant.

2. Cases which may be given assistance depending on available resources and expertise.

a) Matters relating to the purchase, sale, and rental of a client's principal residence. (But see AR 27-3, Paragraph 3-8.a.(2) – may not represent a client in private business activities).

b) Assistance may include drafting documents for above.

D. Personal Property (AR 27-3 Paragraph 3-6.d.).

1. Cases which must be given assistance: Purchases of personal property, to include contracts, mortgages, security agreements, warranties, cancellations, and other consumer affairs matters.

2. Cases which may be given assistance depending on available resources and expertise: selling or leasing personal property (But see, AR 27-3, Paragraph 3-8.a.(2), on prohibition against helping clients on private business activities).

E. Economic (AR 27-3, Paragraph 3-6.e.).

1. Cases which must be given assistance.

a) Debtors in disputes over lending agreements.

b) Debtors requiring help on bankruptcy, garnishment orders, involuntary allotment applications for judgment indebtedness debt, banking, credit card, property insurance problems, and non-government claims (including Article 139 claims).

c) Assertion of rights under the Servicemembers Civil Relief Act (SCRA), including requests for interest rate reductions.

d) Veterans' reemployment rights (see cautionary note and limitations in AR 27-3, Paragraph 3-6.e.(2)).

2. Cases which may be given assistance depending on available resources and expertise: Creditors in disputes over lending agreements.

F. Civilian Administrative (AR 27-3, Paragraph 3-6.f.).

1. Cases which must be given assistance: notarizations (AR 27-55).

2. Cases which may be given assistance depending on available resources and expertise.

a) Name changes.

b) Immigration.

c) Naturalization.

d) Welfare assistance.

e) Other cases.

G. Military Administrative (AR 27-3, Paragraph 3-6.g.).

1. Cases which must be given assistance.

a) Those in which assistance is required by law or regulation.

b) Line of Duty (LOD) investigations, financial liability investigations, OER and NCOER appeals, relief for cause reviews, memoranda of reprimand, Art. 138 complaints, Inspector General (IG) investigations, hardship discharges, compassionate reassignments, officer unqualified resignations, correction of military records.

2. Cases which may be given assistance depending on available resources and expertise: Bars to reenlistment, waivers to allow reenlistment, security clearance revocations, suspension of favorable personnel actions, expungement of military records, physical evaluation boards, medical evaluation boards, flying evaluation boards, quality accreditation for doctors, qualitative management program, driving privileges.

H. Torts (AR 27-3, Paragraph 3-6.h.).

1. Cases which must be given assistance: those invoking whatever protections may be offered under the SCRA on matters related to the prosecution or defense of civilian lawsuits based on alleged tortious conduct. Any further assistance on tort cases is limited to counseling and assistance in retaining civilian counsel.

2. Be alert to cases where client faces civil lawsuit as result of actions taken within the scope of his/her official duties. Refer to claims JA or U.S. Army Litigation Center.

I. Taxes (AR 27-3, Paragraph 3-6.i.)

1. Cases which must be given assistance.

a) Real and personal property tax issues.

b) Income tax return preparation.

2. Cases which may be given assistance depending on available resources and expertise.

a) Electronic filing.

b) Estate, inheritance, and gift taxes.

c) Appealing tax rulings or findings.

3. Tax assistance on private business activities is outside the scope of the legal assistance program, with the exception of income for family child care providers.

J. Civilian Criminal Matters (AR 27-3, Paragraph 3-6.j.) .

1. Assistance may be provided based on expertise and resources.

2. In-court representation is prohibited, except for cases pending before U.S. Magistrate on a military installation.

*Note: In-court representation before a United States Magistrate should be the exception, rather than the norm, and supervising attorneys should carefully review requests for in-court representation on a case-by-case basis.

K. Limitations on Services (AR 27-3, Paragraph 3-8).

1. Unless authorized in a particular case by the Chief, Legal Assistance Division, OTJAG, the following are not considered or counted as legal assistance cases and no legal advice or assistance, other than referral to civilian lawyers or providing lists of lawyers, may be provided:

a) Military justice matters.

b) Private business activities.

c) Civil litigation against the United States.

d) Employment matters, except those involving enforcement of USERRA.

2. For the case types below, legal assistance attorneys may provide limited services.

a) Claims or civil lawsuits against the United States. Legal assistance is limited to general guidance on administrative or legal procedures and filing requirements. Attorneys providing legal assistance will neither advise, nor appear as counsel before any tribunal for a client concerning a claim against the United States or a civil lawsuit in which the United States has an interest.

b) Contingent legal fee cases. Legal assistance is limited to general advice on these lawsuits, court procedures, filing requirements, and the potential merits of these cases.

c) Prepaid legal representation cases. Legal assistance is limited to general advice on these lawsuits, court procedures, filing requirements, the potential merits of these cases, and on the client's need to contact the insurance company or other organization that will pursue or defend a potential lawsuit.

d) Standards of conduct issues. Legal assistance attorneys are not designated ethics attorneys in relation to a legal assistance client and may not, therefore, provide an agency position (ethics opinion) regarding application of the Joint Ethics Regulation.

e) Victim/Witness Assistance Program. A legal assistance attorney who is also assigned as a victim witness liaison may not serve both functions for the same person. Services provided by a victim/witness liaison fall outside the legal assistance program.

VII. PROFESSIONAL LIABILITY (AR 27-3, PARAGRAPH 4-3)

A. Legal Assistance attorneys acting pursuant to AR 27-3 are performing an official function of the U.S. Army.

1. 10 U.S.C. § 1054 – the exclusive remedy for injury or loss of property caused by negligent or wrongful act or omission of any attorney, paralegal, or other member of the Army legal office is a civil lawsuit against the United States under the Federal Tort Claims Act (28 U.S.C. § 2679 or the Military Claims Act (10 U.S.C. § 2733) depending on the situs of the act giving rise to the claim.

2. If the U.S. Attorney General certifies that attorney or other person was acting within the scope of their office or employment, the United States will be substituted as the defendant.

B. For purposes of professional liability, unit tax advisors and other personnel performing tax preparation duties, whether assigned or voluntary, under an installation tax assistance program are considered to be employees for purposes of the Federal Tort Claims Act.

VIII. REPORTING REQUIREMENTS (AR 27-3, CHAPTER 5)

A. Active component Army legal offices must file an annual Legal Assistance Report with the Legal Assistance Division, OTJAG, by 1 February each year, and will reflect all legal assistance provided during the preceding calendar year.

B. Active component Army legal offices must file an annual after action report on tax assistance (Income Tax Report) with the Legal Assistance Division, OTJAG, by 1 June for CONUS installations and 1 July for OCONUS installations.

APPENDIX A: CHECKLIST FOR NEW LEGAL ASSISTANCE ATTORNEYS

This checklist should assist the new legal assistance attorney (LAA) in becoming familiar with legal assistance office procedures and services.

1. Read All Pertinent Publications. Carefully read AR 27-3, Legal Assistance; AR 27-26, Rules of Professional Conduct for Lawyers; AR 25-50, Preparing Correspondence; AR 608-99, Family Support, Child Custody, & Paternity, and the LAAWS Legal Assistance Module Deskbook. Understanding the contents of these publications is crucial to the successful discharge of legal assistance duties.

2. Read the Legal Assistance Office (LAO) SOP. The standard operating procedure explains most basic information that the new LAA needs to know right away about the office (e.g., organization, hours, duties, and resources).

3. Consult the LAO NCOIC and/or Civilian Paralegal. The NCOIC should brief the new LAA on enlisted personnel and responsibilities. The NCOIC also can provide samples of standard correspondence and forms used in the office. Those LAOs with civilian paralegals and attorneys generally have an excellent institutional memory and can quicken the new LAA's transition. Usually, civilians will have been in the office for several years and will be familiar with common issues and problems, as well as many practical solutions and permissible shortcuts.

4. Legal Assistance Office Reading Files. Obtain several weeks or months of recent LAO reading files that have had personal identifying information (e.g., name, social security number) redacted. By reviewing these files, LAAs can identify the matters frequently handled by the LAO and can become familiar with appropriate formats, phraseology, and the correspondence errors the office strives to avoid.

5. Observe Client Interviews. Any good training program capitalizes on the experience of others. Seasoned LAAs should encourage the new LAA to observe several client interviews. Following the interview, the experienced LAA should answer any questions the new LAA may have on the interview or the legal advice rendered. After several interviews, the new LAA should conduct client interviews and consultations in the presence of the more experienced LAA. Thereafter, the two LAAs should discuss the interview process for the benefit of the new LAA.

6. Question Colleagues. Remembering the limits of confidentiality, the new LAA should nevertheless question colleagues, including but not limited to your Chief of Legal Assistance, regarding any matter about which the new LAA has a question. Asking questions is one of the best ways to narrow research and focus on the needs of specific clients.

CHAPTER B

LEGAL ASSISTANCE SERVICES

TABLE OF CONTENTS

August 2018

THIS PAGE LEFT INTENTIONALLY BLANK

LEGAL ASSISTANCE SERVICES

I. REFERENCE

A. Army Regulation 27-3, The Army Legal Assistance Program (Rapid Action Review 13 September 2011, 21 February 1996).

B. Army Regulation 27-26, Rules of Professional Conduct for Lawyers (1 May 1992).

C. GARRY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY (1981).

II. LEGAL ASSISTANCE SERVICES

A. Ministerial. Ministerial services include notarizations and witnessing signatures. These services may be provided by an attorney or nonattorney, and generally complement other legal services, such as execution of a power of attorney or will.

B. Legal Counseling.

1. Legal counseling involves the provision of both legal and nonlegal advice to a client for the purpose of resolving the subject matter of the attorney-client relationship.

2. Legal counseling is required whenever necessary to assist a client in a required case. As a practical matter, legal counseling will be provided in nearly every legal consultation, regardless of whether additional services are performed.

C. Legal Correspondence.

1. Legal correspondence includes a letter that is signed by an attorney on behalf of client, as well as a letter that is prepared by the client for the client's signature, but that is reviewed and edited by an attorney.

2. Disclosure of attorney-client relationship.

a) All legal correspondence that is sent with the attorney's signature block should include language similar to the following:

"I represent (named client)" or "I write on behalf of my client (name)..."

b) Do not state: "This office represents (named client)..."

c) Do NOT include a disclaimer: "This letter represents my own opinion as a legal assistance attorney and not the position of the US Army."

3. General guidance for preparing legal correspondence.

a) Appropriate signature block.

(1) Legal assistance attorneys should carefully distinguish between correspondence that should be signed by the attorney and correspondence that should be signed by the client.

(2) In general, correspondence that may trigger a substantive legal right, such as a request for debt verification made under the Fair Debt Collection Practices Act, should be signed by the client. This procedure avoids the problem of the attorney becoming a witness in a future claim that the opposing party failed to honor the client's substantive right.

(3) Documents that assert a legal right, such as a demand letter sent to opposing counsel in a contract dispute, should be signed by the attorney.

b) Demand for relief.

(1) Letters which seek direct relief on behalf of a client should clearly state the relief requested, the legal basis for the relief, the facts that support the requested relief, and any specific harm caused to the client. The demand will be strengthened by attaching any documents that support the factual assertions. Legal claims in the letter may also be supported by attaching support in applicable case law.

(2) The letter should also contain any additional information required by statute. For example, in efforts

to correct fraudulent credit information due to identify theft, the Fair and Accurate Credit Transactions Act may require a consumer to include a statement that the fraudulent transactions did not result from any transaction initiated by the consumer. Legal assistance attorneys should carefully review the substantive law that supports a client's claims before drafting formal legal correspondence.

(3) Demand letters, and other legal correspondence, serve at least three purposes.

(a) Create a written record which will increase the likelihood of forcing a formal response from the opposing party.

(b) Increase the possibility of resolving a dispute on behalf of a client without taking further measures, such as legal negotiation or litigation.

(c) Puts the opposing party on notice of the asserted legal violations and any associated harm caused to the client. Additional harm caused to a client following notice to opposing party may be argued as being knowing or willful, thereby increasing liability on the part of the wrongdoer.

(d) Unlike informal legal negotiation conducted over the telephone, legal correspondence will sometimes prompt a written response from the opposing party's legal counsel. Legal correspondence increases the likelihood that an opposing party's attorney will recognize any meritorious claims and advise his or her client accordingly.

(4) Demand letters will normally be prepared in the official letter format contained in AR 25-50.

4. Legal correspondence is a required service whenever it is necessary to assist a client in a required case.

D. Legal Negotiations.

1. Legal negotiation involves one or more discussions between an attorney and another party (or his or her attorney) whose interest will usually be adverse to that client.

2. Legal assistance attorneys should take precautions to avoid communications with an opposing party, or agents of an opposing party who is represented by counsel. *See* Rule 4.2, Army Rules of Professional Conduct.

3. Legal assistance attorneys negotiating on behalf of a client must clearly identify themselves as an attorney and the name of the person who they represent.

4. General guidance for conducting legal negotiation.

   a) Legal negotiation should only be conducted after carefully gathering all relevant facts, both from the client and from other sources, and researching the law applicable to those facts.

   b) As with legal correspondence, a legal assistance attorney must be able to clearly articulate the relief requested, the legal basis for requesting the relief, and the facts that support that relief, including any specific harm to the client.

   c) Failure to adequately prepare for legal negotiation by following the guidance above will often result in failed negotiations, and greater difficulty in resolving the dispute without litigation.

5. Legal correspondence is a required service whenever it is necessary to assist a client in a required case.

E. Legal Document Preparation.

1. General. Legal document preparation includes the drafting, completion, and execution of documents such as wills, powers of attorney, leases, consumer contracts, and Federal and State tax returns.

2. Legal document preparation is a required service whenever it is necessary to assist a client in a required case.

3. Estate planning. For detailed guidance on services to be provided in estate planning cases, see paragraph 3-6.b. of AR 27-3.

a) Wills.

(1) Every service member for whom a will is prepared must receive legal advice on designating beneficiaries under SGLI. Attorneys will not advise a client to use a "by-law" or "by-will" designation on SGLI.

(2) An attorney must interview the client and review the will before the client executes the will.

(3) The preparing attorney's name and bar information will be included on every executed will.

(4) A legal assistance attorney must preside over the execution of a will. The will must be executed in the presence of at least two disinterested witnesses (in addition to the presiding attorney), each of whom attests to witnessing the testator/testatrix execution of the instrument by signing it.

(5) If the domicile of the testator cannot be determined, the legal assistance attorney may choose to prepare a Military Testamentary Instrument (MTI) under the authority of DoD Directive 1350.4. MTIs must contain the Military Testamentary Preamble and Self-Proving Affidavit shown in DoDD 1350.4.

"This document was prepared under the authority of 10 U.S.C. § 1044 and implementing military regulations and instructions, by (*name of attorney*), who is licensed to practice law in (*name of one State or other legal bar*)."

b) *Inter vivos* trusts may be prepared based on the availability of resources and expertise.

4. Powers of attorney.

a) The authority to prepare military powers of attorney is contained in 10 U.S.C. § 1044b. Implementing regulations are found in DoD Directive 1350.4, Legal Assistance Matters (April 28, 2001).

b) The following preamble must be contained in every military power of attorney.

This is a MILITARY POWER OF ATTORNEY prepared pursuant to Title 10, United States Code, Section 1044b and executed by a person authorized to receive legal assistance from the Military Service. Federal law exempts this power of attorney from any requirement of form, substance, formality, or recording that is prescribed for powers of attorney under the laws of a State, the District of Columbia, or a commonwealth, territory, or possession of the United States. Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.

c) A limited (or special) power of attorney should be used in lieu of general power of attorney in every case in which the client's need may be met with a limited power.

d) A client who requests a general power of attorney must be advised of the serious legal problems that may arise from its misuse.

5. Separation agreements may be prepared based on the availability of resources and expertise.

6. *Quick*Scribe is a "document assembly" system. *Quick*Scribe allows users to prepare draft documents from forms acquired from various sources (e.g., TJAGLCS publications, experienced practitioners) for specific tailoring to individual client needs. Using *Quick*Scribe, a legal assistance attorney or assistant may enter client information in data-gathering dialogs to quickly and accurately assemble complex or routine draft legal documents instead of retyping or using a "cut & paste" edit method.

7. Office Templates.

a) Many legal assistance offices use template documents to improve the efficiency of legal services.

b) When using a document template, legal assistance attorneys should consider the following:

(1) Templates maintained by the office should not

contain any client identifying information.

(2) The provisions contained in a document template must be fully understood by the legal assistance attorney, and explained to the client when appropriate, i.e. separation agreements.

(3) Templates must be routinely reviewed and updated to ensure that changes in the law are adequately reflected in the document.

(4) Legal assistance attorneys are individually responsible for ensuring that legal correspondence produced for a client is accurate and effective, regardless of whether a template is used.

F. Document Filing.

1. Based on the availability of expertise and resources, legal assistance attorneys may file legal documents, tax returns, and other legal papers to complement other legal services.

2. *Pro se* assistance.

a) *Pro se* assistance is the help rendered to non-lawyer clients to enable those clients to file legal documents, papers, or pleadings in civil proceedings, such as small claims or uncontested divorces.

b) Only supervising attorneys may authorize *pro se* assistance (this does not mean in court representation).

c) When rendering *pro se* assistance, legal assistance attorneys must be careful to avoid the unauthorized practice of law by engaging in "ghost writing." "Ghost writing" refers to the practice of preparing pleadings and other documents for the benefit of the client and then allowing the client to sign as if he or she had personally prepared those documents.

G. In-Court Representation.

1. Only a supervising attorney may authorize in-court representation.

2. Authorization may be made on a case-by-case basis (i.e. to allow the attorney additional experience; to advance certain command objectives (protect Soldiers from unfair business practices)).

3. In-court representation by legal assistance attorneys is prohibited in the following cases:

   a) Military justice proceedings.

   b) Military administrative proceedings, unless representation is authorized by other military regulation. Ordinarily, representation of Soldiers at administrative hearings of any type will be provided by the Trial Defense Service.

   c) Civilian criminal proceedings (except if before U.S. Magistrate on installation).

4. Client eligibility for in-court representation is limited by 10 U.S.C. § 1044 and AR 27-3, Paragraph 3-7g. Soldier must be:

   a) Active duty or reserve on active duty over 29 days (less than 29 days if emergency), and

   b) One for whom hiring civilian lawyer would entail substantial financial hardship to themselves or their family.

      (1) Supervising attorneys will determine if a client satisfies the substantial hardship test on a case by case basis.

      (2) The following guidance will be applied in making these determinations:

         (a) Soldiers in pay grade E-4 and below qualify if have no other significant income (rank and/or income of spouse will be considered if spouse is named party and interests are not adverse to Soldier).

         (b) Soldiers above pay grade E-4 must provide financial information supporting substantial financial hardship.

5. Representation may occur if:

a) There is a state-approved program (written agreement with state bar or motion granted from appropriate court); or

b) The attorney has the requisite bar membership.

H. Legal Referrals.

1. AR 27-3, Paragraph 3-7.h. directs that legal assistance attorneys consider the following before referring a client to a military attorney or to a civilian lawyer, or providing a client a list of civilian lawyers:

a) Their own workloads.

b) Their areas of expertise compared to the expertise of the attorney receiving the referral.

c) The goals or interests of the client.

d) The convenience to the client.

e) The cost to the client.

2. AR 27-3 also indicates the following order of preference on making referrals to military attorneys and civilian lawyers:

a) An attorney in the same Army legal office.

b) An attorney in another Army legal office of the same component in close proximity, such as a USATDS branch office.

c) An attorney in another Army or military legal office of the same or different component.

d) A civilian lawyer on a no-fee basis.

e) A civilian lawyer on a reduced-fee basis.

f) A civilian attorney whose fees are reasonable in the locale in which assistance is required.

3. First discuss the case and potential fee with the lawyer to whom case will be referred.

4. Avoid appearance of favoritism.

5. May provide list of attorneys; copies of JAGC Reserve Officer Legal Assistance Directory will not be given out to clients.

I. Non-Legal Referrals and Other Resources

1. Army Rule for Professional Responsibility 2.1 states that attorneys may advise on the impact of non-legal factors.

   a) Army Rule 2.1 provides that "in rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation, but not in conflict with the law."

   b) Client problems are often complicated, extensive, and interrelated to other financial, personal and/or mental health type of factors. Likewise, clients vary in their levels of sophistication. Some clients may require more in the way of non-legal counseling than others, who want strict legal advice.

2. Outside Resources. The following agencies and entities are common to Army installations. A good working relationship with each is essential, so that the legal assistance attorney can arrange for referrals when appropriate.

   a) Army Community Service (ACS). A sub-entity of an installation's MWR program, ACS is usually a conglomeration of activities that can assist with financial, family and general assistance concerns.

   b) Army Emergency Relief (AER). AER provides emergency financial assistance to Soldiers and their Families in the form of loans or grants. Governed by AR 930-4 and administered through command channels, it is in effect, the Army's own emergency financial assistance organization.

c) Inspector General (IG). A member of the commander's special staff (usually general officer commanders and above), charged with internal investigations and complaints.

d) Chaplain. A member of the commander's special staff (usually battalion commanders and above), available for the counseling needs of Soldiers.

e) Finance Office. The portion of the Garrison Command responsible for pay matters.

f) Social Work Services. Sometimes a part of ACS, dedicated to family and child wellness on post.

g) Loan Closet. Usually part of ACS.

h) Food Bank. Usually part of ACS.

i) Housing Office. A subsection of an installation's logistics staff section, this office controls on-post housing and evictions.

j) Community Counseling Center. Usually part of ACS. Can be named other things on different installations.

k) Mental Health. The part of the supporting medical command dedicated to psychological wellness.

l) Military One Source. On-line resource (www.militaryonesource.com) where Soldiers can obtain assistance outside their command channels.

J. Mediation.

1. Mediation services may be provided as part of a formal program authorized by the commander responsible for the legal assistance program.

2. Attorneys providing mediation services must comply with the applicable ethical standards of AR 27-26, and may mediate any dispute involving one or more eligible legal assistance clients.

III. PREVENTIVE LAW PROGRAMS

A. Purpose.

1. The purpose of preventive law is to assist Soldiers and their dependents in avoiding legal problems rather than reacting to them after they arise. The key to a successful preventive law program is to provide relevant and timely knowledge to Soldiers and their family members so that they can make informed decisions as consumers.

2. Because preventive law seeks to prevent problems, its success is sometimes difficult to measure. How, for example, does one measure the number of consumer law cases that do not turn into legal problems because the consumer is already aware of the provisions of the Federal Trade Commission's Rule on Door-to-Door Sales? This can make "marketing" the program to the commander a challenge, particularly when resources are scarce.

3. Army Regulation 27-3 designates the preventive law program as a mandatory command program. Responsibility for implementation and execution of the program rests with supervisory attorneys. Consequently, effort must be made to "sell" the program as what it truly is – a combat multiplier.

4. Preventing legal problems is a readiness issue. Attorneys must ensure that commanders see the program in this way. More importantly, attorneys must plan their preventive law campaigns with readiness in mind. Aim at the issues that will cause readiness problems. Use forums that will maximize benefit to the unit's readiness. Then use these facts to demonstrate to the commander that the program is well worth the resources he or she is putting toward it.

B. Preventive Law Services.

1. General. (AR 27-3, Paragraph 3-3).

a) Commanders are responsible for ensuring that preventive law services are provided within their commands.

b) Supervising attorneys will ensure that preventive law services are provided by attorneys performing legal assistance duties, as well as by others under their supervision. Attorneys should be aggressive and innovative in disseminating information to service members and their families that is responsive to potential legal problems and issues.

2. Preventive law measures. (AR 27-3, Paragraph 3-4).

a) In assisting commanders to carry out their preventive law responsibilities, supervising attorneys should--

(1) Examine the common legal problems confronted by service members and family members to determine whether changes in law or regulation could benefit them, and then suggest regulatory changes or legislation through appropriate channels to effect those changes.

b) Seek support from bar associations to provide no-fee or reduced-fee legal services for service members and family members with low incomes.

c) Identify businesses that take unfair advantage of service members and family members and develop procedures to help combat such practices.

d) Assist military housing referral offices and disciplinary control boards in ensuring fair treatment of service members and family members by landlords and businesses.

e) Share innovative measures (for example, the use of mediation services to resolve certain legal disputes) and other items of interest (for example, changes in State law affecting service members and family members) with other attorneys providing legal assistance, such as by publishing articles in military legal publications of general circulation and placing information on the electronic bulletin board.

3. Local print, electronic media, training and education programs will be used to advise service members and their families of:

a) Their legal rights and entitlements.

b) Timely legal issues and local legal problems and concerns.

c) The importance of considering the legal consequences of their actions prior to signing legal documents such as purchase agreements, contracts, leases, and separation agreements.

d) The importance of recognizing legal issues and seeking timely legal advice rather than ignoring potential legal problems.

e) The office locations (with telephone numbers and hours of operation) where legal assistance is available.

C. Elements of a Successful Preventive Law Program.

1. The elements listed below are critical to a successful program. The ideas listed below each element are merely suggestions of methods you could use to incorporate the element into your program. These lists are NOT exclusive – use your imagination and resourcefulness to make your program the best it can be.

2. Information Dissemination.

a) Articles in weekly post newspaper.

b) Video presentations for newly assigned Soldiers undergoing post in-processing.

c) Electronic bulletin board entries or periodic newsletters

d) Bulletin board in unit area.

e) Installation or unit website.

f) Preventive law card.

g) Newcomer's briefings.

h) Overseas: Armed Forces Radio and TV stations.

i) Law Day (Annually in May).

j) Fact sheets or information handouts.

3. Education.

a) Any officer and/or NCO meetings.

b) Command information classes for Soldiers in their unit areas.

c) Family Readiness Group briefings

d) Commander / 1SG Courses

4. Liaison Functions with Consumer Agencies.

a) Local bar association.

b) Consumer organizations (community and on-post).

c) Federal Trade Commission (Military Sentinel).

d) Command organizations.

D. Preventive Law as a Command Program.

1. Sales techniques. The initial step in improving or building any preventive law program is to get the commander's support. The following tools should be considered:

2. Strong language in AR 27-3. Army Regulation 27-3 makes it clear that preventive law is a command program. It is not a program made up by the SJA Office.

a) Force Multiplier. This refers to the readiness arguments mentioned in the introduction.

b) 90% - 10 % rule. Commanders often complain that they spend 90% of their time with the 10% of their Soldiers who are causing trouble. Preventive law is a way of doing two important things:

(1) Helping the good Soldiers in their command who are doing a good job.

(2) Keeping Soldiers from becoming part of the "10%" who are in trouble.

3. An effective program is advantageous for the legal assistance office because it:

a) Improves public relations.

b) Provides a forum to interact with and to provide information to commanders and first sergeants.

c) Allows attorneys to become more involved with the military community.

d) Informs commanders of assistance provided by the legal assistance office to their Soldiers and family members.

e) Improves mobilization readiness (i.e. meeting deployment needs early).

IV. ADMINISTRATION AND RECORD KEEPING

A. Legal assistance attorneys are required to prepare DA Form 2465, Client Legal Assistance Record, and maintain temporary files for clients that receive services other than notarization or preparation of a power of attorney.

B. Temporary client files are confidential records that include copies of any checklists or work sheets used to provide legal advice, copies of correspondence or documents drafted by the attorney, and other memoranda and notes relating to the legal assistance provided to the client.

C. Legal assistance attorneys should, when possible, ensure that all original documents are returned to the client for their safekeeping.

D. Information contained on DA Form 2465 and in all temporary client files is confidential and protected by the attorney-client privilege and the work product doctrine.

E. Client Information System (CIS)

1. The Legal Assistance (LA) Client Information System (CIS) is a database computer system put into place by the Army's Legal Assistance Policy Division to manage and track Army JAGC LA operations. The LA CIS produces office-wide statistical workload reports of services, client category (affiliation, status, grade), and provider reports of pending activities and closed cases. LA CIS also produces reports of services provided to clients by military branch (Army, Navy, Air Force, etc.). LA CIS is centrally managed on the JAG Corps' server and is linked through JAGCNET. Information

entered into CIS is often gathered using DA Form 2465, Client Legal Assistance Record.

2. Use of CIS is essential in compiling statistics on legal assistance services provided at the end of each reporting period and also in checking for client conflicts of interest.

F. Client Cards (DA Form 2465).

1. Preparation of DA Form 2465 is required for all legal services provided to a client other than preparation of a power of attorney. A client card is not required for ministerial services such as notarizations or witnessing of signatures.

2. Completing the block on Case Type.

a) Normally, only one case type will be used for a client problem. The predominant issue or problem presented by the client will form the basis for selecting the case type from AR 27-3, Table B-1.

b) When a new case type is used for a client, it should be circled on the Client Card to indicate services on a new case. For future visits to the legal assistance office on the same case, the case type should not be circled.

c) As an exception, more than one case type may be used if the client presents two unrelated legal problems for which the attorney provides independent legal services (other than just counseling or referral).

d) A legal assistance case is composed of a legal problem or issue upon which a client seeks legal assistance, regardless of how many office visits or services may be provided in an effort to resolve that case.

e) Notarizations and powers of attorney are counted as services, not cases.

3. Completing the block on Type of Services.

a) Each legal assistance case will, by definition, include at least one instance of legal counseling, which should be indicated on the client card.

b) One or more services may be provided on a single case. Each service, including duplicate services, should be indicated on the client card.

c) As an example, consider a client who presents with a family nonsupport issue and is interviewed twice, provided advice, and the legal assistance attorney writes three letters. This represents one case type (FN for nonsupport), two services of legal counseling (SC) and three services of legal correspondence (SL).

V. PROFESSIONAL CONDUCT

A. Regulatory Requirements under AR 27-3.

1. Those providing legal assistance will not make statements or send correspondence purporting to be on behalf of the United States, the Army, or the command or legal office (AR 27-3, Paragraph 4-6).

2. Those seeking official interpretation of a regulation or a government position on an issue are referred to a person responsible for such matters (i.e. an official legal opinion on interpretation of Army regulation).

3. Ethical standards (AR 27-3, Paragraph 4-7).

a) AR 27-26 – creates rules of professional conduct for those providing legal assistance in the Army.

b) Refer a client to another attorney when the client's needs exceed legal assistance attorney's competence or authority to render assistance.

c) Must properly terminate attorney-client relationship.

d) May not request or accept benefit or gratuity from any source as payment.

e) May not request or accept compensation or benefit for referring to lawyer in private practice matter in which the lawyer was involved in military legal assistance capacity.

f) (RC) May not refer client to self or own firm for same general matter client sought legal assistance except on no-fee basis, but may represent client on new matters for fee.

B. Duty of Confidentiality.

1. All information related to the attorney-client relationship is confidential.

2. Express consent of the client to disclose confidential information should be obtained in writing after fully advising the client of the reason for disclosing and the advantages and disadvantages of disclosure.

3. The duty of confidentiality applies to all personnel working in support of the attorney providing legal assistance.

4. Client files are confidential and must be safeguarded.

C. Conflicts of Interest.

1. See AR 27-26, Rules of Professional Conduct, 1.7 through 1.10 regarding conflicts of interest and imputed disqualification.

