Greetings from the Chair – Phil Tucker

Dear Colleagues,

Welcome to this double issue of ROLL CALL, an award winning publication assembled by our dedicated Editor, Kristen Coyne of Phoenix, AZ. We all get busy. And, we all have good intentions. With that said, I apologize for not timely producing the Fall 2013 Roll Call. It simply got away from me. Nevertheless, thanks to our dedicated Editor, this issue is available for your information, enjoyment and use. Because we are all busy and bombarded with information overload, we want ROLL CALL to provide value to you and your practice.

Mark your calendars! Time is of the essence. We hope you will make plans to attend the Spring CLE Conference in Southampton, Bermuda during the week of May 7-10, 2014. In order to register, go to: http://www.americanbar.org/groups/family_law.html At this conference, MilComm will be responsible for a joint plenary CLE presentation with the Assisted Reproductive Technologies Committee titled: “Freezing your Bullets: The “ART” of (Love and) War.” ART is an emerging area of law that is virtually ignored by JAG and Legal Assistant Officers. Further, many of us in the private sector are not familiar with this area of law. I predict understanding ART will become increasingly relevant to our practices as the Armed Forces continue to take the lead on same sex relationship matters, which will include this method of family building.

Other future conferences will include the Fall 2014 CLE Conference, October 15-18, 2014 in Stowe, VT; Spring 2015 CLE Conference, May 6-9, 2015 in Carlsbad, CA; and Fall 2015 CLE Conference, October 14-17, 2015 in Portland, OR. MilComm is planning to create and present our own stand alone military/family law CLE program on May 5, 2015 near the Carlsbad, CA conference venue (which is approximately 35 miles North of San Diego, CA). Towards this end, Vice-Chair Steve Shewmaker will be the point person, with support from the Committee to create, organize and implement. If you are interested in being involved, please let us know.

Introduction from the Editor – Kris Coyne

In this first edition of 2014, we will address a variety of issues. The first article is reprinted from the Army Lawyer, May 2008, DA PAM 27-50-420, with permission. It addresses the topic of the Southampton Bermuda conference on Assisted Reproductive technologies – we hope to see you there! Beyond that, we have tried to include a little bit of everything related to dissolution of marriage in the military, a section on new books, a sections on awards won by our members- We are PROUD of you! Lastly, we bid a fond farewell to Mike McCarthy.

Looking forward, we are working on the Fall Edition 2014, and would like to address the topic of how Family Law is addressing this issues of Traumatic Brain Injury and Post Traumatic Stress; Veteran’s Court and what this could mean to Family Law; and Legal Aide/Pro Bono Opportunities to Assist Veterans throughout the U.S. To this end, we would greatly appreciate your input, article, case notes, and ideas. Please send them to me at Kristen@CKGHLaw.com. I’d love to hear from you- preferably by Aug. 31st! We want to get this out before the October CLE.
To Be Continued: A Look at Posthumous Reproduction As It Relates to Today’s Military

By Major Maria Doucettsperry∗


I. Introduction

Permitting families of recently deceased Soldiers to collect semen from the Soldier for the purpose of artificial insemination implicates many moral, ethical, and legal issues. This practice should therefore be limited to cases where the servicemember has voluntarily surrendered a specimen prior to death and has clearly indicated the intended disposition of such specimen in the event of his death or incapacity. Additionally, military benefit eligibility criteria should be redefined to encompass any children conceived from this process within a specified period from the servicemember’s death. The following Sergeant (SGT) Smith and First Lieutenant (1LT) Perry hypotheticals demonstrate the perplexities raised by unanswered moral and legal questions surrounding sperm cryopreservation2 as they may be presented in the military arena.

The first hypothetical concerns SGT John Smith, a twenty-three-year-old Army Reservist who was seriously wounded in Iraq. After being stabilized, he was medically evacuated to Brooke Army Medical Center in Fort Sam Houston Texas, where he was met by his parents and his fiancée. After what appeared to be a miraculous recovery during a two month period where SGT Smith was competently communicating with his family and physicians and had gained enough strength to move about with assistance, SGT Smith’s health began to decline to the point where he entered a persistent vegetative state.3 Before life support was removed, SGT Smith’s parents, the next-of-kin and attorneys-in-fact pursuant to SGT Smith’s Durable Power of Attorney for Health Care, petitioned the hospital to extract SGT Smith’s sperm so that his fiancée may later bear his child.

The second hypothetical concerns First Lieutenant (1LT) James Perry, an Army officer stationed at Fort Carson, who received orders notifying him that he would be deploying to Afghanistan in six months. Before deploying, 1LT Perry and his wife visited a sperm bank, where he deposited several specimens. He explained to his wife that he was leaving the specimens as insurance that his legacy and his dream of having three children could be carried out even if he did not come back.

With recent advances in assistive reproduction technology4 and the high rate of injury and death among military servicemembers stationed in Iraq and Afghanistan,5 the military is ripe for issues surrounding the posthumous conception6 of children conceived to individuals killed on active duty.7 Moreover, family members faced with the decisions associated with the medical care of brain dead individuals8 or with the otherwise untimely death of their servicemember relative, are frequently seeking out options for continuing the legacy of their loved ones.9 For many pursuing this goal, the only hope lays in the birth of a child, “the servicemember’s child,” a child who could bear his name and carry on his legacy. With that hope, these optimistic family members turn to posthumous reproduction.

Posthumous reproduction is the birth of a child after the death of a parent.10 While posthumous births have always occurred, in
cases where a husband died from illness, accident, or war before his pregnant wife could deliver their child, advances in reproductive technologies have given birth to a whole new aspect of posthumous reproduction—conception after death of a parent. Various assistive reproductive procedures are being employed routinely to freeze sperm, eggs, and even embryos, later reviving them in a completely viable form. Although the processes for achieving this wonder vary greatly, the majority of issues that arise concerning posthumous reproduction can generally be traced back to the process of cryopreservation.

Sperm cryopreservation is the scientific process used to freeze a man’s sperm for later use. Using this process, collected sperm is frozen at a temperature of \(-196^\circ C\) where it can be preserved for an indefinite amount of time. Although this process, also known as “sperm-banking,” is typically employed by men who are about to undergo chemotherapy or a vasectomy, rapid deployments into extremely perilous areas have spurred a huge interest in sperm-banking by servicemembers and their loved ones.

Unfortunately, however, the myriad of issues surrounding the military family’s decision to bank sperm are vast. In addition, because of the unique nature of the military, they face many obstacles never contemplated by individuals in the civilian sector. For instance, in many cases, the injured servicemember, or his remains as the case may be, must remain under military care for examination and autopsy for an average of seven to ten days after death. Even in instances where the remains can be released sooner, it is often too late for the family to have the servicemember’s sperm collected and cryopreserved. Similarly, there are often issues regarding government control, consent and jurisdiction because of the effect of the transient nature of the military family and the unique relationship between the servicemember and the government.

Analyzing the hypothetical facts surrounding SGT Smith and 1LT Perry, this article will discuss four issues surrounding posthumous conception resulting from assistive reproduction technology by means of the posthumous removal and insemination of sperm in cases where the servicemember clearly intended such a result, as well as in cases where the servicemember’s desire was unknown. First, this article will then address the status of any resulting child and the right to government benefits of any child conceived posthumously from cryopreserved sperm. Second, this article will address the government’s responsibility to make a Soldier’s remains accessible for sperm retrieval in a reasonable amount of time following the servicemember’s death and any government requirements to assist in such removal when the body cannot be released for sperm removal during the time period wherein cryopreservation is medically feasible. Third, this article will then propose an amendment to the definition of “child” as this term applies to those benefits payable to dependants of servicemembers who die on active duty. Finally, this article will propose appropriate disclosures and advice for servicemembers prior to deployment, on the issues of cryopreservation and consent.

II. The Issue of Issue

At the time of a man’s sudden death, intense bereavement may cause a woman to attempt to “hold on” to her deceased partner by requesting sperm retrieval. Denial, a normal process of self-deception that is part of the grief process following a tragic loss, may initially drive the wife to request the procedure. A pregnancy may be planned as an act of love or memorial in the face of death. Sperm preservation could
provide the false impression that the man will live on through his retrieved sperm and its fertility potential.\textsuperscript{20}

A. Fundamental Right to Children

It is a widely accepted belief that all individuals possess a fundamental right to have children.\textsuperscript{21} In \textit{Skinner v. Oklahoma},\textsuperscript{22} the Supreme Court found that a law authorizing sterilization of certain felons interfered with marriage and procreation rights, which were among “the basic civil rights of man.”\textsuperscript{23} Similarly, in \textit{Meyer v. Nebraska},\textsuperscript{24} the Court listed a person’s right “to marry, establish a home and bring up children”\textsuperscript{25} among those fundamental liberties guaranteed by the Constitution.

In striking down a law requiring habitual criminals to be sterilized, the Court in \textit{Stanley v. Illinois}\textsuperscript{26} opined: “The rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ . . .’\textsuperscript{27} This was made abundantly clear in \textit{Eisenstadt v. Baird}, where the Court noted, “[i]f the right of privacy means anything, it is the right of the \textit{individual}, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”\textsuperscript{28} While these cases clearly affirm an individual’s right to marry and to have children, the Court has not been inclined to find such a right where one of the parties to the marriage has declined or withdrawn their consent to have children.\textsuperscript{29} Moreover, the Court has clearly established that no one can be forced to parent a child against his or her wishes. However, the question remains unanswered as to whether consent to procreate can be inferred to an individual who has not made his desires known. While an argument can be made for allowing such an inference, there are equally strong reasons for disallowing it.

Posthumous conception . . . affects the deceased’s interests, because it recasts the content and contours of the deceased’s life. When it occurs without the person’s consent, it deprives an individual of the opportunity to be the conclusive author of a highly significant chapter in his or her life. Indeed, this is one of the reasons why any attempted analogy between posthumous conception and organ donation fails. Controlling the fate of gametes is different from—and more significant than—controlling the fate of cadaveric organs, because procreation is central to an individual’s identity in a way that organ donation is not. As the consequences of posthumous conception profoundly affect core values held by the deceased while alive, respect for autonomy requires that this procedure should not be permitted unless the deceased’s consent is clear.\textsuperscript{30}

Unfortunately, in cases such as the hypothetical SGT Smith where the desires of the servicemember are presumably unknown, the issue of consent is often anything but clear. In these cases, the courts and legislature are all silent as to whether a spouse or parent could lawfully consent to the cryopreservation of the servicemember’s sperm and if so, what constitutes the proper use of such sperm.\textsuperscript{31} This silence has led to a host of different outcomes as those left behind struggle to balance competing interests of fulfilling their loved one’s lifelong dream of having children with the issues associated with pursuing the posthumous conception of such a child.\textsuperscript{32}

In our hypothetical concerning SGT Smith, SGT Smith’s parents, (the Smiths) the individuals making the request, were not only SGT Smith’s next-of-kin, but also the named agents in SGT Smith’s Durable Power of Attorney for Health Care (DPAHC).\textsuperscript{33} This raises two issues with regard to the element of
First, generally, the DPAHC “enables patients to appoint persons legally authorized to make decisions for them concerning medical treatment when the patients become mentally incompetent.” Accordingly, consent given pursuant to a validly executed DPAHC serves as the lawful consent of the patient so long as such consent is limited to healthcare decisions about treatment and diagnostic procedures. “Treatment and Diagnostic procedures” are typically construed to include, “any care, treatment, service or procedure to maintain, diagnose, or treat an individual’s physical or mental condition.” As retrieving semen or other reproductive matter for the purpose of later inseminating another individual, cannot be deemed to provide care or treatment to the patient from whom the reproductive matter is taken, consent to such a procedure given pursuant to a DPAHC is void.

Similarly, the second consent issue arising out of the SGT Smith hypothetical relates to the consent of the next-of-kin. “In the absence of a living will or DPAHC that is executed in compliance with applicable state statutes, . . . the next of kin has legal authority to consent to the providing or withholding of life-preserving medical treatment for mentally incompetent patients.” In applying such consent, the next of kin is limited to acting in a manner consistent with the course of medical treatment the patient would have chosen if he were competent. Where the next-of-kin does not know what the patient would have chosen, he must act in the best interest of the patient.

Although the argument could be made that consent from the next-of-kin of a mentally incompetent patient, to withdraw that patient’s sperm for later insemination, is valid as “consent for life preserving medical treatment,” this argument should not prevail. Such an argument implies that the consent of the next-of-kin could be substituted for any procedure that is “life preserving” notwithstanding whether the procedure is life preserving for the incompetent patient, or as in the case of sperm retrieval, for another, such as a possible future child. Therefore, unless applying the “substituted judgment” of the patient, in a case where the patient’s decision is known, the best-interest standard must be applied. Therefore, consent of life-preserving treatment is limited to only those procedures which are life-preserving to the patient himself. In such cases, unless it is clear that posthumous conception was actually considered and desired by the servicemember prior to his incompetence, it should be avoided. Accordingly, under this analysis, the Smiths’ request is denied.

That conclusion contrasts with the Government’s goal of avoiding interference with SGT Smith’s right to procreate. Thus, if it is deemed medically feasible to move SGT Smith, the family could be given an option to transport SGT Smith to another facility where his reproductive matter could be retrieved and then, after the procedure is completed, returning or transporting SGT Smith back to the military facility. A second option available to the family calls for the removal of the reproductive matter after SGT Smith’s death. However, because of the relatively short timeframe during which this procedure is medically feasible, this is only a viable option if the government foresees being able to release SGT Smith’s body within the first eighteen to twenty-four hours of his death. As such, mission requirements should be evaluated to ascertain any prevailing need to hold the body for an extended period beyond this timeframe, such as requirements for autopsy. If it is not likely that the government would be able to release the body within the first eighteen to twenty-four hour period, only the first option should be given to the Smiths. In essence, although the Government should not perform the requested procedure for the Smiths, government action that would further frustrate their desire to have the procedure performed should be minimized wherever possible.
When the living can only speculate about the deceased’s wishes, posthumous conception should not be permitted. Even if there is evidence that the deceased desired parenthood in life, it is a considerable leap to assume that he or she would have wished to become a parent posthumously. Evidence indicating a desire for the former does not necessarily support a conclusion that the latter was also desired.  

Where it is clear that the deceased did in fact intend for his sperm to be used for the posthumous conception of his offspring as in the hypothetical raised concerning 1LT Perry, different issues must be addressed—the most prevalent of which being whether advance consent to posthumous conception remains valid after death and, if so, how is it impacted by state legislation pertaining to artificial insemination.

B. New Age Conception

When he deposited his sperm for cryopreservation, 1LT Perry expressed his desires for his wife to use the cryopreserved specimens to have up to three children. The rights afforded by the Constitution necessitate protection of personal decisions “relating to marriage, procreation, contraception, family relationships, child rearing, and education.” Applying this broadly, “[p]rocreative liberty includes not only the right not to procreate but a right to procreate; in essence, to do those things that will lead to biological descendants.” This said, however, “[t]he Constitution does not forbid a State . . . from expressing a preference for normal childbirth. It follows that States are free to enact laws to provide a reasonable framework for a [person] to make a decision that has . . . profound and lasting meaning.” Although there is little law directly regulating or otherwise addressing the right to have children, this suggests that if a state or other government entity were to place reasonable limitations on the right to reproduce through assistive reproduction technology, such limitations would be upheld.

“Although the Uniform Parentage Act sets forth legal rules concerning the paternity of children conceived posthumously,” it fails to address the issues of consent to artificial insemination or consent by the man or his next of kin with regard to the use of sperm for procreation. This being the case, the states could address this issue otherwise. For instance, the states could limit an individual’s right to consent to postmortem sperm retrieval or the use of previously supplied sperm in much the same manner that they regulate contractual agreements or other conveyance actions. Under this reasoning, “if a man consents in advance to having his sperm harvested at his death, the male may have made an enforceable third party beneficiary contract with the doctor in favor of his intended female beneficiary.”

Accordingly, the state would apply standard contract law to resolve any issues concerning the validity of the agreement. Therefore, to ensure compliance with the Statute of Frauds for contracts performed after death, the state could require that such contract be made in writing and meet other standard requirements.

Another means of dealing with the issue could be to apply property law concepts. In *Hecht v. Superior Court*, William Kane cryopreserved fifteen vials of his sperm designating on his storage agreement that in the event of his death, the sperm bank should release the vials to his girlfriend, Deborah Hecht. Kane also executed a will in which he left a large part of his estate to Hecht as well as the sperm, specifying that the sperm was so that Hecht could bear children by him if she desired. Kane’s adult children contested the will and petitioned the court to have the sperm destroyed. The trial court found in favor of the adult children and ordered that the sperm be destroyed; however, the appeal’s court found
that “at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking [sic] authority as to the use of his sperm for reproduction.”57 Thus, they overturned the lower court decision by applying a property law analysis using ownership terminology and applying it to the personal property at issue,58 thereby avoiding the matter of consent.59

Assuming the state would apply the contract or property law concepts discussed above to the 1LT Perry hypothetical, Mrs. Perry would likely be given the sperm since presumably 1LT Perry’s intent to transfer ownership of the specimens was clear.60 Seeing that there has been no legislative guidance on the matter of assistive reproduction,61 Mrs. Perry would likely then be able to use the sperm for artificial conception without legal interference. For, as stated by the court in Hecht, “[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.”62 Thus, although ethical questions may remain,63 when the donating Soldier has clearly indicated his intent to convey reproductive matter and has physically deposited such matter in a means accessible to the recipient, the transfer should be permitted.

