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## **A Brief Guide to Military Child Support**

by Mark E. Sullivan, with additional comments by Stephen W. Crawford and CPT Darrell Baughn Nov 2007

[Note: Resources and Websites – see pp. 36-41; Glossary – see pp. 41-44; Sample Army Nonsupport Letter – see p. 45; Flow charts for Army support regulation – see pp. 46-47.]

### **Introduction**

With the current climate of deployments and Reserve/Guard mobilizations, there are undoubtedly many family law cases which involve plaintiffs or defendants who are on active duty in the armed forces. This guide highlights some of the issues related to child support establishment and enforcement.

### **Paternity**

For each of the military services, paternity is a civil matter to be determined by the courts. A military commander will not become involved in disputed cases, other than to refer the servicemember (SM) or the nonsupport complainant to the civil courts for resolution of this issue. The commander has no authority to order DNA testing or to enforce compliance with a court order to submit a tissue sample. Voluntary samples may be drawn by military health officials. The degree of cooperation varies from location to location.

### **Child Support**

Military regulations specify what is required for support when the parents of a child are separated (or not married) and there is no court order or agreement for child support. These are known as interim support regulations. The point of initial enforcement for support is the unit commander. The Army and the other uniformed services, for example, can't just take money from a SM's paycheck and send it along to your client. Regulations do, however establish a duty to pay support, and the armed services (except the Air Force) can punish a soldier who fails to comply with

this requirement. In addition, the Army and the other branches of service will require servicemembers (SMs) to comply with valid orders for support and separation agreements. Your best bet is to use these regulations as a temporary measure before the case is filed or while pending a hearing. Initiate a nonsupport complaint to get the commander's attention; a sample nonsupport letter is found at the end of this paper.

While a nonsupport letter may be faster, a court order provides more protection for a client. Always try to get a court order at your earliest opportunity. Most civilian practitioners agree that a court order is the best way to obtain enforceable child support remedies such as garnishment and involuntary allotment.

The interim support regulations for family support vary with each branch of the uniformed services. Each of the services has a different standard for the enforcement of support obligations for family members when there's no court order. Here's a quick overview.

For the Army, Army Regulation 608-99 [also located at 32 C.F.R. § 584, and <http://www.army.mil/usapa/> ] requires a soldier to provide support for family members. In the absence of a court order or an agreement between the parties, AR 608-99 establishes interim support guidelines. These are defined in terms of a soldier's Basic Allowance for Housing, BAH (RC/T). The BAH is a nontaxable housing allowance paid to all military personnel who don't live in government quarters or who are separated from their family members. It varies according to the grade or rank of the soldier and whether or not there are dependents. There is no additional amount if there is more than one dependent. The BAH will also vary by geographic location in recognition of the varying housing costs throughout the world. However, the BAH (RC/T) represents only the basic housing allowance without any geographic adjustment. The interim support requirements are based on this basic figure. You may obtain the BAH tables from the Defense Finance and Accounting Service's web site, [www.dfas.mil](http://www.dfas.mil). The full BAH which a SM receives is shown on the pay statement (also called a Leave and Earnings Statement, or LES) of the SM.

As a general rule, the soldier must provide support in an amount equal to the

full BAH (RC/T) at the *with-dependents* rate. If the soldier is required to provide support to more than one group of dependents, the interim guidelines provide for a *pro rata* distribution. If the family is residing in government furnished quarters, the interim support will be the difference between the BAH (RC/T) at the with-dependent rate and the BAH (RC/T) at the without-dependent rate. This is referred to as BAH-DIFF. If both parents are in the military, the interim support for any children will be BAH-DIFF. Soldiers are required to provide support regardless of whether or not they receive any BAH. See the full explanation in the regulation itself, especially paragraph 2-6d and e, which covers the rules as to BAH (RC/T), single family support and multiple family units. Two flow charts are found at the end of this paper, showing Army support rules for single soldiers and for married soldiers.

The battalion commander is no longer able to increase support but may grant an exception in more instances: (1) With an order w/o jurisdiction; or, (2) With an order w/o support; or, (3) With an order stating spousal income exceeds the Soldier's; or, (4) With a Soldier who is the victim of substantial abuse; or, (5) With a Supported family member in jail; or, (6) When regulatory support has been paid to the spouse for 18 months; or, (7) When the supported child is in the custody of someone else. The SCMCA is able to modify guidelines with a preponderance of evidence establishing fundamental fairness.

. These support guidelines are mandatory (unless there is a court order or an agreement between the parties). Failure to pay constitutes a violation of a lawful general regulation and may be punishable by court-martial. The only permissible basis for failing to support a *civilian spouse* is proof that his or her income exceeds the soldier's income or that a court order relieves the soldier of the spousal support obligation.

### **Air Force Rules**

The Air Force has the simplest rules. A brief summary might be "Hands Off!" The basic policy is to require complainants and SMs alike to utilize civilian courts for nonsupport issues. The Air Force will advise its members that they are expected to provide adequate financial support to family members. If a member of the Air Force

receives the Basic Allowance for Housing (BAH) at the with-dependents rate based on dependents that the SM refuses to support, then the BAH will be terminated and the Air Force will recoup the BAH at the with-dependent rate for periods of non-support.

**Marine Corps Rules**

The Marine Corps regulation states that “The Marine Corps will not serve as a haven for personnel who fail to provide adequate and continuous support to their family members.”<sup>1</sup> The support regulation refers to a table, which is shown below, for support obligations in the absence of an agreement or court order. The regulation states that the Marine involved shall pay the greater of either the fixed amount of support for the requesting family member as found in the middle column, or else the fraction of BAH/OHA<sup>2</sup> (right column) based on the total number of eligible family members that exist, as shown in the left column.

THE MARINE CORPS POLICY  
INTERIM FINANCIAL SUPPORT STANDARDS

<u>Total # of Family Members Entitled to Support</u>	<u>Minimum Amount of Monthly Support per Requesting Family Member</u>	<u>Share of Monthly BAH/OHA per Requesting Family Member</u>
1	\$350	1/2
2	\$286	1/3
3	\$233	1/4
4	\$200	1/5

<sup>1</sup> U.S. MARINE CORPS, ORDER P5800.16a MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, ch. 15, (Dependent Support and Paternity) 2003, para. § 15001.

<sup>2</sup> OHA is overseas housing allowance. It is a monthly allowance paid to SMs assigned to a duty station outside the continental United States, except for Hawaii and Alaska, who are authorized to live in private housing. It helps to defray the housing costs and includes components which are equivalent to rent, utility and/or recurring maintenance expenses, and a move-in housing allowance.

5	\$174	1/6
6 or more	\$152	1/7 or etc.

The Marine Corps regulation is punitive; this means that a Marine may be punished under the Uniform Code of Military Justice by means of a court-martial or nonjudicial punishment for violation of the interim support regulation, the financial dependent support terms of a court order, or the financial support terms of a written agreement regarding dependent support.<sup>3</sup>

A commanding officer has the discretion to reduce or eliminate the interim financial support standards if:

- the gross income of the complaining spouse exceeds the gross military pay of the Marine,
- the interim support has been provided for a continuous and uninterrupted period of 12 months,
- the Marine has been the victim of substantiated instance of abuse by a spouse seeking support, or
- the Marine “is paying regular and recurring obligations such as rent or consumer debts of the family members requesting support of sufficient magnitude and duration as to justify a reduction or elimination of interim support.”<sup>4</sup>

### **Navy Rules**

The Navy nonsupport policy states that, in the absence of an agreement or order, a unit commander may use the following as a guide for the adequacy of support:

- Spouse only: 1/3 of gross pay
- Spouse and one minor child: 1/2 of gross pay
- Spouse and two or more children: 3/5 of gross pay

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<sup>3</sup> Id. at § 15002.

- Spouse and four or more children: >3/5 of gross pay
- One minor child (no spousal support): 1/6 of gross pay
- Two minor children (no spousal support): 1/4 of gross pay
- Three minor children (no spousal support): 1/3 of gross pay.