2. Supervising attorneys must establish procedures to ensure that:

a) All clients are screened to avoid inadvertent conflicts.

b) Confidentiality of client information is protected.

3. Army policy discourages attorneys working in the same office from providing legal assistance services to both spouses in a domestic dispute.

a) Exceptions may be granted by a supervising attorney and with the informed consent of both parties.

b) Resolve conflicts before representation in estate planning cases involving both spouses and/or involve requests for legal assistance on behalf of third party (i.e. younger person accompanying older person).

CHAPTER C

INTERVIEWING & COUNSELING

TABLE OF CONTENTS

July 2018

THIS PAGE INTENTIONALLY BLANK.

CLIENT INTERVIEWING AND COUNSELING

I. REFERENCES

A. Army Regulation 27-3, The Army Legal Assistance Program (21 February 1996).

B. Army Regulation 27-26, Rules of Professional Conduct for Lawyers (28 June 2018).

C. DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

II. INTRODUCTION

A. Interviewing . . . refers to attorney interaction with a client for the purpose of identifying the client's problem and . . . gathering information on which a solution to that problem can be based . . . .

B. Counseling . . . refers to a process in which lawyers help clients reach decisions . . . a process in which potential solutions with their probable positive and negative consequences are identified and then weighed in order to decide which alternative is most appropriate. DAVID A. BINDER & SUSAN D. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 5 (1977).

III. THE INITIATION (OR PREPARATORY) STAGE

A. Put the client at ease.

1. Greet the client.

2. Escort the client to your office.

B. Office appearance.

1. Desk appearance.

2. Personal appearance.

3. Office appearance.

C. Initiate conversation.

1. Role of legal assistance attorney.

2. Briefly discussing attorney-client confidentiality will put them at ease.

a) Our Rules of Professional Conduct provide that when representing a legal assistance client, you represent that client, **not the Army**. Army Rule 1.13(b).

b) What they tell you is confidential and should not be told to others unless it fits within the Rules exceptions or you have the client's permission. Army Rule 1.6.

c) You may want to get the client's permission to discuss a difficult case with your boss and/or fellow attorneys. Army Rule 1.6 grants you implied authority to release confidences required to further the representation. It may be advisable, however, to consult with the client and ask permission to discuss the case with other attorneys.

3. If at all possible exclude third parties from the interview.

4. Avoid interruptions.

a) Phone policy.

b) Visitor policy.

D. Time management during interview.

1. Inform the client of time constraints at the beginning of the interview.

2. Focus the interview.

E. At the beginning of the interview, determine whether client has seen another attorney and if so, whether the client or a potential adversary (or opposing party) is already represented.

1. Get the other attorney’s view.

2. Also, hearing what the other lawyer advised can help you focus rapidly on the issues or spot ones not addressed.

3. Ensure there is no conflict.

F. Agenda.

1. Gathering facts.

2. Time for case development.

3. Inform client of agenda.

4. Explain interview process.

G. Identify the reason for the client's visit.

1. Determine the problem. "How may I help you today?"

2. What is the nature of relief sought?

a) Make sure you understand not only the problem but also what resolution the client seeks. Just because client X comes in with a marital problem, does not mean he or she wants a divorce. There may be underlying problems that can be cured through other means such as financial counseling.

b) A Missouri Bar study indicated that there was only a 20% correlation between what a client wanted and what the attorney *thought* the problem was.

IV. THE DEVELOPMENT STAGE

A. Goal. To learn as much as possible about the facts of the case and the client's objectives in the limited time available.

B. Inhibitors.

1. Ego threats. People withhold information that is threatening to their self-esteem. For example, a colonel is taken by a Florida land swindle and he is ashamed to admit all the facts (particularly to a junior officer).

2. Case threats. Clients will withhold information they feel may damage the case. For example, client husband thinks his drinking or abuse of the children will hurt his chances for custody, so he neglects to mention these facts.

3. Role expectations. Clients come into an interview with certain preconceived notions of what is proper client behavior. In the military, clients often expect to be in the subordinate or passive position and they see the lawyer as occupying the superior role. In such situations the client may be reluctant to openly communicate. The military rank structure may make this worse because of rank role perceptions, expectations and sometimes outright hostility.

4. Etiquette barriers. Some people will provide certain information only to certain people and not to others. For example, a man may feel comfortable only discussing problems with a woman and not another man who might threaten his self-image.

5. Trauma. Clients may be reluctant to relate unpleasant experiences. A wife might not relate spouse abuse.

6. Perceived irrelevancy. A client may think that a fact is not significant to the case, when in fact it is.

7. Greater need. A client may have different priorities of needs than the attorney perceives. For instance, a client may want to find another apartment after eviction, whereas the attorney is primarily concerned about a habitability defense for the client.

C. Facilitators.

1. Empathetic understanding. The attorney must try to listen, understand, and avoid judging the client. He must try to see the case from the client's perspective.

2. Fulfilling expectations. On sensing reluctance from the client, the attorney can convey a strong expectation that the sought after information should be revealed. For example, if the client is reluctant to talk about the unhappy marriage, the attorney acknowledges how difficult it is to talk about, but lets the client know that the information is important and that the attorney expects to hear the relevant information.

3. Altruistic appeals. Humans generally respond to higher values, above their own self-interest. This can be effective in persuading a spouse to reveal the other spouse's child abuse so the child can get help.

4. Extrinsic rewards. Show the client that providing the information will be in his or her best interest - it will help the case.

5. Recognition. The attorney may have to resort to praising the client for giving the information by telling her how helpful she is being.

D. Techniques for developing facts.

1. Avoid early conclusions.

a) Let the facts come out first.

b) Adopt an empathic approach.

2. Use questions effectively.

a) Open ended questions.

(1) "How did you feel after the collision?"

(2) "Tell me what happened."

b) Closed ended questions - questions that actually suggest an answer. Be careful, however - remember that the client establishes the goals of the representation. Examples:

(1) "You feel terrible about this, don't you?"

(2) "You would be better off with a divorce, wouldn't you?"

c) Combinations of the two are often used in interviewing and some call this the funnel approach. Use open-ended questions to get a general picture of the problem, then closed questions to focus.

d) Avoid confusing your client by asking double questions. Keep it simple.

3. Avoid bombarding the client, let the client talk without having to respond to you all the time.

4. Try not to ask the "why" question.

5. Use responses to show the client active listening.

    a) Restatement. This technique shows the client you listened and understood what he or she said. Just rephrase.

    b) Reflection. This technique shows the client the attorney is empathetic and relates to his or her feelings about the case.

    c) Explanation. This technique is a descriptive statement used to orient a client in a particular way. "I need to understand this about the case because..."

    d) Encouragement. Supporting and strengthening the client feelings toward the case.

    e) Assurance and reassurance. A technique used to indicate that the attorney believes the client can face up to his or her situation.

    f) Suggestion. This is a mild form of advice, but leaves leeway for the client to make the decision.

E. Other techniques.

1. Wait out silences. Learn when to keep quiet.

2. Do not be afraid to probe deeper if gaps or inconsistencies develop.

    a) Probing is a necessary part of the job.

    b) If the client becomes upset, reeducate him or her about the attorney's role and the confidentiality of the interview.

3. Spot tension and emotional issues and develop. Try to help the client through these.

F. Be sure to ask the client if there is anything else the attorney should know . . . if anything important has been left out.

1. This puts the responsibility back on the client for the extent of the attorney's knowledge of the case.

2. If the attorney does not ask it, he or she can later claim the client did not provide this information because you did not ask.

G. Problem areas during the development stage.

1. The rambling client.

2. The deceptive client.

a) Be careful in domestic situations especially. Seldom will one party give the whole story and often it is shaded in their favor.

b) Tell the client if you find information inconsistent, as this often prompts them to be more truthful.

H. Taking notes. If the attorney takes notes during the interview, wait to do it after the client talks a while and the attorney explains that it is important for you to jot down some facts. Extensive note taking can be very distracting to a client and inhibit their conversation.

Be sure to make notes of the name, phone number, address and military unit. This information should also be on the client cards that your receptionist prepares. If it is, check it for accuracy.

V. THE COLLABORATION AND COUNSELING STAGE.

A. Solving the problem.

1. Apply the appropriate law to the facts.

a) Consider the full range of alternatives and analyze probable outcomes.

b) Consider (and may advise on) the impact of non-legal factors. Army Rule 2.1: provides that "in rendering advice, a lawyer may refer not only to the law but to other considerations such

as moral, economic, social and political factors that may be relevant . . . ."

(1) Telling a client that he or she can sue for child custody without talking about the high costs involved in the suit would do an injustice to the client.

(2) Likewise, if the attorney believes after hearing all of the facts that the children would be better off with the other spouse, the attorney should advise the client how a judge or jury might look at those same facts.

c) Consultation.

B. Teach the client about compromise.

1. A case should not always go to court or even resolve solely in favor of one party.

2. Many problems can be solved with common sense and compromise.

3. Do not rush into a battle when there does not need to be one. One of the lawyer's greatest tools is the ability to negotiate for clients.

C. Completely and competently advise the client of the law and the risks. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (Rule of Professional Conduct For Lawyers, Rule 1.4)

D. Know your capabilities and limitations. Remember Army Rule 1.1 - Competence.

E. Don't ever guess at the law.

F. Be honest with the client.

G. Allow the client to make the final determination. (Army Rule 1.2)

H. Be aware that some clients make very poor decisions in certain circumstances. For example, a mother may not ask for child support thinking she can manage all by herself. The attorney must advise the client-mother that the children are entitled to support by both parents.

I. Problems in Counseling.

1. Negative attitude towards attorney.

2. Legalese.

3. Negative reaction to advice. ("Shooting the messenger").

a) Recognize the limits of what an attorney can do for a client. Keep very good records of what you discussed and the advice offered.

b) Some clients are happy to blame the attorney after the fact.

VI. THE TERMINATION STAGE.

A. End the interview session on time. If the attorney runs over time, he runs the risk of disrupting the next client's time. If the attorney must run over, the attorney should get the client's consent and have someone let the next client know there may be a delay.

B. It is critical to ask client if he or she has any questions before leaving the office.

1. "Do you have any questions?"

2. "Is there anything else I can do for you today?"

C. Make sure the client understands the nature of problem. Restate the problem,
i.e. "Client X, I think you have a financial problem, that if solved, could take the stress off of your marriage."

D. Ensure client understands what will be done about the problem. For example:

1. Tell the client that you will write a letter to the creditor outlining your agreed upon position;

2. That you will call her spouse's divorce lawyer and see if a settlement can be reached on property division without going to court.

E. Also, tell the client what you expect him or her to do. For example:

1. Get more paperwork and bring it back the next day or

2. Go to financial counseling services on base and work up a budget for the family.

3. Some clients you talk to will not need legal services or need greater expertise than you have. Refer them to appropriate agencies or other attorneys.

F. Give the client a timetable for achieving results. For example: "Let me know by next week if you hear from the car dealer." Then, call the client, if they do not call you.

1. Keep the client informed and conduct all necessary follow-up actions. (Rule of Professional Conduct For Lawyers, Rule 1.4)

2. Show client to the door.

3. Terminating the relationship.

VII. HOW WELL DID YOU DO YOUR JOB? ASK THE CLIENT.

A. "Quality service is not limited to good work...[it includes] responsiveness, timeliness, accessibility, and even prompt return of telephone calls...." Schmidt The Client Service Edge - The Key to Your Firm's Future, 16 No. 3 Law Prac. Mgmt 18 (April 1990) (American Bar Journal).

B. Client surveys can provide the legal assistance office with valuable feedback on the quality of services provided. (The following was taken from Coburn and Ginsburg, How to Design An Effective Client Survey, Vol. 13, No. 41 Nat'l. L. J. 26 (June 17, 1991):

1. Good surveys lose their value if worded ambiguously or arranged in a confusing manner.

2. Good surveys positively reflect on the office; poor ones do the opposite. Make the survey professional looking.

3. Surveys should be geared toward the needs and interests of the office.

4. Anonymous survey results provoke more candid responses.

C. Both open-ended and closed-ended questions are valuable. A good approach is to use combination of both. Closed-ended questions are easy, quick for clients to complete, and objective. Open-ended questions complement the objectivity of the closed-ended question and allow the client to elaborate on his or her answers.

1. A good approach is to focus the survey around close-ended questions and include a limited number of open-ended questions to allow the client to explain those questions calling for elaboration.

2. An example of combining these types of questions would be to ask "To what extent were you satisfied with the service you received at this office?" and provide five possible choices, ranging from "completely satisfied" to "very dissatisfied." Follow this question with a space for the client's comments or a follow-on question such as "What would you change about our office?"

D. People evaluate five dimensions when judging the quality of a service (in order of importance) (the following was taken from Schmidt, The Client Service Edge - The Key to Your Firm's Future):

1. Reliability (the ability to provide what was promised, dependably and accurately);

2. Responsiveness (the willingness to help customers and provide prompt service);

3. Assurance (the knowledge and courtesy of employees, and their ability to convey trust and confidence);

4. Empathy (the degree of caring and individual attention provided to customers); and

5. Tangibles (the physical facilities and equipment, and the appearance of personnel).

6. "Most lawyers are technicians - researchers, writers, drafters. Because of the intensive training on the "work product" side (and lack of appreciation for or training on the "service side"), some lawyers even see clients as intrusions...."

E. A survey of legal client satisfaction taken by the Missouri Bar and Prentice- Hall indicated the following:

1. Why would the client hire that attorney again? Because he or she

a) Was friendly,

b) Was prompt and business-like,

c) Was courteous,

d) Was not condescending, and

e) He/she kept me (the client) informed.

2. Why would the client not hire that attorney again? Because he or she

a) Had a superior attitude (said I couldn't understand because I wasn't a lawyer),

b) Was bored or indifferent (couldn't find my file in the pile on his desk),

c) Was impersonal (didn't know who I was),

d) Failed to keep me informed (I never knew what was going on), and

e) Was rude and brusque (he never came out to the waiting room; he didn't rise when I came in the room).

F. What does it take to make a legal assistance office "client oriented?"

1. Commitment from the leadership.

2. Service training.

3. Recognition of the factors clients use to judge quality of service.

THIS PAGE INTENTIONALLY LEFT BLANK

CHAPTER D

NOTARIAL POWERS AND POWERS OF ATTORNEY

TABLE OF CONTENTS

August 2018

I. REFERENCES

A. 10 U.S.C. §§ 936 and 1044.

1. FY 2017 National Defense Authorization Act Sec. 523 (Notary Updates)

B. AR 27-55, Notarial Services (17 November 2003).

C. AR 600-20, Command Policy (6 November 2014).

II. AUTHORITY OF U.S. MILITARY PERSONNEL TO ADMINISTER OATHS AND PERFORM NOTARIAL ACTS

A. 10 U.S.C. § 1044a grants named individuals the general powers of a notary public and of a consul of the United States. SJAs may appoint in writing non-attorney United States citizen employees located outside the United States to perform as military notaries. 10 U.S.C. § 1044a(b), AR 27-55, paras. 1-7b and 2-2a(5).

B. 10 U.S.C. § 1044b is intended to increase the acceptability of general and special powers of attorney prepared by legal assistance attorneys for their clients.

C. 10 U.S.C. § 1044c is intended to increase the acceptability of advanced medical directives prepared by legal assistance attorneys for their clients.

D. 10 U.S. C. § 1044d is intended to preempt state law (including Puerto Rico law) testamentary requirements by forcing states to recognize Military Testamentary Instruments executed in accordance with 10 U.S.C 1044.

E. 10 U.S.C. § 936 grants named individuals power to administer oaths necessary for military administration, including military justice and those necessary in the performance of their duties.

III. GENERAL OVERVIEW

A. Authority to administer oaths and perform notarial acts is based on Federal, State, and foreign law.

B. The authority granted by federal statutes (10 U.S.C. § 1044a and § 936) to administer oaths and perform notarial acts is separate and apart from, and in addition to, any authority provided by state law.

C. Oaths administered pursuant to 10 U.S.C. § 936 are legally effective for the purposes for which the oaths are administered (*e.g.*, military administration).

D. Notarial acts performed under 10 U.S.C. § 1044a are legally effective as notarial acts for all purposes in all states (pursuant to the Supremacy Clause). In the past, not all states agreed; that is why Congress passed § 1044b in 1994.

10 U.S.C. § 1044b provides:

(a) INSTRUMENTS TO BE GIVEN LEGAL EFFECT WITHOUT REGARD TO STATE LAW -- A military power of attorney

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and

(2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.

(b) MILITARY POWER OF ATTORNEY -- For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal Law.

(c) STATEMENT TO BE INCLUDED -

(1) Each military power of attorney shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a military power of attorney that does not include a statement described in that paragraph.

(d) STATE DEFINED -- In this section, the term 'STATE' includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

IAW AR 27-3, paragraph 3-7e, the following is the prescribed PREAMBLE FOR MILITARY POWERS OF ATTORNEY (insert at beginning of each general and special power of attorney in capital letters):

This is a MILITARY POWER OF ATTORNEY prepared pursuant to Title 10, United States Code, Section 1044b and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any requirement of form, substance, formality, or recording that is prescribed for powers of attorney under the laws of a state, the District of Columbia, or a territory, commonwealth, or possession of the United States. Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.

E. Advanced Medical Directives. 10 U.S.C. § 1044c is identical to the military power of attorney provision, except it deals with advanced medical directives. 10 U.S.C. § 1044c

requires similar language on all advanced medical directives as is on military powers of attorney.

> STATEMENT TO BE INCLUDED: Substitute the words "Title 10, United States Code, Section 1044c" for "Title 10, United States Code, Section 1044b" and the words "advanced medical directive" for "power of attorney" in the above language to make this protection effective.

F. Military Testamentary Instruments. 10 U.S.C. § 1044d(e) requires states to recognize a "military will," provided it includes the following language: "A military testamentary instrument (1) is exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State; and (2) has the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate."

IV. NOTARIAL ACTS

A. Under the authority of 10 U.S.C. § 1044a and AR 27-55, Paragraph 2-2a, the following persons (including RC members whether or not in a duty status) have the general powers of notary public and of a consul of the United States in the performance of all notarial services:

1. All judge advocates, and warrant officers who possess a primary MOSC of 270A. Note: Reserve component judge advocates and warrant officers may perform notarial services even in a non-duty status. However, enlisted Reserve component notaries cannot perform notary services in a non-duty status without the authorization of the Reserve component SJA.

2. Active duty and Reserve component NCOs (including corporals) and legal specialists (authorized by their supervising SJA pursuant to Paragraph 1-7a) who possess a primary MOSC of 27D and serve under the immediate supervision of a judge advocate or DA civilian attorney employee. AR 27-55 defines "immediate supervision" as "under the direct guidance or management of another." While "immediate supervision" does require that the supervisor and person supervised be co-located (*e.g.*, within the OSJA or at an SRP site), the term "does not require a supervisor to be present at all times" when the individual is performing assigned duties.

3. SJAs may appoint, in writing, Soldiers in the grades of E-3 and E-4 with a 27D MOSC to perform duties as military notaries. Soldiers appointed must:

(1) Possess appropriate judgment and maturity.

(2) Serve under the immediate supervision of a judge advocate or DA civilian attorney.

(3) Receive training in accordance with AR 27-55, Paragraph 1-8.

4. NCOs in the grade of E6 and higher with primary MOSC of 27D assigned as legal NCO to a brigade or higher unit, even if not under the immediate supervision of an attorney.

5. All DA civilian attorneys serving as legal assistance officers.

6. Those DA civilian employees appointed by their supervising SJA under AR 27-55, Paragraph 1-7b, serving under the immediate supervision of a judge advocate or DA civilian attorney. SJAs may appoint, in writing, non-attorney United States citizen employees located outside the United States to perform as military notaries. Those appointed must:

(1) Possess appropriate judgment and maturity;

(2) Serve under the immediate supervision of a judge advocate or DA civilian attorney;

(3) Receive training in accordance with AR 27-55, Paragraph 1-8.

7. All Adjutants.

8. All civilian paralegals serving at military legal assistance offices, supervised by a military legal assistance counsel.

B. Under the authority of 10 U.S.C. § 1044a and AR 27-55, Paragraph 2-2b, the following individuals may receive notarial services:

1. Members of any of the U.S. Armed Forces;

2. Other persons eligible for legal assistance under AR 27-3 or regulations of the Department of Defense;

3. All individuals serving with, employed by, or accompanying the Armed Forces outside the United States (IAW AR 27-3, Paragraph 2-5a(7), civilian contractors may receive notarial services only "when DOD is contractually obligated to provide this assistance to such personnel as part of their logistical support . . . .");

4. All other individuals subject to the UCMJ outside the U.S.; and

5. DOD civilian employees on matters relating to their official duties.

C. All Military notaries will maintain a notarial log. AR 27-55, Paragraph 3-5. Witnesses are not required to put their social security number on documents. AR 27-55, Figure 4-1.

D. In accordance with 10 U.S.C. § 973, paragraph 2-3 of AR 27-55 prohibits active duty commissioned and warrant officers from obtaining or retaining commissions as civil notaries. Reserve commissioned and warrant officers serving on active duty under a call to duty in excess of 270 days will not obtain or retain commissions as civil notaries. However, this prohibition does not affect the authority of an officer, without a civil notary commission, to actually serve as a civil notary under state law; the laws of most states authorize certain U.S. Armed Forces members to provide notarial services within the military without obtaining commissions or appointments as civil notaries.

V. OATHS

A. IAW AR 27-55, oaths and affirmations are pledges in which the individual making the oath swears or affirms the truth of statements made by them. Oaths and affirmations are used when taking affidavits or sworn statements and documents.

B. Under 10 U.S.C. § 936(a) and AR 27-55, Paragraph 3-1, the following U.S. Armed Forces members on active duty, reservists serving on active duty or inactive duty for training, and Army National Guard members when serving on active duty under Title 10 U.S.C., may administer oaths for all purposes of military administration, including, but not limited to, military justice, legal assistance, and claims:

1. All individuals granted authority as military notaries under AR 27-55, Paragraph 2-2a.

2. Officers appointed as summary courts-martial.

3. Individuals empowered to authorize searches pursuant to Military Rule of Evidence 315(d) for any purpose relating to search authorizations.

C. The following Army personnel are authorized to administer oaths to any individual when the oath is administered in conjunction with duties related to these positions:

1. President, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial.

2. President and counsel for any court of inquiry.

3. All officers designated to take depositions.

4. Any individual conducting an authorized investigation.

5. All recruiting officers.

6. Civilian personnel officers and their designated representatives.

D. Any active or Reserve commissioned officer may administer:

1. Oath of enlistment (10 U.S.C. § 502).

2. Any other oath required by law in connection with enlistment or appointment of any person in the Armed Forces (10 U.S.C § 1031).

E. Procedures.

1. Oaths administered for military justice matters should be administered according to AR 27-10, chapter 10.

2. All other oaths should be administered as described in AR 27-55, paragraph 4-4.

VI. NOTARIAL CERTIFICATIONS

A. AR 27-55, Paragraph 4-2a. The signature of the officer taking acknowledgments or sworn instruments, together with the title of his or her office, is *prima facie* evidence of the officer's authority, and an impressed or raised seal is not required.

B. 10 U.S.C. § 1044a. The signature of any such person acting as notary, together with the title of that person's offices, is *prima facie* evidence that the signature is genuine, that the person holds the designated title, and that the person is authorized to perform a notarial act. A seal is not required by the statute.

C. Notarization vs. Certification.

1. Notarization: The notary signature and seal (if required) just indicate that the person purporting to sign the document physically appeared before the notary, produced identification or was known personally by the notary, and signed the document in the presence of the notary.

2. Certification. Signifies that the document is an accurate and complete copy of the original document. Most public records and documents, like marriage licenses, birth certificates, divorce decrees, and titles, are recorded in public offices and those offices certify copies.

3. AR 27-55, paragraph 4-5, prohibits notaries from certifying copies of public documents or records except in the following circumstances:

a) Military administration, including finance or personnel administration.

b) Federal administration where allowed by law or regulation. For example, the Veterans Administration permits designated judge advocates to authenticate documents for VA administration.

c) The military notary must indicate the purpose for which public records are authenticated (*e.g.,* "Authenticated Copy for DFAS"). *See* figure 4-2, AR 27-55.

4. Typical public record documents that clients often wish Legal Assistance Offices to certify involve birth certificates and car titles. Certifying these records would violate AR 27-55.

VII. POWERS OF ATTORNEY (POAs)

A. Definition. AR 27-3.

1. A written instrument executed by one person, the principal,

2. Designating another individual, the agent or "attorney-in-fact,"

3. To perform specified acts on the principal's behalf.

B. Purpose.

1. To notify third parties of the agent's authority.

2. Powers of attorney are usually designated as either "special" or "general" depending on the specified act(s) or kind(s) of act(s) for which authority to act on behalf of the principal has been given.

C. Overview of Dangers.

1. Execute only when there is a reasonable or immediate need for the instrument.

2. No law requires third parties to recognize the authority of the agent to act on the principal's behalf as set forth in the POA. However, the majority of persons, businesses, and institutions will do so.

3. Personnel should be fully advised of the inherent dangers involved in granting to another the authority to act in their stead.

D. Special Powers of Attorney.

1. Special POAs give limited authority for a limited purpose.

2. To reduce the risk, a special POA should be used whenever it can fulfill the needs of the client, because the authority given is limited to the specific act or acts described in the instrument.

E. General Powers of Attorney.

1. General POAs give broad authority for a broad purpose.

2. General POAs can be dangerous instruments in the hands of persons inexperienced in business matters, persons of unstable temperament, or anyone in whom the grantor does not have the utmost trust and confidence.

3. The possibility of strained marital relations should be considered.

4. General POAs will not be notarized until an attorney has counseled the prospective grantor on the nature and effect of a General POA. AR 27-55, Paragraph 3-3a(11).

5. Under no circumstances should an unrestricted general POA be used or produced unless it contains a specific termination date or other provisions for revocation.

F. Termination or Revocation.

1. If the POA contains no expiration date, it continues in effect until statutory provisions for termination, operation of law (i.e., death of the principal or agent), or an act of the principal or agent evidencing intent to revoke the power.

2. Insert a termination clause in all POAs. For example, the principal may want the power to expire on or about the date of his or her expected return from an overseas tour of duty. This prevents the POA from being indefinite in duration and allows it to terminate on a specific date, unless sooner revoked.

3. If no termination date is inserted in a POA, or if the principal wishes to revoke the power prior to its stated termination date, notice of the revocation must be given to the agent.

a) Such notice preferably should be in writing, although it may be made orally, and

b) The principal should request the agent to acknowledge receipt of such notice.

4. Ordinarily, the revocation takes effect as soon as it is communicated to the agent.

5. As to third persons that have dealt with the agent, the revocation takes effect when they receive notice of the revocation.

6. Where a statute provides for the recording and revocation of POAs, third parties that do not have notice of an unrecorded revocation may be justified in relying on the continuance of the authority as recorded.

7. Additionally, in some states, the POA terminates upon the incapacity of the grantor, notwithstanding that the POA has no termination date or the termination date is subsequent to the date upon which the incapacity occurs.

G. Durable Powers of Attorney.

1. A durable POA is a special agency relationship that remains valid and operative despite the incapacity of the grantor.

2. Under common law, a POA becomes inoperative upon the disability of the principal. State statutory law has remedied this by giving powers to agents to act even during the incapacity of the principal.

3. Guardianship and conservatorship are a separate legal status that can conflict with the durable POA. Each state's separate rules control as to the relationship between these powers.

4. The lack of federal law addressing durable POAs is a continuing problem.

a) Since there is no federal law on the subject, state law controls and can be in the form of either state common law or state statutes.

b) Some statutes require the word "durable" to create a power that is capable of surviving the disability or incapacity of the principal.

c) The problem of having several different states involved is a conflict of laws question. The Restatement of the Conflict of Laws 2d § 291 states,

> "The rights and duties of a principal and agent toward each other are determined by the local law of the state, which, with respect to the particular issue, has the most significant relationship to the parties in the transaction . . . ."

d) Another possible conflicts problem is the validity of the agent's acts. According to The Restatement on Conflict of Laws 2d § 292, the validity of the agent's acts is determined by the law of the state that has the most significant relationship to the parties and the transaction. In any case, a choice of laws clause should be included in the durable power of attorney.

H. Using Powers of Attorney for Child Care – Family Care Plans. AR 600-20, Paragraph 5-5.

1. Mission readiness and deployability needs especially affect Active Component (AC) and Reserve Component (RC) single parents and dual military couples with dependent family members.

2. AR 600-20, Paragraph 5-5, requires those Soldiers to implement a Family Care Plan to provide for the care of their family members when military duties prevent the Soldier from doing so.

a) Plans must be made to ensure dependent family members are properly and adequately cared for when the Soldier is deployed, on TDY, or otherwise not available due to military requirements.

(1) ARNG and RC Soldiers are subject to these policies and regulations and will implement plans during any periods of absence for Annual Training, regularly scheduled unit training assemblies, emergency mobilization and deployments, or other types of active duty.

(2) All married Soldiers who have dependent family members are encouraged, even if not required by the regulation, to complete and maintain a Family Care Plan.

b) Commanders are responsible for ensuring that affected Soldiers complete the Family Care Plan.

c) Affected Soldiers are considered nondeployable until a Family Care Plan is validated and approved.

d) The DA Form 5305 (Family Care Plan) is the means by which Soldiers provide for the care of their family members when military duties prevent the Soldier from doing so.

(1) DA Form 5305 (Family Care Plan) must include:

(a) Proof that guardians and escorts have been thoroughly briefed on the responsibilities they will assume for the sponsor/Soldier and on procedures for accessing military and civilian facilities and services on behalf of the dependent family members of the sponsor/Soldier.

(b) Attestation that the guardian and escort agree to provide care and have been provided all necessary legal authority and means to do so.

(c) Proof that the Solider has obtained consent to the planned designation of guardianship from all parties with a legal interest in the custody or care of the child, or proof that reasonable efforts have been made in this regard.

(2) Proof of the foregoing will consist of (as a minimum) the following attachments to the DA Form 5305:

(a) DA Form 5841 (Power of Attorney), or equivalent delegation of legal control, which the legal assistance office prepares, the Soldier executes and has notarized, and the guardian/escort receives.

(b) DA Form 5840 (Certification of Acceptance as Guardian or Escort) which the guardian/escort completes, has notarized, and returns to the Soldier.

(c) DD Form 1172 (Application for Uniformed Service Identification Card—DEERS enrollment) which the Soldier executes for each dependent family member (AR 600-8-14 directs that ID cards will be issued for children under age 10 who reside with a single parent or dual military couple).

(d) DD Form 2558 (Authorization to start, stop, or change an allotment for Active Duty or Retired Personnel) or other proof of financial arrangements for the care of dependent family members.

(e) Letters of Instruction executed by the Soldier which contain additional pertinent information for escorts, or temporary or long-term guardians.

(f) DA Form 7666, if appropriate, as evidence of consent to the Family Care Plan from all parties with a legal interest in the custody of the minor child.

(3) DA Forms 5304, 5305, 5840 and 5841 will be locally reproduced.