In cases where the servicemember has clearly demonstrated an intent to have his reproductive matter made available for use by a designated recipient for the express intent of posthumous conception, but has not physically made such matter available, still other issues arise. Although, as discussed previously, some courts have addressed the status of sperm and have applied property law concepts to it, none of these cases have considered the issue of whether sperm may be posthumously removed for distribution purposes.64 Once again the absence of legislative guidance has resulted in a myriad of outcomes. In an effort to address this growing concern, the Ethics Committee of the American Society for Reproductive Medicine (ASRM) has distributed guidance to assisted reproduction facilities, stating that a spouse’s request for the posthumous removal of sperm “without the prior consent or known wishes of the deceased spouse need not be honored.”65 They opine that since these requests pose judgmental questions, they should be considered individually in light of circumstances and relevant state law.66

In an attempt to maintain some level of consistency in these cases, many assistive reproduction facilities, and many hospitals, have adopted their own policies for addressing this issue.67 These policies rely on evidence of the actions and discussions of the deceased prior to his death to determine whether there is a reasonable expectation that he would have consented to having his sperm used for procreation after his death. Most of these policies also go on to find that “as next of kin, the wife should have responsibility for giving permission for sperm retrieval and should maintain responsibility for storage and subsequent disposition of sperm.”68 The rationale is that the next of kin is typically vested with control of the deceased’s remains and is empowered with the ability to consent to anatomical gifts believed to be within the consent of the deceased.69 Notwithstanding this ability to consent, the spouse is required to make the request for sperm retrieval in writing and retrieval is often limited to cases where the sperm will be used only to inseminate the deceased’s spouse.70 Inasmuch as the result of cases based on this scenario would be so tenuous and diverse on otherwise similarly situated individuals, absent concise legislation on the subject, cases that lack both clear intent and pre-death retrieved reproductive matter should be rejected as candidates for post-mortem assisted reproduction.
Having determined that posthumous insemination is sustainable in cases where the servicemember has consented to the use of his sperm for this purpose and has made the sperm available, we return to our hypothetical 1LT Perry to determine the status of the resulting child or children.

III. Parental Status Determined by Location

Let us assume that 1LT Perry was killed in action. After a period of mourning and counseling, his wife Logan was inseminated with the sperm left to her by 1LT Perry. Twenty-two months after 1LT Perry’s death, Logan gave birth to twin girls in her hometown, Baton Rouge, Louisiana. After the birth of the twins, Logan applied for Social Security benefits on behalf of the girls and for increased indemnity compensation payments from the Veterans Administration because she is now the mother of two of 1LT Perry’s surviving children. Both actions were denied at the agency level initially and on appeal. Logan then filed an action in federal court.

A. Federal Silence

To date, there is no federal guidance on the issue of posthumous reproduction. Although cases involving posthumously conceived children have been brought in a number of state and federal courts, with increased frequency since 1993, most of these cases have dealt exclusively with the issue of inheritance rights or benefits of some type. In each of these cases, the federal court looked to underlying state law as a predicate for determining whether the posthumously conceived child was in fact a child of the decedent before determining whether the child was eligible to inherit or otherwise receive benefits as a descendant of the deceased. Accordingly, the outcome varied depending on the law of the state where the conception occurred.

Noting a need for consistency, the Uniform Parentage Act (UPA) was amended to address the issue of posthumous conception. The UPA eliminates the possibility of parentage posthumously in cases where an individual dies after having provided reproductive matter, unless he or she has provided written consent to the posthumous insemination and to becoming the parent of the resulting child. Notwithstanding the increased number of cases arising out of this very issue, only seven states have codified the UPA, making it necessary to consider in detail the individual states laws on the subject.

B. States Divided

As previously stated, few states currently address the issue of posthumously conceived children, addressing only inheritance rights benefits. Those states, as well as states that have not yet enacted any legislation on the matter, disagree with regard to whether and when posthumously conceived children can lawfully be considered children of the deceased.

For instance, under Florida law, a posthumously conceived child must have been provided for in the deceased individual’s will before such child can lawfully be considered a “child” of the decedent. Similarly, Virginia and California treat the child as issue of the decedent only if there is written consent by the decedent and the child is born within ten months of the decedent’s death in Virginia, or is in utero within two years of the decedent’s death in California.

Louisiana takes a similar position, recognizing the posthumous child as the child of the decedent if there is written consent by the decedent, the child’s mother is the decedent’s surviving spouse, and the child is born within three years of the decedent’s death. Contrary to this position, some states, like Arizona, treat all natural children as legitimate children of the
decedent, ignoring entirely the issue of posthumous conception. While still other states, like Idaho, consider the issue head-on and intentionally exclude children from posthumously implanted gametes from rights as a child of the decedent.

With the parentage determination varying among states, it is foreseeable that there may be an inequitable distribution of benefits based on the designation of child as determined by state statute or case law. For instance, in *Gillett-Netting v. Barnhart*, the Ninth Circuit considered the issue of whether twins conceived with cryopreserved sperm, eighteen months after the death of their father, were eligible to receive Social Security benefits as dependent children of the decedent.

Shortly after getting married in 1993, Rhonda Gillett and her husband Robert Netting had begun trying to have a child, albeit unsuccessfully. In 1994, Netting was diagnosed with cancer, but before beginning chemotherapy, he cryopreserved some of his sperm. The facts revealed that when he deposited the sperm, Netting knew his sperm could possibly impregnate his wife after his death and Gillett continued fertility treatments throughout the duration of Netting’s cancer treatments. Notwithstanding this, and evidence from the decedent’s wife that the decedent had requested her to continue to try and have children after his death, the district court determined that the children did not meet the definition of “child” under the Social Security Act. Specifically, the district court found that the Social Security regulations required that the children prove that they could inherit from the decedent under the relevant intestacy laws and that they could meet all of the criteria that define a child under the intestacy laws of the state.

On appeal, the twins were awarded benefits when the court determined that the Social Security Act’s definition of child would only apply when parentage was in dispute. Because Arizona treated all natural children as legitimate children, parentage could not be in dispute. The court then looked to the Social Security Act’s dependency requirements and concluded that, notwithstanding the fact that the children could not show actual dependence on the decedent as they were not born during his lifetime, dependence could be presumed because of the Arizona statute deeming them legitimate, and the fact that “[i]t is well-settled that all legitimate children automatically are considered to have been dependent on the insured individual.”

The courts in *In re Estate of Kolacy* and *Woodward v. Commissioner of Social Security*, also found that posthumously conceived children were children of the decedent. Similar to the facts in *Gillett-Netting v. Barnhart*, the decedent in *Kolacy* had cryopreserved sperm prior to undergoing chemotherapy treatment for cancer which ultimately took his life. Just as in *Gillett-Netting v. Barnhart*, in *In re Estate of Kolacy*, twins were conceived using cryopreserved sperm, after the decedent’s death. Initially, the court denied the Kolacy twins the right to receive their father’s Social Security benefits because the Social Security Act only allows a child to collect the benefits of his deceased parent if he is entitled to inherit from his deceased parent’s intestate estate, and because New Jersey does not recognize a posthumously conceived child born more than 300 days after the father’s death as a child of the father eligible to receive benefits. The court then applied New Jersey law which required that posthumously conceived children be born with the decedent’s consent. The court rationalized that the children were conceived of sperm intended for their mother’s use. The court went on to acknowledge the gap between the state intestacy law and the “basic legislative intent to enable children to take property from their parents,” ultimately finding that the twins were children of the
Woodward involved a similar situation with twins conceived using the frozen sperm of their deceased father who had died of cancer. After learning that he had leukemia, Warren Woodward froze his sperm before undergoing a bone marrow transplant. He died shortly thereafter. Lauren Woodward retrieved the cryopreserved sperm for insemination and two years later, gave birth to twin girls. After the birth of the twins, Lauren Woodward obtained a judgment listing Warren as the twin’s father on the birth certificate. The court in that case applied Massachusetts law and upheld the inheritance rights of the children. Before coming to this conclusion, however, the Woodward court set out criteria to be fulfilled before a child can be considered “issue” under the intestacy laws of Massachusetts.

The court determined that the child must prove a genetic relationship between the child and the decedent. The court also found that the child must show that the decedent affirmatively consented to the posthumous conception prior to death; and that the decedent affirmatively consented to the support of any resulting child. After applying this criterion, the court found that legislative intent supported a ruling in favor of the descendants. The Massachusetts Supreme Court noted that the term “posthumous children” was not defined in the state’s intestacy statutes, yet, the court went on to hold that where all of these criteria were met, and there were no time limitations at issue, posthumously conceived and born children were “children” of the decedent eligible for benefits.

This same criterion proved lacking however, when considered under New Hampshire law. In Eng Khabbaz v. Commissioner, Social Security Administration, the facts indicated that before dying, Mr. Khabbaz had banked his sperm so that his wife could conceive a child through artificial insemination. Mr. Khabbaz then executed a consent form indicating that the sperm was for his wife’s use, specifying in writing that he desired and intended to be legally recognized as the father of any resulting child. After Mr. Khabbaz’s death his wife became pregnant using the inseminated sperm. She later applied for social security survivor’s benefit for her daughter as the surviving child of Mr. Khabbaz. The benefits were denied. The court held that a posthumously conceived child was not a surviving child eligible to inherit from her father under New Hampshire intestate law regardless of the intent or preparation of the father. The court reasoned that although the issue of posthumously conceived children was not specifically addressed, the statutes clearly intended to provide for “surviving” issue. Here, although there was no doubt that the child was in fact the issue of the deceased, she was not “surviving” issue, since in order to “survive” the father, the child would have necessarily had to already be in existence at the time of Mr. Khabbaz’s death.

Applying Florida law, the court in Stephen v. Commissioner of Social Security came to a similar conclusion, notwithstanding strikingly similar facts to those in Gillett-Netting. In this case, a child was denied Social Security benefits after being found not to be a child of the decedent because Florida had specifically addressed the issue of the rights of posthumously conceived children and the court found that the child did not “qualify” as the decedent’s child. Unlike Arizona law, which had been silent on the issue, Florida law specifically limits the rights of posthumously conceived children unless they were provided for in the decedent’s will. In so ruling, the court in Stephen distinguished the case from Gillett Netting, citing the fact that Arizona law was silent on the issue of posthumously conceived children whereas Florida law was not.
A similar approach was taken by the Arkansas Supreme Court in *Finley v. Astrue.* The Finleys were a married couple who had pursued fertility treatments during the course of their marriage. As part of those treatments, Mr. Finley willingly provided his sperm for use to fertilize his wife’s eggs. In June 2001, ten embryos were created. Two of these embryos were implanted into Mrs. Finley’s womb while four of the remaining embryos were frozen for preservation. One month later, Mr. Finley died intestate. Subsequently, Ms. Finley miscarried both fetuses. In June 2002, Ms. Finley had two of the frozen embryos implanted into her womb. She later gave birth to a child and filed for child’s insurance benefits on behalf of her child as a surviving child of her husband. Initially the claim was denied, but in 2006 an administrative law judge awarded child’s insurance benefits. An appeals council later reversed the decision and Ms. Finley filed her complaint with the district court. Since, however, the federal issue of benefits eligibility would be tied to the question of whether the child would inherit as a surviving child under Arkansas state law, the parties filed a joint motion to stay the federal court proceeding and the issue was certified to state court. The state court considered whether an embryo created using in vitro fertilization during his parents’ marriage and implanted into his mother’s womb after the death of his father could inherit from his father as a surviving child. The court determined that since under Arkansas law a posthumous heir could only inherit if he were conceived before the decedent’s death, the Finley baby was not a surviving child. In making this finding, the court rejected an argument that conception had occurred at the time of fertilization, holding that when enacted the Arkansas code had not intended to include a child created through in vitro fertilization and implanted after the father’s death since it was enacted in 1969, years before technology even made such a thing possible. Accordingly, in Arkansas, regardless of the father’s intent, a posthumously conceived child is not a “surviving child” for inheritance or benefit purposes.

What all of these cases indicate is that “unless and until a uniform set of statutory laws gain a universal recognition, the status of posthumous children of assisted reproduction will remain doubtful and probably be the subject of conflicting judicial treatment.” This may have an even greater detrimental effect on military servicemembers and their families because of the increased transient rate of military families that increases the likelihood of more than one jurisdiction being applicable. For example, in our hypothetical, the Perry twins were born in Louisiana. However, prior to the deployment the Perrys lived in Colorado, where 1LT Perry had cryopreserved his sperm and where the insemination occurred. After learning that she was pregnant with twins, Logan decided to move back to Louisiana to be close to family. However, 1LT Perry was legally a resident of Florida.

As state laws have been deemed applicable, even when considering benefits under the Federal Social Security Act, it can be concluded that state laws will also be fundamental in determining eligibility for many military survivor benefits. If that were the case, Logan Perry’s federal court action would likely be governed by 1LT Perry’s home state laws since those laws would be determinative of whether the children would be found to be 1LT Perry’s heirs. To ascertain the logical impact of state law on military benefits as they relate to the eligibility of a posthumously conceived child, it should prove helpful to consider each of the benefits concerned.

IV. The Benefits at Stake

A. Dependent Status

Posthumously conceived children may
not come into the world the way the majority of children do. But they are children nonetheless. We may assume that the Legislature intended that such children be “entitled,” insofar as possible, “to the same rights and protections of the law” as children conceived before death.  

There are a number of benefits that individuals enjoy solely as a result of their sponsor’s service on active duty. Survivor benefits include different allowances that specified surviving family members are eligible to receive due to the deaths of their servicemember sponsor. The requirements for eligibility for any of these benefits is usually met where the death of the servicemember occurred in the line of duty while on active duty.  

Beyond this requirement, where children are concerned, there must be evidence that the beneficiary is indeed the child of the deceased servicemember. Accordingly, “posthumous conception is relevant in certain claims for survivor’s benefits because the conception and birth of the child applicant occurs after the death of his . . . putative wage earner parent,” or in military terms, after the death of the veteran. A literal reading would lead one to believe that only those who are alive, and could thus, outlive the soldier, would be entitled to “survivor’s” benefits. However, as this might result in children within the same family “having different survivor’s status and benefits,” courts have typically rejected such a literal approach with regard to Social Security benefits, and should arguably reject it with regard to military survivors’ benefits for the same reasons.  

Moreover, as military survivor benefits often mirror Social Security benefits and includes them to some extent, distribution of payments for survivors’ benefits should be similar under both programs. As with Social Security benefits, military survivor benefits are payable on a monthly basis to the beneficiary, depending on the relationship of the beneficiary to the deceased military sponsor. Therefore, “[t]he establishment of an applicant’s relational status to a deceased wage earner is paramount in qualifying for survivor’s insurance under social security” and is equally important when determining beneficiary status as a military survivor. Both social security and military survivor benefits are payable to “a range of family members.” Under both systems, qualifying family members include the spouse of the deceased as well as unmarried children under the age of eighteen. Considering that monetary benefits are often decreased or withheld in cases where the deceased has no children, posthumous conception issues are not only relevant, but paramount.  

B. Monetary Concerns  

Survivor benefits include several different allowances that surviving spouses, children, and other dependents are eligible to receive due to the death of their servicemember provider. These allowances include Dependency Indemnity Compensation (DIC) [38 U.S.C.S. §§ 1301–1323], Service Member’s Group Life Insurance (SGLI) [38 U.S.C.S. § 1970], Survivor Benefit Program (SBP) [10 U.S.C.S. § 1450], Dependent Education Assistance (DEA) [38 U.S.C.S. §§ 3501–3567], Social Security, death gratuity, and other benefits.  

1. Dependency and Indemnity Compensation  

Dependency and indemnity compensation (DIC) is a monthly benefit paid by the Veteran’s Administration to eligible survivors of military servicemembers who died while serving on active duty and other specified deceased veterans. Survivors eligible for DIC
include spouses who were married to a servicemember who died on active duty and who is not currently remarried, and unmarried natural, step or adopted children of the deceased veteran under the age of eighteen. Currently, DIC is paid to a surviving spouse at a monthly rate of $1,091 and increases with inflation, for as long as the spouse maintains eligibility. The spouse who has children receives an additional $271 per child each month. Where there is no eligible surviving spouse but there is an eligible child or children, an increased individual DIC payment is made.

