V. SPECIAL ISSUES IN MILITARY DIVORCE

A. Statutory Changes and Current Case Law

Most recent statutory and case law changes of note have been in isolated pockets of State statutes, and are of interest to Nevada practitioners primarily in interstate cases, and best discussed as part of the substantive section of the materials addressing the topics themselves.

For example, in the disability area, there has been a determined push by retirees receiving disability benefits to try to find ways to shield those benefits from consideration by State divorce courts. Those efforts have seen some very bad legislation result in Arizona, and somewhat less bad results in Oklahoma. Much the same practical result has been seen in case law developments out of Texas. The substantive legal developments are set out in Section VI, pp. 36-109.

As of this writing, there is a small chance that the United States Supreme Court will take up a challenge to the use of V.A. benefits in support calculations. A retiree named Peter Barclay has petitioned for certiorari, arguing that he shouldn't have been ordered by the Oregon family court to pay his ex-wife, Claudia Barclay, $1,000 a month in spousal support because the amount was calculated by combining his monthly Department of Veterans Affairs disability benefits and his Social Security Disability benefits. His petition argues that federal law prohibits states from including VA disability benefits in such calculations, on the grounds that Congress intended such benefits to be for the welfare of the veteran. A decision on the cert petition is due on September 28.

B. Rules of Practice and Procedure for Family Court

The single biggest change relating to Nevada practice and procedure has to do with active-duty cases involving minor children.

I. BACKGROUND: MILITARY DIVORCE RATES AND CONGRESSIONAL POSTURING

The last decade has seen a rate of deployments, particularly among Reservists, that is unprecedented in modern history. As might be expected, the personal strain of such deployments has resulted in a large increase in the strain on military families. All services have seen a spike in their rate of divorce, up 40% since 2000, which necessarily increases the number of custody and visitation cases involving military members.

As of December, 2011, the Air Force Times reported that the military divorce rate was “leveling off” at 3.6 per 100 – about 1 in 27 military marriages ended just in 2010. The data had both predictable components – the enlisted divorce rate is more than double that of officers, and the Army and Marines rate is higher than that of the Air Force – and some surprises, including that women service members divorce their spouses at more than double the rate of their male counterparts.

By an overwhelming majority, the usual arrangement for single parents in the armed forces is secondary custody (access or visitation rights), not primary physical custody. According to Defense

Department regulations, first-term single enlisted parents cannot ***have*** custody of a minor child. Counsel versed in this area are therefore attuned to family law matters involving both custody and visitation relating to deployments.

Mark Sullivan of North Carolina (my successor as Chair of the ABA Family Law Military Committee; mark.sullivan@ncfamilylaw.com) has tirelessly worked to improve both education and substantive military-related family law; he designed the model State legislation now in effect in over 40 States that gives protections to military members involved with the family law system, and was the kernel of the proposed model uniform act recently approved by the Uniform Law Commissioners and before the Nevada Legislature in the next term (it is included in these materials).

In the meantime, Rep. Mike Turner of Ohio has figured that he can score political points by trying to engraft specific child custody laws for military members onto the Servicemembers Civil Relief Act of 2003 (SCRA), despite the fact that the ABA, the AAML, and a host of other organizations that have looked at the matter, have protested that federalization of family law is a rotten idea for many reasons, including that it is unnecessary, invades traditional State law, and if passed would harm the people it purportedly was proposed to assist. For a discussion of that proposal, see legal note Vol. 52, "Proposed Changes to the SCRA are a Bad Idea," posted at http://willicklawgroup.com/newsletters/.

Naturally, these facts have had no impact on Congress. But they have in part spurred the remaining States, Nevada among them, to look at the subject.

II. THE NEVADA MILITARY CUSTODY AND VISITATION STATUTE

Nevada's AB 313 was introduced and passed in 2011, and went into effect October 1, 2011. It tracks, pretty exactly, the earlier draft of the model legislation. As enacted in Nevada, the law modifies NRS 125.480 (dealing with child custody determinations), 125C.010 (dealing with visitation rights); and 125.510 (dealing with modification of orders). It applies to any unaccompanied deployment, including to temporary duty stations, but does not include annual Reservist or National Guard training.

A. PRESERVING RIGHTS OF MILITARY MEMBERS TO CUSTODY OR VISITATION

A court may not enter a "final order" altering either custody ***or*** visitation rights of a deployed member until 90 days after the member returns from deployment, unless the matter had already been litigated before the deployment, and all that remained was entry of the order.

The deployment of the member "must not, by itself," constitute a "substantial change of circumstances" to warrant entry of a permanent order modifying a custody or visitation order. A court ***may*** enter a "temporary order" to "reasonably accommodate" the deployment of the member.

However, if such a temporary order is entered, it must permit custody or visitation during leave if the prior order had provided for such (unless not in the child's best interest), and the court must consider whether and how to provide continuing contact between the child and the member during the deployment.

Any such temporary order "expires by operation of law" when the member's deployment ends, automatically restoring whatever custody or visitation order had been in effect prior to the deployment – unless something happens that presents an alleged "immediate danger of irreparable harm."

