Greetings from the Chair

Dear colleagues,

Welcome to the Spring 2010 issue of ROLL CALL, assembled by our two committed editors, Henry DeWoskin and Theresa Buchanan. I hope that you’ll find the provided practice tips on such topics as collecting child support when stationed overseas, Basic Allowance for Housing, and a Checklist for Initial Consultation to be valuable in your everyday practice. We look forward to expanding this feature in future issues so we welcome both your feedback and suggestions.

We hope to see all of you at the 2010 Spring Meeting of the Section, April 14-17, in New Orleans. We’ll have a Committee meeting on Saturday afternoon at lunch, where you will hear about all the activities of the Committee, our Committee’s future plans and the many ways in which you can contribute to make this the best committee in the Section! You’ll be able to sign up to get involved in our activities.

Please contact me at the e-mail address below with your suggestions, concerns and ideas. Oh, yes – and for a wealth of useful resources and information on military family law issues, go to the home page of the Committee, www.abanet.org/family/military.

I look forward to seeing you in “The Big Easy”.

Patricia Apy, Chair
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Introduction from the Editor

In this issue of ROLL CALL, we discuss several practice tips that will help attorneys in their practice. In addition, we explore the law as it relates to the relationship between the Survivor Benefit Plan and Dependency and Indemnity Compensation. Further, we have a very informative article on the Post 9/11 G.I. Bill that gives an in-depth look at the bill and its benefits.

As with the past issue of ROLL CALL, I want to thank former Rhode Island attorney, now at the National Military Family Association in Alexandria, VA, Theresa Buchanan, the assistant editor of ROLL CALL, for her hard work and assistance in the preparation of this issue. We are continuously seeking articles, checklists, or other information relating to family law issues relevant to servicemembers. If you have an idea or a proposal for an article or are interested in providing a submission, please contact me at hmdewoskin@cs.com.

Henry DeWoskin
Editor

Military: SBP-DIC Offset No Longer Applies if Remarriage Occurs at Age 57 or Older

By Lawrence D. Gorin*

A WEDDING GIFT FROM THE DEPT. OF DEFENSE.... or a slap in the face to widows who choose not to remarry?

Background

For qualifying and eligible surviving spouses of deceased military servicemembers and retirees, there are two principal long-term financial benefit programs offered through the federal government.

First, the Department of Defense administers the Survivor Benefit Plan (SBP), which is a government-subsidized insurance plan that provides a deceased servicemember’s or retiree’s qualifying surviving spouse with a monthly annuity payment, commencing upon the death of the servicemember or retiree. SBP coverage is provided at no cost to all servicemembers while on active duty. Upon retirement, the servicemember may “elect” to continue SBP participation, with the retiree's portion of the premium cost then being paid by way of a reduced monthly retirement benefit during the retiree's lifetime. Upon the retiree's death, a monthly annuity, the maximum amount being 55% of the amount of retired pay, is then paid to the retiree’s surviving spouse.

Second, the Department of Veterans Affairs (the VA) administers a program, funded entirely by the government, that provides monthly Dependency and Indemnity Compensation (DIC) payments for the surviving spouse of a servicemember in the event the servicemember dies as a result of service-connected causes as well as for the surviving spouse of a retiree if the retiree’s death is due to injury or disease contracted while on active duty.

While each program is independent of the other and each is administrated by a different agency (SBP by the Department of Defense; DIC by the Department of Veterans Affairs), there are several situations in which eligibility for benefits under one program may affect eligibility under the other.

Eligibility restrictions based on age and marital status

Prior to January 1, 2004, eligibility of a deceased veteran’s surviving spouse to receive benefits from the Department of Veterans Affairs under the VA’s Dependency and Indemnity Compensation (DIC) program was lost in the event of the surviving spouse’s remarriage, regardless of age at time of remarriage.

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remarriage.