For these purposes “gross pay” includes base pay and the BAH but doesn’t include the basic allowance for subsistence (BAS), hazardous duty pay, sea or foreign duty pay, or incentive pay.<sup>5</sup>

A sailor may request a waiver of spousal support based on desertion without cause, physical abuse, or for infidelity on the part of the spouse. This waiver request shall be submitted to the Director, Navy Family Allowance Activity. It must include a complete statement of facts, the recommendation of the SM’s commander, and substantiating evidence.<sup>6</sup>

### **Coast Guard Rules**

The Coast Guard policy on support of dependents provides that if, after counseling, the SM demonstrates a pattern of non-support and/or failure to obey civil court support orders, he or she is subject to administrative discharge for unfitness. Non-support that is "notorious" and discrediting to the Coast Guard can result in a court-martial or other disciplinary proceedings. Court orders for support are normally binding on members. If, however, a "member acting on good faith and on the express advice of qualified legal counsel disputes such a claim, the commanding officer may withhold disciplinary /administrative action against the member for a reasonable length of time...."<sup>7</sup>

When there is no order or agreement, the following support scale is used:

- Spouse only: BAH difference plus 20% of base pay
- Spouse and one minor child: BAH difference plus 25% of base pay

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<sup>4</sup> Id. at § 15005.

<sup>5</sup> U.S. DEP’T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1754-030 (Support of Family Members) (22 Aug. 2002), para.

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<sup>6</sup> *Id.*, para. 5

<sup>7</sup> U.S. DEP’T OF HOMELAND SECURITY, U.S. COAST GUARD COMMANDANT INSTR. M1000.6A, ch. 8M (Supporting Dependents) (3 May 2001) [http://www.uscg.mil/directives/cim1000\\_1999/CIM\\_1000\\_6A.pdf](http://www.uscg.mil/directives/cim1000_1999/CIM_1000_6A.pdf)

- Spouse and two or more minor children: BAH difference plus 30% of base pay
- One minor child: 16.7% (1/6) of base pay
- Two minor children: 25% (1/4) of base pay
- Three or more minor children: 33% (1/3) of base pay.<sup>8</sup>

Defenses to non-support of a spouse include infidelity or desertion. Defenses to non-support of a child are inability of the SM to ascertain the whereabouts and welfare of the child, or the facts that the person seeking support does not have physical custody of the child.<sup>9</sup>

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## **PRACTICE TIP**

Searching for military regulations on the Internet is easy if one simply types in the number of the regulation involved into a search engine such as Google. Typing “608-99” into a search engine usually will land you at the government website containing the text of AR 608-99, for example.

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As stated above, a court order is the best way to obtain enforceable child support. An order supersedes the interim support regulations. Each branch of the armed services will comply with valid orders for child support, as well as separation agreements.

### **Deployment and Expedited Hearings**

Clients in the Guard or Reserve who are mobilized (that is, called up to active duty) usually face immediate changes in their ability to provide family support. They leave their civilian careers and often face substantial reductions of income. Those Guard/Reserve personnel who are presently paying child support based on higher (civilian) monthly income will find that child support arrears begin to build up. Those payments made by garnishment stop as soon as the SM leaves his or her job to

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<sup>8</sup> Id.

<sup>9</sup> Id.

report for activation. Those payments made by check or money order usually stop when the civilian pay stops.

The first advice to give such a client is to file a motion to modify the support immediately. Federal law requires that all states enact laws that make past due installments (under a court order) into a judgment by operation of law. Court-ordered support obligations generally cannot be modified retroactively. Once a payment is due, it cannot be changed or forgiven, so promptly requesting court help, and then following up with a request for a hearing, are essential for mobilized SMs. This filing can be done through private counsel or through a child support agency. The SM should provide a copy of the mobilization orders and as much information on military pay and allowances (such as pay grade, time in service, and a recent LES) as possible. A copy of the current child support order is an important document to provide as well.

When a SM is involved in a support case and cannot be present in court to give testimony or evidence due to his military duties, the court has the choice of proceeding with the hearing without the SM's testimony or continuing the case. Doing without the SM's testimony leaves the court without the benefit of potentially useful and relevant information upon which to base its decision. The option of a continuance, also known as a stay of proceedings under the Servicemembers Civil Relief Act, 50 U.S.C. App. § 522, only delays the progress of the case.

There are times when the SM will want a hearing, and to participate actively in it, rather than to delay the resolution of a controversy. Such would be the case when a SM is asking for a modification of child support or alimony due to financial difficulties imposed upon him or her by deployment or, if the SM is a Guard/Reserve member, by mobilization. The reduction in pay that most Guard/Reserve SMs face frequently leads to support arrears with no ability to take leave to ask the court for an adjustment in payments. Any missed payment is "vested" and may not be modified by the court, as a general rule. Even though accrued child support cannot be forgiven or changed, there could be other possible defenses like mistake of fact,

errors in calculation, payment in kind, fraud or some other procedural problem with the arrearages.

Knowing that delay often means increased legal fees, a SM might also want to participate electronically in a hearing involving property division, divorce, or adoption. A SM who needs an adjustment to visitation rights or a modification of custody might elect to request electronic testimony rather than allow delay to affect the situation of a child. Counsel for the SM should explore any options available for taking testimony electronically. In addition to the telephone, a SM sometimes can obtain access to videoteleconferences (VTCs) at commercial or command facilities that allow real-time audiovisual interaction. The use of a camera and a microphone in connection with a computer connected to the Internet makes possible testimony from locations that do not have commercial or command VTC facilities. Section 316(f) of the Uniform Interstate Family Support Act (UIFSA) provides for parties to “testify by telephone, through audiovisual means or by any other electronic means.” Section 111 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) permits an individual to be deposed or to testify by telephone, audiovisual means, or electronic means.

When the case does not involve the UIFSA or the UCCJEA, opportunities to use telephone or audiovisual testimony are limited. Florida, for example, allows testimony by telephone of nonparty witnesses at trial. As a general rule, telephone testimony is not allowed in a trial court. Some courts have recognized, however, that special circumstances can justify bending this rule. The option of taking electronic testimony and evidence upon the SM’s motion allows the SM to facilitate the prompt disposition of the case rather than leaving him or her with only the options of default or delay.

### **Military Pay**

Military compensation consists of basic pay and other entitlements. Base pay is the wage paid to a SM. It is subject to the usual taxes that are deducted from anyone’s paycheck – federal and state income tax withholding, Medicare, FICA, etc.

BAH is described above. Entitlements may also include the Basic Allowance

for Subsistence (BAS), special skill pay (such as combat pay for those in a combat zone, flight pay for pilots or “jump pay” for those who are on airborne status), special allowances (e.g., family separation allowance) and bonuses (e.g., reenlistment bonuses).

To find out how much Sergeant John Smith is earning, review a copy of his monthly LES. It shows his Base Pay, BAH, BAS, tax withholdings, voluntary allotments to pay bills or support, and accrued leave. Carefully review his allotment deductions -- they can be used for elective payments (e.g., an allotment can be for a car payment or an automatic savings plan). Also pay close attention to the following:

- How much leave has he accrued (to determine whether a stay of proceedings under the Servicemembers Civil Relief Act is justified)?
- What state does he claim as his legal residence for income tax purposes? This may be important for jurisdictional issues.

While federal and state tax returns may be helpful in discovering other income, don't use them to look for military entitlements, since some of these are *tax-free*.

### **Guard and Reserve Pay**

When calculating pay for child support purposes, do not overlook the members of the National Guard and Reserve. Unlike active duty SMs, these Reserve Component (RC) SMs usually hold civilian jobs. Most of them are assigned to a unit that drills one weekend a month and for two weeks during Annual Training, usually during the summer. RC SMs receive pay for these drills. They receive pay statements each month and a W-2 form each January. Note that some RC SMs are designated Individual Mobilization Augmentees (IMA) and only drill once a year during Annual Training. Others are assigned to the Individual Ready Reserve (IRR) and might only drill annually as well.

