Greetings from the Chair

Dear Colleagues,

Welcome to the Fall 2012 issue of ROLL CALL, an award winning publication assembled by our dedicated editors, Kristen Coyne, Theresa Buchanan, and Mary Fran Quindlen. In this issue you will enjoy an overview article on the National Conference of Commissioners on Uniform State Law’s recently adopted Uniform Deployed Parents Custody and Visitation Act, in addition to a summary and analysis of several recent judicial decisions regarding family - military law decisions from around the country. Be on the lookout for a special edition of ROLL CALL devoted exclusively to conversion issues between military retirement pay and VA Disability benefits. This is an important and controversial topic across the country. If you would like to submit an article, then please contact me, Kristen Coyne and/or Theresa Buchanan. We want your input.

Next, mark your calendars! We hope you will attend the Spring CLE Conference in Anchorage, Alaska during the week of April 17-19, 2013. MilComm will be responsible for a significant program beginning 1:00 pm on April 17, 2013 (the day before the ABA/FLS Spring Conference begins), which you are welcome to attend. Further, at the Conference we will be producing an important CLE program titled: Military Nuances in Domestic Violence Cases. This program is sure to provide essential information for you to fully understand the complexities of domestic abuse allegations on a servicemember’s employment and career. As always, we want to produce CLE programs of interest to you and your practice. If you have any ideas or suggestions for future CLE seminars, please contact me. We encourage, welcome and want your participation.

Likewise, if you have any suggestions, ideas or concerns regarding how the Military Committee may better meet your needs, please e-mail me. And, for a useful resource tip regarding military family law issues – please bookmark the Committee’s home page by going to www.abanet.org/family/military. I think you will find it a beneficial icon to have on your desktop.

Again, welcome to Philadelphia. Please stop and introduce yourself….and by all means enjoy the Conference!

Phillip J. Tucker, Chair
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Introduction from the Editor

It is an incredible honor and awesome responsibility to take over the position of editor. I appreciate the trust that you have placed in me, and look forward to continuing to provide timely and informative articles and information in support of our military and their families, active, reserve, retired, and veterans.

It is our goal to make this publication a collaborative effort of all members of the section. To that end, we invite and encourage input-- articles, case notes, web sites, personal experiences, and suggestions are all welcome. Please provide input nlt Jan 1, 2013!

I look forward to hearing from you
all in the near future.

Kristen MH Coyne
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UNIFORM DEPLOYED PARENTS
CUSTODY AND VISITATION ACT

(Reprinted with Permission and
represents the views of its author.)

by Mark E. Sullivan*

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Introduction

Today’s armed forces are numerous
and widespread. As of August 2012, there
are over 80,000 Army personnel assigned
in Afghanistan, Iraq and Kuwait, and over
96,000 soldiers deployed in about 140
countries around the world. Over 100,000
Army personnel are stationed overseas on
a permanent basis, from the civilized
comforts of Germany, Italy and Japan to
the remote outposts of the Demilitarized
Zone in Korea, Honduras, Kosovo, and the
Horn of Africa. The August total for
mobilized National Guard and military
Reserve forces of all services was over
63,000.

Frequent deployments and other
military absences can leave
servicemembers and judges without clear
legal precedents and rules to guide them
when a family separation arises and there
is a dispute over the care of children. As a
result, states have been searching for
ways to protect the rights of
servicemembers (SMs) and their children
in custody and visitation matters, and
coming up with mixed results. In
numerous states the answer has been a
variety of state laws and cases dealing
with visitation rights, the impact of “military
absence” on custody rights, electronic
testimony, expedited hearings and so on.
And in a few states, there has been total
inaction.

But a new tool became available in
July 2012. The Uniform Law Commission,
meeting in Nashville, adopted the latest in
a series of “uniform laws” which serve as
models for state legislation. The “new kid
on the block” is the Uniform Deployed
Parents Custody and Visitation Act, which
can be found at the following web address:
www.uniformlaws.org/shared/docs/depl
oyed_parents/2012am_dpcva_approved
text.pdf

The DPVCVA takes the best and
brightest provisions found in the statutes of
those states with the most far-reaching and
comprehensive terms protecting military
personnel and their children (e.g., Georgia,
Louisiana, Washington, Alaska) and in
judicial decisions (e.g., Colorado, Idaho,
Alabama and Illinois), and it improves on
them. States are already looking it over,
“kicking the tires,” so to speak, and asking
about taking it out for a test drive to see if
it’s a good fit for their own courts and
military populations. This article tells what
it does, what surprises it contains and what
innovations it makes in the complex world
of custody/visitation with a camouflage
coloration.

Enter the ULC

A body of about 350 influential
attorneys who are appointed by the states to draft legislation, the Uniform Law Commission began committee meetings two years ago to address what was found to be a mounting problem in a mobile military population, namely, the provisions for custodial care, visitation, decision-making and access for families and former families where one parent is absent due to military duties. Such responsibilities might arise from deployment, temporary duty (TDY), remote assignments and unaccompanied tours. The issues with which judges, lawyers and parents have struggled include custody jurisdiction, substitute visitation by step-parents and grandparents during deployment, consideration of military service as a factor in custody determinations, and whether a temporary custody order can or should be made permanent when a parent comes back from a military absence, such as a deployment.

