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As we are about to convene again, this time in Quebec for the ABA Family Law Section Fall Conference, I must send my regrets. Happily, one of our associates, Ms. Casey Doyle, is getting married, and I must attend. Sadly, I will miss all of you at the end of a very interesting year for military domestic law. And, I am not even talking about Trump and Clinton. No, aside from the Presidential Race, 2016 is a watershed moment for military domestic law.

There are three reasons why I say this, and each one has significant, long-term effects on the military and the practice of military domestic law. In no particular order of importance, these are:

First, a new military retirement plan is coming. In November of 2015, Congress revamped the decades-old military retirement system. The “all or nothing” or “cliff vesting” plan - requiring twenty years of service for retirement - is no more. Gary Port does a great job laying that out in his article “The New Military Retired Pay System.” In many respects the new plan resembles the Federal Employees Retirement System. The new plan changes the pension from 50% after 20 years to 40%. However, it adds a Thrift Savings Plan, with a minimum government contribution of 1% and a maximum of 5% if the service member matches it. For those who qualify, the plan also includes some, as yet, undefined bonuses paid to service members who opt into it.

Some say this new plan will erode the force and fail to incentivize new recruits, while fans claim the opposite. Time will be the judge. What is certain, the new system and those who fade away under the old will make military domestic law a more variegated landscape for at least twenty years.

Second, Congress may soon limit the way a military pension is divided. As Fred Arquilla tells us in his article “Proposed Amendment to the Former Spouse Protection Act” the Fiscal Year 2017 Defense Authorization Bill contains a proposed amendment, which would mandate that a former spouse’s entitlement to military retired pay shall be frozen effective on the date of divorce, at the rank and number of years of service of the service member on the date of divorce. Until now, this method - also frequently called the “hypothetical” division - has been one of four possible division methods available to the trial court.

This bill has already been approved by both the House and Senate; however, it has not yet been forwarded to or approved by the President. It now looks like the final bill may not be considered until November, after the 2016 presidential election. Overall, a mandated hypothetical division will tremendously and negatively impact spouses in long-term marriages where the marriage has spanned more than ten years of a typical twenty year military career. Opinions vary widely regarding the fairness of this amendment. One interesting effect, is that all pension divisions now will use the method generally regarded as the most complex to draft. Again, time will tell whether the President will approve the amendment, whether the public backlash will effect its longevity and whether it will vastly increase rejected pension division orders for faulty drafting. It will be interesting to see how this evolves.

And third, the United States Supreme Court is looking into matters of Veterans Administration (VA) waiver of military pension. Since 1982, military pensions have been divisible in divorce; however, the question of whether a service member can waive a portion of the pension for VA disability and be required to indemnify the former spouse has remained open. Ten state supreme courts have addressed the matter, and there is an even split regarding whether the doctrine of federal preemption bars state courts from indemnifying spouses whose portions of military retired pay is reduced by the retiree’s decision to receive VA
disability. The Arizona case of John Howell v. Sandra Howell raises this issue. The Supreme Court may hold that a trial court may order indemnification for a subsequent waiver of military pension for VA disability pay, or it may not. Since this issue has been a hot-button potential malpractice area for years, many feel some clarity would benefit us all. Again, time will tell. Family law is not the only area where the winds of change are blowing. As Jessica McBride reminds us, criminal law is no stranger to the military. Jessica does a fabulous job in her article “Implementation of the Model State Codes of Military Justice: An Analysis of Jurisdictional Requirements.” Jessica explains how the active military falls under the Uniform Code of Military Justice, but the National Guard of the 54 states and territories does not. Jessica’s article hits home, since 24 states have adopted similar state codes of military justice. I currently serve in the Alabama National Guard. Alabama adopted its revised military code in 2012, and I am part of the effort to test its code through a series of mock courts martial.

Finally, the US military continues to wage war against America’s enemies overseas while simultaneously drawing down, gender norming its ranks and occupational specialties and combating its inherent flaws (i.e. sexual assault, domestic violence, post-traumatic stress) while at the same time significantly revamping its family law laws and the laws the effect its members. For all of you who regularly represent service members, please read these fine articles and study these changes, because they will likely be with us for a long time.

-Steve Shewmaker

Introduction from the Editor

I am excited to help bring forward the Fall 2016 Edition of Roll Call, which addresses some very interesting and time sensitive issues in the military family law realm. As the Editor for this unique and highly beneficial newsletter, I want to take a moment to reiterate that this is a newsletter by and for the members of this section. Your input and contributions to this newsletter play a crucial role in continuing to provide a valuable resource for military family law practitioners and professionals. With that in mind, I would strongly encourage anyone who has an interest in publishing and article in Roll Call in the coming year to reach out to me. I am always happy to entertain proposals for articles and will make every effort to ensure that your article makes it into the newsletter. Again, I am happy to consider a wide variety of articles, from copiously researched and footnoted articles to a more informal article on a matter of personal experience or immediate importance.