### **Resources for Understanding the LES**

The best websites to use in understanding and explaining military pay are:  
> <http://www.dfas.mil> - click on Military Pay, then on News & Information, and you'll see a selection of several different LES's to review; which will teach you how

to read and understand the various fields and entries in the LES

><http://www.dod.mil/militarypay> - contains information on military pay, allowances, retired pay and the BAS and BAH. The general rules of military pay and the "federal taxability" of its elements can be reviewed in the IRS Publication 3, Armed Forces Tax Guide, <http://www.irs.gov> and, State laws of the domiciliary SM govern the taxation of the military pay and its elements. A rather quick way to look at most of the types and amounts of pay "rates" a SM can receive is to also go to <http://www.uscg.mil/hq/psc/rates.asp> and its various links. Address for LES information from DFAS is below, and which is slightly different from the DFAS garnishment address on page 18 of this Handout.

Defense Finance and Accounting Service  
Cleveland DFAS-DGG/CL  
PO Box 998002  
Cleveland Ohio 44199-8002  
1-888-332-7411 (toll free Customer Service)

You could subpoena LESs for five years back, from DFAS, but that they will not accept the administrative subpoena from the child support agency because the Agency can access this income information on its quarterly wage report from the federal parent locator. A child support agency may simply send DFAS a request for previous years LESs on agency letterhead signed by a supervisor. They no longer require a FOIA or Privacy Act letter.

### **Setting Child Support**

The general rules on child support guidelines indicate that all income goes into the calculation. This means that court should usually consider *all* pay and allowances in setting the support obligation. The judge should also consider housing provided in kind to military members. For the latter, the amount of the housing allowance should ordinarily be constructively added to the member's pay, as the reasonable value of the "in-kind" income.

The concept of in-kind equivalency, however can be carried to extremes. It

works fairly well if Sergeant John Smith is living in quarters at Ft. Swampy, East Carolina. On the other hand, suppose that SGT Smith is deployed to Iraq. Rather than adequate lodging in the barracks on base, SGT Smith will be living in a tent near Takrit, competing for living space with sand fleas and scorpions. Under these circumstances, the soldier has a pretty good argument about the minimal value of government lodging, and that there should be little, if any, value assigned to “free government housing.” The same would be true for a sailor whose station was on a destroyer escort in the Persian Gulf. His “government housing” consists of a bunk and a shared small cabin. In either case, the judge would be justified in placing at zero the value of lodging and in deciding that the reduction in BAH constitutes a substantial change in SGT Smith’s income, unless offset by other added compensation, such as the Family Separation Allowance, combat pay or hazardous duty pay.

The court should also note that these allowances are not taxable. Since state guidelines are based on gross pay and assume that all pay is taxable, it may be appropriate to adjust military pay upward to factor in the nonexistent taxes. Since the Guidelines presume that all income is taxable, converting these two sums into their taxable equivalents would allow application of the Child Support Guidelines as originally intended by the drafters of the Guidelines. The amount of the adjustment would be the actual tax rate on the member's taxable income. It would also be appropriate to add in the member’s constructive share of FICA and Medicare taxes that would apply if these allowances were so taxable.

As an example of how to recalculate the taxable equivalent of the BAH and BAS, assume a SM earns \$24,000 a year from his base pay, that he receives \$500 a month in nontaxable BAH and BAS, and he pays \$4,800 in federal income tax. This means that his actual tax rate is 20%. To convert the nontaxable entitlements into their taxable equivalent for federal income tax purposes, follow the steps below:

- A. Find his actual tax rate. [This is 20%, as shown above]
- B. Convert this to a decimal and subtract it from 1.00. [This would be 1.00 -

.20, or **.80**]

C. Take this figure and divide it into the sum of the BAS and BAH above.  
[\$500 ÷ .80 = **\$625**]

D. The result will be the federal taxable equivalent of these nontaxable allowances. Thus \$625 is the taxable equivalent of the BAH and BAS of \$500 for federal tax purposes at the 20% tax rate.

Use the same approach for state taxes if the member is from another state with no tax on wage income, such as Tennessee, or one with no income tax at all, such as Texas. You would add in a state income tax component if your state guidelines assume that all of the payor's income is subject to state income tax. Just divide the non-taxed item (here, the base pay, BAH and BAS) by one minus the appropriate state tax rate.

BAH and BAS are not the only nontaxable funds available to the SM. Under section 112 of the Internal Revenue Code, enlisted personnel who are serving in a combat zone (CZ) or "Qualified Hazardous Duty Area" (QHDA) during any part of a month may exclude from gross income all compensation that they receive for active service for that month. Under I.R.C. § 112(c), officers can exclude a large part of their compensation under the same rule; the amount is about \$6,500 for 2005. The exclusion from taxes frees up considerable amounts of income that otherwise would be consumed in taxes. This should be taken into account by the court or in negotiations by the parties in reaching an equitable settlement.

In reality, however, few judges and attorneys are aware of this windfall. In addition, a combat tour usually lasts twelve to eighteen months. Unless counsel for the recipient is able to time the hearing or negotiation for the period just before the SM is deployed to the combat zone, the SM will effectively be beyond the reach of the court or the parties due to the Servicemembers Civil Relief Act, which allows a stay of proceedings when the military duties of the SM prevent his or her participation in court proceedings. Furthermore, courts might be reluctant to determine amounts of support based on income that will last for a relatively narrow window of income exclusion, only to have another motion filed at the end of the tour

of duty to reduce support from the previous order.

### **Medical Expenses**

These days health insurance covers most, but not all, medical expenses. At the outset it is vital to find out whether the nonmilitary parent has private medical insurance covering the children and what is covered. A typical policy may have an annual deductible amount of \$250, cover 80% of most medical expenses and exclude entirely such items as elective surgery, routine physical examinations and dental work.

Military dependents are entitled to medical treatment at military hospitals and are covered for civilian health care purposes by TRICARE, which covers a portion of allowable medical expenses. This is the military equivalent of medical insurance. TRICARE is a cost-sharing program. Just like any private medical insurance program, there is an annual deductible amount and co-payments are required. Information about TRICARE can be found in the TRICARE Standard Handbook, available at the nearest uniformed services medical facility or through the TRICARE Management Activity, 16401 E. Centretch Parkway, Aurora, CO 80011-9043. Information is also available from the TRICARE website, [www.tricare.mil](http://www.tricare.mil).

As to coverage alternatives to negotiate for the children, one option for parents who are both working is to have each parent maintain insurance. This provides "double coverage" (usually through TRICARE and, for the non-military spouses, an employer-sponsored plan) and reduces uncovered medical expenses to a small amount.

Another alternative is to have the noncustodial parent maintain medical coverage (either through TRICARE or private insurance) while both parents split the uncovered portion equally (or in some specified ratio, such as  $\frac{3}{4}$  for dad and  $\frac{1}{4}$  for mom). The advantage of this option is that it puts part of the financial burden on both parents, and gives them both an incentive to economize.

A third approach to consider is the payment of extraordinary unreimbursed amounts on behalf of the child. In case of a catastrophe, it would appear that the party earning more income should be liable for excess payments. Where the father

earns more than the mother, such a clause might state that medical insurance would be maintained by the mother, that the uncovered part would be shared equally by the parties up to an annual per-parent ceiling of \$300, and that any uncovered expense in excess of this amount would be paid by the father.

If you're concerned that the custodial parent may never receive those reimbursements from the noncustodial parent, who at various times is thousands of miles away, ask the judge to listen to your client's testimony regarding medical expenses for the kids for the last year or two, what was covered,, what was out-of-pocket. Then argue to the judge that, due to the distance presently – and the distance in the future after a couple of PCS moves – the judge's intentions regarding prompt payment for medical expenses for the children would be best met by including in the monthly child support an additional amount based on the proper share for the noncustodial parent of his share of those average monthly uncovered medical expenses.

For medical care and health insurance, it is first necessary to determine whether the child (or spouse in an alimony case) is enrolled in the Defense Enrollment Eligibility Reporting System (DEERS). If the family is intact, the military member (also known as the "sponsor") initiates the dependent's enrollment by filling out DD Form 1172. When the family is separated, the custodial parent can start the process by mail and then come in to the nearest military base to sign the final documents. With a child over ten years old, a military dependent ID card will be issued and the child's picture will be taken. Contact the nearest military installation DEERS office for more details. The location of the nearest place for enrollment or military installation can be obtained from the DEERS Telephone Center: 800-538-9552.