Under the facts in our hypothetical, Logan Perry stands to gain an additional $542 per month if the Veterans Administration recognizes the twins as 1LT Perry’s surviving children. Once the twins are so recognized, they would be entitled to such payment until they reach the age of eighteen. Another significant fact is that even if Logan later remarries prior to attaining the age of fifty-seven, thereby loosing her own entitlement to a DIC payment, the children would still maintain their entitlement. In fact, the children’s payment level would increase since they would no longer be living with an eligible surviving spouse but would be entitled to the child(ren) only payment amount. Accordingly, over the course of eighteen years, the amount of benefits at issue for a posthumously conceived child, or as in this case children, are significant.

2. Servicemembers Group Life Insurance

Although it is not as likely that the benefits at stake for posthumously conceived children pursuant to an entitlement under the Servicemembers’ Group Life Insurance (SGLI) program are as great, they too should be considered. The SGLI is a life insurance program made available to all members of the Uniformed Services. Originally enacted pursuant to the Servicemen’s Group Life Insurance Act of 1965, the SGLI was intended to provide insurance coverage for the servicemember and his designated beneficiaries notwithstanding the inherently hazardous nature of the servicemember’s duties. Active duty servicemembers are automatically insured under the SGLI for the maximum amount of $400,000 unless they file an election reducing the amount of insurance. Upon the death of an active duty servicemember, the proceeds of this insurance are paid to designated beneficiaries under the policy. If the servicemember has not designated a beneficiary, the proceeds of the policy are paid to the surviving spouse or, if none, to the children in equal shares. Herein lies the opportunity for the posthumously conceived child to benefit.

Posthumously conceived children born to someone other than a surviving spouse would arguably be first in line to take pursuant to the statutory order of precedence in cases where the policy of an unmarried servicemember is distributed “by law.” In these cases, just as in cases concerning other benefits, the definition of “child” will ultimately be determinative. Here, however, the various state interpretations of the term “child” will likely be less influential than in cases concerning other benefits. Moreover, because proceeds of the SGLI “do not pass by intestacy, but pass, rather, according to a federal statutory scheme wholly independent of the laws of intestate succession of any state,” it is generally recognized that the definition of “child” as used in the SGLI incorporates the ordinary and natural use of the term.

Specifically, in matters pertaining to the SGLI, “child” is defined as the natural, adopted or illegitimate child of the decedent where the “proof adduced . . . establishes unquestionably that the deceased was the natural father of the child.” What is more, the Supreme Court has held that notwithstanding the generally restricted application of federal law in domestic matters, the Supremacy Clause necessitates that
the Servicemen’s Group Life Insurance Act “prevail over and displace inconsistent state law.”192 Therefore, in evaluating the “proof” of parentage, the requirements of state law on the subject are substituted for a statutory scheme that “provides (1) reliable determinations of paternity; (2) quick and efficient administration of the insurance proceeds; and (3) a pattern of distribution which parallels the insured’s own wishes, could they be discovered.”193

The statute provides that “child” includes legitimate children, legally adopted children, illegitimate children of the mother, and illegitimate children of the father who: he has acknowledged in a signed writing; he has been judicially ordered to support; he was, while living, judicially determined to be the father of; have a certified copy of a public birth record or church baptismal record wherein the decedent was named as the father and served as the informant; or, who have public records naming the deceased as the father with his knowledge.194 This language would likely prove problematic to the posthumously conceived child, as was demonstrated by the case of Prudential Ins. Co. v. Moorhead.195 Although that case involved a challenge to the statute by a posthumous illegitimate child,196 the holding of the case is probably quite indicative of the outcome of a claim pursued by a posthumously conceived child under the statute.

In Moorhead, Billie-Joe Moorhead was born seven months after her father, William Moorhead, an active-duty Sailor, was killed in a motorcycle accident.197 After Billie-Joe’s birth, a New York family court granted an order finding that William Moorhead was Billie-Joe’s father and a birth certificate was issued by the state listing him as her father.198 Both the court finding of parentage and the birth certificate listing the deceased as Billie-Joe’s father had been obtained after the death of the servicemember and without his acknowledgement or consent, thus, the documents failed to operate to make Billie-Joe an eligible beneficiary under the statute.199 Billie-Joe filed her action asserting that she was entitled to recover the SGLI proceeds as the servicemember’s daughter and that the requirements of the statute deprived her of due process and the equal protection rights guaranteed her by the Fifth Amendment.200

The Court of Appeals for the Fifth Circuit found that “[i]t is well settled constitutional law that statutory classifications based on illegitimacy are subject to intermediate or heightened scrutiny.”201 Accordingly, the court sought to ascertain whether the statutory beneficiary requirements for illegitimate children to collect as a “child” pursuant to the SGLI were related to an important governmental objective.202 The court noted that intermediate scrutiny was appropriate in cases involving illegitimate children to ensure that “additional strictures imposed” on them do not have a “constitutionally impermissible discriminatory purpose as their impetus. It is a response to the fear that legal hardship may be visited upon illegitimate children merely because of ‘society’s condemnation of irresponsible liaisons beyond the bonds of marriage.’”203 The court went on to note that while intermediate scrutiny in such cases ensures a substantial relationship between the statutory means and end, it does not serve to forbid a statutory scheme that serves a legitimate governmental function, even if the statute imposes an unavoidable “hardship on a particular individual subject to it.”204

To that end, the court recognized that the governmental interests of accurately determining paternity and efficiently distributing insurance proceeds were important governmental interests justifying the government act of statutorily classifying children based on legitimacy to ensure greater accuracy in matters related to paternity.205 Having made this finding, the court noted that
there was a need for a determination of paternity during the father’s lifetime, as was accomplished through the statutory provisions, because even “[t]he marvels of DNA testing . . . only solve the problem if the putative father can be tested.”

The court then went on to find that the five means for establishing paternity listed in the statute promoted the governmental interest in accuracy of paternity notwithstanding Appellant’s argument that only one of those five methods, the signed acknowledgment, was available to her because she was a posthumously born illegitimate child. The court rejected this argument noting that “Congress . . . is not charged with making every option available to every illegitimate child—the fit between statutory purpose and statutory rule need not be perfect.” Accordingly they found that the statutory language describing “child” pursuant to the SGLI was related to an important government interest, met the test of intermediate scrutiny and did not violate the equal protection clause.

In finding against Billie-Joe, a posthumously born child, the court struck down most of the arguments likely to be asserted in a similar claim by a posthumously conceived child. However, in cases where the decedent leaves a signed written document indicating his desires with respect to posthumous conception, it is foreseeable that the writing would serve as a “signed acknowledgement” as required under the statute. Thus, that writing alone or the writing coupled with DNA documentation establishing that the child is the natural, i.e., biological, child of the servicemember should suffice in qualifying the posthumously conceived child as a “child” eligible to receive SGLI proceeds under the statute. Accordingly, under our hypothetical, the Perry twins, who are born to a surviving spouse, would have no claim. A child born under circumstances similar to the facts in Hecht, however, would be a “child” eligible to receive proceeds paid pursuant to a claim under the SGLI because the decedent made his intent clear.

As posthumously conceived children would likely not be born until sometime after the distribution under the SGLI, however, it is not likely that many issues will arise with regard to this benefit. Of course it is possible that the servicemember would name a trust or similar entity, for the benefit of his children, as the beneficiary under such a policy. If this were the case, it is foreseeable that issues would arise with regard to children already born and their interest as well as to the question of whether to leave the trust open if, at the time of the veteran’s death he does not yet have any children, but has left reproductive matter and something indicating his express desire that such matter be used for posthumous conception of a child or children.

In Moorhead, the court stated in dicta “[t]o require that all disbursements be withheld for several years on the chance that a claim from an afterborn [sic] illegitimate might be forthcoming would be impractical.” While the court may be correct in that such an indefinite requirement is impractical and in direct contrast to Congress’s stated interest in making quick insurance disbursements, in cases where a servicemember has left reproductive matter and a signed written statement of consent or acknowledgment to someone other than his spouse, a requirement withholding disbursement for a specified time period reasonable to accomplish the servicemember’s desires, should be considered. Moreover, if posthumously conceived children are recognized as children of the servicemember with regard to other survivor’s benefits, they should be treated similarly with regard to the SGLI where this can be accomplished within the current statutory infrastructure.

3. Survivor Benefit Program

Another benefit likely affected is the Survivor Benefit Program (SBP) benefits.
The SBP provides monthly payments to the surviving spouse or children of servicemembers who die in the line of duty while serving on active duty.\textsuperscript{215} Payments under the SBP are made at 55% of the member’s would-be retired pay based on 100% disability.\textsuperscript{216} Additionally, the SBP is automatically adjusted annually for cost-of-living increases although payments are subject to federal income taxes.\textsuperscript{217} If the spouse remarries before age fifty-five, SBP payments cease.\textsuperscript{218} However, the spouse could opt to have payments made to children until they reach age eighteen (or age twenty-two if enrolled in school).\textsuperscript{219} If the subsequent marriage ends in death, divorce or annulment, SBP payments may be reinstated.\textsuperscript{220} Remarriage after age fifty-five has no effect on payment eligibility.\textsuperscript{221} Payments made pursuant to the SBP are offset by dependency and indemnity compensation (DIC) payments unless such payments were made to a spouse who remarried after age fifty-seven.\textsuperscript{222}

As the SBP is paid only to the surviving spouse or surviving children, a claim would not likely be filed on behalf of posthumously conceived children pursuant to the SBP unless and until the surviving spouse desires to remarry or is in some other way disqualified. At such time, it is foreseeable that she would petition to have the benefit paid to the surviving posthumously conceived children. Thus, any decision with regard to the status or eligibility of posthumously conceived children to receive other survivor’s benefits would likely be determinative of a claim under the SBP. Such a determination might also be fundamental in cases where a posthumously conceived child is born to a servicemember who had no surviving spouse. As in the other benefits analyses, a determinative factor in such a case would be whether the posthumously conceived child is a surviving dependent child of the servicemember.

Since the SBP plan is akin to an insurance policy in that it is typically set up as an annuity payable to a named beneficiary which acts as an income maintenance program for the servicemember’s survivors,\textsuperscript{223} the same reasoning applied in determining the proper interpretation of “child” under the SGLI should be applied with respect to the SBP. Furthermore, proceeds paid should pass in accordance with the “federal statutory scheme wholly independent of the laws on intestate succession of any state.”\textsuperscript{224} This being the case, the language of the statute must be consulted.

Like “child” under the SGLI, “dependent child” under the SBP is also statutorily defined.\textsuperscript{225} Unlike the definition of child under the SGLI, however, dependent child under the SBP is not defined in great detail. Moreover, the statute provides only that a dependent child is a person who is the child of a person to whom the plan applies, who is unmarried and under eighteen or between eighteen and twenty-two if enrolled in school, or is unmarried and incapable of self support because of a mental or physical incapacity that existed before the child was eighteen or when the child was between eighteen and twenty-two and in school.\textsuperscript{226} Accordingly, the language should be given its natural meaning.\textsuperscript{227} This being said, the posthumously conceived child is likely to be considered a “dependent child” under the statute since he would genetically be a “child of a person to whom the Plan applies.”\textsuperscript{228}

This, however, may present other issues. Specifically, since under the statute, surviving dependent children take in equal shares, issues concerning distribution with respect to other children of the deceased may arise. Moreover, dependent child annuity coverage under an elected SBP has been deemed to include all dependent children, not only those who were alive at the time of the election.\textsuperscript{229} Such coverage “extends automatically and involuntarily to any child[ ] . . . thereafter acquir[ed].”\textsuperscript{230} Logically, this reasoning should be applied to the analogous
situations of the automatic SBP. Therefore, where there is no surviving spouse, but there are surviving dependent children who receive payments pursuant to the SBP, it is foreseeable that after having received monthly payments for a considerable time, even a few years, these dependent children could receive substantially reduced shares of the SBP payment as the result of posthumously conceived children being born. To ensure the most equitable result in such cases, a reasonable time period should be specified after which, posthumously conceived children should be precluded from receiving payments where it means reducing already established payments to other beneficiaries.

4. Survivor’s Benefits Generally

Since these and other military survivor’s benefits were established to ensure that the surviving dependents were not left destitute by the death of the servicemember, a goal similar to that of Social Security, it stands to reason that the analysis applied by courts in Social Security cases should also be applied to military beneficiaries. In Social Security cases, courts began by concluding that “the legislative intent behind [social security] payments [was] to support surviving children who were actually “dependent” upon the wage earner,” an intent similar to that which underlies the allocation of Military survivor benefits. The courts realized that this dependency could be presumed through the child’s “relational status” with the wage earner. This was based on a recognized congressional intent that the actual dependency would not need to be shown in instances where the child would be entitled to inherit under state laws; where a marriage was invalid due to legal impediment; or where a parent had acknowledged in writing that the child was his child before his death or had been decreed by a court to be the father of the child. Since it is not likely that a posthumous child, conceived with or without the consent or knowledge of her father, could meet any of this criteria, it is probably more appropriate to rely on the statutory definitions of qualifying child and thereby eliminate the requirement for actual dependency.

V. A Proposed Change

A “child of the veteran” is statutorily defined as an unmarried legitimate child, an illegitimate child, an adopted child, or a stepchild acquired before reaching the age of eighteen years old and “who is a member of the veteran’s household or was a member of the veteran’s household at the time of the veteran’s death,” and who is under eighteen when benefits are awarded or who became permanently incapable of self support before reaching the age of eighteen or who is under the age of twenty-three and pursuing an education at an approved school. Looking at the face of this statutory language, it would appear that posthumously conceived children attempting to recover under this statute, will encounter the same problems encountered by the children in Woodward and the other posthumous conception cases. Moreover, because the statute does not define the terms used to describe the child such as “legitimate” and “illegitimate,” it is foreseeable that interpretation will be “totally reliant on inconsistent state laws.” This would also prove detrimental to the child where, as is likely in a military case, the law applied is that of the father’s home of record, possibly a state with no real connection to the child and where the laws may be less favorable to the child.

A. Child Defined

For this reason, the definition of child as applied to cases pertaining to military survivor’s benefits should be expanded to reduce the need to rely on state law for interpretation. It can be argued that the need for an expanded definition has already been made apparent because of issues arising in other cases. Moreover, over the past several
To clarify the present definition of child, a change should be made to Topic 37 of the Veterans Administration’s manual titled, M21-1MR, Pt. III, Subpt. iii, 5.G, Establishing the Relationship Between the Veteran and His/Her Biological Child, expanding the categories of children affected. Topic 37 currently reads:

Evidence adequate to establish the child’s age as outlined in M21-1MR, Part III, Subpart iii, 5.F.33 is also adequate to establish the relationship of a biological child to a male veteran married to the child’s mother if the

• veteran was married to the child’s mother at the time of the child’s birth, and
• evidence shows that the veteran was the child’s father.

If the veteran was not married to the child’s mother at the time of the child’s birth, acceptable proof of relationship consists of the following:

• a written acknowledgement signed by the veteran
• evidence that the veteran has been identified as the child’s father by judicial decree ordering him to contribute to the child’s support or for other purposes, and/or
• any other secondary evidence that reasonably supports a finding that a relationship exists, such as—a copy of the public record of birth or church record of baptism showing that the veteran was the informant and was named as the father of the child—certified statements of disinterested persons who state that the veteran accepted the child as his, and/or
—information obtained from a service department, or public records such as those maintained by school or welfare agencies, that show the veteran, with his knowledge, was named as the father of the child.

Moreover, the language in Section 37c. Establishing a Child’s Relationship to Male Veteran Not Married to the Child’s Mother, should be amended to include language stating that “if the veteran was not married to the child’s mother at the time of the child’s birth, acceptable proof of relationship consists of the following: documentation that the veteran was married to the child’s mother at the time of his death and the child is biologically related to the veteran or, a written document manifesting the veteran’s intent to convey reproductive matter to the child’s mother for insemination after his death together with documentation establishing that the child was: (1) conceived using such reproductive matter, and (2) born within three years of the veteran’s death.”

This change alone will effectively restore to posthumously conceived children the status of a legitimate child that they are effectively deprived of at birth. This is easily demonstrated by looking at the 1LT Perry hypothetical. With the change, the twins would clearly be eligible for benefits because their mother was married to 1LT Perry at the time of his death. The twins are biologically related to 1LT Perry, he consented to the posthumous conception, and the twins were born within three years of his death. In essence, this change would allow posthumously conceived children to receive survivors’ benefits in the absence of their father while at the same time providing an avenue to prevent frivolous or untimely claims.