Concerned about the “marriage penalty,” at least for “older” women, Congress changed the law through the Veterans Benefits Act of 2003, Pub L 108-183. Under the revised law, codified as 38 USC § 103(d)(2)(B), eligibility for receipt of DIC benefits would no longer be lost in the event of the surviving spouse’s remarriage, provided, however, the remarriage occurred at age 57 or thereafter. (The act also provided for the restoration of DIC benefits for those otherwise eligible surviving spouses who, prior to December 16, 2003, the date the new law took effect, had remarried at age 57 or older and who had thereby lost their DIC eligibility.)

But surviving spouses who are eligible to receive both DIC benefits as well as SBP annuity payments, often referred to as “dual-eligible” surviving spouses, suffer an economic set-back in the amount of their SBP benefit. Specifically, under 10 USC § 1450(c)(1), the federal law applicable to this class of surviving spouses, DOD is required to reduce (“offset”) the amount of the surviving spouse’s SBP payment on a dollar-for-dollar basis by the amount of the DIC benefit (regardless of the surviving spouse’s age or marital status). In essence, the DIC dollars simply replace the SBP dollars. (Of course, there is a tax advantage to receiving DIC dollars in place of SBP dollars, since the SBP dollars are taxable whereas the DIC dollars are not. But the “offset” still results in a net loss.)

For example, if a veteran’s surviving widow is entitled to a DIC benefit of $1,154 per month (the standard DIC amount for 2009) and an SBP benefit of $1,400 per month, the SBP payment would be reduced by $1,154 (the amount of the DIC benefit). Thus, instead of receiving a total of $2,554 per month (the full amount both DIC and SBP payments), the surviving spouse would receive only $1,400 (being the $1,154 DIC benefit and a reduced SBP payment of $246).

**Change in the law**

However, as a result of an August 26, 2009, decision of the US Court of Appeals, DOD has changed its policy. From now on, the dollar-for-dollar SPB-DIC “offset” will no longer apply to surviving spouses who otherwise qualify for both DIC and SBP benefits AND who remarry at age 57 or later. Consequently, for surviving spouses whose SBP annuity has been previously reduced due to receipt of DIC benefits, getting married at age 57 or later will now result in receipt of the full unreduced amount of the SBP benefit as well as the full DIC benefit.

In sum, a surviving spouse who is eligible to receive both DIC and SBP benefits will now be provided with a financial reward from DOD for remarrying as soon as possible upon attaining age 57. For surviving spouses in this particular group, it literally pays to get married. Indeed, using the 2009 DIC payment rate, the qualifying surviving spouse who remarries at age 57 or older will be effectively paid $1,154 per month by DOD for doing so.

But the financial reward accorded to dual-eligible surviving spouses who remarry at age 57 or older (and thus retain their DIC benefit and regain their full and unreduced SBP benefit) is not accorded to dual-eligible surviving spouses who (perhaps for moral, religious, ethical or other personal reasons) choose not to remarry and who thus continue to be subjected to the SBP-DIC offset. In effect, the financial boon for the former class (widows who remarry at age 57 or older) is a financial bust of the latter class (those who choose not to remarry). Although the servicemember paid for both benefits (SBP with premiums and DIC with his life), the only way his widow can collect the full amount of both benefits is to do something she perhaps finds disloyal to her original vows of marriage and the memory of her deceased husband. The law that allows this to occur is arguably unfair, unreasonable, illogical and irrational, but nonetheless perfectly legal.

**The “rest of the story”.......

On August 26, 2009, the US Court of Appeals for the Federal Circuit, in the case of *Sharp v. United States*, 580 F.3d 1234 (DC Cir, 2009), held that the SBP-DIC “offset” as applied by the Department of Defense, effectively reducing SBP benefits for surviving spouses who also qualify for DIC benefits, is in fact not authorized by the controlling congressional enactments, at least not as to otherwise eligible surviving spouses who remarry at age 57 or later.