VIII. HEALTH CARE POWERS OF ATTORNEY

A. Overview.

1. What They Are. A special type of durable POA, in which the grantor gives the agent the power to carry out the grantor's health care decisions in the event the grantor is incapable of making informed decisions.

2. Why They Are Useful. The grantor can provide the agent the authority to carry out all of the grantor's health care desires, in the event of the grantor's incapacity.

a. "Incapacity" in this sense refers to the grantor's inability to understand the nature, extent, and consequences of a proposed medical decision.

b. A determination of "incapacity" must be made by an attending physician (in writing), as well as a second physician or licensed clinical psychologist.

3. Compared with Living Wills.

a. Health Care POAs provide more flexibility than living wills.

b. Health Care POAs grant broad powers to the agent, who can make all health care decisions (unless otherwise specified). This includes matters concerning hospitalization, surgery, and care and treatment in a nursing home, for example. Clients can tailor Health Care POAs to apply to a variety of different medical situations.

4. State-Specific Provisions. Some states restrict the power of a health care representative in a Health Care POA.

B. Drafting Health Care Powers of Attorney.

1. DL Wills Program.

a. Agents: One; Acting Jointly; or Alternate.

b. Organ Donation.

2. Provisions. The drafting attorney and client must carefully review the POA to ensure the removal of objectionable provisions or the insertion, through word processing, of some desired provisions.

C. Physical Location of Health Care POAs. Clients should ensure that their agent has a copy. Additionally, clients should ensure the inclusion of copies in their medical records.

CHAPTER E

THE SERVICEMEMBERS CIVIL RELIEF ACT

TABLE OF CONTENTS

THIS PAGE INTENTIONALLY BLANK.

I. INTRODUCTION

A. This outline provides a brief summary of the key protections of the Servicemembers Civil Relief Act (SCRA). The outline addresses most of the major provisions and protections of the Act, but does not address every provision and protection. For example, the outline does not address some of the more obscure provisions of the SCRA such as rights in public lands, mining claims, mineral permits and leases, and land rights. The outline does not cite to all case law related to the Act. Accordingly, please use this outline as a starting point for your research.

B. Organization of the SCRA.

1. Codified at 50 U.S.C. §§3901 - 4043.

2. The SCRA has eight titles:

Title I: General Provisions (50 U.S.C. §§ 3911-3920);
Title II: General Relief (50 U.S.C. §§ 3931-3938);
Title III: Rent Installment Contracts, Mortgages, Liens, Assignments, Leases (50 U.S.C. §§ 3951-3959);
Title IV: Life Insurance (50 U.S.C. §§ 3971-3979);
Title V: Taxes and Public Lands (50 U.S.C. §§ 3991-4001);
Title VI: Administrative Remedies (50 U.S.C. §§ 4011-4013);
Title VII: Further Relief (50 U.S.C. §§ 4021-4026;
Title VIII: Civil Liability (50 U.S.C. §§ 4041-4043).

II. GENERAL AND MISCELLANEOUS PROVISIONS

A. The Act's Purposes - 50 U.S.C. § 3902

1. To provide for, strengthen, and expedite the national defense through protection extended by this Act to Servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

2. To provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of Servicemembers during their military service.

B. Application and Jurisdiction

1. The SCRA is applicable in the United States, in each of the States (including all political subdivisions) and in all territories subject to the jurisdiction of the United States.

2. Applicable in all civil and administrative proceedings. Not applicable in criminal proceedings.

3. Applicable to all agencies of the federal government.

C. Who Receives the Protections

1. Applicable to members of the Armed Forces when they are on active duty. Also applies to commissioned officers of the Public Health Service, and commissioned officers of the National Oceanic and Atmospheric Administration when they are on active duty.

2. Reserves: Applicable to members of the Army, Navy, Air Force, Marine Corps, and Coast Guard Reserves when they are on active duty. Does not apply when they are on inactive duty status, such as weekend drill duty.

3. National Guard: Applicable to Guardsmen activated under federal calls to active duty. Also applicable when in a Title 32 status for more than thirty days in response to a presidential declaration of national emergency. The SCRA does not apply to Guardsmen during state activations or in most traditional, routine Title 32 periods.

4. Civilians and Contractors: Does not apply to civilian employees of the armed services, contract surgeons, or government contractor employees.

D. Start and Termination of Protections

1. Start of Protections: SCRA's protections commence no later than when a person enters active duty service. In addition, Reserve Component personnel are entitled to most of the Act's "rights and protections" on the date they receive active duty orders.

2. Termination of Protections: The SCRA's coverage *normally* terminates "on the date the Servicemember is released from military service (i.e. active duty service) or dies while in military service."

E. The Concept of "Material Effect"

a. The concept of material effect is embodied in many of the Act's relief provisions. Some protections require a showing that military service has materially affected the Servicemember's rights or legal standing.

b. Key issue: Does military service prejudice the Soldier's ability to comply with the obligation, such as appear in court, pay a creditor, pay rent, make a payment on a contract, etc?

F. Waiver of Benefits - 50 U.S.C. § 3918

1. Criteria: A waiver of rights under the SCRA is effective only if in writing and executed as an instrument separate from the obligation or liability to which it applies. It must be executed during or after the Servicemember's period of military service, and must be in "12 point type."

2. Although a Servicemember might waive in writing certain benefits of the Act, s/he does not thereby waive all other rights under the Act.

G. Enforcement and Remedies

1. Enforcement by the Attorney General – 50 U.S.C. § 4041. The Attorney General may commence a civil action in federal district court against any person who (1) engages in a pattern or practice of violating the SCRA, or (2) engages in a violation of the SCRA that raises an issue of significant public importance. A court may grant equitable or declaratory relief, money damages, civil penalties of up to $55,000 for a first offense and up to $110,000 for subsequent offenses, and any other appropriate relief.

2. Private Right of Action – 50 U.S.C. § 4042. Any person aggrieved by a violation of the SCRA may, in a civil action, (1) obtain any appropriate equitable or declaratory relief, and (2) recover all other appropriate relief, including monetary damages. A court may award costs and attorney fees.

3. Preservation of Remedies – 50 U.S.C. § 4043. Sections 4041 and 4042 do not limit other legal remedies, to include consequential and punitive damages.

4. Knowing violations of many SCRA sections may lead to criminal liability. Fines pursuant to title 18, U.S. Code, and imprisonment for up to one year are possible. *See* sections 3951, 3952, 3953, 3955, 3957, and 3958 and *United States v. McLeod,* 2008 WL 114789 (W.D. Mich. Jan. 9, 2008) (landlord who improperly evicted a Soldier's family in violation of the SCRA was sentenced to 6 months confinement and ordered to pay $15,300 restitution).

III. PROCEDURAL PROTECTIONS

A. Default Judgment Protection – 50 U.S.C. § 3931

1. This provision covers two issues: 1) requirements for a plaintiff to move for a default judgment; and 2) criteria a Servicemember must meet in order to reopen a default judgment.

2. Moving for a Default Judgment: Before judgment in any civil action or proceeding, if there is a default of any appearance by **t**he defendant, the plaintiff must file an affidavit stating facts showing whether the defendant is in military service, not in the military service, or whether the defendant's status cannot be determined.

   a. If the Servicemember is absent, then the court must look to appoint an attorney for the absent Servicemember.

   b. The requirement for the plaintiff to file an affidavit applies when "the defendant does not make an appearance."

3. Criteria for a Servicemember to reopen a default judgment.

   a. The Servicemember has ninety days from end of the active duty service to file an application to reopen the default judgment.

   b. The default judgment must have been rendered against the defendant Servicemember during a period of active duty service or within sixty days thereafter.

   c. The Servicemember must not have made an appearance in the case.

   d. The Servicemember's military service must be shown to have materially affected his or her ability to defend the suit.

   e. Must have a meritorious or legal defense to the action.

B. Stays of Civil and Administrative Proceedings - 50 U.S.C. § 3932

1. Stay Basics. A Servicemember may request a stay of any civil action or administrative proceeding for not less than 90 days if the SM:

   a. Is on active duty or is within 90 days after release or termination from active duty, and

   b. has received notice of the action or proceeding.

2. Stay requirements.

   a. The Servicemember must send "a letter or other communication" to the court or proceeding explaining how the Servicemember's military duty requirements materially affect the ability to appear, and stating when the Servicemember will be available to appear.

   b. The request must include a letter or other communication from her/his commander stating that the Servicemember's current duty prevents appearance and that military leave is not authorized.

3. Additional stays. A Servicemember can ask for an additional stay by providing similar proof that led to the initial stay.

C. Protection of Persons Secondarily Liable on Servicemember's Obligation - 50 U.S.C. § 3913

1. Subsections 3913(a) and 3913(b) of the Act provide those persons who are either primarily or secondarily liable with a Servicemember on an obligation or liability with the same rights to delay actions and vacate judgments available to Servicemembers.

2. The court in its discretion may grant stays, postponements, or suspensions of suits or proceedings to sureties, guarantors, endorsers, accommodation makers, and others.

3. Codefendants are not covered by § 3913. See § 3935 of the Act.

D. Stay or Vacation of Execution of Judgments, Attachments - 50 U.S.C. § 3934

1. Authorizes a court to stay execution of a judgment or order entered against a Servicemember. Also authorizes a court to vacate or stay an attachment or garnishment on a Servicemember's property.

2. The same basic rules for granting stays under § 3932 apply (good faith, material effect, and the suit giving rise to the judgment must have commenced prior to, during, or within 90 days after military service).

E. Tolling of the Statue of Limitations - 50 U.S.C. § 3936

1. Tolls statutes of limitation during the period of active duty of any military plaintiff or defendant.

2. No requirement to show material effect.

3. Applies to state and municipal governments, as well as probate, bankruptcy and administrative proceedings, such as boards of correction of military records and the Merit Systems Protection Board. Inapplicable, however, to periods of limitations imposed by federal internal revenue laws.

IV. EVICTIONS, LEASES, CELL PHONE CONTRACT TERMINATION, INSTALLMENT CONTRACTS, MORTGAGES AND SIMILAR PROTECTIONS

A. Eviction and Distress - 50 U.S.C. § 3951

1. To evict a Servicemember or dependents, a landlord must obtain a court order. This section does not preclude eviction, but sets up the process through which that remedy must pass. As of January 2015, it applies to rentals up to $3,329.84. The amount changes each year (typically in mid February) based on the annual adjustment for inflation as published yearly in the Federal Register.

2. Stay provision: Upon the Servicemember's or family member's request and upon a showing that there is material effect, the court must stay the proceeding for ninety days, plus or minus, based on justice and equity.

B. "Residential" Lease Terminations - 50 U.S.C. § 3955

1. Servicemembers may terminate residential leases (as well as professional, business, agricultural, and similar leases) under the following conditions:

a. The lease was executed prior to active duty service, or

b. While on active duty, the Servicemember executes a lease and thereafter receives PCS orders, or

c. While on active duty the Servicemember executes a lease and thereafter receives orders to deploy for 90 days or more.

2. Joint leases with dependents: Termination of a lease pursuant to the SCRA shall terminate any obligation a dependent may have under the lease.

3. The lessor may not impose an early termination charge, but any taxes, summonses, or other obligations and liabilities of the lessee in accordance with the terms of the lease, including reasonable charges to the lessee for excess wear, that are due and unpaid at the time of termination of the lease shall be paid to the lessee.

C. Automobile Lease Terminations - 50 U.S.C. § 3955

1. May terminate an auto lease under the following conditions:

a. Lease was executed prior to active duty service and thereafter the Servicemember entered military service under an order to active duty specifying a period of not less than 180 days, or

b. While on active duty, the Servicemember executes a lease and thereafter receives orders to PCS from either (1) a location in the continental United States to a location outside the continental United States, or (2) from Alaska or Hawaii to anywhere, or

c. While on active duty the Servicemember executes a lease and thereafter receives orders to deploy for 180 days or more.

2. The lessor may not impose an early termination charge, but any taxes, summonses, title and registration fees, or other obligations and liabilities of the lessee in accordance with the terms of the lease, including reasonable charges to the lessee for excess wear or use and mileage, that are due and unpaid at the time of termination of the lease shall be paid by the lessee.

D. Cellular Telephone Contract Termination - 50 U.S.C. § 3956

1. Servicemembers may terminate or suspend cellular telephone contracts if the Servicemember receives orders to relocate for a period of not less than 90 days to a location that does not support the contract.

2. Notice. The Servicemember must provide written or electronic notice of the termination and a copy of the Servicemember's orders. The provider must then provide the Servicemember with written or electronic notice of the Servicemember's cellular telephone rights under the SCRA.

3. To be eligible for termination, the Servicemember must have entered into the contract prior to receiving relocation orders.

4. Prohibits early termination charges or reactivation fees.

5. "Family Plans." If a Servicemember is eligible to terminate a cell phone contract, "any individual" who entered into a cell phone contract in which a Servicemember was the beneficiary can terminate the contract:

   a. With respect to the Servicemember, if the Servicemember is eligible to terminate the contract;

   b. With respect to all of the designated beneficiaries of such contract if all such beneficiaries accompany the Servicemember during the Servicemember's period of relocation.

E. Installment Contracts - 50 U.S.C. § 3952

1. Applicability. Applies only to a contract for which a deposit or installment has been paid by the Servicemember before entering active duty.

2. Court order required to rescind or to terminate installment contracts: A contract for the purchase of real or personal property (including a motor vehicle) or the lease or bailment of such property, may not be rescinded or terminated for a breach of terms of the contract occurring before or during that person's active duty service, <u>without a court order</u>.

3. Court order required to repossess: Real or personal property (including a motor vehicle) purchased under a contract may not be repossessed for breach of contract without a court order.

4. Stay protection: This section also contains a provision calling for a stay in a proceeding involving an installment contract. A court can grant this relief on its own motion, but it must take action at the request of a Servicemember following a showing of material effect. The court may also make other disposition as is equitable to preserve the interests of all parties.

F. Mortgage Protections - 50 U.S.C. § 3953

1. Applicability: Applies to purchases of real or personal property that a Servicemember makes prior to entry on active duty that are secured by a mortgage or trust deed.

2. Court order required for foreclosure: If a Servicemember breaches the obligation, a sale, foreclosure, or repossession action is not valid unless there is a court order or a waiver from the Servicemember.

3. The Foreclosure Relief and Extension for Servicmembers Act of 2015 gave temporary extensions to timelines associated with this section. The protections in subparagraphs E. and F. in this section extend for one year beyond the period of active duty. Though the legislation indicated this extension is temporary, it is currently still in effect.

4. Stay protection: This section also contains a provision calling for a stay in a proceeding to foreclose or to enforce a mortgage obligation. A court can grant this relief on its own motion, but it must take action at the request of a Servicemember following a showing of material effect. The court may also make an equitable adjustment.

G. Appraisals Following Foreclosure and Repossession - 50 U.S.C. § 3954

1. This section is designed to provide supplemental relief for all parties when an installment contract or other obligation for purchase of personal property has been stayed under other sections of the SCRA. In such a case, the court may appoint three disinterested parties to appraise the property.

2. Based on the appraised value, the court may order whatever sum, if any, it believes is representative of the Servicemember's equity to be paid to the Servicemember or the Servicemember's dependent. This payment may be made a condition precedent to foreclosing the mortgage, terminating the contract, or permitting the vendor to resume possession of the chattel.

H. Storage Liens - 50 U.S.C. § 3958

1. Court order required for foreclosure or enforcement. A person holding a lien on the property or effects of a Servicemember may not, during any period of active duty of the Servicemember and for 90 days thereafter, foreclose or enforce any lien on such property or effects without a court order granted before foreclosure or enforcement.

2. Applicability: Pertains to the foreclosure of liens for storage of household goods or other personal property. The term "lien" includes a lien for storage, repair, or cleaning of the property or effects of a Servicemember or a lien on such property or effects for any other reason.

3. Stay protection: This section also contains a provision calling for a stay in a proceeding to foreclose or enforce a lien. A court can grant relief on its own motion, but it must take action following a showing of material effect. The court may also make an equitable adjustment.

I. Anticipatory Relief - 50 U.S.C. § 4021

1. A court may suspend enforcement of all or any portion of any obligation or liability that arose prior to entry on active duty, or any tax or assessment falling due either before or during service. This section provides a means by which a person in military service may orderly liquidate obligations and liabilities affected by that service. It permits the Servicemember to initiate the action instead of waiting for the creditor to commence proceedings. The section is divided into two categories.

   a. Obligations incurred "for the purchase of real estate or secured by a mortgage or other instrument in the nature of a mortgage upon real estate," and

   b. Any other obligation, liability, tax, or assessment.

2. The Servicemember must apply to the court during active duty service, or within six months thereafter, and must show material effect.

V. TAXATION AND VOTING RIGHTS

A. Residence for Tax Purposes - 50 U.S.C. § 4001

1. Military income is deemed earned in the state of domicile (home state), even the though Servicemember is assigned for duty in another state. Only the state of domicile may tax military income.

2. Personal property (such as a motor vehicle) is deemed located in the state of domicile (home state) rather than in the host state where the Servicemember is actually stationed. Thus, *ad valorem* personal property taxes imposed by the host state, whether on motor vehicles or other personal property, are prohibited by the SCRA.

3. Spousal income is deemed earned in the state of domicile IF the spouse is in the duty state solely to be with the Servicemember AND the spouse's domicile is the same as the Servicemember's domicile. Thus, if the above prerequisites are met, the spouse does not have to pay income taxes for income earned in the duty state.

4. Spousal personal property is deemed located in the state of domicile (as in para 2 above) IF the spouse is in the duty state solely to be with the Servicemember AND the spouse's domicile is the same as the Servicemember's domicile. Thus, if both prerequisites are met, personal property taxes on the spouse are subject to the same rule as para 2.

B. Deferral of Collection of Income Taxes - 50 U.S.C. § 4000

1. This section defers collection of any income tax, federal or state, on military or nonmilitary income, falling due either before or during active duty service. Note: This section grants relief from tax collection but not from *filing* returns.

2. The Servicemember must show material effect.

3. This section may have utility for Servicemembers deployed to non-combat zones and at such times when it may be difficult for them to file tax returns.

C. Non-Income Personal and Real Property Taxes - 50 U.S.C. § 3991

1. A Servicemember's real or personal property may not be sold to enforce the collection of a tax or assessment except by court order.

2. If the court orders a sale, it must find that military service does not materially affect the Servicemember's ability to pay the unpaid tax.

3. In cases where the property may be lawfully sold to satisfy taxes or assessments, § 561(c) gives the Servicemember time in which to redeem the property. Redemption action must begin within 180 days after termination of or release from military service, or a later date if a greater redemption period is authorized by the laws of the state or territory.

D. Voting Rights of Servicemembers and Spouses - 50 U.S.C. § 4025

1. Servicemembers:

a. For voting purposes, a Servicemember neither acquires nor loses residence or domicile solely by residing in a given state pursuant to military orders.

b. Unless the Servicemember takes affirmative steps to register to vote in the host state, the Servicemember's home state registration remains valid.

Spouses: For voting purposes, spouses neither acquire nor lose residence or domicile solely by residing in a given state to accompany a Servicemember spouse who is absent *from the same state* per military orders. Thus, if the spouse is domiciled in the same state as the Servicemember, the spouse may continue to vote in that same state although living in another state with the Servicemember on military orders.

VI. FINANCIAL PROTECTIONS

A. Six Percent Interest Cap - 50 U.S.C. § 3937

1. Allows a Servicemember to reduce interest on debts that existed prior to entry on active duty to 6 percent.

a. For obligations or liabilities other than mortgages, the protection remains for the period the Servicememember is on active duty. For mortgages, the protection remains for the period of active duty AND for one year thereafter.

b. Forgiveness of Interest. Interest at a rate in excess of 6 percent per year is forgiven, not deferred.

c. Prevention of acceleration of principal. The amount of any periodic payment due under the terms of the obligation or liability must be reduced by the amount of the interest forgiven.

2. Written Notice and orders: The Servicemember must provide to the creditor written notice and a copy of the military orders calling the Servicemember to active duty. Notice and orders should be provided as soon as possible, but not later than 180 days after the Servicemember's release from active duty.

3. Creditor protection. A court may grant a creditor relief from the 6 percent provision if the court finds that the Servicemember's ability to meet the obligation is not materially affected by military service.

As of August 14, 2008, federally-insured student loans are covered by the 6 percent interest rate cap for loans for which the first disbursement was made on or after July 1, 2008. See 20 U.S.C. § 1078(d) and Pub. L. 110-315, § 422(g)(1), which added the SCRA provision.

B. Fines and Penalties on Contracts - 50 U.S.C. § 3933

1. When compliance with the terms of a contract is stayed pursuant to the SCRA, no fine or penalty shall accrue by reason of failure to comply during the period of the stay.

2. When no stay exists and a fine or penalty is imposed for nonperformance, the court can relieve enforcement if the person was on active duty and his service materially affected his ability to pay or perform.

3. Examples: This section can apply to late charges on an installment contract or to a delinquency fine on a promissory note. In these cases, the court must conclude that the maker's active duty service impaired the ability to pay.

C. Exercise of Rights under Act Not to Affect Certain Future Financial Transactions - 50 U.S.C. § 3919

1. This protection precludes negative consequences from a Servicemember's resort to the Act's other benefits and protections. Use of the protections of the SCRA shall not itself (without regard to other considerations) provide the basis for any of the following:

   a. A denial or revocation of credit by the creditor;

   b. A change by the creditor in the terms of an existing credit arrangement;

   c. A refusal by the creditor to grant credit to the Servicemember in substantially the amount or on substantially the terms requested;

   d. An adverse report relating to the creditworthiness of the Servicemember by or to a person engaged in the practice of assembling or evaluating consumer credit information;

   e. A refusal by an insurer to insure the Servicemember;

   f. An annotation in a Servicemember's record by a creditor or a person engaged in the practice of assembling or evaluating consumer credit information, identifying the Servicemember as a member of the National Guard or a reserve component;

   g. A change in the terms offered or conditions required for the issuance of insurance.

2. A basic protection would prevent a creditor, for example, from making an adverse entry on a Servicemember's credit report because of the reduction in interest on a Servicemember's debts to six percent.

D. Business and Trade Protection - 50 U.S.C. § 4026

1. During active duty service, a Servicemember's assets not held in connection with a trade or business may not be available for satisfaction of the trade or business obligation or liability for which the Servicemember is personally liable.

2. This section does not require that the military service materially affect the Servicemember's ability to meet the trade or business obligation. A creditor may seek relief from this section from a court, and a court may modify the protections § 4026 provides, as justice and equity require.

VII. INSURANCE

A. Life Insurance - 50 U.S.C. §§ 3971-3979

1. Life Insurance in General. The SCRA's life insurance provisions are designed to provide a means by which any person entering active duty may apply for continued protection by commercial life insurance. Upon proper application, a Servicemember may have the premiums and interest for certain types of commercial life insurance guaranteed for his or her "period of military service and for two years thereafter." Prerequisites:

   a. The Servicemember must have taken out the policy and paid one premium not less than 180 days before the date the insured entered active duty;

   b. The total amount of life insurance coverage protection may not exceed $250,000, or an amount equal to the Servicemember's Group Life Insurance maximum limit, whichever is greater, regardless of the number of policies submitted; and

   c. The insured Servicemember must repay the unpaid premiums and interest no later than two years after the expiration of the term of active duty.

2. This protection does <u>not</u> require a showing of material effect.

B. Health Insurance Reinstatement - 50 U.S.C. § 4024

1. Servicemembers are entitled to have their civilian health insurance reinstated when they return to civilian life following periods of active duty.

2. This protection is very similar to the protections found under the Uniformed Services Employment and Reemployment Rights Act (USERRA). In fact, USERRA is the governing provision for Servicemembers participating in employer-offered health plans.

C. Professional Liability Protection - 50 U.S.C. § 4023

1. Provides that professional liability insurance can be suspended during a period of active duty service for certain professions.

2. Applies to Servicemembers engaged in health care (such as doctors and nurses) or legal services (such as attorneys) and to other professions the Secretary of Defense determines to be professional services.

CHAPTER F

DOD FAMILY SUPPORT POLICY AND AR 608-99

TABLE OF CONTENTS

I. INTRODUCTION

A. Department of Defense (DOD) Policy: Service members will not use military service to evade family support obligations.

B. Each service implements the DOD Policy through its respective service regulations.

II. REFERENCES & WEBSITES

A. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105.

B. Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408.

C. 42 U.S.C. §§ 659-664 (Garnishment), 5 C.F.R. § 581, Processing Garnishment Orders for Child Support and/or Alimony.

D. 15 U.S.C. § 1673 (Restriction on Garnishment).

E. 42 U.S.C. § 665 (Allotments), 32 C.F.R. § 54, Allotments for Child and Spousal Support.

F. U.S. DEP'T OF DEFENSE, INST. 5525.09, COMPLIANCE OF DOD MEMBERS, EMPLOYEES, AND FAMILY MEMBERS OUTSIDE THE UNITED STATES WITH COURT ORDERS (10 Feb. 2006) [hereinafter DOD INST. 5525.09].

G. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (29 October 2003) [hereinafter AR 608-99].

H. U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1754-030 (Support of Family Members) (26 April 2006) art. 5800-10 (Paternity Complaints) (22 August 2002) [hereinafter MILPERSMAN].

I. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2906, PERSONAL FINANCIAL RESPONSIBILITY (30 MAY 2013) [hereinafter SECAF INST. 36-2906].

J. U.S. MARINE CORPS, ORDER P5800.16A MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, ch. 15, (Financial Support of Family Members) [hereinafter LEGADMINMAN].

K. U.S. DEP'T OF HOMELAND SECURITY, U.S. COAST GUARD COMMANDANT INSTR. M1600.2, ch. 2E (Support of Dependents) (September 2011) [hereinafter COMDTINST M1600.2].

L. Defense Finance and Accounting Service (DFAS) Website: http://www.dfas.mil.

M. Defense Travel Management Office (DTMO) Website: https://www.defensetravel.dod.mil

III. THE AIR FORCE POLICY. SECAF INST. 36-2906

A. Overall Financial Responsibility Policy: The Air Force will advise its members and the complainants that "the Air Force has no authority to arbitrate disputed cases of nonsupport or personal indebtedness." AFI Paragraph 1.1, A3.2.

B. Policy Toward Nonsupport of Family Members: Air Force members are expected to provide adequate financial support to family members, and the procedures which the family member may implement to obtain involuntary collection of support through garnishment or statutory allotments. AFI Paragraph 1.2.3.7.

C. Termination of Basic Allowance for Housing (BAH): If a member receives BAH at the with-dependents rate based on dependents for whom the member refuses to support, then the Air Force will terminate the BAH-with entitlement and recoup the BAH-with dependent rate payment(s) for the periods of non-support, after informing the member that he or she may not receive BAH at the with-dependent rate if he or she does not provide support to his or her spouse and/or children. AFI Paragraph 1.2.3.7.3.

D. Paternity: The Air Force does not adjudicate paternity claims. If a member denies paternity, advise the claimant that the Air Force does not have the authority to adjudicate paternity claims. If a member admits paternity, then the Air Force will advise the member of his financial support obligations. AFI Paragraph 1.2.3.8.

IV. THE MARINE CORPS POLICY. LEGADMINMAN, CH. 15

A. Interim Financial Support Standards. §15004.

1.

Total # of Family Members Entitled to Support	Minimum Amount of Monthly Support per requesting Family member	Share of Monthly BAH/OHA per Requesting Family Member
1	$350	1/2
2	$286	1/3
3	$233	1/4
4	$200	1/5
5	$174	1/6
6 or more	$152	1/7 or etc.

B. Joint Military. §15001. Active duty military spouses without children do not have an interim support obligation to each other.

C. Punitive Regulation: §15002. Marines who fail to comply with any of the three requirements below violate a punitive lawful general order:

1. The financial support provision of a written agreement addressing the issue of dependent support.

2. The financial dependent support provisions of a court order.

3. The interim support standards of §15004, and orders issued thereunder by a commanding officer, if neither a court order nor written agreement exists.

D. Modification of Interim Support. §15005. Only after consulting with the appropriate stuff judge advocate, a commanding officer has discretion (but is not required) to reduce or eliminate the interim financial support standards under the following circumstances:

1. Gross income of spouse exceeds the gross military pay of the Marine (including allowances).

2. Interim financial support has been provided to the spouse for a continuous and uninterrupted period of 12 months. This does not relieve the Marine from providing financial support to his or her adopted or biological minor children.

3. The Marine has been the victim of substantiated physical abuse by the spouse requesting support (only releases spousal support, not child support).

4. The Marine is paying regular and recurring obligations (such as consumer debts of the family members requesting support) of sufficient magnitude and duration as to justify a reduction or elimination of support.

E. Paternity. §15003. In instances where a request for support is made for a child born out of wedlock, the Marine shall provide support only when paternity is established by a court or administrative order, or a formal written acknowledgement by the Marine.

V. THE NAVY POLICY. MILPERSMAN ARTS. 1754-030 AND 5800-10 (PATERNITY)

A. Policy: The Navy will not act as a haven for personnel who disregard or evade obligations to their legal family members. Any failure to provide adequate and continuous support for lawful family members that brings discredit upon the Naval Service may be cause for administrative or disciplinary action.

B. Type of Support: In the absence of an agreement or a court order, the following may be used as a guide:

1. Spouse only: 1/3 of gross pay.

2. Spouse and one minor child: 1/2 of gross pay.

3. Spouse and two or more children: 3/5 of gross pay.

4. Spouse and four or more children: >3/5 of gross pay (moral obligation advisement).

5. One minor child (no spousal support): 1/6 of gross pay.

6. Two minor children (no spousal support): 1/4 of gross pay.

7. Three minor children (no spousal support): 1/3 of gross pay.

8. Gross Pay. Gross pay includes basic pay and BAH but does not include basic allowance for subsistence (BAS), hazardous duty pay, sea or foreign duty pay, or incentive pay.

C. Waiver of Spousal Support: A member can request a waiver of spousal (but not child) support based on desertion without cause, physical abuse, or for infidelity on the part of the spouse.

1. The request for waiver must be submitted to the Director, Dependency Claims, Navy Military Pay Operations, Defense Finance and Accounting Service, Cleveland Center, Code PMMACB, 1240 East Ninth Street, Cleveland, OH 44199.

2. The request must have a complete statement of facts, commander recommendation, and substantiating evidence.

D. Paternity. The Navy does not decide paternity. The Navy will advise members of their financial, legal, and moral obligations to support a child when a United States or foreign court of competent jurisdiction renders an order or decree specifying support of a child.

VI. THE COAST GUARD POLICY. COMDTINST M1600.2, CH. 2E

A. Policy: The Coast Guard will not be a haven or refuge for personnel who disregard or evade their obligations to support their families. Members are expected to provide adequate and continuous support for lawful dependents, and to comply with the terms of support clauses in separation agreements and court orders.

1. If, after counseling, the member demonstrates a pattern of non-support and/or failure to obey civil court support orders, the member is subject to administrative discharge for misconduct.

2. Non-support that is "notorious" and discrediting to the Coast Guard can result in courts-martial or other disciplinary proceedings.