Once a child is enrolled in DEERS, he or she is eligible to receive medical care in two ways:

- Medical care and medications may be obtained from military hospitals and clinics at no charge; or

- TRICARE can be used with civilian health care providers. It is usually best to use military facilities for medical care, since it cuts down on paperwork, time and costs. The branch of service of the enrollment site doesn't have to match the branch of service of the military parent; thus although the father may be in the Air Force, the family members can get treatment at the nearest Navy facility, for example.

Children born outside marriage are entitled to medical care TRICARE if the following conditions are met:

- a. The child is acknowledged and supported by the member; or
- b. There is a judicial decree of paternity.

A military ID card is issued to prove eligibility. If the member will not cooperate in getting a card for the child, his or her commander can coordinate issuance of the card. A National Medical Support Notice for medical coverage needs to go to the local DEERS office.

### **Life Insurance**

In case one of the parents dies while child support or college expenses are still due, it is a wise idea to use a life insurance clause to provide for the payment of insurance proceeds as a substitute for child support. Since both of the parents are legally responsible for the support of the children, it makes sense to have this provision apply to both parents, not just the noncustodial parent who is responsible for paying child support.

If you do decide to use life insurance to back up child support promises in the event of the untimely death of the military member, just don't rely on SGLI (Servicemembers' Group Life Insurance). A 1981 Supreme Court case, Ridgway v. Ridgway,<sup>10</sup> states that a servicemember may choose whichever life insurance beneficiary he desires, regardless of court orders or separations agreements. So be sure not to include SGLI as the method of funding a child support death benefit. Protect your client by ensuring that there's other life insurance owned by the non-custodial parent.

## **Garnishment**

Federal law (42 U.S.C. § 659) authorizes the garnishment or attachment of pay of active, Guard/Reserve, and retired members of the military, as well as the pay of civilian civil service employees, for child support and/or spousal support. The procedure for garnishment is as follows: First, obtain an order for garnishment. The court must have jurisdiction over the payor. There is no requirement that the garnishment order name the U.S. government, DFAS, or the branch of service that employs the SM. There is no duty to join the government as a party (typically called a third-party garnishee). DFAS treats state wage assignment orders in the same manner as garnishments.

The next step is to serve the garnishment order on the proper *designated agent* by certified or registered mail, return receipt requested. This service should include a copy of the underlying support order or other evidence that the garnishment is entered to enforce a support obligation if this is not apparent from the garnishment order. Also include the following to allow identification of the payee and processing of the garnishment:

1. Full name of the SM;
2. Date of birth of the SM;
3. Social Security number of the SM;
4. Component and duty station (e.g., U.S. Air Force, stationed at Pope AFB, North Carolina); and
5. Status of obligor (e.g., active-duty, Utah Air National Guard or Navy Reserve).

The list of designated agents for the federal government is found at 5 C.F.R. Part 581, Appendix A. For all DoD SMs (active-duty SMs as well as retirees and members of the National Guard and Reserve), the agent is:

Assistant General Counsel for Garnishment Operations  
Defense Finance and Accounting Service

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<sup>10</sup> 454 U.S. 46, 102 S. Ct. 49 (1981)

Cleveland Center—Code L (DFAS-CL/L)  
P.O. Box 998002  
Cleveland, Ohio 44199-8002

The telephone number for the Garnishment Operations section of DFAS is (216) 522-5301. The garnishment agent for the Coast Guard, now a part of the Department of Homeland Security, is:

Commanding Officer (LGL)  
Personnel Support Center (PSC)  
444 S.E. Quincy Street  
Topeka, KS 66683-3591  
Telephone: 785-339-3596  
Fax: 785-339-3784

Once the papers are properly served, DFAS/PSC will notify the SM-obligor and will suspend payment of funds necessary to comply with the garnishment order. DFAS/PSC is required to serve notice of the garnishment order on the SM-obligor no later than fifteen calendar days after receipt of the garnishment order. SM can request a copy of the court order from DFAS after garnishment.

The limits on garnishment are imposed by the Consumer Credit Protection Act, 15 U.S.C. § 1673, and reflected in 5 C.F.R Part 581. This statute limits payments to:

1. Fifty percent of the SM's disposable pay if the SM can prove that he or she is providing more than half of the support for family members other than those to whom the garnishment order pertains; or
2. Sixty percent of the disposable pay of the SM if the SM is *not* providing more than half of the support for such other family members.

An additional five percent may be added to the fifty (or sixty) percent above if the arrearage is for twelve or more weeks. You can find fact sheets and other helpful information at "Garnishment" on the DFAS website, [www.dfas.mil](http://www.dfas.mil).

## **Involuntary Allotment**

Another way to attach military pay for support purposes is through the use of an "involuntary allotment". Also known as a "mandatory allotment," this is actually a wage withholding action that's enforceable against active duty servicemembers. It can be used to attach active duty military pay (basic pay plus bonuses, *plus* BAH and BAS in some cases). It's usually easier to obtain than a wage garnishment, and more money may be available.

An involuntary allotment requires an initial order that establishes support. This may also be an order for alimony *and* child support. There must be an arrearage in an amount equal to or greater than *two months' support* under the order. Once this happens, the court or the state Child Support Enforcement Agency can send a notice to the military requesting initiation of an involuntary allotment. The "notice" can simply be a letter, and no prior notice to the obligor is necessary. Withholding order/notice should probably be on the standardized form used by the child support agency. It must include the member's name and SSN as well as a statement that there are arrearages equal to or greater than 2 months' support (and, if true, that the obligor is in arrears for more than 12 weeks). Also include a copy of the underlying order certified by the clerk of the court, the date the allotment should stop and a statement certifying that the writer is an "authorized person" under 32 C.F.R. § 54.3 (such as a state CSE agent, clerk or judge).

The allotment will be established for the amount of the monthly support obligation. If arrearages are sought, they must be requested and there must be a court order requiring the payment of accrued arrearages. The allotment stays in effect until an order is served on the finance center to end it. The standardized withholding order/notice will suffice to stop the CS when it comes from a child support agency or court. The SM cannot unilaterally terminate the involuntary allotment. The amount of the allotment ordinarily will be the monthly support obligation plus arrears, if required by the order. The same percentage limitations apply as set out above. Disposable earnings subject to involuntary allotment are: (1) basic pay, some special pay, and bonuses; (2) BAH for all SMs with dependents,

and for SMs without dependents in the grade of E-7 and above; and (3) BAS for all commissioned and warrant officers. The federal limits are the same as for garnishment (50%-65%), but the amount of pay available for attachment usually is greater.

The addresses for involuntary allotment are:

All DoD military personnel-

Defense Finance and Accounting Service  
Cleveland Center—Code L (DFAS-CL/L)  
P.O. Box 998002  
Cleveland, Ohio 44199-8002

Coast Guard-

Commanding Officer (LGL), Personnel Support Center (PSC)  
444 S.E. Quincy  
Topeka, KS 66683-3591  
Telephone: 785-339-3596  
Fax: 785-339-3784

The form for involuntary allotments is DD Form 2653. It is available from the following Defense Department Website:

<http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm>.

### **Retired Pay and Support**

Finally, the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, authorizes division of disposable retired pay for purposes of child support, spousal support, or both by means of garnishment of retired pay. A final decree of divorce, dissolution, or legal separation must be served on DFAS. The decree must be from a court of competent jurisdiction. You must include as a cover sheet a completed DD Form 2293, found at "Garnishment" at the DFAS website. The total of all direct support payments under the statute may not exceed fifty percent of disposable retired pay.

