Legal Assistance Notes

Debt Collection Assistance Officers: A New Tool for Legal Assistance Attorneys

On 27 June 2000, the Under Secretary of Defense announced a new program to assist service members with TRICARE claims collection problems.[1] TRICARE-related debt problems were identified as a primary concern for service members during the first Military Family Forum in June 2000. Ordinarily, a service member with an outstanding debt arising from a TRICARE claim is solely responsible for resolving the issue and dealing with the creditor, debt collector, or credit reporting agency.

This new program entitled the Debt Collection Assistance Officer Program provides for the establishment of Debt Collection Assistance Officers (DCAO) at medical treatment facilities and TRICARE lead agent offices.[2] Under the program, the DCAO will assume responsibility for researching the TRICARE claim involved and determining whether or not the basis for the underlying alleged debt is valid.[3] The DCAO will provide feedback directly to the service member and, if appropriate, provide written documentation necessary to assist the service member in addressing national credit reporting companies or debt collection agencies regarding unwarranted adverse credit information.

At first glance, it appears the DCAO will act as an advocate for the soldier and take the place of the legal assistance attorney when service members have TRICARE-related debt issues. The DCAO will contact the debt collection agency or credit reporting agency to explain that the service member's case is being reviewed and will request a temporary suspension on further collection action. However, the program explicitly states that the DCAO is not acting as an advocate regarding the debt collection action and is not a legal representative of the service member.[4] Additionally, these contacts are not sufficient to invoke the protections available under the Fair Debt Collection Practices Act (FDCPA) or the Fair Credit Reporting Act (FCRA).[5] A legal assistance attorney must still assist the soldier in invoking these protections if appropriate.

However, the legal assistance attorney can use the DCAO as a research tool when a client meets the threshold for help under this program. If a client receives a letter from a debt collection agency or has negative information on their credit report relating to a TRICARE claim, the legal assistance attorney, after advising the client on the applicable dispute procedures under the FDCPA or the FCRA, should refer the client to the DCAO for assistance in investigating the claim. If the client does not meet the DCAO assistance threshold, he should be referred to the local TRICARE Beneficiary Counseling and Assistance Coordinator for assistance.

Once the DCAO concludes the investigation, they will provide the results of the investigation to the service member along with a list of local resources available, a copy of the FDCPA, and a letter to the collection agency or credit bureau notifying them of the investigation findings. During the initial consultation, the client should authorize the DCAO to release the results of the investigation to the client's legal assistance attorney.

Since a significant number of clients consult with military legal assistance attorneys regarding TRICARE-related debt problems, establishing the DCAO to assist in cutting through the TRICARE red tape is a step in the right direction. Legal assistance attorneys should use these individuals as fact finders and investigators and should ensure that those clients who meet the criteria for assistance are referred to the DCAO. Attorneys must also advise clients on their rights under the FDCPA and FCRA and assist them in invoking those rights. Simply referring the client to the DCAO is not providing competent, diligent and complete legal advice. Major Kellogg.

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1. Memorandum, Office of the Under Secretary of Defense, Personnel and Readiness, to Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, and Executive Director, Tricare Management Activity, subject: Debt Collection Assistance Officer Program to Assist Service Members with TRICARE Claims Collection Problems (27 June 2000), *available at* http://www.tricare.osd.mil/downloards/signed_memo.pdf.

2. Under Secretary of Defense, Personnel and Readiness, *Debt Collection Assistance Officer Directory, at* http://www.tricare.osd.mil/dcao/DCAO_Dir.doc (last modified Nov. 9, 2000).

3. Office of the Judge Advocate General, U.S. Army, Tricare Debt Collection Assistance Officer (DCAO) Training Guide (detailing the strategy for implementing this program and providing guidance on responsibilities and limitations of DCAO's), *available at* http://www.jagcnet.army.mil/LegalAssistance.

4. *Id.* at 37.

5. *See* Administrative and Civil L. Dep't, The Judge Advocate General's School, U.S. Army, JA 265, Consumer Law Guide, ch. 9 (2000) (providing more information about the FDCPA or FCRA), *available at* http://jagcnet.army.mil/LegalAssistance (JA 265, Consumer Law Deskbook (2000)).

"I Might Like You Better if We Slept Together,[6] but I Like My Alimony Even More"

Legal assistance attorneys (LAA) are becoming ever more involved in the marital dissolution process, be it with general divorce counseling, nonsupport issues, or preparing separation agreements. Although much emphasis is placed on securing a portion of the service members' military retirement pay for the former spouse in divorce proceedings, less attention is given to whether those payments are characterized as alimony, child support, or a property interest.

A recent case, *Ex parte Ward*,[7] highlights what can happen when, through either poor draftmanship, bad luck, or bad advice, a former spouse's portion of the service member's retired pay is characterized as alimony rather than property, and provides valuable food for thought to LAAs representing either side in these situations.

Charles Ray (the husband) and Mary Frances Ward (the wife) divorced in 1984.[8] As part of the divorce, the husband agreed to pay the wife the total amount of his military retirement pay.[9] The retirement paychecks were sent directly to the wife, and, under the terms of the agreement, were "considered as child support . . . and periodic alimony."[10] The agreement did not provide for any adjustments in amount paid to the wife after their child reached age nineteen.[11]

The wife continued receiving payments until December 1996. The husband then stopped the checks going directly to the wife and reduced the amount paid her to one-half of his military retirement pay.[12] Payments stopped altogether in February 1997.[13] Not surprisingly, the wife petitioned the court for a *rule nisi*,[14] and asked that the husband be found in contempt for not paying alimony and ordered to pay arrearages as well.[15] At the hearing, the husband argued that the wife's cohabitation with another man released him of his obligation to provide alimony under Alabama law.[16]

Despite significant evidence that the wife had been cohabitating with another man for twelve years,[17] the trial court found the husband in contempt and ordered him to pay arrearages.[18] The husband appealed, but the Court of Civil Appeals affirmed without opinion.[19] The Alabama Supreme Court granted the husband's petition for certiorari review,[20] and reversed and remanded the lower courts' ruling.

The Alabama statute at the heart of the husband's argument, ALA. CODE § 30-2-55 (1975), states:

> Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabitating with a member of the opposite sex. This provision shall be applicable to any person granted a decree of divorce either prior to April 28, 1978, or thereafter; provided, however,that no payments of alimony already received shall have to be reimbursed.

Looking at the lower court's ruling, the Alabama Supreme Court noted that the trial judge found the husband had not proven cohabitation.[21] Recognizing that "whether cohabitation exists is a factual determination for the trial judge in each case,"[22] the state supreme court stated that it could not substitute its judgment for the trial judge's unless the trial court's findings were "plainly and palpably wrong."[23]

In addition to reviewing the specific facts of the husband's case, the court also reviewed similar case law[24] providing indicia of cohabitation. The court stated that "[a] petitioner must prove some permanency of relationship, along with more than

6. ROMEO VOID, *Never Say Never, on* NEVER SAY NEVER (415 Records 1981).

7. *Ex parte* Charles Ray Ward (Re: Charles Ray Ward v. Mary Frances Ward), No. 1990727, 2000 Ala. LEXIS 393, at *1 (Supreme Court of Alabama, Sept. 15, 2000).

8. *Id.*

9. *Id.* At the time of divorce, the husband's monthly military retired pay was $783.63. *Id.*

10. *Id.*

11. *Id.* Age nineteen was the parties' agreed upon age of majority.

12. *Id.*

13. *Id.*

14. *Id.* at *2. A *rule nisi* is a rule that becomes imperative and final *unless* cause be shown against it. This rule commands the party to show cause why he should not be compelled to do the act required, or why the object of the rule should not be enforced. BLACK'S LAW DICTIONARY 1331 (6th ed. 1990).

15. *Ward*, 2000 Ala. LEXIS 393, at *2.

16. *Id.*

occasional sexual activity, in order to establish cohabitation. Factors which suggest some 'permanency of relationship' include evidence that the former wife and alleged cohabitant occupied the same dwelling and shared household expenses."[25] These factors are important, because the Alabama legislature "intended to strike a balance between the occasional brief sojourn and the common-law marriage."[26] In this case, the fact that the wife testified that she had lived with a man in the same house for twelve years, that they shared expenses, and that they had a sexual relationship was more than enough to convince the supreme court that not only had the wife cohabitated with another,[27] but that the trial court had "plainly and palpably erred in finding no cohabitation because the evidence was supplied by the wife's own testimony and was uncontroverted."[28] The court also stated that the "trial court cannot ignore undisputed evidence."[29]

Although holding that the husband was not liable for any alimony once the wife began cohabitating, the state supreme court also held that, according to statute,[30] the husband was not entitled to a refund of monies already paid.