B. Court Orders. Court orders for support are normally binding on members. If, however, a "member acting on good faith and on the express advice of qualified legal counsel disputes such a claim, the commanding officer may withhold disciplinary /administrative action against the member for a reasonable length of time . . . ."

C. Support Scale:

1. Spouse only: BAH difference plus 20% of basic pay.

2. Spouse and one minor or handicapped child: BAH difference plus 25% of basic pay.

3. Spouse and two or more minor or handicapped children: BAH difference plus 30% of basic pay.

4. One minor or handicapped child: 16.7% (1/6) of basic pay.

5. Two minor or handicapped children: 25% (1/4) of basic pay.

6. Three or more minor or handicapped children: 33% (1/3) of basic pay.

D. Special Circumstances. A commanding officer has discretion to withhold action against a member for failure to support a child under the following circumstances: 1) Member cannot ascertain the whereabouts and welfare of the child; or 2) Person seeking payment does not have physical custody of the child.

E. Spousal Support Waiver. The Commandant may grant exemption from the military requirement to support a spouse, but not children, on the basis of desertion without cause, infidelity on the part of the spouse, or in some cases of spousal abuse inflicted on the member.

F. Paternity. In the absence of a judicial determination, the member will be counseled privately, advised of the legal and moral obligations to support illegitimate children, advised of his rights on the matter, and asked whether he admits paternity.

VII. THE ARMY SUPPORT REQUIREMENTS: AR 608-99

A. Applicability.

1. All members of the Active Army, including cadets at the U.S. Military Academy.

2. All members of the U.S. Army Reserve on active duty pursuant to orders for thirty days or more.

3. All members of the Army National Guard of the United States on active duty for thirty days or more.

4. Members of the Army National Guard on active duty for thirty days or more pursuant to orders under Title 32, United States Code, except for the punitive provisions of the regulation.

5. Soldiers receiving full or partial pay and allowances while confined at the U.S. Disciplinary Barracks or other confinement facilities.

B. Command-Driven Program.

1. The enforcement authority is the military commander.

2. The commander can punish a Soldier for failing to comply with certain obligations imposed by the regulation.

3. The commander must become involved when the parties are unable to agree on a proper method to provide financial support to the family members. The commander's obligation does not arise until a family member or an authorized representative of the family member

complains to the command that the Soldier is failing to provide proper support. AR 608-99, Paragraph 2-1b.

D. Interim Support Only. AR 608-99, Paragraph 2-6.

1. Army Regulation 608-99 creates an interim support requirement that applies **only** when the parties do not have a court order containing a financial support provision, or an agreement concerning support, and until such time as an agreement is signed or issued.

2. This interim amount is not intended to provide adequate support in all cases, and should not be used as a guideline for civilian agencies or courts in establishing support requirements.

3. Purpose. The purpose of interim support is to provide some family support while the parties seek an agreement or settlement by a court. AR 608-99, Paragraph 1-5d.

4. When the Interim Requirement is not Enough (or Excessive). Soldiers or family members who think the interim amount is not enough, or excessive, must obtain a court order or enter an agreement to change the Soldier's support obligation. However, see "Release from Support Requirements" paragraph below.

E. Basic Allowance for Housing RC/Transient (Reserve Component/Transient) (formerly BAH II). Where no court order or support agreement exists, the Army uses BAH RC/T as a measure for determining the amount of the interim support obligation.

1. BAH Terminology. AR 608-99, Paragraph 1-7a.

a) Basic Allowance for Housing (BAH). A military housing allowance based on the geographic duty location, pay grade, and dependency status.

b) BAH II (RC/T). The BAH allowance without consideration of the geographic duty location—the equivalent of the former basic allowance for quarters.

c) BAH-WITH. The BAH rate for a Soldier with dependents.

d) BAH-WITHOUT. The BAH rate for a Soldier without dependents.

e) BAH RC/T DIFFERENTIAL. The housing allowance amount for a member who is assigned to single-type quarters and who is authorized a basic allowance for housing solely by reason of the member's payment of child support.

2. A Soldier's actual receipt of BAH is not a prerequisite to the obligation to pay interim support to family members. Remember that the BAH II

(RC/T) is simply a yardstick to arrive at an amount, when no court order or agreement exists. AR 608-99, Paragraph 1-7b.

3. BAH II (RC/T) is not a cap on the support obligation of a Soldier. The Army regulation merely sets minimum interim support requirements. A service member can pay more voluntarily.

F. Family Members. AR 608-99, Glossary, Section II. Family members, for purposes of AR 608-99, only include:

1. A Soldier's present (not former) spouse.

2. A Soldier's minor children from the present marriage.

3. A Soldier's children by any former marriage if the Soldier has a current obligation to provide support to that child (includes adopted children, but not children adopted by another person).

4. Minor children born out of wedlock to—

e) a female Soldier, or

f) a male Soldier, if evidence by a court order, or the functional equivalent of a court order, identifying the Soldier as the father: or if the Soldier is providing support to the child under the terms of the regulation.

3. Any other person the Soldier is obligated to support by applicable state law (*e.g.*, parent, stepchild).

G. Determining the Amount of Support Due.

1. Rule. To determine a Soldier's support obligation, look for controlling authority in the following order:

a. Court Order. If no court order, look for a . . .

b. Support Agreement. If no agreement, rely on . . .

c. Interim Support IAW AR 608-99, Paragraph 2-6.

2. Court Order. Soldiers must comply with any support order issued by a court of competent jurisdiction.

a. Failure to do so may result in contempt of court for failure to adhere to court orders.

b. Failure to do so may be the basis for commander's lawful order to comply with the court order.

c. Silent Orders. If a court order does not contain a financial support provision, the interim support requirements of AR 608-99, Paragraph 2-6, will apply.

Example: Private Jones and his wife separate. He divorces his wife. They have one child who resides with his ex-wife. The court does not order financial support, and the couple has no written financial support agreement. If his wife now demands that she receive BAH-WITH for her and their child, the Soldier should provide his child with BAH II (RC/T)-WITH. AR 608-99, Appendix B-3

3. Functional Equivalent of Court Order. AR 608-99, Section II, Terms.

a) With regard to financial support or paternity, a court order also includes an order, recognized as valid and enforceable under applicable state law, issued by an authorized official of a child support enforcement agency.

b) With regard to paternity, a court order also includes any document that is granted the equivalent effect of a court order under applicable state law. In many cases, consenting to be named the father on a birth certificate, or acknowledging paternity in an affidavit will have the legal effect of a court order if the alleged father fails to challenge the document within a specified number of days. In those cases, the document will be treated as a court order establishing paternity.

4. Foreign Court Orders. AR 608-99, Paragraph 2-4c–e.

a. A commander cannot order a Soldier to comply with a foreign court order of support unless:

(1) A U.S. state court recognizes and enforces the foreign court order; or

(2) A treaty or international agreement requires the United States to honor the foreign court order. The United States has such an agreement with Germany only while the Soldier is assigned to and present in Germany.

b. Once a Soldier leaves the foreign country, a commander lacks authority to compel compliance with a foreign court order, except as described above. However, a Soldier might still be subject to the obligation of the foreign court order if the Soldier either returns to the foreign country or the supported family member domesticates the foreign order in a U.S. Court.

c) If a foreign court order is not recognized within the U.S., a Soldier is in compliance with the regulation if he is providing support in an

amount required by the foreign court or by the interim support provisions of AR 608-99, whichever is less.

5. Agreements. Absent a court order for support, a Soldier makes payments according to any written support agreement. AR 608-99, Paragraph 2-3b.

   a. Verbal Agreements. The Army will not mediate disputes over terms in verbal agreements. If a verbal agreement exists and is being followed, the Army will not interfere. However, when a dispute arises, the parties are no longer in agreement for purposes of AR 608-99.

   b. Written Agreements. Absent a court order, if a signed written support agreement exists, the amount specified in such an agreement controls.

      (1) Silence on Support. If a written agreement is silent on support, AR 608-99's interim support requirements apply.

      (2) Incorporation of Written Agreement. Granting of a divorce sometime after a written support agreement has been signed will extinguish that written agreement's support terms, unless:

         (A) The agreement was approved, ratified, or otherwise incorporated within the divorce decree; OR

         (B) The agreement, by its specific terms, continues beyond the divorce.

6. Interim Support. Absent a court order or support agreement, a Soldier pays according to the AR 608-99, paragraph 2-6, interim support requirement.

7. Arrearages. Soldiers cannot fall into arrears without violating the regulation. AR 608-99, paragraph 2-5.

   a. Collection of arrearages through court procedures is only possible for violations of a court order or a written support agreement.

   b. There are no legal means to collect arrearages based on failure to pay under AR 608-99's interim support requirements.

      (1) Army policy is to encourage - but not order - payment of arrearages regarding interim support.

(2) Punishment for failure to pay interim support is based on a failure to pay support when it was due, not for failure to pay arrearages.

H. Common Interim Support Scenarios under AR 608-99, paragraph 2-6.

1. Rules for a Single Family:

a. **All family members living in government family housing.** While the Soldier's family members are residing in Government family housing, the Soldier is not required to provide additional financial support. AR 608-99, Paragraph 2-6d(2).

(1) **Scenario 1**: Soldier-Husband deployed to Afghanistan for a six-month rotation. Wife, a civilian, remained in government family housing in Germany. Husband is not sending any money to Wife and she does not have access to the bank account. Wife now complains that she is entitled to money to purchase food. What is Husband's interim support requirement if any?

(2) **Analysis 1**: Because the wife is living in government family housing, Husband is not obligated by AR 608-99 to make additional payments.

b. **Single family unit living off-post.** BAH II (RC/T)-WITH. AR 608-99, Paragraph 2-6d(1).

(1) **Scenario 2**: Soldier-Wife moved out of her off-post rental house after deciding to divorce Husband, a civilian. They have three children who all remained with Husband in the rental house. What is Wife's interim support requirement?

(2) **Analysis 2**: Wife must provide financial support in an amount equal to her BAH II (RC/T)-WITH rate.

c. **Family members residing in different locations.** Pro-Rata share of BAH II (RC/T)-WITH to those not in government quarters. No additional support for family members residing in government family housing. AR 608-99, Paragraph 2-6d(3).

$$\textit{Pro-Rata Share} = \frac{1}{\text{Total \# of supported family members}} \times \text{BAH II (RC/T) Married Rate}$$

(1) **Scenario 3**: Soldier-Wife and Husband, a civilian, have four children and live on-post in government family housing. Husband leaves the children in the

care of his wife, and moves out to an apartment. Assume Wife's BAH II (RC/T)-WITH amount is $1,000 per month. What is Wife's interim support requirement, if any?

(2) **Analysis 3**:

Pro-Rata Share = $\frac{1}{5}$ *x* $1000 = $200 to Husband

2. Rules for a Dual Military Couple:

a. **Neither has children.** Absent a court order or written agreement, neither military spouse owes support to the other if they do not have children. AR 608-99, Paragraph 2-6d(4).

(1) **Scenario 4**: Soldier-Husband and Soldier-Wife are married but were assigned to two separate duty locations. The Army sends Husband to language training in California for a year and Wife to Korea for a year. They decide to end their marriage but have not finalized their divorce. What are the respective support requirements if they do not have children?

(2) **Analysis 4**: There is no support requirement for either Soldier.

b. **Dual military couple has children, who all live with one spouse and not in government family housing.** If a military couple has children, and the children are all living with one spouse and not in government family housing, the non-custodial spouse owes BAH II (RC/T)-DIFF. If the children reside in government family housing, the Soldier is not required to provide financial support. AR 608-99, Paragraph 2-6d(4)(a).

(1) **Scenario 5**: What if the dual military Husband-Wife family has two children who both reside with Husband, off post in Monterey, California? Does Wife owe support? Does it matter if Husband and the kids are in government family housing?

(2) **Analysis 5**: Yes, Wife owes BAH II (RC/T)-DIFF to Husband. However, if Husband and the kids were in government family housing, Wife would not owe any support.

c. **Dual military couple has children, and at least one child lives with each spouse.** If at least one child resides with

each spouse, neither spouse owes support to the other. AR 608-99, Paragraph 2-6d(4)(c).

(1) **Scenario 6**: What if Child A lives with Wife in Korea and Child B with Husband in California?

(2) **Analysis 6**: Neither Soldier is required to make a support payment.

3. Rules for Multiple Families:

a. **Soldier has family members from different relationships and living at varying locations.** If there is no court order or support agreement, a Soldier in a multiple family situation must provide a pro-rata share of the BAH II (RC/T)-WITH to each family member not in government family housing. Those family members in government family housing receive no additional support from the Soldier. AR 608-99, Paragraph 2-6e(1)(c)-(d).

(1) **Scenario 7**: Soldier-Husband has two children by a previous marriage for which he pays $300 support under a court order. He just separated from his current family of a civilian wife and one child who reside off post. What is Husband's support requirement?

(2) **Analysis 7**: Under court order, Husband must pay $300 to the two children from a previous marriage. He also must pay a pro-rata share of BAH II (RC/T)-WITH to his current wife and one child under the following formula:

Pro-Rata Share = 2/4 *x* BAH II (RC/T)-Married rate

b. Remember that in a "Multiple Family" scenario, the location of family members determines how much interim support the service member owes.

(1) **Scenario 8**: Same facts as #7, but suppose his current spouse and child live in government family housing.

(2) **Analysis 8:** Under court order, Husband must pay $300 to the two children from a previous marriage. He does not owe any additional support to his wife and child from his current marriage.

c. A Soldier must still comply with the support provisions of any valid existing court order, not just ones pertaining to child support.

(1) **Scenario 9**: Same facts as #7 except you just found a clause in the court order requiring Husband to pay $100 per month in alimony to his former spouse.

(2) **Analysis 9:** Same analysis as #7, plus Husband must continue to pay $100 per month in alimony to his former spouse.

I. Payment of Support. AR 608-99, Paragraph 2-9c.

1. Form of payment. Payment must be in the form of:

a. Cash

b. Check.

c. Money Order.

d. Electronic Funds Transfer.

e. Voluntary Allotment.

f. Involuntary Allotment.

g. Garnishment or wage assignment.

2. Receipt. To prevent disputes over whether payment has occurred, the Soldier should request a receipt for all payments, or be able to provide some measure of proof that payment occurred.

2. Initiation. AR 608-99, Paragraph 2-7a.

a. The interim support obligation begins on the date that the parties cease living together in the same dwelling in either of following events:

(1) Either party voluntarily leaving the residence; or

(2) The Soldier is ordered out of the residence, subject to AR 608-99, Paragraph 2-6d(2).

b. In the case of family members moving out of government family housing, the obligation to pay BAH II (RC/T)-WITH begins on the date the family moves out, even if the Soldier has not cleared government family housing and is not entitled to draw BAH II (RC/T)-WITH.

3. Timing of Payment.

a. Payment Due Dates. All payments are due on the first day of the month following the month to which the support payment

pertains (*e.g.*, payments for April are due 1 May). AR 608-99, Paragraph 2-9b.

b. Obligation for less than one month. Absent specific terms in a court order or financial support agreement, a Soldier's support obligation beginning or terminating on other than the first or last day of the month will be calculated for that month based on a pro-rata daily share (*e.g.*, if the family member moves out of government family housing on 16 September, the Soldier's support obligation for the month of September is based on 15 days' worth (from 16 to 30 September)). AR 608-99, Paragraph 2-8.

J. Payment In-Kind. AR 608-99, Paragraph 2-9d–e.

1. Generally, payment in-kind is limited unless a written agreement or court order provides for payment in-kind. However, the Soldier may comply with the financial support requirements of Paragraph 2-6 by directly paying non-government housing expenses on behalf of family members if the family members are living in non-government housing.

2. Payment in-kind is limited to non-government housing expenses for a dwelling where the supported family members live (provided the Soldier has legal responsibility by reason of contract, lease, or loan agreement). Examples:

a. Rent (Includes payments to contractor-managed privatized housing on-post).

b. Principal and interest payments, real property taxes, and property insurance covered under escrow for the same property.

c. Essential utilities such as gas, electricity, and water.

3. Soldier must make up any shortfall between payment in-kind and the actual interim support obligation. Any overage will not be treated as a credit toward future obligations. AR 608-99, Paragraph 2-9d(3).

4. Supported family member must give written consent for any other in-kind support, such as car payments, insurance, or credit card payment obligations. AR 608-99, Paragraph 2-9e.

K. Release from Support Requirements. AR 608-99, Paragraph 2-14.

1. Authority to release. Only battalion commanders and above may release a Soldier from interim support obligations. Prior to release, the battalion commander must obtain a written legal review that the release is legally sufficient and complies with AR 608-99, applicable laws, court orders, or written agreements. AR 608-99, Paragraph 2-12b(3).

2. Battalion Commander's Release Authority is Limited. A battalion commander's authority to release Soldiers from interim support requirements is limited to the following situations:

a. Order issued by a court without jurisdiction. Release from the requirement to provide support in accordance with the terms of a court order is only appropriate when jurisdiction is clearly lacking and the Soldier has continuously provided support in accordance with another court order, a written agreement, or AR 608-99's interim requirements. AR 608-99, Paragraph 2-14b(1).

b. A court order does not contain a financial support provision, and:

(1) There is a judicial proceeding underway by a court with proper jurisdiction;

(2) The court has issued at least one order, none of which contains financial support provisions;

(3) There is no written financial support agreement or other court order that requires support; and

(4) The Soldier is not receiving BAH – WITH or agrees to terminate such payment upon date of release. AR 608-99, Paragraph 2-14b(2)

c. The spouse's income exceeds the Soldier's military basic pay. Release from spousal support, not child support, is only applicable in the absence of a court order or written separation agreement. The Soldier must show the spouse makes more than the Soldier's military pay (defined as military basic pay only), and the Soldier is not getting BAH-WITH solely for that spouse or agrees to terminate such payment upon date of release from the support obligation. AR 608-99, Paragraph 2-14b(3).

d. The Soldier has been the victim of a substantiated case of documented abuse. The abuse must be documented by a court or a Family Advocacy Case Management Team (FACMT), by a court judgment amounting to a conviction, or by a permanent or temporary restraining order then in effect. The case must not involve a mutual affray or abuse of the spouse by the Soldier. The Soldier must not be receiving BAH-WITH solely for that spouse or must agree to terminate such payment upon date of release from the support obligation. This exception authorizes release from regulatory requirements of spousal support, not child support. AR 608-99, Paragraph 2-14b(4).

e. The supported family member is in jail. This exception applies to any penal institution, regardless of the reason for incarceration, and is available if the Soldier is not getting BAH-WITH solely for that family member or agrees to terminate such payment upon date of release from the support obligation. AR 608-99, Paragraph 2-14b(5).

f. Regulatory support has been provided to the spouse for 18 months. A battalion commander may release a Soldier from the regulatory requirement to provide financial support to his or her spouse but not from the requirement to provide financial support to the children from that marriage, when ALL of the following apply (AR 608-99, Paragraph 2-14b(6)):

(1) The husband and wife have been separated for 18 months;

(2) The Soldier has made the financial support required by AR 608-99 for the entire 18 months;

(3) Civilian courts are available and would have jurisdiction to order financial support;

(4) The Soldier has not acted in any manner to avoid service of process or otherwise to prevent a court from ruling on the issue of support; and

(5) The Soldier is not receiving BAH-WITH solely on the basis of providing support to the family member concerned or agrees to terminate such BAH-WITH effective upon the date released from the support obligation.

g. The supported child is in the custody of another who is not the lawful custodian. This limited exception applies only when the Soldier is the child's lawful custodian. Without the Soldier's consent, the child must be in the custody of another person who is not then the lawful custodian of the child, and the Soldier must be diligently pursuing physical custody of the child. AR 608-99, Paragraph 2-14b(7).

3. Special Court-Marital Convening Authority's Release Authority. A SPCMCA (normally, a Brigade Commander) may release a Soldier under his or her command from the regulatory requirements to provide spousal support, but not child support, and not support required by court order or support agreed upon in written financial support agreements. Relief may include:

a. A release from the total support requirement.

b. A reduction in the amount of monthly support requirement.

c. A credit toward the regulatory requirement.

A SPCMCA must be satisfied by a preponderance of evidence that the Soldier should be released as a matter of fundamental fairness, and the SPCMCA must obtain a written legal opinion before releasing the Soldier from the obligation. AR 608-99, Paragraph 2-15.

L. Raising the Issue of Non-Support. AR 608-99, Paragraph 3-4.

1. Communicating with the non-supporting Soldier is the initial option. If it is obvious that the nonpayment of support is intentional, or if there is no satisfactory response from the Soldier, contact the Soldier's immediate (*i.e.*, company) commander.

2. The commander is required to counsel the Soldier, ascertain his/her intentions regarding support, and respond to the writer. The commander may also impose sanctions for non-support.

M. Sanctions for Non-Compliance. AR 608-99, Paragraph 3-10.

1. Administrative Actions, including:

a. Reprimand.

b. Adverse information in official file.

c. Bar to Reenlistment.

d. Administrative Elimination.

2. Punitive Measures. AR 608-99, Paragraph 2-5, regarding support, is punitive. Punishment (e.g., Article 15 or court-martial) is predicated on the violation of a lawful general regulation (Article 92, UCMJ).

a. Arrears. While Soldiers cannot fall into arrears without violating AR 608-99, there is no legal means for commanders to collect or order the payment of arrearages based on failure to provide interim support under the Army rules. Soldiers should be encouraged, but not ordered, to pay arrearages. *See* AR 608-99, Paragraph 2-5c.

b. Punishment for Failing to Make Payments. Soldiers who fall into arrears may be punished under Article 92, UCMJ, for failing to make interim support payments when due. Punishment is based on failure to provide support when due, but not for failing to pay arrearages. AR 608-99, Paragraph 2-5c.

3. Entirely Discretionary. The decision to impose sanctions is entirely within the commander's discretion.

N. BAH Recoupment. Generally, a Soldier receiving allowances premised on supporting dependents must provide such support. Failure to actually provide such support can lead to recoupment and, potentially, criminal charges based on fraud. *See* AR 608-99, Paragraphs 1-7c, 3-3a.

O. Staff Judge Advocate Responsibility. AR 608-99, Paragraph 1-4h. SJAs will establish procedures to avoid conflicts of interest while insuring that legal services and guidance are provided to all eligible clients and commanders. These preventive procedures include:

a. Conflict screening procedures.

b. Designating an office, other than legal assistance, to provide command advice on AR 608-99-related issues.

c. Procedures to insure that attorneys avoid conflicts when they are transferred to other areas of responsibility within an OSJA.

P. Commander Response Requirements for Inquiries. Paragraph 3-5, AR 608-99, lays out very specific requirements for responses to allegations of non-support, and JAs must be aware of these requirements and the timelines involved for such responses.

VIII. ARMY PATERNITY POLICY: AR 608-99

A. Support Obligations.

1. Soldier Mothers. Soldier mothers of children born out of wedlock are expected to provide support in accordance with court decrees or the interim support requirements.

2. Soldier Fathers. In the absence of a court order identifying a Soldier as the father of a child, a male Soldier has no legal obligation under the regulation to provide financial support to a child alleged to have been born to him and the child's mother out of wedlock.

a. Soldier Disputes Paternity, and No Paternity Order. Soldier is not required to provide support. He also may terminate voluntary support at any time, for any reason, absent a court order. AR 608-99, Paragraph 2-2a.

b. Paternity Order. If there is a court order (or functional equivalent) identifying the Soldier as the father, then the father must follow the provisions of the order. AR 608-99, Paragraph 2-2a.

c. Paternity Order, but Silent on Support. If there is a court order (or functional equivalent) identifying the Soldier as the father, but not directing financial support, the Soldier will provide

financial support in accordance with the interim support requirements. AR 608-99, Paragraph 2-2a.

3. Foreign Court Orders. Foreign court orders establishing paternity will be honored if the court had proper jurisdiction. If the financial support provision is not enforceable, the Soldier must provide interim support. AR 608-99, Paragraph 2-2c.

B. The Role of the Command in Establishing Paternity.

1. Civil Matter. Paternity is a civil matter. The Army will not adjudicate the issue of paternity.

2. Command Response. A paternity claimant may make the allegation of paternity with the Soldier's immediate commander. IAW AR 608-99, Paragraph 3-7, the commander will:

a) Advise the Soldier of the allegation.

b) Provide an opportunity for the Soldier to consult with an attorney.

c) Provide the Soldier the opportunity to acknowledge or deny paternity.

d) Assist the Soldier if paternity is admitted.

e) Send a reply to the paternity claimant within 14 days of receipt that includes the information required by Paragraph 3-5, AR 608-99, and advises the claimant of the opportunity to pursue legal remedies if the Soldier denies paternity or declines to comment.

C. The Role of Legal Assistance Attorneys in Establishing Paternity. AR 608-99, Paragraph 1-9a.

1. Neither people pursuing a paternity claim against a Soldier nor children born out of wedlock before paternity is established or formally acknowledged are entitled to legal assistance, unless they have an independent right to legal services pursuant to AR 27-3.

2. The child may qualify for legal assistance only once paternity has been established, IAW AR 27-3. Once paternity is established, a legal assistance attorney can assist in child support matters affecting that child.

D. Criteria for Establishing Paternity (AFI36-3026_IPV1 and AR 600-8-14, 4 August 2017).

1. AFI36-3026_IP, Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel (also considered AR 600-8-14), establishes criteria for DEERS enrollment in cases where a child is born out of wedlock.

2. A male member of the Uniformed Services can make his out-of-wedlock child qualify as a dependent by presenting a court order establishing paternity and the child's birth certificate, presenting an approved dependency determination, or by signing a voluntary acknowledgement of paternity.

3. The member may rescind his acknowledgement in DEERS within 60 days of enrollment.

IX. CHILD CUSTODY

A. Army Policy.

1. Compliance. Soldiers will comply with court orders regarding child custody.

2. Assistance. Commanders will investigate and respond to inquiries.

a) Soldiers will be ordered to comply with the custody provisions of AR 608-99.

b) Command responses must comply with information release guidelines. AR 608-99, Paragraph 3-2.

B. Legal Obligations. AR 608-99, Paragraph 2-11.

1. No Kidnapping. Soldiers will not knowingly abduct, take, entice, or carry away a child from a lawful custodian.

2. No Harboring. Soldiers will not knowingly withhold, detain, or conceal a child from a lawful custodian.

3. Defense. A valid court order granting sole physical custody to the Soldier is a defense to this provision.

X. REQUESTS FOR ASSISTANCE FROM GOVERNMENT OFFICIALS, BASED ON COURT ORDERS (SOLDIERS OR FAMILY MEMBERS OUTSIDE THE U.S.).

A. Army Policy. AR 608-99, Chapter 4 implements Department of Defense Directive 5525.9.

B. Application.

1. Outside United States. Applies only to Soldiers and family members living outside the U.S.

2. Family Members. Does not apply to DOD or DA civilian employees who are not also family members.

3. Official Requests. Applies to requests for assistance by U.S. Federal, State, or local government officials based on court orders regarding financial support, child custody, visitation, paternity, and related cases.

C. Procedure to Request Assistance.

1. Request. Federal, State, or local government official sends a letter requesting assistance from the Army regarding a Soldier or family member living outside the U.S.

2. Basis for the request. AR 608-99, Paragraph 4-2.

a) Soldier stationed or residing outside the U.S. who has been charged or convicted of a felony arising from financial support, child custody, visitation, paternity or a related case.

b) Held in contempt by a court for failing to obey an order or been ordered to show cause why he should not be held in contempt arising from a case of financial support, child custody, visitation, paternity, or a related case.

3. Articulate Requested Assistance.

a) The requestor must ask for some sort of assistance by the Army regarding the Soldier or family member.

b) The assistance requested need not be realistic, warranted, or possible, to trigger some response under AR 608-99, Ch. 4.

c) Examples of Requested Assistance.

(1) Return of Soldier or family member to the jurisdiction of a court.

(2) Reassignment of the Soldier within the United States.

(3) Compliance with a court order.

(4) Curtailment of OCONUS assignment.

(5) Removal of family member's command sponsorship.

4. Response Required. AR 608-99, Paragraph 4-3.

a) Commanders with "close consultation with their servicing SJA" will allow the subject of the request an opportunity to show legitimate cause for noncompliance with the order.

b) Commanders will attempt to resolve the matter without the return of the Soldier or family member.

c) If the Commander and court cannot resolve the issue without the return of the Soldier or family member, the following will occur if the subject of the request is a Soldier, and:

(1) The underlying charge, conviction, contempt, or order to show cause involves removal of a child from the jurisdiction of a court or the custody of the lawful custodian:

(a) Company Commander will order the Soldier to return to an appropriate port of entry at Government expense, contingent on the party requesting assistance providing transportation (and escort if desired) of the Soldier to the jurisdiction of the court.

(b) Ordinarily the commander will give ten days' notice to the requesting government official.

(c) Military escort to the port of debarkation is appropriate if escort to the jurisdiction is provided from the port of entry by the requesting official.

(d) Company Commander must promptly report action under the regulation through command channels to the General Court-Martial Convening Authority (GCMCA).

(2) The underlying charge, conviction, contempt, or order to show cause does not involve removal of a child from jurisdiction or custody of lawful custodian:

(a) The Company Commander will forward the matter with recommendations to the GCMCA for action.

(b) The GCMCA may, if appropriate, order the Soldier to return at Government expense to the nearest port of entry to the jurisdiction.

d) If the charge, conviction, contempt or order to show cause involves a family member the following guidance applies:

(1) The Company Commander of the Soldier will forward the request with recommendations to the GCMCA for action.

(2) The GCMCA (or an officer acting on his behalf) will strongly encourage the family member to comply with the court order.

(3) If the family member fails to comply, the GCMCA may take appropriate action, including:

(a) Withdrawal of command sponsorship.

(b) Adverse action, up to and including removal from the Federal service by a supervisor, if the family member is a DA civilian employee.

(c) Curtailment of the Soldier's military assignment outside of the U.S. or denial of a request to extend beyond normal tour length.

(d) Cancellation of orders to another OCONUS assignment.

5. Requesting a Delay or Exception. AR 608-99, Paragraph 4-4.

a) The GCMCA may request a delay in taking action up to ninety days in order to afford the subject of the request a reasonable opportunity to provide evidence of legal efforts to resist the order or to otherwise show legitimate cause for non-compliance.

b) The GCMCA must request delay within thirty days of the date the request for assistance is first received in the command.

c) The request for delay must be forwarded through the Legal Assistance Policy Division in the Pentagon to the Assistant Secretary of Army for Manpower and Reserve Affairs. The Assistant Secretary of Army for Manpower and Reserve Affairs is the approval authority of the delay.

d) The Undersecretary of Defense (Personnel and Readiness) is the approval authority for all requests for exception.

XI. SUPPORT ENFORCEMENT GENERALLY

For information on support enforcement through garnishment, state wage assignment orders, and involuntary allotments, see the Child Support Deskbook.

XII. SUPPORT ENFORCEMENT THROUGH THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT: 10 U.S.C. § 1408

A. Authorizes division of disposable retired pay for purposes of child support and/or alimony payments.

B. Requirements for direct payment of child support or alimony.

1. Service on the military finance center.

2. A final court decree of divorce, dissolution, or legal separation (10 U.S.C. § 1408(a)(2)).

3. Issued by a court of competent jurisdiction. 10 U.S.C. § 1408(a)(1).

4. The order must direct child support or alimony.

5. The total of all direct payments under the USFSPA cannot exceed 50% of disposable retired pay. 10 U.S.C. § 1408(e)(1).

