Rules of Engagement:
SCRA and Other Unique Considerations in the Military Divorce

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The very basis of any lawsuit begins with a jurisdictional analysis. Beyond a basic application of procedural law to enforce a contract or determine the best advantage for damages, the divorce case has the unique added analysis of multiple jurisdictional considerations. The outcomes of marital issues such as property division, child custody and visitation, support alimony, retirement and business evaluations can all greatly be affected by where the divorce case is filed. When one of the parties is an active duty military member there are additional unique issues to consider, and not just in the jurisdictional aspect of the case. If the family law practitioner is not aware of these issues he or she will find themselves inadequately representing their client.

It is impossible to cover in detail all the issues unique to representing a servicemember or his or her spouse in a paper designed for a single presentation. Given this limitation it is the goal of these materials to identify and briefly discuss the various issues, provide additional resources for further research and emphasize the most critical of considerations, the Service Members Civil Relief Act.

If you are called upon to represent a service member, one must gather enough initial information to determine the nature/type of the pending family law proceeding. Further, one must make an initial determination on whether or not to invoke the provisions of the Service Members Civil Relief Act. This unique consideration is fundamental, even before a proper jurisdictional analysis can be made.

I. SERVICE MEMBERS CIVIL RELIEF ACT

A. Introduction and History of the SCRA

On December 19, 2003, President Bush signed into law the Servicemembers Civil Relief Act (“SCRA”), which was a complete revision of the statute known as The Soldiers’ and Sailors’ Civil
Relief Act, or (“SSCRA”). Even for lawyers with no military base nearby, this federal statute is important. There are over 100,000 National Guard and Reserve personnel at present who have been called up to active duty, and over 40% of the armed forces serving in Iraq and Afghanistan are Reserve/Guard service members. These Reserve Component (RC) military members often come from the big cities and small towns of America. So, lawyers need to know their way around the basic federal statute that protects those on active duty. Although previously there was limited coverage by the SSCRA for Guard members, the SCRA extends protections to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the President or the Secretary of Defense. 50 U.S.C. App. § 511(2)(A)(ii). Up until the passage of the SCRA, the basic protections of the SSCRA for a service member (“SM”) included:

1. Postponement of civil court hearings when military duties materially affected the ability of the SM to prepare for or be present for civil litigation;
2. Reducing the interest rate to 6% on pre-service loans and obligations;
3. Barring eviction of a SM’s family for nonpayment of rent without a court order for monthly rent of $2,400.00 or less;
4. Termination of a pre-service residential lease; and
5. Allowing SMs to maintain their status of residence for tax purposes despite military reassignment to other states.

The SSCRA, enacted in 1940 and updated after the 1991 Gulf War, was still largely unchanged as of 2003. Congress wrote the SCRA to clarify the language of the SSCRA, to incorporate many years of judicial interpretation of the SSCRA and to update the SSCRA to reflect new developments in American life since 1940. Like its predecessor, the SCRA is intended "to provide for, strengthen, and expedite the national defense" by enabling service members "to devote their entire energy to the defense needs of the nation" through "the temporary suspension of judicial
and administrative proceedings and transactions that may adversely affect the civil rights of service members during their military service." 50 App. U.S.C. §502(2). The Supreme Court noted, in an oft-quoted passage from a 1943 case addressing the SSCRA's purpose, that liberal construction of the statute served the end of "protect[ing] those who have been obliged to drop their own affairs to take up the burdens of the nation." Boone v. Lightner, 319 U.S. 561, 575 (1943).

As noted above, the SCRA covers all active-duty service members, including reservists and guardsmen serving for more than 30 consecutive days in times of national emergency under 32 U.S.C. § 502 (f). See, 50 App. U.S.C. §511(2)(A). It also applies to periods of absence from active duty due to injury, illness, leave, and other lawful causes—and, for reservists and members of the National Guard, to the period between when they receive orders and when they report. Id. §511(3), 516; see, e.g., Sec'y of Housing &Urban Dev. v. McClenan, 798 N.Y.S.2d 348 (N.Y. Civ. Ct. 2004).

The SCRA offers many options to help you protect your clients' rights. You should use care and creativity in employing its provisions. Since many of the SCRA’s provisions are particularly useful (and potentially dangerous) in domestic litigation, the family law attorney should have a good working knowledge of them. Here’s an overview of what the SCRA does.¹

B. Stay and Delays of the SCRA

The SCRA expands the application of a SM’s right to stay court hearings to include administrative hearings (e.g. DHS Administrative Child Support proceedings, etc.) Previously only civil courts were included in the preview of the SSCRA and this caused problems in cases involving administrative child support determinations as well as other agency determinations which impacted service members. Note: criminal matters are still excluded. 50 U.S.C. App. §511-512. There are

¹ An expansive (146 page) pdf guide to the SCRA can be located on the internet at: http://www.americanbar.org/content/dam/aba/migrated/legalservices/lamp/downloads/SCRAguide.authcheckdam.pdf.
several provisions regarding the ability of a court or administrative agency to enter an order staying, or delaying, proceedings. This was one of the central points in the SSCRA and continues now in the SCRA. Two ways the SCRA is used to obtain a continuance which halts legal proceedings:

1. In a case where the SM has not made an appearance in the proceedings, the SCRA requires a court or administrative agency to grant a stay (or continuance) of at least 90 days when the defendant is in military service and

   - the court or agency decides that there may be a defense to the action, and such defense cannot be presented in the defendant’s absence, or

   - with the exercise of due diligence, counsel has been unable to contact the defendant (or otherwise determine if a meritorious defense exists). 50 U.S. C. App. §521(d).

2. In a situation where the military member has notice of the proceeding, a similar mandatory 90 days stay (minimum) of proceedings applies upon the request of the SM, so long as the application for a stay included two things:

   - The first is a letter or other communication that (1) states the manner in which current military duty requirements materially affect the SM’s ability to appear; and (2) gives a date when the SM will be available to appear.

   - The second is a letter or other communication from the SM’s commanding officer stating that (1) the SM’s current military duty prevents appearance, and (2) that military leave is not now authorized for the SM. 50 U.S.C. App. § 522.

   Of course, these two communications may be consolidated into one if it is from the
SM’s commander. (An example of these letters are attached for your reference.) A stay request under the SCRA does not waive any jurisdictional objections or substantive or procedural defenses; (50 U.S.C. App. §522(c)) nor should it be the basis for an award of attorney fees for dilatory conduct. See Perez v. Cottrill, No. A04-771, 2005 WL 701701, (Minn. Ct. App. Mar. 29, 2005 (“an award of conduct-based attorney fees based on delays caused by a party's status as an active member of the armed services is contrary to the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. § 522 (2000)”). These protections substantially clarified the old SSCRA's stay provisions, under which all stays were discretionary. Also, the old law provided no explicit guidance on the length of a stay or the impact of a stay request on jurisdictional defenses, and that omission created fertile ground for appeal. Henneke v. Young, 761 N.E.2d 1140 (Ohio Ct. App. 2001); Phelps v. Fowler, 668 N.E.2d 558, 561-62 (Ohio Ct. App. 1995).