This change will also help the servicemember maintain a sense of peace, knowing that if something were to happen to him, his desires would be carried out and his family would be
B. Advice to the Soldier

For this same reason, Soldiers preparing to deploy should be briefed on cryopreservation as part of their Soldier Readiness Process Training. Moreover, the military has established the Soldier readiness process program to help ensure that all Soldiers are administratively ready for deployment, at all times. In preparing for deployment, soldiers are given legal advice on issues pertaining to estate planning, medical directives and other personal matters such as family plans and control and maintenance of personal property through powers of attorney and other legal documents. This would be an opportune time to discuss the servicemember’s issues, concerns, and desires relating to posthumous reproduction. If the stories cited in the newspaper articles are accurate depictions of what is taking place regularly, it is time for the military to step up to ensure that servicemembers are accurately and adequately informed. If this is done, last minute issues of consent and intent can be eliminated or reduced so that the level of stress on family members at critical times when emotions are high can be minimized. Additionally, having the servicemember consider and express his desires up-front may help the military to avoid the uncomfortable position of having to deny that finale request made by servicemember’s loved ones in their attempt to carry out what they believe are his last wishes, or in their own effort to continue his legacy.

VI. Conclusion

It is evident from reading headlines such as “Fearing Injury, Soldiers Freeze Sperm,” “War Boosts Sperm Deposits,” and “Some Troops Freeze Sperm Before Deploying,” in popular newspapers, that posthumous conception will soon be a growing concern for the United States Military. Already we have seen the fruition of these issues as newspapers recently reported “Science Makes A New Father Of A Fallen American Soldier” as they introduced the world to sevenmonth-old Benton Drew Smith, the posthumously conceived child of Second Lieutenant Brian Smith who was killed in action in Iraq more than two years before his son’s birth. Although issues involving posthumous conception have already been considered by a handful of States, the unique nature and varied aspects of military service require that these concerns be addressed more broadly and in a more uniformed fashion.

As partial compensation for the unique and inherently dangerous nature of service in the military, servicemembers receive benefits and entitlements not necessarily common in other professions. Moreover, at times many aspects of military life can seem a bit paternalistic. To this extent Servicemembers receive free counseling on personal issues and even free legal advice to a certain extent. These services are provided to ensure that the servicemember and his family are adequately informed and cared for so that the servicemember is free to focus on the military mission. For these reasons, before deploying servicemembers are briefed on a number of topics, to include some degree of estate and family planning. Since it appears that issues concerning posthumous reproduction are of greater concern for servicemembers anticipating deployment, the military could use this opportunity to discuss these issues so that the servicemember can prepare the documentation necessary to ensure his desires are known and expressed in a way that would facilitate his desires being lawfully carried out if there were a need.

Along the same lines, military survivor’s benefits were established to ensure that the families of servicemembers who had made the ultimate sacrifice for their country would be cared for in the servicemember’s...
absence. This cannot be accomplished through a system that purports to provide a means of support to a particular group of individuals and then excludes an entire subsection of that group based on factor’s that if changed would preclude the very existence of the group. If indeed benefits were established to provide for surviving spouses and children, all such children who are similarly situated should be considered. Accordingly, it is within reason to make a slight administrative accommodation to an already existing rule so that posthumously conceived children may have the same opportunities for support as other children of deceased veterans, which, very well might include their older siblings. This can be achieved by merely broadening the definition of “child” as the term is used in determining eligibility for survivors’ benefits. Although issues concerning posthumous reproduction are still relatively new, it is within the best interest of the military and its servicemembers to address foreseeable concerns and to eliminate any unnecessary government induced impediments. By implementing a few simple practices in its pre-deployment estate and family planning services and making an uncomplicated modification to a regulatory definition, the military would be better prepared to meet the needs of “this new kind of Military family.”

ENDNOTES:

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2 Sperm Cryopreservation is an assistive reproduction technique wherein liquid nitrogen is used to freeze reproductive cells for future use. See Tyler Medical Clinic, Sperm Cryopreservation, http://www.tylermedicalclinic.com/cryobank.html (last visited May 14, 2008).

3 See In re Jobes, 529 A. 2d 434, 438 (N.J. Sup. Ct. 1987). Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heartbeat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner. Id.

4 Assistive Reproduction technology includes “all treatments or procedures which include the handling of human oocytes or embryos, including in vitro fertilization, gamete intrafallopian transfer, [and] zygote intrafallopian transfer . . . .” THE PRESIDENT’S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES ch. 2, § I.A.1.a.(i). (2004) [hereinafter PRESIDENT’S COUNCIL ON BIOETHICS] (citing 42 U.S.C. § 263a-7(1)), available at http://www.bioethics.gov/reports/reproductionandresponsibility/index.html (follow “Chapter Two: Assisted Reproduction” hyperlink). “Most methods of assisted reproduction involve five discrete phases: (1) collection and preparation of gametes; (2) fertilization; (3) transfer of an embryo . . . to a woman’s uterus; (4) pregnancy; and (5) delivery and birth.” Id. § 1.

5 Since March 2003, there have been 3965 military fatalities resulting from the war on Terrorism. An additional 29,320 servicemembers have been wounded in action. Defense Manpower Data Center, Statistical Information Analysis Division, Global War on Terrorism - Operation Iraqi Freedom, available at http://siadapp.dmdc.osd.mil/personnel/CASUALTY/OIF-Total.pdf (last visited May 14, 2008).

6 Posthumous conception occurs when a child is conceived via assistive reproduction technology after one

7 See, e.g., Valerie Alvord, Some Troops Freeze Sperm Before Deploying, USA TODAY, Jan. 27 2003, at 1A; Ellen Gamerman, For U.S. Troops, A Personal Mission, BALTIMORE SUN, Jan. 27, 2003, at 1A; Marilyn Dunlop, Fearing Injury, Soldiers Bank Sperm, TORONTO STAR, Feb. 13 1991, at A14 (referencing a campaign to inform military men that sperm banks were an option for them); Ivor Davis, Posterity Insurance: AIDS, Infertility and Medical Advances Have Given Sperm Banks a Run on Their Frozen Assets, CHICAGO TRIB., Apr. 26, 1988, at 1 (noting that sperm donors included men on military duty who were posted to possible war or volatile zones).

8 Brain dead refers to a state wherein there is irreversible cessation of all functions of the brain, including the brain stem. UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 589 (1996).

9 See, e.g., Israeli Court: Family Can Have Dead Soldier’s Sperm, CNN.com, Jan. 29, 2007, available at http://cnn.wirednews.printhistory.clickability.com/pt/cpt?action=cpt&title=Israeli+court%282006%29 (reporting of a families struggle to have a sample of their son’s sperm that was taken after he was shot four years ago by a sniper, released to them for insemination by a surrogate mother).


11 Id.

12 RICHARD M. LEOVITZ, NATURAL SELECTION IN FAMILY LAW ch. 5.2 (2005), available at http://www.biojuris.com/natural/5-2-0.html.

13 “Most current conflicts about posthumous reproduction arise from the ability to freeze and thaw gametes and embryos . . . . In each case, the question is whether the freezing, thawing, inseminating, implanting, and other activities that lead to posthumous offspring should occur or continue.” Robertson, supra note 10, at 1030.


15 Teresa Burney, War Boosts Sperm Deposits, ST. PETERSBURG TIMES (Florida), Feb. 19, 1991, at 1B.

16 See Ann Denogean, Davis-Monthan Airmen Bank Sperm as They Gird for Conflict, TUCSON CITIZEN, Feb. 15, 2003, at 1B; Gamerman, supra note 7, at 1A (citing Angela Cruz, the fiancée of an Army reservist who was scheduled to deploy who stated “[i]f he were to die over there, I’m definitely going to use the sperm sample (deposited by her fiancée) to get pregnant.”).


18 Posthumous sperm retrievable for sperm cryopreservation is only medically feasible within the first twenty-four to thirty hours after death. CORNELL UNIVERSITY, DEP’T OF UROLOGY, NEW YORK HOSPITAL GUIDELINES FOR CONSIDERATION OF REQUESTS FOR POST-MORTEM SPERM RETRIEVAL (2006) [hereinafter N.Y. HOSP. GUIDELINES], available at http://www.cornellurology.com/guidelines.shtml.


20 N.Y. HOSP. GUIDELINES, supra note 18.


23 Id. at 541.

24 262 U.S. 390 (1923).

25 Id. at 399; see KENNETH D. ALPERN, THE ETHICS OF REPRODUCTIVE TECHNOLOGY 252 (1992).

26 405 U.S. 645 (1972).

27 Id. at 651 (quoting Meyer, 262 U.S. at 399; Skinner, 316 U.S. at 541).


29 Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).


31 There have been several civilian cases arising from the posthumous conception of children when sperm had been cryopreserved by the wife after the death of her husband; however, none of these cases specifically address the issue of the lawfulness of the removal and subsequent insemination of the sperm. See Ex rel. Stephen v. Barnhart, 386 F. Supp. 2d 1257 (M.D. Fla. 2005); Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961 (D. Ariz. 2002); Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002); In re Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000); see also Laura A. Dwyer, Dead Daddies: Issues in Postmortem
Reproduction, 52 RUTGERS L. REV. 881 (2000) (discussing the moral and legal issues arising out of a request form a mother to have her son, who had shot himself, kept alive long enough to have his sperm surgically removed so that she might one day become a grandmother).

32 See Schiff, supra note 30, at 53.

Any attempt to formulate a coherent ethical framework in this area must be sensitive to the many interests at stake. In addition to considering the grieving family member’s desire to produce a child, policymakers must identify and evaluate other important interests. For example, protecting the psychological well-being of the resulting child should receive serious attention. Might the child be adversely affected by being knowingly denied access to one biological parent? Also, the interests of the deceased’s family are important, as posthumous conception of a child will probably have enduring emotional, psychological and financial implications for the family. However, the issue most easily overlooked, as the dead have no voice, concerns the interests of the deceased. Specifically, what significance ought to be afforded the deceased’s interests when we have little or no evidence regarding his or her wishes for, or objections to, posthumous procreation?

Id.


35 Id.

36 Id.

37 A living will is a document executed by patients while competent that specifies “those life-sustaining medical procedures they would want provided and those they would want withheld, should they become terminally ill.” Id. Most living wills are derived from the Uniform Rights of the Terminally Ill Act which authorizes a person to manage decisions regarding life-sustaining treatment should he be unable to make medical treatment decisions due to an illness or condition deemed medically terminal. Id. This language would likely serve to prohibit consent to sperm retrieval or similar procedures by an agent acting pursuant to a Living Will. Id.

38 Id. at 248.

39 Id.

40 Id.

41 Even after death, the rights of the next of kin at common law with respect to any interest in the deceased’s body would not normally permit removal of the deceased’s reproductive matter. See id. at 355.

Similarly, as the Uniform Anatomical Gift Act (UAGA) permits limited postmortem removal of organs and tissue used for transplantation or therapy, it should not be considered to include or permit posthumous sperm retrieval. Id.

42 This is the current policy in the Army. See Memorandum from Brigadier General William T. Bester, Deputy Chief of Staff for Operations, Health Policy and Services, to Commanders, MEDCOM Military Treatment Facilities, subject: Sperm Collection from Deceased Active Duty Army Personnel (4 Aug. 2000).

43 Schiff, supra note 30, at 53 (discussing posthumous conception and the need for consent).


46 Dwyer, supra note 31, at 889 (citing Casey, 505 U.S. at 872).

47 Kerr, supra note 45, at 71.

48 Strong, supra note 34, at 252.

49 Id. at 252–53.


51 Id.


53 Id. at 840.

54 Id.

55 Id. at 841, 843–44.

56 Id. at 844 n.3 (noting that before ruling the court stated, “[o]bviously we are all agreed that we are forging new frontiers because science has run ahead of common law. And we have got to have some sort of appellate decision telling us what rights are in these uncharted territories.”).

57 Id. at 850.

58 Id.

59 See Strong, supra note 34, at 253 (noting that the Hecht decision leaves open the argument that consent by the sperm provider prior to death is valid authority to permit postmortem insemination with the sperm provided).

60 Although the hypothetical did not mention a written document, it is likely that Mrs. Perry could still prove 1LT Perry’s clear intention to leave the sperm for her use in conceiving his child or children posthumously, based on his statement and any writing provided to the storage facility.

61 Currently, there is no federal oversight of assisted reproduction technology that addresses the issue of consent or any other ethical concern raised in the area. There is only one federal statute that aims at the regulation of assisted reproduction: the Fertility Clinic Success Rate and Certification Act of 1992 (“the Act”). The purposes of the statute and its related regulations are
twofold: (1) to provide consumers with reliable and useful information about the efficiency of ART services offered by fertility clinics, and (2) to provide states with a model certification process for embryo laboratories.”

PRESIDENT’S COUNCIL ON BIOETHICS, supra note 4, ch. 2, § III.A.1.

62 Hecht, 16 Cal. App. 4th at 861 (quoting Johnson v. Calvert, 5 Cal. 4th 84, 100 (1993)).

63 “Spouses should not automatically have the right to their dead partner’s sperm . . . the intent to have a child with another living person does not necessarily translate into the rights to the use of your partner’s gametes after they’ve died.” Dinah Wisenberg Brin, Dead Men’s Sperm Raises Ethical Debate, COLUMBIAN (Vancouver, Wash.), May 29, 1997, at A3 (quoting the executive director of the National Advisory Board on Ethics and Reproduction).

64 See Hecht, 16 Cal. App. 4th at 861; Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

65 The Ethics Committee of the American Society for Reproductive Medicine, Posthumous Reproduction, 82 FERTILITY & STERILITY SUPP. 1, S262, Sept. 2004.

66 Id.

67 Although ASRM provides guidance on ethical issues that the “actively encourage” compliance with, compliance of ART facilities and practitioners with these guidelines is entirely voluntary. What is more, ASRM’s entire system of “professional self-regulation is voluntary” thus no penalties or consequences are accessed for violations, as such, there is a general lack of compliance with ASRM. PRESIDENT’S COUNCIL ON BIOETHICS, supra note 4, ch. 2, § 1. Accordingly, where state law is silent, the clinics are free to act in the manner they feel most appropriate under the circumstances. Id.

68 N.Y. HOSP. GUIDELINES, supra note 18.

69 Robertson, supra note 10, at 1034.

70 N.Y. HOSP. GUIDELINES, supra note 18.

71 Id.

72 Although it is acknowledged that “[c]ryopreservation of sperm and embryos make posthumous parentage possible,” currently, there is no federal oversight of assisted reproduction technology that addresses the issue of posthumous conception. PRESIDENT’S COUNCIL ON BIOETHICS, supra note 4, ch. 2, § II.C.


74 See, e.g., Gillett-Netting, 231 F. Supp. 2d at 963; Stephen, 386 F. Supp. 2d 1257 (finding child did not qualify as the decedent’s child under Florida intestacy law); Woodward, 760 N.E.2d 257 (finding posthumously conceived children entitled to inherit under applicable state law); In re Estate of Kolacy, 753 A.2d 1257 (finding posthumously conceived children entitled to inherit under applicable state law).

75 See In re Marriage of Adams, 551 N.E.2d 635, 639 (Ill. 1990) (holding that the lower courts should have applied Florida law instead of Illinois law when determining parentage issues concerning a child conceived through artificial insemination when the insemination had occurred in Florida).

76 The Uniform Parentage Act § 707 (UPA), entitled Parental Status of Deceased Individual, states that: If an individual who consented in a record to be a parent by assisted reproduction dies before placement of . . . sperm . . . the deceased individual is not a parent of the resulting child unless the deceased [individual] consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.


77 The UPA has been codified by Colorado, Texas, Delaware, North Dakota, Utah, Washington, and Wyoming. It was considered for adoption in Minnesota and West Virginia but was not enacted. It is currently being considered by Alabama and New Mexico. Id. See Carole M. Bass, What If You Die, and Then Have Children?, EST. PLAN. & TAX’N, Apr. 2006, at 20, 26, available at http://www.sonnenschein.com/docs/docs_Bass.pdf.


79 See FLA. STAT. § 742.17(4) (2006).

80 VA. CODE ANN. § 20-158 (LexisNexis 2006); CAL. PROB. CODE § 249.5 (2006).

81 VA. CODE ANN. § 20-164.

82 CAL. PROB. CODE § 249.5.


86 371 F.3d 593 (9th Cir. 2004).

