Greetings from the Chair

Dear Colleagues,

It is with great pleasure to welcome you to the Spring 2012 issue of ROLL CALL, assembled by our dedicated team of editors, Theresa Buchanan, James Wherry and Kristen Coyne. This issue provides a long overdue Index of prior ROLL CALL articles and practice tips, as well as a Returning Warriors article by Mark Sullivan. Lastly, this issues looks at a recent decision for the Supreme Court of Alaska regarding characterizing TRICARE as a marital assets and placing a value on same in the context of a marital asset division (as if we didn’t have enough to fight about)!

We hope to see you at the Fall CLE Conference on October 10-13, 2012 in Philadelphia. While the Committee is not producing any CLE seminars at this meeting, we will be planning a half-day military family law program for the Alaska Judiciary, as well as a Military Nuances in Domestic Violence Cases CLE program for the Spring Meeting in Anchorage, Alaska on April 19, 2013. If you have any ideas or suggestions for future CLE seminars, please contact me. We encourage and welcome your participation.

Likewise, if you have any suggestions, ideas or concerns regarding the Military Committee, please contact me at the e-mail address. 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.

Henry Dewoskin, Chair
hmdeboskin@cs.com

Introduction from the Editor

With sadness, this marks my last issue as Editor. Reiterating what Henry shared about this issue, we have both articles, resources, indeed, that well overdue Index of past ROLL CALL articles and more, and practice tips that have been carefully selected to enhance your practice in a field that presents both challenge yet unlimited professional and personal reward.

And since this is my last issue as Editor, I want to commend all of you for your work on the behalf of those currently serving and those who have served. Working in the arena of military family law can present a variety of legal issues. Both the servicemembers and their family members are and have experienced years of uncertainty, unpredictability and stressors that some of us can only begin to imagine. Add the inquiries that occur from retirees and their families and veterans and the field can become complicated by changing rules and remedies over the years. When the opportunity presents itself for any of us to provide the legal response to their need, ROLL CALL wants to be that “go-to” resource so that you can offer best practice. If you don’t find the specific answer you seek here, know that you will be able to discover the practitioner who will
be able to guide you to the answer you seek.

I have been fortunate to have worked with some talented and forward thinking practitioners who have made contributions to these past issues that were timely and what we hope helpful to your ever-evolving practice. Working under Henry Dewoskin’s guidance as his Assistant Editor who then assumed Chair of the Committee, and then later with Jim Wherry as my Assistant Editor and now your Vice-Chair of the Committee, I was also fortunate to also experience the talents of Kristen Coyne, retired Navy JAG practicing in Phoenix, AZ, who now assumes the position of Editor of this newsletter. I would be remiss if I did not express my most sincere appreciation for Mark Sullivan’s support and insights. Thank you all! This Committee will be in such good hands now that Phil Tucker, an outstanding practitioner in this field out of Oklahoma, assumes the Chair of this Committee. It all comes down to our caring about what we do.

And remember that the National Military Family Association, located in Alexandria, VA, and online at www.MilitaryFamily.org is there for you, too. When one percent serves so that that ninety-nine percent can be free, you need to know that there are advocates who are dedicated to ensuring that servicemembers and their families’ voices are heard. Keep up the good work – no Great Work – that you continue to do!

Theresa T. Buchanan
Editor

Military Divorce: Returning Warriors and “The Home Front”

by Mark E. Sullivan*

*Mr. Sullivan, a retired Army Reserve JAG colonel, practices family law in Raleigh, NC and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2nd Ed. 2011), from which portions of this article are adapted. He is a fellow of the American Academy of Matrimonial Lawyers and has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

1. RETURN OF THE WARRIORS

Empty outposts overseas mean full billets and bedrooms back at home. In view of the “new phase of relations” between the U.S. and Iraq, using Vice-President Joe Biden’s language, many servicemembers (SMs) are returning home. The redeployment of military personnel back to their stateside assignments and their homes is the result of significant drawdowns in Iraq and Afghanistan. SMs who are returning from the Middle East are not only from the active-duty forces (Army, Navy, Air Force and Marines); they are also from the Reserve Component, namely, the National Guard and the Reserves. Thus the homecoming impact will be felt nationwide, not just in communities near military bases.