The lead plaintiff in the case, Patricia Sharp, is the surviving spouse of Brig. Gen. Richard H. Sharp (USA), who died in 1983 while on active duty. At the time of his death, he and Mrs. Sharp had been married for 23 years, and she was her husband’s designated beneficiary for SBP annuity payments. Mrs. Sharp thus became eligible to receive both SBP benefits and DIC benefits, with the former (SBP) being reduced (“offset”) to the extent of the latter (DIC). Subsequently, on November 25, 2000, at the age of 60, Mrs. Sharp remarried. As a result of her remarriage, she lost her DIC eligibility in its entirety (but did regain the full amount of her SBP entitlement). This was in accord with the law in effect at the time of her remarriage in 2000 that barred surviving spouses from continued receipt of DIC benefits if and when they remarried, regardless of age at time of remarriage.

But 38 USC § 103(d)(2)(B), the statute that mandated the “DIC marriage penalty” (loss of DIC eligibility due to remarriage), was amended by Congress through the enactment of the Veterans Benefits Act of 2003, Pub L 108-183. Specifically, section 101(a) of the act amended 38 USC § 103(d)(2)(B) so as to declare that “The remarriage after age 57 of the surviving spouse of a veteran shall not bar the furnishing of [DIC] benefits.”

Further, section 101(b) of the act created a new provision, codified as 38 USC § 1311(e), stating that “In the case of an individual who is eligible for dependency and indemnity compensation under this section by reason of section 103(d)(2)(B) of this title who is also eligible for benefits under another provision of law by reason of such individual’s status as the surviving spouse of a veteran, then, notwithstanding any other provision of law... no reduction in benefits under such other provision of law shall be made by reason of such individuals eligibility for benefits under this section.”

Lastly, section 101(e) of the act included a
“grandmother provision” that restored DIC benefits to those qualifying surviving spouses (such as Mrs. Sharp) who had remarried at age 57 or older prior to December 16, 2003 (the date the new law took effect) and had thereby lost their DIC eligibility.

Thus, under the revised law, Mrs. Sharp was entitled to have her DIC benefits from the VA restored, which is what then occurred. But when that happened, DOD then applied the “SBP-DIC offset” and reduced Mrs. Sharp’s SBP benefit by the amount of her restored DIC benefit. DOD’s action was taken pursuant to 10 USC § 1450(c)(1), the provision of the SBP law that mandates the dollar-for-dollar reduction of SBP payments for a surviving spouse who is also eligible for DIC benefits. It was DOD’s position that 10 USC § 1450(c)(1) was applicable and controlling in Mrs. Sharp’s circumstances.

Not being happy with DOD’s reduction of her SBP annuity amount, Mrs. Sharp (along with two other similarly situated widows) then sued the government in 2007. According to Mrs. Sharp, the Veterans Benefits Act of 2003, at section 101(a), not only removed remarriage as a DIC eligibility disqualification factor, at least if the remarriage occurs at age 57 or later, but also provided, in section 101(b), that as for such surviving spouses, there shall be “no reduction in benefits under such other provision of law... by reason of such individual’s eligibility for [DIC] benefits.”

Mrs. Sharp correctly pointed out that 10 USC § 1450(c)(1), the provision of law that mandates the dollar-for-dollar offset of the SBP annuity payments for surviving spouses who also qualify for DIC payments, is a “provision of law” that, if applied to surviving spouses in her situation (being eligible for DIC benefits even though remarried at age 57 or older), would result in a reduction of her SBP annuity. Mrs. Sharp argued that the language used in section 101(b) of the Veterans Benefits Act of 2003 (“no reduction in benefits under such other provision of law shall be made”) means exactly what it says and effectively bars DOD from reducing her SBP annuity as otherwise required by 10 USC § 1450(c)(1).

Consequently, said Mrs. Sharp, dual-eligible widows who remarried after age 57 are entitled to receive BOTH Survivor Benefit Plan (SBP) annuity payments from DOD and Dependency and Indemnity Compensation (DIC) benefits from the VA, in full and without any offset between the two.