Here is a table comparing the above three methods of support payments:

	GARNISHMENT	INVOLUNTARY ALLOTMENT	USFSPA
<b>Pay subject to process</b>	Basic pay, bonus pay and retired pay	Basic pay, BAH and BAS and bonus pay	Disposable retired pay
<b>Obligation enforced</b>	Child support and/or alimony; arrears; attorney fees	Child support or child support plus alimony; arrears	Child support and/or alimony
<b>Triggering events</b>	A court order for garnishment	Letter or court order issued by an authorized person, plus an underlying support order, and arrears equal to two months' support	Final decree of divorce, dissolution or legal separation
<b>Amount subject to process</b>	50-65% of applicable pay	50-65% of applicable pay	50% of disposable retired pay

### **FINDING ACTIVE DUTY/RESERVE MEMBERS**

For All Military Members, other than the U.S. Coast Guard,

- **Certificate of Service.** [Section 582](#), of the Servicemembers' Civil Relief Act, establishes certifications by the Secretary of the Service concerned are prima facie evidence in any proceeding under the SCRA to establish several categories of factual matters ([Section 582\(a\)](#)). They include the following:
  1. That a person is, is not, during a specified time has been, or has not been in military service.
  2. The time and place of entry into military service.
  3. The person's residence at the time of entry into military service.
  4. The rank, branch, and unit to which assigned on entry into military service.
  5. The inclusive beginning and completion dates of military service, which includes to the "present" for persons still on active duty.
  6. The monthly pay received by the servicemember as of the date

of issuance of the certificate.

7. The time and place of the person's termination or release from military or of the member's death during military service.

The Service Secretary concerned shall provide a certificate on receipt of an application or request seeking information on an individual's military status. A certificate that appears on its face to be signed by the Service Secretary concerned is prima facie evidence both of its contents--establishing the facts outlined above--and of the authority of the signer to issue the certificate ([Section 582\(b\)](#)).

**Practice Point:** Referring back to the protections the SCRA affords against entry of default judgments, Section 582 provides the means by which a civil plaintiff can determine whether a defendant in the action is in military service. The plaintiff generally will file an application with each of the services, seeking information on whether the member is, or at times relevant to the case was, in military service. Courts and administrative bodies and agencies (e.g., child support enforcement) may similarly apply to the services for this information. Indeed, any entity seeking to confirm military service potentially could apply to the Service Secretaries for a certificate. Base legal office personnel will likely receive questions about where the application for a certificate should be sent. **Most importantly, these applications should NOT go to bases. Please direct all inquiries to the Defense Manpower Data Center (DMDC) (<http://www.dmdc.osd.mil/>).** All requests for certificates must be submitted in writing, either by fax to (703) 696-4156 or by mail to:

**DMDC, Military Verification**  
**1600 Wilson Boulevard, Suite 400**  
**Arlington, VA 22209**

>**NOTE:** Effective 6 November 2003, DMDC will issue the certificates of military status via its website. However, the applications must be submitted as described above. No on-line means for filing applications exists. The requests must be faxed or mailed as described above.

**Servicemembers in Missing Status (SCRA [Section 582\(c\)](#)).** A servicemember reported as missing is considered “in military service” until accounted for. Any requirement or obligation under the SCRA that begins or ends with the death of a servicemember does not begin or end until the member is reported to or determined by the Secretary concerned as dead or until a court of competent jurisdiction determines the member to be dead.

**TO LOCATE ARMED FORCES MEMBERS AND TO DETERMINE IF IN  
MILITARY AND WHAT TO DO AFTER THAT POINT**

**Coast Guard Locator Service:**

<http://www.uscg.mil/hq/cgpc/Home/locator.html>

Anyone can call and get a members unit, unit address and unit phone number. This web site directs you to the military records branch with the USCG. For the Coast Guard, the World Wide Locator, you can call ph # 202-493-1697

**Here is the DOD Locator Services web site:**

<http://www.defenselink.mil/faq/pis/PC04MLTR.html>

**IF THERE HAS BEEN NO SERVICE OF PROCESS OR NO NOTICE OR APPEARANCE BY MILITARY MEMBER, WHAT TO DO:**

50 U.S.C. App. § 521 governs when the SM has made no appearance. When a judgment, order or adverse ruling is sought against a party who has not made an appearance, it is the duty of the court to determine whether that party is in the military. The SCRA states that either side or the court may apply for information as to military service to the Department of Defense (DOD), which must issue a statement as to military service. 50 U.S.C. App. § 582. The office in DOD to contact for information under the SCRA on whether a person is in the armed forces is as above at <https://www.dmdc.osd.mil/scra/owa/home> . DMDC prefers requests be made through the internet for the active duty status and once that is confirmed a written request for the unit to the address below:

Defense Manpower Data Center [Attn: Military Verification]

1600 Wilson Blvd., Suite 400

Arlington, VA 22209-2593

[Telephone 703-696-6762 (computer to web) or -5790 (customer service)]

**FROM THE SCRA JUDGES GUIDE A SNAPSHOT TO GET YOUR PERSONNEL AUTHORIZED TO ACCESS THE DMDC DATA BASES:**

The DMDC website is available on a 24-hour basis to accepted customers (State Agency Personnel), who will obtain written documentation containing DoD seal and signature of DMDC Director verifying military service. To provide customer access to the website, the State agency needs to identify all employees who will be doing these checks and complete a form by typing all the required information for each person performing the search; as well as a cover letter under Agency letterhead to accompany the form, which states that the members and State agency will not be using the information save than SCRA searches.

The general information on Agency letter head to get DMDC Web information/access for each member: Last name, first name, middle initial, e-mail, telephone, mother's maiden name.

**(SCRA) Servicemembers Civil Relief Act**

SSN	<input type="text"/>	Repeat SSN	<input type="text"/>
Last	<input type="text"/>	Last	<input type="text"/>
Birth Yr	<input type="text"/> Month <input type="text"/>	Birth Yr	<input type="text"/> Month <input type="text"/>
First	<input type="text"/>		
Middle	<input type="text"/>		
<input type="button" value="LookUp"/> <input type="button" value="Erase"/>			
Upon clicking the "LookUp" button, based on the SSN and other personal information furnished, the Department will advise you that it does			
<ol style="list-style-type: none"><li>1. <b>Not</b> possess information regarding whether the individual is on active duty, or</li><li>2. Possess information indicating that the individual is on active duty.</li></ol>			

Go to the DMDC website for SCRA inquiries, <https://www.dmdc.osd.mil/scra/owa/home> and enter either the last name & Social Security number of the individual or the last name and date of birth of the individual. Either the SSN or the DOB is mandatory; the form on the main page also asks for a first name, and middle initial, which will help with the search. Further information is available on the "Help" section of the above website.

To execute a report, click on the "Look Up" button, which will open up a second window holding the report generated by DMDC. If the individual is on active duty, the report will show his or her branch of service and beginning date of active duty status. If DMDC does not have information as to whether the individual is on active duty, the generated report will only list the supplied last name, first name and middle initial (if supplied), with the text:

"Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty."

The report is signed by the DMDC Director.

**FROM THE SCRA AND FAMILY LAW HAND OUT BY MARK SULLIVAN,  
ESQ.**

**LEGAL CONSIDERATIONS IN SCRA STAY REQUEST LITIGATION: THE  
TACTICAL AND THE PRACTICAL**

Stays of Proceedings

Section 202 of the Servicemembers Civil Relief Act (SCRA), the successor to the Soldiers' and Sailors' Civil Relief Act (SSCRA) allows the servicemember (SM) to obtain an initial stay of at least 90 days upon production of a statement showing how the SM's current military duties materially affect his ability to appear and stating a date when the SM will be available to appear, along with a statement from the SM's commanding officer stating that the SM's current military duty prevents his appearance and that military leave is not authorized for him at the time of the statement. This Section also allows the SM to request an additional stay, based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. The same information as given above is required. 50 U.S.C. App. § 522.

After the initial mandatory stay, which must be granted upon production of the above statements, the granting of an additional stay is in the discretion of the judge. The U.S. Supreme Court has held that this provision should be "liberally construed to protect those who have been obliged to ... take up the burdens of the nation."<sup>11</sup>

Do the courts have to grant an additional stay? No -- it is merely the

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<sup>11</sup> *Boone v. Lightner*, 319 U.S. 561 (1943).

purpose of the Act to focus the court's attention on whether a military member's ability to appear is materially effected by military service. If the court finds no "material effect," for example, the request for stay should be denied. The court is unlikely to find material effect, for example, when the courthouse is in close proximity to the base or post and the military member has a reasonable amount of annual leave accrued that can be used in trial preparation and attendance.