B. ACCOMMODATING MEMBERS' APPEARANCES

If a member receiving orders for deployment might not be able to participate in future hearings, a court on a showing of good cause must hold an expedited hearing, permit testimony and evidence from the member by affidavit or electronic means (phone, e-mail, or videoconferencing), or both.

Given the push to permitting electronic appearances in all cases, this portion of the legislation should not be particularly difficult to implement.

C. DELEGATION OF VISITATION RIGHTS TO OTHERS

As noted above, most military members do not have primary or joint custody. For those members, this could be the most important provision of the new legislation.

A court may order the visitation rights of the member delegated to a "family member" (a term curiously undefined in the statute) who has "a substantial relationship with the child" (also undefined) ***if*** the court finds that it would be in the best interest of the child to do so.

The statute cross-references as factors to be considered the exiting factors set out in NRS 125C.050 as to when a court should order visitation between a minor child and various relatives. The order terminates when the temporary order ends, or upon a showing that the delegated visitation is no longer in the best interest of the child.

D. MISCELLANEOUS PROVISIONS

The military member has the burden of giving a copy of any deployment orders to the other parent. If the child happens to not be in Nevada when a deployment arises, the child's absence is deemed a "temporary absence" under the UCCJEA, and the deployment may not be used as the basis for an "inconvenient forum" claim.

Finally, and wisely, the provisions of the new statute do not apply to custody or visitation orders made in a temporary or extended order for protection against domestic violence.

III. BOTTOM LINE TO THE STATUTE

Those of us who have been working in the field of military-related family law have been debating the proper contours of such custody and visitation laws for many years. The Nevada statute is a "middle-of-the-road" statute that preserves the priority of the best interest of the child while providing protections and accommodations to military members as possible and necessary to preserve their relationships with their minor children.

It strikes a fair balance among the competing interests, and should do some good for military members, and their children, while remaining cognizant of the rights and responsibilities of the non-military parents. Hopefully, it – and measures like it – will suffice to prevent the fat-fingered feds from mucking up the law of child custody by way of misguided federal enactments.

The question pending at this moment is what, if any changes should be made to the Nevada legislation in view of the final version of the Uniform Act.

C. Parenting and Child Support Issues

Most child support issues relating to military personnel (active duty, reserves, or retired) are the same as those relating to everyone else, and were addressed in section IV. There are a few unique aspects of child support relating to active duty members, however, due to the interface between federal employment classifications of income and State divorce law classifications of resources calculated in figuring support, and those are what will be addressed here.

I. INTRODUCTION; CHILD SUPPORT AND MILITARY PERSONNEL

Some members of the military community have argued that their status as military members, or veterans, give them ***superior*** rights to those of other citizens, extending to exemptions from the support and property laws governing everyone else in the United States, regardless of the harm such would cause to others, including their own children.

II. USE OF MILITARY ALLOWANCES FOR CHILD AND SPOUSAL SUPPORT

Some military members apparently think their enlisted status somehow means that they don't have to pay child support, or if they do, that most of their actual income is exempt from consideration in determining how much support should be paid.

The military pay system is too complex to be thoroughly examined here. A review of the components of military pay was set out in my 1998 book, "Military Retirement Benefits in Divorce: A Lawyer's Guide to Valuation and Distribution" (which can be accessed at http://www.willicklawgroup.com/online_store), and a more up to date discussion is contained in

Mark Sullivan's thorough and well-written "Military Divorce Handbook," now in its second edition and available through the ABA or at Amazon.

In summary, however, all active duty members receive "basic pay" corresponding to their rank and years of seniority. In addition, there are a host of "special pays," because of the particularities or facts of that member's current service, such as "submarine pay" or "hazardous duty pay." There can also be substantial bonuses for various purposes, such as to retain trained pilots.

And then there are "allowances" – categories of extra money handed to military members on which there is no tax. Essentially every member gets nontaxable basic allowances for housing (BAH) and subsistence (BAS), and there are many kinds of situational allowances, as well. Some of these allowances – including BAH – are even ***greater*** when the member has "dependents" (a spouse or children).

The total paid in nontaxable allowances can come close to matching the amount of taxable pay received by a military member, and because allowances are received ***tax-free***, they are significantly more valuable than the regular taxable income of civilians receiving comparable perks.

In fact, there is an adjusted civilian equivalency, known as "Regular Military Compensation" (RMC), which the military itself uses for determining the actual value of the "salary" paid to members at each grade, combining basic pay, basic allowance for subsistence and the basic allowance for housing, along with the tax advantage from untaxed allowances. The chart, published annually by the Department of Defense Office of the Actuary, provides a more realistic and correct basis for an award of child support, spousal support, and attorney's fees, because it gives the Court an "apples to apples" basis on which to compare the incomes of a military member and a non-military spouse.

Some military members look at the special protections put in place by the federal government to prevent garnishments and executions against military personnel, and figure that the same rules should insulate them from paying child or spousal support based on the money they are actually receiving. One active-duty military member wrote to me, outraged that the allowances he received for reimbursement of expenses, etc., could be used as a basis for awarding child support.