87 Id.

88 Id.


90 Id.

91 Id.

92 Id. at 966–67.

93 Gillett-Netting, 371 F.3d at 599.

94 Id.

95 Id. at 598–99.

96 Id. at 598.


99 Gillett-Netting, 371 F.3d at 598.
100 Id. at 598–99.
101 In re Estate of Kolacy, 753 A.2d at 1259.
102 Id.
103 Id.
105 In re Estate of Kolacy, 753 A.2d at 1259.
106 Id. at 1262.
107 Id. at 1264.
109 Id. at 260.
110 Id.
111 Id.
112 Id. at 260–61.
113 Id. at 260.
115 Id.
116 Id.
117 Id. at 265–66.
118 Id. at 264, 272.
119 Id.
120 930 A.2d 1180 (N.H. 2007).
121 Id. at 799.
122 Id.
123 Id.
124 Id.
125 Id. at 800.
126 Id. at 802.
127 Id. at 808. See Judge Broderick’s concurrence noting, “Mr. Khabbaz did not execute a will, but his intentions to have and to provide for his child were clear. Our reading of RSA 561:1, however, leaves Christine unprotected and ignores what we know to be his intent.”
128 Id. (Broderick, J., concurring).
129 Id.
130 386 F. Supp. 2d 1257 (M.D. Fla. 2005).
131 Gillett-Netting v. Barnhart, 371 F. 3d 593 (9th Cir. 2004).
132 Stephen, 386 F. Supp. 2d at 1261.
133 Id.
134 See FLA. STAT. § 742.17(4) (2006).
135 Stephen, 386 F. Supp. 2d at 1257.
137 Id. at 105.
138 Id.
139 Id.
140 Id. at 106.
141 Id.
142 Id.
143 Id.
144 Id.
145 Id.
146 Id.
147 Id. at 107.
148 Id. at 109–12.
149 Id. at 110.
151 See 42 U.S.C. § 416(h)(2)(A) (2000). With regard to determining eligibility of a child to collect social security benefits, the provision provides:
In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.
155 Major Dana Chase, Legal Assistance Notes: Person Authorized to Designate Disposition (PADD) Update, ARMY LAW., Feb. 2006, at 25. 156 An injury, disease, or death is considered to have occurred in the line of duty when, at the time the injury was suffered, the member was in active military service regardless of whether on active duty or in an authorized leave status, unless the injury resulted from the person’s own willful misconduct.
Cole, supra note 154, at 2. 157 For purposes of benefits, active duty is defined as, “full-time duty in the armed forces.”
158 38 C.F.R. § 3.57 (2007).
159 Banks, supra note 6, at 310.
160 Id.
162 Cole, supra note 154, at 3. Eligibility for Social Security survivor benefits is determined by the “insured status” of the deceased. The survivors of a military member are eligible for Social Security due to the military status of the deceased. What this means is that even if a military member has not been
employed for a long enough period of time to be either currently or fully insured under Social Security, the member will still be treated as if fully insured. The surviving spouse of a veteran is not entitled to monthly [Social Security] survivor benefits until the spouse has reached the age of sixty. However, the surviving spouse will receive benefits as a custodial parent for any child of the fully or currently insured individual who is under the age of sixteen.

Id.


164 Banks, supra note 6, at 311.


166 Banks, supra note 6, at 311.

167 See 42 U.S.C.S. § 402(d); see also 10 U.S.C.S. § 1487(11). In addition, there are provisions for children over eighteen and in college, or permanently disabled, to continue to receive benefits. Id.

168 Under the VA system surviving spouses generally receive a basic rate of monetary benefits with additional payments assessed for dependant children.

169 In order to be eligible to receive survivors’ benefits under Social Security the surviving spouse must be at least sixty years old or fifty years old if disabled. See 42 U.S.C.S. § 402(e), (f).

170 Chase, supra note 155, at 25 (noting that children may be eligible for other benefits including, death gratuity, medical care, emergency money, and exchange and commissary privileges); see Dep’t of Veterans Aff., Survivor Benefits, http://www.vba.va.gov/survivors/vabenefits.htm (last visited May 23, 2008) [hereinafter VA Survivor Benefits].


172 Id. § 1311.

173 This rate is effective for the period from December 2007 through 30 November 2008. See Dep’t of Veterans Aff., Dependency and Indemnity Compensation, http://www.vba.va.gov/bln/21/Rates/comp03.htm (last visited May 23, 2008).


175 38 U.S.C.S. § 1311; see also Military.com DIC, supra note 174.

176 38 U.S.C.S. § 1311; see also Military.com DIC, supra note 174.

177 If after attaining the age of eighteen the twins are pursuing an education at an approved educational institution, they could maintain eligibility until they are twenty-three years old. 38 U.S.C.S. § 101(4)(A)(iii).


179 VA VIC, supra note 174.


181 VA Survivor Benefits, supra note 170.


187 Id. § 1970(a).


191 Rodriguez v. Rodriguez, 329 F. Supp. 597, 599 (Cal. 1971) (citations omitted); see Prudential Ins. Co. v. Jack, 325 F. Supp 1194, 1196 (La, 1971) (finding that the legislative intent of the SGLI program included illegitimate children within the definition of the term “child” where there was a written acknowledgement of parentage).


195 Moorhead, 916 F.2d 261.

196 The appellant in Moorhead, Billie-Joe Moorhead had be conceived “traditionally” however, her father who had never married her mother, was killed in an accident prior to Billie-Joe’s birth. Id. at 263.

197 Id.
Payments made pursuant to claims under the SGLI are typically made fairly quickly since the code states that if a claim has not been filed by the person entitled to receive the payment under the language of the code within one year of the servicemember’s death, payment should be made to the person who would be entitled to payment if the first person had predeceased the servicemember. 38 U.S.C.S. § 1970(b) (LexisNexis 2008). The code goes on to provide that if after two years of the servicemember’s death there has still not been a claim for payment made by a claimant entitled pursuant to the order of precedence in the statute, payment may be made to an equitably entitled claimant and that such a distribution would bar recovery by any other person. Id.

When a Servicemember dies, family members are offered several benefits to ease some of the financial burdens. See Military.com DIC, supra note 174.

Military Custody and Visitation

By Patty Shewmaker

Shewmaker & Shewmaker, LLC in Atlanta, Georgia. Her practice is devoted to family law matters and she specializes in military family law matters. Patty is a graduate of the United States Military Academy at West Point, New York, and spent 10 years in the United States Army and the Georgia Army National Guard, leaving the service as a Major and having earned the Bronze Star Medal in Operation Iraqi Freedom.

There are currently 1,455,375 servicemembers serving on active duty in the United States Armed Forces. And, there are 850,880 servicemembers serving in a reserve status, including both Reservists and National Guardsmen. Of those, it is estimated that about 142,000 of those servicemembers are single parents with primary custody of his or her children. The operational tempo (“optempo”) of the Armed Forces including the repeated mobilizations and deployments and the frequent changes of duty stations are significant challenges to custody and visitation arrangements. The optempo also places additional stress on the family unit leading to higher incidents of divorce and the custody issues resulting from divorce.

Here are a few examples that I have seen involving servicemembers and child custody:

Scenario #1:

Vince and his wife get a divorce. They have two (2) minor children, and they agree to a joint legal and physical custody arrangement. Vince has parenting time with his children approximately 40% of the time. Vince is also a Sergeant (E-5) in the Army National Guard. In 2009, Vince gets called to active duty to deploy to Afghanistan. While he is deployed, his ex-wife doesn’t allow him to call the children, and she doesn’t allow him to see the children when he comes home on mid-tour leave. What should he do?

Scenario #2:

Crystal is a divorced mother of her son. She has primary physical custody, and her ex-husband has “standard” visitation. Crystal is in the Reserves, and she has remarried since the divorce. Crystal gets mobilized and is scheduled to deploy in ten (10) days. She

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1 Patty Shewmaker is a family law attorney and partner at 2 http://us-military-

3 Id.
wants to leave her child with her new husband; however, her ex-husband says the child comes with him and he tells her he is going to file a modification of custody and get primary physical custody of the child. What should she do?

Scenario #3:

Connie was married to Alex, an active duty Marine, and they had a son. They subsequently divorced. Alex had primary custody of their son. Alex deployed, and he left their son with his new wife, Sally, which is in accordance with the family care plan that Alex put together and submitted to the Marine Corps. Connie thinks that their son should be with her. What should she do?

These are just three (3) examples, and the different situations are endless. Custody issues between parents can be difficult and complex. Adding the challenges of military life can dramatically exacerbate the difficulty and complexity of custody issues.

**Servicemembers Civil Relief Act.**

Any discussion of civil actions and servicemembers must start with and include a discussion about the Servicemembers’ Civil Relief Act (commonly referred to as the “SCRA”). This was formerly the Soldiers’ and Sailors’ Civil Relief Act of 1940 (SSCRA), but was updated and amended in 2003 as the Servicemembers Civil Relief Act. One of the purposes of the act is “to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.”

Title III of the SCRA provides procedural protections for the servicemember, including a stay of civil proceedings. The SCRA provides that "at any stage before a final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.”

The stay proceedings of the SCRA is intended to protect servicemembers from worrying about possible litigation and having to deal with civil litigation when deployed. A soldier who is distracted by things going on at home is often and understandably unable to focus on his or her mission in a combat theater of operations and can be a danger to self and comrades. The SCRA provides specific guidelines for a servicemember to apply for a stay of proceedings. To apply for a stay of proceedings, a servicemember must follow specific guidelines in the SCRA; and even then, that is not a guarantee that the court will grant the stay. If there is an issue regarding child custody or other child issues or on issues or upon issues in which the servicemember is not materially affected, a court has the discretion to enter temporary orders even while the servicemember is deployed.

**Parenting Plans**

Any time there is a custody case involving a servicemember, whether on active duty or part of the reserve component, the parenting plan or visitation schedule that is part of a custody order should contemplate the military service of that parent. What does that mean? A parenting plan should contemplate

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5 Servicemembers Civil Relief Act Guide, The Judge Advocate General’s Legal Center & School, U.S. Army, JA 260 (March 2006), p. 1-2. It is not uncommon to hear attorneys and Judges still refer to the act by its old name, the Soldiers’ and Sailors’ Civil Relief Act.
6 Id. at 1-3.
that a servicemember on active duty changes their duty station every few years, so even though the servicemember and the other parent may be in close proximity at the time of the order, it is reasonably foreseeable that the servicemember will be moving. When that servicemember/parent moves, what will the parenting time schedule look like then? Every other weekend may no longer work.

Addressing these issues in a parenting plan can also help to alleviate the need for the parents to go back to court for a modification. In some jurisdictions, it is standard practice to provide provisions in a parenting plan for when the parents live within 100 or 150 miles of each other and provisions for when they live more than 100 or 150 miles apart.

Parenting plans should also contemplate what happens in the event of a deployment. Does the deployed parent get parenting time during pre-deployment leave, during mid-tour leave, and when do we return to the original schedule? Does the deployed parent have contact with the child(ren) while he or she is deployed via telephone or skype? Does the deployed parent’s family get parenting time with the child(ren) while the deployed parent is deployed? Contemplating these things in the parenting plan can reduce problems and litigation as well as reduce the stress of a deployment on a family. Some states even require that these types of things be contemplated when there is a parent who is a

10 Deployment can mean a variety of things and should be defined in the parenting plan. A deployment can refer to a servicemember going out on a field exercise at his or her local base for 2 weeks. A deployment can mean a servicemember going to a military school for 2 months. Or, a deployment can mean a servicemember deploying to a combat theater of operations. A well written parenting plan will contemplate all of these scenarios because all of these and other probable scenarios impact parenting time.

9 A great article on relocation and child custody is “PCSing Again? Triggering Child Relocation and Custody Laws for Servicemembers and Their Families,” by Major M. Turner Pope, Jr., The Army Lawyer, June 2012, p. 5-16.

11 As an example, Georgia requires a parenting plan that contemplates these things under its Military Parents Equal Rights Act, codified at O.C.G.A. §§ 19-9-3(i) and 19-9-1(b)(2)(G) (2013); Alaska has a similar laws under AS 25.20.095 (2013).
12 However, let me quickly add that these laws are not standard and vary greatly from state to state. Some state statutes only apply to National Guardsmen and/or Reservists. Some state statutes provide that a deployment does not solely justify a child custody modification; while others do not have
this provision.\textsuperscript{13} Given the prevalence of the issue and the disparity among the states on dealing with custody and the military, there has even been legislation introduced at the Federal level regarding military servicemembers and child custody. The most recently proposed legislation was H.R. 1898 introduced on May 8, 2013; this legislation would amend the SCRA to include provisions regarding deployments and child custody.\textsuperscript{14} While uniformity among the States may be desirable, the introduction of Federal legislation regarding child custody matters has created much concern and angst regarding the involvement of the federal government in areas that have strictly and historically been dealt with by the state courts.

In response, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment by the States the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) at its annual conference in July 2012.\textsuperscript{15} The National Conference of Commissioners on Uniform State Laws has previously given us such uniform laws as the Uniform Commercial Code (UCC), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and the Uniform Interstate Family Support Act (UIFSA). The UDPCVA has already been enacted by four states: Colorado, Nevada, North Carolina, and North Dakota.\textsuperscript{16}

The UDPCVA addresses things such as 1) the entry of temporary orders when a servicemember deploys; 2) contact between the servicemember and his or her child(ren) during deployment; 3) delegation of visitation rights so other family members may see the child(ren) in the servicemember’s absence; and 4) returning to the prior visitation upon redeployment.\textsuperscript{17} The UDPCVA also provides that “a court may not consider a parent’s past deployment or possible future deployment in itself in determining the best interest of the child.”\textsuperscript{18}

Not only does the military provide a great service to this nation but it also provides great opportunities for servicemembers and their families, including children. Servicemembers should not have to choose between serving their country and taking care of their children.

**DEALING WITH MILITARY RETIREMENT BENEFITS IN DIVORCE ACTIONS**

By Marshal S. Willick

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Military retirement benefits are perhaps the most important part of any military divorce, and are usually the largest single marital asset in a military marriage. The rules governing what benefits are available during life and upon death, how they can be divided, and how they can be protected or lost, are complex. Knowing a few basic concepts can ensure you know to protect your interests in a military divorce.

**A. The Most Valuable Asset**

\textsuperscript{13} Id. at p. 31.
\textsuperscript{14} Id. p. 1 and Appendix A.
\textsuperscript{16} Id.
\textsuperscript{17} A complete copy of the text of the act is available online at http://www.uniformlaws.org/Act.aspx?title=Deployed Parents Custody and Visitation Act.
\textsuperscript{18} Section 107 of the UDPCVA.
Retirement benefits are usually the most valuable asset of marriages, often exceeding the value of all other assets combined, including the equity in any marital residence. This is particularly true in military marriages, in which frequent moves are the norm.

Almost universally, pension benefits are recognized as community or marital property, including benefits that are still being earned (“unvested” and unmatured pensions). This is because the benefits accrued during marriage, and future receipt of retirement income is actually a large part of the benefits earned by the labor performed during marriage.

Senior enlisted personnel frequently retire after 20 years active service in their early forties and receive a lifetime pension of one-half their basic pay. This means a minimum of about $2,000 per month, every month for life, plus cost of living adjustments. These benefits are worth some half million to a million dollars or more in “present value” and not including cost of living or inflation increases.

As a practical matter, it may be necessary to deal with pensions during the divorce itself, instead of deferring the matter to be dealt with “later.” Some states do not permit a “partition action” after divorce if the retirement is omitted from the divorce itself. Failing to fully address the retirement during the divorce could leave the spouse with no interest in the most valuable asset of the marriage.

In 1982, Congress enacted the Uniformed Services Former Spouses Protection Act (“USFSPA”), explicitly permitting States to divide military retired pay as property belonging to both spouses to a military marriage, or to use military retired pay as a source of alimony or child support payments. The USFSPA does not give former spouses an automatic entitlement to any portion of members’ pay. Only state laws can provide that military retirement pay can be divided in a divorce, or provide for alimony or child support to be paid from a military retirement.

The traditional military retirement is a “defined benefit” type of plan – it does not have a cash balance, but like a traditional pension pays monthly benefits (which vary depending on the service member’s rank and length of service) every month from the time of retirement for life. Reservists have a slightly different retirement system, which only starts paying monthly benefits once the reservist becomes 60 years old.

From time to time, the military permits members to take one of several forms of early retirement without serving the usual 20 years or longer. If the divorce is during service, the attorney for the spouse must know about those programs, and build into the decree protections for the spouse to make sure that possibility is adequately covered.

A former spouse’s right to a portion of retired pay as property terminates upon the death of the member or the former spouse, unless the court order explicitly provides for the former spouse to be the beneficiary of the Survivor’s Benefit Plan (“SBP”).

Most States divide pensions according to the “time rule” – each spouse gets 50% of whatever benefits accrued during the marriage. Under the USFSPA, a spouse may get direct payment of up to 50% of “disposable retired pay” directly from the military pay center. If arrears are also owed for child or spousal support, up to a total of 65% can be collected.

Military retirement division may be made by percentage or dollar sum, and it is possible to provide for cost-of-living adjustments (“COLAs”) when dividing the retirement benefits by percentage. This secures both parties against erosion of the value of their portions of the retirement by inflation.
B. There is Also a Thrift Savings Plan

The TSP is a defined contribution type of plan for federal employees; like a private employer’s 401(k) plan, it is a mechanism for diverting pre-tax funds into retirement savings. It was made available to military members in 2001. As of 2012, a “Roth” (post-tax contributions) option was added to the TSP.

TSP balances are also divisible upon divorce; typically, each spouse is awarded half of whatever benefits accrued during the marriage. Orders dividing TSP should deal properly with gains and losses, select a proper valuation date, etc.

C. Special Jurisdictional Rules

Special jurisdictional rules must be followed in military cases to get an enforceable order. An order dividing retired pay as property will only be honored by the military if the court had personal jurisdiction over the member by reason of: (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court.

In most places, and under the current regulations, making a “general appearance” or litigating any issue in a divorce case usually constitutes “consent” to trial of the military retirement issue as well.