17. At the hearing, the husband's attorney questioned the wife about one of her relationships:

> [Attorney]: Now, what was the name of this gentleman you lived with over there? You lived with a gentleman in Austin, Texas, what was his name?
>
> [Wife]: I had a boyfriend named Domingo, but I didn't live with him.
>
> [Attorney]: He didn't live with you at all?
>
> [Wife]: Oh yeah, he stayed at my place and paid rent.
>
> [Attorney]: Okay. And you shared a house together?
>
> [Wife]: No, the house was mine. My cousin bought the house.
>
> [Attorney]: How long did he stay there for?
>
> [Wife]: Off and on about 12 years.
>
> [Attorney]: Twelve years. And did you have sexual relations with this man?
>
> [Wife]: Of course.

18. *Id.* at *3. The trial court determined the amount of arrearages to be $15,141.90.

19. *Id.* The Court of Civil Appeals affirmed without opinion, although there was a dissenting opinion. *Id.*

20. *Id.* The Alabama Supreme Court reversed the Court of Civil Appeals' judgment of affirmance, and remanded the cause to the Court of Civil Appeals to direct the trial court to enter an order consistent with the supreme court's opinion. *Id.*

21. *Id.* at *4. This was because the trial judge had ordered payment of arrearages for alimony, not child support, since it was only after the child reached majority that the husband reduced, and then stopped payments. *Id.*

22. *Id.* (citing Capper v. Capper, 451 So. 2d 359, 360 (Ala. Civ. App. 1984) (citing Tucker v. Tucker, 416 So. 2d 1053 (Ala. Civ. App. 1982))).

23. *Id.* (citing Ivey v. Ivey, 378 So. 2d 1151, 1153 (Ala. Civ. App. 1979) (citing Sutton v. Sutton, 55 Ala. App. 254, 314 So. 2d 707 (1975))).

24. *Id.* (citing *Capper*, 451 So. 2d at 359 (finding that the wife's longtime paramour had lived in her apartment for twenty-three days, kept his personal items there, and had shared her bed and engaged in sexual relations with her. The court found this evidence sufficient to support cohabitation). In *Ivey*, 378 So. 2d at 1151, the court found sufficient evidence of cohabitation where the wife admitted in interrogatories that she lived with a man.

25. *Id.* at *5, (citing Taylor v. Taylor, 550 So. 2d 996, 997 (Ala. Civ. App. 1989) (citing Hicks v. Hicks, 405 So. 2d 31 (Ala. Civ. App. 1981))).

26. *Id.* at *6.

27. *Id.*

28. *Id.*

29. *Id.* (citing Carufel v. Hub Trucking, Inc., 687 So. 2d 200 (Ala. Civ. App. 1996); State ex rel. Smith v. Smith, 631 So. 2d 252 (Ala. Civ. App. 1993); Easterly v. Beaulieu of America, Inc., 717 So. 2d 406 (Ala. Civ. App. 1998)).

30. ALA. CODE § 30-2-55 (1975).

This case should serve as a warning to LAAs counseling spouses who qualify for receipt of a portion of military retired pay. If the parties intend, or at least one party intends, to ensure that payments continue beyond remarriage, or cohabitation, that share of military retired pay must be classified by the court as property, and not as alimony or child support. The court is free to order those payments as well.[31] And naturally, those LAAs advising service members should negotiate to have any payment of retired pay categorized as alimony and not as a property interest. Failing that, LAAs advising those clients receiving a portion of military retired pay as alimony should, at a minimum, advise their clients of the ramifications attached with remarriage or cohabitation. Major Boehman.

Criminal Law Note

United States v. Collazo[32]: The Army Court of Criminal Appeals Puts Steel on the Target of Post-Trial Delay

Over the last several years, errors in the post-trial processing of records of trial have become more and more of a problem for the Army Court of Criminal Appeals (Army Court).[33] One particularly vexing aspect of this problem has been undue post-trial delay. The Army Court has seen a steady climb in the time it takes to get from sentencing an accused to convening authority action. Excessive delay in the post-trial processing of a record of trial can adversely impact an accused in several ways. Lengthy delay in the preparation of a record of trial can effectively deprive an accused of a genuine opportunity for clemency,[34] parole, and can affect job opportunities once the accused is released from confinement and placed on appellate leave. Additionally, lengthy post-trial delay deprives the accused of a speedy appellate review since the service courts cannot review a case until the convening authority has taken action.

As of 28 August 2000, the average Army post-trial processing time was 119 days for a general court-martial and 115 days for a special court-martial, as compared to ninety-three days and seventy-nine days respectively, five years ago.[35] More disturbing perhaps are the number of cases in the Army which have taken over six months to get from sentencing to action. Army-wide, there have been forty-five cases this year which have taken over six months to get from sentencing to action; sixteen of those forty-five cases have taken over a year.[36]

Both the Army Court and the Court of Appeals for the Armed Forces have admonished staff judge advocates in the field regarding this trend. The warning has been clear: staff judge advocates must correct the problem of undue post-trial delay or the courts will fix it for them.[37] After years of not seeing any improvement, the Army Court has apparently grown weary of shooting rounds across the bow of undue post-trial delay and has decided to put one on the deck. *United States v. Collazo* is that round. *Collazo* represents a significant break from precedent in handling undue post-trial delay and the establishment of a new method of addressing this issue.

To put *Collazo* in perspective, we must review how military appellate courts have previously dealt with the issue of undue post-trial delay. The logical place to begin this review is with *Dunlap v. Convening Authority.*[38] In *Dunlap*, the United States Court of Military Appeals (the forerunner of the Court of Appeals for the Armed Forces) changed significantly the way the courts would deal with delays in post-trial processing. Before *Dunlap*, the most relief an appellant could realistically hope to receive for post-trial delay was removal of the impediment to the completion of the post-trial process and an order directing that the record be completed and action taken.[39] After

31. The Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1972, 1076, 1086, 1408, 1447, 1448, 1450, and 1451, allow courts of competent jurisdiction to divide military retired pay once certain jurisdictional requirements are met. However, the USFSPA places no limitations or special requirements on a court's jurisdiction in awarding a portion of the retired pay for child support or alimony purposes.

32. 53 M.J. 721 (Army Ct. Crim. App. 2000).

33. *Id.* at n.4.

34. In cases where an accused receives a punitive discharge and confinement, failure to prepare the record of trial quickly may result in the accused being release from confinement before the convening authority takes action. At this point, the only clemency the convening authority can offer is to disapprove some of the findings or disapprove the punitive discharge. By not having the option of disapproving a portion of the accused's confinement, it becomes much less likely that the convening authority will grant any clemency.

35. The above statistics address those cases which are still outstanding as of 1 September 2000. Interview with Mr. Joseph A. Neurauter, Clerk of the Court for the United States Army Court of Criminal Appeals, in Arlington, Va. (Sept. 1, 2000).

36. According to statistics from the Office of the Clerk of Court, United States Army Court of Criminal Appeals, as of 29 August 2000, there were forty-five cases Army-wide that were over six months from sentence to action, and sixteen were over a year from sentence to action. *Id.*

37. *See* United States v. Bell, 46 M.J. 351, 354 (1997); United States v. Hudson, 46 M.J. 226, 228 (1997); United States v. Sherman, 52 M.J. 856 (Army Ct. Crim. App. 2000).

38. 48 C.M.R. 751 (C.M.A. 1974).

39. *See* Rhoades v. Haynes, 46 C.M.R. 189, 190 (C.M.A. 1973).

Dunlap, an appellant might get the ultimate relief, dismissal of all charges.[40]

Dunlap was decided in 1974, after a string of post-trial delay cases had come before the Court of Military Appeals.[41] In December 1972, the appellant in *Dunlap* pled guilty to some charges and was found guilty of others at a general court-martial. The appellant was sentenced to three years confinement at hard labor, total forfeitures, and a bad conduct discharge.[42] During the first staff judge advocate's post-trial review it was discovered that, despite the appellant's request for a panel composed of one-third enlisted members, the panel had fallen below one-third enlisted membership. The staff judge advocate recommended adjusting the findings to conform with the charges the appellant pled guilty to and holding a new sentencing hearing.[43] It was at this point that the post-trial process fell apart.