Lastly, if anyone has any suggestions for additional items, sections, or segments that they would like to see in the newsletter, please contact me to discuss. Again, this is your newsletter and I look forward to hearing your feedback on how we can improve it.

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A proposed amendment to the Former Spouses Protection Act (FSPA) is contained in the Fiscal Year 2017 Defense Authorization Bill. This Bill, as of this writing, has been approved by both Houses of Congress, but has not yet been forwarded to or approved by the President. In my view, the likelihood that this proposed amendment to the FSPA will be further amended or deleted from the Authorization Bill is not good.

The proposed amendment to the FSPA is not retroactive. The amendment would also not affect those who divorce a military member after the member has retired or who is very near retirement.

The proposed amendment would provide that a former spouse’s entitlement to military retired pay in future divorces will be frozen effective the date of the divorce to the rank and number of years of service of the military member at the time of the member’s divorce.

The best way to explain this change is by means of an example as to what this would mean in present day dollars if the amendment had been the law in the past.

Under the present law, if a wife after 15 years of being a military wife separated from her husband (and divorced him in Virginia) when he was a major (0-5) in 2001 and 15 years later in 2016 he retires as a colonel 0-6 with 30 years of service, she would receive 25 percent (15/30 times ½) of his military retired pay as a colonel with 30 years’ Service. Retired pay would be 75 percent of his active duty pay (ignoring for ease of the example that military retired pay is based on the average high three earnings years). This would mean that the former spouse would receive each month, under present pay scales, $2,080 ($11,094.90 active duty 0-6 pay at over 30 years times 0.75 times 0.25).

If the proposed amendment had been effect all these years, then under the same facts the former spouse would receive each month, under present pay scales, $685 ($7,314.90 present active duty 0-4 pay times 0.375 times 0.25). The figure 0.375 is arrived at by multiplying 15 years times the retirement factor of 0.25 per year). In other words, under the example given, the former spouse would suffer a decrease of $1,395 per month after waiting 15 years for the member to retire, during which time she would receive nothing.

The earlier FY 2016 Defense Authorization Bill implemented a so-called Blended Retirement System that will take effect in 2018. Under this law, had it been effect all these years, the retirement factor of 0.25 per year would be reduced to 0.20, which would mean that in the above example the former spouse would receive $549 per month.

Obviously, the economic impact on former spouses is greatest for those who divorce members at the midpoint of their military careers. For those who divorce after members have served almost 30 years of active military duty, there will be little impact on former spouses under either the proposed amendment to the FSPA or the Blended Retirement System.

Nevertheless, family lawyers will generally find the proposed amendment to the FSPA to be very unfair to former spouse because under Federal law their entitlement to the military member’s retirement benefits is being handled much less favorably than would be their entitlement as former spouses under civilian pension systems (e.g., school teachers and police) or under other Federal pension systems. Indeed, if military former spouses are employed under such systems, as many are, they may, in some divorce situations, have to give up more to their military spouses than what they would gain under the amended FSPA.
Implementation of the Model State Codes of Military Justice: An Analysis of Jurisdictional Requirements

Jessica McBride is a J.D. Candidate (May 2017), Concordia University School of Law, Boise, Idaho. She is also a Military Intelligence Officer with the Idaho Army National Guard. She is a lifelong learner and enjoys martial arts as well as raising three children. This note is adopted from a full article written as a Student Note for the Concordia Law Review.

“Discipline is the soul of an Army. It makes small numbers formidable; procures success to all of the weak, and esteem to all.” The military has a requirement for a comprehensive military justice system that is fair and efficient. The National Guard is no exception; as a military force, the Guard must maintain good order and discipline in order to create effective and cohesive units. The active duty meets this requirement using the Uniform Code of Military Justice (UCMJ) and its universal, status-based applicability to Active Duty servicemembers. The UCMJ is a commander’s critical tool to enforce discipline in his or her formation. However, the UCMJ is not applicable to members of the National Guard when serving in a Title 32 status. National Guardsmen are subject to their state or territory’s code of military justice. Because of a lack of uniformity in state codes of military justice, there has been a trend for states to adopt the Model State Code of Military Justice (MSC). The purpose of this article is to discuss the origin and applicability of the MSC, as well as jurisdictional issues arising under the MSC. Civil practitioners should be aware of these issues as they represent clients facing military justice actions under state codes of military justice.

Title 32 of the United States Code governs the National Guard, both air and land components. Each of the 54 states and territories maintain National Guard units under the direct control of each state’s Governor. However, the federal government may activate the National Guard under Title 10 in order to augment the active-duty forces as operational requirements dictate.