C. Additional Stays

An application for an additional stay may be made at the time of the original request or later. 50 U.S.C. App. §522(D)(2). (An example of a Motion for Stay is attached for reference.) If the court refuses to grant an additional stay, then the court must appoint counsel to represent the SM in the action or proceedings. 50 U.S.C. §522(d)(2). Once again, give this some thought. What is the attorney supposed to do – tackle the entire representation of the SM, whom s/he has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm’s way?

Who pays for this representation? There is no provision for compensation in the SCRA. Imagine that her Honor beckons you to the bench next Monday and say, “Counselor, I am appointing you as the attorney for Sargent Sandra Blake, the absent defendant/respondent in this case. I understand that she’s in the Army or maybe the Army Reserve or National Guard ... whatever.
Please report back to the court in two weeks and be ready to try this case.” How would you respond?

For your reference I have attached a couple handy flow charts, “SCRA Flow Chart for “Additional Stay” and “SCRA Flow Chart for Opposing “Additional Stay”“ which I believe were created by Mark Sullivan, Esq.

**D. Danger and Defaults**

Does a stay request expose a SM to any risks? The SCRA states that an application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. §522(c) eliminates the previous concern that a stay motion would constitute a general appearance, exposing the SM to the jurisdiction of the court. This new provision makes it clear that a stay request “does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense.”

Can you obtain a default judgment against a SM? Broadly construing “default judgment” as any adverse order or ruling against the SM’s interest, the SCRA clarifies how to proceed in a case where the other side seeks a default judgment (this is, one in which the SM has been served but has not entered an appearance by filing an answer or otherwise) if the tribunal cannot determine if the defendant is in military service. A default judgment may not be lawfully entered against a SM in his absence unless the court follows the procedures set out in the SCRA. When the SM has not made an appearance, 50 U.S.C. App. §521 governs. The Court must first determine whether an absent or defaulting party is in military service. Before entry of a judgment or order for the moving party (usually the Petitioner/Plaintiff), the movant must file an affidavit stating “whether or not the defendant is in military service and showing necessary facts in support of the affidavit.” Criminal penalties are provided for filing a knowingly false affidavit. 50 U.S.C. App. §521(c).
When the court is considering the entry of a default judgment or order, one tool that is specifically recognized by the SCRA is the posting of a bond. If the court cannot determine whether the defendant is in military service, then the court may require the moving party to post a bond as a condition of entry of a default judgment. Should the nonmoving party later be found to be a SM, the bond may be used to indemnify the defendant against any loss or damage which he or she may incur due to the default judgment (if it should be later set aside). 50 U.S.C. App. §521(b)(3).

When the filed affidavit states that the party against whom the default order of judgment is to be taken is a member of the armed forces, no default may be taken until the court has appointed an attorney for the absent SM. Specifically, 50 U.S.C. App. §521(b)(2) provides: If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a service member cannot locate the servicemember, actions by the attorney in this case shall not waive any defense of the servicemember or otherwise bind the service member. If the court fails to appoint an attorney, then the judgment or decree is voidable.

E. Attorney for the “Absent Service Member”

The role of the appointed attorney is to “represent the defendant”. The statute does not say what happens is the SM is, in fact, the plaintiff in a particular domestic case, but undoubtedly this wording is careless drafting. Particularly in domestic cases, it is as likely that the SM would be the Petitioner/Plaintiff as the Respondent/Defendant .... and default decree are sought against both sides, not just defendants.

The statute does not say what tasks are to be undertaken by the appointed attorney, but the probably duties are to protect the interests of the absent member, much as a guardian ad litem
protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and to ask whether that party wants to request a stay of proceedings. Counsel for the SM should always renew the request for a stay of proceedings, given the difficulty of preparing and presenting a case without the client’s participation. (An example of a letter to the Servicemember is attached for reference.)

The statute also leaves one in the dark about the limitations of the appointed attorney. Her actions may not waive any defense of the SM or bind the SM. What is she supposed to do? How can she operate effectively before the court with these restrictions? Can she, for example, stipulate to the income of her client or of the other party? Can she agree to guideline child support and thus waive a request for a variance? Without elaboration in this area, the SCRA could mean that she must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions for fear of violating the SCRA. Such conduct is, of course, at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.

F. Default Protections

If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the SCRA provides protections. The purpose of this is to protect those in the military from having default judgments entered against them without their knowledge and without a chance to defend themselves. The SCRA allows a member who has not received notice of the proceeding to move to reopen a default judgment. To do so, s/he must apply to the trial court that rendered the original judgment or order. In addition, the default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter, and the SM must apply for the reopening of the judgment while on active duty or within 90 days thereafter. 50 U.S.C. App. §521(g). Reopening or vacating the judgment does not impair any right or title acquired
by a bona fide purchaser for value under the default judgment. 50 U.S.C. App. §521(h).

To prevail on this motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service. In addition, he must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant’s position lacks merit. Such a requirement avoids a waste of judicial effort and resources in opening default judgments in cases where service members have no defense to assert. As part of a well-drafted motion or petition to reopen a default judgment or order, the SM should clearly delineate his claim or defense so that the court will have sufficient facts upon which to base a ruling.

G. Interest Rates

The Act clarifies the rules on the 6% interest rate cap on pre-service loans and obligations by specifying that interest in excess of 6% per year must be forgiven. 50 U.S.C. App. §527(a)(2). The absence of such language in the SSCRA had allowed some lenders to argue that interest in excess of 6% was merely deferred. How does this apply when your SM client has a child support arrearage judgment that is drawing a statutory 10% per year prior to the November 1, 2016 amendment to 43 O.S. §114 which reduced child support arrearage interest to 2% per year?