The appellant had been tried in Bamberg, Germany. After the court-martial, but before the staff judge advocate's post-trial recommendation, the appellant was transferred to Fort Leavenworth, Kansas. The convening authority agreed with his staff judge advocate, but felt incapable of ordering the necessary rehearing because the appellant had been transferred to Fort Leavenworth.[44] The convening authority from Bamberg therefore forwarded the record of trial to the Fort Leavenworth convening authority, and requested that he take jurisdiction over the case and order a rehearing. The Fort Leavenworth convening authority refused to take jurisdiction over the case, concluding that the original court-martial of the appellant was invalid for all purposes, and a rehearing for just the sentencing phase of trial would be inadequate.[45] Ultimately the convening authority in Germany agreed, and ordered a rehearing for findings and sentencing. The record was again returned to Fort Leavenworth, with a request that Fort Leavenworth conduct the rehearing. It was not until 20 November 1973 that new charges were referred against the appellant. In the meantime, the appellant filed a petition with the United States District Court of Kansas to have the charges dismissed for a violation of his right to a speedy trial.[46] The new trial was postponed pending the District Court's ruling on the appellant's petition. The District Court refused to rule on the petition, concluding that the appellant had not exhausted the remedies available to him through the military judicial system. On 25 February 1974, the Court of Military Appeals heard the appellant's case on the issue of whether he had been denied his right to a speedy trial.[47]

By the time the appellant's case in *Dunlap* made it to the Court of Military Appeals, a year and three months had passed since the appellant's court-martial. The frustration the Court of Military Appeals felt over the issue of undue post-trial delay is evident from its opinion. The court began its discussion by pointing out that delayed convening authority action had been a source of criticism by the court for years.[48] The court then discussed the unique role that the convening authority action occupies in the military justice system. According to the court, "[i]n significant ways . . . the function of the court-martial and those of the convening authority in the determination of guilt and in the imposition of sentence are so connected that they can be regarded as representing, for the purpose of speedy disposition of the charges, a single stage of the proceedings against the accused."[49] After this provocative comment, the court backed off and concluded it did not have to decide whether the requirement for the speedy disposition of charges applied to the convening authority action. Instead, the court reasoned that Congress, through various statutes, mandated that all stages of the military criminal justice system move as expeditiously as possible.[50] In order for the court to fulfill its obligation to "protect [Congress's] mandate for timely justice,"[51] it had to provide timeliness guidelines for the convening authority's action. The *Dunlap* court created a brightline rule when it stated:

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40. *Dunlap*, 48 C.M.R. at 754.

41. United States v. Gray, 47 C.M.R. 484 (C.M.A. 1973); United States v. Timmons, 46 C.M.R. 226 (C.M.A. 1973); United States v. Wheeler, 45 C.M.R. 242 (C.M.A. 1972).

42. *Dunlap*, 48 C.M.R. at 751, 752.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 753.

49. *Id.*

50. *Id.* at 754.

51. *Id.*

> 30 days after the date of this opinion, a presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial.[52]

The consequence of violating this new rule was dismissal of all charges against the appellant.

The military justice system labored under the *Dunlap* ninety-day presumed prejudice rule for five years, until *United States v. Banks*.[53] In a short opinion, the Court of Military Appeals concluded that the ninety-day presumed prejudice rule was too inflexible and had outlived its usefulness.[54] In particular, the court pointed to changes in military law that made the *Dunlap* rule unnecessary. Those changes included specifying the post-trial duties of trial defense counsel and the announcement of standards for the evaluation of deferment requests.[55] After *Banks,* an appellant could still receive relief for undue post-trial delay, but the appellant would now have to establish prejudice.[56]

After *Banks*, the military appellate courts became less inclined to grant relief for inordinate post-trial delay. There have been several cases where the appellate courts have granted relief for post-trial delay,[57] but as the *Dunlap* ninety-day rule has become more a thing of the past, courts have become less inclined to grant relief for this issue. In early cases after *Banks*, the Court of Military Appeals believed it "should be vigilant in finding prejudice whenever lengthy post-trial delay in review by a convening authority is involved."[58] Later cases showed a greater reluctance to find prejudice regardless of the length of delay. In *United States v. Hudson*,[59] it took the government eight hundred and thirty-nine days to get from the announcement of the accused's sentence to action. Despite allegations by the appellant that he lost job opportunities due to the delay, no relief was granted.[60] In *United States v. Bell*,[61] it took the Government 737 days to produce a sixty-nine page record of trial. The appellant alleged that he was prejudiced because he lost three days of confinement credit that he would have been given had his case made it to appellate review before he served his confinement. The Court of Appeals for the Armed Forces held: "The defense argument that three 3 days' confinement or less, even if unlawful, warrants setting aside a bad-conduct discharge is not well taken . . . . [S]uch harm, although unfortunate, does not render the appellant's punitive discharge inappropriate."[62]

In *Collazo,* the Army Court fashioned a new method of dealing with undue post-trial delay.[63] This new method provides incentive to the field to clean up post-trial delay without granting the extreme sanction of dismissal of charges. In *Collazo*, the accused was convicted of rape and carnal knowledge and sentenced to a dishonorable discharge, total forfeiture of all pay and allowances, reduction to E1, and confinement for eight years. On appeal, the appellant claimed that he had been prejudiced by the length of time it took the Government to process the record of trial to action. The appellant also pointed out other administrative errors in the processing of the record of trial that had adversely impacted the appellant. These administrative errors included failing to provide the accused or counsel with a complete authenticated record of trial until after action was taken, and failing to provide the appellant and his counsel with a copy of the convening authority's action in a timely manner.[64]

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52. *Id.*

53. 7 M.J. 92 (C.M.A. 1979).

54. *Id.* at 93.

55. *Id.*

56. *Id.* at 94.

57. *See* United States v. Bruton, 18 M.J. 156 (C.M.A. 1984); United States v. Shely, 16 M.J. 431 (C.M.A. 1983); United States v. Sutton, 15 M.J. 235 (C.M.A. 1983); United States v. Clevidence, 14 M.J. 17 (C.M.A. 1982).

58. *Shely*, 16 M.J. at 431.

59. 46 M.J. 226 (1997).

60. *Id.* at 227.

61. 46 M.J. 351 (1997).

62. *Id.* at 354.

63. United States v. Collazo, 53 M.J. 721 (Army Ct. Crim. App. 2000).

64. *Id.*

The appellant in *Collazo* was convicted on 25 September 1997, and the 519-page record of trial was not authenticated until 4 August 1998.[65] The staff judge advocate's post-trial recommendation was served on the defense counsel on 18 August 1998, and a defense request for delay in submitting Rule for Courts-Martial (RCM) 1105 matters was granted until 16 September 1998.[66] Although the government failed to serve the appellant or his defense counsel with a properly authenticated record of trial, appellant's counsel was provided an electronic version of the transcript to assist in the preparation of the RCM 1105 matters. The appellant's counsel submitted the RCM 1105 matters on 16 September 1998 and action was taken on 30 September 1998.[67] A complete authenticated record of trial was not served on the appellant's defense counsel until 7 October 1998.[68]

The Army Court's frustration with the unexplained post-trial delay in *Collazo* was reminiscent of the Court of Military Appeal's frustration in *Dunlap*, but the Army Court's solution was different. First, the court reminded readers, particularly staff judge advocates, that it was not so long ago that lengthy post-trial delays brought about the *Dunlap* ninety-day rule.[69] The Army Court addressed staff judge advocates directly in the opinion, stating, "[s]taff judge advocates can forestall a new judicial remedy by fixing untimely post-trial processing now."[70] Next, the court specifically found the appellant in *Collazo* suffered no actual prejudice due to the post-trial delay. Had the court found prejudice, under a *Dunlap*/*Banks* analysis, the court would have had to dismiss the charges. Finally, the court created a new remedy for inordinate post-trial delay.[71]

The new remedy could be called "fundamental fairness credit," although the Army Court did not name it so. After the court concluded the appellant suffered no actual prejudice, it went on to state "fundamental fairness dictates that the government proceed with due diligence to execute a soldier's regulatory and statutory post-trial processing rights and to secure the convening authority's action as expeditiously as possible."[72] The test that the court applied was a "totality of the circumstances" test.[73] The court concluded that the government did not proceed with due diligence and, although the appellant was not prejudiced, he was entitled to some relief. The appellant had been sentenced to ninety-six months of confinement. The Army Court only approved ninety-two months of that sentence.[74]

For decades, military appellate courts have struggled with how to resolve the issue of undue post-trial delay. Besides undermining public confidence in the military justice system, delay in convening authority action can cause actual harm to the accused. In a fit of frustration over this issue, the Court of Military Appeals wrote the *Dunlap* opinion. In *Dunlap* the Court of Military Appeals took the radical step of treating post-trial delay in the same way as pretrial delay. Although this position helped reduce post-trial delay, it was extreme. The dissent in *Dunlap* pointed out that "[t]here is a marked dissimilarity between pretrial delay and delay in a convening authority's action and the harm that may result from each."[75] The dissent went on to comment that "whatever reason might exist to deplore post-trial delay generally . . . [I am] loathe to declare that valid trial proceedings are invalid solely because of delays in the criminal process after trial."[76] Even after *Banks* removed the ninety-day presumed prejudice rule, *Dunlap* was not completely dead. As noted in later decisions, if the court finds prejudice, the remedy created in *Dunlap* remains the mandatory result, that is, dismissal of the charges.