While reuniting with one’s family will be a joyous experience for SMs, it may create significant stresses for some. And these stresses may lead to legal consequences.
2. STRESSES AND RELATIONSHIPS

Stresses may arise due to one party’s having been solely in charge of the home for the entire deployment, without any help and with heavy responsibilities for running the home, managing the budget, taking care of children and – quite often – holding down a job as well. Having been away for a year in most cases, the returning SM has his or her own issues. These SMs need time to decompress and to adjust to new responsibilities, routines and duties – both at home and at work.

Sometimes there is an “interim relationship” which was formed while one spouse was gone. If this is so, it will have to be dissolved so that the marriage may continue. When this doesn’t happen, then the marriage will be in trouble and a separation is definitely on the radar screen. The impacts on the parties include separation, interim support, domestic violence, temporary custody and many more issues.

The result for the family law attorney is a confusing welter of rules, laws, cases and problems. When does state law govern? When should the injured party seek redress through the military? How does federal law affect the conflict? Where can one locate co-counsel who is familiar with these matters, a consultant who can give quick and accurate advice, or an expert witness who is available in person or by phone or Skype to assist the court?

3. RULES AND RESOURCES

Where to find the resources for a military divorce case will depend on the issue involved. The usual matters involved are custody and visitation for minor children, support for the spouse and children, the role of the Servicemembers Civil Relief Act in default rulings and motions to stay proceedings, and division of the military pension. Domestic violence may also be involved in some family law cases involving military personnel. The well-read attorney is the one best armed to defend or prosecute in these areas. They are complex and often counter-intuitive. A mentor, consultant or expert will often be useful as a guide through the wilderness.

There are several sources of information for the attorney caught up in these problem areas. For the following scenarios, assume that the parties are Army Sergeant Fred Wilson and his wife, Maria Wilson, the mother of their two minor children.

4. SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)
Formerly known as the Soldiers' and Sailors' Civil Relief Act, the SCRA is found at 50 U.S.C. App. § 501 et seq. The two most important areas in civil litigation are the rules for default judgments (when the SM has not entered an appearance) and the motion for stay of proceedings. The former requires an affidavit as to the Fred's military status and the appointment of an attorney for Fred by the judge. The duties of the attorney are not specified, and there are no provisions for payment. The default section of the SCRA is at 50 U.S.C. App. § 521.

At 50 U.S.C. App. § 522 are the requirements for Fred's obtaining a continuance (called a “stay of proceedings” in the Act) for 90 days or more. Here are the requirements:

Elements of a Valid 90-Day Stay Request. Does the request contain...

- A statement as to how the SM's current military duties materially affect his ability to appear...
- and stating a date when the SM will be available to appear?
- A statement from the SM's commanding officer stating that the SM's current military duty prevents appearance...
- and stating that military leave is not authorized for the SM at the time of the statement?

An overview of the Act is found at “A Judge’s Guide to the Servicemembers Civil Relief Act,” located at www.nclcmp.gov > Resources (the website of the military committee, North Carolina State Bar). You can also get this info-letter at www.abanet.org/family/military (the website of the ABA Family Law Section’s Military Committee). The Guide tells about the requirements and protections of the SCRA and the steps one should take to comply with the Act’s requirements. It contains a sample motion for stay of proceedings and what the appointed attorney needs to do to protect his or her newest client.

5. FAMILY SUPPORT- MILITARY RULES
Fred is required to provide adequate support to Maria and the children; each of the military services has a regulation requiring adequate support of family members. The Air Force support policy is found at SECAF INST. 36-2906 and AFI 36-2906. [Note: Numbered rules and regulations can be easily found by typing the number of the regulation into one’s favorite search engine]. The Marine Corps policy on support of dependents is found at Chapter 15, LEGALADMINMAN, found at http://www.marines.mil/unit/mcieast/sja/Pages/legal-assistance/domestic-relations/default.aspx. The Navy Policy for support issues is at MILPERSMAN, arts. 1754-030 and 5800-10 (paternity). Go to http://www.public.navy.mil/bupers-npc/reference/milpersman/Pages/default.aspx. The policy of the U.S. Coast Guard is located at COMDTINST M1000.6A, ch. 8M. This may be found at http://isddc.dot.gov/OLPFiles/USCG/010564.pdf. The nonsupport policies and rules of the U.S. Army are found at AR [Army Regulation] 608-99. See also the SILENT PARTNER info-letter on “Child Support Options” at the N.C. State Bar and ABA websites shown above.