In order to fulfill both state and federal missions, National Guardsmen may serve in one of four different capacities, or “statuses.” The first is known as “Title 10 status” and is used when a Guardsman is mobilized for a federal mission. In this status a member of the National Guard is legally equivalent to an active-duty soldier. The second status is called “Title 32 full-time active-duty.” These Guardsmen are commonly referred to as Active Guard/Reserve or AGRs. This status also includes members of the Guard who are active-duty for a special purpose—such as work within a school, on a special project or in operational support. The third status is called “State Active-duty.” This status requires that the governor activate the militia to support a state mission such as firefighting, floods, hurricanes or civil disobedience. These members are placed on orders, which are funded by the state. Finally, the most common status is the Title 32 “Traditional” or “M-Day” status. Guardsmen in this status are only obligated to serve one weekend a month and two weeks a summer with the National Guard.

When a servicemember commits criminal misconduct “on duty,” that servicemember’s particular status becomes a question of critical legal importance, since status determines which set of laws to which the member is subject. Title 10 military members are subject to the UCMJ. Guardsmen in a Title 32 or State Active Duty status are not subject to the UCMJ. These members are subject to either the particular civilian criminal laws of their jurisdiction or the code of military justice in their state.

Unfortunately, because of the statutory differences between Title 10 and Title 32, each state and territory must adopt its own code of military justice. As mentioned, because there are 54 different state codes of military justice, there has been a disturbing lack of uniformity in the way criminal misconduct committed by National Guardsmen has been treated around the country. Hence, in 2003 the National Guard Bureau developed the Model State Code of Military Justice (MSC) and has encouraged its adoption by the states. Idaho, along with 23 other states, has adopted the MSC.

The MSC is generally written like the UCMJ, and distinguishes between military and civilian offenses. The MSC extends personal jurisdiction to all guardsmen at all times, similar to active duty service members. However, before jurisdiction attaches, the MSC requires a “nexus” between the military and the crime committed. The term, “nexus” is defined as a “connection or series of connections.” However, “nexus” does not indicate how strong of a connection is required before jurisdiction attaches.

Nearly forty years ago, federal military courts struggled with the same issue. At that time the UCMJ was written to include the nexus requirement. The United States Supreme Court heard several cases on this issue. Over time, SCOTUS created a “factors test” to assist in the determination of jurisdiction. These same tests and rules should be
by National Guardsmen has been treated around the country. Hence, in 2003 the National Guard Bureau developed the Model State Code of Military Justice (MSC) and has encouraged its adoption by the states. Idaho, along with 23 other states, has adopted the MSC.

In O’Callahan v. Parker, 395 U.S. 258 (1969), the Court ruled that there must be a nexus, or a service-connection requirement, before jurisdiction attached under the UCMJ for active-duty servicemembers. In Relford v. Commandant, U.S. Disciplinary Barracks, Ft. Leavenworth, 401 U.S. 355 (1971), the Court reaffirmed the O’Callahan nexus test, and set out twelve factors courts should use when determining whether jurisdiction attaches under the UCMJ. These factors include: 1) The serviceman’s proper absence from base; 2) The crime’s commission away from base; 3) Its commission at a place not under military control; 4) Its commission within out territorial limits and not in an occupied zone of a foreign country; 5) Its commission in peacetime and its being unrelated to authority stemming from the war power; 6) The absence of any connection between the defendant’s military duties and the crime; 7) The victim’s not being engaged in the performance of any duty relating to the military; 8) The presence and availability of a civilian court which the case can be prosecuted; 9) The absence of any flouting of military authority; 10) The absence of any threat to a military post; 11) The absence of any violation of military property; and 12) The offense is being among those traditionally prosecuted in the civilian court.

According to Relford, courts must balance the factors to determine whether the “military interest in deterring the offense is distinct and greater than that of the civilian jurisdiction, as well as whether this distinct military interest can be vindicated adequately in the civilian courts, must be completed on a case-by-case, offense-by-offense basis.” In addition, these factors need not be weighed evenly.

Over time, courts tended to rule that if the crime was committed during duty hours, in uniform, on military property, against military persons, or military property, there was a substantiated military nexus. In addition, courts extended jurisdiction over drug offenses and crimes committed in foreign countries. Although federal courts had a tendency to expand jurisdiction under the UCMJ, they did defer to state courts when the crime “did not involve a ‘flouting of military authority, the security of a post or the integrity of the military property.”

States that have adopted the Model State Code of Military Justice now find themselves in the same position that the federal military justice system was in after the O’Callahan decision in 1969. Subject matter jurisdiction must now be determined by the military nexus test with very little guidance from case law. This challenge may be overcome simply by applying the past test that the Supreme Court decided in O’Callahan and expanded upon in Relford. This test, balances the servicemember’s rights against the need for military justice and discipline within the ranks.