In response, DOD urged the Court of Appeals to determine the intent of Congress by considering the legislative history leading up to the enactment of the Veterans Benefits Act of 2003. DOD argued that Congress never intended the law to have the result urged by Mrs. Sharp. The court rejected DOD’s “unconvincing argument,” noting that the text of 38 USC § 1311(e) is clear and unambiguous. Said the Court of Appeals:

“To determine Congress’ intent, we use the traditional tools of statutory construction, beginning with the text of the statute. Where the intent is unambiguously expressed by the plain meaning of the statutory text, we give effect to that clear language without rendering any portion of it meaningless. Here, Congress’ intention to supersede all other laws (except a provision not at issue in this case), and prevent a decrease in some other benefit payment as a result of section 1311(e)’s restoration of DIC payments to surviving spouses who remarry after age 57, is plain on the face of the statute.”

Net result: DOD was ordered by the court to commence acting in conformance with the law as enacted by Congress (which DOD had erroneously not been doing), thereby restoring to Mrs. Sharp the SBP reduction that it had been applying in her case. Mrs. Sharp, having remarried after attaining age 57, was thus allowed to retain her full DIC benefit (notwithstanding her remarriage) and also receive her full and unreduced SBP benefit (notwithstanding her receipt of the DIC benefit).

See entire court decision at: http://scholar.google.com/scholar_case?case=5422111345562531106

Follow-up note. Following the court’s decision in Sharp v. US, DOD decided not to further appeal the decision. Thus, the SBP-DIC offset that applies to surviving spouses who are eligible for both SBP and DIC benefits will NOT apply to those surviving spouses who remarry at age 57 or thereafter. For that particular group, they will get their full unreduced SBP benefit AND the full DIC benefit. However, surviving spouses who are eligible for both SBP and DIC benefits but who remain unmarried will continue to have their SBP benefit reduced on a dollar-for-dollar basis by the amount of the DIC benefit.


Practice Tips

A. Collecting Child Support When Overseas

When the Servicemember or retiree is overseas, here’s a tip for collecting needed child support, courtesy of Joerg C. Moddelmog, a German attorney-advisor at the Kaiserslautern Legal Services Center in Germany.

- Ohio allows the custodial parent to for Title IV-D child support services, regardless of the location of the custodial parent. The federal Policy Interpretation Question (PIQ 99-01), followed by Ohio, is described at http://www.acf.hhs.gov/programs/cse/pol/PIQ/1999/piq-9901.htm.

- DFAS is located in Cleveland which is in Cuyahoga County, Ohio. It manages the payroll for several federal agencies, including all branches of the military. The connection to the support application is that the property (pay or pension) of the Servicemember or retiree is located in Cleveland, Ohio. No personnel jurisdiction is needed!

- If a case is established, Cuyahoga County will use the direct income withholding provisions of Uniform Interstate

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Family Support Act (UIFSA) to send an income withholding notice directly to DFAS without any requirement for registering the foreign order in Ohio first.

- Even though Ohio does have a reciprocal agreement for child support enforcement with Germany - it was entered into on January 16, 1989 – and although Germany also qualifies as a "State" under the UIFSA definition, thereby allowing child support obligations to be established and enforced reciprocally, the income withholding can be accomplished without relying on either of these points.

- If the obligor is not contesting the validity of the support order or his duty to pay child support, as stated in the foreign support order, Ohio Revised Code (ORC) Section 3115.32 can be used to issue an income withholding notice. Again, personal jurisdiction over an obligor is not a prerequisite to the issuance of an income withholding notice pursuant to ORC Section 3115.32. The obligor's payor, DFAS, is located in the State of Ohio and will be required to honor the income withholding notice pursuant to 42 U.S.C. 659. The procedures may be available to alimony also.

B. Basic Allowance for Housing (BAH)

The Department of Defense Per Diem, Travel and Transportation Allowance Committee has changed the term used for BAH II. It is now known as BAH-II (RC/T), and that term should replace “BAH II” throughout the text below. The BAH-II (RC/T) rates are used wherever AR 608-99 specifies BAH II. The Army’s regulation still speaks of BAH II at the “without dependents rate,” and the tables also call this the “married rate”. The tables are at: http://www.defenselink.mil/militarypay/pay/bah/02_types.html. This website is an excellent explanation of all the types of BAH which are available to a SM, as follows:

There are several types of BAH to satisfy various housing situations that occur among military members. In general, the amount of BAH you receive depends on your location, pay grade, and whether you have dependents. Under most circumstances, you receive BAH for the location where you are assigned, not where you live. Additionally, you may be entitled to some BAH amounts if you are residing separately from your dependents. This occurs in situations involving unaccompanied overseas tours or having a dependent child that resides with a former spouse. The rules regarding these situations can become quite complex. Consult your Finance Office if you are in one of these situations. Each type of BAH is described below.