XIII. GARNISHMENT, INVOLUNTARY ALLOTMENTS, AND USFSPA COMPARED

A. Reference: 42 U.S.C. §§ 659-662 (2000); 5 C.F.R. pt. 581.

B. Pay Subject to Process.

1. Garnishment. Basic pay, bonus pay, and retired pay.

2. Involuntary allotment. Basic pay, BAH, BAS, and bonus pay.

3. USFSPA. Disposable retired pay.

C. Obligation Enforced.

1. Garnishment. Child support and/or spousal support; arrearages; attorneys fees.

2. Involuntary Allotment. Child support or child support plus spousal support; arrearages.

3. USFSPA. Child support and/or spousal support.

D. Triggering Events.

1. Garnishment. A garnishment order issued by a state court in accordance with state law.

2. Involuntary Allotment. A letter or court order issued by an authorized person, plus an underlying support obligation created by an administrative order or court order; and arrearages equal to two months support obligation.

3. USFSPA. A final decree of divorce, dissolution, or legal separation.

E. Amount Subject to Process

1. Garnishment. 50% - 65% of applicable pay.

2. Involuntary Allotment. 50% - 65% of applicable pay.

3. USFSPA. In cases where there are payments both under the USFSPA and pursuant to a garnishment for child support or alimony under 42 U.S.C. 659, the total amount payable cannot exceed 65 percent of the member's disposable earnings for garnishment purposes

CHAPTER G

SEPARATION AGREEMENTS

TABLE OF CONTENTS

July 2018

I. OVERVIEW

A. Definition – a contract

1. A separation agreement is a contract between separating spouses. As such, principles of contract law apply. Agreements must be voluntarily entered into by the parties. Coercion, fraud, undue influence, or lack of knowledge will render a separation agreement void.

2. No spouse can be required to sign a separation agreement. For this reason, competent legal advice and negotiation skills play a large role in creating a separation agreement acceptable to both parties.

3. Written separation agreements are not prerequisites to a divorce. However, parties often find it beneficial to settle property division, child support and custody matters, debts, and other claims when they are separating.

B. Effect of a Separation Agreement

1. Separation agreements <u>can</u> resolve matters relating to:

a) Property Division

b) Debts

c) Child Custody and Visitation

d) Child Support

e) Spousal Support

2. Separation agreements <u>cannot</u>:

a) Legally obligate third parties who are not signatories (e.g., financial institutions).

b) Legitimize adulterous conduct under the UCMJ. Only a finalized divorce can take that conduct out of the "adultery" realm.

c) Bind a family court judge in matters concerning children. A judge can always override the provisions of a separation agreement regarding child support, custody, and visitation if the judge finds that other arrangements are in the best interests of the children.

3. Standard separation agreements include provisions that:

a) State the parties' names, residences, dates of marriage and separation, identity of children, assets, and debts;

b) Restrict parties from harassing or interfering with each other;

c) Prohibit parties from incurring debts in each other's names;

d) Waive all marital, estate, and inheritance rights;

e) Waive all claims against each other (the "General Release" clause); and

f) Identify enforcement and breach mechanisms.

C. Separation Agreements in the Military

1. Some Army Legal Assistance offices draft separation agreements while other SJAs decline to provide this service. Separation agreements are more common in overseas Legal Assistance offices.

2. OTJAG Legal Assistance Policy Division distributes *Hot Docs* software, available through JAGCNET to authorized users, to enable the preparation of separation agreements.

II. PROFESSIONAL CONDUCT CONSIDERATIONS

A. Competence.

1. State Laws and Local Procedures. There is no substitute for researching and knowing the laws and procedures of the particular jurisdiction.

2. Information Gathering. Separation Agreement Questionnaires, available through Hot Docs, can be completed prior to the legal assistance appointment. These questionnaires allow for a complete description of property.

3. Client Entitlements (e.g., military retirement pay, benefits, etc.).

4. Tax Consequences.

5. Fraud, Duress, and Unfairness. Be aware of jurisdictional requirements concerning—

a) State statutes or individual judges prohibiting "unconscionable" agreements.

b) Opposing spouse's opportunity for representation.

c) Full disclosure of assets.

B. Representation.

1. Avoid Dual Representation.

    a) Each party should have their own counsel.

    b) Advise the opposing party to consult an attorney, and provide a list or other references (but not a particular attorney), and memorialize this notice in the agreement.

2. Legal Assistance Attorneys from Same Office? Discouraged. See AR 27-3, paragraph 4-9c.

3. Client Control.

    a) Client contact with the other spouse may result in a claim of duress when creating the separation agreement.

    b) Full disclosure of assets is mandatory.

    c) Manage client expectations ("It's not fair," and "I'll never give her that.") regarding property, support, and custody issues.

    d) Encourage de-emotionalization of the process.

III. SEPARATION AGREEMENT BASICS

A. Legal Requirements.

1. Valid marriage.

2. Capacity to contract.

    a. Sound mind, appropriate age.

    b. Understanding of what the spouse is signing (sometimes an issue with foreign spouses).

3. Fact of separation or imminent separation.

4. Consideration.

5. Legal purpose.

6. Full disclosure of pertinent information between the parties.

7. Fair provision for the disadvantaged party.

8. In written form only. Oral agreements are unenforceable.

B. Choice of Law.

1. Normally, the law of the jurisdiction where executed applies. (Significant Contacts Test).

2. Parties may express a contrary intent.

3. Choice of law has significant implications for issues such as division of military retired pay, taxes, child support, and spousal maintenance.

C. Duration, Enforcement, and Modifications.

1. Interim agreements.

a) Courts generally recognize as interim if stated as such.

b) Problems may arise as interim agreements become more comprehensive, or when the parties remain under the provisions for an extended period of time.

2. Enforcement. Depends on state (and local) law.

a. Unincorporated Agreements. Remedy is based on contract principles (*e.g.*, breach of contract). Contempt of court proceedings are not an option.

b. Incorporation. In some states, incorporation means the promises contained in the agreement become part of (*i.e.*, merge into) the court's divorce order. In such states, remedy for breaches of the agreement is through contempt of court proceedings.

3. Modifications.

a. Child-Related Provisions. Courts may always modify terms such as those related to visitation, child support, and child custody, provided modification would be in the child's best interest.

b. Other Provisions. Ability to modify other provisions – and extent to which they are modifiable – remains a matter of state law.

IV. PROPERTY AND DEBT DIVISION

A. Relevant State Law. Identify the relevant state property division law and determine whether the state follows equitable distribution or community property principles.

B. Identify all of the property.

1. Real property identified by lot description.

2. Personal property - tangible (*e.g.*, household furnishings, motor vehicles, lawn and garden equipment, books, china, crystal, jewelry, etc.).

3. Personal property - intangible (*e.g.*, bank accounts, mutual funds, stocks and bonds, CDs, retirement benefits, IRAs, etc.).

C. Classify all of the property. (Again, classification is very state-law specific)

1. Separate Property - often described as premarital property, may include gifts or inheritances to one of the parties during marriage, especially if it has not been commingled. Professional degrees or licenses may or may not be separate property. In some states, non-vested pension rights are separate property.

2. Marital (or Community) Property - generally described as all property acquired by either or both of the parties during the marriage (unless it falls into one of the above categories of separate property).

D. Valuate the marital and separate property.

1. Certain property is easy to "value," such as bank accounts and mutual funds.

2. Some items may require some research, such as determining the "Blue Book" value of motor vehicles.

3. Some items may require an expert. Such items include houses (real estate agent or appraiser), retirement rights (CPA, economist, or actuary), and businesses (CPA, financial advisor).

4. Valuation Dates.

a. Agreed upon by the parties.

b. Date assigned by a court.

E. Divide the property.

1. State Law. The presumption in some states is that marital property is equally divisible. State law also determines the extent to which military retired pay is divisible.

2. Real Estate. Who stays in the marital home? Who pays the mortgage? If real estate is sold, how should proceeds be split?

3. Tangible Personal Property.

a. Attach a schedule to provide the details of who gets what.

b. List bank accounts, CDs, etc. by owner, account number, institution, and approximate balance.

c. Consider a waiver clause for property not mentioned in the agreement (*e.g.*, "Each party has independently determined to his or her satisfaction the extent of property owned by the parties jointly and individually. Each party is satisfied that this agreement divides all property and assets that should be divided between the parties. Notwithstanding contrary provisions of law, any property, asset or expectancy, be it real or personal, tangible or intangible, vested or contingent, that is not addressed in this agreement is the separate property of the party who now owns or possesses it.").

4. Retirement Benefits (USFSPA).

a) If the separation agreement provides no provision for division of military retired pay, the agreement should say so. See *Knisley v. U.S.*, 817 F. Supp. 680 (S.D. Ohio 1993) concerning a malpractice claim against the Army for failing to address military pension in the separation agreement negotiated by two Army Legal Assistance attorneys. The parties could not agree on pension, so the separation agreement completely omitted reference to it.

b. The better practice is to indicate in the separation agreement that the parties cannot agree, and "reserve" the issue of division of military retired pay. This technique oftentimes enables courts to decide the issue.

F. Dividing Debts. Clients must be aware that debt division in a separation agreement is not a legal bar to a creditor suit against either obligee of a joint debt.

V. CHILD CUSTODY AND VISITATION

A. Custody.

1. General preference for joint custody, rather than sole custody.

2. Relocation Considerations.

a. Advance notice before relocation.

b. Distance.

c. Prior court approval and/or automatic cause for re-examination of custody and visitation.

B. Visitation Rights.

1. Describe with as much specificity as possible.

   a. Which holidays? Even/Odd Years? How many days?

   b. Spring Break and Summer Vacation – Even/Odd Years? How many weeks?

   c. Birthdays, Mother's Day, Father's Day, etc.

2. Allocate travel expenses and responsibilities incident to the exercise of visitation rights.

3. Sample provision:

   a) Noncustodial parent shall have the right to have the child with him during the following visitation periods:

      (1) The first weekend each month, from 5:00 p.m. on Friday until 5:00 p.m. on Sunday; however, if the following Monday is a holiday, the visitation period shall extend until 5:00 p.m. on Monday.

      (2) For the month of July every summer.

      (3) For a one-week period each Christmas, and the period will include December 24 and 25 in each even-numbered year.

      (4) For 4 days during school's spring break in each odd-numbered year.

      (5) Such other times as the parties may agree.

   b) The parties agree that upon the child's attaining the age that air carriers will allow him to travel unaccompanied, he will use this means for visitation purposes. Noncustodial parent will bear all transportation costs incident to exercise of visitation rights, except as follows:

      (1) Custodial parent will be responsible for delivering the child to and picking the child up at the major commercial airport nearest his or her home.

      (2) If custodial parent moves to a new location so that transportation costs are higher, he or she will bear the additional cost.

   c) Noncustodial parent's exercise of the rights of visitation under this agreement shall be optional with him, and his failure to exercise such rights on any occasion, for whatever reason, shall not be construed as a waiver of future rights. However, any such unused visitation shall not accumulate.

4. Include an obligation to avoid disparaging the other parent in the child's presence (*e.g.*, "Neither party will disparage or criticize the

other party in the child's presence, and each party will ensure that other adults refrain from disparaging or criticizing the other party in the child's presence.").

VI. CHILD SUPPORT AND HEALTH CARE EXPENSES

A. Amount.

1. What amount, if any, have the parties determined for child support?

a. Review state child support guidelines.

c. Excessively low support amounts are self-defeating because the court may ignore this portion of the agreement.

d. Even when the agreement is to be incorporated into a court decree, the court may be required to determine whether the agreed upon amount of child support conforms to state guidelines.

B. Health Care Expenses.

1. Military medical care is likely preferred, from the paying Soldier's perspective, but it may not be convenient.

a. Insurance.

(1) TRICARE.

(2) Civilian insurance.

b. Uncovered health care expenses (UHCE).

(1) Define what "health care" is. Does it include psychological counseling? Orthodontia? Prescription drugs?

(2) Who pays for what expense? (Silence likely means the custodial parent will bear the burden).

C. Termination - define "emancipation". Emancipation remains vastly different among the states.

a. Age. What is the emancipation age in the applicable state?

b. Education.

(1) States may require support past the emancipation age if the child is still in high school. Some states may require payment of college expenses as well.

(2) Scrutinize support while children are in college. Should this money go directly to the child or the custodial parent?

c. Residence outside the custodial parent's home.

VII. SPOUSAL SUPPORT (ALIMONY)

A. State Rules on Alimony.

1. Duration.

2. Rehabilitative only, or “need based”?

B. Duration.

1. Death of either party.

2. Remarriage of recipient.

3. Cohabitation of recipient with a romantic partner.

C. Waiver. If parties intend spousal support to be waived, clearly say so in the agreement. Prepare your client for future claims of duress or unconscionability.

VIII. APPROVAL, INCORPORATION, AND MERGER

A. Meaningful Terminology. Approval, incorporation, and merger refer to actions that a court might take in relation to a separation agreement. Jurisdictions differ on how separation agreements are treated at divorce, and the distinction can have lasting consequences.

B. Definitions.

1. “Approval” usually refers to a court either expressly or impliedly acknowledging the existence of a separation agreement. The agreement, however, persists as a separate contract even after court action.

2. “Merger” has the opposite effect of “approval,” in that the court takes the pre-existing separation agreement document and makes it part of the court’s decree. The agreement ceases to exist as a contract.

3. “Incorporation” has elements of both “approval” and “merger.” With “incorporation,” the court makes the separation agreement part of the court’s decree, but it also allows the document to continue to exist as a contract.

4. Jurisdictional uncertainty. Not all jurisdictions agree to this terminology. For example, some jurisdictions do not recognize “incorporation” but have instead treated “merged” separation agreements as if they retain some characteristics and remedies of contracts. Those jurisdictions label “mergers” the way others label “incorporations.” For this reason, jurisdictional competence is essential. Sometimes, courts will incorporate only portions of agreements.

C. Repercussions. How a court deems an existing separation agreement when the parties obtain a divorce decree can have lasting implications, especially when one of the parties seeks modification, or brings an action to enforce a provision in the agreement. These decisions often turn on whether the separation agreement was acknowledged, merged or incorporated, or neither.

CHAPTER H

CHILD SUPPORT GUIDELINES

TABLE OF CONTENTS

I. REFERENCES

A. www.supportguidelines.com (links to state child support guidelines, state child support enforcement agencies, and child support calculators).

B. http://www.dfas.mil (Defense Finance and Accounting Service information regarding garnishments and involuntary allotments).

C. CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION, LAURA W. MORGAN (2001, with 2007 supplement).

D. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (29 Nov. 2003) [hereinafter AR 608-99].

E. Aid to Families with Dependent Children Program (AFDC), 42 U.S.C. § 601 (2006).

F. Family Support Act of 1974 (Title IV-D of the Social Security Act), 42 U.S.C. §§ 651-665 (2006).

G. Child Support Enforcement Amendments of 1984 (CSEA), 42 U.S.C §§ 657-662 (2006).

H. Family Support Act of 1988, 42 U.S.C. §§654, 666-667 (2006).

I. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (1996).

J. Uniform Interstate Family Support Act, 2008 Version.

II. INTRODUCTION: A PRACTICAL CONTEXT

A. Waivers of Child Support. Generally, waivers of child support are not permissible. Remember the "best interests of the child" (or some variation of this phrase) governs most state child support determinations. *See, e.g.*, Harris v. Westfall, 90 P.3d 167 (Alaska 2004) (finding as against public policy a mother's waiver of child support in return for more favorable visitation schedules); *but see* Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007) (holding that a child support waiver agreement between a mother and a sperm donor in a clinical setting does not violate public policy).

B. Amending Child Support. Courts will always retain jurisdiction to modify child support, if in the child's best interests. Federal law provides for a judicial "re-look" at a child support award at least every three years. 45 CFR § 303.8.

C. Components of Child Support.

1. Cash money (working through the presumptive amount and variances).

2. Health care coverage by military parent or private health care by non-military parent.

3. Uncovered health care expenses.

D. Unilateral Changes in Child Support. Reduction in child support payments during extended visitation requires specific authorization by agreement or court order. In absence of such an authorization, there is no relationship between visitation and support. If the obligor does not pay child support, the obligee cannot withhold visitation. If an obligee withholds visitation, the obligor cannot withhold support. The appropriate response to either issue is an enforcement action.

E. Child Support *Pendente Lite* (While the Litigation is Pending). Temporary orders for child support may be entered pending the final outcome of a divorce proceeding, to ensure the children involved are adequately cared for. Because of their temporary nature, court orders for child support *pendente lite* are not binding in later divorce proceedings.

III. CHILD SUPPORT GUIDELINES OVERVIEW

A. Introduction.

1. Child Support Prior to the Guidelines. Historically, judges had sole discretion to determine child support awards based on the ability of the obligor and the needs of the child. This approach caused inconsistent and inadequate orders.

2. The Federal Mandate.

a. The Aid to Families with Dependent Children program (AFDC) (1935) established a federal appropriation to states that adopted plans approved by the Secretary of Health and Human Services. The states provided a minimum monthly subsistence payment to families meeting the need requirements.

b. The Family Support Act of 1974 (Title IV-D of the Social Security Act) required states receiving AFDC funds to enforce child support obligations. The Act required these states to set up enforcement agencies, known as IV-D agencies.

c. The Child Support Enforcement Amendments of 1984 (CSEA) broadened the powers of state IV-D agencies to reach non-AFDC families. These powers included employer wage withholding, property liens, and tax refund intercepts.

B. Challenges to the Guidelines. Constitutional challenges to federal statutes and regulations regarding child support have been uniformly rejected. Challenges based on Separation of Powers arguments, for example, were rejected in Boris v. Blaisdell, 492 N.E.2d 622 (Ill. 1986). Challenges based on violations of due process were rejected in Schenek v. Schenek, 780 P.2d 413 (Ariz. Ct. App. 1989). Finally, challenges based on violations of equal protection were rejected in P.O.P.S. v. Gardner, 998 F.2d 764 (9th Cir. 1993).

C. The Family Support Act of 1988. The Family Support Act (FSA) of 1988 required all states to adopt presumptive child support guidelines by 1994. While most states have incorporated their guidelines into state statutes, a minority of states have done so through court rules or decisions, or through enacting administrative regulations.

1. Federal regulations implementing the FSA (*see* 45 C.F.R. § 302.56) require all state guidelines to consider all income and earnings of the noncustodial parent, be based on specific criteria that lead to the computation of a presumptive child support amount, and provide for children's health care needs through health insurance coverage or other means.

2. Federal regulations implementing the FSA, such as 42 U.S.C. § 667, require states to establish a rebuttable presumption that the amount resulting from application of the state guidelines is the correct amount. The guidelines may be rebutted, allowing deviations from the guidelines, but the court must make written findings as to why deviation is appropriate.

D. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) [Welfare Reform Act] ended federal AFDC entitlements, replacing them with block grants known as Temporary Assistance to Needy Families (TANF) grants.

1. Perhaps most important, the PRWORA required all states to adopt the Uniform Interstate Family Support Act (UIFSA).

2. UIFSA establishes rules governing state jurisdiction over the establishment, modification, and enforcement of child support actions.

IV. MODELS OF IMPLEMENTATION

A. The two main child support guideline models used by the states are the Income Share Model and the Percentage of Income Model. A third model, the Melson Formula, is used in only three jurisdictions (Delaware, Hawaii, and Montana).

B. Income Share Model. The tenet of the Income Share model is that the child should receive the same proportion of income from each parent that the child would have received but for the parents' divorce. *See, e.g.*, 43 OKLA. STAT. §§ 118 et seq.; Archer v. Archer, 813 P.2d 1059 (Ct. App. Okla. 1991).

1. Four-step process

a. Determine both parents' income – gross or net, depending on the state's provisions – and add both incomes together.

b. Determine basic support obligation based on the parents' combined income. The "basic support obligation" is derived from a table or a matrix contained in the guidelines.

c. Arrive at the presumptive child support obligation by adding expenditures for work-related child care expenses, other add-ons, and deductions.

d. The presumptive child support obligation is pro-rated between each parent based on his or her proportionate share (percentage) of total income. The obligor's portion becomes the child support obligation, whereas the obligee's portion is retained and presumed to be spent on the child.

C. Percentage of Income Model.

1. This method sets the obligation directly from a percentage of the non-custodial parent's income. It does not consider the custodial parent's income. *See, e.g.*, TEXAS FAMILY CODE CHAPTER 154. and In re. C.W., No. 07-04-0543-CV, 2006 WL 118937 (Tex. Ct. App. 2006).

2. Three-step process.

a. Determine non-custodial parent's income.

b. Apply the state-mandated child support percentage (*e.g.*, 17% of gross income for one child, 35% for two children, etc.).

c. Make adjustments for add-ons and deductions, to reach a final presumption.

V. DEFINING INCOME.

A. Some states use a person's *gross income*, and others use *net income* when determining a person's ability to pay child support. Further, the definition of income under federal and state tax codes is not determinative. *See* In re Marriage of Fain, 794 P.2d 1086 (Colo. Ct. App. 1990) (rejecting a father's claim that his personal injury settlement award should not be considered income because it was not income for federal tax purposes); *but see* Brinegar v. Reeves, 681 N.E.2d. 1080 (Ill. Ct. App. 1997) (excluding a personal injury settlement from income by distinguishing a one-time lump sum award from a structured settlement). *See also* In re Marriage of Bohn, 8 P.3d 539 (Colo. Ct. App. 2000) (holding that even though taxes withheld are unavailable to a recipient, they are still a component of gross income for purposes of calculating child support).

B. Gross v. Net Income. Proponents of a net income model for calculating child support argue that a person's after-tax and after-payroll deduction income most properly reflects a person's ability to pay support. Proponents of a gross income model, however, argue that using gross income reduces discovery and provides less incentive to manipulate or hide income.

C. The definition of "income" for child support purposes is *expansive*. The following is a non-inclusive list of types of income state courts may consider:

1. Salary and Wages. Any income from salary and wages is income regardless of the source. This includes tips, commissions, bonuses, profit sharing, deferred compensation, severance pay, and cost of living allowance (COLA).

2. Overtime and Second Jobs. States differ on this issue. Some states that consider overtime pay as income also require that it be consistent and predictable over time in order to be considered income for child support purposes. *But see* Evans v. Evans, 676 S.E.2d 180 (Ga. 2009) (citing Ga. Code Ann.,§ 19-6-15 which requires consideration of "variable income").

3. Income from Contracts. Money received is considered income, but not payments made pursuant to a marital property settlement contract.

4. Investment and Interest Income. Investment and interest income is included as income for child support purposes. Some states include such income on the corpus of an inheritance, where other states include the inheritance itself as income.

5. Retirement Pensions. Income includes money received from a retirement pension and includes military pensions (notwithstanding the fact that potentially 50% of the pension will be awarded to the child support obligee spouse as part of the property settlement).

6. Trust and Estate Income. This income is included even if the trustee may not have yet received any distribution of the trust income. *See* Grohmann v. Grohmann, 525 N.W.2d 261 (Wis., 1995).

7. Annuities. Annuities and structured settlements are considered income for support purposes.

8. Capital Gains. Capital gains are normally included as income; however, some states distinguish between recurring capital gains and nonrecurring capital gains. *See, e.g.*, In re Marriage of Miller, 595 N.E.2d 1349 (Ill. App. 3 Dist., 1992).

9. Social Security Benefits. Child support is an exception to the general non-assignability rule regarding social security payments and is therefore considered income. Further, a child receiving Social Security income for his own disability does not entitle the obligor to an offset. A spouse receiving benefits on the obligor spouse's account does not entitle the obligor to an offset. It can be considered income to the obligee in an income share model.

10. Veterans' Benefits. The Supreme Court ruled in Rose v. Rose, 481 U.S. 619 (1987), that Veterans' benefits could be considered income for purposes of child support.

11. BAH and BAS. These fringe benefits are included as income for child support purposes in most state statutes, even though this income is excluded as income for tax purposes.

12. National Guard and Reserve Pay. Normally included as income where the pay is steady and regular.

13. Gifts, Prizes, Education Grants, Lottery and Gambling Winnings. Gifts generally are not considered income because they are not predictable, steady income. *But see* In re Marriage of Rogers, 802 N.E.2d 1247 (Ill. App. Ct. 2003) (holding that receipt of $46,000 per year in gifts is considered income under the Illinois child support statute). Grants (that do not have to be repaid) and lottery and gambling winnings are, however, considered income for child support purposes.

14. Income of a New Spouse. Most states will not consider the income of a new spouse as income to the obligor. However, *see* In re Marriage of Drysch, 314 Ill.App.3d 640 (Ill.App. 2 Dist., 2000) in which the court considered the new spouse's income (which had been pooled with the noncustodial parent's income) when determining the financial resources of each former spouse in funding their child's college education.

VI. SELECT ISSUES INVOLVING "INCOME"

A. Exclusions from "Income." A large majority of states do not consider income from public assistance programs (*e.g.*, Medicaid, Earned Income Credit, food stamps, public housing assistance, etc.) as "income" for purposes of calculating child support obligations. *See*, *e.g.*, Hodges v. Commonwealth, 609 S.E.2d 61 (Va.App. 2005); Burns v. Edwards, 842 A.2d 186 (N.J. Super. App. Div. 2004). *See also* Gifford v. Benjamin, 892 A.2d 738 (N.J. Super. App. Div. 2006) (holding that a child's receipt of supplemental security income (SSI) benefits due to disability could not be credited against a parent's child support obligation). A majority of courts also do not consider child support received for the benefit of other children when calculating the parties' income.

B. Accounting for Fluctuations in Income. Where parents' income potentially may vary greatly from year to year, many state guidelines, rules, or cases require that income over a specific period of time be analyzed, in order to achieve consistency in determining income.

1. For instance, in Ball v. Willis, 438 S.E.2d 860 (W.Va. 1993), the obligor's annual income over a three-year period fluctuated greatly, based on his income received as a private attorney. The appellate court held that it was improper to consider only the obligor's income from one year; rather, it required that the court consider the obligor's income tax returns and yearly income for a "lengthy enough period of time" to determine a fair attribution of income to the obligor.

2. Moreover, when courts do calculate a child support obligation based on average income over a number of years, they cannot modify the child support obligation based on a fluctuation from the average, without a showing that the fluctuations were both unanticipated and continuous for a long period of time. *See, e.g.*, Matter of Marriage of Boyd, 954 P.2d 1281 (Ore. Ct. App. 1998); In re Marriage of Nieth, 116 P.3d 234 (Ore. Ct. App. 2005).

C. Imputed Income. Where parties manipulate their income by deliberately becoming underemployed or unemployed, state guidelines permit courts to evaluate the "earning capacity" of a person and impute income to that person.

1. Such income imputation may be a factual determination by the court (as where a court refuses to believe a party's testimony regarding actual earnings).

2. Alternatively, courts may impute income as a matter of law, as in cases in which they accept a party's testimony regarding actual earnings, but attribute to him or her a higher earning capacity, nevertheless. Income imputation as a matter of law generally considers the parent's earning history, education level, work qualifications, mental and physical condition, and job opportunities and wages in the parent's geographic area. *See, e.g.*, O'Connell v. Christenson, 75 P.3d 1037 (Alaska 2003).

3. However, courts may view as reasonable a custodial parent's decision to forego employment outside the home. *See, e.g.*, In re Marriage of Chen, 695 N.W.2d 758 (Wis. 2005).

VII. DEVIATION FROM THE GUIDELINE'S PRESUMPTIVE AMOUNT

A. The Family Support Act of 1988 required states to adopt child support guidelines that include a presumptive amount of child support, based on factors (*e.g.*, the parents' earnings, number of children, etc.) that the states determine relevant.

1. The guidelines are premised on certain assumptions about the expenditures and living conditions for the average family. These assumptions are based on statistics that federal and state agencies compile about the costs associated with raising children.

2. However, in case-specific instances, the assumptions that were incorporated into the drafting of the guidelines may differ dramatically from the facts. In those instances, states permit deviation from the guidelines.

B. Burden of Proof and Standard for Deviation. Where a court calculates a child support award, it first must determine the presumptive child support award, which leads to a rebuttable presumption that this amount is correct. *See* Costello v. Miranda, 137 S.W.3d 498 (Mo. Ct. App. 2004). The party arguing for deviation – either upward or downward – from the presumptive guideline amount bears the burden of showing why the presumptive child support award is unjust or inappropriate in the particular instance. *See, e.g.*, In re Marriage of DeWitt, 905 P.2d 1084 (Mont. 1995). This requires a showing that the facts of the particular case vary materially from the economic assumptions upon which the guidelines were based.

C. Written Findings. Federal regulations mandate that if a court chooses to deviate from the presumptive guideline amount, it must first reach the presumptive amount, and then enter written findings as to why deviation is proper. 45 C.F.R. § 302.56(g). *See generally* Sain v. Sain, 517 S.E.2d 921 (N.C. App. 1999) (overruled on other grounds) (establishing a four-step process for a court to deviate from a presumptive child support award).

VIII. SUPPORT ENFORCEMENT THROUGH GARNISHMENT

A. Statutory Basis. 42 U.S.C. §§ 659-662 (2000); 5 C.F.R. pt. 581.

B. Authorized purposes for Garnishment. 5 C.F.R. § 581.101.

1. Child support.

2. Alimony (separate maintenance, spousal support).

3. Attorney's fees and court costs, if defined by state law as a component of support and expressly made a part of the recovery in the garnishment order. 5 C.F.R. § 581.307.

4. Arrearages, if payment is called for by the garnishment order. *See* 32 C.F.R. § 54.6(a)(1)(iii).

C. Money Subject to Garnishment for Civilian Employees. 5 C.F.R. § 581.103(a) lists twenty-nine categories of pay, to include:

1. Employee wages, salaries, commissions;

2. Sick pay, overtime;

3. Differentials (premium pay); and

4. Bonuses.

D. Money Subject to Garnishment for Military Service Members: 5 C.F.R. § 581.103(b) lists seventeen categories of pay, to include:

1. Basic pay;

2. Special pay;

3. Bonuses;

4. Incentive pay;

5. Inactive duty training pay;

6. Retired pay;

7. Disability pay; and

8. Separation incentives.

E. Money NOT Subject to Garnishment. 5 C.F.R. § 581.104 includes:

1. BAH;

2. BAS;

3. Dislocation Allowances;

4. Family Separation Allowance; and

5. Cost of Living Allowances (COLA).

F. Money EXCLUDED from Garnishment. 5 C.F.R. § 581.105 includes:

1. Debts owed by the individual to the United States;

2. Required deductions by law:

   a. Fines and forfeitures,

   b. Amounts deducted for Medicare;

3. Tax withholdings for Federal, State, or local income tax;

4. Health insurance premiums;

5. Amounts deducted as normal retirement contributions (including contributions to the Thrift Savings Plan); and

6. Amounts deducted as normal government life insurance premiums (SGLI).

G. Garnishment Procedure.

1. Obtain a garnishment order issued by a state or federal court with jurisdiction over the support debtor. The garnishment order need not name the government entity that employs the obligor as the garnishee. 5 C.F.R. § 581.202(a).