A finding of "material effect" on the ability to appear is likely, on the other hand, when the member is distant from the courthouse, lacks sufficient leave that may be used for travel, preparation, and attendance in court, or is on an assignment that precludes the granting of leave to take care of one's civil legal affairs. The trial court (federal or state) must grant a request for a stay when it finds that the member's military service has a "material effect" on the individual's ability to appear.<sup>12</sup>

#### Determining 'Material Effect'

It is up to the trial judge to determine, on a case-by-case basis, what are the boundaries of "material effect." A good example can be found in *Cromer v. Cromer*.<sup>13</sup> In that case the defendant was serving on board a submarine that was scheduled for operations at sea during the period when his child-support case was set for trial. The Supreme Court remanded the case for consideration of the affidavit of the sailor's commanding officer in determining whether his military service and duties had a "material effect" on his ability to defend himself so as to justify a stay of proceedings under the SSCRA.

There is no clear formulation of who has the burden of proof to show a "material effect." As stated by the U.S. Supreme Court in *Boone v. Lightner*:

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<sup>12</sup> *Boone v. Lightner, supra*.

<sup>13</sup> *Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981).

The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sense to know from what direction their information should be expected to come.<sup>14</sup>

Although it is logical to require the burden of proof to be on the movant (i.e., the service member who is requesting a stay of proceedings), some courts have stated that both parties may be required to produce evidence on the issues.<sup>15</sup>

A stay is not forever. Contrary to the popular notion of many servicemembers and some civilian practitioners, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. Military members accrue leave at the rate of 30 days per year, and courts can take judicial notice of this fact.<sup>16</sup> Current overseas postings usually last around three years for an “accompanied tour” (with family members), and much less for unaccompanied tours in such host countries as Turkey, Korea and Iceland.

The stay is, in fact, intended to last only as long as the material effect lasts. Once this effect is lifted, the opposing party should immediately request the lifting of the stay of proceedings. In the event of further resistance by the military member, the court should require submissions upon affidavit for deciding the issue.

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<sup>14</sup> *Boone v. Lightner, supra.*

<sup>15</sup> *Gates v. Gates*, 197 Ga. 11, 25 S.E.2d 108 (1943).

The statement of a service member -- and any other proof offered to show “material effect”--will ordinarily be scrutinized by the court to determine whether the member has exercised due diligence to secure counsel or to attend the hearing. In *Palo v. Palo*,<sup>17</sup> a South Dakota divorce and property division case, the parties were both in service, and both were stationed in Germany when the trial was scheduled. The wife had no leave accrued, but she borrowed money and took an advance on future leave to attend the hearing. The husband was absent at the trial and his affidavit stated that he had no money, wished to reconcile with his wife, did not have any remaining leave, and did not wish to take an advance on leave. The appellate court upheld the trial court’s decision not to grant a stay to the husband because the evidence showed that the husband was unwilling, rather than unable, to attend the proceeding. The trial judge found that the husband should not be allowed to take advantage of the SSCRA’s protections where the wife did not do so. The Supreme Court of South Dakota ruled that the husband failed to demonstrate due diligence in trying to attend the proceedings.

#### Unwritten Rules

A further rule that is applied by the courts but is not found in the Act is that the stay requested must be for a reasonable period of time. In *Plesniak v. Wiegand*,<sup>18</sup> the defendant requested four stays under the SSCRA between the filing of suit in 1969 and the final trial date in 1973.

When the final stay request was turned down, the court ruled that the service member had not made a reasonable effort to make himself available for trial. The court also ruled that the Act does not require indefinite continuances and that it was incomprehensible why the defendant, a commanding officer,

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<sup>16</sup> *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E.2d 905 (1982).

<sup>17</sup> *Palo v. Palo*, 299 N.W.2d 577 (S.D.1980).

could not take leave to attend trial.

An affidavit or statement supporting the stay request should be carefully prepared by counsel with an eye toward the close scrutiny and possible skepticism of the trial court. It must also be prepared with a view toward appeal.

A good affidavit will not only state that the defendant cannot be present at trial but also indicate why the defendant is unavailable, what efforts he or she has made to attend trial, and when the member will probably be able to be present.

Some courts require more of such information whenever a stay application does not contain sufficient facts. One example is the set of questions used by the courts in Monterey County, California, to get information from the defendant's commander.<sup>19</sup> The author has added several additional inquiries, and these are formatted as interrogatories to the defendant (as opposed to questions by the court):

1. What have you done to obtain ordinary and/or emergency leave to attend any necessary hearings and/or trial in this court?
2. What results did these efforts produce?
3. How much leave did you request?
4. When did you request this leave?
5. Give the name, rank, title, address and commercial telephone number (if available) of the individual who denied your leave request.
6. Have you taken any leave in the last three months?
7. If so, how much and for what purpose?
8. How much leave do you currently have as reflected on your latest Leave and Earnings Statement (LES)?

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18 *Plesniak v. Wiegand*, 31 Ill. App.3d 923, 335 N.E.2d 131 (1975).

19 Hooper, The "Soldiers and Sailors Civil Relief Act of 1940 as Applied in Support Litigation: A Support Attorneys Perspective," 112 Mil. L. Rev. 93, 95-96 (1986).

9. Provide a copy of your last three Leave and Earnings Statements with your responses to these questions.
10. What have you done to obtain a transfer to a military installation near this court on either a temporary or permanent basis?
11. What results did these efforts produce?
12. When were you assigned to the present duty station?
13. When are you due to be transferred on normal rotation or reassignment?
14. To what station will you probably be transferred?
15. (If the SM is an enlisted person) What is the date of your present enlistment contract?
16. When does the enlistment expire?
17. Do you intent to re-enlist?
18. Does your service record contain a bar to re-enlistment?
19. Is there any likelihood that you will obtain an early release from active duty and, if so, when is this expected to occur?
20. State any and all reasons why you cannot respond to written interrogatories in this case.
21. State any and all reasons why you cannot respond to written document requests in this case, so long as the documents request are readily available to you.
22. State any and all reasons why you cannot respond to written requests for admissions in this case.
23. Give the location (and distance) of the nearest legal assistance office (JAG office or staff judge advocate office) to you.
24. State your duty hours during the week.
25. State your duty hours on weekends.
26. State what means of communication are available between you and this court, specifically including telephone, e-mail, regular mail and videoteleconference (both individually and through you JAG office).

## Default Judgments

Members are further protected from default judgments under the SCRA. The purpose of this is to protect those in the military from having default judgements entered against them without their knowledge and without a chance to defend themselves.<sup>20</sup> The SCRA allows a member who has not received notice of the proceeding to seek the reopening of a default judgment. The requirements are as follows:

- ❑ The member must apply to the trial court that rendered the original judgment of order.<sup>21</sup>
- ❑ The default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter.
- ❑ The member must apply for reopening the judgment while on active duty or within 90 days thereafter.
- ❑ The member must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service.<sup>22</sup>
- ❑ The member must show that there is a meritorious or legal defense to the initial claim.

An important requirement of the reopening of a judgment is that the moving party have a meritorious or legal defense. Default judgments will not be set aside when a litigant's position lacks merit. As part of a well-drafted petition

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<sup>20</sup> *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).

<sup>21</sup> *Davidson v. GFC*, 295 F. Supp. 878 (N.D. Ga. 1968).

to reopen under Rule 60, movants should clearly delineate their claim or defense so that the court will have sufficient facts upon which to base a ruling.

The North Carolina Courts of Appeals most recently dealt with the “meritorious defense” issue in *Smith v. Davis*.<sup>23</sup> In that case, plaintiff served defendant with a complaint that charged him with nonsupport and requested an order of child support. In response, the member sent a letter to plaintiff’s attorney asking that the attorney recognize his rights under the SSCRA. Defendant failed to appear at the hearing and the court, without appointing an attorney to represent the defendant, entered an order that defendant pay child support to plaintiff on behalf of the minor child.