Knowing Fred’s pay and allowances is a key factor in determining support. All SMs receive a twice-monthly LES (leave-and-earnings statement). To learn how to decipher one of these, just type into any search engine “read an LES” to find a guide explaining the various entries on the form.

There are numerous garnishment resources at the website for the Defense Finance and Accounting Service (DFAS), located at www.dfas.mil. The statutory basis for garnishment is at 42 U.S.C. §§ 659-662 and the administrative basis is at 5 C.F.R. Part 581. A list of designated agents (and addresses) for military garnishment is found at 5 C.F.R. Part 581, Appendix A. Military finance offices will honor a garnishment order that is “regular on its face.” 42 U.S.C. § 659 (f). See also United States v. Morton, 467 U.S. 822 (1983) (holding that legal process regular on its face does not require the court have personal jurisdiction, only subject matter jurisdiction). Limits on garnishment are found in the Consumer Credit Protection Act, 15 U.S.C. § 1673.

6. CUSTODY AND VISITATION

The best source for information on military custody and visitation issues is usually your own state custody statutes. There are 43 states with specific provisions covering visitation and custody issues
which arise when one or both parents are in the military. These include delegated visitation rights when a parent is absent due to military orders, visitation during leave, mandatory contact information, rules on not using Fred’s military absence against him in a custody determination and the use of expedited hearings and electronic testimony. “Counseling on Custody and Visitation Issues” is a SILENT PARTNER info-letter found at the websites in the second paragraph of Section 2 above.

If Fred is retaining the children beyond the date of return in the custody order or keeping the children, and a custody order requires their return, then Maria can use Department of Defense (DoD) Instruction 5525.09, 32 C.F.R. Part 146 (February 10, 2006), to obtain the return of children from a foreign country. In general, this Instruction requires SMs, employees, and family members outside the United States to comply with court orders requiring the return of minor children who are subject to court orders regarding custody or visitation.

7. MILITARY PENSION DIVISION

Rules on retired pay garnishment are at [www.dfas.mil](http://www.dfas.mil) > “Find Garnishment Information” > “Former Spouses’ Protection Act.” In addition to a legal overview, there is a section on what the maximum allowable payments are and an attorney instruction guide on how to prepare pension division orders. Information on the Survivor Benefit Plan (SBP) is at the “Retired Military and Annuitants” tab (under “Survivors and Beneficiaries”) and at the “Provide for Loved Ones” link at this tab. Military pension division is set out at 10 U.S.C. § 1408, and the Survivor Benefit Plan is located at 10 U.S.C. § 1447 et seq. The Defense Department rules for both are in the DODFMR (Department of Defense Financial Management Regulation), [http://comptroller.defense.gov/fmr/](http://comptroller.defense.gov/fmr/).

There are seven SILENT PARTNER info-letters on dividing military retired pay and SBP coverage. All of these are found at the websites shown above at Section 2, second paragraph.

8. DOMESTIC VIOLENCE

The DoD Instruction on domestic violence is DoDI 6400.6 “Domestic Abuse Involving DoD Military and Certain Affiliated Personnel (August 21, 2007). Other websites containing useful information about the rules and procedures in this area are:

[www.vawnet.org](http://www.vawnet.org) (National Online Resource Center on Violence Against
An excellent summary of the remedies and responses is found in “Domestic Violence Report,” April/May 2001 by Christine Hansen, Executive Director of The Miles Foundation, which is at www.civicresearchinstitute.com/dvr-military.pdf.

BACKGROUND: This is a case involving a military retiree and a family member.