It seems clear that in *Collazo* the Army Court was wrestling with the ghost of *Dunlap*. Because *Banks* did not completely eradicate *Dunlap*, the Army Court was left with the options of finding prejudice and letting a rapist go free, or finding no prejudice and ratifying the sloppy administration of justice. The Army Court elected to create a new option. This new option

65. *Id*. at 724.

66. *Id*. at 725.

67. *Id*.

68. *Id*.

69. *Id*.

70. *Id*.

71. *Id*.

72. *Id*. at 727.

73. *Id*.

74. *Id*.

75. United States v. Dunlap, 48 C.M.R. 751, 756 (C.M.A. 1974).

76. *Id*. at 757.

used the court's broad authority under Article 66,[77] to provide relief to an appellant despite a lack of prejudice.

Three questions remain after the *Collazo* opinion. First, does the Army Court have the authority to grant the relief it provided in this case? Article 66[78] does grant the service courts authority that is unique to appellate courts, but the service courts are not courts of equity. In *United States v. Powell*,[79] the Court of Appeals for the Armed Forces described the authority of the service courts as bracketed by Article 59(a) and Article 66(c) when it stated: "Article 59(a) constrains their authority to reverse; Article 66(c) constrains their authority to affirm."[80] Article 59(a) states, "[a] finding or sentence of a court-martial may not be held incorrect on the grounds of an error of law unless the error materially prejudices the substantial rights of the accused."[81] Arguably, the Army Court acted beyond the scope of its authority by granting relief to an accused where no prejudice was found.

The second question is whether *Collazo* demonstrates the need for new guidance from the Court of Appeals for the Armed Forces to the service courts on resolving issues related to inordinate post-trial delay. Based on the present guidance, the service courts have two options when dealing with inordinate post-trial delay: they can find prejudice and dismiss all charges, or find no prejudice and do nothing. Given the Army Court's opinion in *Collazo*, it is clear that these two options are not enough. *Collazo* highlights the need for the Court of Appeals for the Armed Forces to put a stake through the heart of the *Dunlap* opinion by removing the requirement to dismiss all the charges if the service courts find prejudice.

The final question is how will *Collazo* be applied? In *Collazo* the court established a totality of the circumstances test to determine whether fundamental fairness had been violated. Although this test avoids the inflexibility of a *Dunlap* fixed-day rule, it is hard to know what will warrant relief. In *Collazo,* the Army Court relied on the following facts to find a violation of fundamental fairness: ten months to type a relatively short record; failure to give the defense an opportunity to review the record of trial before authentication; and failure to provide the appellant and defense counsel a full authenticated record of trial for the preparation of RCM 1105 matters.[82] It is unclear if relief would be warranted if the government had done everything correctly except for the ten-month delay in the preparation of the record of trial.

Despite the questions that remain after *United States v. Collazo,* some things are clear. Staff judge advocates and chiefs of justice need to take notice of this decision. *Collazo* represents a break from precedent and puts more pressure on criminal law sections and staff judge advocate offices to decrease post-trial processing time. Finally, based on recent memorandum opinions of the Army Court, it is clear that *Collazo* was the first of many rounds directed at the target of undue post-trial delay.[83] Major MacDonnell.

Estate Planning Note

Gifts Made Under a Durable Power of Attorney

The general power of attorney (POA) is an essential weapon in the arsenal of the legal assistance attorney. At its most basic level, the POA allows the agent or attorney-in-fact to carry on personal affairs during the absence of the principal. For this reason, many legal assistance clients drawn from our aging military retiree population request POAs as a tool to assist in managing financial affairs should they become incapacitated. Consequently, it is critical that legal assistance attorneys supporting the military retiree population specifically contemplate drafting POAs with an eye toward carrying out estate plans,[84] and ensuring the POA contains "durable" language that allows it to survive the incapacity or incompetency of the principal.

In addition to executing a power of attorney, one of the most basic estate planning techniques for reducing potential estate taxes is the annual gift tax exclusion ($10,000 per person, per year).[85] These two components of estate planning often overlap. When a principal is incapacitated, elderly, and financially

77. UCMJ art. 66(c) (2000).

78. *Id.*

79. 49 M.J. 460 (1998).

80. *Id*. at 464.

81. UCMJ art. 59(a) (2000).

82. United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000).

83. United States v. Benton, No. 9701402 (Army Ct. Crim. App. 10 Aug. 2000); United States v. Marlow, No. 9800727 (Army Ct. Crim. App. 31 Aug. 2000); United States v. Fussell, No. 9801022 (Army Ct. Crim App. 20 Oct. 2000).

84. For a thorough examination of the durable power of attorney, see, for example, Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney,* 75 Neb. L. Rev. 574 (1996*);* Major Michael N. Schmitt & Captain Steven A. Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 Mil. L. Rev. 203 (1991); Captain Kent R. Meyer *Proactive Law: Continuing Powers of Attorney: A Military Use*, 112 Mil. L. Rev. 257 (1986); Major Mulliken, TJAGSA Practice Notes: *Legal Assistance Items, Powers of Attorney,* Army Law., July 1986, at 72.

stable, it may be prudent for an attorney-in-fact under a POA to make gifts of the principal's resources by taking advantage of the annual gift tax exclusion. Regrettably, many POAs neither expressly confer nor specifically withhold the power to make gifts. These POAs leave open the issue of whether the power to make gifts of property has been conferred by the principal. The absence of specific language granting authority to make gifts can be interpreted as an intentional choice by the principal. Many legal assistance attorneys are not aware that the Internal Revenue Service (IRS) *generally* holds the position that an attorney-in-fact who makes such a gift on behalf of a principal without specific gifting language in the POA is actually making a "revocable transfer" which is not entitled to the gift tax exclusion. The result is an inclusion in the decedent's estate of the unauthorized gifts.

The current military wills drafting software, Drafting Libraries (DL), not only drafts wills, but also ancillary documents. Before the purchase of the DL program by the Army, legal assistance practitioners used the Patriot Expert System (and its predecessors) for drafting wills and POAs. The Patriot Expert System general POA did not contain gifting language and the drafter did not have the option to include such language. The ancillary document feature of DL, however, contains tools for the drafting of general POAs. While the DL ancillary document feature is convenient and produces a general POA of broad applicability, the legal assistance practitioner who wishes to tailor a general POA to provide specific authority for gifting must answer numerous queries regarding gifting clauses to ensure the complete POA reflects the requirements of the client. Practitioners need to understand the importance of these options as they relate to their clients.

The Durable Power of Attorney (DPOA)

One of the most common estate planning tools in preparing for incapacity is the DPOA.[86] Different from a regular POA, which terminates on the incapacity of a principal, a DPOA continues during the incapacity of the principal until death.[87] When durable powers are included in a POA, the powers can survive incapacity, and can be relied upon for management of the principal's affairs. All states recognize durable powers of attorney.[88] Some states have a requirement for statutory language in the DPOA.[89] The DPOA can be prepared as either a "current DPOA" or a "springing DPOA."[90] A springing power makes the DPOA effective only when a specific event occurs, such as incapacity of the principal, and if it is authorized by state law.[91] A current DPOA is effective upon execution of the document. The DPOA is founded in statutory law with a basis in agency law. General DPOAs grant *almost* unlimited authority to the attorney-in-fact. Normally, any powers in the POA that are not expressly conferred will not be implied under the law of agency.[92] The agent does not own the property, and agency law customarily cautiously implies powers and exactingly construes express powers.[93] Therefore, DPOAs drafted by legal assistance attorneys survive the incapacity of the principal, but

85. I.R.C. § 2503(b) (LEXIS 2000).

86. The DPOA gained popularity in estate planning following the adoption of the Uniform Durable Power of Attorney Act in 1979. UNIF. DURABLE POWER OF ATTORNEY ACT (amended 1987), *reprinted in* MARTINDALE-HUBBELL UNIFORM AND MODEL ACTS §§ 1 –10 (2000).

87. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 396 (6th ed. 2000); *see* UNIF. PROBATE CODE § 5-501 (amended 1998) (When Power of Attorney Not Affected by Disability).

> Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.

Id.

88. DUKEMINIER & JOHANSON, *supra* note 87, at 396; UNIFORM PROB. CODE §§ 5-501 to 5-505.

89. DUKEMINIER & JOHANSON, *supra* note 87, at 396. The DL Wills program prepares state specific POAs and will include the necessary statutory language.

90. See Appendix for state summary of DPOA statutes.

91. Normally, a springing POA states that it is validated by the written certification of at least one physician who opines that the principal meets the disability criteria. The agent does not currently hold a general power of appointment. A power that is exercisable only upon the occurrence of a future event(s) which did not occur before the agent's death, would not be taxable in the agent's estate as a general power of appointment. 26 C.F.R. § 20-2041-3(b) (LEXIS 2000). Consequently, if the attorney-in-fact dies before the principal's disability, there are no unfavorable estate tax consequences because the contingency did not occur before the agent's death. Peter J. Strauss & Russell N. Adler, *Using Powers of Attorney as Planning Tools*, N.Y. L. J., July 17, 2000, at 7.

if the power to gift is not expressly conferred by the DPOA, then generally the authority will not be implied.

The Gift Tax

The intent of this note is not an in-depth look at the gift tax. However, for purposes of this article, the most notable feature of the gift tax is the annual gift tax exclusion (currently $10,000 per donee).[94] Estate planners frequently advise financially secure clients to establish a strategy of making annual gifts in order to reduce the value of their potential gross estate and to reduce the amount of taxes due upon death. A donor can gift up to the annual exclusion amount to an unlimited number of recipients during any calendar year without the gifts being subject to gift taxation.[95] While the rationale for the annual exclusion is to preclude the requirement for record keeping for small gifts, the annual exclusion is an effective estate tax planning device because the annual exclusion gifts are not includible in the donor's gross estate and can reduce the gross estate. However, the donor should keep in mind that a gift is not complete until the donor parts with dominion and control so as to leave him with no power to change the disposition.[96] In order to qualify for the annual exclusion, the gift must be a transfer of a present interest in property rather than a future interest,[97] and the donor must complete the gift within the calendar year.[98] When an individual makes a gift that qualifies for the annual gift tax exclusion, there is no requirement for the filing of a gift tax return.

The Estate Tax

Again, the intent of this note is not to serve as an in-depth look at estate taxation, but it is important to review several important points relating to estate taxation. A decedent's gross estate includes the value of all property to the extent the decedent had an interest at the time of death.[99] Certain adjustments, which decrease the overall worth of an estate due to gifts made within three years of death, are included in the value of the gross estate.[100] Several years ago, all gifts made within three years of death were included in the donor's gross estate, unless it could be shown that the gifts were not made in contemplation of death.[101] Currently, the three-year rule only applies to any property interests transferred by gift within three years of death with a retained life estate;[102] transfers taking effect at death;[103] revocable transfers;[104] and proceeds of life insurance.[105]

Generally, lifetime transfers by a decedent over which he retains the power to revoke are included in the decedent's tax-

92. RESTATEMENT (SECOND) OF AGENCY § 34, cmt. h (1999).

> *Formal instruments*. Formal instruments which delineate the extent of authority, such as powers of attorney and contracts for the employment of important agents, either executed on printed forms or otherwise giving evidence of having been carefully drawn by skilled persons, can be assumed to spell out the intent of the principal accurately with a high degree of particularity. Such instruments are interpreted in light of general customs and the relations of the parties, but since such instruments are ordinarily very carefully drawn and scrutinized, the terms used are given a technical rather than a popular meaning, and it is assumed that the document represents the entire understanding of the parties. On the other hand, a hastily drawn memorandum can be expected to contain only the outlines, and to indicate only in a general way the extent of the authority. Hence the attendant circumstances can properly be used more freely to explain or to interpret it. It is because formal instruments are subjected to careful scrutiny that it is frequently said that they must be "strictly" construed. In fact, of course, they are construed so as to carry out the intent of the principal. There should be neither a "strict" nor a "liberal" interpretation, but a fair construction which carries out the intent as expressed. It is true that dangerous powers, such as the power to borrow money, will not be inferred unless it is reasonably clear that this was intended. It is also true, on the other hand, that ambiguities in an instrument will be resolved against the one who made it or caused it to be made, because he had the better opportunity to understand and explain his meaning. But this must be done only within the frame of the entire instrument. All-embracing expressions are discounted or discarded. Thus, phrases like "as sufficiently in all respects as we ourselves could do personally in the premises", "as the said agent shall deem most advantageous", "hereby ratifying and confirming whatever our agent shall do in the premises" are disregarded as meaningless verbiage. As to the introduction of parole evidence, see Section 48.

Id.

93. DUKEMINIER & JOHANSON, *supra* note 87, at 397.

94. I.R.C. § 2503(b) (LEXIS 2000).

95. *Id*.

96. 26 C.F.R. § 25.2511-2 (LEXIS 2000).

97. *See generally* Treas. Reg. § 25.2503-3 (2000).

98. Metzger v. Comm'r, 38 F.3d 118 (4th Cir. 1994).

99. *See generally* I.R.C. §§ 2031-2046.

100. *Id.* § 2035 (1997).

101. *Id.* (amended by Pub. L. 105-34, § 1310(a)) (applies to the estates of decedents dying after 5 August 1997).

102. I.R.C. § 2036 (LEXIS 2000).

able gross estate.[106] In other words, an individual cannot dodge the tax consequences of property transfers at death while remaining in a position during life to enjoy some or all of the fruits of ownership.[107] The gross estate includes the value of property interests transferred by a decedent (except to the extent that the transfer was made for full consideration) if the enjoyment of the property was subject to any power of the decedent to alter, amend, revoke, or terminate the transfer at the date of the death.[108]

What is the importance of these estate tax provisions when making gifts using a power of attorney? The IRS has used these provisions to contest gifts made by attorneys-in-fact by arguing that POAs that do not include specific gifting language result in the inclusion of gifts in the estate because the agents are acting without authority to gratuitously transfer the principals property, and consequently the gifts are actually "revocable transfers."[109]

Gifting and POAs[110]

Although a general POA would apparently include the ability to make gifts, the IRS has repeatedly challenged the authority of the attorney-in-fact to make gifts when gifting language is not included in the POA.[111] The general assumption is that the attorney-in-fact must act in the principal's best interest. Giving away the principal's assets is not ordinarily in the principal's best interests. Most states follow the common law rule that a general DPOA does not include a power to gift.[112] Normally, unless the POA includes a specific power to make gifts, the attorney-in-fact does not have the power to make gifts.

A dilemma occurs when an attorney-in-fact makes gifts on behalf of a principal who later dies, but the POA does not contain a specific power to make gifts. The IRS may assert that the gifts are includible in the gross estate of the decedent because the transfer was revocable.[113] The rationale for this assertion by the IRS is that if the principal regains capacity to act, the principal could recover the unauthorized gifts. Therefore, if the estate plan of the individual needs to include the ability to make gifts as a planning technique, it is critical to grant specific authority to make gifts in the DPOA.

If the attorney-in-fact does hold the power to make gifts, then any such gift is complete at the time it is made for the reason that the principal is bound by the acts of the attorney-in-fact.[114] On the other hand, if the attorney-in-fact is not authorized to make gifts under the POA, then the transfers are considered to be revocable by the principal despite that the principal may in reality not have the mental capacity to revoke the gift. A transfer that is revocable by a decedent due to an attorney-in-fact's lack of power, is includible in the decedent's estate for estate tax purposes.

While most courts have concurred with the IRS position, a few courts have interpreted broad grants of power to include the power to make gifts.[115] When a DPOA does not contain specific gifting language, state law governs an attorney-in-fact's authority to make gifts.[116] Currently, only two states provide statutory authority that specifically recognizes that a general grant of power includes an implied authority to make gifts.[117] Most states have not addressed the issue of an attorney-in-fact's power to make gifts when a DPOA does not contain specific

103. *Id.* § 2037.

104. *Id.* § 2038.

105. *Id.* § 2042.

106. *Id.* § 2036.

107. *Id.* §§ 2036-2038.

108. *Id.* § 2038.

109. *Id.*; Townsend v. United States, 889 F. Supp. 369 (D. Neb. 1995); Estate of Casey v. Comm'r, 948 F.2d 895 (4th Cir. 1991).

110. For an extensive review of this subject, see generally Valerie Finn-DeLuca, *The Federal Tax Problems Posed by Durable Powers of Attorney Which are Ambiguous as to the Agent's Authority to Make Gifts*, 22 N. Ky. L. Rev. 891 (1995).