BAH With Dependents and BAH Without Dependents

A member with permanent duty within the 50 United States, who is not furnished government housing, is eligible for Basic Allowance for Housing (BAH), based on the member's dependency status at the permanent duty ZIP Code. A member stationed overseas, including U.S. protectorates, who is not furnished government housing, is eligible for Overseas Housing Allowance (OHA) based on the member's dependency status. If a member is serving an UNACCOMPANIED overseas tour, the member is eligible for BAH at the "with dependents" rate, based on the dependent's US residence ZIP Code, plus OHA at the "without dependents" rate, if the member is not furnished government housing overseas.

Partial BAH

A member without dependents who is living in government quarters is entitled to a Partial BAH.

BAH-II (Reserve Component/Transit)

BAH-II (RC/T) is the housing allowance for members in particular circumstances, for example, reservists on active duty less than 30 days. It also applies when a member is in transit from selected areas where no prior BAH rate existed. It does not vary by geographic location. BAH-II (RC/T) was set based on the old Basic Allowance for Quarters (BAQ), which was based on the national average for housing. BAH-II is published annually and is determined by increasing the previous year's table by the percentage growth of housing costs.

BAH-DIFF

BAH-DIFF is the housing allowance amount for a member who is assigned to single-type quarters and who is authorized a basic allowance for housing solely by reason of the member's payment of child support. A member is not entitled to BAH-DIFF if the monthly rate of that child support is less than the BAH-DIFF. BAH-DIFF is determined by the SECDEF and was equal to the difference between BAH-II with dependents and BAH-II without dependents in 1997 for the member's grade. BAH-Diff is published annually and is determined by increasing the previous year's table by the percentage growth of the military pay raise. For more information contact your finance office or consult Section 260416, Chapter 26 FMR.

C. Checklist for the Initial Consultation

Here are questions to ask the custodial parent/child support payee, actions to take, documents to request, when meeting with a client about a military child support case:

QUESTIONS FOR THE CLIENT

1. Is there a paternity determination? If so, when and where?

2. Do you have an agreement or court order determining child support? If so, when, where, how much support, what other terms?

3. If the parties were married, when did they separate and when, if applicable, did they divorce? Where was the divorce granted?

4. What is the rank of father/alleged father?

5. What is his Social Security Number?
6. What is his branch of service (e.g., Coast Guard, Navy Reserve, Ohio National Guard)?

7. What is his full name?

8. What is his location (e.g., Fort Hood, Texas, or Shaw Air Force Base, South Carolina)?

9. What is his unit (e.g., 82d Airborne Division, or 3rd Bomber Wing)? The more detailed this information is, the better. For example, instead of 82d Airborne Division, it would be preferable to identify the other party’s unit as “Company C, 2d Battalion, 503 Parachute Infantry Regiment, 82d Airborne Division.”

10. What support have you received?

11. What attempts have you made to obtain support?

DOCUMENTS: Get the following -

1. Divorce decree

2. Paternity determination

3. Child support order or agreement

4. Military ID cards, military orders

5. Payments of support

6. Attempts to obtain support payments (e.g., letters, e-mails, long-distance phone charges)

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Calling all recently admitted JAGS...an opportunity not to be missed!

The American Bar Association (ABA) is now providing a financial and professional opportunity and irresistible incentive for any active duty JAG officer in his or her first five years of practice. As if having the opportunity to provide legal services to a deserving military population, having broad exposure to a wide variety of legal challenges, and having the chance of a lifetime to learn, develop and manage in a dynamic environment were not enough for any JAG officer, the ABA now offers FREE membership to qualified JAG officers. Section, Division and Forum dues will be billed at regular rates, with some Divisions, such as General Practice, Solo and Small Firm Division and Government and Public Sector offering one year free membership upon enrollment.