"States are all across the board on those issues, so the impetus for the uniform act was to provide states with a well-conceived piece of legislation that takes the best practices from all the states that we have seen and give them some guidance," says Eric Fish, legal counsel for the ULC. The Commission is best known for its enactments which give uniformity to the area of family support, the Uniform Interstate Family Support Act (UIFSA), and custody jurisdiction, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

**War Stories, Tales from the Trenches**

A recent case will illustrate what can happen when a custodial parent is “called to the colors." In a battle between Colorado and Maryland, when the child’s mother was sent to Texas on active duty and then deployed overseas, the Colorado Supreme Court issued a show cause order to suspend a trial judge’s decision to take over custody jurisdiction. The case is *In re Marriage of Brandt*, 268 P.3d 406 (Colo. 2012), decided January 23, 2012. Here’s what happened –

- The military mother had custody of the parties’ daughter pursuant to a Maryland court order. She and the daughter had lived in Maryland after the parties’ divorce, and she resided there when she was entered the Army Nurse Corps. She and the daughter moved to Ft. Hood Texas for a year, and then she was deployed to Iraq for six months. Upon her return to Texas, she was ordered back to Maryland for a non-deployable assignment.
- She turned custody over to her ex-husband in Colorado pursuant to her Army Family Care Plan, which laid out the rules for care and custody during her deployment. When she returned, the parties agreed that the child would stay in Colorado for the next seven months to finish the school year, ending in May 2011.
- It was in May 2011 that the father filed in Colorado for the court to assume custody jurisdiction, since neither mother nor child "currently resided" in Maryland. He also filed a motion to change custody.
- The trial judge issued an order assuming jurisdiction. When the judges in Maryland and Colorado conferred by telephone, as is required under the UCCJEA, they disagreed on custody jurisdiction, each one holding that his state was properly exercising jurisdiction.
- The mother asked the Colorado Supreme Court to grant an order for show cause – which it did – arguing that the district court erred in finding that she no longer resided in Maryland.
for custody jurisdiction purposes.

The Colorado Supreme Court disagreed with the trial judge’s custody jurisdiction ruling, stating that the phrase “presently reside” in the UCCJEA is not the same as “currently reside” or “physical presence,” and that the judge must make an inquiry into the totality of the circumstances, examining what makes up a person’s permanent home or domicile. The Court further held that the parent who claims that the initial state has lost “exclusive, continuing jurisdiction” has the burden of proof in showing this before the trial judge. Accordingly, the Court vacated the district’s judge’s order assuming jurisdiction. In its final remarks, the Supreme Court of Colorado stated:

...[The trial court’s] order assuming jurisdiction to modify Maryland’s custody decree cannot stand because that order appears to be based solely on Christine Brandt being out of Maryland on military assignment. The UCCJEA provision allowing Colorado to divest Maryland of jurisdiction based on where the parties "presently reside" should not be interpreted to allow one parent to re-litigate the issue of custody simply by winning the race to the courthouse when the other parent is absent from the issuing state.

In a series of visitation cases, military parents have fought to keep contact through their new spouses or their parents when the children are denied such access by the children’s non-military parent. In such cases, courts have found that the court can delegate or assign visitation rights to family members during a deployment. In each of these cases, the non-military parents have objected to attempts to involve the rest of the SM’s family in substitute visitation, have argued that visitation is a personal right which belongs only to the deployed parent, and have claimed that when the SM is absent there are no visitation rights available. Such assertions have been rejected in favor of “substitute visitation” in Webb v. Webb, 148 P. 3d 1267 (Ida. 2006); Settle v. Galloway, 682 So. 2d 1032 (Miss. 1996); In re Marriage of DePalma, 176 P.3d 829 (Colo. App. 2008); In re Marriage of Sullivan, 342 Ill. App. 3d 560, 795 N.E. 2d 392 (2003); and McQuinn v. McQuinn, 866 So. 2d 570 (Ala. Civ. App. 2003).

A Federal Response?

The issues in military visitation and custody cases have even led one Congressman, Rep. Michael Turner of Ohio, to introduce a bill in Congress to amend the Servicemembers Civil Relief Act to include protections for deployed service members in child visitation and custody cases. See Sullivan, “Military Custody Bill in Congress,” American Academy of Matrimonial Lawyers Newsletter, Spring/Summer 2011, p. 21. Is this what we want the law to be?

"Service members themselves are going to be completely lost. This is because they are going to hear there is a federal law and not understand the difference of who is in charge, federal or state law," Fish says in response. "The UDPCVA is an approach to maintain states' rights and protect service members across the country, without creating an invasive federal system that is just going to confuse child custody," Fish said. Most domestic practitioners agree with that approach.

One of the key points of the UDPCVA establishes that the mere absence of a military parent from a state
will not be used to deprive that state of custody jurisdiction. For most cases, a move is a purely voluntarily thing. For servicemembers, a move is not voluntary but is made under a military order that can be enforced with imprisonment if it is not obeyed. Such an involuntary move upon a military parent should not lead to the loss of jurisdiction by a state most familiar and involved with the child’s best interests. Moreover, an overwhelming number of family law attorneys feel strongly that states should regulate child custody, divorce and other family law issues which are the recognized and traditional domain of state laws and cases. Few in the know believe that the substantive rules about custody in military cases belong in the U.S. Code. Even fewer want to have a “second chance” for litigation in federal court when there are “federal rights” to be vindicated. Almost no one in the military can afford such disastrously expensive litigation.

**False Impressions**

Some lawyers and legislators cannot understand why any change is needed. “Why isn’t the status quo sufficient protection?” they ask. Why not leave things as they are? After all, there’s always the Servicemembers Civil Relief Act – surely that provides enough protections for members of the armed forces.