111. *See generally Agents Under Powers: Can They Make Gifts?*, 19 Tax Mgmt. Est., Gifts & Tr. J. 89 (1994).

112. *See generally* Russell E. Haddleton, *The Durable Power of Attorney: An Evolving Tool*, 14 Prob. & Prop. 58 (May/June 2000).

113. I.R.C. § 2038.

114. S*ee generally* Finn-DeLuca, *supra* note 110.

115. *See, e.g.*, Estate of Bronston v. Comm'r, 56 T.C.M. (CCH) 550 (1988); Estate of Gagliardi v. Comm'r, 89 T.C.M. 1207 (1987); Estate of Council v. Comm'r, 65 T.C. 594 (1975).

116. *See generally* Finn-DeLuca, *supra* note 110.

gifting language. In the majority of states that have not addressed this issue statutorily or judicially, the IRS takes the position that a DPOA which does not explicitly authorize the attorney-in-fact to effectuate gifts creates revocable transfers which are incomplete for gift tax purposes and subject to taxation as part of the estate.[118] Conversely, the Tax Court has inferred gift giving authority not specifically provided in a DPOA in only a few situations when the attorney-in-fact could demonstrate he was carrying out a long established pattern of gift giving by the principal.[119] Nevertheless, these cases are the exception rather than the norm and should not be relied upon in the majority of states.

Swanson[120] *and* Pruitt[121]

Two recent cases illustrate the importance of careful draftsmanship of general DPOAs and coordination of the POA with an estate plan. The lessons from these cases are valuable to practitioners who have drafted general POAs using the prior military drafting software (such as Patriot Expert Systems) and the new DL program.

In 1985, Sylvia Swanson was declared legally blind and a relative began to manage almost all of her assets and financial affairs. In 1990, the health of Mrs. Swanson quickly deteriorated. Mrs. Swanson executed a DPOA which purported to give her agent the legal authority to manage and dispose of her property and to conduct business on her behalf. The DPOA was

117. ALA. CODE § 26-1-2.1 (2000) (Attorney-in-fact; power to make gifts), states:

> (a) If any power of attorney or other writing either authorizes an attorney in fact or other agent to do, execute, or perform any act that the principal might or could do, or evidences the principal's intent to give the attorney in fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney in fact or agent shall have the power and authority to make gifts of any of the principal's property to any individuals, including the attorney in fact or agent, within the limits of the annual exclusion as provided by Section 2503(b) of Title 26 of the United States Code, and taking into account the availability of Section 2513 of Title 26 of the United States Code, as the same may from time to time be amended, or to organizations described in Sections 170(c) and 2522(a) of Title 26 of the United States Code, or corresponding future provisions of federal tax law, or both, as the attorney in fact or agent shall determine: (1) to be in the principal's best interest; (2) to be in the best interest of the principal's estate; or (3) that will reduce the estate tax payable on the principal's death; and is in accordance with the principal's personal history of making or joining in the making of lifetime gifts.
>
> (b) Subsection (a) shall not in any way impair the right or power of any principal, by express words in the power of attorney or other writing, to further authorize, expand, or limit the authority of any attorney in fact or other agent to make gifts of the principal's property.
>
> (c) This section is declaratory of Section 26-1-2 and shall not be construed to nullify any actions taken by any attorney in fact prior to May 6, 1994.

Id.

VA. CODE ANN. § 11-9.5 (2000) (Gifts under power of attorney), states:

> A. If any power of attorney or other writing (i) authorizes an attorney-in-fact or other agent to do, execute, or perform any act that the principal might or could do or (ii) evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact or agent shall have the power and authority to make gifts in any amount of any of the principal's property to any individuals or to organizations described in §§ 170 (c) and 2522 (a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts.
>
> B. Subsection A shall not in any way impair the right or power of any principal, by express words in the power of attorney or other writing, to authorize, or limit the authority of, any attorney-in-fact or other agent to make gifts of the principal's property.
>
> C. After reasonable notice to the principal, an attorney-in-fact or other agent acting under a durable general power of attorney or other writing may petition the circuit court for authority to make gifts of the principal's property to the extent not inconsistent with the express terms of the power of attorney or other writing. The court shall determine the amounts, recipients and proportions of any gifts of the principal's property after considering all relevant factors including, without limitation, (i) the size of the principal's estate, (ii) the principal's foreseeable obligations and maintenance needs, (iii) the principal's personal history of making, or joining in the making of, lifetime gifts**,** (iv) the principal's estate plan, and (v) the tax effects of the gifts.

Id.

118. *See, e.g.*, Estate of Casey v. Comm'r, 948 F.2d 895, 898 (4th Cir. 1991); Tech. Adv. Mem. 93-97-003 (Aug. 5, 1993); Tech. Adv. Mem. 92-31-003 (Apr. 9, 1992); Tech. Adv. Mem. 93-42-003 (June 30, 1993).

119. *See, e.g.*, Estate of Bronston v. Comm'r, 56 T.C.M. (CCH) 550 (1988); Estate of Gagliardi v. Comm'r, 89 T.C.M. 1207 (1987); Estate of Council v. Comm'r, 65 T.C. 594 (1975).

120. 46 Fed. Cl. 388 (2000).

121. Estate of Pruitt v. Comm'r, 80 T.C.M. (CCH) 348 (2000).

very broad in the authority and discretion it purported to authorize the agent. However, the DPOA *did not* include specific gifting language or provisions. The DPOA gave the agent the "sole discretion" as to when he should invoke the powers conferred by the DPOA. The DPOA was properly executed and witnessed. A couple of months after the execution of the DPOA, the agent approached Mrs. Swanson with the idea of making $10,000 gifts to forty individuals for "minimizing the tax impact on her estate."[122] Mrs. Swanson approved thirty-eight gifts to potential gift recipients by nodding her head when the agent read each individual's name. The agent wrote, signed, and delivered thirty-eight checks made out to thirty-eight separate individuals for $10,000 each. Mrs. Swanson died the following week.[123]

Sometime after her death, the estate of Mrs. Swanson paid estate tax on the $380,000 of gifts, and filed a claim for refund for the tax on the gifts. The IRS denied the claim for the refund. The estate then brought an action in the United States Court of Federal Claims. The IRS asserted that all thirty-eight gifts made by the agent were beyond the power given to the agent under the DPOA and thus were void under state law. The IRS argued that Mrs. Swanson retained a power of revocation over the gifts and they were includible in her gross estate.[124] The Court of Federal Claims agreed with the IRS position.[125]

In *Swanson*, the decedent's DPOA did not give her attorney-in-fact authority to make gifts, and therefore the gifts were void under state law (California). Because the gifts were void, the decedent retained the right to revoke the gifts, and the gifts were includible in her estate.[126] Most states agree with the IRS position that when an attorney-in-fact or agent is acting without authority or beyond the scope of the expressed powers of the general POA, the gifts are actually revocable transfers.[127] The *Swanson* court reiterated that the legality of a gift made under a POA depends on state law.[128] The court pointed out that California law does not automatically give the attorney-in-fact the right to give away the principal's property.[129]

The estate unsuccessfully argued to the court that the POA gave the attorney-in-fact the right to make the gifts. However, the POA did not contain any specific gifting language. The estate argued that even if the attorney-in-fact did not have authority to make the gifts under the POA, the decedent ratified the gifts when she nodded as each prospective beneficiary's name was read to her. The court did not agree. The court relied upon state law that said that any additional authority given the attorney-in-fact must be done in writing.[130] According to California law, a transfer of assets by an attorney-in-fact without proper authority is void.[131] The *Swanson* court held that the decedent could have revoked the transfers by the attorney-in-fact before death, and the estate could have pursued the collection of the revoked gifts before death. The decedent retained the right to revoke the gifts and each of the thirty-eight gifts of $10,000 was included in the decedent's gross estate for estate tax purposes.[132]

In *Pruitt*,[133] the U.S. Tax Court had the opportunity to address a similar situation, but in a different state and with a slightly different twist on the facts. Beginning in the 1980's, the decedent engaged in lifetime estate planning techniques in order to lower her potential estate tax liability and increase her children's inheritance. From 1980 to 1992, the decedent consistently engaged in a pattern of making lifetime gifts to her children (and their spouses) and grandchildren in order to reduce the size of her estate. From 1987 to 1993, the decedent executed three different powers of attorney to the same agent or attorney-in-fact. None of the POAs contained specific gifting provisions or language. Beginning in 1993, the decedent's mental condition had deteriorated to the point where she lacked

122. *Swanson*, 46 Fed. Cl. at 390.