Defendant then filed a motion to set aside the decree under several provisions of the SSCRA. The affidavit attached to the motion alleged that defendant was on active duty in the Marine Corps in California, that his military obligations prevented his attendance at the hearing, and that he was having “pay problems”-- he had not been paid in four months. On appeal, the order was set aside because “[d]efendant has alleged facts which at the time of the child support hearing were sufficient to constitute a legal defense to plaintiff’s petition.”<sup>24</sup>

## Meritorious Defense

When representing a servicemember, it is important to state early and clearly the meritorious defense that is involved. In cases where a servicemember has been sued, this is usually done in a pleading under Rule 8 of the Federal Rules of Civil Procedure (or the local jurisdiction’s equivalent), giving adequate notice to the plaintiff of any defenses upon which defendant will rely.

One particular area where valid defenses will usually be difficult to assert

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22 *Bell v. Niven*, 225 N.C. 395, 35 S.E.2d 182 (1945).

23 *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).

is in cases involving the initial determination of child support. A copy of the military pay tables is available from most recruiters and also from the website of the Defense Finance and Accounting Service, [www.dfas.mil](http://www.dfas.mil). The laws of all states and territories require “expedited process” in child support determinations.<sup>25</sup> Ordinarily a preliminary determination of child support must be made within 60 days of filing suit. The child support guidelines usually prescribe a formula for child support based on the incomes of one or both parents. In fact, often a servicemember is better off establishing the child support early so he can start receiving BAH with based on this new dependent. Otherwise, servicemember would not receive this BAH with for the retroactive child support judgment ordered after a stay.

Even if the military member does not show up in court for the hearing due to military duties elsewhere, the trial judge can easily determine his or her income for input into the child support guidelines. Most judges add the servicemember’s taxable gross base pay to the nontaxable basic allowance for housing (BAH) and the nontaxable basic allowance for subsistence (BAS) in order to arrive at the member’s gross pay. With airborne troops, an additional component termed “jump pay” is added; for aviators, this is called ‘flight pay.’

Base pay, BAS and BAH can all be found on the published military pay tables. A recent leave-and-earnings statement of the member will contain an accurate picture of the total entitlements, statutory deductions, voluntary deductions and year-to-date totals. In addition, it will contain a category describing total leave accrued and leave time remaining, which are invaluable pieces of information for the trial court. These pay statements are easily available to every servicemember.

With all these tools available for an expedited and straightforward determination of child support (at least on a temporary basis), it is hard to see

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24 *Id.*, 364 S.E.2d at 159.

25 N.C. Gen. Stat. § 50-32.

how the trial court would grant an additional stay at this stage of the proceedings absent a very good showing by military members of their “valid defense” requiring personal attendance at court for preparation and trial of the matter.

On the other hand, some valid defenses do exist in enforcement proceedings, as shown in *Smith v. Davis*. As a general rule, “[a]bsence when one’s rights or liabilities are being adjudged is usually prima facie prejudicial.”<sup>26</sup> In *Smith v. Davis*, the Court of Appeals held that it was reversible error to proceed with the trial without the defendant, and that his military service did prejudice his ability to defend the child-support action.<sup>27</sup>

A servicemember’s defense could be based, for example, on any one of the following:

- Death or emancipation of the child;
- Transfer of physical or legal custody of the child;
- Prior payment of child support (but failure of the court, agency or custodial parent to credit same); or
- Military financial error (resulting in no paycheck or substantially reduced pay).

A personal appearance for testimony would probably be essential for each of these issues. In any of the above enforcement-defense cases, a clear statement of the defense which is sufficient to give notice of same to the other side, made under oath, should be sufficient to persuade the trial court to grant a stay for a reasonable period of time.

Three additional protections may help the servicemember. The Act requires the filing of an affidavit whenever judgment is taken by default. 50 U.S.C. App. § 521(b)(1). It contains provisions for the appointment of an attorney for the absent servicemember. 50 U.S.C. App. § 521(b)(2). It also provides for

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<sup>26</sup> *Boone v. Lightner*, 319 U.S. at 575; see also *Chenausky v. Chenausky*, 128 N.H. 116, 509 A.2d 156 (1986).

<sup>27</sup> *Smith v. Davis*, *supra*.

the posting of a bond, in the discretion of the court, by the party requesting a default judgment. 50 U.S.C. App. § 521(b)(3).

### **Resources and Websites**

ABA Standing Committee on Legal Assistance for Military Personnel (LAMP):  
[www.abanet.org/legalservices/helpreservists/forms/lampbrochure.pdf](http://www.abanet.org/legalservices/helpreservists/forms/lampbrochure.pdf) and  
[www.abanet.org/legalservices/lamp/home.html](http://www.abanet.org/legalservices/lamp/home.html)

Resources for legal assistance issues (e.g., tax, family law, Servicemembers Civil Relief Act, Uniform Interstate Family Support Act, custody, jurisdiction, military pension division, etc.)

ABA Family Law Section's Military Committee: [www.abanet.org/family/military](http://www.abanet.org/family/military)  
Includes information such as volunteer list for Operation Stand-By, all the Silent Partners (info-letters on family law matters), written materials from September 2005 and May 2006 military divorce seminars, past issues of *Roll Call* (Committee's newsletter), pre-deployment legal resources, etc.

ABA GP/Solo Section Articles ("Legal Face of War")

[www.abanet.org/genpractice/legalface](http://www.abanet.org/genpractice/legalface)

Includes topics such as: deployment issues, reemployment rights of recalled Reservists, survivor benefits, estate planning and veteran's benefits.

Air Force: [www.af.mil](http://www.af.mil)

Air Force Reserve: [www.afreserve.com](http://www.afreserve.com)

Air National Guard: [www.ang.af.mil](http://www.ang.af.mil)

Allotments: 42 U.S.C. § 665 (2002).

Allotments for child and spousal support: 32 C.F.R. pt. 54.

Armed Forces legal assistance offices (active duty):

<http://legalassistance.law.af.mil/content/locator.php>

*Armed Forces Tax Guide*: [www.irs.gov/pub/irs-pdf/p3.pdf](http://www.irs.gov/pub/irs-pdf/p3.pdf)

U.S. Army: [www.army.mil](http://www.army.mil)

Army Family Liaison home page: [www.armyfamiliesonline.org](http://www.armyfamiliesonline.org)

Army JAG Corps Legal Assistance Public Page: [www.jagcnet.army.mil/legal](http://www.jagcnet.army.mil/legal)

Army JAG School: [www.jagcnet.army.mil/tjaglcs](http://www.jagcnet.army.mil/tjaglcs)

Go to TJAGLCS Publications, then scroll down to “Legal Assistance” for course books for recent legal assistance classes covering family support, estate planning, deployment, taxes, separation agreements, custody, etc... and for all the School’s guides to military family law topics (extensively footnoted and well written by the School’s professors).

Army personnel issues: <http://www.armyg1.army.mil/>

Army Regulations: family support, child custody and paternity.

AR (Army Regulation) 608-99 (29 Nov. 2003).

Army Reserve: [www.armyreserve.army.mil](http://www.armyreserve.army.mil)

Army Reserve Benefits: [www.goarmy.com/benefits/after\\_the\\_army.jsp](http://www.goarmy.com/benefits/after_the_army.jsp)

Basic Allowance for Housing (BAH): U.S. Dep’t of Defense Financial Management Reg, vol. 7, pt. A, ch. 26 (Sept. 2000).

BAH: <https://secureapp2.hqda.pentagon.mil/perdiem/bah.html>

Amount of BAH by zip code.