Towards this end, the SCRA specifies that a SM must request this reduction in writing and include a copy of his/her military orders. 50 U.S.C. App. §527(b)(1). Once the creditor receives notice, the creditor must grant the relief effective as of the date the service member is called to active duty. The creditor must forgive any interest in excess of the six percent with a resulting decrease in the amount of periodic payment that the service member is required to make. 50 U.S.C. App. §527(b)(2). The creditor may challenge the rate reduction if it can show that the SM’s military service has not materially affected his or her ability to pay. 50 U.S.C. App. §527©.
H. Family Law Sidebar

Pause for a moment to think through the potential impact of this stay provision on the family lawyer and his/her client. How would this affect an action for custody by the non-custodial dad when mom, who has custody, get mobilization orders and takes off for Afghanistan, leaving the parties’ child with her mother in Florida? How are you going to get the child back when mom’s lawyer interposes a stay request to stop the litigation dead in its tracks? If mom has executed a Family Care Plan (“FCP”), which is required by military regulations, leaving custody with the maternal grandparent, will that document - executed by mom, approved by her commanding office and accompanied by a custodial power of attorney- displace or overcome a court order transferring custody to dad? Can the Court even enter such a custody order given the stay and default provisions of the SCRA? To see how the battle is being jointed in this area, take a look at *Lenser v. McGowan*, 191 S.W.3d 506, 507 (Ark. 2004) (sustaining judge’s grant of custody to the mother when the mobilized father requested a stay of proceedings to keep physical custody with his own mother, holding that the SCRA provides a stay of the domestic relations case but did not prevent the circuit court from entering a temporary order of custody) and *In re Marriage of Grantham*; 698 N.W.2d 140 (Iowa 2005) (reversing a judge’s order that stayed the mother’s custody petition when father was mobilized and had given custody via his FCP to his mother). See also, *Diffin v. Towne*, 787 N.Y.S.2d 677 (N.Y. Fam. Ct. 2004) and *Ex parte K.N.L.*, 872 So. 2d 868 (Ala. Civ. App. 2003).

Section 522 of the SCRA entitles the serviceman to a mandatory 90-day stay of proceedings. To qualify for it, he must alert the court—in writing (which might include e-mail), supported by a commanding officer's statement—that he is on active duty, which will materially affect his ability to defend for a specified period of time during which he cannot take military leave. He may also seek an extended, discretionary stay if he shows that his military service will continue to affect his ability to defend; if this additional stay is denied, counsel must be appointed to protect his rights.

Having fun yet? OK, in another example ... what happens if a husband ships out without consulting an attorney or appearing in his wife's action, and in due time she moves for a default judgment?

The SCRA says that before the court may enter a default judgment, the plaintiff must file an affidavit (or subscribed written statement in any form, certified or sworn to) that the defendant is not in military service and show "necessary facts" to support the affidavit. 50 U.S.C. App. §521(b)(1)(A), (b) (4). The plaintiff may obtain an acceptable affidavit or certificate from the Department of Defense (DOD) Manpower Data Center. If the plaintiff fails to conduct or prove a DOD search to discover whether the defendant is serving in the military, the court may scrutinize or even discredit the affidavit. Sec'y of Housing & Urban Dev. v. McClenan, 798 N.YS.2d 348 (N.Y. Civ. Ct. 2004).

On another front, think about support. How does this stay provision affect the custodial dad who suddenly stops receiving child support when his ex-wife is called up to active duty from the Guard or Reserve? When she leaves behind her “day job”, her pay stops and so does the monthly
wage garnishment for support of their children. How can dad get the garnishment restarted while she’s in uniform on active duty? Will the reduction in pay she probably gets results in less child support? Or will her reduced costs of living in the military (how much does it cost to live in a tent outside Bigram Air Base in Afghanistan?) have the opposite result? How can dad move the case forward to establish a new garnishment when he cannot locate her, he might not be able to serve her (if he can locate her), and she probably will have a bullet-proof motion for stay of proceedings if dad ever gets the case to court?

The SCRA’s stay and default protections pose special challenges in child support and custody proceedings. Under the old law, courts readily recognized the need to balance servicemembers' procedural rights against dependents' rights to adequate care and support during the period of military service, particularly when the dependents were children. See, e.g., Cherubini, No. 000160/2003, 2003 WL 1389094; Kelley v. Kelley, 38 N.Y.S.2d 344 (N.Y. Sup. Ct. 1942); see also Lebo v. Lebo, 886 So. 2d 491 (La. Ct. App. 2004); Henneke, 761 N.E.2d 1140. Likewise, if the issue is child support, courts under the old Act routinely granted the military obligor a discretionary stay, subject to an award of temporary child support, which could be determined on papers alone, without a hearing. See, e.g. Cherubini No. 000160/2003, 2003 WL 1389094; Kelley, 38 N.Y.S.2d 344; Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989).

Does the court have the same discretionary power to award interim relief to the civilian parent under the SCRA, with its 90-day mandatory stay provision? At least one court has held that it did not, at least in the custody context, although the grant of a stay in that case was accompanied by assurance that in proceedings before the stay application, the best interests of the child had already been aired. Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981).

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2 The converse (increase in pay) is also worth considering. I have seen reports that say around 40% of Service members called to active duty actually receive an increase in income/pay.
Another court, on a child support agency's petition against the military father, simply refused to grant the stay, concluding that the father had ample time before being called up to gather materials that counsel could present in documentary form. Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981). Another court did the same in a custody case, concluding that "access to video conferencing equipment" made the servicemember available to appear. Wagner, 887 A.2d 282, 284.

Other courts have held, however, that the issuance of an SCRA stay does not bar temporary relief for the civilian parent. Thus, a child's temporary custody is not determined by the happenstance of being with a particular parent or grandparent at the time a stay is requested, particularly if it appears that the service member obtained custody of the child by subterfuge or unfair dealing (by holding the child over on visitation, for example). See, e.g., Lenser v. McGowan, 191 S.W.3d 506, 507 (Ark. 2004) ("We hold that the SCRA provides a stay of the domestic relations case but did not prevent the circuit court from entering a temporary order of custody."); cf. George P. v. Super. Ct., 24 Cal. Rptr. 3d 919, 924 (Ct. App. 2005) (even if 90-day stay is mandatory, additional stay is discretionary and subject to denial for want of legitimate defense).

The courts' willingness to condition or override an SSCRA or SCRA stay is based on the longstanding principle that both laws function as a shield that can help protect service members from disadvantages arising from military service, but not as a sword to give them unfair advantage over other litigants. See Boone, 319 U.S. 561, 575; see also Lenser, 191 S.W.3d 506, 510-11; In re Marriage of Grantham, 698 N.W.2d 140. This principle plays out in a number of circumstances.

One such situation might be the example above, in which a military mother keeps secret a military family care plan--placing her children with her relatives or new spouse--until the eve of her
deployment, and then requests a stay in the father's custody proceeding. Or, in the context of child protective or permanent termination proceedings, a military father may try using the stay to buy time to reinstate a relationship with the child or work on his parenting resume or, if posted to a non combat zone, he may keep the children in his care and refuse the mother visitation or information about the child. See, e.g., *Ex parte K.N.L.*, 872 So. 2d 868; *Lenser*, 191 S.W.3d 506; *George P.*, 24 Cal. Rptr. 3d 919; *Louis J. v. Super. Ct.*, 127 Cal. Rptr. 2d 26 (Cal. Ct. App. 2002); *In re Grantham*, 698 N.W.2d 140; *Diffin*, 787 N.Y.S.2d 677. In such cases, the SCRA's provision for a short-term 90-day stay, and for appointment of counsel if further stay is denied or default judgment is sought, can effectively limit potential abuse of military status while protecting the servicemember's legitimate concerns. Also, in balancing service members' needs against their dependents' needs, courts maybe willing to push the definition of a service member's "availability" under the SCRA's stay and default provisions, to allow for video or telephone appearances or to consider pendente lite issues, particularly regarding child support, on papers alone. See, e.g., *In re Diaz*, 82 B.R. 162 (Bankr. M.D. Ga. 1988); *Foster v. Alexander*, 431 S.E.2d 415, 416 (Ga. Ct. App. 1993); *Wagner*, 887 A.2d 282; see also *Krutke*, 693 N.W.2d 147.