In the absence of an accepted test, the application of the Model State Code will vary across jurisdictions as state military judges consider the issue. Even with a base definition of the word “nexus”, there is a lack of guidance for how strong that “nexus” must be. Each of the 54 states and territories are left to devise their own definition and application of this one word. Allowing absolute discretion of the states to determine what a military “nexus” is may undermine the Model State Code by recreating the inconsistency in application and an appearance of unfairness across units that the MSC was originally drafted to eliminate.

Although adoption of the MSC may resolve uniformity of laws issues, it may create inconsistency when applied. As discussed, of primary concern is the increase in personal and subject matter jurisdiction and the requirement of the nexus between the crime and the service before subject matter jurisdiction exists. To strike the proper balance, the analysis should be that found in Relford—the twelve-factor test. By using the Relford test, a state military judge should be able to determine whether the military interests outweigh the justice provided in civilian court.

References

Id.

Survey, supra note 6 at 33.

Id.

Survey, supra note 6 at 29.


Survey, supra note 6 at 51* George Washington


Id.


Survey, supra note 6 at 29.

Id.

Survey, supra note 6 at 33.

Id.

Survey, supra note 6 at 29.


MSC, Supra note 16, Article 2(b)

Id.


See Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355 (1971) (Relford was an active-duty Corporal, when he kidnapped and raped two women. He conduced both incidents in civilian clothes while on the military installation. The court implemented a factor test to determine that the military was the appropriate forum for this case to be heard, and further that an offense committed within the boundaries of a military installation is, by virtue, service connected.).

See O’Callahan v. Parker, 395 U.S. 258 (1969) (O’Callahan was a sergeant in the Army stationed in Hawaii. He was accused of attempting to rape a child in a hotel room off base, while in civilian clothes and off duty. The court decided that to establish military jurisdiction, the crime must be service connected. If the crime is cognizable in a civilian court and has no military significance, the courts are open, the crime is committed within the territorial limits and committed in peacetime the appropriate forum is a civilian court.)

See id.


U.S. v. Newvine, 48 C.M.R. 960 (1974). (Newvine was stationed in a border town, went into Mexico and committed murder. Id. He argues that under O’Callahan he is not subject to military jurisdiction, however, the courts have ruled that O’Callahan does not apply to crimes committed in foreign nations. Id. at 961. See U.S. v. Newvine, 48 C.M.R. 960 (1974).)


MSC, Supra note 16, Article 2(b)

Id.

See id.


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Gary Port is a Retired Lieutenant Colonel in the United States Army. Mr. Port twice awarded the Meritorious Service Medal, three times awarded the Army Commendation Medal and was awarded the Army Achievement Medal.

On November 25, 2015, a huge if not seismic change occurred to the military retired pay system. For generations the military retired pay was “all or nothing.” A service member had to serve at least twenty years and get a discharge no less favorable then Honorable in order to qualify. Upon retirement they would, on a monthly basis, get a percentage of their base pay. If the service member served only 19 years and 364 days, then he or she got nothing.

All that changed with the passage of the Defense Authorization Bill of 2016, signed into law on November 25, 2015.

The military will now have a hybrid system. For all service members who come on active duty on or after 1 January 2018, the military will place 1% of the annual base pay in the retirement savings plan. The government will match dollar for dollar every amount a service member places into the retirement savings plan up to 5% of the base pay. A frugal service member see could see up to 11 percent of his/her annual pay flow into the retirement savings every year.

This money belongs to the service member after two years regardless of how or when he/she leaves the service. This money can be rolled over to another tax deferred plans without any tax penalties. But, the money could not be drawn without tax penalties money before age 59 and a half, a significant change from the current system that begins payouts immediately upon retirement.

For those service members staying the full twenty, the traditional military retired pay will be reduced from 50% of the base pay to 40%. Further, the service members who stay to twenty, can upon retirement chose a lump sum option. Retirees could receive a one-time check for either 25 percent or 50 percent of their total anticipated retirement payments up until their 60th birthday. The remainder would continue as reduced monthly pension payouts.

This new retirement system would go into effect Jan. 1, 2018. Folks who came in before Jan. 1, 2006, would be grandfathered under the current system and could choose to stay will the old system or move over to the new one.

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The Military Committee of the American Bar Association’s Family Law Sector studies issues relating to clients in the military and their families, including procedural issues unique to the military, and custody and visitation, divorce, alimony/support, military pension division and Survivor Benefit Plan issues affecting military divorces. Reviews state and federal legislation and initiatives where ABA policy is affected, and teaches lawyers how to deal with military matters affecting state court legal disputes.

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Military Family Law Resource Center