Not so. The Servicemembers Civil Relief Act (SCRA), found at 50 U.S.C. App. § 501 et seq., only provides *procedural protections* for the military member. There’s nothing in the SCRA to give military parents any substantive rights regarding parental access, joint decision-making, notice of relocation, visitation or primary custody of the children. It’s not part of “the territory” covered by the SCRA, and the federal law was never intended to prescribe rules for legal custody and visitation decisions. It was created to prevent harm to servicemembers, not to create rights for them irrespective of state cases and codes. The issue of custody and visitation rules and rights for military members is solely the province of state law and appellate decisions, not the U.S. Code.

**The UDPCVA**

The new Act is divided into five articles. The first of these deals with definitions (e.g., “deploying parent,” “family member” and uniformed service”). It also covers enforcement (including attorney fees) and a provision that the residence of a parent is not changed by reason of deployment. Parents are required to provide notice of impending deployment and of address changes during a deployment. A court may not consider a parent’s past deployment or possible future deployment in itself in deciding the best interest of the child, although the court may consider material effects on the child’s best interest associated with past or future deployments.

Articles 2 and 3 deal with matters that come up upon notice of deployment and during the actual absence, depending on whether the case is resolved by settlement or litigation. The Act encourages parents to settle visitation and custody issues before they arise. Where there is a negotiated settlement, Article 2 sets out the substantive terms and procedural protections which cover the agreement. When parents cannot agree, Article 3 states provisions for a court’s resolution of the issues of custody and visitation. It includes terms for electronic testimony (e.g., telephone or internet) and expedited procedures for entry of a temporary custody order during
deployment. A permanent custody order cannot be entered before or during deployment absent the consent of the SM. Article 3 also states that the judge may grant substitute visitation and decision-making to a non-parent with a close and substantial relationship with the child if it is in the best interest of the child.

The return from deployment is governed by Article 4. This includes termination of the temporary custody arrangement following the SM’s return, with one set of procedures for mutual agreement to end a temporary custody settlement, another for mutual agreement to terminate a court order for temporary custody, and a third to deal with the situation where a court’s intervention is required.

The final part is Article 5. This contains the effective date provision and a transition provision regarding prior orders for temporary custody entered before the effective date of the Act.

Why Enact the UDPCVA?

First and foremost, the Act should be passed by legislatures to ensure that courts will not use past or potential future deployments against a servicemember, unless substantial issues regarding the impact of a deployment on the child’s best interest are present. Parents should be free to serve their country in uniform without having that service held against them in a custody case.

In addition, the Act commends itself for consideration by state legislatures because it:

- Encourages the parents to reach enforceable agreements on custodial arrangements and communications during deployment;
- Protects the residence of the deploying parent, thus discouraging interstate jurisdiction litigation, in support of the goals of the UCCJEA, and discouraging the kind of dispute that is exemplified by the Brandt case (above);
- Establishes prompt procedures and electronic testimony to assist in moving the case forward and not impairing the planned deployment; and
- Allows judges to grant delegated visitation rights to family members who have a close relationship with the child, so long as this is in the child’s best interest.

Finally, the UDPCVA promotes an expeditious and fair resolution of custody and visitation issues in the face of an impending deployment, and helps to attain a proper balance of interests, that is, the protection of the rights of the SM, the nonmilitary parent and, above all, the best interest of the children involved.

* * *

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Quick Tips for Handling Military Retirement Benefits

by Amy M. Privette*

*Amy Privette, a North Carolina State Bar Certified Paralegal, wrote this when employed by the Law Offices of Mark E. Sullivan, P.A., where her main area of practice was family law, with a special focus in the area of military divorce and federal pension division issues. Ms. Privette is now in law school at Regent.

Military retirement benefits are not handled in the same manner as private pension plans that are governed by ERISA (Employee Retirement Income Security Act). Allocating and dividing military retirement benefits as part of a divorce case is not easy. The best advice is to find someone “in the know” who can help you and your client navigate the minefield of military pension division, Survivor Benefit Plan (SBP), medical insurance coverage, and other retirement benefits. Still, for those bold enough to take on the challenge, here are some tips to help you get started:

1. **Get the docs!** There are numerous documents that you need to request from the military servicemember in order to evaluate what retirement benefits are available. This could include a Leave and Earnings Statement (for active duty members), Retirement Points Statement (for Reserve and Guard members), Retiree Account Statement (for retirees), SBP election forms, retirement orders and discharge papers, and Officer or Enlisted Record Briefs.

2. **Know the rules!** The division of military retired pay is authorized by the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408. It is an enabling act which allows states to divide military retired pay but leaves the specifics of how to do it up to each state. SBP is the survivor annuity program that allows the former spouse to continue receiving a stream of payments after the servicemember/retiree dies. SBP is provided for under 10 U.S.C. § 1447 et seq. Volume 7B of the Department of Defense Financial Management Regulation, DoD 7000.14-R (DoDFMR) expands upon the federal statutes to provide more detailed guidance as to the division of military retirement benefits. See also 10 U.S.C. § 1408 (c)(4) for specific rules regarding which courts have jurisdiction to divide military retirements.