2. Serve the garnishment order on the appropriate "designated agent" by certified or registered mail, return receipt requested, together with:

   a. A copy of the underlying support order or the evidence that the garnishment is to enforce a support obligation, if it does not appear from the face of the process that it has been so brought (5 C.F.R. § 581.202(c)); and

   b. Sufficient identifying information so that the government entity can process the garnishment. IAW 5 C.F.R. § 581.203, the following information is requested:

      (1) Full name;

      (2) Date of birth;

      (3) Employment number, SSN, or VA claim number;

      (4) Component and duty station; and

      (5) Status of obligor (employee, former employee).

3. A list of designated agents for the entire federal government is located at 5 C.F.R. pt. 581, Appendix A. The agent for Active, Retired, Reserve, and National Guard members of the Department of Defense is:

   Defense Finance and Accounting Service, Cleveland Center – Code L
   Assistant General Counsel for Garnishment Ops
   PO Box 998002 (DFAS-CL/L)
   Cleveland, Ohio 44199-8002

(216) 522-5301

4. Upon proper service of legal process, together with all supplementary documentation and information required by the regulation, the government entity shall identify the obligor and suspend payment of such money to comply with the order. 5 C.F.R. § 581.301.

5. The government entity shall send notice of the garnishment to the obligor not later than fifteen calendar days after receipt of the garnishment order. 5 C.F.R. § 581.302.

6. Military finance offices will honor a legal process (garnishment order) that is "regular on its face." 42 U.S.C. § 659 (f). *See also United States v. Morton*, 467 U.S. 822 (1983) (holding that legal process regular on its face does not require the court to have personal jurisdiction, only subject matter jurisdiction).

7. Exceptions to honoring a legal process regular on its face (5 C.F.R. § 581.305):

   a. The garnishment involves withholding of funds that are not associated with employee wages from the United States;

   b. The legal process is not brought to enforce legal obligations associated with alimony and/or child support;

   c. It fails to comply with 5 C.F.R. Pt. 581;

   d. The government has been served with an order enjoining or suspending the garnishment order; or

   e. The government has received notice that the obligor is appealing the underlying support obligation and state law calls for suspension of garnishment during appeal.

H. Consumer Credit Protection Act Limits Amount Garnished. 15 U.S.C. § 1673(b)(2).

1. 50% of disposable pay, if the Soldier is supporting family other than those whom the garnishment order pertains to.

2. 60% of disposable pay, if the Soldier is not supporting other family members.

3. Plus additional 5% added to 50% or 60% if the arrearage is for 12 or more weeks.

IX. SUPPORT ENFORCEMENT THROUGH STATE WAGE ASSIGNMENT ORDERS

A. DFAS View.

1. Treat like garnishment.

2. Same rules as above apply.

B. State Court Use.

1. Some states require 30 day arrears.

2. Some issue automatically upon ordering support.

X. SUPPORT ENFORCEMENT THROUGH INVOLUNTARY ALLOTMENTS

A. Statutory Authority. 42 U.S.C. § 665; 32 C.F.R. pt. 54. Essentially, this is a federal wage assignment statute applicable only to active duty military pay.

B. Threshold Requirements. 32 C.F.R. Pt. 54, § 54.3–4.

1. Support Order. An order establishing a support obligation issued by a court or in accordance with administrative procedures under state law that afford substantial due process subject to judicial review.

2. Child and/or spousal support. The order must pertain to child and/ or spousal support.

3. Arrearage. Member has an arrearage equal to support payable for two months or longer.

C. Procedures: 32 C.F.R. Pt. 54, § 54.6

1. Authorized Person. An authorized person must send a signed notice to the designated official (military finance center) requesting initiation of an involuntary allotment.

a. An “Authorized Person” is any agent or attorney of a state having an approved IV-D plan who has authority to seek recovery of child or child and spousal support; or any court (or agent of the court) that has authority to issue a child support order against a member. 32 C.F.R. § 54.3(a).

(1) Private attorneys and legal assistance attorneys are not "authorized persons."

(2) Legal assistance attorneys may be able to arrange mutual cooperation with state child support enforcement agents.

b. Designated Official. This is the representative of the Military Service who is authorized to receive and process notices under this part that a servicemember has failed to make periodic support payments under a support order. 32. C.F. R. Pt. 54, §§ 54.3(c) and 54.6(f).

(1) Army, Navy, Air Force, and U.S. Marine Corps: DFAS Cleveland Center, DFAS-DGI/CL, P.O. Box 998002, Cleveland, OH 44199-8002

(2) Coast Guard: Commanding Officer, U.S. Coast Guard Pay and Personnel Center Federal Building, 444 SE Quincy Street, Topeka, KS 66683-3591

c. Notice. A court order, letter, or similar document issued by an authorized person providing notification that a member has failed to make support payments under an order. 32 C.F.R. Pt. 54, § 54.3(d). IAW 32 C.F.R. Pt. 54, § 54.6(a), the notice shall include:

(1) A statement of delinquency in an amount equal to or exceeding two months' support and a request for allotment pursuant to 42 U.S.C. § 665 (notice of arrearage in excess of 12 weeks if appropriate);

(2) A certified copy of support order;

(3) An amount of monthly payments and how much would be applied to arrearages;

(4) Sufficient identifying information (full name, social security number, military service);

(5) Full name and address of the allottee;

(6) Any limitations on the duration of the support allotment; and

(7) A certificate that the official sending notice is an authorized person.

2. Notice to Service Member. A finance center notifies the service member (with copies of materials received from the state) and the servicemember's commander. 32 C.F.R. Pt. 54, § 54.6(d)

3. Legal Counseling. The commander is responsible for providing a legal assistance attorney for the servicemember. 32 C.F.R. § 54.6(d)(3).

4. Command Notice to Finance. The commander notifies the finance center that the servicemember has been counseled. 32 C.F.R. Pt. 54, § 54.6(d)(4).

5. Allotment goes into effect. 32 C.F.R. Pt. 54, § 54.6(e)

a. After the finance center receives notice that the servicemember has consulted with a legal assistance attorney; or

b. In the next pay period, after thirty days elapse from the date of sending notice to the servicemember, whichever occurs first; and

c. The allotment stays in effect until the state says to terminate it; the servicemember cannot stop an involuntary allotment.

6. Payee. Allotment is payable to the "authorized person" (or agency) or directly to the support obligee, as requested in the notice.

7. Amount of the allotment.

a. The amount of the monthly obligation, plus arrearages, if an order specifically calls for the payment of arrearages through the allotment.

b. Same percentage limitations apply as with garnishment (See Consumer Credit Protection Act).

c. Disposable Earnings subject to Involuntary Allotments. 32 C.F.R. Pt. 54, § 54.6(b).

(1) Basic pay, some special pay, and bonuses;

(2) BAH for all members with dependents, and for members, in the grade of E-7 and above, without dependents; and

(3) BAS for all commissioned and warrant officers.

d. Income Exclusions. Same as for Garnishments. *See* 32 C.F.R. Pt. 54, § 54.6(c)

D. Defenses to Involuntary Allotments: 32 C.F.R. Pt. 54, § 54.6(d)(5)

1. Substantial Error. Finance Center may decline to honor a request if the member provides an affidavit and supporting documentation, within thirty days of notice, showing substantial proof of error, such as:

a. The support payments are not delinquent; or

b. The underlying support order has been modified, superseded, or set aside.

2. Request for involuntary allotment may be returned by the finance center without action if the notice fails to comply with procedures established by 32 C.F.R. Pt. 54, § 54.6(a) or if the obligor cannot be identified.

CHAPTER I

CHILD CUSTODY

TABLE OF CONTENTS

July 2018

CHILD CUSTODY

I. REFERENCES

A. Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11670 (1980).

B. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601 – 11611 (1988).

C. Parental Kidnapping Prevention Act, 28 USC § 1738A.

D. Uniform Child Custody Jurisdiction and Enforcement Act.

E. AR 600-20, *Army Command Policy*, 6 November 2014, Paragraph 5-5, *Family Care Plans*.

F. *Family Law Quarterly*, Published by the Section of Family Law, American Bar Association (Annual Winter Edition provides a Review of Family Law in the Fifty States for the preceding year, including significant cases involving child custody).

II. THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA)

A. Background.

1. Uniform Child Custody Jurisdiction Act (UCCJA). Promulgated in 1968, the UCCJA was designed to discourage interstate kidnapping of children by their non-custodial parents, who would hope to find sympathetic courts willing to reverse unfavorable custody orders. It set forth two overriding principles: (1) establishment of jurisdiction over a child custody case in one state; and (2) protection of the order of that state from modification in any other state, provided the original state retained jurisdiction. By 1981, every state had adopted the UCCJA, although some states modified the uniform language.

2. Parental Kidnapping Prevention Act (PKPA), 28 USC § 1738A, enacted in 1981. It was passed because Congress was dissatisfied with increasing numbers of parental kidnappings, inconsistent and conflicting court orders, and excessive litigation. Congress was also dissatisfied with the lack of a criminal enforcement mechanism in the UCCJA. The PKPA does not govern the terms for exercise of initial custody jurisdiction; rather, it establishes criteria for interstate enforcement and recognition of existing decrees.

a) Most importantly, the PKPA mandates that full faith and credit be given to valid sister state child custody decisions. Such decisions are binding as long as the rendering state had jurisdiction and one of five conditions under 28 USC § 1738A(c) is met:

(1) The PKPA gives first priority to the child's home state, when determining which state may exercise jurisdiction. The

home state is the child's state on the date of commencement of the proceeding; or had been the home state within 6 months of the commencement, and the child was removed by a contestant and a contestant continues to reside in that jurisdiction.

(2) If no state qualifies as a home state, jurisdiction can be exercised if the child and at least one contestant have significant connections with the state (other than mere physical presence), and substantial evidence concerning the child's present and future care, protection, training, and personal relationships is available in that state.

(3) Third, the PKPA allows jurisdiction if the child is physically present in the state and abandoned, or an emergency situation exists.

(4) Finally, if no state has jurisdiction on any of the preceding grounds, or all states with potential jurisdiction have declined to exercise it, a state may exercise jurisdiction if in the child's best interest.

(5) The state has continuing jurisdiction based on past custody or visitation determinations, if the state's own jurisdictional requirements are met and the state remains the residence of the child or of any contestant.

b) Where the PKPA and state law conflict, the PKPA, as a federal law, preempts state law under the Supremacy Clause.

3. Conflict between UCCJA and PKPA. The UCCJA drafters believed the child's home state was the best state within which to find information in making a custody decision. Nevertheless, the drafters also assumed that once a court assumed jurisdiction on another basis, that state should be permitted to proceed without delay and without determining if another state had "home state" status. The PKPA, on the other hand, regarded the child's home state as much more important in determining jurisdiction.

B. Uniform Child Custody Jurisdiction and Enforcement Act. Adopted in 1997, the UCCJEA is intended to replace the UCCJA. It reconciles UCCJA principles with the PKPA, and provides interstate civil enforcement for child custody orders. As of June 2017, the UCCJEA has been adopted by all states except Massachusetts. The District of Columbia, Guam, and the US Virgin Islands have also adopted the UCCJEA while Puerto Rico has yet to adopt it.

1. Jurisdiction for Initial Custody Determinations (§ 201(a)). Under the UCCJEA, parents may not create their own agreements to confer subject matter jurisdiction over child custody determinations. *See, e.g.*,. Griffith v. Tressel, 925 A.2d 702 (N.J.Super. 2007). Rather, jurisdiction for initial custody determinations must satisfy one of the UCCJEA's jurisdictional bases:

a) Home State Priority for Initial Custody Decisions. "Home state" jurisdiction is the priority in initial child custody determinations. A "home state" is the state where the child lived with a parent for 6 consecutive months immediately before commencement of the proceeding. Alternatively, a former "home state" may have jurisdiction if it was the child's home state within 6 months before commencement of the proceeding, and the child is absent from the state, but a parent continues to reside there.

Temporary absences of the child from a state do not defeat the "home state" jurisdiction. A totality of the circumstances test includes both total duration of the absence and intent for a temporary absence. *See, e.g.*, Chick v. Chick, 596 S.E.2d 303 (N.C. App. 2004) (holding that a six-week absence was temporary); *but see* Powell v. Stover, 165 S.W.3d 322 (Tex. 2005) (which rejects the totality of the circumstances test and accepts a physical presence test for home state priority).

b) Significant Connection. A state can exercise "significant connection" jurisdiction in an initial custody determination only if there is no home state, a home state declines jurisdiction, or a home state makes an inconvenient forum determination. Furthermore, the child and parents, or child and at least one parent, must have a "significant connection" with the state beyond their mere presence there, and substantial evidence must be available concerning the child's care, protection, and personal relationships. *See, e.g.*, In re Forlenza, 140 S.W.3d 373 (Tex. 2004).

c) State Declination of Jurisdiction. One state may decline jurisdiction in favor of another state, based on "inconvenient forum" or "parental misconduct" grounds.

d) Catchall Jurisdiction Provision. The UCCJEA provides that if no other state has jurisdiction based on the above three grounds, a court of last resort may fill the void and issue an initial custody order.

2. Invalid Bases for Initial Jurisdiction.

a) Emergency Jurisdiction. The UCCJEA removes "emergency jurisdiction" as a basis for jurisdiction in initial, permanent custody determinations.

b) No "Best Interests of the Child" Standard. The UCCJEA has dispensed with the UCCJA's "Best Interests of the Child" as a theory upon which to base a court's jurisdiction. *See, e.g.*, In re Marriage of Fontenot, 77 P.3d 206 (Mont. 2003) (finding that the lower court erred in applying the "Best Interests" test to a jurisdiction determination).

3. Personal Jurisdiction Over a Party. Unlike under the Uniform Interstate Family Support Act (UIFSA), where valid service of process fulfills personal jurisdiction requirements over a party, the UCCJEA confers personal

jurisdiction over a party based on either the current or immediate-past presence of the child in the state.

4. Temporary Emergency Jurisdiction (§ 204). Under the UCCJEA, a court can exercise temporary emergency jurisdiction if the child is in the state and has been abandoned, or if the child or his sibling or parent is subjected to or threatened with abuse.

C. Jurisdiction to Modify a Custody Decree under the UCCJEA, (§ 202). Modification jurisdiction is intertwined with the concept of Continuing Exclusive Jurisdiction (CEJ).

1. Except for temporary jurisdiction, a court that issued a custody order has CEJ until:

a) A court of that state determines that neither the child, nor the child and one parent, nor the child and a person acting as parent still has a significant connection with the state, and that substantial evidence is no longer available in the state concerning the child's care, protection, and personal relationships; or

b) The original court or a new court in another state determines that the child, the child's parents, and any person acting as parent do not presently reside in the initial determination state.

2. If the court does not have CEJ, it may modify a child-custody determination only if the court has jurisdiction to make an initial determination under § 201.

When the child, the child and one parent, or the child and a person acting as a parent remain in the state that issued the initial custody decree, only that state can determine whether it should continue to exercise CEJ. Sister states may not determine, *sua sponte,* that a child's recent move to their state enables amendment to the original custody decree. *See* J.T. v. A.C., 892 So.2d 928 (Ala. Civ. App. 2004).

3. If a court that entered the original child custody decree later determines that the custodial parent, the noncustodial parent, and the children have departed the state, the court cannot modify the decree until it determines whether it has lost continuing, exclusive jurisdiction. *See* Baker v. Baker, 25 So.3d 470 (Ala.Civ.App.2009).

D. Enforcement of Custody Decrees Under the UCCJEA (§§ 303, 305). The UCCJEA requires sister states to recognize and enforce custody determinations of another state that were made in substantial conformity with the Act.

1. Orders must be filed in the new state as a "foreign judgment," and notice must be given to the non-custodial parent. That party has 20 days to request a hearing to contest validity of the registration.

2. If registration is contested, the only limited available defenses are: (1) lack of jurisdiction by the initial court that entered the order; (2) the original order has been vacated, stayed, or modified; or (3) lack of notice and opportunity to be heard as part of the initial order.

E. "Turbo Habeas" (§ 308). Where children have been wrongfully removed from a state, the UCCJEA provides a mechanism for their prompt recovery and return. An enforcement hearing will produce an order authorizing the petitioner to gain immediate physical custody.

III. STANDARDS FOR CHILD CUSTODY DETERMINATIONS

A. Parenting Plans. Parenting plans include parents' proposals regarding division of responsibilities, access to the child(ren), and parenting time. In many states, parenting plans are prerequisites to a completed divorce application. Courts are not bound by the terms of the parenting plans, and will review them to ensure they comport with the child's best interests.

B. "Best Interests of the Child" Standard. The basic principle courts use to decide custody between two parents is known as the "best interests of the child" standard. *See, e.g.*, Pace v. Pace, 22 P.3d 861 (Wyo. 2001); *see also* In re Paternity of JWH, 252 P.3d 942 (Wyo. 2011), ("[T]he ultimate goal . . . [is] a reasonable balance of the rights and affections of each parent, with paramount consideration being given to the welfare and needs of the children.").

C. The "Tender Years" Doctrine & Gender-Based Parenting Preferences.

1. Absent some showing of mental or physical incapacity of the mother, or evidence of gross misconduct by the mother, a presumption arises that custody of an infant or very young child of "tender years" should be awarded to the mother.

2. Today, this doctrine is largely rejected as unfair, sexist, and not necessarily in the child's best interests. *See* Ketola v. Ketola, 636 So.2d 850 (Fla. Dist. Ct. App. 1994)("The Legislature has now established unequivocally that it is the public policy in this state to give no preference to either the mother or the father in judging each parent's right to custody or primary residence of the minor child."); *See also* Pusey v. Pusey, 728 P.2d 117 (Utah 1986)("We believe the time has come to discontinue support, even in dictum, for the notion of gender-based preferences in child custody cases.").

D. "Primary Caretaker" Approach.

1. Some courts presume that custody of young children should be awarded to the parent who is the "primary caretaker." *See, e.g.,* Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981), for primary caretaker criteria:

a) Preparing and planning meals.

b) Bathing, grooming, and dressing.

c) Purchasing, cleaning, and care of clothes.

d) Providing medical care, including nursing and trips to physicians.

e) Arranging for social interaction among peers after school, such as transportation to friends' houses.

f) Arranging alternative care such as baby sitters and daycare.

g) Putting the child to bed at night, attending to the child in the middle of the night, and waking the child in the morning.

h) Disciplining, including teaching general manners and toilet training.

i) Educating (religious, cultural, social, etc.).

j) Teaching elementary skills such as reading, writing, and arithmetic.

2. Problems.

a) Is this approach truly nondiscriminatory on the basis of gender?

> "West Virginia law does not permit a maternal preference [in child custody litigation]. [However, the preceding] list of criteria usually, but not necessarily, spells 'mother.' That fact reflects social reality; the rule itself is neutral on its face and application. . . . Our rule inevitably involves some injustice to fathers who, as a group, are usually not primary caretakers." David M. v. Margaret M., 385 S.E.2d 912 (W. Va. 1989).

b) The Primary Caretaker Approach is growing in acceptance.

(1) It remains at least a factor in custody determinations.

(2) Studies find it tends to lengthen the custody determination process by leading to multiple hearings on who the primary caretaker is, shifting the focus away from the best interest of the child.

(3) The primary caretaker presumably made sacrifices in his/her career or time to care for the child. However, this is not always an easy standard; perhaps the secondary parent wanted to be the primary caretaker but was able to produce more income.

E. Religion.

1. *See* Pater v. Pater, 588 N.E. 2d 794 (Ohio 1992) (reversing the trial court custody award to the father because the mother's religion was seen as a detriment to child's best interest).

2. Courts cannot consider the merits or contents of religious doctrine, but may consider the religious practices of the parent in order to protect the best interests of the child. *Id.*

F. Race. Courts cannot decide initial custody and modification of custody based on race. Palmore v. Sidoti, 466 U.S. 429 (1984).

G. Sexual Conduct. A court may consider sexual conduct as a factor in determining child custody.

1. Adultery. *See* Hanhart v. Hanhart, 501 N.W. 2d 776 (S.D. 1993); Sitts v. Sitts, 74 A.D.3d 1722 (N.Y. App. Div. 2010) ("A parent's infidelity or sexual indiscretions should be a consideration in a custody dispute only if it can be shown that such factor may adversely affect the child's welfare.").

2. Sexual Preference. *See* Pulliam v. Smith, 476 S.E.2d 446 (N.C. 1996) ("Our courts have been consistent in rejecting the opinion that conduct of a parent, *ipso facto,* has a deleterious effect on the children. . . . There must be evidence that the conduct has or will likely have a deleterious effect on the children.").

H. Child's Preference.

1. Yates v. Yates, 702 P.2d 1252 (Wyo. 1985) (custodial preference by the affected child is a factor to be considered, but such preference is not conclusive).

2. Key Issues regarding a child's preference.

a) At what age is a child sufficiently mature to state a preference for one parent over another?

b) What weight should a court give to the child's stated preference?

c) How should the court go about determining whether the child's stated preference is wholly voluntary?

IV. CUSTODY DECISION-MAKING

A. Sole custody.

1. The "custodial" parent has full-time custody of the children.

2. The "non-custodial" parent may receive visitation rights.

a) “Reasonable and seasonal visitation": the court relies on the parents to work out their own visitation schedule.

b) Specific visitation provisions: the court specifies the visitation schedule.

B. Split custody. In multi-child situations, one parent has sole custody of one child and one parent takes custody of the other.

C. Joint custody, or "shared custody."

1. Preference for Joint Custody.

a) Based on a presumption that the parents should have equal rights in providing care, custody, education, and control for the child.

b) Favored by statute and case law in many jurisdictions.

2. Types of Joint Arrangements.

a) Joint legal custody - one parent has sole physical custody, but both parents have an equal voice in major life decisions.

b) Joint physical custody - the child or children live with one parent for a specified period of time and then live with the other parent for a separate specified period.

3. Effectiveness of joint legal custody

a) Joint legal custody is the presumptive approach in many states.

b) Desirable Preconditions for Joint Physical Custody.

(1) Cooperative, communicative, flexible parents who respect each other.

(2) Parents who are dedicated to providing for the child's best interests.

(3) Parents residing in the same school district.

(4) Sufficient income in both households to maintain two rooms and sets of clothes and necessities for the child.

c) Psychological studies indicate that this may not be in the child's best interests when the parents are likely to continue fighting as it exposes the child to continuous conflict and changing priorities.

d) The military parent: challenging to make it work.

(1) Irregular child-care schedules.

(2) Frequent moves.

(3) Maintaining close enough contact to participate in major decisions.

e) Tactical considerations.

(1) Joint custody (even a limited joint legal custody arrangement) may be more palatable than "losing custody" completely.

(2) Especially when agreed upon by both parties, a joint custody award at the time of divorce may preclude attacking the parent's fitness when he or she later requests a custody modification.

4. Specific visitation rights.

a) The current trend is for courts to spell out specific visitation in as much detail as possible.

b) Under joint legal custody, courts typically allow for more visitation periods.

c) The parties should consider travel costs when setting up a visitation plan.

d) Some states allow for abatement of child support to the custodial parent when children are visiting the noncustodial parent.

5. Denial of Visitation.

a) Is visitation a "right" of the noncustodial parent? Most courts see it as a right.

b) Several conditions that can frustrate visitation.

(1) A child's opposition.

(2) Custodial parent conduct.

(3) Noncustodial parent conduct (e.g. timely child support payment).

c) Remedies.

(1) Contempt actions.

(2) Reduction or termination of alimony.

(3) Change of custody.

(4) A few states have recognized an action in tort for interference with visitation.

(5) Forcing the noncustodial parent to visit.

V. RELOCATION AFTER A CUSTODY DETERMINATION.

A. Relocation of the custodial parent is one of the most common "interference with visitation" issues which challenges military parents. The right to travel is a constitutional right, and relocation thus carries constitutional implications. *See,* Shapiro v. Thompson, 394 U.S. 618 (1969) (*rev'd on other grounds*) (finding that the right to interstate travel is a fundamental right encompassing the right to "migrate, resettle, find a new job, and start a new life"). Therefore, a state needs a compelling state interest to infringe upon such a right. *See generally* Braun v. Headley, 750 A.2d 624 (Md. Ct. Spec. App. 2000) (holding that a custodial parent has a qualified constitutional right to travel where a proposed relocation implicates the best interests of the child); *see also* Bartosz v. Jones, 197 P.3d 310 (Idaho 2008).

B. Relocation as a Change in Circumstances. Some states characterize relocation of the custodial parent as a change in circumstances that may warrant amendment of a custody decree. *See, e.g.*, Bodne v. Bodne, 588 S.E.2d 728 (Ga. 2003) (holding that a custodial parent's relocation out of state may constitute a substantial change in material circumstances affecting the child's welfare, sufficient to warrant a modification to the custody decree); Bagby v. Bagby, 250 P.3d 1127 (Alaska 2011).

C. Rebuttable Presumption that Relocation is Not in the Child's Best Interests. A majority of states create a rebuttable presumption that a change of residence is not in the child's best interest. Once the custodial parent rebuts this presumption, however, the burden shifts to the noncustodial parent to rebut the presumption *in favor of* relocation. *See, e.g.*, Blivin v. Weber, 126 S.W.3d 351 (Ark. 2003).

D. Notice Requirements. Many state statutes impose advance notification requirements prior to a custodial parent's proposed move outside the jurisdiction. *See, e.g.*, S.D. CODIFIED LAWS § 25-4A-17 (requiring forty-five days' notice unless moving closer to noncustodial parent, moving within the same school district, there is a protective order in effect, or the non-relocating parent has been convicted of a domestic abuse offense.); *See also* UTAH CODE § 30-3-37 (imposing a sixty-day advanced notice requirement). Such notice requirements also can be included in the terms of a separation agreement.

E. Enforcement of Domicile Restrictions.

1. Injunction. The noncustodial parent files for injunction and usually seeks a modification of custody or visitation.

2. Contempt. This usually happens when there is a notice requirement in the decree or by statute, and the custodial parent ignores the notice requirement. The noncustodial parent who files the contempt action is usually also seeking modification of custody.

VI. SEEKING MODIFICATION OF CUSTODY ORDERS.

A. Relevant Issues.

1. Which court has jurisdiction to modify? *See* Uniform Child Custody Jurisdiction and Enforcement Act.

2. What is required for a relook at custody (*e.g.,* material change in circumstances)?

3. What standard should be used (*e.g.*, best interests of the child)?

4. What factors may influence a judge to change an order?

B. Factors to Consider.

1. Material Change. Generally, the change must have been unforeseeable, and not caused by the moving party (*e.g.*, abuse or abandonment by the custodial parent, or the custodial parent's major health problems). Generally, remarriage and cohabitation are not considered "material changes," unless they affect the care of the child.

2. Timing. In the majority of states that have adopted the Uniform Marriage and Divorce Act (sometimes called the Uniform Dissolution of Marriage Act), a child custody order may not be modified for two years unless the child's environment seriously endangers the child's physical, mental, moral or emotional health.

VII. ARMY POLICY REGARDING CHILD CUSTODY

A. Soldier Obligations IAW Army Regulation 608-99.

1. Generally. Comply with applicable court orders, laws, and treaties regarding child custody. AR 608-99, Paragraph 2-10.

2. Punitive Provisions Regarding Child Custody (AR 608-99, Paragraph 2-11).

a) "Soldier Relatives" who are aware that another person is a lawful custodian of an unmarried child under 14 will not wrongfully:

(1) Abduct, take, entice, or carry the child from a lawful custodian, or

(2) Withhold, detain, or conceal the child from the lawful custodian.

b) "Soldier Relatives" are Soldiers who are parents, stepparents, grandparents, siblings, uncles, aunts or people who have at some time been the lawful custodian of the child.

c) "Wrongfulness" implies that the Soldier is not authorized to have physical custody of the child to the exclusion of others, pursuant to a valid court order.

B. Release of Soldiers from Child Custody Regulatory Obligations.

1. Battalion commanders may release Soldiers from obligations to comply with court orders regarding child custody, if the issuing court clearly was without jurisdiction to do so. AR 608-99, Paragraph 2-14b(1).

2. Soldiers disobey court orders at their peril; the battalion commander's "release" applies only to release from the requirements of AR 608-99.

C. Command Responses to Child Custody Inquiries (Paragraph 3-8, AR 608-99). Commanders will fully investigate all inquiries about a child custody, visitation, or related matter, and respond appropriately.

1. Seek OSJA Advice

2. Investigate, and inform the complainant.

3. Commanders may not order Soldiers to give up physical custody to anyone other than the child's lawful custodian, and cannot take physical custody of a child in question.

D. Enforcement Tools Available to Commanders. Commanders have a variety of enforcement actions for violations of the regulation, or violations of lawful orders issued based on the regulation. These actions include, but are not limited to:

1. Counseling.

2. Reprimand.

3. Administrative Separation.

4. Nonjudicial Punishment. Violation of a lawful general regulation under Article 92, UCMJ for violating Paragraph 2-11's punitive provisions regarding child custody. (*See supra* para. VII A 2).

VIII. ARMY FAMILY CARE PLANS

A. Overview. Mission, readiness, and deployability needs especially affect Active Component (AC) and Reserve Component (RC) single parents and dual military couples with dependent family members. As a result, Paragraph 5-5 of AR 600-20 requires those aforementioned categories of Soldiers to implement a Family Care

Plan to provide for the care of their family members when military duties prevent the Soldier from doing so.

1. Plans must be made to ensure dependent family members are properly and adequately cared for when the Soldier is deployed, on TDY, or otherwise not available due to military requirements.

2. RC Soldiers are subject to these policies and regulations, and will implement plans during any periods of absence for Annual Training, regularly scheduled unit training assemblies, emergency mobilization and deployments, or other types of active duty.

3. All married Soldiers who have dependent family members are encouraged to complete and maintain a Family Care Plan, even if not required by the regulation to do so.

B. DA Form 5305 (Family Care Plan). The Family Care Plan is the means by which Soldiers draft their plan to provide for the care of their family members when military duty prevents the Soldier from personally caring for their children.

1. Components of the Family Care Plan. The Soldier's Family Care Plan consists of the following:

a) Proof that guardians and escorts have been thoroughly briefed on the responsibilities they will assume for the sponsor/Soldier and on procedures for accessing military and civilian facilities and services on behalf of the dependent family members of the sponsor/Soldier.

b) DA Form 5840 (Certification of Acceptance as Guardian or Escort) which the guardian/escort completes, has notarized, and returns to the Soldier.

c) DA Form 5841 (Power of Attorney), or equivalent delegation of legal control, which the legal assistance office prepares, the Soldier executes and has notarized, and the guardian/escort receives.

d) DD Form 1172 (Application for Uniformed Services Identification Card—DEERS enrollment) which the Soldier executes for each dependent family member. (AR 600-8-14 directs that ID cards will be issued for children under age 10 who reside with a single parent or dual military couple).

e) DD Form 2558 (Authorization to start, stop, or change an allotment for Active Duty or Retired Personnel), which the Soldier executes, or other proof of financial arrangements for the care of dependent family members.

f) Letters of Instruction executed by the Soldier which contain additional pertinent information for escorts, or temporary or long-term guardians.

g) If appropriate, DA Form 7666 (Parental Consent) as evidence of consent to the Family Care Plan from all parties with a legal interest in the custody of the minor child.