The best source of quick information on the SCRA is *A Judge’s Guide to the Servicemembers Civil Relief Act*, found at the website of the Military Committee of the ABA Family Law Section, www.americanbar.org/family/military. Also, *The Servicemembers Civil Relief Act: A Judge’s Checklist* is also helpful and is attached to these materials for your reference. Another great source is the *Army JAG School’s SCRA Guide* and can be found on-line at the School’s website, www.jagcnet.army.mil/tjagcls. Click on TJAGLCS Publications tab, then scroll down to Legal Assistance, and then look for the publication, which is JA 260.

There may be another option. Let’s go off the reservation, or base as it were and consider
the mechanism of the Power of Attorney for Care and Custody of Child statute passed in 2014. This new and untested statute is codified at 10 O.S. §700 and §701. These two sections provide for a delegation of parental responsibility (i.e. custody) through a power of attorney by a parent or legal guardian. Section 701 is simply the prescribed form.

This delegation of parental responsibility by a power of attorney makes the person so delegated the equivalent of the child’s parent with full custodial authority. The only limitation on the parental authority of the person so delegated is that the person may not consent to the adoption of the child, the child’s marriage, the procurement of an abortion, or to the termination of parental rights to the child. Further, the delegated person may not be compensated.

The delegation can last up to one year and can be revoked by the delegating person at any time. It can however be renewed and there is no limitation on the number of times the power of attorney can be renewed. The statute also provides that such delegation does not constitute abandonment under the Children’s Act unless the parent, after one year, fails to make contact or fails to execute another power of attorney. It also provides that the Child Care Facilities Act is not applicable to such a delegation, nor do any of the requirements of the Foster Care statutes apply to the delegation.

The intent behind the new statute was to allow families that are in crisis and cannot care for their children to delegate by a power of attorney someone else to care for their children. Thus allowing them to avoid being caught up in the juvenile court system. However, to the extent that there are services available to the parents through the juvenile system, the services would not be available to parents who utilize this power of attorney. Actually, the Department of Human Services would not even know of such a family.

Looking at this mechanism for a deployed parent, it could potentially create a seamless
transition to and from deployment without court intervention. For example, the custodial parent could delegate the non custodial parent, grandparent or other family member or third party as legal custodian of a child for a year while the parent was abroad without going through a formal guardianship or formal temporary modification from a court.

However, note the delegation with regard to third parties is unclear. There is also no indication concerning the relationship between this statute and 43 O.S. §112.5 on third party custody. That statute, and voluminous case law tells a court that custody is to be given to a parent, unless that parent is unfit or has failed to pay child support or has abandoned the child under §112.5. May a custodial parent appoint a third party to have custody of the child by a power of attorney when there is a fit parent who would otherwise be entitled to custody? There is also no indication of the relationship between this statute and 30 O.S. §2-107 which deals with third-party custody in the context of a guardianship by abandonment.

Since the transfer of custody is done by a power of attorney, there would probably be no effect on previous orders. The obvious question is whether the person delegating the custody right has the responsibility to pay child support. If so, there would have to be a court order; nothing in this bill effects prior support orders.

For the purposes of this paper it should be specifically noted that there is nothing in the statute to indicate how it relates to Uniform Deployed Parent’s Custody and Visitation Act codified in 43 O.S. 150.1 et seq. One of the major orders that can be entered under the Act is provided for in 43 O.S. §150.3. This order allows, upon application to the appropriate court, for the deployed parent to designate a family member or other person with a close and substantial relationship to the child to exercise the deployed parent’s visitation rights unless the court determines that it is not in the child’s best interest. Suppose a member of the military, who is a noncustodial parent, delegates a
right to visitation with the child to the military members parents. Then further suppose the custodial parent delegates, by power of attorney, all the custodial rights over the child to the custodial parent’s parents. Does the delegation by power of attorney supercede the court’s orders of temporary visitation? Or does the court’s orders supercede the delegation of custodial responsibility? Does it depend on the timing? If so, which prevails: the first or the second order? The point here is to raise the issue of another mechanism that may serve a purpose in a servicemembers family care plan.

II. JURISDICTIONAL CONSIDERATIONS

It is amazing how often we observe the apparent lack of understanding of the most fundamental of case attributes - jurisdiction. In this context, family law jurisdictional analysis is often more complex than other types of civil litigation. This is especially true with Servicemembers.

The review initially depends upon what is happening, e.g. original dissolution of the marriage action, paternity determination, post decree child custody modification, post decree child support modification, etc. Jurisdiction is not unique to the military family law case. However, as a family law practitioner accepting family law cases involving service members and their spouses you will undoubtedly find yourself in uncommon jurisdictional discussions. You will likely advise and or debate with JAG officers, opposing counsel and judges the fundamental aspects of jurisdiction. Despite the mobile society we live in today the vast majority of our family law cases have little to no jurisdictional considerations. They are routinely a “given” because both parties typically reside in the same geographical location. Just as a muscle not exercised grows weak, knowledge not regularly called upon fades. Thus, forgive the digression to the fundamentals of jurisdiction.

A. Subject Matter Jurisdiction

Subject matter jurisdiction over the marriage itself – and therefore, jurisdiction to grant a divorce
– is present as long as the court has personal jurisdiction over *either* of the parties to the marriage, and every State is required under the Full Faith and Credit clause of the United States Constitution to recognize decrees entered by other States if those other States had such personal jurisdiction over one party and afforded notice to the other in accordance with procedural due process.\(^3\) Child custody jurisdiction is controlled by the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), located at 43 O.S. §551-101, *et. seq.* In 1998 Oklahoma was the first state to pass the UCCJEA, which also repealed the Uniform Child Custody Jurisdiction Act (UCCJA). Oklahoma's frontier spirit may have been helped by having two of Oklahoma's own legal pioneers on the ten-person Committee that acted for the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in preparing the Uniform Child Custody Jurisdiction and Enforcement Act (1997): The Honorable Marian P. Opala, Chairperson of the Committee, and Professor Robert G. Spector, Reporter for the Committee. The basis for jurisdiction under the UCCJEA comes in four flavors: Initial, Continuing, Modification and Emergency. Let’s look at each component.