3. **Identify the system!** Active duty retirement occurs under one of 3 systems: a) Final retired pay; b) High-3; or c) CSB/Redux - [http://militarypay.defense.gov/retirement/ad/01_whichsystem.html](http://militarypay.defense.gov/retirement/ad/01_whichsystem.html). Reserve/National Guard retirements are based on retirement points, NOT time, and the servicemember must have at least 20 “good” years of service (50 points are required to have a “good” year) to be retirement eligible. Active duty retirements pay out immediately upon retirement.
whereas Reserve or Guard retirements generally do not pay out until the retiree reaches age 60. The cost of providing SBP coverage to a former spouse can also differ depending on whether it is an active duty or reserve retirement.

4. **Use the right lingo!** **SCRA** – When the servicemember has not yet retired, the pension division order must state that the servicemember’s rights under the Servicemembers Civil Relief Act, 50 U.S.C. Appx. 501 et seq. have been honored. **DFAS** is the retired pay center for Army, Navy, Air Force, Marine Corps (and reserve units, also Air and Army National Guard). There are separate pay centers for retirees of Coast Guard, Public Health Service, National Oceanographic and Atmospheric Administration. **Disposable Retired Pay** is gross retired pay less any VA disability waiver and premium for SBP (if coverage is for former spouse of this divorce). This is the type of pay that the pay center divides, regardless of what the court order says. **COLAs** (cost-of-living adjustments) are usually applied to retired pay in January and are automatically included in the share received by the former spouse unless the court order awards the spouse a flat dollar amount. The pension is not a “fund,” so you cannot refer to the account balance or the part of the fund acquired during the marriage or vested at the date of divorce. Use a **MPDO** (Military Pension Division Order) to divide the retirement benefits, not a **QDRO**, since this is not a qualified plan governed by ERISA.

5. **Choose wisely!** There are four acceptable methods for dividing military retired pay: a) fixed dollar amount; b) percentage; c) formula clause; and d) hypothetical award. There are pros and cons to each method, so make sure you evaluate which would be best for your case. A full explanation of the four methods can be found in the Attorney Instruction Guide available at the DFAS website: [http://www.dfas.mil/garnishment/usfspa/attorneyinstructions.html](http://www.dfas.mil/garnishment/usfspa/attorneyinstructions.html)

6. **Don’t forget the SBP!** SBP is a unitary benefit and cannot be divided between a present and former spouse. Without the Survivor Benefit Plan, the stream of retired pay payments to the former spouse cease upon the death of the servicemember/retiree. The benefit paid out is 55% of the selected base amount. The maximum base amount is the full retired pay check; the minimum base amount is $300.00. The cost for coverage is generally 6.5% of the selected base amount, paid upon retirement by deduction from pension check. If the former spouse predeceases the retiree, then the spouse’s share of the retired pay automatically reverts back to the retiree – at NO cost. If
the former spouse gets remarried before age 55, then her coverage under SBP is halted.

7. **Watch the clock!** There must be ten years of marriage overlapping ten years of military service in order for the former spouse to get pension payments directly from the pay center. Even with an overlap of less than ten years, the former spouse is still eligible to claim a share of the retired pay, but the retiree will have to make the payments. There are two deadlines for setting up SBP coverage for the former spouse. When the servicemember makes election, it must be done within one year of divorce; when the former spouse sends in a “deemed election,” it must be done within one year of order granting SBP coverage.

8. **Beware of disabilities!** Certain types of disability compensation can reduce the retired pay that is divisible with a former spouse. The primary types of disability payments are military disability retired pay, VA disability compensation, and Combat-Related Special Compensation (CRSC). The Court cannot divide VA disability compensation (see 1989 Mansell decision by the US Supreme Court), and only a small part of military disability retired pay is subject to pension division (although disability benefits ARE subject to consideration in support cases, in general). When the military retiree has a VA disability rating of less than 50%, election of VA payments means a dollar-for-dollar reduction of retired pay; thus, the retired pay share for the former spouse gets reduced due to the unilateral action of retiree. Courts and agreements often employ indemnification language to guard against this and to protect the property share awarded to a former spouse.

9. **But wait….there’s more!** When representing the former spouse, don’t rely on Servicemembers Group Life Insurance to secure benefits; 1981 Supreme Court decision says courts cannot enforce orders or agreements that require SGLI. *Ridgway v. Ridgway*, 454 U.S. 46 (1981). If there has been 20 years of marriage which overlaps 20 years of military service, then the former spouse may qualify for full medical benefits as a 20/20/20 spouse. For shorter term marriages, look in to CHCBP (Continued Health Care Benefit Program) as a means of providing health insurance coverage.
CASE NOTE
by Marshal Willick*:

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I. THE APPELLATE OPINION

Brownell is the latest example of a military veteran, having been advised to ignore court orders by certain militant veteran fringe groups, landing in deep trouble.

After a 13 year marriage, Ronald and Irene separated in 2010, and were divorced in 2011. Ronald is totally and permanently disabled, and receives $962 in monthly social security benefits and some $2,578 in monthly V.A. disability benefits, which was awarded based on post-traumatic stress disorder from serving in Vietnam. Irene also suffers from post-traumatic stress disorder, as well as other ailments, but has no income or assets beyond some $200 in monthly food stamps.

Ronald also inherited trust income, which paid him $79,000. The trial court issued an “anti-hypothecation order,” but Ronald spent all $79,000 by the time of the divorce hearing anyway. The appellate court’s recitation indicates that he used more than $30,000 of it to buy illegal narcotics, and spent the rest buying a truck and a trailer for himself, giving his children $9,000, and paying $6,000 for his daughter’s wedding. Apparently, another $15,000 was to be received in the future.