2. Command Responsibility. Commanders are responsible for ensuring that affected Soldiers complete the Family Care Plan. Nevertheless, Legal Assistance Attorneys often provide advice to Soldiers on how best to accomplish the Family Care Plan and fill out the required forms.

a) Affected Soldiers are considered non-deployable until a Family Care Plan is validated and approved.

b) Willful failure to complete. Command options include issuing lawful order to implement the plan and administrative separation of one of two Soldier-spouses (thus removing the "dual military" status and need to obtain family care plan).

3. Defective Family Care Plans. If Family Care Plans are found to be deficient, Soldiers must receive a "reasonable period" of time to rework the plan. Ordinarily, this will be at least 30 days.

C. Deployment-Related Controversy.

1. With the Global War on Terrorism and increased deployments, custodial parents are facing situations where Family Care Plans are put to the test. Special problems arise when Soldiers designate individuals besides the other natural parent as guardians, and even greater problems come about when a non-custodial natural parent is uninformed about a pending deployment. A natural parent has very strong custodial rights when a previously designated custodial parent is unable to exercise custody.

2. In these situations (custodial parent deploys, custodial parent designates someone besides the other natural parent to exercise guardianship during absence, custodial parent does not inform other natural parent of absence due to deployment), Soldiers may sometimes seek to invoke the SCRA to prevent a family court from modifying a custodial arrangement during the deployment.

3. In re Grantham, 698 N.W.2d 140 (Iowa 2005), Diffin v. Towne, 787 N.Y.S.2d 677 (N.Y. Fam. Ct. 2004), and Matter of Diffin v. Towne, 47 A.D.3d 988 (N.Y. App. Div. 2008), involve attempted invocations of the SCRA in child custody modification cases that arose because of the deployment of the Soldier-custodial parent. In both cases, the court held that the SCRA could not place the child's best interest in suspense for the duration of the deployment. In Matter of Diffin, the New York State Court of Appeals found that even though a temporary change in custody had only been prompted by the Soldier-mother's deployment, a permanent change of custody was warranted even when the mother redeployed.

4. Possible Pre-Deployment Remedies:

a) Obtain a consent form from the noncustodial parent, which consents to the placement of the child with the Soldier's choice of guardian during the period of the Soldier's absence.

b) Obtain a court order that permits the child to stay in the physical custody of the individual the Soldier designates under the Family Care Plan.

c) Include a provision in the couple's Parenting Plan that permits the custodial Soldier-parent to deliver the child to the physical custody of a pre-designated individual who the Soldier names in the Family Care Plan.

IX. SERVICEMEMBERS' CIVIL RELIEF ACT (SCRA) AND CHILD CUSTODY

A. The FY08 NDAA (signed into law on 28 Jan 2008) included language amending the SCRA, emphasizing that the protections afforded to servicemembers for both stays and the entry of default provisions apply in child custody cases.

1. 50 U.S.C. § 3931 protects servicemembers against default judgments in "any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance."

2. 50 U.S.C. § 3932 allows for a stay "to any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application . . . (1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding."

3. These protections do not represent new law but emphasize Congressional recognition that state courts were not properly applying the SCRA.

B. The FY15 NDAA (signed into law on 19 Dec 2014) included an amendment to the SCRA to provide additional protections regarding child custody arrangements for parents who are servicemembers. 50 U.S.C. § 3938, which is a new section in the SCRA, addresses three custody-related issues.

1. If a court issues a temporary child custody order based solely on a servicemember's deployment or anticipated deployment, that temporary order must expire at the conclusion of the deployment.

2. In considering a petition for a permanent modification to a custody order, a court may not consider a servicemember's absence due to deployment or potential deployment as the sole factor in determining the best interests of the child.

3. If a state provides higher standards of protections for deploying servicemembers with regard to temporary child custody orders, a court will apply the higher standards rather than § 3938's baseline standards.

C. Individual states have also passed their own laws protecting servicemembers from child custody changes. However, because states have taken different, and inconsistent, approaches to the issue, protections differ extensively by state.

1. In addition to the SCRA protections, states generally enact one or more of the following types of protections:

a) A prohibition against a judge considering the military parent's service or deployment in making a custody determination.

b) An explicit prohibition on using an absence due to deployment as a "material change in circumstances" prompting a custody modification.

c) Permission for a servicemember to delegate guardianship during deployment.

d) Allowance for expedited processing or electronic testimony in hearings on custody modification.

2. Some states limit the protections to only those members in the Reserve Component, activated for military duty, or those members in the National Guard of that state.

X. HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

A. Background. In 1988, the U.S ratified the Hague Convention, *opened for signature*, October 25, 1980, T.I.A.S. No. 11670 (1980). The Convention became U.S. law upon enactment of enabling legislation, the International Child Abduction Remedies Act, Pub. L.No.100-300, 102 Stat.437 (codified at 42 U.S.C. §§ 11601 – 11610 (1988).

B. Purpose. While laws in the U.S., such as the UCCJEA, seek to resolve jurisdiction to determine initial custody determinations, the Hague Convention's purpose is to secure the prompt return of wrongfully removed or retained children back to their country of "habitual residence" without a resolution on the merits of the underlying custody dispute. The Convention's stated purpose is to restore the status quo that existed prior to the child's alleged wrongful removal or retention.

C. Procedural Overview. The Convention applies only to children under the age of sixteen. In a Convention proceeding, the court must find a breach of custodial rights. After this finding is made, the child must be returned to the petitioner's country immediately. However, if the proceeding to return the child is initiated more than one year after his removal, the country may decline to return the child if evidence exists that the child has been integrated into the new home. *See* Article 12, Hague Convention.

1. As an initial matter, however, one must determine whether the country involved is a signatory to the Hague Convention. Because the Hague

Convention is reciprocal, the rights and remedies may be applied only when the country to which the child has been removed or withheld has executed the treaty.

2. Moreover, countries are free, to some extent, to apply the Convention's terms according to their own courts' interpretations. There may be significant discrepancies in the methods by which each country applies the Convention's provisions. Due to the potential for protracted litigation (especially when negotiating legal and procedural obstacles in a foreign jurisdiction is concerned), a case involving children removed from the U.S. may involve litigation of two years or more.

D. "Habitual Residence". The Convention does not define the term "habitual residence"; rather, case law has developed the term.

1. In Feder v. Evans-Feder, for example, the court defined "habitual residence" as "the place where [a child] has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." 63 F.3d 217 (3d Cir. 1995).

2. In Friedrich v. Friedrich, a case involving an American mother's removal of her child from Germany, where the German father lived, the court declared that Germany was the child's "habitual residence." 983 F.2d 1396 (6th Cir. 1993) (the court stated that "habitual residence must not be confused with domicile [and] . . . [t]o determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions."). *But see* Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004) ("In addition [to the parents' intention,] there must be an actual change in geography and the passage of a sufficient length of time for the child to have become acclimatized.").

E. Petitions. The only place a petition may be brought seeking the return of a removed child is the country to which the child has been taken. The Convention requires each country to maintain an administrative agency ("Central Authority") to assist in locating and returning children. A petition for return must allege that the child's removal or retention breaches the petitioner's right of custody, and that the petitioner actually was exercising those rights at the time of removal or retention (or would have exercised those rights, but for the removal or retention).

1. In the United States, the National Center for Missing and Exploited Children (NCMEC) in Alexandria, Virginia, is the receiving agency for applications to return a child to a foreign country. The U.S. Department of State's Office of Children's Issues serves as the agency for applications to return a child back to the United States. Despite the fact that Article 27 of the Convention permits Central Authorities to determine the legitimacy of claims submitted to them, neither NCMEC nor the State Department evaluate the merits of applications; they simply begin the process of facilitating the voluntary return of children by contacting the wrongdoing parents.

2. In the United States, petitions for return may be filed in either state or federal courts.

3. Petition Contents.

a) Breach of right of custody that the petitioner enjoyed, under the law of the State of Habitual Residence.

b) Right of custody was being exercised at the time of removal / retention, or would have been exercised, but for the removal/retention.

F. "Rights of Custody". The applicable law for determining custodial rights is the law of the child's habitual residence. Thus, the petitioner may have to provide a foreign custody order as part of the petition. Provision of this custody order is not an application for enforcement of a foreign order, but rather is merely to show the nature of the custody rights that the petitioner had.

1. The Convention also requires any court with notice of an unauthorized removal to stay any custody action that has been commenced by the alleged abductor, until the matter has been resolved in accordance with the Convention. *See* Hague Convention art. 16.

2. In Shealy v. Shealy, 295 F.3d 1117 (10th Cir. 2002), the court held that, while the child was a habitual resident in Germany and the father had custody rights under a German temporary custody order, the removal of the child by the mother did not violate the foreign order. A military necessity existed based on both the military transfer order and the foreign court's finding of military necessity, and the fact that the mother created the necessity (i.e., requesting curtailment orders to return to the United States earlier than planned to avoid Germany's exercise of jurisdiction in the pending custody battle) was irrelevant.

G. Defenses under the Convention.

1. Petitioner's failure to show he was exercising a right of custody. Article 13a.

2. Failure to show the child was removed from habitual residence. Article 3.

3. More than one year passed since the alleged wrongful removal / retention, and the child has settled in his new environment. Article 12.

4. Acquiescence on the part of the petitioner to the allegedly wrongful removal or retention. Article 13a.

5. Grave risk that return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation. Article 13b.

6. Child objects to the return, and his age and maturity make it appropriate to consider his wishes. Article 13.

7. Return would violate fundamental principles of the requested state relating to protection of human rights and fundamental freedoms. Article 20.

CHAPTER J

UNIFORM INTERSTATE FAMILY SUPPORT ACT

TABLE OF CONTENTS

I. INTRODUCTION

A. UIFSA limits jurisdiction for child and family support orders to a single state, eliminating jurisdictional disputes. Support orders may be enforced in multiple states, but modified in only one state. UIFSA:

1. Establishes which courts have jurisdiction to enforce a support order, based on personal jurisdiction.

2. Establishes which single court has jurisdiction to modify a support order (subject matter jurisdiction).

B. Background. In 1950, the Uniform Reciprocal Enforcement of Support Act (URESA) created the first mechanism to enforce child support obligations across state lines. However, the explosion of divorce rates and out-of-wedlock births in an increasingly mobile society created the chaos of a multiple-order system. Out of this chaos rose the UIFSA's concept for determining a single controlling order for support.

C. UIFSA's Goals. One order, from one state, that will be enforced in other states.

1. True uniformity in the child support arena.

2. Processing and collecting support payments more efficiently.

3. One controlling order based on fairness, rather than merely the interests of the custodial parent.

4. Identify a tribunal with continuing exclusive jurisdiction for the purpose of modifying an existing order.

D. Public Law 113-183 (Sep 2014) effectively requires that all states adopt the 2008 version of UIFSA or lose federal funds for state child support programs. All states plus the District of Columbia, Puerto Rico, subsequently enacted the 2008 version into law. For purposes of this outline, refer to the 2008 version of UIFSA.

II. KEY DEFINITIONS AND CONCEPTS

A. **Continuing, Exclusive Jurisdiction (CEJ) to Modify a Child-Support Order.** CEJ belongs to a state that has issued a child-support order and remains the residence of the obligor, individual obligee, or child. However, all parties may consent to another state exercising jurisdiction to modify the order if that other state is the child's state of residence and the state of residence of at least one of the parties (or the state otherwise has jurisdiction over one of the parties). § 205(b)(1) UIFSA.

B. **State**. Any state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession under the jurisdiction of the United States. It includes an Indian nation or tribe. § 101(26) UIFSA.

C. **Tribunal.** A court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support or to determine parentage. §101(29) UIFSA.

D. **Home State.** The state or foreign country in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the state or foreign country in which the child lived from birth with any of them. A period of temporary absence from any of them counts as part of the six-month or other period. §101(8) UIFSA.

E. **Issuing State.** The state in which a tribunal issues a support order or a judgment determining parentage of a child. §101(13) UIFSA.

F. **Responding State.** A state in which a petition for support or to determine parentage of a child is filed or to which a comparable proceeding is forwarded for filing from another state or foreign country. §101(23) UIFSA.

G. **Controlling Order.** The order to be used for enforcement from the present time forward.

III. ESTABLISHING A SUPPORT ORDER

A. Personal Jurisdiction. Establishing a child support order requires a state to have personal jurisdiction over a non-resident defendant/obligor.

1. Personal jurisdiction requires "minimum contacts," in order to satisfy Due Process. *See, e.g.*, *International Shoe v. Washington*, 326 U.S. 310 (1945).

2. Subject matter jurisdiction over an action does not necessarily confer personal jurisdiction over a non-resident defendant for other purposes.

3. To enforce a support order, it is necessary to assert personal jurisdiction over a non-resident defendant. This can be difficult when the parties reside in different states. Thus, broad, long-arm statutes facilitate the contacts between a state and a non-resident defendant.

B. UIFSA Long-Arm Provision. Personal jurisdiction over non-residents for child support purposes under UIFSA is based on the Long-Arm Provisions of UIFSA, § 201. There are eight bases for long-arm jurisdiction under UIFSA:

1. Individual is personally served in the state seeking to assert jurisdiction. *But see Clemens v. Clemens*, 1999 WL 997882 (The father, a resident of Hong Kong, was served while exercising visitation of his child in Connecticut. The court held that while proper under § 201 of Connecticut's version of UIFSA, he would not meet the minimum contacts standard for personal jurisdiction.).

2. Consent. *See Knabe v. Brister*, 65 Cal. Rptr. 3d 493 (3d Dist. 2007).

3. Individual resided with the child in the state seeking to assert jurisdiction.

4. Individual resided in the state seeking to assert jurisdiction, and he provided prenatal expenses or support for the child.

5. Child resides in the state as a result of the acts or directives of the individual.

6. Individual engaged in sexual intercourse in the state, and the child may have been conceived by that act. *See El v. Beard*, 795 N.E.2d 462 (Ind. Ct. App. 2003) (Evidence of location of concep*tion is required*).

7. Individual asserted parentage of a child in the "putative father" registry of the state. (Note: Not all states have such a registry).

8. Any other constitutional basis for the state to assert personal jurisdiction. *See, Hawley v. Murphy*, 736 A.2d 268 (Me. 1999) (holding that where the state has any personal jurisdiction over the defendant under its long-arm statute, the state has jurisdiction under its UIFSA).

C. Once a state successfully asserts personal jurisdiction over a non-resident defendant/obligor, that state can enforce its support order over the defendant, regardless of his state of residence.

D. Two-State Proceeding. If the initiating state cannot assert personal jurisdiction over a non-resident defendant/obligor through any long-arm method, a two-state process must be used. §401 of UIFSA states that a tribunal may issue a child support order if a nonresident obligee, or out-of-state Child Support Enforcement Agency (IV-D Agency), seeks the order.

IV. MODIFYING A CURRENT CHILD SUPPORT ORDER

A. Continuing Exclusive Jurisdiction (CEJ) to Modify a Child Support Order. (UIFSA § 205).

1. A state has CEJ to modify a child support order as long as it issued the order, and a party or child remains in the state that issued the order. Alternatively, if the child and both parties no longer reside in the state that issued the support order, the parties can consent in a record or in open court to that same state retaining CEJ to modify the order.

2. UIFSA prohibits a state with CEJ from releasing jurisdiction on an inconvenient forum basis. *See, Hibbitts v. Hibbitts*, 749 A.2d 975 (Pa. Super. Ct. 2000).

3. A state can lose CEJ (*e.g.*, if no party or child lives in the state any longer), but if that state issued the sole child support order, that order will continue to be called the Controlling Order.

B. Choice of Forum When Seeking Modification.

1. Under UIFSA, either party may request a modification of an existing support order.

2. When a state loses CEJ (*e.g.*, no party or child resides in the state that issued the order), modification must be sought in the non-moving party's state. *See In re Marriage of Abplanalp*, 7 P.3d 1269 (Kan. 2000) (stating that the purpose of the UIFSA is to prevent a party from obtaining a local

advantage by requiring that the moving party must be a nonresident of the state where a motion for modification of a child support order is filed, and also that the state where the action is brought must have personal jurisdiction over the nonmoving party).

C. Modification Forum Based on Consent of Parties. As an alternative to the above rule, all individual parties may file a written consent in the state that issued the order, permitting a different state to modify that order and assume CEJ prospectively. However, the proposed new state in this "consent" action must have personal jurisdiction over one of the parties or be the residence of the child.

D. Effect of Modification. Modifying an order provides the modifying state CEJ.

E. Modification Process. To proceed in a modification action, the party must register the current order in effect (*see* "Registration Procedures," *infra*) with the new state in which modification is sought.

V. ENFORCING AN OUT-OF-STATE SUPPORT ORDER THROUGH REGISTRATION IN ANOTHER STATE

A. Enforcement of out-of-state support orders normally occurs in the context of attempting to collect arrearages. *See, Cowen v. Moreno*, 903 S.W.2d 119 (Tex. App. Austin 1995) (The language of UIFSA implies that registration is solely for the purpose of enforcement.).

B. Registering an out-of-state order in another state permits a person trying to collect child support to use all remedies available under the new state's law.

C. Registration Procedures. UIFSA § 602. A support order of one state may be registered in another state by sending the following to the receiving state:

1. Letter to clerk of court requesting registration of an out-of-state order, and enforcement.

2. Two copies of the order to be registered (one certified copy), including any modification of the order.

3. Sworn statement by the person seeking registration, listing arrearages.

4. Name of obligor and personal contact information, if known (address, SSN, employer).

5. Name and address of person seeking enforcement and, if applicable, the person to whom payment will be sent.

D. Notice to Obligor. UIFSA §605. The court must notify the obligor of the enforcement action, and give the obligor 20 days to contest the validity or enforcement of the registered order. The court must notify the obligor that failure to contest is a waiver.

E. Obligor Defenses to Registration. UIFSA § 607.

1. Court that issued the order did not have personal jurisdiction over the contesting party.

2. The order was obtained fraudulently.

3. The order was vacated, suspended, or modified by a later order.

4. The court that issued the order has stayed it, pending an appeal.

5. There is a defense to the remedy sought under the law of the registering state.

6. Full or partial payment has been made.

7. Statute of limitations precludes enforcement of some or all alleged arrearages. (The longer of the statutes of limitation of the issuing or responding state applies).

8. The alleged controlling order is not the controlling order.

VI. ADMINISTRATIVE ENFORCEMENT – UIFSA § 507

A. Administrative enforcement is an alternative to registering a support order. (Examples include tax return withholdings, liens, seizures, or license revocations).

B. Procedure.

1. The issuing state or a party or agency from the issuing state sends the same documents required for registration (*see supra*) to the responding state, but clearly states that administrative enforcement is sought.

2. Before registering, the responding state may:

a) Attempt any authorized administrative procedure to enforce the order.

b) If the obligor does not contest the administrative enforcement, the order need not be registered. If the obligor contests the order, the Child Support Enforcement Agency of the responding state will register the order pursuant to UIFSA § 609.

VII. INCOME WITHHOLDINGS – UIFSA §§ 501-502

A. An income-withholding order issued in another state may be sent directly to the obligor's employer without first filing a petition or registering the order.

B. Employers receiving an out-of-state income withholding order that appears valid on its face must honor that order, subject to the obligor's opportunity to contest the order.

C. Employer Obligations.

1. Treat the withholding order as if it had been issued by a tribunal in the employer's state.
2. Provide the obligor a copy of the income withholding order.
3. Distribute the funds as directed in the withholding order.

D. Contesting Withholding Orders. UIFSA § 506. In contesting a withholding order, obligors must notify any support enforcement agency providing services to the obligee and each employer that has directly received an income-withholding order relating to the obligor. Additionally, the obligor must notify the person or agency designated to receive payments in the withholding order.

VIII. PATERNITY AND UIFSA

A. Section 402 of UIFSA allows a court to serve as a responding tribunal in a proceeding to determine parentage under UIFSA or a similar act.

B. A pure parentage action (i.e., an action not joined with a claim for support) in the interstate context is allowed under this provision.

C. Although a pure parentage action is allowed, it will more commonly be associated with a petition to establish support, under UIFSA § 401.

CHAPTER K

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Table of Contents

July 2018

THIS PAGE INTENTIONALLY LEFT BLANK

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

I. REFERENCES AND WEBSITES.

A. Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 [hereinafter USFSPA].

B. www.dfas.mil (DFAS website).

C. *Military Retirement Benefits in Divorce*, Marshal S. Willick (1998).

D. *Dividing Pensions in Divorce*, Gary A. Shulman & David I. Kelley, Daniel E. Kelley (2014).

E. *The Military Divorce Handbook, A Practical Guide to Representing Military Personnel and their Families,* Mark E. Sullivan (2013).

II. Uniformed Services Former Spouses' Protection Act (USFSPA) Basics.

A. What the USFSPA does. The USFSPA allows, but does not require, states to treat disposable military retired pay as marital or community property upon divorce. While the USFSPA is permissive, the practical effect is that all 50 states and the District of Columbia treat military disposable military retired pay as divisible. Puerto Rico does not allow the division of military retired pay.

1. As part of the divorce settlement, the USFSPA permits courts to divide disposable retired pay as child support, alimony, and/or marital property.

2. Where courts adjudge a division of retired pay as part of a property settlement, former spouses whose marriage to the service member overlapped with 10 years of the service member's military service may receive their share of military retired pay directly from DFAS. They do not have to rely on the retiree sending retired pay to them by mail, electronic transfer, or any other means. Many retired service members find this advantageous as well. In cases where DFAS provides direct payments to a former spouse, DFAS prepares separate wage and earnings statements for both the retiree and the former spouse, so there is no question as to the taxable nature of each person's share of the retired pay.

3. The USFSPA permits some former spouses to continue to receive certain military benefits (commissary and exchange privileges, as well as health care) even after the divorce. The two primary classes of these former spouses are “20/20/20” spouses and “20/20/15” spouses.

4. Section 641 of the FY17 NDAA restricts the definition of “disposable retired pay” to “the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order.” This provision is effective with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation.

5. Until 2017, many court orders/separation agreements divided the “disposable retired pay” based on the final retired pay that the Servicemember received, including promotions and longevity beyond the divorce date. Under the old process, a MAJ and spouse could divorce when the MAJ had 10 years of service, yet if the MAJ was promoted to COL and served for a total of 24 years, the spouse could receive her marital fraction of the retired pay of an O6 with 24 years. Under the new rule, the most the spouse can be awarded is the marital share of the retired pay of an O4 with 10 years of service; a significant reduction. The spouse would continue to see cost of living increases on the marital share.

6. The USFSPA permits former spouses to be designated as Survivor Benefit Plan (SBP) beneficiaries. This typically occurs as part of the court order for divorce, in which the court orders the service member to designate the former spouse as his or her SBP beneficiary. If the service member fails to do so, the former spouse has one year from the date of the divorce to notify DFAS and to submit the application. DFAS terms this action by the former spouse a “deemed election.”

B. What the USFSPA does not do. The USFSPA does not require courts to divide military retired pay. The USFSPA, as recently amended, also does not award a predetermined share of military retired pay to former spouses. Instead, this task is left up to each individual family court judge who may apply the state's pension division rules and formulas. (As discussed *infra*, Chapter V, DFAS provides recommended formulas for the division of retired pay that may be included in the state court orders). When a decision is made by the parties or the judge to award a share, the disposable retired pay available to be divided is defined by federal statute. Finally, the USFSPA does not require a minimum overlap of military service and marriage as a prerequisite to the division of military retired pay as property. (As discussed *infra*, Chapter VII, this "minimum overlap," or the "10-year overlap rule," applies to DFAS's rule. DFAS requires 10 years of overlap in order for the former spouse to receive direct payment of military retired pay from DFAS).

III. HISTORY OF THE USFSPA.

A. *McCarty v. McCarty*, 453 U.S. 210 (1981) is the seminal United States Supreme Court (USSC) case involving the divisibility of military retired pay. The USSC found no language in the then-current federal statute governing military retired pay that allowed states to divide military retired pay as marital property upon divorce. The Court determined that Congressional silence in the military pension statute, especially when contrasted with other federal pension statutes, indicated Congressional intent that former spouses not be entitled to a share of their service member-spouse's military retired pay upon divorce. The Court held that Congress created the entitlement as separate property, specifically for the retired service member.

B. The Uniformed Services Former Spouses' Protection Act. Pub. L. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §1408 (2009). The USFSPA legislatively overruled the USSC decision in *McCarty* and authorizes, but does not require, states to treat disposable military retired pay as divisible upon divorce. All states and the District of Columbia treat military retired pay as divisible upon divorce. Puerto Rico does not.

C. DoD Directive 7000.14-R, Vol. 7B, Ch. 29 (DoD Financial Management Regulation) expounds on the rules regarding direct payment from military finance centers. The DoD FMR establishes the rules for DFAS payments made directly to former spouses.

D. Gross Retired Pay vs. Disposable Retired Pay. After the *McCarty* decision, further USSC jurisprudence restricted the ability of state courts to **divide only disposable retired pay**, as opposed to gross retired pay. This distinction gave rise to significant case law and disparate jurisdictional results.

1. *Mansell v. Mansell*, 490 U.S. 581 (1989). Retired soldiers who are disabled can receive disability payments from the Veterans Administration (VA). In order to receive these disability payments, however, military retirees must first waive an equivalent amount of military retired pay. These VA disability payments are not taxable to the recipient. The disability payments are not retired pay or "disposable retired pay" under 10 U.S.C. §1408(a)(4). The retired pay that the retiree waives in order to receive the disability payments is excluded from the term "disposable retired pay." In *Mansell,* Major Mansell divorced his wife in California prior to the *McCarty* decision. After 23 years of marriage and service, the trial court split the military retirement 50/50. When MAJ Mansell retired, he elected to receive VA disability pay, and therefore he waived a portion of his military retired pay. Following enactment of the USFSPA, Major Mansell went to court trying to use the act to limit the amount paid to his former spouse. The Court held that the language of 10 U.S.C. § 1408(c)(1) prohibited states from dividing the value of the waived military retired pay because it is not "disposable retired pay" as defined by the statute.

2. 10 U.S.C. § 1408(c)(1) provides that “a court may treat disposable retired pay . . . 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.”

3. What is “Disposable Retired Pay?” 10 USC § 1408(a)(4) was redefined in the 2017 NDAA. The term still means the total monthly retired pay to which a member is entitled. It is to be determined using the member’s pay and years of service at the time of the court order rather than the member’s pay grade and years of service at the time of retirement, unless the same, less the following amounts:

   a. Amounts owed by the servicemember to the U.S. for previous overpayments of retired pay and for recoupment;

   b. Amounts deducted from retired pay due to forfeitures ordered by court-martial or due to waiver of retired pay required in order to receive **disability compensation**;

   c. Amounts of the servicemember’s retired pay **computed using the percentage of the member’s disability** on the date when he was retired, or placed on the temporary disability retired list; and

d. Amounts deducted in order to provide an annuity to a spouse or former spouse to whom a payment is being made pursuant to a court order (i.e., the SBP designation).

4. Previous to the 2017 NDAA, 10 USC § 1408(a)(4) defined "disposable retired pay" in part as the total monthly retired pay to which a member is entitled, less the following amounts:

a. Amounts owed by the service member to the U.S. for previous overpayments of retired pay and for recoupment;

b. Amounts deducted from retired pay due to forfeitures ordered by court-martial or due to waiver of retired pay required in order to receive **disability compensation**;

c. Amounts of the service member's retired pay **computed using the percentage of the member's disability** on the date when he was retired, or placed on the temporary disability retired list; and

d. Amounts deducted in order to provide an annuity to a spouse or former spouse to whom a payment is being made pursuant to a court order (i.e., the SBP designation).

5. What is the Significance of the "Gross" v. "Disposable" Distinction? Problems, uncertainty, and litigation arise when disposable retired pay changes after divorces are final. A retiree can apply to the VA for **non-taxable disability compensation** at any time, so the equitable distribution of assets that a family court judge has fashioned is sometimes later disrupted when the military retiree elects to receive disability pay, thereby reducing the amount of disposable retired pay and the amount the former spouse receives. The VA disability amount corresponds to the extent of the retiree's physical disability, and that disability rating is changeable.

The following table illustrates the potential effect a retiree's election to receive Veterans Administration (VA) disability compensation in lieu of disposable retired pay may have on a former spouse. Assume the court order divided military retired pay equally by percentage (50% - 50%), and when the military member retired, he was to receive $2000/month.

	Retiree	**Former Spouse**
Gross Retired Pay	$ 2,000	

VA Disability Pay	$376	
Waived Retired Pay	($376)	
Disposable Retired Pay (D.R.P)	= **$1,624**	
Division of D.R.P	$812	$812
Tax (15% rate)	($122)	($122)
Net After Taxes	**$ 1,066**	**$690**

The example shows how the retiree's waiver of a portion of his retired pay, in order to receive non-taxable disability pay, will reduce his former spouse's share of the remaining, divisible retired pay. Additionally, the VA Disability amount varies both with the extent of the disability rating and annual cost of living changes.

State court treatment of this "disability offset" issue is discussed *infra*, Chapter VI.

IV. STATE COURT JURISDICTION TO DIVIDE RETIRED PAY.

A. Courts That Can Divide Military Retired Pay. As previously discussed, USFSPA provides state courts the authority to divide military retired pay. States, however, still must have jurisdiction over both the service member and his pension. Generally, the following courts will have such jurisdiction.

1. A court of competent jurisdiction of any state, District of Columbia, Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, N. Mariana Island, and the Trust Territories of the Pacific.

2. Any federal court of competent jurisdiction.

3. Any foreign court of competent jurisdiction if there is a treaty requiring the U.S. to honor court orders of such nation.

B. Special Jurisdictional Requirements. In order for states to divide service member retired pay as marital property (as opposed to alimony or child support), USFSPA requires state courts to show jurisdiction over the service member (and, thus, his pension) by one of three means: **Domicile**, **Residence**, or **Consent**. For this reason, state "minimum contacts" tests or other state methods to assert jurisdiction over a non-resident for divorce purposes may not suffice to establish jurisdiction over the member's military retired pay. The three-part jurisdictional requirement that USFSPA imposes applies only where states are to divide military retired pay as property. When it is apportioned or assigned as alimony or child support, the court is treating it as income, not property.