**B. Initial Jurisdiction**

Perhaps the simplest way of determining the meaning of the initial jurisdiction rule is to see what the drafters were trying to accomplish. As documented in an extensive study by the American Bar Association’s Center on Children and the Law,\(^4\) inconsistency of interpretation of the

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\(^3\) *Williams v. North Carolina, 317 U.S. 287 (1942); see also Sherrer v. Sherrer, 334 U.S. 343 (1947); Coe v. Coe, 334 U.S. 378 (1947).*

\(^4\) *Obstacles to the Recovery and Return of Parentally Abducted Children (ABA 1993) (“Obstacles Study”).*
UCCJA\textsuperscript{5} and the technicalities of applying the PKPA\textsuperscript{6}, resulted in a loss of uniformity among the States. The Obstacles Study suggested a number of amendments which would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.\textsuperscript{7}

The UCCJEA was intended to provide clearer standards for which States can exercise original jurisdiction over a child custody determination, enunciate a standard of continuing jurisdiction for the first time, and to clarify modification jurisdiction. It also sought to harmonize the law on simultaneous proceedings, clean hands, and \textit{forum non conveniens}. Between 1998 and August 2010, forty-eight (48) states\textsuperscript{8}, the US Virgin Islands and the District of Columbia have now adopted some form of the UCCJEA.

\textbf{1. Home State priority.} The PKPA prioritizes “home State” jurisdiction by requiring that full faith and credit cannot be given to a child custody determination by a State that exercises initial jurisdiction as a “significant connection State” when there is a “home State.” Initial custody determinations based on “significant connections” are not entitled to PKPA enforcement unless there is no home State. Under the UCCJEA, home state jurisdiction is established by determining:

\begin{itemize}
  \item[(1)] where the child in question has lived with a parent or person acting as a parent for at least
\end{itemize}

\textsuperscript{5} Uniform Child Custody Jurisdiction Act (“UCCJA”) was initially located at 10 O.S. §1601, \textit{et. seq.} and renumbered to 43 O.S. § 501 on September 1, 1990. It was repealed with the passage of the UCCJEA on November 1, 1998.

\textsuperscript{6} Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A.

\textsuperscript{7} Before 1968 (and the UCCJA), parents who abducted their children stood an excellent chance of being rewarded with custody. Any court before which the abductor-parent appeared had the legal authority to issue a custody order based solely upon the abductor’s physical presence in the state with the child. The inherent unfairness to the left-behind parent, the psychological harm to the child in being shifted from home to home, and the inefficiency and judicial expense wrought by repetitious litigation over child custody in sister states, all led to the promulgation in 1968, and eventual adoption by all 50 states and the District of Columbia, of the UCCJA.

\textsuperscript{8} Vermont and Massachusetts are the only states that have not enacted some form of the UCCJEA.
six months (not including “periods of temporary absence”) immediately before the date of commencement of the child custody action; or

(2) if the child in question is less than six months old, then has the child been in state since birth until the date of commencement of the child custody action living with a parent or person acting as a parent; or

(3) within six months before commencement of the action,
   i. the subject child resided in the state for six months or more;
   ii. the subject child is now absent from the state; and
   iii. one parent continues to live in the state.

For the purpose of this primer, the messages are short and simple. **If there is a Home State, no further inquiry about the significance of anyone’s connections with anywhere else has any relevance.** Only if there is **no** Home State are such “significant connection” analyses relevant.

The test for initial child custody jurisdiction is considerably different from the personal jurisdiction test for divorce/dissolution of marriage – the UCCJEA states on its face that “physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.” Those lawyers who insist on arguing personal jurisdiction matters in child custody proceedings – and those judges who indulge such expositions, as opposed to staying focused on the statutory inquiry – waste the time and money of everyone involved. And in the unusual circumstances supporting an assertion of initial emergency jurisdiction (i.e. the child is present here and has been abandoned or an emergency amounting to actual or threatened mistreatment or abuse is presented), it is now clear that such an emergency order only lasts until a State with initial or continuing jurisdiction under 43 O.S. §551-204 issues an order relating to the matter. Only in the peculiar situation that such other State does not issue any order on the subject within the time specified in our order, does the emergency order either continue or expire, as it
provides by its own terms.\textsuperscript{12} And only if that other State \textit{never} acts could the emergency order of this State ever become a final determination, making this State the new Home State of the child.\textsuperscript{3}

2. \textbf{Significant Connection Jurisdiction}. In order to have “significant connection” jurisdiction, there is \textbf{no} Home State for the subject child; and the child and at least one of the child’s parents or persons acting as a parent has a “significant connection” with the State and there is available in this State “substantial evidence” concerning the child’s care, protection, training, and personal relationships.

3. \textbf{“Vacuum” Jurisdiction}. 43 O.S.§501-201. This is the catch all provision that is used only if:

(a) all other more appropriate States have declined jurisdiction; or

(b) this State is the only remaining place to decide child custody issues. The goal of statute and what we call “vacuum” jurisdiction is to ensure that some Court, somewhere has subject matter jurisdiction over a child at all times in order to make an initial child custody determination. It requires rare and unique fact situations to trigger vacuum jurisdiction. Be very careful in justifying jurisdiction on this ground!

C. \textbf{Continuing and Modification Jurisdiction}

Once again, the intent of the drafters was pretty clear as to the problem they sought to address, and the solution they reached. The UCCJA’s failure to clearly enunciate that the decree granting State retains exclusive continuing jurisdiction to modify a decree resulted in two major problems.

\textsuperscript{3} 43 O.S. §501-201
First, different interpretations of the UCCJA on continuing jurisdiction produced conflicting custody decrees. States also had different interpretations as to how long continuing jurisdiction lasted. Some courts have held that modification jurisdiction continued until the last contestant left the State, regardless of how many years the child had lived outside the State or how tenuous the child’s connections to the State had become. Other courts had held that continuing modification jurisdiction ended as soon as the child had established a new home State, regardless of how significant the child’s connections to the decree State remained. Still other States distinguished between custody orders and visitation orders. This divergence of views lead to simultaneous proceedings and conflicting custody orders.

The second problem arose when it was necessary to determine whether the State with continuing jurisdiction had relinquished it. There was a need for a clear basis to determine when that court has relinquished jurisdiction. The UCCJA provided no guidance on this issue. The ambiguity regarding whether a court has declined jurisdiction can result in one court improperly exercising jurisdiction because it erroneously believes that the other court has declined jurisdiction. This caused simultaneous proceedings and conflicting custody orders. In addition, some courts have declined jurisdiction after only informal contact between courts with no opportunity for the parties to be heard. This raised significant due process concerns. The UCCJEA addresses these issues in 43 O.S. §501-206 [Simultaneous Proceedings and communication between courts]), 43 O.S. §501-202 [Exclusive, continuing jurisdiction]), and 43 O.S. §501-206 [Simultaneous proceedings]].