While he was spending that money, Ronald was ignoring the trial court’s temporary spousal support order of $1,250 per month. Irene, unable to pay the mortgage on the marital home, lost it to foreclosure by the time of the divorce trial, and was homeless and living in a shelter.

The trial court specifically found that Ronald had “no credibility,” as he lied when he said at one hearing that he had received only $25,000 from the trust (having in fact received $41,000), lied again a month later when his interrogatory responses said that he had only received $31,500 from the trust, when, in fact, he had received $51,000, and lied yet again on his financial affidavit, which claimed that he had “no cash,” although in fact in that month alone he received $10,500 in cash from the trust, which he then spent on illegal drugs.

The divorce decree ordered Ronald to pay Irene half of his trust distributions, which the court calculated to be $47,000, and found Ronald in indirect civil contempt for not paying alimony as ordered and by hypothecating marital property. Ronald appealed.

His primary argument was that “federal law” precluded the trial court from “counting” his V.A. benefits as income for alimony purposes, because of 38 U.S.C. § 5301(a)(1) (2006). That provision provides that federal veterans’ disability benefits “shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under
any legal or equitable process whatever, either before or after receipt by the beneficiary.” By Ronald’s reasoning, since he had too little income from “alternative sources” to make the entirety of the alimony payments, the trial courts alimony order was an “attachment, levy, or seizure” of his V.A. benefits in violation of the federal statute.

Citing multiple cases from all over the country, the appellate court dryly observed that his assertion “is contrary to the governing law,” and quoted multiple authorities stating that “An overwhelming majority of courts have held that [V.A.] disability payments may be considered as income in awarding spousal support.” Like most of those courts, the New Hampshire court relied on *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987) (State court had jurisdiction to hold a disabled veteran in contempt for failing to pay child support when veterans’ disability benefits were the veteran’s only means of satisfying his obligation, because V.A. disability benefits were never intended to be exclusively for the subsistence of the beneficiary, but also to support “the veteran’s family as well”).

The Court also resisted the typical second bogeyman argument in such cases, stemming from *Mansell v. Mansell*, 490 U.S. 581, 594-95, 109 S. Ct. 2023, 104 L. Ed.2d 675 (1989), holding like virtually all other courts that the “federal question in *Mansell* was a narrow one” relating solely to a State court’s ability to treat military retirement pay that a retiree has waived in order to receive veterans’ disability benefits as property that can be divided on the dissolution of a marriage.” Finding that Ronald sought to conflate that property question with the very different question of a divorce court’s considering all income sources in determining alimony, the court rejected Ronald’s argument as spurious.

The court then dealt with a few other non-military issues, and affirmed the trial court order.

II. WHY WOULD SOMEBODY DO SUCH THINGS?

Background facts not found in the opinion illustrate why Mr. Brownell was willing to risk contempt sanctions and potential jail time. In an e-mail string proudly circulated by one of the “5301” military fringe group leaders, Mr. Brownell’s daughter conceded that it was garden-variety spite, which Ronald tried to dress up with pretense to federal preemption: “I know he would rather die than pay her a cent . . . he has said over and over he will never pay her.”

Of course, every divorce lawyer is familiar with that kind of ignorant obstinance; the question is why this litigant felt that he could have some possibility of convincing the court system that it was powerless to try to protect the equally-disabled and utterly destitute spouse. The answer is the prattling poison of the fringe groups. The daughter noted that Ronald had been led into his predicament by that group, ironically not understanding that they had led him to ruin:

I just don’t know what to do here and I am worried and the 5301 group is the only outlet available to reach out to for support so please, anything you have to say will be greatly appreciated, because when I spoke with you both on the phone you had a lot of great advise [sic] for me in the beginning of all of this.
In response to the e-mail from the daughter, one of the self-appointed leaders of that group conveyed his sympathies, adding that “the way this nation treats its wounded soldiers is a national disgrace.”

Totally disregarding the equities of the situation, the needs of both parties for subsistence, Ronald’s defiance of court orders in favor of blowing tens of thousands of dollars on drugs, or anything else outside of the myopic self-absorption of whether one of the litigants was ever in the military, the group leader added some remarkable delusion as to the situation:

Attorneys such as the one representing your father’s former spouse have learned to exploit loopholes that exist in the law - namely a process called “indemnification” and, as I suspect in your father’s case alimony to circumvent federal laws which protect veterans from having their disability compensation stripped away. . . . state legislatures are infested with these attorneys. . . . miscreants that have worked tirelessly to create a legal environment in which wounded veterans are sitting ducks and lambs to the slaughter . . . . It is high time attention be brought upon this holocaust that’s occurring . . . what has happened to your father is a national disgrace.

In short, these groups are of the opinion that if a divorcing couple includes one party receiving thousands of dollars each month in VA benefits, and the other is utterly destitute, he should keep the entire income stream and she should starve and be homeless, and it is a “disgrace” if a court prevents that inequity.

After deluding saps such as Ronald to misfortune with their snake oil, the groups in question hold them up as martyrs for their cause. This is not an isolated matter; one of their websites (veteransnewsnow.com) reports several more of their adherents reporting to jail for contempt sanctions for outright refusal to pay child and spousal support, in Iowa, Minnesota, and Texas.

III. THE ACTUAL LAW ON THE SUBJECT

Generally, State courts have felt free to make alimony awards where necessary to do substantial justice to the parties in front of them, taking into account the entirety of the actual financial circumstances of the parties. Many courts have awarded alimony upon divorce to one spouse on the basis that the other spouse has a separate property stream of income.