D. Disposable Retired Pay

Since 1991, the USFSPA has permitted division of “disposable pay,” which was redefined to eliminate the deduction of income taxes before retired pay was divided. Since then, each spouse gets a portion of the pre-tax retirement, and each must pay taxes on the sum he or she receives.

If a military member claims a disability award, the total amount of money going to the retired military member will stay the same or be increased (depending on which program is involved), and the money will become partly or entirely tax-free to the member, and so is much more valuable.

Some disability awards are simply in addition to the retired pay, so the spouse is unaffected (while the military member receives the disability pay in addition to a share of the retired pay). But sometimes the election of a disability award greatly reduces the amount of money considered “disposable retired pay” and therefore reduces the money paid to the former spouse. There are several different disability programs and the ways they affect retired pay are complex. It is critical that the attorney for the spouse in a military case understands all those programs, and how to draft appropriate indemnification clauses to protect the spouse from being divested of benefits after the divorce.

The bottom line to these cases is that it is incumbent upon the attorneys, particularly the attorney for the spouse, to anticipate post-divorce status changes or military orders and build that anticipation into the decree.

E. The “Ten Year Rule”

The so-called “ten year” limitation is much misunderstood. A court order that divides military retired pay as property may only be directly paid from the military pay center to the former spouse if the parties were married for at least ten years during military service.

If the marriage overlapped service by less than ten years, the right still exists, but the spouse has to obtain the monthly payments from the retired member rather than the military pay center, or the court must characterize the
payments as a stream of spousal support in order to obtain direct payment from the military pay center.

II. OTHER MILITARY BENEFITS TO CONSIDER

A. Survivor’s Benefits

The Survivor’s Benefit Plan provides monthly payments of 55% of the selected retired pay amount to a single named survivor. It can be allocated to the former spouse by the divorce court. There is a premium for coverage, and there is a way to arrange for that premium to be paid by the member, the spouse, or divided between them.

The military retirement system is different than many other kinds of retirement, especially regarding survivorship benefits. If the spouse dies first, the member gets an automatic reversion of the full spousal share. But if the member dies first, the spouse gets nothing at all, unless the SBP is in place.

B. Medical Benefits

If the parties were married for 20 years during military service, the spouse is entitled to free Tricare until the spouse is eligible for medicare. If the overlap of marriage and service was shorter than 20 years, certain lesser benefits are available, and most former military spouses can get Continuation of Health Care Benefits Plan (“CHCBP”) medical coverage, although there is a premium cost for that coverage.

III. OTHER RESOURCES

Much greater explanation of these and other aspects of military retirement in divorce, including a detailed article titled “Divorcing the Military,” drafting guides, model clauses, special calculators, and lots more, is posted at http://willicklawgroup.com/military-retirement-benefits/.

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SBP PREMIUM-SHIFTING… SIMPLIFIED

by Mark E. Sullivan

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of The Military Divorce Handbook (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

Survivor Benefit Plan Overview

A well-structured military pension division for the non-military spouse must include a death benefit, which is usually the Survivor Benefit Plan (SBP). The SBP is an annuity that lets a retired SM (active duty or Guard/Reserve) provide continued income to specified beneficiaries after his death. The SBP is funded by premium payments from the retiree’s paycheck. There is a slight tax break for the retiree in that the amount of the SBP premium is not included in the taxable portion of his or her retired pay.

The death of a military retiree terminates all pension payments. When SBP is elected, however, upon the retiree’s death, the designated survivor receives a lifetime annuity for 55% of the selected base amount (full retired pay or lesser figure). In addition to

spouses and former spouses, there is child coverage available so long as the child is of the marriage of the SM (servicemember) and the spouse or former spouse. The cost for spouse or former spouse coverage is a premium during the retiree’s lifetime of 6.5% of the selected base amount. Thus, for example, if the total pension payment before division is $3,000 a month, and if that were the base amount selected, then the SBP payment would be $1,650 a month (i.e., 55% of base amount) and the monthly premium would be $195 (6.5% of base), to be paid out of the pension.

The premium is deducted from the SM’s gross retired pay to arrive at DRP (disposable retired pay). In a divorce case, it is the DRP which is divided between the SM (now a retiree) and the former spouse (FS). The net effect of this is to divide the premium payment into shares, the same shares as the parties receive of the pension itself. Thus, if the retiree gets 60% of the pension and the FS gets 40%, then the retiree pays 60% of the SBP premium (even though it is of no direct benefit to him or her in a divorce case), and the FS pays 40% of the premium.

While this is what the law (Uniformed Services Former Spouses’ Protection Act, or USFSPA) says, it doesn’t always sit well with the client who is a servicemember or retiree. Let’s take a look inside a typical law firm and see what all the noise is about.

Who Pays the Premium?

You could hear the shouting all the way down the hall. “Why doesn’t my wife have to pay for SBP? After all, she wants it! I’ll be dead and gone by the time she gets it. She should have to pay the entire premium.” Sergeant Major Ace Barker, U.S. Marine Corps, was in rare form when his attorney told him about the Survivor Benefit Plan. He didn’t want to hear from the lawyer that, unfortunately, it doesn’t work that way with the retired pay center. You can send them as many orders as you want — signed by judges, certified by clerks and approved by the highest court you can fine — and they’ll still pay no attention if you try to shift the premium payment to Mrs. Barker by telling DFAS to take the premium out of her share. They just won’t do it since the SBP premium, according to USFSPA, comes off the top before determining disposable retired pay.

Barker continued, “But that means I’m paying for at least 50% of the premium for her coverage!” Yes, that’s right — this arrangement results in the parties both paying the SBP premium in the same ratio as the pension is divided. DFAS won’t do the fee-shifting for you.

Of course, one option for SGM Barker is to negotiate an agreement, or seek a court order, which requires Mrs. Barker to be responsible for the premium payments and to reimburse him for some portion, or all, of the premium each month. This would require, of course, her continued interaction with her former husband through the process of writing a check or approving a direct debit from her bank account. This is something that SGM Barker would clearly not want, since it involves the continued duty to monitor and enforce payments. Such a divorce settlement clause might read:

The former spouse will reimburse and indemnify the SM/retiree for the cost of the

22 DFAS, or Defense Finance and Accounting Service, for the Army, Navy, Air Force and Marines; there are separate pay centers for retirees from the Coast Guard and the commissioned corps of the Public Health Service and the National Oceanographic and Atmospheric Administration. The retired pay center will be called DFAS throughout this article.

20 RCSBP, or Reserve Component SBP, involves an additional premium over and above 6.5%.

SBP premium by paying to him each month the full cost thereof by [certified check] [money order] [automatic bank debit from her account to his at XYZ Bank, Apex, North Carolina, Acct. #12345] no later than the fifth day of each month.

But one can accomplish premium-shifting another way in cases where the marital percentage is “fixed” or known, and thus the share of the non-military spouse is also known. This exists in four types of cases: 1) where the SM has already retired; 2) where the retirement is on the immediate horizon and it’s possible to fix the marital percentage by approximation; 3) is a Guard/Reserve case, where the SM has stopped drilling and put in for retirement, even though not yet age 60; and 4) where the parties have agreed – to save themselves time and money – on a specified percentage for the non-military spouse.23 In any of these situations, since the share of the FS is fixed, you can do the premium-shifting by adjusting the percentage that the FS receives.

This option is available whether or not payments are being made through DFAS. As an example, assume that the parties were married for 18 of the 30 years of SGM Barker’s military service and that SGM Barker retires on the date of divorce. Mrs. Barker is entitled to 30% of the military pension of SGM Barker. His retired pay is $4,000. In order to shift the SBP premium to her, follow these steps:

- First, calculate the amount of the total SBP premium. In an active-duty case, the formula 6.5% times the base amount selected for former spouse coverage. In SGM Barker’s case, his full retired pay is the selected base amount. Thus, the SBP premium for coverage for Mrs. Barker is $260 ($4,000 x 6.5% = $260).

- Determine the amount Mrs. Barker is to receive from DFAS each month as her share of the pension.
  - Remember that DFAS only pays a percentage of DRP, or disposable retired pay, which is gross pay less certain deductions, the most important of which are the SBP premium and disability pay. For this example, assume there are no deductions other than the SBP premium.
  - Mrs. Barker is to receive 30% of SGM Barker’s DRP. His DRP is $3,740 ($4,000-$260 = $3,740). Mrs. Barker’s share of that is $1,122.00 (30% x $3,740 = $1,122).
  - This amount, $1,122, is what DFAS would pay to Mrs. Barker if the court order simply required her to receive 30% of SGM Barker’s DRP. However, the order specifies that the SBP premium is to be paid to Mrs. Barker. To achieve this, follow the steps below:

  1. Calculate the monetary amount due to the former spouse by multiplying her share times the “disposable retired pay.” Subtract from this the retiree’s portion of the SBP premium (in dollars). Divide the remainder by the disposable retired pay to get her adjusted percentage of the pension, thus allocating payment of the entire SBP premium to the former spouse.

  - Calculate the amount due to Mrs. Barker: $1,122 / $3,740 = 0.300021. This is Mrs. Barker’s share of the disposable retired pay.
  - Calculate how much of the SBP premium Mrs. Barker should receive: $260 / $3,740 = 0.069231. This is Mrs. Barker’s share of the SBP premium.

23 In any other situation, you’ll have to specify (in an agreement or order) what the premium-shifting arrangement is, then state that this is not intended to be treated as instructions to DFAS (otherwise the order will be rejected), and then come back to the problem and do a clarifying order when the individual retires and the numbers are known (or when the Guard/Reserve member stops drilling and puts in for retirement). Putting this into a formula for the separation agreement or court decree involving a military retiree might be accomplished as below:

  Calculate the monetary amount due to the former spouse by multiplying her share times the “disposable retired pay.” Subtract from this the retiree’s portion of the SBP premium (in dollars). Divide the remainder by the disposable retired pay to get her adjusted percentage of the pension, thus allocating payment of the entire SBP premium to the former spouse.
Barker’s retired pay without any adjustment for the SBP premium. DFAS would deduct the premium from his gross pension, which means that each party shares in the cost of the SBP premium proportionate to the percentage share of the pension each receives. In this example, with the SBP premium coming “off the top,” Mrs. Barker is paying 30% of the premium and SGM Barker is paying 70%.

- We need to have Mrs. Barker pay SGM Barker’s 70% of the SBP premium. To calculate this in dollars, multiply the full premium by SGM Barker’s percentage of the pension. This yields $182 ($260 x 70% = $182).
- Next, subtract this figure from Mrs. Barker’s share of the pension. The result is $940 ($1,122 - $182 = $940). This is her net share after shifting the full SBP premium to her.
- Finally, divide Mrs. Barker’s new pension share by the total disposable retired pay (which, in this case, is retired pay less the SBP premium) to arrive at Mrs. Barker’s new percentage of the retired pay, which is 25.13% ($940 ÷ $3,740 = 25.13%).

The result is the percentage of retired pay that she would get with her paying for the entire cost of SBP coverage. You’ve effectively shifted the premium payment to her by reducing the percentage of SGM Barker’s retired pay that she receives. Note that these calculations assume NO disability pay waiver or other debits from gross pay (such as court-martial fines and forfeitures, or money owed to the federal government) which are subtracted from gross retired pay to arrive at disposable retired pay. All of this is set out in the chart at ATCH 1 at the end of this article.

A Simpler Life – and an Easier Calculation!

The late Mike McCarty of Phoenix, a retired Air Force Reserve brigadier general, discovered an easier way. Mike used to say, “But that’s too complicated. Whenever the share of the former spouse is known and she (or he) is to pay the entire premium for SBP in a retirement from active duty, there are a few simple steps which yield the correct adjusted percentage for the former spouse to pay for the SBP premium. Here are the simple steps to use in shifting the premium over to her side of the ledger.”

Mike’s math is straightforward. When the pension shares for FS and SM/retiree are known, it should be easy to figure out the FS’s share. It’s 50% of the marital percentage in a community property state, and presumptively 50% in equitable distribution states. Here are the next steps:

- We start with the fact that the SBP premium in such a case is known. For the FS of an active-duty SM, it’s 6.5% of the gross pension.
- So let’s assume that the military pension in the Barker case is 70% marital. Thus, we can use 35% for the share of Mrs. Barker, or half of 70%, and 65% for the share of SGM Barker (35% + 30% = 65%).
- And we know that the SBP premium comes off the top.24

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24 By this, Mike meant that the premium is deducted
• In the absence of SBP, the FS would get 35% of the gross military retired pay, and the share for the SM, consisting of his separate and his marital or community share, would be 65% of the gross. That’s what the SM/retiree should get in the end if all the cost of SBP is moved over to the FS.

• Since SBP is a deduction from gross retired pay which, in the absence of any other deductions, yields a lower figure as DRP, or disposable retired pay, then the goal is for the SM to get whatever portion of DRP equals 65% of the gross retired pay.

• The easiest way to explain this is to list the steps or elements of the calculations as letters in the process. Here they are –

    A = Gross retired pay  
    B = SM’s share of gross retired pay  
    C = FS’s share of gross retired pay  
    D = Goal: Upon deduction of SBP premium, SM to receive from E (below) the $ amount equal to 65% of A.  What % is required?  
    E = Disposable Retire Pay, or DRP.  
    This always = Gross – premium (6.5%) = 93.5% of Gross (A above).  
    F = SM’s % of E must equal B.

Therefore, in the Barker case, you would divide B (65%) by E (.935) = 74.87% of DRP, in turn leaving 25.13% of DRP for Mrs. Barker. The adjusted share of disposable retired pay for her is 25.13%, which means that she is receiving her initial allocated share, 30%, less the cost of the SBP premium.

“I don’t expect you to believe that it’s this simple,” added Mike. “So I’ve prepared below a couple of examples. You’ll see that it works. Just remember – pick any retirement dollar amount you like; the SM’s dollar receipt will always be the same percentage as calculated (the nominal percentage divided by .935). Since we’re talking about calculations involving two decimal points, you will see at most a few pennies’ difference. If you want to be more accurate, then use the four decimal percentage.”

Examples

In one pending case, Husband has finished his Guard/Reserve service and awaits age 60 for the commencement of retired pay/SBP. His share of the pension is 55% and Wife’s share is 45%. Husband’s gross retired pay is projected (assuming basic pay increases in the next 4 years) to fall in the range of $4,300-$5,000 per month. The difference is not significant, but is used to illustrate that the percentages may be established today; this will yield the same result as waiting 4+ more years and starting over with the calculations. Thus, we use two monthly gross retired pay amounts for illustration. The reader may apply the formula to any other amount and reach the same result.
### $4,300 per month Gross Retired Pay

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$4,300</td>
</tr>
<tr>
<td>B</td>
<td>A x 55% = $2,365</td>
</tr>
<tr>
<td>C</td>
<td>A x 45% = $1,935</td>
</tr>
<tr>
<td>D</td>
<td>Goal is the same (see above)</td>
</tr>
<tr>
<td>E</td>
<td>DRP = 93.5% of Gross (A above) = $4,020.50 (SBP premium @ 6.5% of A = $279.50)</td>
</tr>
<tr>
<td>F</td>
<td>55% divided by 93.5% = 58.82% of E = $2,365. 100% less 58.82% = Wife’s share = 41.18% of E = $1,656.</td>
</tr>
</tbody>
</table>

Double-check: $4,300 gross - $2,365 (SM’s share) = $1,925 (FS’s share) + $325 (premium rounded off).

### $5,000 per month Gross Retired Pay

<p>| | |</p>
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>A</td>
<td>$5,000</td>
</tr>
<tr>
<td>B</td>
<td>A x 55% = $2,750</td>
</tr>
<tr>
<td>C</td>
<td>A x 45% = $2,250</td>
</tr>
<tr>
<td>D</td>
<td>Goal is the same (see above)</td>
</tr>
<tr>
<td>E</td>
<td>DRP = 93.5% of Gross (A above) = $4,675 (SBP premium @ 6.5% of A = $325)</td>
</tr>
<tr>
<td>F</td>
<td>55% divided by 93.5% = 58.82% of E = $2,750. 100% less 58.82% = Wife’s share = 41.18% of E = $1,925.</td>
</tr>
</tbody>
</table>

Double-check: $5,000 gross - $2,750 (SM’s share) = $1,656 (FS’s share) + $279 (premium rounded off).