Of the referenced model sections, the key is 43 O.S. § 551-202. This provision defines “Exclusive, Continuing Jurisdiction” (commonly, if oddly, abbreviated as “CEJ”). It provides a
few very simple rules by which continuing jurisdiction can nearly always be easily and quickly ascertained. Once an Oklahoma Court has made a custody determination, only an Oklahoma Court has jurisdiction to modify that order, until one of two things happens:

(A) *Our* court determines that neither the child, nor a parent, nor any person acting as a parent has any significant connection to this State, and that no substantial evidence exists here as to the child’s care, protection, training, and personal relationships;

OR

(B) A Court of this State, or elsewhere, determines that the child, the child’s parents, and any person acting as a parent do not reside in Oklahoma.

The comments make it crystal clear that the statutory language is intended to deal with where the people involved *actually live*, not with any sense of a technical domicile. Regardless of whether a State considers a parent a domiciliary, the State loses exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.

The statutory scheme makes it clear that only the State with CEJ can determine that there is no significant connection remaining. So it simply makes no sense for lawyers to continue filing motions asking our courts to determine that some *other* State should not exercise its CEJ. The only thing that could be asked of our Court is the factual determination that all relevant persons do not reside in the State issuing the earlier order. If any other basis for changing or relinquishing jurisdiction is required, the request must be made in the State issuing the earlier order.

If it has been determined that the original State with CEJ lost that jurisdiction, then the question becomes whether there is a new Home State, which becomes the place where further custody litigation should take place.\(^4\) Until and unless there is a *new* Home State, the *prior* Home State is presumptively where any custody-related litigation should proceed.

\(^4\) 43 O.S. §551-203
It is also necessary to stress that the question of jurisdiction is a “snapshot” taken at the moment of filing the action. In the language of the comments, “jurisdiction attaches at the commencement of a proceeding.” The way NCCUSL put it: “If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 207.”

And once lost, CEJ stays lost. If the custodial parent and child return to Oklahoma before some other State makes the requisite finding (that all persons had left) and assumes jurisdiction, then Oklahoma remains the only place where a modification motion could be filed. But when all relevant persons have left, and the non-custodial parent returns here, there is no such effect. Or, as NCCUSL put it: “Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns.” And yet we have seen a judge convene a lengthy, costly “evidentiary hearing,” despite those facts being agreed by all parties, to determine “what ought to be done,” when the resolution was a clear matter of law based entirely on the absence of jurisdiction.

D. Emergency Jurisdiction

While touched upon earlier, a Oklahoma Court may exercise temporary emergency child-custody jurisdiction if: (1) the child is now present in the State; and (2) the child is alleged to be abandoned or it is necessary in an emergency to protect the child because of abuse or mistreatment. If emergency child-custody jurisdiction is taken, then the primary purposes of the Order are to protect/safeguard the child and make arrangements to ensure the child’s

5 43 O.S. §551-207
return to the child’s Home State or State that has CEJ over the subject child. An emergency child custody order is of limited life – i.e. to remain in effect only until a child custody proceeding is instituted in the correct jurisdiction, if no previous action exists. If a previous jurisdiction exists, the emergency order must set a period of time to obtain a new order from the appropriate jurisdiction.

Lastly, in this remedial course, remember that simultaneous proceedings are to be avoided. 43 O.S. § 551-206. One of the major goals of the UCCJEA is to avoid the existence of conflicting custody orders involving the same child. One way this is accomplished (besides the jurisdiction hierarchy in 43 O.S. §551-201 and 202) is for Courts to communicate with each other. 43 O.S. §551-110. Ways to avoid simultaneous child custody proceedings is for a Court to invoke the doctrine of “inconvenient forum” (43 O.S. §551-207) and well as decline the exercise of jurisdiction based on reason of conduct, e.g. Petitioner has wrongfully taken child from another state; or Petitioner has engaged in any “unjustifiable conduct”. 43 O.S.§551-208.

III. CUSTODY and VISITATION

The unique consideration for custody and visitation issues for service member families is substantial and significant enough the Uniform Laws Commission (“ULC”) has developed the Uniform Deployed Parents Custody and Visitation Act. This Act provides a standard protocol for service members continued contact between their children and the service members family. Oklahoma passed this Act in 2011 and a revision will take effect on November 1, 2017. 43 O.S. §150.1 et seq. The revision included coverage for the “civilian personnel” and expanded the definition of “deployment”.

Generally, the Deployed Parents Custody and Visitation Act and similar state versions allow the deployed parent to do the following:
1. Obtain expedited custody/visitation hearings upon notice of deployment.

2. Allow the service member the ability to delegate his custody or visitation to a family member to assure continued relationship development between the child and the deployed parents family.

3. Creates an expedited process to return the custodyor visitation schedule to pre deployment status upon the return of the service member.

A copy of the ULC current draft of the Deployed Parents Custody and Visitation Act can be accessed at www.uniformlaws.org

A. Family Care Plans

Preparing a Family Care Plan is standard procedure for all service members. They are encouraged to complete this form and execute the plan regardless whether or not the service member is being deployed. The goal is to have the service member consider and prepare for a future separation from his or her family. Each branch of the service have their own Family Care Plan forms which cover the following issues:

- Guardianships and Powers of Attorney and make sure they have access to the information they need to execute their duties, including financial information.
- Prepare a will.
- Obtain current ID and commissary cards and assure insurance is in place.
- Life insurance enrollment.
- Arrange for housing and other necessities and emergency needs.
- Arrange for child care, education and medical care.
- Make travel considerations to transport dependents to guardian if servicemember is a single parent. Sound good? On paper yes, in a family law court, no. Chances are any documents
prepared on base will be forms not specifically tailored to the service members unique situation. They may not even be specific to the service members designated usual place of residence. Although, these documents will be helpful to determine a service members “intent”, they may not pass muster with local case law and statutory requirements.

As a family law practitioner representing a service member or a service member spouse in a paternity, guardianship, divorce or post divorce matter you should address these issues. Place language in the Decree or Orders that will allow for seamless execution of his or her desired plan for his or her family. If you practice in the area of Wills and Estates you may want to include this information in your closing letters. If your closing letter is to a servicemember client you will want to emphasis the importance of updating or preparing an estate plan package.