Some courts have noted that such is particularly appropriate in the military cases in which the member was enjoying a separate property cash flow from disability benefits applied for before divorce that would have been divisible retirement benefits but for the member’s election. Where VA disability exists at the time of divorce, the court cannot divide those benefits as property, but they “may be considered as a resource for purposes of determining [one’s] ability to pay alimony.”

This is what has the militant groups so

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worked up. In a case like *Brownell*, they want the court to be prohibited from ever knowing that the disabled member has 20 times the financial resources each month as does the spouse, and wants courts to be prevented from doing equity between spouses if one of them ever wore a uniform.

As this case illustrates, there are members who continue trying to argue that an alimony order affects an “attachment, levy, or seizure” of veterans’ disability benefits under 38 U.S.C. § 5301(a)(1), but that argument is contrary to essentially all law on the subject.2 The South Dakota Supreme Court, summarizing the national decisional law in 2011, noted that “An overwhelming majority of courts have held that [federal veterans’] disability payments may be considered as income in awarding spousal support.”3 As noted by the collected opinions, that conclusion is undeniable as a statement of current law.

\(^2\) See, e.g., *Case v. Dubaj*, ___ F. Supp. ___ (W.D. Pa. No. 08-347, Aug. 29, 2011) (no 42 U.S.C. § 1983 violation could be asserted against county support enforcement workers who seized or froze a bank account consisting entirely of veterans’ disability benefits, because 38 U.S.C. § 5301 does not apply to claims for spousal and child support); 52 A.L.R. 5th 221 §28[a] (“With few exceptions, the cases hold that payments arising from service in the Armed Forces . . ., though exempt as to the claims of ordinary creditors, are not exempt from a claim for alimony, support, or maintenance . . ..”); *Commonwealth ex. rel. Caler v. Caler*, 1981 WL 207422 (Pa. Com. Pl. 1981) (exemption statutes such as § 5301(a) “are generally held to apply only to claims arising from the debtor-creditor relation and have no application to claims for family support absent clear statutory language to the contrary”); *In re Marriage of Dora Pope-Clifton*, 823 N.E.2d 607 (Ill. App. 2005) (veteran’s bank account could be frozen to satisfy his support obligations despite that the proceeds in the account consisted of veterans’ disability funds because “veterans’ benefits are not for the sole benefit of disabled veterans,” but rather, “are] intended to benefit both veterans and their families”).

\(^3\) *Urbaniaik v. Urbaniaik*, 807 N.W.2d 621, 626 (S.D. 2011) (quotation omitted).

\(^4\) “These courts conclude that federal law does not prohibit an award of alimony against a spouse receiving military disability pay and, once alimony is awarded, federal law will not relieve the paying spouse from paying such alimony obligations, even if most of the veteran’s income consists of military disability benefits.” *Urbaniaik, supra; see In re Marriage of Wojcik*, 838 N.E.2d 282, 299 (Ill. Ct. App. 2005); *Morales and Morales*, 214 P.3d 81, 85 (Or. Ct. App. 2009); *Youngbluth v. Youngbluth*, 6 A.3d 677, 687 n.3 (Vt. 2010); Annotation, Enforcement of Claim for Alimony or Support, or for Attorneys’ Fees and Costs Incurred in Connection Therewith, Against Exemptions, 52 A.L.R. 5th 221, 372 (1997) (“With few exceptions, the cases hold that payments arising from service in the Armed Forces . . ., though exempt as to the claims of ordinary creditors, are not exempt from a claim for alimony, support, or maintenance . . ..”).


\(^6\) *Rose*, 481 U.S. at 621-22.

\(^7\) *Rose*, 481 U.S. at 630.

\(^8\) *Strong v. Strong*, 8 P.3d 763, 770 (Mont. 2000); see *Rose*, 481 U.S. at 634.

\(^9\) *Rose*, 481 U.S. at 634.
Accordingly, the courts reviewing this subject have held, with near unanimity, that to recognize an exception to the statute’s prohibition against attachment, levy, or seizure in the child support context “would further, not undermine, the federal purpose in providing these benefits.” 10 In Rose, the United States Supreme Court concluded that “regardless of the merit of the distinction between the moral imperative of family support obligations and the businesslike justifications for community property division . . . . [the statute] does not extend to protect a veteran’s disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support.”

Other courts have used “the logic of Rose” to hold that “a state court is clearly free to consider post-dissolution disability income and order a disabled veteran to pay spousal support even where disability benefits will be used to make such payments.” 11

In the absence of further federal legislation or a changed opinion from the United States Supreme Court, those arguing that courts may not consider disability or any other form of benefits in fashioning child support and spousal support orders are arguing out of wishful thinking, without any kind of legitimate legal basis.

It is worth mentioning that, even as to property, there are significant limits of application to § 5301 to exempt property from classification and division as joint property. While the statutory language of 38 U.S.C. § 5301(a) exempts veterans’ disability benefits from “attachment, levy, or seizure” either before or after receipt by the veteran, 12 the limits are not absolute.