1. **Domicile** in the territorial jurisdiction of the court (*i.e.*, at the time the action was commenced, the service member had made that state his true, fixed, and permanent home and intended to return to it), or

2. **Residence** within the state other than because of military assignment (*i.e.*, the member was personally present within the state not due to military assignment, at the time the action commenced), or

3. **Consent** to jurisdiction.

   a. Many states hold that a member's general appearance constitutes "consent"; the member need not specifically consent to the state's jurisdiction over his military retired pay to divide the pension. *See, e.g.*, *Kildea v. Kildea*, 420 N.W.2d 391 (Wis. Ct. App. 1988); *see also Davis v. Davis*, 284 P. 3d 23 (Az. Ct. App. 2012).

   b. Other states hold that the failure of a non-resident, non-domiciliary service member to contest personal jurisdiction over him does not amount to the "consent" that USFSPA requires in order to determine division of the military pension. *See, e.g.*, *In re Marriage of Akins*, 932 P.2d 863 (Colo. Ct. App. 1997). This is so even though the member's failure to contest personal jurisdiction may be sufficient to grant the court jurisdiction to decide the divorce, support, and <u>other</u> property division issues.

   c. Other states have asserted jurisdiction over the member's retired pay when the member responded to divorce petitions by making an appearance and praying for some relief (*e.g.*, division of property <u>other than</u> the military pension) while attempting to reserve the issue of division of military retired pay. *See, e.g.*, *Blackson v. Blackson*, 579 S.E.2d 704 (Va. Ct. App. 2003) (holding that, where a nonresident, non-domiciliary service member who was served with divorce papers in Virginia filed a cross-complaint which sought to apportion all property except his military retired pay, he made a general appearance which permitted the Virginia court to exercise jurisdiction over his military retired pay).

d. However, at least one state court has permitted a non-resident, non-domiciled retiree to consent to jurisdiction to resolve only divorce, custody, child support, and some property division issues (*i.e.*, to enter a "special appearance"), but to reserve the right not to consent to division of his military retired pay. *See Tucker v. Tucker,* 226 Cal. App. 3d 1249 (1991) (holding that a non-resident, non-domiciliary service member did not consent to California jurisdiction to divide military pension even though he consented to the court deciding dissolution, child support, and other property issues); *see also Wagner v. Wagner*, 768 A.2d 1112 (Pa. 2001) (upholding the right of a nonresident, non-domiciliary service member to contest the state court's jurisdiction to divide military pay, although the member does not contest jurisdiction to resolve other property rights; secures counsel who enters a written appearance and represents him during discovery; and answers interrogatories).

e. Continuing jurisdiction may also constitute "consent." *See, e.g.*, *Bumgardner v. Bumgardner*, 521 So.2d 668 (La. Ct. App. 1988) (finding a state's continuing jurisdiction to partition military retired pay several years after the divorce, when the servicemember had married and divorced in that state but it was no longer his domicile or state of legal residence). However, at least one state has found that a service member did not give "implied consent" for a court to divide his retired pay when his wife sought to re-open the issue, even though several years earlier, the servicemember was the original divorce petitioner in that same state! *See Flora v. Flora*, 603 A.2d 723 (R.I. 1992).

C. Satisfying the Jurisdictional Requirement. Court orders should state that the court has jurisdiction under both the applicable state law and the USFSPA, by the concepts of domicile, residence, or consent.

D. The Effect of Failing to Establish Jurisdiction over the Member's Retired Pay at the Time of Divorce. Where the divorce fails to resolve the division of retired pay as marital property, the former spouse must next find a court of competent jurisdiction over the member, based on the member's **domicile**, **residence**, or **consent**.

V. DIVISIBILITY OF RETIRED PAY.

A. What Law Controls? It is critical to remember that USFSPA still creates **no** federal right to apportion retired pay. USFSPA leaves it to the states to determine both **whether** and **how much** to divide military retired pay. State law thus will determine any division of retired pay in order to satisfy **child support** obligations, **alimony**, and / or **property settlement**. Every state and the District of Columbia, either through codification or judicial ruling, currently divides military retired pay for property settlement purposes (as well as alimony and child support in appropriate cases). Puerto Rico, however, does not divide military retired pay upon divorce. *See Delucca v. Colon*, 119 P.R. Dec. 720 (1987).

B. Vesting of Retired Pay. "Vesting" of retired pay for Active Duty service members occurs when they attain 20 years of creditable service. At that point, they have "vested" their retired pay and are eligible to draw retired pay upon retirement. What is the significance of "vesting" in the USFSPA context?

1. In a very few states, vesting is a prerequisite to the courts' division of the retirement pension, in the first place. In other words, if the service member has not vested his retired pay **at the time the divorce is finalized**, the state will not divide the retired pay between the service member and the former spouse. *See, e.g.*, *Durham v. Durham*, 708 S.W.2d 618 (Ark. 1986)

2. A great majority of states divide pensions that are not yet vested at the time the divorce is finalized. See, e.g., Longo v. Longo, 663 N.W.2d 604 (Neb. 2003). However, in very few states, such as Alabama, state law requires a minimum overlap between the marriage and the accumulation of retirement benefits. See, e.g., Ala.Code 1975 § 30-2-51.

C. Formulas and Theories for the Division of Retired Pay. Formulas for dividing retired pay are distinctly a creation of each state's law. There is no federal formula other than by defining the definition of disposable retired pay. Nevertheless, many state courts follow DFAS-suggested formulas for division, which are discussed *infra*.

1. USFSPA Requirements for All Court Awards. USFSPA requires that all awards of retired pay be expressed in either a fixed dollar amount or as a percentage of disposable retired pay. DFAS will reject any court orders that do not express awards in one of these two manners.

a. Fixed Dollar Amount Awards. Former spouses receiving retired pay pursuant to court orders that direct a Fixed Dollar Amount – as opposed to a Percentage – will not enjoy Cost of Living Adjustments that apply to the service member's retired pay.

b. Percentage Awards. DFAS, in accordance with *Mansell* (*see supra*), construes all Percentage Awards as a Percentage of Disposable Retired Pay.

2. DFAS-Proposed Formulas. Keeping in mind that state courts are free to divide military retired pay pursuant to state laws, DFAS previously suggested several formulas regarding how to divide military retired pay for inclusion in state court orders. These DFAS-suggested formulas were, at one time, proposed Federal Rules. However, they were never ultimately codified in the C.F.R. DFAS provided a product on the DFAS website (www.dfas.mil) entitled *Guidance on Dividing Military Retired Pay*, which all practitioners should read and retain. Several of the most common formulas, reproduced in the DFAS pamphlet under the former statutory regime, are discussed below. It is anticipated new DFAS guidance will be forthcoming pursuant to the statutory revision.

a. Pre 2017 NDAA Formula Awards While Member is on Active Duty. When the service member remains on active duty at the time of the divorce and award of retired pay, it was difficult to apportion the former spouse's percentage, because the service member's ultimate retirement date (and, hence, total amount of years on active duty) is not known at the time of divorce. Thus, DFAS recommended a formula that allows the former spouse a percentage, based on the following formula:

$$1/2 \times \frac{\text{Length of overlap of marriage and service}}{\textit{Time in service}} \times 100 = \%$$

For example, if COL and Mrs. Jones were married for 20 years of COL Jones' total 30 years of military service, her percentage would be:

$$1/2 \times \frac{(240 \text{ months})}{(360 \text{ months})} \times 100 = 33\%$$

DFAS then recommended that the court order state: **"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is ____ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service."**

b. Pre 2017 NDAA Formula Award for Reserve Component Members. DFAS recommends substituting "points earned" in the numerator and denominator, in place of years (or months) of marriage and years of service.

DFAS then recommended that the court order state: "**The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____ reserve retirement points earned during the period of the marriage, divided by the member's total number of reserve retirement points earned.**"

c. Pre 2017 NDAA Hypothetical Awards Based on the Member's Pay at the Time the Court Divides Retired Pay. Many states use "hypothetical awards," in which they divide the retired pay based on the date of the divorce, and assume in their formula that the service member retired on the date of the divorce. This method does not provide the former spouse the financial benefit of any of the member's future military service (*e.g.*, promotions or accumulated years of service), after the entry of the order. For members entering military service after September 7, 1980 the hypothetical "retired pay base" is the average of the member's highest 36 months of basic pay prior to the hypothetical retirement date. (DFAS requires the service member's pay records to be included with a copy of the court order). DFAS then converts hypothetical awards to a percentage of the member's actual disposable retired pay.

DFAS then recommended that hypothetical awards included the following language: **"The former spouse is awarded ____% of the disposable military retired pay the member would have received had the member retired with a retired pay base of _____ and with _____ years of creditable service on ____."**

d. Pre 2017 NDAA Hypothetical Awards Based on Pay Table in Effect at the Time a Member Becomes Eligible for Retired Pay. Courts sometimes directed DFAS to calculate a hypothetical retired pay amount using the pay table in effect at the time the member becomes eligible to receive military retired pay, rather than the pay table in effect at the time of the court order. In those cases, Courts had to provide the percentage awarded to the spouse; the member's rank to be used in the calculation; and the years of creditable service used in the calculation. DFAS made this hypothetical retired pay calculation using the basic pay figure from the pay table in effect at the member's retirement, for the rank and years of service given in the court order.

DFAS recommended that hypothetical awards of this nature include the following language: "**The former spouse is awarded ____ % of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of ____ and with ____ years of creditable service.**"

For an example of this, *see* Kelly v. Kelly, 78 P.3d 220 (Wyo. 2003) (calculating the formula for dividing retired pay as if the service member retired as a Major, even though the member attained higher rank after the divorce decree was entered).

VI. THE ISSUE OF DISABILITY COMPENSATION.

A. The USFSPA only permits the division of disposable retired pay. "Disposable" retired pay is only the portion of the retired pay remaining after, among other events, the service member elects to receive a dollar-for-dollar offset in the form of disability compensation, or the amount that is the difference between the service member's gross retired pay and his disability pay.

B. Military Disability Retired Pay and VA Disability Benefits.

1. Military Disability Retired Pay. This retired pay is available to service members who are so disabled that they cannot perform duties. To qualify for disability retirement, the Soldier must have completed at least 20 years of service creditable under 10 USC §1208 or hold a combined disability rating of 30 percent or more for the disabilities determined to be unfitting for military duty. Members who retire with military disability pay draw the higher of two different amounts of pay: their gross retired pay or their disability pay based on their disability rating. Determining which amount they will draw is generally a two-step process:

   a. First, determine the member's normal retired pay. For service members entering the military after September 7, 1980, this typically is accomplished by calculating the average of the member's highest 36 months of basic pay prior to retirement. This typically is the last 36 months prior to retirement. For example, an average basic pay over the preceding 36 months may calculate out to $4,000. Retirement pay would be 50% of this amount or $2000 per month.

   b. Second, multiply the member's active duty base pay times the member's disability percentage rating. For example, $4,000 x 40% Disability Rating equates to $1,600.

   c. The member would receive the higher of these two above amounts. However, only the difference between the two above amounts ($2,000 v. $1,600) is divisible between the two spouses. In the above example, then, the service member's spouse would be entitled to split the difference between $2,000 and $1,600, (or $400), giving her a total of $200.

2. VA Disability Offset. A second, and more prevalent, type of disability retirement benefit comes directly from the Department of Veterans' Affairs (VA). In these types of cases, service members are not qualified to receive military disability retired pay, although they have incurred some disability as a result of their military service. Such members are entitled to monthly payments directly from the Department of Veterans' Affairs upon their retirement. These payments are tax-free. However, service members must waive an equal amount of their military retired pay in order to receive the disability pay from the VA. The U.S. Supreme Court in *Mansell* held that, IAW USFSPA, former spouses may not be awarded any portion of the disability offset that the service member elects to receive.

C. Service members' ability to waive retired pay in order to receive disability pay creates problems of equity for state courts, who often express concern that the service member's election to receive disability compensation reduces the "pool" of available retired pay that the courts may divide between the spouses. This especially is apt to occur when, perhaps **years** after the initial court order dividing the retired pay, the service member begins to receive disability pay **or** his percentage of disability is increased, due to a newly-diagnosed physical disability. This has the effect of increasing the amount of disability pay the service member receives and, concurrently, reducing the amount of remaining retired pay that may be divided between the parties. Many courts thus find that the service member's subsequent receipt of more disability pay warrants, on equity grounds, replacing that "forfeited" retired pay with other assets. This enables the former spouse to be returned to the financial position he or she was in before the member opted to receive disability compensation. Many courts consider the service member's action to be a unilateral and extrajudicial modification of the original divorce decree.

1. Indemnity Provisions. Often, courts look to indemnity provisions in the court order or the separation agreement to effectively prevent the service member from taking action to reduce the amount of retired pay the former spouse would receive. *See, e.g.*, *Nelson v. Nelson*, 83 P.3d 889 (Okla. Civ. App. 2003); *Janovic v. Janovic*, 814 So.2d 1096 (Fla. Dist. Ct. App. 2002). *But see In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999) (refusing to direct a retired service member who, subsequent to a divorce action, waived a portion of his retired pay to receive disability compensation, to indemnify his former spouse with other assets when nothing in the couple's separation agreement required him to do so).

2. Contract Theory. Where the parties have entered a pre-divorce agreement (*e.g.*, a separation agreement or a property settlement agreement) that courts rely upon to divide the military retired pay, and the service member subsequently waives a portion of his retired pay to receive even more disability compensation, many states hold that **contract theory** precludes the service member from unilaterally reducing the amount of property the former spouse can receive. *See, e.g.*, *Hayward v. Hayward*, 868 A.2d 554 (Pa. Super. Ct. 2005); *Suratt v. Suratt*, 85 Ark. App. 267 (Ark. Ct. App. 2004); *Gatfield v. Gatfield*, 682 N.W.2d 632 (Minn. Ct. App. 2004); *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003); *In re Marriage of Hayes*, 208 P.3d 1046 (Or. Ct. App. 2009).

3. Constructive Trust Theory. Other states find that, once the divorce is finalized, the service member essentially holds in constructive trust that portion of retired pay the court awards to the former spouse, and the service member cannot unilaterally convert or change that interest (*e.g.*, by waiving a portion of retired pay in order to receive disability compensation) without indemnifying the former spouse.

   a. As part of this growing trend, courts are finding that the lack of an indemnification provision does not prevent returning the former spouse to her financial position prior to the service member's election to receive disability compensation.

   b. Courts often find that the lack of an indemnification provision cannot defeat either the parties' or the court's intent that the spouse's original interest not be diminished by a unilateral act of the service member. *See, e.g.*, *Black v. Black*, 842 A.2d 1280 (Me. 2004); *Whitfield v. Whitfield*, 862 A.2d 1187 (N.J. Super. Ct. App. Div. 2004); *Danielson v. Evans*, 36 P.3d 749 (Ariz. Ct. App. 2001); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001); *In re Marriage of Lodeski*, 107 P.3d 1097 (Colo. Ct. App. 2004).

4. Courts that take any of these approaches in preventing the service member from unilaterally altering the division of retired pay typically require the service member to make up the difference with other assets (*e.g.*, property or cash payments). However, it is impermissible under the USFSPA to require the member to "make up" for these payments by providing the former spouse a portion of the actual disability pay that the member has opted to receive. *See, e.g.*, In re Marriage of Perkins, 26 P.3d 989 (Wash. Ct. App. 2001) (finding that language in a decree stating the wife is "'entitled to 45% of the husband's military retirement' even 'if the husband's military retirement [pension] is changed in form to a disability payment'" was in violation of federal law despite the fact the court called it "maintenance").

5. Moreover, when courts *"make u*p" to the former spouse the amount the retiree waived to receive disability compensation, many states require the courts to merely treat the disability benefits as "one" distribution factor to consider, rather than as an automatic requirement to provide the former spouse more property. *See, e.g.*, *Halstead v. Halstead*, 596 S.E.2d 353 (N.C. Ct. App. 2004) ("[W]hen the payment of disability benefits is the only factor a court considers in providing an unequal distribution of a military retirement and a judge treats the disability benefits by providing a dollar for dollar compensation to the non-military spouse, the disability payments become less a factor and more an [improper] acknowledgment that the non-military spouse has an ownership interest in both the military retirement and the disability payments."); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992) ("In arriving at an equitable distribution of marital assets, courts should only consider a party's military disability benefits as they affect the financial circumstances of both parties. Disability benefits should not, either in form or substance, be treated as military property subject to division upon the dissolution of marriage."); *Perkins v. Perkins*, 26 P.3d 989 (Wash. Ct. App. 2001) (holding that "a Washington dissolution court may not divide or distribute a veteran's disability pension, but it may consider a spouse's entitlement to an *undivided* veteran's disability pension as one factor relevant to a just and equitable distribution of property . . . and as one factor relevant to an award of maintenance"). *See also In re Marriage of Bahr*, 32 P.3d 1212 (Kan. Ct. App. 2001) (noting that courts may consider a service member's receipt of VA disability benefits when allocating other property of the marriage to be paid in maintenance to the former spouse).

D. Concurrent Retirement and Disability Pay.

1. The FY 2004 Defense Authorization Act, Pub. L. 108-136; 117 Stat. 1392 (Nov. 24, 2003) created what was later called Concurrent Retirement and Disability Pay (CRDP) to restore the retired pay that retirees had to waive in order to receive non-taxable VA compensation. Beginning on 1 January 2004, qualified individuals could begin receiving both disability pay from the VA and a phased-in amount of their retired pay. "Qualified Individuals" include all retirees with 20 or more years of service and a VA disability rating of 50% or higher.

2. The CRDP gradually increased ("phased-in") over a period of 10 years until January 2014, when the phase-in became complete. Qualified individuals now receive their taxable full retired pay entitlements as well as their non-taxable VA disability compensation, with no offset or reduction.

3. Because CRDP restores retired pay, it is taxable and divisible as marital property. This means that former spouses who have been awarded a portion of the retired service member's disposable retired pay will have access to that retired pay if the retired service member qualifies for the CRDP.

E. Combat-Related Special Compensation.

Similar to the CRDP, Congress created Combat-Related Special Compensation (CRSC) (10 U.S.C § 1413a) to compensate eligible retired veterans with "combat-related" disabilities. "Combat-related" disabilities include injuries sustained as a direct result of armed conflict, while engaged in hazardous duty, through an instrumentality of war, and while performing duties under simulated war conditions.

1. To qualify for CRSC, the retiree must:

   a. Be entitled to and/or receiving military retired pay;

   b. Have a VA disability rating of at least 10 percent;

   c. Waive his or her VA disability compensation from retired pay; and

   d. File a CRSC application directly with the retiree's specific branch of service.

2. CRSC is treated as special compensation and is not subject to the rules governing military retired pay. As such, it is not taxable and not subject to division with the former spouse, although CRSC payments may be treated as income for alimony and child support purposes. Also, CRSC payments are capped at the amount a retiree waives for VA disability compensation.

F. Comparing CRSC and CRDP.

1. Retirees who qualify for the CRDP will receive it automatically. Those who qualify for CRSC, however, must apply for those payments through the retiree's branch of service during "open season" (see 10 U.S.C § 1414(d)). Qualified retirees cannot receive both the CRDP and CRSC. Unless directed otherwise by the retiree, DFAS will select the program that renders the highest gross payment, without consideration of taxes or marital property division issues.

2. For retirees, and former spouses who are awarded a portion of the retiree's disposable retired pay, the decision between the CRDP or CRSC can have a significant impact on both parties. For example, assume a retiree (with a current spouse and a child) receives $2,000 per month in retired pay, has a 50% VA disability rating ($975/month for retiree with a spouse and a child) and a 30% CRSC rating ($490 for a retiree with spouse and a child). Assume also that a court divides his disposable retired pay 50/50 with his former spouse.

Retiree Chooses 50% CRDP	**Retiree**	**Former Spouse**
Gross Retired Pay	$ 2,000	
VA Disability (50% rating)	$975	
Waived Retired Pay	N/A	
Disposable Retired Pay (DRP)	= **$2,000**	
Division of DRP (50/50)	$1,000	$1,000
Tax (assume 15% rate)	($150)	($150)
Net DRP After Taxes	**$850**	**$850**
VA Payment (50% rating)	$975	
Total Payment	**$1825**	**$850**
Retiree Chooses 30% CRSC	**Retiree**	**Former Spouse**
Gross Retired Pay	$ 2,000	
VA Disability (50% rating)	$975	
Waived Retired Pay	($975)	

Disposable Retired Pay (DRP)	= **$1,025**	
Division of DRP (50/50)	$512.50	$512.50
Tax (assume 15% rate)	($77)	($77)
Net DRP After Taxes	**$435.50**	**$435.50**
VA Payment (50% rating)	$975	
CRSC Payment (30% rating)	490	
Total Payment	**$1900.50**	**$435.50**

3. While the decision to select the CRDP or CRSC is fact specific, both the retiree and former spouse should be aware of the potential positive and negative impacts of each option. If possible, former spouses should attempt to protect themselves accordingly (see discussion, *supra* Chapter VIC).

VII. DIRECT PAYMENT TO FORMER SPOUSE.

A. In some limited circumstances, USFSPA and 32 C.F.R. Pt. 63.6 permit former spouses to receive their payments directly from DFAS, rather than from their former spouse/military retiree.

B. For all direct payments from DFAS, whether for child support, alimony or as a property division, follow DFAS's procedures as outlined at http://www.dfas.mil/dfas/garnishment/usfspa/apply.html

C. Generally, to apply for direct payments of retired pay as property from DFAS under the USFSPA, the following are required:

1. A final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement.

2. Proof that the marriage overlaps with ten years of the service creditable toward retirement. DFAS states that a recitation in the court order such as, "The parties were married for 10 years or more while the member performed 10 years or more of military service creditable for retirement purposes" satisfies the requirement. If the court order does not clearly state the date of the parties' marriage, DFAS requires a photocopy of the marriage certificate. The best practice is to submit the photocopy with all applications.

3. The court order must provide for payment from military retired pay, and the amount must be a specific dollar figure or a specific percentage of disposable retired pay.

4. The order must show that the court has jurisdiction over the service member in accordance with USFSPA provisions (domicile, residence, or consent). The court order should also state its jurisdiction over the member under the applicable state law. *See generally supra* Chapter IV (discussing jurisdiction issues).

5. Sufficient information to show that the Servicemembers Civil Relief Act rights were met.

6. An application to DFAS by the *former spouse – not the retiree* – for direct payment. The application to DFAS consists of completing DD Form 2293, and sending a certified copy of the court order to DFAS within 90 days of its certification. Applicants should send applications to:

   Defense Finance and Accounting Service
   Cleveland DFAS-DGG/CL
   PO Box 998002
   Cleveland, Ohio 44199-8002
   (888) 332-7411 (toll free Customer Service)

D. The maximum amount of money directly payable by DFAS to the former spouse is 50% of the retiree's disposable retired pay. However, this percentage increases to 65% if the payment includes child support and/or alimony awarded from the retired pay. DoDFMR § 2908.

1. State courts differ regarding interpretations of the “50% cap” on division of disposable retired pay. Most state courts find that the “50%” language in 10 U.S.C. § 1408(e) pertains only to direct payment from DFAS to the former spouse: in essence, courts following this interpretation do not interpret the provision to restrict their award of retired pay to 50% or less of the disposable retired pay. *See, e.g.*, Ex parte Smallwood, 811 So.2d 537 (Ala. 2001); *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984) (finding that the statutory provision merely limits direct payments from the government to 50% of disposable retired pay).

2. However, at least one state court has determined that the provision of 10 U.S.C. § 1408(e) is a subject matter jurisdiction limitation on courts’ ability to award more than 50% of a service member’s disposable retired pay. *See Cline v. Cline*, 90 P.3d 147 (Alaska 2004) (interpreting the statutory provision to limit state courts “to the distribution of fifty percent or less of a recipient’s military retirement”). *But see Leisnoi, Inc. v. Merdes & Merdes*, 307 P.3d 879, 892 n. 39 (Alaska 2013) in which the Alaska Supreme Court states that it “seriously questions whether *Cline* was properly decided.”

E. Tax Treatment of Divisions. As a result of 1992 amendments to the USFSPA, amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree. Direct payments of retired pay received from DFAS by the former spouse are now subject to withholding. DFAS will withhold taxes on amounts paid directly to ex-spouses. Separate W-2 forms are issued to the retiree and the former spouse.

VIII. ADDITIONAL BENEFITS FOR FORMER SPOUSES.

A. Commissary and PX/BX.

1. In accordance with 10 U.S.C. § 1062, "[A]n unremarried former spouse . . . is entitled to commissary and exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services."

2. Requirements to qualify. *See* AR 215-8/AFI34-211(1).

a. “Unremarried” means "unmarried," to qualify for these benefits; termination of a subsequent marriage revives the benefits.

b. 20/20/20 test.

(1) 20 years of creditable service by the member, and

(2) 20 years of marriage, and

(3) 20 years of overlap between marriage and the creditable service.

B. Medical Benefits. 10 U.S.C. §§ 1072, 1078 & 1086.

1. Three categories of health care.

a. Full military health care program, including TRICARE coverage (up to age 62) and in-patient and out-patient care at military treatment facilities.

b. Transitional health care - full coverage for one year after the divorce, with the possibility of limited coverage for an additional year.

c. The DOD Continued Health Care Benefit Program - insurance plan negotiated by DOD.

2. Requirements to qualify for full military health care program.

a. Un-remarried; termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does.

b. 20/20/20 test (or 20/20/15 test and divorce dated before 1 April 1985).

c. Not enrolled in an employer-sponsored health insurance plan.

3. Requirements for transitional health care.

a. Un-remarried; termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does.

b. 20/20/15 test.

(1) 20 years of creditable service by the member, and

(2) 20 years of marriage, and

(3) 15 years of overlap between marriage and the creditable service.

c. Not enrolled in an employer-sponsored health insurance plan.

d. To qualify for a second year of limited coverage, the spouse must have enrolled in the DOD Continued Health Care Benefit Program (CHCBP).

4. Requirements for DOD Continued Health Care Benefit Program (CHCBP).

a. Eligibility: anyone who loses entitlement to military health care (*e.g.*, former spouses, non-career soldiers and their family members, etc.)

b. Concept: premium-based temporary health care coverage program designed to mirror the benefits offered under the basic TRICARE program (it is not, however, part of TRICARE).

(1) Facilitates retention of medical insurance coverage until alternative coverage can be obtained (former spouses and others who no longer qualify as dependents qualify for 36 months coverage).

(2) Primary advantage: guaranteed eligibility for most people if they enroll within 60 days of losing TRICARE benefits.

(3) Not free to the individual - premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs).

C. Practical Issue – Getting Former Spouses Identification Cards. Chapter 3 of AR 600-8-14, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel*, 17 Jun 2009, governs procedures and points of contact for assisting eligible former spouses to obtain military identification cards that will entitle them to military benefits.

IX. USFSPA AND DOMESTIC ABUSE CASES.

A. 10 U.S.C. § 1408(h) allows for former spouses to collect their portion of retirement pay (and other benefits), even though the service member does not retire, due to domestic abuse he or she has committed. In order to qualify, the former spouse must satisfy the following criteria:

1. Court order awarding as a property settlement (not child support or alimony) a portion of disposable retired pay.

2. The Military member is eligible for retirement by the accumulation of years for retirement but loses the right to retire due to misconduct involving dependent abuse.

a. Date for determining the years of service is the date of final action by the convening authority (if a court-martial) or approval authority (if a separation action).

b. Does not apply to early retirement programs.

3. The person with the court order was either the victim of the abuse or the parent of the child who was the victim of the abuse.

B. The benefits to which such dependents are entitled under USFSPA include:

1. Retirement pay as certified by the Service Secretary, determined by the amount the member would have received if he/she retired upon date eligible.

2. PX.

3. Commissary.

4. Medical.

5. Legal Assistance.

C. These benefits terminate upon remarriage but can be revived by divorce, annulment, or death of the subsequent spouse.

D. Procedures.

1. DFAS treats these just like any other direct payment request.

2. Use the same USFSPA application for payment as any other former spouse

X. USFSPA AND SEPARATION INCENTIVES AND BONUSES.

A. Separation Incentives. In addition to involuntary separation benefits and voluntary 15 year retirement, some soldiers are being offered certain separation benefits if they separate from active duty prior to their twenty-year mark.

Career Status Bonuses (CSB/REDUX). Members who entered the service after July 31, 1986 are given a choice of two retirement plans when they reach their 15th year of active service: high-3 year average or Career Status Bonus (CSB)/REDUX. Service members who choose the CSB/REDUX are eligible to receive a $30,000 bonus when they reach their 15th year of active service, but will also have their retired pay calculated at a reduced rate.

B. When considering the divisibility of CSB/REDUX, see Boedeker v. Larson, 605 S.E.2d 764 (Va. Ct. App. 2004). In this case, the court divided a service member's CSB between him and his wife upon their divorce, finding that the bonus, taken while the couple was married, was "[i]n the nature of retirement pay, compensating the service member now for retirement benefits he would have received in the future."

XI. SURVIVOR BENEFIT PLAN.

A. Overview. Retired pay is a personal asset of the retired military member. As such, it terminates when the military member dies. The Survivor Benefit Plan (SBP) assists in making up for the loss of part of this income by paying eligible survivors (defined as a spouse or former spouse; children; or spouse or former spouse and children) a monthly income.

1. The amount paid to the survivor is based on a specified dollar amount of the member's retired pay. Generally, basic SBP for a spouse pays a benefit of 55% of retired pay.

2. Moreover, the SBP annuity stops the first of the month in which an annuitant under the age of 55 remarries. If that marriage ends in death, divorce or annulment, however, DFAS will reinstate the SBP annuity.

B. Designation of Former Spouses as Beneficiaries. A spouse's coverage under the SBP terminates upon the date of divorce – by operation of law – regardless whether DFAS is notified of the divorce. Nevertheless, many divorce decrees direct that the service member must make the former spouse his SBP beneficiary. This is possible because in 1986, Congress authorized state courts to order members to designate former spouses as SBP beneficiaries. State law controls whether such an order will be issued. Congress also authorized the member and former spouse to enter into a voluntary written agreement making the former spouse a beneficiary.

1. Court orders that direct the service member to cover his former spouse must be complied with within one year of the divorce decree. Nevertheless, some service members fail to comply with the court's directive and do not name their former spouse as the SBP beneficiary. In such cases, *it is the former spouse's responsibility* to notify DFAS of the court order and to apply for the SBP designation within one year of the court order. This is known as a "deemed election" on the former spouse's part.

2. Such "deemed elections" must include a copy of the divorce decree and a written statement requesting former spouse coverage, and must be submitted to DFAS at the following address:

Defense Finance and Accounting Service
U.S. Military Retirement Pay
P.O. Box 7130
London, KY 40742-7130
FAX: 1-800-321-1080

3. If the service member remarries, he can *only* change his SBP designation to cover his new spouse in a few instances. Those instances are:

   a. The former spouse election was required by court order, and the service member-retiree provides a certified court order that permits the change; or

   b. The former spouse election was made to comply with an agreement that is *not* part of the court order, and the former spouse agrees in writing to the change; or

   c. The service member-retiree made the former spouse election voluntarily (*i.e.*, not as part of a court order or written agreement).

XII. CONCLUSION.

A. Supreme Court Litigation, *Howell v. Howell*, 581 U.S. ___ (2017) addressed the question of whether a State can subsequently increase, pro rata, the amount a divorced spouse receives each month form a veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver.

B. The court in a unanimous opinion stated, “No”, relying on its holding in *Mansell*. However, the court noted that family courts remain free to take into account the potential for future disability claims/waivers and a reduction in value when initially calculating the need for spousal support. See *Rose v. Rose*, 481 U.S. 619, 630-634, and n.6 (1987); 10 U.S.C. §1408(e)(6). Expect litigation related to these issues to continue.