Plaintiff/Husband, a retired service member, filed for divorce in 2009. The superior court valued Husband’s military health insurance benefit as a marital asset and allocated it to Husband. Husband appealed on two basis: (1) Benefit is too speculative to be valued; (2) State courts is preempted from treating this type of federal benefit as a marital asset.

The court found that the healthcare benefit could be deemed an asset and valued, but remanded for reconsideration of the value found by the lower court.

Husband and wife were married while Husband was on active duty in the military. The family moved “numerous” times over the course of Husband’s military career, ultimately settling in anchorage, where he retired. Wife move with husband.
over the course of his military service, worked part-time and stayed in the home to raise their son for a period of time. After his retirement from the service, he subsequently obtained two new jobs. Wife has also been since employed full time.

Husband, as a military retiree, receives TRICARE health insurance. 1 Based on his service and the length of their marriage, Wife would be classified as a 20/20/15 spouse, 20 years of service by the member, 20 years of marriage, but only 15 years of concurrent marriage and service2. This entitles her after the divorce to one year of medical benefits, after which she can purchase has to purchase her own health insurance, which can include paying for continued health care benefit coverage for a limited period of time.3

Husband also receives healthcare through the United States Department of Veterans Affairs based on his disability rating of 20%.

In dividing the marital property, the superior court included Husband’s military pension, FERS pension, and TRICARE insurance4 in the valuation of the marital estate.

RULES: First it should be noted that Alaska has previously found that Alaska uses statutory scheme of equitable division codified in AS 25.24.160(a)(4). Further, Alaska has “…repeatedly recognized that "[h]ealth insurance benefits earned

1 There are three plans the Retiree can choose under TRICARE – standard, prime and TRICARE for life. Costs and benefits are explained at http://www.tricare.mil/mybenefit/home/Costs
3 If spouse does not meet eligibility requirements for health care benefits, they can get Continued Health Care Benefits Program- $1065.00 per quarter ($355.00 per month) http://www.tricare.mil/mybenefit/home/overview/SpecialPrograms/CHCBP
See also, Healthcare options for former military spouse: Tricare and CHCBP. family law quarterly, Vol. 43, No. 2 (Summer 2009), p. 227-300.
4 The superior court valued his military health insurance benefit at $129,959.00 based on a report by an expert insurance evaluator.
during the marriage are a marital asset of the insured spouse," \(^{15}\) but we have not yet specifically addressed the characterization of *military* health insurance benefits." \(^{\text{Burts v. Burts, 233 p.3d 337, 340 (Alaska 2011), (citing Hansen v. Hansen, 119 P.3d 1005, 1015 (Alaska 2005) (citing Kinnard v. Kinnard, 43 P.3d 150, 156 (Alaska 2002)))}}

ANALYSIS:

Point 1: Husband Argues:

TRICARE is too speculative to be valued.

The court did not agree saying that the Military Health Pension is relatively permanent. They then likened the benefit to military pension saying that not too speculative, just because it is subject to congressional appropriation. Further, the Wife’s expert was able to prove an objective valuation of the benefit.

Point 2: Alaska is not pre-empted by Federal Law from considering TRICARE in marital property division: (1) The court did not transfer the benefit.; (2) Federal Law does not preempts state courts from characterizing TRICARE benefit as a marital asset.

In finding that TRICARE could be valued as a marital asset, the court likened TRICARE benefits to military disposable retired pay – which courts may permissibly categorize as marital property under the Former Spouse’ Protection Act\(^{5}\), stating “Any military retiree with the required years of service is eligible for both disposable retired pay and TRICARE benefits.” \(^{\text{Burts at 351}}\). They went on to state that valuation of TRICARE as a marital asset did not do major damage to or interfere with the federal interest in this case of providing continuing health care for the service member, and emphasized that Congress has made it clear that there is also an important Federal interest in protecting the former military spouse.

COMMENT: The lesson learned here is
not to overlook military benefits in valuation of marital benefits. This is HIGHLY dependent upon state law, however, can be of extreme value as demonstrated above.