In 1962, the United States Supreme Court considered the circumstances under which benefits paid by the Veterans’ Administration retain their exempt status under the statutory predecessor of § 5301(a), 13 and held that veterans’ disability benefits are the separate property of the beneficiary, exempt from creditors’ claims, attachment, levy or seizure, “provided the benefit funds . . . are readily available as needed for support and maintenance, actually retain the qualities of moneys, and have not been converted into permanent investments.” 14

The statutory language only limited the exemption “as to taxation” as regarded property purchased with benefits. However, in an even earlier case, 15 the Court held that benefits invested in property were also nonexempt from creditor actions, since they were not “payments of benefits due or to become due” and thus did not fall within the initial immunizing language. On this basis, the Court held property acquired with VA

10 Id.
12 Specifically:
(a) Payments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments.
13 38 U.S.C. § 3101(a). That subsection has since been renumbered to § 5301(a). Pub. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239. With one minor exception, the relevant language of the provisions is identical.
disability benefits to have no exempt status of any kind – it is property like any other property, and to be analyzed as it would be analyzed without any special gloss from being traceable to acquisition with VA benefits.16

Accordingly, federal and State courts have held for many decades that the exempt character of VA disability benefits does not extend to property purchased with the benefit funds.17 So if a former military member receiving VA disability benefits buys houses, cars, or other personal property during marriage, and the relevant State’s laws would consider such purchases to be marital property, the assets are fully divisible upon divorce.18

Even funds not used to purchase “things” could lose their exempt status and be fully divisible. In Pennsylvania, for example, the increase in value of non-marital property during marriage is considered marital property, so the doubling in value of an investment account consisting entirely of pre-marital deposits of VA disability funds, which had been placed in securities, mutual funds, and annuities," had been turned into “permanent investments," and was divisible between the parties.19

These limitations on the extent of the exemption from execution are analogous to limitations on “assignability” found in other federal retirement and benefit schemes that protect benefit streams from attachment.

For example, the Social Security Act20, contains limiting language comparable to that found in 38 U.S.C. § 5301, and subsection (a) of that section states:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

But the uniform interpretation of that provision across the United States appears to be that, for reasons similar to those announced in Porter and Carrier, any property purchased with Social Security disability benefits would be treated the same as property purchased with veterans' disability benefits – as property purchased with an income stream containing no special properties – because Social Security benefits that have been converted to property are not “moneys paid or payable” within the meaning of § 407(a).

In the world of ERISA-based private pensions, the courts have long held that

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18 Gray v. Gray, 922 P.2d 615 (Okla. 1996) (“once the veteran applied his disability benefits toward the purchase of the two vans and the motor home, those funds were no longer ‘readily available as needed for support and maintenance,’ they did not ‘actually retain the qualities of moneys,’ and they were ‘converted into permanent investments.’” Once spent, the funds were no longer ‘payments of benefits due or to become due’ pursuant to Carrier” and so the two vans, and the insurance proceeds received from destruction of the motor home, were subject to equitable division by the trial court).
ERISA preemption supercedes “any and all state laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA, citing 29 U.S.C. § 1144(a). The United States Supreme Court has observed that the preemption provision is “clearly expansive” but has also added that it cannot be taken “to extend to the furthest stretch of its indeterminacy.”

The bottom line to the case law is a reminder that any given statutory provision exists in the context of other provisions, and of decades (or longer) of interpretation, rather than in a vacuum. Those myopic partisans determined to read 38 U.S.C. § 5301 – or any other provision of statutory or case law – alone and outside its full legal context are in error, and misinterpreting the law.

IV. A BRIEF PRIMER ON THE FRINGE PRESSURE GROUPS

While several of the leaders of the fringe groups have delusions of self-importance, they are actually a small number of extremely angry, legally uneducated, and fixated individuals who cannot be reasoned with. They reject all legitimate legal authority and expertise – while purporting to know and proclaim “what the law really is” – and their membership (and sometimes their leadership) have directly or indirectly threatened the lives of multiple people, including lawyers, legislators, and others. Much like the “sovereign citizens,” they see no reason to obey judicial or other authorities who disagree with them.

Those wanting a further discussion of who they are and how they operate can review legal notes Nos. 46, 47, and 49, all posted at http://willicklawgroup.com/full-list-of-newsletters/.

Case Note

In re: Marriage of Zickefoose
228 W. Va. 708, 724 S.E.2d 312 (W. Va. 2012)

( Represents the views of its author. )

by Phillip J. Tucker*

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Question? Can disability benefits from the Department of Veterans Affairs be considered in determining the amount of support alimony to be paid by a former spouse upon dissolution of the marriage?

Answer: Yes. In this case of first impression for West Virginia, the state Supreme Court
adopted the majority view from across the country in holding that federal law, in particular that neither 10 USC § 1408 [Uniformed Services Former Spouses' Protection Act] nor 38 USC § 5301 [nonassignability of veterans benefits] demonstrated a clear intent to prohibit state courts from considering VA disability benefits when deciding alimony.

The straightforward facts of this case are these: the parties were married on May 1, 2004. During the marriage, both parties ceased work and were adjudged disabled. In 2007, Husband was awarded disability benefits by the VA for post traumatic stress disorder relating to his service in Vietnam War. In May 2008, the husband was also awarded Social Security disability benefits.

Wife had a history of psychiatric hospitalizations and, in September 2009, received a decision from the Social Security Administration finding her disabled as of December 2007 on the basis of a bipolar disorder. The parties separated May 22, 2009 .... making the relationship basically a five (5) year tour of duty. At the time of separation, Husband was 63 and Wife was 48.

West Virginia has a statute setting out twenty (20) factors a court may consider in awarding spousal support. W.Va. Code, 48-6-301(b). One of those factors is:

(3) The present employment income and other recurring earning of each party from any source.