Mike’s point is basic: “In any case involving an active-duty retirement, you can accomplish a shift of the entire SBP premium to the former spouse just by dividing the SM’s percentage of the pension by .935, and then subtracting the resulting percentage from 100%.”
Shifting of SBP premium to former spouse, % method [retirement from active duty]

<table>
<thead>
<tr>
<th>Instructions [*=input items]</th>
<th>Amt./Number</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Calculate Disposable Retired Pay (DRP)</td>
<td></td>
<td>DFAS bases pay calculations on disposable retired pay; see 10 U.S.C. 1408(a)(4) and (c)(1)</td>
</tr>
<tr>
<td>*Gross retired pay</td>
<td>$4,000.00</td>
<td>See annual Retiree Account Statement (RAS) if SM already retired; otherwise make estimate based on years of service</td>
</tr>
<tr>
<td>*SBP premium</td>
<td>$260.00</td>
<td>@6.5% of selected base amount</td>
</tr>
<tr>
<td>*Disability compensation</td>
<td>$3,740.00</td>
<td>Unknown until retirement; see RAS</td>
</tr>
<tr>
<td>Calculate % for Retiree, for FS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>*Marital pension service months</td>
<td>216</td>
<td>From marriage or start of military service, whichever is later, until separation, divorce or other date, per state law</td>
</tr>
<tr>
<td>*Total pension service months</td>
<td>360</td>
<td>Months from start of military service to retirement</td>
</tr>
<tr>
<td>Marital/comm. Property % of pension</td>
<td>60.00%</td>
<td>Months of marital pension service ÷ total months of pension service</td>
</tr>
<tr>
<td>FS % of pension</td>
<td>30.00%</td>
<td>Half of above % (presumed equal division)</td>
</tr>
<tr>
<td>SM/retiree % of pension</td>
<td>70.00%</td>
<td>100% - FS %</td>
</tr>
<tr>
<td>Calculate FS Share of DRP</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DRP from above</td>
<td>$3,740.00</td>
<td></td>
</tr>
<tr>
<td>Spouse % from above</td>
<td>30.00%</td>
<td></td>
</tr>
<tr>
<td>FS share of DRP</td>
<td>$1,122.00</td>
<td>DRP x FS %</td>
</tr>
<tr>
<td>SBP premium from above</td>
<td>$260.00</td>
<td></td>
</tr>
<tr>
<td>SM/ retiree share of premium</td>
<td>$182.00</td>
<td>Retiree % x SBP premium</td>
</tr>
<tr>
<td>FS net share of pension</td>
<td>$940.00</td>
<td>FS share of DRP less retiree share of SBP premium</td>
</tr>
<tr>
<td>Calculate New Spouse %</td>
<td></td>
<td>Based on shift of SBP premium to FS</td>
</tr>
</tbody>
</table>
### Hidden Money in Military Divorce Cases

by Mark E. Sullivan*

*Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

Q. I’m representing Mrs. Roberts, the wife of Army Colonel Bill Roberts, in her divorce case. What are some of the overlooked sources of money and benefits?

A. When representing the nonmilitary spouse, the accrued leave of the servicemember (SM) is a valuable but often overlooked part of marital property division. Each person in military service on active duty accrues thirty days of paid leave per year, regardless of rank. This leave is worth what its equivalent would be at the monthly pay rate of the SM, and one can calculate this easily by using the pay tables available at the Defense Finance and Accounting Service (DFAS) website, www.dfas.mil.

Thus, if COL Roberts’s gross pay is $6,600 per month and he has forty-five days of accrued leave at the point of evaluation according to state law (i.e., date of separation, date of filing, date of divorce), his accrued leave would be worth about $9,900 (45/30 x $6,600), which represents gross pay before tax and other withholdings. Counsel for Mrs. Roberts should advocate use of the gross pay figure, whereas opposing counsel should use after-tax computations for the pay and eliminate any non-pay entitlements.

Counsel for the SM sometimes will attempt to confuse the issue by pointing out that the nonmilitary spouse cannot be awarded military leave. This argument misses the point. The issue is not who can use military leave but whether, under applicable state law, assets such as “vacation time” and “sick leave” are marital or community property if it is acquired during the marriage.

If the individual will not voluntarily produce his monthly LES, counsel may resort to formal discovery procedures if the matter is in litigation. In addition, the DFAS office in Cleveland will honor a request for documents so long as it is in the form of a court order or a subpoena signed by a judge.

Sometimes the attorney for the retiree will disavow any knowledge of the existence of the LES, or the SM will claim that it was lost, misplaced, or “floated away in that big flood last month.” All SM’s are eligible for a free “myPay” account at the DFAS website. This secure website is found at https://mypay.dfas.mil. Once there, it is a simple matter for the member to obtain his current LES; he just enters his “LogIn ID” and password, and then goes to the screen for current pay information. Sometimes a judge,
when frustrated with the refusal of a SM or his attorney to produce an LES, will issue an order requiring both attorneys and the SM to use a computer to access the current or past LES from the myPay website.

DFAS even has a way that a third party can be given access to the secure website to view, but not to change, the SM’s pay information. Here’s what the DFAS website says:

**What is a restricted access Personal Identification Number (PIN)?**

You now have the ability to establish a Restricted Access PIN. The Restricted Access PIN may be given to others along with your Social Security Number to view your pay or tax statements without allowing them to create any pay changes.

You may establish a restricted access PIN by clicking on the Personal Setting Page, and selecting the Restricted Access PIN option. You may delete the restricted access PIN at any time. If the user suspends their restricted access PIN you must reset the PIN and provide that new PIN number to the user.

Q. **What else can we do for the non-military spouse?**

A. Even with a short marriage of, say, five years, the pension share is worth something. Don’t waive it without getting a trade. Assume that the husband is a Sergeant First Class John Doe, in the pay grade of E-7, with 20 years of service, who will get an estimated $1,600 a month retired pay if he retires at the 20-year mark, which many servicemembers do. If there were only five years of marriage, his ex-wife would get 50% of 5/20 of $1,600, or $200 a month. If she is 40 when he retires and he were to live another 35 years, this would be worth $2,400 a year, or $84,000 (and this ignores all cost-of-living adjustments). That’s a lot of money!

The lesson? If you want a pension waiver, you have to ask for it and pay for it. If your client is asked to waive military pension division, make sure she or he does it for a reasonable, fair trade – don’t just give it away if the period of marriage is short. Look at the facts and calculate the numbers. Even if you trade the pension waiver for a washer, dryer and TV, you’re doing better than just giving it away.

Q. **What about reenlistment bonuses and other special pay?**

A. “Reenlistment bonuses can be big money, especially when you consider the impact of signing reenlistment papers in a combat zone,” according to Stephen T. Lynch, a Coast Guard legal assistance attorney in Cleveland. Lynch notes:

For military members who are 1) about to get divorced, and 2) about to reenlist, counsel should be sensitive to the timing of both events, and the potential impact of one on the other. Many enlisted personnel are eligible for a reenlistment bonus. For example, assume that Petty Officer Jake Jones (PO2) is a Navy Seal Independent Duty Corpsman. He would be eligible for a reenlistment bonus totaling as much as $75,000 – which will come free of state and federal income taxes if reenlistment occurs in a combat zone. There are obvious advantages for this sailor if he were to obtain a divorce prior to signing the reenlistment papers, and obvious advantages to Mrs. Jones is she were to delay the divorce until after Jake reenlisted and received his bonus. How much of the bonus, if any, would accrue to
Mrs. Jones is a matter of state law and artful negotiation. However, if counsel for Mrs. Jones is unaware of the pending bonus and the timing implications, then counsel surely will fail to assert Mrs. Jones’ interest in a sizeable payment that can be made in a lump sum and just might serve as a ready source for alimony, child support, and the payment of pending bills (such as mortgages, car payments, and attorney fees). Information about reenlistment bonuses may be found at: http://usmilitary.about.com/od/enlistmentbonuses/l/bl01bonus.htm.

Q. Is there anything else for the spouse who is not in the military?
A. Yes, and it has to do with insurance. Many military members, including Guard and Reserve, choose USAA for their insurance needs. A little known fact about USAA is that members have a Subscriber’s Account (formerly called a “Subscriber Savings Account”) which contains moneys contributed through premiums for property and casualty insurance (such as car insurance) and distributed from time to time to the subscribers. These periodic distributions amount to a refund of money not needed for operating reserves and they come as a credit on the quarterly or yearly premium, thus saving money for the customer. If one of the parties will be retaining USAA membership and benefits, including the balance in the Subscriber’s Account, then it makes sense to ask how much is in the Account and allocate the sum to that party, even though it is money which can’t be spent at present. The USAA pamphlet on this states (using SSA for “Subscriber Savings Account”):

An SSA is not a bank account. A member cannot make withdrawals from, or deposits to, an SSA. Since SSA funds are an integral part of USAA’s capital structure, they remain with the association as long as the member has at least one P&C [property and casualty] policy. If a member terminates all P&C policies, the balance of the SSA is paid out approximately six months later.

Here is an outline of the rules for the Savings Account:

- The Savings Account (formerly known as the Subscriber Savings Account) at USAA is only for the sponsor, that is, the one who has served in the military. A spouse or eligible child would not have such an account (assuming no military service).
- Thus there is no “division” of the Savings Account or allocation of it by USAA when parties divorce – it always stays with the sponsor.
- The refund of Savings Account money each December is proposed and approved by the Board of Directors, depending on how the company has done in the past year; if there are excess funds, then USAA pays out refunds.
- The refunds are paid out according to the premiums paid by a sponsor in the prior year. Thus if John had paid $2,000 in premiums for his family, while Jane – a single sponsor – paid only $1,000 for her own car, then John’s refund would be twice what Jane receives.
- Before divorce, as afterwards, the spouse/former spouse can maintain vehicle coverage through USAA. After divorce, she or he would be known as a “legacy.” The only difference is that – with a spouse or former spouse who has no independent eligibility for USAA through prior military service – there would be no Savings Account.
- When a sponsor has been with USAA for over 40 years, he or she is eligible for a Senior Bonus (10% of the Savings Account) if approved by the Board of Directors. This

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can be paid to the sponsor in February of each year, or else it can be left in the Acct. An example of a Subscriber’s Account Annual Statement for 2008 from USAA is at ATCH A at the end of this article.

Q. **How can we save some money for COL Roberts?**

A. You can save money for COL Roberts in several ways in negotiations over his pension or, if your trial judge allows it, in the courtroom. The first one to use a *set dollar amount* in specifying the pension share for his wife upon divorce. This means that the spousal entitlement is calculated (usually with 50% of the marital share as the model) and then converted in today’s dollars to a specific monetary amount, such as: “Mrs. Roberts shall receive $495 a month from the disposable retired pay of COL Roberts, the defendant.” This method of dividing the pension, if accepted by the other side, means that all future increases in COL Roberts’ pay belong to him and, upon retirement, the cost-of-living adjustments (COLAs) which are applied to retired pay go solely to him. She receives none of these benefits. The COLA, when applied solely to COL Roberts’ pension, will roughly double its value over twenty years.

Another option, if the first won’t work, is freezing the benefit for Mrs. Roberts at the rank and years of service of her husband at divorce or separation, whichever is used under state law for the point of evaluation of marital assets. In this way, we will be fixing his rank at the date of separation or divorce. That will mean that we’re dividing the pension of a colonel right now, not a two-star general, which he might be at the time of retirement.

COL Roberts will also want to try to keep the denominator of the marital fraction as the total years of creditable military service, not the years up to the date of separation or divorce. In doing this, we are creating a marital fraction that is constantly shrinking in absolute value, not one that, in fairness, should be fixed as of the latter date.

A third step would be to state that we are dividing the retired pay of a colonel with a certain number of creditable years of service, fixing the years of service at the date of divorce or separation. The years of creditable service would usually be stated in even numbers, so we could say “a colonel over 20” or “a sergeant over 16” to show how many years of service at that rank. This likewise keeps the divisible pay down; we are fixing the benefit to be divided at the time of divorce or separation.

Finally, we would want to fix the pay tables involved as of the date of the separation or divorce, whichever is appropriate under state law. In doing this, we insulate Mrs. Roberts from any future congressional pay raises; all of these accrue solely to the benefit of COL Roberts.

If we specify these in the pension division clause for COL Roberts, it could mean a savings of tens or hundreds of thousands of dollars for him, in comparison to using his final rank upon retirement, and the pay tables that would apply when he retires.

Q. **What about military medical care – is there some money to be saved there? Is Mrs. Roberts eligible for that after divorce?**

A. Yes, if the marriage and the military career were long enough. There must be 20 years of military service concurrent with 20 years of marriage to get full military medical benefits. This means medical insurance coverage through TRICARE, the military equivalent of Blue Cross, and some free medical care at military medical treatment facilities.

Pub. L. 98-525, the Department of Defense Authorization Act of 1985, expanded the medical (and other) privileges set out in Pub. L. 97-252 to extend certain rights and benefits to unremarried former spouses of military members. If the former spouse was married to a member or former member for at least 20 years during which he or she performed at least 20 years of creditable service (also called “20/20/20” spouses, which refers to 20
years of service, 20 years of marriage, and 20 years of overlap), then the former spouse is entitled to full military medical care, including TRICARE, if not enrolled in an employer-sponsored health plan. He or she is also entitled to commissary and exchange privileges.¹

If the former spouse was married to a member or former member for at least 20 years during which the member or former member performed at least 15 years of creditable service (also called "20/20/15" spouses, for 20 years of service, 20 years of marriage and 15 years of overlap), and the former spouse is not enrolled in an employer-sponsored health plan, then the length of time that the former spouse is entitled to full military medical care, including TRICARE, depends upon the date of the divorce, dissolution or annulment, as set out below. No other benefits or privileges are available for this spouse.

If the date of the final decree of divorce, dissolution or annulment of marriage was before April 1, 1985, then the former spouse is authorized full military medical care for life, so long as he or she does not remarry. If the decree date is on or after April 1, 1985, then the former spouse is entitled to full military medical care, including TRICARE, for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, he or she may purchase a "conversion health policy"² under the DOD Continued Health Care Benefit Program (CHCBP), a health insurance plan negotiated between the Secretary of Defense and a private insurer, within the 60-day period beginning on the later of the date that the former spouse ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe.

Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(a) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.³ Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is not part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse may also obtain indefinite medical coverage through CHCBP (under 10 U.S. Code 1078a) if she or he meets certain conditions. The former spouse:

● Must be entitled to a share of the servicemember’s pension or SBP coverage;
● May not be remarried if below age 55;
● Must pay quarterly advance premiums; and
● Must meet certain deadlines for initial application.

Details regarding application for this “CHCBP-indefinite” coverage may be found at www.tricare.mil/chcbp/default.cf. The coverage is the same as that for federal employees, and the cost is the sum of the following: premium for a federal employee, plus premium paid by the federal agency, plus 10%. This amounts to less than $350 per month as of 2008. There is an article explaining this coverage in the Summer 2008 issue of Roll Call (the newsletter of the Military Committee, ABA Family Law Section) at www.abanet.org/family/military.

A former spouse who qualifies for any of these benefits may apply for an ID card at

² 10 U.S.C. § 1086 (a).
³ 10 U.S.C. § 1078 a(g)(1)(C).
any military ID card facility. He or she will be required to complete DD Form 1172, “Application for Uniformed Services Identification and Privilege Card.” The former spouse should be sure to take along a current and valid picture ID card (such as a driver’s license), a copy of the marriage certificate, the court decree, a statement of the member’s service (if available) and a statement that he or she has not remarried and is not participating in an employer-sponsored health care plan.

It is important to remember that these are statutory entitlements; they belong to the nonmilitary spouse if she or he meets the requirements of federal law set out herein. They are not terms that may be given or withheld by the military member, and thus they should not be part of the “give and take” of pension and property negotiations since the military member has no control over these spousal benefits.

Q. You said that military medical benefits depend on the date of divorce. What if my client has all the other requirements but is just 6 months short of 20 years of marriage?
A. Since 20-20-20 medical coverage depends not on the date of separation or the date of filing, you might need to postpone the divorce for 6 months. This may not be easy, but if you look hard enough you might be able to find something that you can contest, that the other side did wrong in the pleadings, or that you can at least question through discovery. I had a case several years ago where there was a question about the domicile of the SM – he was the one filing for divorce. We were desperate to delay the granting of a divorce. I started with a set of interrogatories and document requests related to domicile, which of course is an essential jurisdictional element in divorce. The plaintiff got so busy fighting off my discovery requests and my motions to compel that he went through two separate civilian lawyers before the court finally granted him a divorce. That was a year and a half after he’d filed!

Q. Are there any retirement benefits in the military similar to a 401(k) plan?
A. Yes. In addition to the military pension, which is a defined benefit plan that has existed all along, we now have another retirement benefit. This is the Thrift Savings Plan, or TSP. It’s a voluntary defined contribution plan, it can be divided, and it’s basically the same as the federal civil service TSP. Contributions are sheltered from taxes and are allowed to grow in a number of different funds selected by the servicemember.

Q. Are there any resources which can help attorneys understand the military TSP and how to divide it?
A. Yes. There’s a booklet available online. Go to www.tsp.gov and click on Military – Forms and Publications, then click on Publications, then on Booklets, then on Court Orders. It’s quite helpful and has sample clauses that’ll make your work a lot easier and your TSP division order “rejection-proof.”
As a member-owned association, our mission is to serve our members. And we’re proud that in today’s tumultuous economy, military families can depend on us. You can rest assured your association is strong, growing and well positioned for the future.