B. Passports

Passport considerations are another less common issue in the typical family law case. However, when you add the aspect of a service member parent not only are you likely to encounter international travel but there are unique passport options not available to a non service member family. A passport is a travel document issued bya competent authority showing the bearer’s origin, identity, and nationality, which is valid for the entry of the bearer into a foreign country (8 U.S.C. § 1101(3)). Under U.S. law, U.S. citizens must enter and depart the U.S. with valid U. S. passports (8 U.S.C. §1185(b)). This requirement, however, is waived until December 2006 for travel from countries within the Western Hemisphere, with the exception of Cuba (22 CFR 53.2). However, each foreign country has its own entry requirements concerning

6 The Intelligence Reform and Terrorism Prevention Act of 2004 requires that by January 1, 2008, travelers to and from the Caribbean, Bermuda, Panama, Mexico and Canada have a passport or other secure, accepted document to enter or re-enter the United States. In order to facilitate the implementation of this requirement, the Administration has proposed it be completed in phases following a time line, which will be published in the Federal Register in the near future. In the proposed implementation plan, which is subject to a period of initial public comment and
citizenship, passports and visas. Information regarding those requirements may be obtained from the appropriate foreign embassy or consulate. The addresses and telephone numbers for the foreign embassy or consulate near you are best found on the U.S. Department of State website, located at: http://www.state.gov/. This link is worth bookmarking in your internet browser’s favorites. There are more types of passports than meet the eye: diplomatic, envoy, special, military, tourist, etc. Since most of us will never represent a U.S. State Department employee, an Ambassador or Consular employee, the two most common types of passports we’ll have contact with are: civilian/tourist passport and no-fee military passport. If you have a U.S. passport, chances are it is a civilian/tourist passport. It has a blue cover, containing your picture, particular personal information, signature page, visa pages, etc. You applied for it at one of some 7,000 passport offices, paid your fees and, in the normal course of things, waited some 6 to 8 weeks to obtain. The no-fee military passport is available to members of the “American military or Naval forces on active duty outside the United States” and their dependents. These passports look the same as civilian/tourist passports; however, they contain the following restrictive endorsement on the last page: “THIS PASSPORT IS VALID ONLY FOR USE IN CONNECTION WITH THE BEARER’S RESIDENCE ABROAD AS A DEPENDENT OF A MEMBER OF THE AMERICAN MILITARY OR NAVAL FORCES ON ACTIVE DUTY OUTSIDE THE UNITED STATES.”

The no-fee military passports are applied for and processed at the service member’s base/post through the U.S. Department of State, Special Issuance Passport section. While they are better at expediting, passports also can take 6 to 8 weeks to obtain. This restrictive finalization, the proposed timeline is as follows: December 31, 2006 - Passport is required for all air and sea travel to or from Canada, Mexico, Central and South America, the Caribbean, and Bermuda. December 31, 2007 - Requirement extended to all land border crossings as well as air and sea travel.
endorsement can cause some confusion. The U.S. Department of Defense (“DoD”) has a regulation titled “Passport and Passport Agent Services Regulation”. In that Regulation, it states “No-fee passports are used by eligible DoD personnel and their family members while on official travel to countries requiring passport.” Additionally, the same paragraph goes on to state, “While outside the United States, no fee passports maybe used for incidental personal travel between foreign destinations providing the foreign government concerned accepts no-fee passports for personal travel.” The concern that can arise is this: Can a military dependent (child) travel on a no-fee military passport, unless the U.S. service member is traveling with him/her? Answer: Yes. According to Mr Randall Bevins, Supervisor for Special Issuance Passports at the U.S. Department of State, military passports have no travel limitations, contrary to statements from the DoD, and even the Office of Children’s Issues. “Incidental travel” is a term of art, and that all travel by a military dependent (child) that is without the military member, including court ordered travel, falls within this term.

If you represent the moving military member .... or his/her spouse, it may be beneficial to have dual passports, i.e. military and civilian. However, it is generally not recommended for military dependents. Generally, the military passport is necessary for military dependents to enter and exit the service members’ duty country, i.e. Japan, Germany, etc. The United States Armed Forces have pacts with the various countries were military bases are located. To be in compliance with those pacts, military personnel and their dependents must use their military passports.

IV. RETIREMENT CONSIDERATIONS

Next to the SCRA, retirement considerations are the most significant and unique issues to

7 Mr Bevins is a government employee who is extremely knowledgeable and competent. His phone number is: (202) 955-0203. According to the U.S. Department of State’s Legal Division, his statements are “gospel”.

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address in a military divorce. The timing of retirement and the medical status of the member at
the time of divorce versus time of retirement playa significant roll on the type of award available
to the member and the member’s former spouse. Excellent materials have already been written
on this subject by those considerably more knowledgeable than your authors. We have attached
what we believe are the key resource guides needed to understand and properly divide military
pension benefits, aka military retainer pay or retirement benefits to the rest of us. Again, when
looking to divide military pension benefits, one must start with a jurisdiction analysis. However,
the initial analysis begins not only with a review of state court requirements, but also federal law
(10 U.S.C. §1408(C)(4) in order to determine if a family law court has the jurisdictional power to
divide a military retirement benefit. In conjunction withe a list of resources we also want to
touch on a few unique consideration specific to military compensation.

1. Combat Related Special Compensation

Federal law allows for the waiver of military retired pay in exchange for VA (Department
of Veterans Affairs) disability compensation .... but only if the servicemember ("SM") gives up the
same amount of retired pay. 38 USC §5301. Taking this option is always beneficial to the military
retiree, since it yields an increase in net income because of the non-taxable aspect of VA disability
compensation. In reviewing recent continuing legal education materials on this topic, the following
description, provided by Mr Steve Chucala, the Chief of Client Services, Ft. Belvoir, is helpful:

The election concerning VA tax-free compensation requires some clarification due to the
various categories of soldier separations from military service. The following serves to clarify most
issues presented since the option to elect VA compensation depends upon the status of the soldier
at the time of discharge.

Service members who terminate active service prior to regular retirement or retire without
any disability compensation from the armed forces, and who subsequently are awarded disability compensation by the VA, automatically receive tax-free compensation. There is no election involved since all payments are from the VA only.

If a service member is awarded severance pay (normally where the percentage of disability is less than 30% and the soldier is not retirement eligible as those on active duty with 20 years of service or is a Reservist not eligible for age 60 retirement), s/he accepts the severance pay without any options. Should this service member subsequently be awarded additional VA disability compensation, the amount previously awarded as severance pay is deducted from the VA compensation amount.

If a service member is retired either on TDRL (temporary disability retirement list) or PDRL (permanent disability retirement list) and is later awarded VA compensation, DFAS offers the option of keeping the military disability pay or accepting the VA tax-free payments as a dollar-for-dollar offset.

Regardless of how a VA disability award is taken, this election usually wreaks havoc when the retiree’s pension is subject to a garnishment order for part of “disposable retired pay” in favor of a former spouse due to separation or divorce/dissolution of marriage. As soon as the election takes place at DFAS, the former spouse usually sees his/her share of divisible retired pay decrease, sometimes substantially.