The trial court, after reviewing the evidence in this case, awarded Wife a $1,000.00 per month permanent spousal award. Husband appealed. The circuit court (immediate court of civil appeals for West Virginia) modified the award to $500.00 per month for 18 months.

Both parties appeared to the West Virginia Supreme Court. At the trial, both parties agreed the husband’s military disability benefits were not subject to direct attachment or allocation for spousal support. The parties contested whether the benefits could be considered in determining the amount of support to be received from the husband’s other income. As with any support alimony analysis, “need” and “ability to pay” are the main criteria. Individual states, like West Virginia, may codify various factors for the trial court to consider; however, those factors generally come down to some type of a “need” and “ability to pay” analysis. In this case, each party was receiving disability income, which argued mentally was their separate property. And that separate property income was “recurring earning(s) of each party from any source.” In factoring the VA disability benefits into a determination of Husband’s ability to pay, the West Virginia Supreme Court looked at these majority decisions:

Urbaniak v. Urbaniak, 2011 SD 83, 807 N.W.2d 621);
Clauson v. Clauson, 831 P.2d 1264 (Alaska 1992);
In re Marriage of Howell, 434 N.W.2d 629 (Iowa 1989)
Gillis v. Gillis, 2011 Me. 45, 15 A.3d 720;
Riley v. Riles, 82 Md. App. 400, 571 A.2d 1261;
Steiner v. Steiner, 778 So.2d 771 (Miss. 2001);
Repash v. Repash, 148 Vt. 70, 528 A.2d 744 (Vt. 1987); and
In re the Marriage of Weberg, 158 Wis. 2d 540, 463 N.W.2d 382 (1990)
to conclude:

“... in determining the amount of spousal support to be awarded pursuant to the factors enumerated in West Virginia Code 48-6-301(b)(1)-(20), federal, service-connected veterans disability benefits received by the payor spouse may be considered by the family court as a resource, along with the payor’s other income, in assessing the ability of the payor to pay spousal support.”

The Circuit Court’s opinion was vacated and the case remanded back to the trial court to set the amount and duration of the spousal support award (which I suspect will be very close to the original award).

PORTALS FOR PRACTICE*

(Presented without endorsement)

Pension links:


http://www.divorcenet.com/states/nationwide/ssn_art

http://www.dfas.mil/garnishment.html

http://militarypay.defense.gov/retirement/calculator/02_highthree.html


http://www.abanet.org/family/military/silent/pension_division.pdf


http://www.abanet.org/dch/committee.cfm?com=FL115277

Other links:

https://www.alaskabar.org/

https://www.hrc.army.mil/site/active/tagd/a_soldiers_guide_to_citizenship.htm

http://www.abanet.org/legalservices/helpforvets/lamphrdirectory.html

http://www.childsupport.alaska.gov/

http://www.dfas.mil/garnishment/military.html

http://www.courts.alaska.gov/

http://www.courts.alaska.gov/selfhelp.htm

http://courts.alaska.gov/shcforms.htm

http://www.alsc-law.org/alscoffices.html

http://usmarriagelaws.com/search/united_states/alaska/index.shtml

http://www.expertlaw.com/library/limitations_by_state/Alaska.html

http://www.touchngo.com/lglcntr/akstats/statutes.htm

https://ataaps.csd.disa.mil/
http://www.defensetravel.dod.mil/
http://www.usbirthcertificate.com/
http://www.courts.alaska.gov/trialcts.htm
http://www.fightidentitytheft.com/credit-freeze-laws.html
http://www.defensetravel.osd.mil/dts/site/index.jsp
http://www.sesameworkshop.org/initiatives/emotion/tlc
http://www.lewis.army.mil/lodging/
http://www.visajourney.com/faq/k1faq.htm
http://www.dced.state.ak.us/occ/pub/landlord.pdf
http://www.abanet.org/legalservices/helpservisists/legalassistdir.pdf
https://www.jagcnet2.army.mil/forums
http://usmilitary.about.com/od/theorderlyroom/a/medseparation.htm
http://www.military-info.com/freebies/murphy.htm
http://militarypay.defense.gov/retirement/calculc/index.html
http://www.dfas.mil/militarypay/debt/waiver/remsissions.html
https://www.jagcnet4.army.mil/8525755B00550A9A
http://www.irs.gov/efile/article/0,,id=118986,00.html
https://webapp.state.ak.us/cssd/guidelinecalc.jsp
http://www.nclamp.gov/s_mpdlost.asp
http://www.usimmigrationsupport.org/green-card_adoption.html
http://en.wikipedia.org/wiki/Community_property
http://www.cpol.army.mil/
Editor’s Note: Do You Have Your Own Copy of The Military Divorce Handbook?

The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families by Mark E. Sullivan is a useful outline that guides the family law practitioner through the unique and difficult issues involved when a military retiree or servicemember divorces. Included in the book are a clear explanation of the Servicemembers Civil Relief Act, how to locate and serve the military member, visitation and custody, domestic violence, military tax issues, pension division, family support, medical care, and the division of military retirement benefits. The book includes is a CD-ROM full of checklists, instruction sheets, forms and info-letters. The Military Divorce Handbook is priced at $149.95, with a price of $129.95 available to members of the ABA Section of Family Law. Learn more about the book and order online at http://www.abanet.org/abastore/productpage/5130135. To order by phone, call the ABA Service Center at 1-800-285-2221 and request product code 5130135. Orders can be faxed to 1-312-988-5568.