Yes, this not to be missed membership offer requires annual re-qualification based on JAG status and original date of bar admission, but satisfying that administrative requirement is but a minor detail for the chance to experience ABA benefits that range from being able to access and to participate substantively across the spectrum of legal practice, to discounted best-selling books and publications targeted at improving practice skills, and other legal and continuing education resources. The value of ABA membership is ultimately the responsibility of the member, but when networking opportunities, professional growth and knowledge enhancement are offered for FREE, this is an offer not to be missed. Go to www.abanet.org/join/jag to take advantage of this valuable professional opportunity today.

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The Post-9/11 G.I. Bill
by Mark E. Sullivan*

A new benefit which may be useful in providing educational assistance and support for a spouse or child is the “Post-9/11 G.I. Bill.” The law, found at Chapter 33 of Title 38, U.S. Code, lets eligible individuals (active duty members, some Reserve Component members, and certain retirees), subsequent to August 1, 2009, to transfer unused education benefits to immediate family members, that is, to spouses and/or children.

The Post-9/11 GI Bill only covers education at institutions of higher learning, such as public and private colleges and universities. The benefit may not be used for trade or vocational schools, flight training, correspondence schools, or online distance education programs.

The “Yellow Ribbon Program” allows certain schools, such as private colleges, to enter into arrangements with the Department of Veterans Affairs for payment of established

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education costs not covered by the Post-9/11 GI Bill. The Department matches each additional dollar funded by the school, so long as the combined total does not exceed the full cost of the established charges. Only individuals entitled to the 100% benefit rate may use it.

The applicable parts of the statute are as follows:

§ 3020. Authority to transfer unused education benefits to family members for career service members

(b) ELIGIBLE INDIVIDUALS.—An individual referred to in subsection (a) is any member of the Armed Forces—
(1) who, while serving on active duty or as a member of the Selected Reserve at the time of the approval by the Secretary concerned of the member’s request to transfer entitlement to basic educational assistance under this section, has completed six years of service in the Armed Forces and enters into an agreement to serve at least four more years as a member of the Armed Forces; or
(2) as determined in regulations pursuant to subsection (k).

(c) ELIGIBLE DEPENDENTS.—An individual approved to transfer an entitlement to basic educational assistance under this section may transfer the individual’s entitlement as follows:
(1) To the individual’s spouse.
(2) To one or more of the individual’s children.
(3) To a combination of the individuals referred to in paragraphs (1) and (2).

(f) TIME FOR TRANSFER; REVOCATION AND MODIFICATION.—
(1) Subject to the time limitation for use of entitlement under section 3031 of this title, an individual approved to transfer entitlement to basic educational assistance under this section may transfer such entitlement at any time after the approval of the individual’s request to transfer such entitlement only while the individual is a member of the Armed Forces when the transfer is executed.
(2)(A) An individual transferring entitlement under this section may modify or revoke at any time the transfer of any unused portion of the entitlement so transferred as long as the individual is serving on active duty or as a member of the Selected Reserve.
(B) The modification or revocation of the transfer of entitlement under this paragraph shall be made by the submittal of written notice of the action to both the Secretary concerned and the Secretary of Veterans Affairs.
(3) Entitlement transferred under this section may not be treated as marital property, or the asset of a marital estate, subject to division in a divorce or other civil proceeding.

Additional points to remember are:

- This benefit is available if the servicemember has six or more years of creditable service and will commit to an additional four years.
- The designated family member must be enrolled in DEERS and be eligible for benefits at the time of transfer to receive transferred educational benefits.
- The later marriage of a child will not affect his or her eligibility to receive the educational benefit.
- Likewise, a later divorce of the servicemember and spouse will not affect the eligibility of the spouse (now “former spouse”) to receive educational benefits.