When the VA disability election happens pre-decree(i.e. before a divorce occurs), the VA award is typically the SM’s separate property and not subject to division by the trial court. Gray v. Gray, 1996 OK 84, 922 P.2d 615) Conversely, when the VA disability election happens post-decree (i.e. after the divorce occurs) resulting in a decrease of the former spouse’s share of court awarded divisible retired pay, some courts have held that the service member is required to indemnify or hold
the formerspouse harmless for the reduction/loss of awarded property- for only a court can modify the terms of a court order. See, Troxel v. Troxel, 2001 OK CIV APP 96, 28 P.3d 1169; Nelson v. Nelson, 2003 OK CIV APP 105, 83 P.3d 889; and Hayes v. Hayes, 2007 OK CIV APP 58, 164 P.3d 1128. Although that was NOT the case in a Michigan Court of Appeals decision of Megee v. Carmine, 290 Mich.App. 551, 802 N.W.2d 669 (Mich.App. 2010). When the retired service member elected to receive CRSC, resulting in the termination of his retirement pay, his former spouse stopped receiving her court awarded 50% share of his retirement. She filed a Motion to Enforce which the trial court denied but was reversed on appeal ordering husband to pay his former spouse half of his monthly CRSC pay.

2. Congressional Developments

In 2003, Congress passed legislation taking effect January 1, 2004 to allow concurrent receipt of both forms of payments – retired military pay and VA disability benefits – for certain eligible retirees. The restoration of retired pay is known as Concurrent Retirement and Disability Pay (“CRDP”). The enacting legislation for CRDP is located at 10 U.S.C. §1414. Also beginning in 2003, Congress made a new form of special compensation available to a limited number of retirees. The benefits and definitions were expanded substantially in 2004. Called Combat-Related Special Compensation (“CRSC”), these payments may now, under the 2004 revised rules, be made to those retirees with a disability of at least 10% directly related to the award of the Purple Heart decoration or else a combat-related disability rated at least 10% (such as hazardous duty or training for combat). CRSC legislation is found at 10 U.S.C. §1413a. The CRSC regulations are at Chapter 63, Volume 7B of the Department of Defense Financial Management Regulations (DoDFMR), effective May 31,

8 While outside the scope of this letter and pending legislation, if you desire a further explanation of the “ins and outs” of CRDP, I will be glad to provide by separate letter.
2006, Sections 6301-6310. Both of these new compensation programs affect the division of military retired pay. Both programs are complex and (as I can attest) misunderstood – if not unknown – by civilian practitioners as well as many judge advocates.

3. CRSC Explained

CRSC is a benefit provided by Congress for those who have a combat-related disability of at least 10% under certain conditions. The Defense Department estimates that about 200,000 military retirees will be eligible for CRSC. The disability is considered to be combat-related under 10 U.S.C. §1413a (e) if it –

(1) is attributable to an injury for which the member was awarded the Purple Heart; or

(2) was incurred (as determined under criteria prescribed by the Secretary of Defense)

(A) as a direct result of armed conflict;

(B) while engaged in hazardous service;

C) in the performance of duty under conditions simulating war; or

(D) through an instrumentality of war.

These qualifications include, by way of example, injury or illness resulting from actual combat, simulations of war (e.g., gas mask training, field training exercises, direct-fire training and “confidence courses”), hazardous duty such as diving or parachuting, and instrumentalities of war (e.g., tanks, artillery, machine guns, military planes). These conditions are defined at §630602 of the CRSC regulations in the DoDFMR. There is further general information on CRSC at www.hrc.army.mil/site/crsc/. Since “combat-related” is service-specific, a SM’s application is sent to the retiree’s branch of service, not to the Department of Defense.

CRSC is not longevity retired pay. It is an additional form of compensation for certain members of the armed forces. 10 U.S.C. §1413a (g) states that “[p]ayments under this section are not retired
pay.” Thus payments are not divisible in a divorce/dissolution of marriage action as property. In this regard, SB 1951 (new subsection D in 43 O.S. §121) would match federal law.

The CRSC rates come from the VA tables and increase with the number of a retiree’s dependents (spouse, spouse and child, etc.). Thus, to use a May 2006 example, a SM’s compensation for a 10% rated disability with no dependents, is $112 a month. The no-dependents rate for a 20% disability rating is $218 per month. The amount goes up to a total of $2,844 a month for maximum dependents and a 100% disability rating. If the retiree has been getting CRDP and then elects CRSC, there will be a one-time retroactive payment to him or her, and the money received under CRDP for that same time period that is covered by the CRSC retroactive payment will be taken back. The CRDP pay-back will be subtracted from the retroactive CRSC payment that the service member receives.

4. Additional Military Retainer Pay Research

As previously promised here is a list of the additional research materials you may want to review before advising a service member or service member spouse regarding retirement consideration. Copy are also included in these materials for your convenience:

- Silent Partner / Military Pension Division: Scouting the Terrain.
- Silent Partner / Military Pension Division: The “Evil Twins” - CRDP and CRSC
- Silent Partner / Military Pension Division: The Servicemembers’s Strategy.

9 DoDfMR §630104 further states: “Since CRSC is not retired pay, it is not subject to the provisions of section 1408, title 10, United States Code, relating to payment of retired or retain pay in compliance with court orders. CRSC is also not subject to any survivor benefit provisions of chapter 73 of title 10, United States Code. However, CRSC is subject to a Treasury offset to recover a debt owed to the United States as well as to garnishment for child support or alimony. In addition, debts due the Government may be collected from CRSC, including overpayments of retired pay or erroneous payments of CRSC, by means of an administrative offset.”

10 Again, note the new legislation is limited to only the service member’s portion of the award and not include any amount attributable to dependents.
CONCLUSION

The family law attorney, perhaps even more than the general practitioner, needs to know and understand the SCRA (and general domestic jurisdiction), as well as the unique issues of military custody, visitation and retainer pay for those occasions when a military member is one of the parties to the litigation. Mobilizations and deployments affect mothers and fathers, wives and husbands, and separated partners who are in the Reserves, on active duty and in the National Guard. They will have an impact on income, visitation, family expenses, custodial care for children, mortgage foreclosures, garnishments, and many other domestic issues.

(As for many of us, we can see far because we stand on the shoulders of giants. Towards that end, I must acknowledge the continual efforts and extensive works of my colleague, Mark E. Sullivan. Mr. Sullivan is a retired Army Reserve JAG colonel who practices in Raleigh, NC. He is a board-certified specialist in family law and past president of the North Carolina Chapter of the American Academy of Matrimonial Lawyers. Further, Mark is a past Chair of the Military Committee of the ABA Section of Family Law and author of The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families (American Bar Association, May 2006, Second Edition August 2011), from which much of this material is adapted.)