The Subscriber’s Accounts assist in maintaining the association’s financial strength and in meeting the needs of its members. Below you will see your allocation and distribution.

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<tr>
<th>Subscriber’s Account Annual Statement for 2008</th>
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<td>Prior Balance</td>
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<td>Distribution on 12-08-2008</td>
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<td>Subtotal</td>
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<td>2008 Allocation</td>
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<td>2008 Year-End Balance</td>
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This is not a bill.

What is a Subscriber’s Account?
USAA is required to raise and maintain capital to satisfy legal and regulatory requirements, support current and future operations and pay large unexpected losses, such as member claims from catastrophes. As a reciprocal insurer, USAA does this in part through its Subscriber’s Account program, which holds a portion of USAA’s capital in each member’s name. Subscriber’s Accounts are a unique feature of membership with USAA. Each account remains in effect as long as that member has at least one property and casualty policy.

How is Money Deposited in the Subscriber’s Account?
This is not a bank account where a member can make deposits. Rather, if there is sufficient income at the end of the year, the USAA Board of Directors may allocate funds to Subscriber’s Accounts the following February. The amount of allocation to an individual Subscriber’s Account depends on the member’s existing Subscriber’s Account balance and the amount of premiums that the member paid the prior year for his/her auto and property insurance. The amount allocated to your Subscriber’s Account is shown in the box above.

How is Money Disbursed from the Account?
This is not a bank account where a member can make withdrawals. Rather, the USAA Board of Directors may distribute funds from Subscriber’s Accounts to members after considering a number of factors, including the regulatory and financial requirements of the association and USAA’s investment portfolio and operational performance. The amount of your distribution made in December 2008 is shown in the box above.

For more information about Subscriber’s Accounts, please refer to the enclosed brochure or call us at 1-800-495-5957.
Case Note

Daniel v. Daniel
Slip Opinion 2014-Ohio-1161

By Philip J. Tucker
phil@tuckerlawfirm.com

On March 26, 2014, the Ohio Supreme Court in a 4-3 vote published this decision. At issue was the question of whether or not unvested military retirement benefits earned during the marriage fell within the definition of marital property under Ohio law, and therefore must be considered for division.

Christen and Sean Daniel were married in 1995. Sean (“Husband”) was enlisted in the National Guard just prior to their marriage and at the time of the divorce had 16 years of service. Prior to the divorce hearing, he had reenlisted for an additional 6 years, making him eligible for retirement once he accumulates 20 years of creditable service. Id. at ¶3.

The matter was tried before a Magistrate, who concluded “Ohio law does not permit the court to divide a non-vested pension benefit.” Wife filed her objection contending that since the husband “...is already contractually committed to remain in the military through vesting “age”, the court should have divided one-half of his retirement benefits acquired during the years of marriage.” Id. at ¶4. Wife was seeking a formula division of Husband’s retirement benefits, i.e. one-half of the retirement benefits (i.e. points) divided by the ratio of the number of years of the Husband’s military service during the marriage to the total years of his military service. The trial court overruled Wife’s objection and adopted the Magistrates’s decision. In its final order, the trial court found that Husband’s military retirement benefits were a “mere expectancy” and concluded that the were “no retirement benefits for the court to divide.” Id. at ¶4.

The Court of Appeals (“COA”) affirmed this decision, even though it implied that the trial court’s analysis may have been incorrect. The majority concluded there was no need to decide whether unvested pension benefits are a marital asset, because insufficient evidence regarding the benefits were presented at trial. In a separate dissent, the Court noted that in this case “the potential military pension is the only marital asset that the parties may have.” and for that reason, “an exact valuation or further details concerning the plan was not necessary in order for the court to provide for the future division of this asset.” 2012-Ohio-5129, ¶61.

The Ohio Supreme Court agreed with the COA dissent noting “[w]hile the exact amount to be divided is not ascertainable unless and until the servicemember completes the required 20 years of service, the percentage of ownership of the benefits on the date of divorce can readily be discerned. It is simple math: the number of years in service compared to the number of years of marriage provides the formula for division.” Daniel, 2014-Ohio-1161, ¶6.

The Ohio Supreme Court started its analysis by affirming these statutory and judicially created concepts:
1. In any divorce action, the starting point for a court's analysis is an equal division of marital property. 29

2. “Marital property” includes all real and personal property that currently is owned by either or both of the spouses and “all interests...including, but not limited to, the retirement benefits of the spouses, that was acquired by either or both of the spouses during the marriage.”

The Ohio statute does not distinguish between vested or unvested retirement benefits. R.C. 3105.171(A)(3)(a)(i) and (ii). The portion of the statute that sets forth what is not to be considered marital property does not mention retirement benefits at all. R.C. 3105.171(A)(3)(b).

The Court’s survey of how other jurisdictions have addressed the dividing of pension benefits discovered that two approaches: the “present cash value” method (which requires the court to place a value on the benefit as of the date of the final decree and divide that value between the parties) and the “deferred distribution” method (in which the court devises a formula for dividing the monthly benefit at the time of the decree, but defers distribution until the benefits become payable) were the common methods used. It noted that “[m]ost states hold that unvested retirement benefits accrued during the marriage constitute marital property subject to division.” Id. at ¶10, citing Cohen v. Cohen, 937 S.W.2d 823,920 (Tenn. 1996) - listing cases from 37 states.

Fixing a precise present value and the date of vesting is not mandatory under Ohio law. A court “can and should seek other reasonable methods of achieving equity”. When the only marital asset of the parties is an employed spouse's pension or retirement benefits, it is difficult for the trial court to structure an equitable property division without dividing the pension or retirement asset. Hoyt v. Hoyt, 53 Ohio St.3d 177, 559 N.E.2d 1292 (1990). Thus, the Ohio Supreme Court agreed with Wife that using the “coverture fraction” (i.e. the ratio of the number of years of the employed spouse's employment during the marriage to the total number of years of employment) was an appropriate way to divide an unvested pension. The fact that its precise value will be become fixed, if it ever does, until some future date was deemed “irrelevant”.

Unvested military retirement benefits earned during the marriage fall within the definition of marital property under Ohio law. Because the trial court erred as a matter of law in not dividing this asset, it's division of property was inequitable and an abuse of discretion. Id. at ¶16. Accordingly, the Judgment was reversed and the cause remanded.

The dissents argued that Ohio law provided for only the division of property that “currently” is owned by either or both of the spouses. Since unvested benefits were not “currently” owned by the employed spouse, they by statute are not subject to division. The role of the judiciary is the exercise of judicial power granted by the
Constitution to interpret the law that the General Assembly enacts. If the General Assembly wants to include unvested benefits in its definition of marital property, it should do so. The Court should not rewrite the statute by giving the phrase "currently owned" such an expansive meaning.

All that can really be said about this case is: “welcome Ohio into the 20th century!” The clear majority of jurisdictions have long ago determined that compensation earned during a marriage, although receipt of same is deferred to the future, creates an interest and is subject to distribution.30

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30 This notion was decisively resolved by the Oklahoma Supreme Court in Carpenter v. Carpenter, 1983 OK 2, 657 P.2d 646. Dr. Carpenter participated in a pension and profit sharing plan through his employer. Payments were only available to him upon his death, disability or retirement. The Court found that it was not significant whether the pension was now due and owing, whether it was conditional or contingent upon continued employment for a prescribed period of time or terminable upon the occurrence or non-occurrence of some future event. Therefore, the fact that the pension was not vested had no effect on its divisibility.
EDITOR’S NOTE: BZ To Mark Sullivan from all of us on being recognized by the ABA for his service to Military Families. We join in applauding his outstanding contributions to the servicemembers and their families.

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AMERICAN BAR ASSOCIATION TO HONOR RALEIGH ATTORNEY MARK E. SULLIVAN FOR SERVICE TO MILITARY FAMILIES

WASHINGTON, April 2, 2014 — Mark E. Sullivan, principal of the Sullivan & Tanner law firm in Raleigh, N.C., will receive the American Bar Association’s Grassroots Advocacy Award on April 8 for his outstanding support of military service members and their families.

Recognized as one of the nation’s leading experts in family law, Sullivan has focused his career on the needs of military families, serving as an educator, an advocate and a resource for practical assistance. He worked with the ABA to prevent the enactment of legislation that would harm military families by allowing federal courts to exercise jurisdiction in child custody cases that involve military parents.

“I’m deeply honored that my work on military custody legislation has led to the Grassroots Advocacy Award from the ABA,” Sullivan said. “These efforts were truly a labor of love, and I hope that the results in state legislatures will provide additional and much-needed protection for military families. Those who are in our armed forces deserve a fair shake in family court. Hopefully my work has helped to give that to them.”

Sullivan has limited his trial practice to family law since 1981 and has been certified by the North Carolina State Bar as a family law specialist since 1989. He is a frequent speaker at military and family law programs and is an annual lecturer on family law at the Army JAG School and the Naval Justice School. A member of the Judge Advocates Association and the Reserve Officers Association, Sullivan is a retired colonel in the U.S. Army Reserve. His writings include “The Military Divorce Handbook,” second edition, published in 2011 by the ABA. Sullivan is past chair of the ABA Standing Committee on Legal Assistance for Military Personnel and the ABA Family Law Section’s Military Law Committee. He is the recipient of numerous honors, including the Distinguished Service Award from the ABA Standing Committee on Legal Assistance for Military Personnel and the Army’s Legion of Merit as the service’s “foremost expert in family law.”

“Mark Sullivan is a dedicated advocate for service members and their families,” ABA President James R. Silkenat said. “We are proud to honor him with the ABA Grassroots Advocacy Award.”

Sullivan will receive the award as part of the association’s annual effort to connect policymakers with constituents in the legal profession. ABA Day 2014 brings distinguished lawyers from 50 states to D.C. to discuss issues such as funding for the Legal Services Corporation.

The other recipients of the 2014 ABA Grassroots Advocacy Award are South Dakota
Chief Justice David E. Gilbertson and George Washington University law professor Stephen A. Saltzburg.

With nearly 400,000 members, the American Bar Association is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. View our privacy statement on line. Follow the latest ABA news at www.ambar.org/news and on Twitter @ABANews.

This entry was posted on Wed Apr 02 11:08:00 CDT 2014 and filed under ABA Day 2014.
McCarthy, Michael W. "Mike", retired Brigadier General, USAF, born July 31, 1936 in Shorewood, WI passed away on All Soul's Day, November 2, 2013. Mike lived a colorful and varied life; from public service and private practice to Grand Canyon river rafting (21 times), softball and golfing until his death.

After graduating from the University of Wisconsin law school and was commissioned in the US Air Force, serving active and reserve for over 30 years, at which 3 years were served at Luke AFB, Arizona. Mike was known as the creator of a training program that eliminated distinction between active and reserve Judge Advocates (military lawyers), he served as Senior Reserve JAG at Strategic Air Command, Air Training Command and Air Mobility Command, then was called to serve as reserve counterpart to the USAF Deputy Judge Advocate General. At retirement, Air Combat Command renamed its annual outstanding reserve JAG award in his name.

Mike left active duty in 1966, followed by service as partner in several law firms, while also serving as a Judge Pro Tem in the Maricopa County Superior Court. He was also an initial member of the Arizona Court of Military Appeals. In his later years, he was regarded nationally as one of the experts in military pension law and was published in several articles.

He was a man of integrity and his greatest accomplishment was being a wonderful husband, father and grandfather. He will forever be known as a true Irishman with the gift of gab and a contagious laugh. His wit and sense of humor were larger than life.

His service and contributions to Family Law and the Military will be greatly missed, as will he. We wish him “Fair Winds and Following Seas.”
Editor’s Note: We are adding this new section for this Edition to Highlight some new and valuable resources for your Military Practice.

By Michael Archer
Standing Committee on Legal Assistance for Military Personnel

$24.95 Regular; $22.00 ABA Members

A Book for our Military

Ripped Off! A Servicemember’s Guide to Common Scams, Frauds, and Bad Deals

Our military men and women are targeted by certain types of sales, scams and abusive commercial practices with appalling frequency. This book sheds a light on these shady deals so that rip offs can be recognized and prevented. Perhaps most importantly, this book contains useful tips and resources to help those that have been victimized find justice.

Important topics covered in this text include:

- Loans—high interest personal, and payday
- Life insurance sales
- Landlord/tenant issues
- Internet, telephone and mail scams
- Identity theft
- Education rip-offs
- Debt-collection abuses
- Auto purchase, repossession, and repair fraud

This book is accessible enough for troops to find value in reading it themselves. It is designed to help attorneys and others in the position of advising our military understand and repair the damage caused by these immoral and illegal scams. It is also a tool to educate those who are in a position to change laws to better protect our servicemen and women from being ripped off.

Learn More >>
Clients need information when they start working with a family lawyer—that's a given. How can you best share important information to save their time and yours, while helping to avoid future claims that they were not informed about key issues upfront? Formal client handouts are an invaluable resource for accomplishing both objectives.

Client Letters for the Family Lawyer offers practice-tested forms, letters, and checklists that are designed to educate and inform your clients. Sample informative handouts in plain English clearly explain various issues involved in the legal process, while using these checklists and forms are a convenient and logical way to obtain and manage critical client information.

Author Mark E. Sullivan makes it easy for family lawyers to adopt this handout strategy in their daily legal practice. The numerous documents in Client Letters for the Family Lawyer cover the most common topics in family law practice, including legal fees, the trial process, adoption, custody, property division, and much more. Many handouts are written in question-and-answer format that is easy for clients to understand. Forms are organized logically for easy use by the lawyer and law firm staff:

Part I: Office Procedures, including dispute resolution, firm procedures, and fees
Part II: Discovery and Trial Procedures
Part III: State-Specific Issues, ranging from adoption and custody to wills and property division
Part IV: General or Federal Law, covering topics such as custody, family support and separation

Aspects of the same topic can be discussed in different parts of the book, such as the state-specific aspects of property division and the federal aspects of the same issue. Many of the book's forms are provided on the accompanying CD-ROM.


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.

What's NEW?

THE MILITARY DIVORCE HANDBOOK (ABA, 2nd Ed. 2011)

A. Chapter 1: New section on getting documents from the government (pay records, retired pay statements, other military or federal records), with sample motion, order and cover letter; complete and up-to-date instruction outlines on the Privacy Act, the Freedom of Information Act (rules, exceptions, exemptions), courtesy of the Army JAG School.

B. Chapter 2: Complete outline of Servicemembers Civil Relief Act cases; article on “Appointment Practice under the SCRA” and article, “Are We There Yet? A Roadmap for Appointed Attorneys.”

C. Chapter 3: “Leaving on a Jet Plane” article by Noel and Phil Tucker, Family Medical Leave Act materials; flow chart on family care plans and Dept. of Defense rules; DD Forms 2870 and 2871 re Release and Restriction of Medical/Dental Information

D. Chapter 4: Checklist for what information to gather at initial consultation on family support; article on bonuses (re support and property division) by Jim Wherry; information on Regular Military Compensation Calculator (to compare military pay and benefits to civilian salary); two UIFSA articles; three articles on former spouse medical coverage and CHCBP (Continued Health Care Benefit Program); information on DoD Instruction re ID cards (gateway to military benefits)

E. Chapter 5: Updated with new cases

F. Chapter 6: Article and fact sheet on MSRRA (Military Spouse Residency Relief Act)
G. Chapter 7: Updated instructional materials from Army JAG School – deployment tax outline, income tax outline, divorce tax outline

H. Chapter 8: “Insider’s Guide to DFAS Pension Division Regulations”; client questionnaire for military pension cases; checklist on how to avoid consenting to pension division jurisdiction; clarification order for reimbursement of former spouse; “floor language” for military pension division (by Jim Higdon); “Recall – the Gap and the Reset” with sample clauses (for recall of servicemember to active duty and later re-retirement); section on how foreign courts can divide military pensions; dialogue on CSB/Redux with John Kirchner; bonus article by Jim Wherry (re support and property division); how to get paid arrears by DFAS; charts and explanations on “mirror award” and reduced basis for Survivor Benefit Plan; checklist of SCRA protections; brief on calculation of Guard/Reserve pensions according to points; “Plan A/Plan B” order for use when it is unknown whether member will retire from active duty or from Guard/Reserve; short and long waivers of military pension division (sample clauses); and expanded treatment of Combat-Related Special Compensation and Concurrent Retirement and Disability Pay.

The Military Divorce Handbook is priced at $179.95, with a price of $149.95 available to members of the ABA Section of Family Law. Learn more about the book and order online at http://www.abanet.org. 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.

i SM = servicemember

ii FS = former spouse

iii This is necessary because SBP “comes off the top” in arriving at DRP, which means that each party pays his or her own percentage of the SBP premium. Thus, the spouse’s share of DRP has only had her/his share of SBP withheld from it. To get the remainder paid by the spouse, subtract the amount of SBP paid by the SM/retiree, which is his/her % times the SBP premium. The result should be the same net dollar amount for the spouse as in the first part of this table.