123. *Id.*

124. *See generally* I.R.C. § 2038(a)(1) (LEXIS 2000).

125. *Swanson*, 46 Fed. Cl. at 391.

126. *Id.* at 393 (applying I.R.C. § 2038(a)(2)).

127. The majority of courts have agreed with the IRS position, but some cases have interpreted broad grants of power to include the authority to make gifts. *See, e.g.*, Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L. J. 143 (1996).

128. *Swanson*, 46 Fed. Cl. at 391 (citing Morgan v. Comm'r, 309 U.S. 78 (1940); Mapes v. United States, (9th Cir. 1994)).

129. *Id.* (citing Huston v. Greene, 51 Cal. App. 4th 1721, 1726 (Cal. Ct. App. 1997); Randall v. Duff, 19 P. 532 (Cal. 1888), *adhered to on reh'g* 21 P. 610 (Cal. 1889); Bertelsen, 122 P.2d 130 (Cal. Dist. Ct. App. 1942)).

130. *Id.* (citing *Huston*, 51 Cal. App. 4th at 1727 (quoting CAL. CIV. CODE § 2310 (2000))).

131. *Id.* at 393.

132. *Id.* (citing I.R.C. § 2038(a)(2)).

133. Estate of Pruitt v. Comm'r, 80 T.C.M. (CCH) 348 (2000).

the mental capacity to discuss gifting with the attorney-in-fact. The agent used the DPOA to make gifts to family members and their spouses. The gifts made in 1993 and 1994 pursuant to the DPOA were not included in the calculation of the of the decedent's gross estate.[134]

The IRS asserted that the gifts made by the attorney-in-fact pursuant to the DPOA were not expressly authorized by the DPOA and were includible in the decedent's gross estate. However, unlike the *Swanson* case, the court held that the decedent did not have the right to revoke the gifts on her date of death and the gifts were not includible in her gross estate. Despite the lack of specific language in the DPOA regarding the authority to make gifts, the court looked beyond the DPOA to find that the decedent had a history or record in the case showing a clear intent on the part of the decedent to include the power to make gifts in the DPOA. The court held that the gifts made were authorized by the DPOA, despite the lack of specific language or a specific gifting provision.[135]

Lessons from Swanson & Pruitt

What lessons can be learned from *Swanson*? The case highlights the significance of advance estate planning and careful consideration. In the proper situation, legal assistance clients, particularly retirees, should be counseled to make annual exclusion gifts as early on as possible. The client should also be counseled regarding the importance of giving a DPOA that permits the making of gifts. In the event of the incapacitation of the client, the attorney-in-fact would be in a position to make annual exclusion gifts on behalf of the client and thereby save estate taxes. The ill-fated tax consequence of *Swanson* easily could have been avoided if the DPOA had been drafted to include specific authority for the attorney-in-fact to make gifts. Generally, an attorney-in-fact does not have implied authority to make gifts under a DPOA (depending on state law). The provisions in California regarding the POA are common in most other states. In some situations, making a number of gifts using the annual exclusion and a general DPOA is an effective way to reduce a client's gross estate. However, the legal assistance attorney must make sure that the gift giving is allowable under the instrument. When drafting the POA, the client and attorney should consider the potential need and usefulness of including gifting language in the POA. Likewise, legal assistance attorneys that advise clients regarding the ability to use a general DPOA need to look closely at the language of the document (if already in existence) to make sure the document has gifting language if that is the desire of the client.

Pruitt can be distinguished from *Swanson*. All parties in the *Pruitt* case agreed that the DPOA did not contain an express authorization for the attorney-in-fact to make gifts. However, the Tax Court applied the state law and examined not only the language of the POA, but the facts and circumstances surrounding the execution of the POA to ascertain whether the power to make gifts must be inferred to give effect to the decedent's intent. The *Pruitt* court held that its goal was to ascertain whether the decedent had the intent to confer gift-giving power upon the attorney-in-fact.[136] In *Pruitt*, the court rationalized that the power to make gifts was inferred from the language of the POA and the state law controlling did not contain a prohibition on inferring the power to make gifts. In addition, the state jurisdiction considered the principal's intention in interpreting the POA which was manifest in the principal's pattern of gifting prior to the initiation of gifting by the attorney-in-fact . The gifts made by the attorney-in-fact were consistent with the principal's prior gifting, and the gifts did not deplete the principal's assets to the principal's detriment. Finally, it was clear there had been no fraud or abuse by the agent.[137]

In light of *Swanson* and *Pruitt*, legal assistance practitioners should closely examine the intent of their clients regarding the ability of their agents to make lifetime gifts pursuant to general DPOAs. The result may be surprising for some practitioners that drafted POAs using the Patriot Expert System (and its predecessors). The DPOAs drafted using the Patriot Expert Systems did not contain any gifting language or provisions. Many legal assistance clients may be under the false impression that the general DPOA they currently have in their estate plan will allow their agent to make gifts. For practitioners drafting POAs using the DL program, the attorney will need to understand the importance of options available for the making of lifetime gifts and include the appropriate gifting language if the client desires the agent to have such powers.

Drafting Considerations

In drafting a POA, it is important to state specifically all the powers the principal intends to convey. When a client desires to confer the power to make gifts upon his agent, the POA should explicitly state that the attorney-in-fact has the power to make gifts for purpose of estate planning. Although a few cases were mentioned where courts looked to the pattern of past gifts by the principal to establish the authority to make gifts in the absence of specific language, a drafter should by no means rely on this versus including specific language in the POA.

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134. *Id.*

135. *Id.*

136. *Id.* (citing Estate of Bronston v. Comm'r, 56 T.C.M. (CCH) 550 (1988); Estate of Neff v. Comm'r, 73 T.C.M. (CCH) 2606 (1997)).

137. *Id.*

Many clients select an agent in a POA that is trusted implicitly and thus, the client is not concerned with the abuse of power. Is it advisable to provide the trusted agent with the unlimited ability to make gifts? From the standpoint of the principal, there may be no downside to giving unlimited ability to gift to a trusted agent. In the event the agent is not a potential beneficiary, there is no problem. However, most agents are family members and also potential beneficiaries. The dilemma is that under the Internal Revenue Code, the agent is considered to possess a general power of appointment.[138] If the attorney-in-fact predeceases the principal, the principal's entire estate will be included in the attorney-in-fact's gross estate. This sticky situation requires the client and the drafting attorney to develop a line of attack that allows the attorney-in-fact to make substantial gifts and yet avoids unfavorable gift and estate tax consequences to the agent.

There are several strategies for employing a restriction on an attorney-in-fact's gifting power.[139] It is common to limit the power to make gifts in a POA to a specific dollar limitation. For example, the limitation could state an amount not to exceed the annual gift tax exclusion (currently $10,000 per person, per year) or an amount not to exceed the principal's unused unified credit amount. The limitation reduces the agent's exposure upon death. In addition, some clients may want to identify a class of potential beneficiaries to some extent. The disadvantage of limiting a potential class is that the restriction may prevent the attorney-in-fact from taking complete advantage of the annual exclusion in order to avoid potential estate taxation. Another approach is to use the ascertainable standard exception to the general power of appointment rule.[140] An ascertainable standard includes amounts for health, education, maintenance, and support.[141] Finally, an annual limitation on gifting to the greater of $5000 or five percent ("5 and 5 power") of the aggregate value of the assets subject to the power also limits the negative tax exposure.[142] Upon the death of the agent, the tax liability arising under the POA would be limited to the "5 and 5" power if the assets have not already been withdrawn during that year. Limitations in the POA using the annual exclusion, the ascertainable standard, and "5 and 5" power formulas limit the agent's exposure for estate taxes upon his death and reduces the potential for abuse.

Conclusion

The foundation of military estate planning for disability or incompetency is the DPOA. The basic reason most individuals need a DPOA is to prevent the requirement for an unnecessary and burdensome guardianship. For legal assistance clients with potentially taxable estates, a properly drafted DPOA is an effective component of an estate plan that can significantly reduce taxation. Automation programs such as the DL program greatly enhance the estate planning arsenal of the legal assistance attorney. Despite the fact the DL program assists the attorney in drafting a general DPOA, the attorney still must be an effective document drafter and make the appropriate selections regarding the inclusion of clauses in the general DPOA. Military attorneys may encounter clients from all fifty states. It is not realistic for legal assistance attorneys to commit to memory the law of each state regarding DPOAs and gifting. However, the legal assistance attorney must understand the importance of including specific gifting language in the general DPOA for clients that are involved in a gifting program, or may need to engage in a gifting program prior to their death. Major Rousseau.[143]

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138. *See* I.R.C. § 2041 (2000). For more information on a general power of appointment, see Major Joseph E. Cole, *Essential Estate Planning: Tools and Methodologies for the Military Practitioner*, ARMY LAW., Nov. 1999, at 1, 13-14.