It is important to note that after the individual has designated a spouse or child as a transferee under this section, he or she still retains the right to revoke or modify the transfer at any time. If terms for the transfer are included in negotiations and eventually wind up in the marital settlement document or court decree, counsel should be sure to consider and address the possibility of revocation or modification if you represent the transferee spouse (or the custodial parent of the transferee child). This could be done through the use of a penalty clause, a clause providing alternate additional support, a damages clause, or a provision for liquidated damages and reimbursement of the injured person. An example of an educational benefit clause is as follows:

The Defendant shall transfer 36 months of education benefits under the Post 9/11 GI Bill to the parties’ children (18 months for each child). He will verify to the Plaintiff that he has done this by January 31, 2010. The “Transfer Begin Date” for Jane will be August 1, 2015, and that for Jack will be August 1, 2012. He shall not revoke the decision. If he violates this agreement, then he shall indemnify and reimburse the Plaintiff (or the children, if they are over 18 years of age) for any funds which must be paid due to Defendant’s revocation of the commitments made herein as to the transfer of education benefits.

There are two other issues which may arise. The first is the opposite of the above situation. What if there is no agreement as to transfer of educational benefits to the spouse or children. What if the spouse demands the allocation of education benefits under the Post-9/11 G.I. Bill? Is this a valid claim under the support statutes or the scheme of marital or community property of the states?

The statute states that “Entitlement transferred under this section may not be treated as marital property, or the asset of a marital estate, subject to division in a divorce or other civil proceeding.” 38 U.S.C. 3020(f)(3). Counsel for the
A servicemember/retiree should argue that this bars the division of the asset or, in the alternative, its allocation to one spouse and an offsetting award of other property to the other. The reason that this benefit is “off-limits”, counsel should argue, is that this is a unique aspect of a complex and integrated system of military compensation, devised by Congress to compensate those who have served honorably, to encourage the selection of military service by men and women in the United States, to create an orderly career path, and to retain until retirement those who are presently serving. The potential for disruption of personnel management tools and systems in the armed forces is great if state courts are allowed to allocate, over the objection of those who have served in the military, the educational benefits that they have earned. The value of Post-G.I. Bill benefits is significantly diminished to the extent that the SM or retiree sees that he or she may be subject to court orders which involuntarily transfer to a spouse or children the benefits that were earned by active duty service. Allocation of the benefit is also inconsistent with the clear language of the statute that a member may revoke the transfer at any time.

The consideration of education benefits in a support case is a second concern. Generally speaking, the income of both parties is fair game for the court to consider when looking at the funds available for support. Laura Wish Morgan, in her treatise, *Child Support Guidelines: Interpretation and Application*, states that cases which consider such gifts to be excluded from income in determining child support are misguided, since the policy of guidelines for child support is to consider all income, regardless of its source and tax considerations; there is no reason to distinguish between earned and unearned income. Thus educational grants which are not required to be repaid are “income” under the guidelines. This is distinguished from education loans, which must be repaid.

At this writing, there are no cases on point. The benefit is simply too new. The cases on student loans and “excess funds” used for living expenses are not applicable. A 2003 Tennessee case, *Lacey v. Lacey*, 2003 Tenn. App. LEXIS 790 at *13 (Ct. App. at Jackson, 2003) dealt with a waiver of the mother’s tuition by the University of Mississippi (she was pursuing a doctoral program after loss of her job). The Court of Appeals held that the waiver of the mother’s tuition was a benefit that could not be used to pay for the mother’s living expenses, and hence could not be characterized as an “in kind” benefit or remuneration which would be included in the mother’s income for child support determination. The Court’s analysis is not persuasive, however, since the opinion states that

> The mere fact that an obligor has received a benefit is not, in itself, enough to qualify the benefit as “in kind” remuneration…. There must be evidence that the benefits “amount to a payment for services rendered.” [citations omitted]

This ignores the rule, however, that gifts, prizes and severance pay are included in child support calculations, even though none of them are payments for services rendered. And even if the “payment for services rendered” theory about in-kind benefits were applicable, this would be persuasive evidence for including Post 9/11 G.I. Bill benefits, since these payments are another form of compensation to servicemembers (and, indirectly, their families) for services rendered after 9/11.
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.