As is typical, the member attempted to portray the matter as one of national security, claiming that such funds were "to provide a recipient working away from their home in another state or country with reimbursements for expenses necessary and required to perform their duties efficiently." From which he considered that the bulk of his actual income was to be ignored in setting child and spousal support, despite the fact that the existence of those dependents was part of the reason he was ***receiving*** the allowances in the first place. He was incensed that a court ordered that he pay "40% to 50% of my allowances for child support and alimony" (for support of two-thirds of his family), citing a host of federal regulations that he considered to be violated by such an order.

A California intermediate appellate court did an excellent job of setting out such an argument – and explaining why it does not hold water. *In re Marriage of Stanton*, 190 Cal. App. 4th 547, 118 Cal. Rptr. 3d 249 (Ct. App. 2010), considered the case of a litigant, like the member who wrote to me, who argued that setting child support based on allowances violated the federal preemption doctrine

since federal law exempts military allowances from the definition of income for federal tax purposes, and such allowances are not subject to wage garnishment for support arrears.

The trial court's analysis was the pretty straightforward one that if money "looks like income, it is income no matter how it's paid."

On appeal, the court affirmed, finding the law of federal pre-emption "inapplicable to California support law," given that "[e]ach parent should pay for the support of the children according to his or her ability," that gross income "means income from whatever source derived," and that "employment benefits" include "taking into consideration the benefit to the employee, [and] any corresponding reduction in living expenses. . . ."

The court explained well the place – and limits – of federal pre-emption in a family law analysis:

> In [*Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987)], the United States Supreme Court explained: "We have consistently recognized that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' [Citations.] 'On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "*positively required by direct enactment*" that state law be pre-empted.' [Citations.] Before a state law governing domestic relations will be overridden, it 'must do "major damage" to "clear and substantial" federal interests.'" (Italics added.) Express preemption arises when Congress has explicitly stated its intent in statutory language.

Exhaustively reviewing cases from around the country, the court found that the nontaxable status of military allowances did not suggest that Congress had any preemptive intent with regard to either child or spousal support. Nor was the court impressed by the fact that such allowances could not be garnished, noting that in *Rose*, the United States Supreme Court found that the State of Tennessee could hold a military veteran in contempt for nonpayment of child support when the support was based on disability payments not subject to garnishment, and such payments were his only means for satisfying his support obligation.

Explaining that conclusion, the Supreme Court rejected the idea that disability benefits not be subject to ***any*** legal process aimed at diverting funds for child support, including a State-court contempt proceeding, and held that the statutes merely applied to State proceedings against agencies of the United States government. As the California court noted, the purpose of those laws is "to avoid sovereign immunity problems, not to shield income from valid support orders," citing *In re Marriage of McGowan*, 638 N.E.2d 695, 698 (Ill. App. 1994).

The California court therefore joined courts across the nation in holding that federal preemption is inapplicable to military allowances such as BAH and BAS, and that such allowances are included in a party's gross income for purposes of support when State law encompasses them. The court held that not only did including such allowances in gross income "not do major damage to a clear and substantial federal interest," but "to the contrary, the Department of Defense by regulation and

otherwise encourages members of the armed forces to fulfill their family commitments," again citing *In re Marriage of McGowan*, *supra*.

Given the essentially-identical definition of gross income in Nevada, the same result should be expected to result here in support cases involving military personnel. As the Nevada Supreme Court has pointed out, our courts are to use any source of income to calculate child support payments that is otherwise not explicitly prohibited by law; it is for this reason that SSI, but not SSD, is includable in income considered for support purposes. *See Metz v. Metz*, 120 Nev. 786, 101 P.3d 779 (2004).

There is no justification for treating tax-advantaged military allowances as anything other than income to the member, just as a court would include both salary and bonus, or wages plus commissions, for a salesman, or the value of the company car and expense account for an executive; they are just part of the compensation package. All military pay and allowances "count" as income for child support purposes – pretty much the same way that all ***non***-military allowances and perks count. That is pretty much definitionally "fair."

D. Military Pension, Retirement, and Benefits

Rather than attempt to do an extracted outline, we will be using the *Divorcing the Military* materials for this section of the program.

E. Survivor's Benefit Plan for Retired Military Personnel

Rather than attempt to do an extracted outline, we will be using the *Divorcing the Military* materials for this section of the program.

F. Military Reservists' Retirement Benefits

Rather than attempt to do an extracted out line, we will be using the *Divorcing the Military* materials for this section of the program.

G. Continued Health Care

Rather than attempt to do an extracted out line, we will be using the *Divorcing the Military* materials for this section of the program.

H. Contempt & the SCRA

Rather than attempt to do an extracted out line, we will be using the *Divorcing the Military* materials for this section of the program.

Also see attorney Mark Sullivan's excellent primer on the subject, *The Servicemembers Civil Relief Act - an Overview*, which is included in these materials, and his other reference works on this subject:

A Judge's Guide to the SCRA (includes judge's checklist)
An Agency Guide to the SCRA
"Are We There Yet?" A Roadmap for Appointed Counsel under the Servicemembers Civil Relief Act

All of which are posted at: http://apps.americanbar.org/dch/committee.cfm?com=FL115277

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