139. *See generally* Strauss & Adler, *supra* note 91, at 7.

140. I.R.C. § 2041(b)(1)(A); I.R.C. § 2514(C)(1) (LEXIS 2000).

141. *Id.*

142. The tax code allows a power limited to this method to avoid gift taxation when the power lapses each year. I.R.C. § 2514.

143. Major Vivian Shafer, 48th Graduate Course, assisted with the preparation of this article.

Appendix[144]

State	Statute Section	Comment	Durable	Springing/Contingent
Alabama	ALA. CODE § 26-1-2 (LEXIS 2000)		Yes	Yes
Alaska	ALASKA STAT. § 13.26.350 (LEXIS 2000)		Yes	Yes
Arizona	ARIZ. REV. STAT. § 14-5502 (LEXIS 2000)		Yes	Yes
Arkansas	ARK. STAT. ANN. § 28-62-201, § 28-62-202 (LEXIS 1999)		Yes	Yes
California	CAL. PROB. CODE § 4124, 4125, 4029, 4030 (LEXIS 2000)	Written declaration required asserting that contingency has occurred.	Yes	Yes
Colorado	COLO. REV. STAT. § 15-14-501, § 15-14-604 (LEXIS 1999)		Yes	Yes
Connecticut	CON. GEN. STAT. § 45a-562, § 1-56h (LEXIS 1999)	For Springing POA, the POA must require that a written affidavit be executed to verify that the contingency has occurred.	Yes	Yes
Delaware	12 DEL. CODE ANN. § 4901, 4902 (LEXIS 1999)		Yes	Yes
District of Columbia	DIST. COL. CODE § 21-2081, 2081 (LEXIS 1999)		Yes	Yes
Florida	FLA. STAT. § 709.08 LEXIS 1999)	Current statute has specific limitations on powers.	Yes	No
Georgia	GA. CODE ANN. § 10-6-6, 10-6-36 (LEXIS 1999)	POA does not terminate at incompetence unless expressly provided. Agent must execute written declaration that the contingency has occurred. POA valid until administrator appointed or judicial action to terminate.	Yes	Yes
Hawaii	HAW. REV. STAT. § 551d-1, 551d-2 (LEXIS 1999)		Yes	Yes
Idaho	IDAHO CODE § 15-5-501, 15-5-502 (LEXIS 1999)		Yes	Yes

144. Appendix furnished by the Office of The Judge Advocate General, Legal Assistance Policy Division.

Illinois	755 ILL. COM. STAT. ANN. § 45/2-4, 45/2-5, 45/2-6 (LEXIS 2000)		Yes	Yes
Indiana	IND. CODE ANN. § 30-5-10-3, 30-5-3-2, 30-5-4-2 (LEXIS 1999)		Yes	Yes
Iowa	IOWA CODE § 633.705 (LEXIS 1999)		Yes	Yes
Kansas	KAN. STAT. ANN. § 58-610, 58-611 (LEXIS 1999)		Yes	Yes
Kentucky	KEN. REV. STAT. § 386.093 (LEXIS 1998)		Yes	Yes
Louisiana	LA. CIV. CODE art. 3026; LA. REV. STAT. § 9:3861 - 9:3887 (LEXIS 2000)		Yes	[a]
Maine	ME. REV. STAT. § 5-501, 5-502, 5-508 (LEXIS 1999)	A financial durable POA must be notarized. There is required language for a durable financial POA.	Yes	Yes
Maryland	MD. EST. & TRUSTS CODE ANN. § 13-601 (LEXIS 1999)		Yes	[b]
Massachusetts	MASS. ANN. LAWS Ch. 201B § 1 Ch. 201B § 1 (LEXIS 2000)		Yes	Yes
Michigan	MICH. STAT. ANN. § 700.5501, 700.5502 (LEXIS 1999)		Yes	Yes
Minnesota	MINN. STAT. § 523.02, 523-07 (LEXIS 1999)	POA valid if valid pursuant to law of another state.	Yes	Yes
Mississippi	MISS. CODE ANN. § 87-3-105, 87-3-107 (LEXIS 2000)		Yes	Yes
Missouri	MO. REV. STAT. § 404.705 (LEXIS 1999)		Yes	[c]
Montana	MONT. CODE ANN. § 72-5-501, 72-31-222 (LEXIS 1999)		Yes	Yes
Nebraska	NEB. REV. STAT. ANN. § 30-2665, 49-1510, 1511, 1518, 1523, 1524 (LEXIS 2000)		Yes	Yes
Nevada	NEV. REV. STAT. ANN. § 111.460 (LEXIS 2000)		Yes	Yes
New Hampshire	N.H. REV. STAT. ANN. § 506:6 (LEXIS 1999)		Yes	[d]
New Jersey	N.J. REV. STAT. § 46:2B-8 (LEXIS 2000)		Yes	Yes

New Mexico	N.M. STAT. ANN. § 45-5-501, 45-5-502 (LEXIS 2000)		Yes	[e]
New York	N.Y. GEN. OBLIG. LAW § 5-1505, 5-1506 (LEXIS 2000)	POA must require that the agent declare in writing that the contingency has occurred.	Yes	Yes
North Carolina	N.C. GEN. STAT. § 32A-8, 32A-9 (LEXIS 1999)	Needs to be registered in the office of the register of deeds of the county in the state designated in the POA, or if none, designated office in county of legal residence of principal at time of registration, or if unsure of residence, in county in which principal owns property.	Yes	Yes
North Dakota	N.D. CENT. CODE § 30.1-30-01, 30.1-30-02 (LEXIS 2000)		Yes	Yes
Ohio	OHIO REV. CODE ANN. § 1337.09 (LEXIS 2000)		Yes	Yes
Oklahoma	OK. STAT. tit. 15 § 1004, 1072, 1073 (LEXIS 1999)		Yes	Yes
Oregon	OR. REV. STAT. § 127.005 (LEXIS 1997)		Yes	No
Pennsylvania	20 PA. CONS. STAT. § 5601.1, 5604 (LEXIS 1999)		Yes	Yes
Rhode Island	R.I. GEN. LAWS § 34-22-6.1, 23-4.10-11 (LEXIS 2000)		Yes	Yes
South Carolina	S.C. CODE ANN. § 62-5-501 (LEXIS 1999)		Yes	Yes
South Dakota	S.D. CODIFIED LAWS § 59-7-2.1 (LEXIS 2000)		Yes	No
Tennessee	TENN. CODE ANN. § 34-6-102, 34-6-103 (LEXIS 1999)		Yes	Yes
Texas	TEX. PROB. CODE § 482, 484 (LEXIS 2000)		Yes	Yes
Utah	UTAH CODE ANN. § 75-5-501 (LEXIS 1999)		Yes	Yes
Vermont	14 VT. STAT. ANN. § 3051 (LEXIS 2000)		Yes	Yes
Virginia	VA. CODE ANN. § 11-9.1, 11-9.4 (LEXIS 1999)		Yes	Yes
Washington	WASH. REV. CODE § 11.94.010 (LEXIS 2000)		Yes	Yes

West Virginia	W. VA. CODE ANN. § 39-4-1, 34-4-2 (LEXIS 2000)		Yes	Yes
Wisconsin	WIS. STAT. § 243.07 (LEXIS 1999)		Yes	Yes
Wyoming	WYO. STAT. ANN. § 3-5-101 (LEXIS 2000)		Yes	Yes

a. Louisiana statutes do not specifically address springing powers. However, LA. REV. STAT. § 3862 (LEXIS 2000), contains a sample military power of attorney that contains language that indicates the power of attorney is effective immediately unless otherwise directed.
b. Maryland changed its statute effective 1 January 2000. Previously, the law was clear that a power of attorney could become effective upon the disability of the principal. When the new statute was enacted, that language was deleted. The new statute provides that a power of attorney is durable unless otherwise provided by its terms.
c. The statute in Missouri does not clearly provide for a springing power of attorney, but the statute has a sample phrase that seems to contemplate a springing power of attorney.
d. There is no statute or case in New Hampshire on point as to whether a springing power of attorney is authorized.
e. New Mexico statutes doe not expressly provide for a springing power of attorney, but the statute has a sample phrase that contemplates a springing power of attorney. However, N.M. STAT. ANN. § 45-5-602 (LEXIS 2000), a statutory form of power of attorney, seems to allow for springing powers.