Additionally, it is important in all cases to watch closely in military cases is the time restrictions for former spouse qualification for ancillary benefits (medical, commissary, theater, etc.) The spouse can receive full benefits where the member has served twenty years, the marriage must have lasted twenty years, and the service and marriage must have overlapped by twenty years (the "20/20/20" rule). In an appropriate case, deferring the divorce could prove to be in the parties' mutual best interest.

5 10 U.S.C. Sect 1408(C)(2006)
<table>
<thead>
<tr>
<th>Article</th>
<th>Volume</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uniformed Services Divorce Equity Act of 2003</td>
<td>2003-1</td>
<td>1</td>
</tr>
<tr>
<td>Case Summaries</td>
<td>2003-1</td>
<td>3</td>
</tr>
<tr>
<td>Military Divorce Pointers</td>
<td>2003-1</td>
<td>4</td>
</tr>
<tr>
<td>Valuing and Allocating the Members</td>
<td>2003-1</td>
<td>4</td>
</tr>
<tr>
<td>Military Medical Benefits</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Military Pension Distribution Stops on the Death of a retired member</td>
<td>2004-1</td>
<td>1</td>
</tr>
<tr>
<td>The History of Concurrent Receipt</td>
<td>2006-1</td>
<td>1</td>
</tr>
<tr>
<td>September 2005 Case Studies</td>
<td>2005-2</td>
<td>1</td>
</tr>
<tr>
<td>New Developments in International Child Custody Disputes Under the Hague Convention</td>
<td>2006-2</td>
<td>1</td>
</tr>
<tr>
<td>By Gabriele Mezger Lashly</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Every Other Weekend While in Iraq</td>
<td>2007-1</td>
<td>1</td>
</tr>
<tr>
<td>The Continuation of Health Care Benefits Program as a Long-Term Health Care Option for Former Military Spouses</td>
<td>2008-1</td>
<td>1</td>
</tr>
<tr>
<td>By Wm. John Camp</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drafting Military Custody And Visitation Statute</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By. Mark E. Sullivan</td>
<td>2008-2</td>
<td>1</td>
</tr>
<tr>
<td>The Scope of Representation and Duties of Attorneys Appointed Under the Servicemembers Civil Relief Act</td>
<td>2009-1</td>
<td>1</td>
</tr>
<tr>
<td>By Captain Matthew T. Besmer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The New Defense Finance and Accounting Service (DFAS) Regulations on Military Retirement Pay</td>
<td>By: Mary Fran Quindlen and Jeffrey Stephens</td>
<td>2009-2</td>
</tr>
<tr>
<td>Title</td>
<td>Author</td>
<td>Year</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------</td>
<td>-------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>Military: SBP-DIC Offset No Longer Applies if Remarriage Occurs at Age 57 or Older</td>
<td>Lawrence D. Gorin</td>
<td>2010</td>
</tr>
<tr>
<td>Active Guard And Reserve Program (AGR) Basics for Family Law Practitioners</td>
<td>Captain Lundsey M. Kimber Olson</td>
<td>2010</td>
</tr>
<tr>
<td>Transitional Compensation Benefits and Retirement Protection Benefits for Military Spouses Who Are the Victims of Domestic Violence</td>
<td>James C. Wherry</td>
<td>2011</td>
</tr>
<tr>
<td>Questions of Fundamental Fairness: Veteran or Military Disability and Divorce in Arizona</td>
<td>Leslie A. W. Satterlee, Esq. and Kristen M.H. Coyne, Esq.</td>
<td>2011</td>
</tr>
<tr>
<td>Introduction to Military Child Support- How to Calculate the Pay of Military Members</td>
<td>James C. Wherry</td>
<td>2011</td>
</tr>
<tr>
<td>Explaining the Value of a Military Pension and the Cost of Providing the Survivor Benefit Plan to a Client</td>
<td>Jim Wherry</td>
<td>2011</td>
</tr>
<tr>
<td>A look at the DEERS/RAPIDS Program</td>
<td>Amy Eagen</td>
<td>2011</td>
</tr>
<tr>
<td>Resources</td>
<td></td>
<td>2011</td>
</tr>
</tbody>
</table>
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.