Coast Guard: [www.uscg.mil](http://www.uscg.mil)

Coast Guard family support regulations: U.S. Dep’t of Homeland Security, U.S. Coast Guard Commandant Instr. M1000.6A, ch.8M (Supporting Dependents)(2 May 2001) [http://www.uscg.mil/directives/cim/1000\\_1999/CIM\\_1000\\_6A.pdf](http://www.uscg.mil/directives/cim/1000_1999/CIM_1000_6A.pdf)

Coast Guard Reserve: [www.uscg.mil/hq/reserve/reshmpg.html](http://www.uscg.mil/hq/reserve/reshmpg.html)

Code of Federal Regulations: [www.gpoaccess.gov](http://www.gpoaccess.gov)

Court order compliance as to family support: U.S. Dep’t of Defense, Dir. 5525.9 (17 Aug. 1990)

Includes compliance of DoD members, employees and family members outside the United States with court orders.

Defense Enrollment Eligibility Reporting System (DEERS):

<http://www.tricare.mil/DEERS/default.cfm>

Enrollment information necessary for military medical care (on base or TRICARE)

Defense Finance and Accounting Service (DFAS)-main site: [www.dfas.mil](http://www.dfas.mil)

DFAS–garnishment information for child support and alimony:

<http://www.dfas.mil/militarypay/garnishment/childsupportandalimony.html>

DFAS Garnishment Quick Guide:

<http://www.dfas.mil/militarypay/garnishment/DFAS-QuickGuide-05-2007.pdf>

DFAS website—commonly asked questions about pay, allowances:

<https://corpweb1.dfas.mil/askDFAS/askDFAS.jsp>

Defense Technical Information Center (DTIC): [www.dtic.mil](http://www.dtic.mil)

Department of Defense (DoD): [www.defenselink.mil](http://www.defenselink.mil)

DoD Dictionary of Military Terms: [www.dtic.mil/doctrine/jel/doddict](http://www.dtic.mil/doctrine/jel/doddict)

DoD Directives: [www.dtic.mil/whs/directives/](http://www.dtic.mil/whs/directives/)

DoD Forms: [www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm](http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm)

Employer Support of the Guard and Reserve: [www.esgr.org](http://www.esgr.org)

Garnishment: 42 U.S.C. §§ 659-662 (2002).

Garnishment—Processing for child support and alimony: 5 C.F.R. pt. 581 (2002).

Garnishment—Restrictions: 15 U.S.C. § 1673 (2002).

Leave and Earnings Statement (LES):

[http://www.operationhomefront.org/Benefits/benefits\\_pay\\_les.shtml](http://www.operationhomefront.org/Benefits/benefits_pay_les.shtml)

[http://www.dfas.mil/militarypay/newinformation/Active\\_Duty\\_LES\\_Guide.pdf](http://www.dfas.mil/militarypay/newinformation/Active_Duty_LES_Guide.pdf)

(how to read a Leave and Earnings Statement).and

[www.dfas.mil/militarypay/newinformation.html](http://www.dfas.mil/militarypay/newinformation.html) (includes Guard, Reserve and active-duty LES's)

Marine Corps: [www.usmc.mil](http://www.usmc.mil)

Marine Corp Legal Assistance: <http://sja.hqmc.usmc.mil>

Includes an automatic child support calculator (type into search engine “Automatic Support Calculator”)

Marine Corps—Support. U.S. Marine Corps Order P5800.16A, *Marine Corps Manual for Legal Administration*, ch. 15 (Dependent Support and Paternity)2003-

[http://hqinet001.hqmc.usmc.mil/ig/Complaints%20%20\(Spousal%20Support\).htm](http://hqinet001.hqmc.usmc.mil/ig/Complaints%20%20(Spousal%20Support).htm)

Marine Forces Reserve: [www.marforres.usmc.mil](http://www.marforres.usmc.mil)

Military branches: [www.nightscribe.com/Military/military\\_branches.htm](http://www.nightscribe.com/Military/military_branches.htm)

Military Pay and Garnishment: [www.dfas.mil/militarypay.html](http://www.dfas.mil/militarypay.html)

Finding the military status of an individual, facts sheets on alimony and child support, mobilization information, and medical support)

Military pay tables: <http://www.dfas.mil/militarypay/2006militarypaytables.html>

Includes current and prior military pay scales (helpful for calculating retired pay)

Military Record Requests: [www.archives.gov/st-louis/military-personnel/standard-form-180.html](http://www.archives.gov/st-louis/military-personnel/standard-form-180.html)

myPay questions and answers: [www.mypay.gov/FAQ.htm](http://www.mypay.gov/FAQ.htm)

National Guard: [www.1800goguard.com](http://www.1800goguard.com) and [www.arng.army.mil](http://www.arng.army.mil)

Navy: [www.navy.mil](http://www.navy.mil)

Navy support guidelines: [www.jag.navy.mil/html/njs.htm](http://www.jag.navy.mil/html/njs.htm)

Navy Military Personnel Manual. U.S. Dep't of Navy, Art. 1754-030 (Support of Family Members)-

[http://buperscd.technology.navy.mil/bup\\_updt/508/milpers/1754-030.htm](http://buperscd.technology.navy.mil/bup_updt/508/milpers/1754-030.htm) and

Art. 5800-10 (Paternity Complaints)(22 Aug. 2002)-

[http://buperscd.technology.navy.mil/bup\\_updt/upd\\_CD/BUPERS/MILPERS/MILPERSMAN%20%205800%20-%20GENERAL.PDF](http://buperscd.technology.navy.mil/bup_updt/upd_CD/BUPERS/MILPERS/MILPERSMAN%20%205800%20-%20GENERAL.PDF)

Navy Reserve: [www.navyreserve.com](http://www.navyreserve.com)

North Carolina's State Bar Military Committee: <http://www.nclamp.gov/>

Includes general client handouts (TAKE-1 for North Carolina, "Legal Eagle" for general issues, not state-specific), attorney infoletters ("Co-Counsel Bulletin" and SILENT PARTNER), "A Judge's Guide to the Servicemember's Civil Relief Act," "A Judge's Guide to Military Divorce in North Carolina," and N.C. School of Government pamphlets on international establishment and enforcement of support, international service of process, service of process on military personnel and UIFSA.

Office of Child Support Enforcement's "A Caseworker's Guide to Child Support Enforcement and Military Personnel":

<http://www.acf.dhhs.gov/programs/cse/fct/militaryguide2000.htm#relief>

Reserve Affairs (Office of Assistant Secretary of Defense):

[www.dod.mil/ra/index.html](http://www.dod.mil/ra/index.html)

Standard Forms (SFs) from the Office of Personnel Management:  
[www.opm.gov/forms/html/sf.asp](http://www.opm.gov/forms/html/sf.asp)

TRICARE: [www.tricare.mil](http://www.tricare.mil)

TRICARE Continued Health Care Benefits: [www.tricare.mil/chcbp/default.cfm](http://www.tricare.mil/chcbp/default.cfm)

TRICARE handbook: [www.tricare.mil/tricarehandbook](http://www.tricare.mil/tricarehandbook)

TRICARE local, regional toll-free numbers: [www.tricare.mil/main/tollfree.htm](http://www.tricare.mil/main/tollfree.htm)

Uniform Interstate Family Support Act (UIFSA)—Procedural Guidelines Handbook [www.acf.hhs.gov/programs/cse/fct/uifsahb.htm](http://www.acf.hhs.gov/programs/cse/fct/uifsahb.htm)  
Includes UIFSA Q&A and Lawyer's Reference.

Uniformed Services Former Spouses' Protection Act (USFSPA):  
<http://www.dfas.mil/militarypay/garnishment/Speech5.pdf>  
Garnishments for family support and military pension division

Veterans Affairs (VA): [www.va.gov](http://www.va.gov)  
Information on VA benefits and programs

Welfare Reform: Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996)-  
[http://www.ssa.gov/OP\\_Home/comp2/F104-193.html](http://www.ssa.gov/OP_Home/comp2/F104-193.html)

## **Glossary of Terms, Abbreviations, and Acronyms\***

**Active Duty:** Full-time duty in the active armed forces of the United States, including full-time training duty, annual training duty, and attendance (while in the active service), at a school designated as a service school by law or by the service secretary concerned.

**Active Duty for Training:** Full-time duty in the active armed forces of the United States for training purposes.

**Allotment:** A specified amount of the pay and allowances of a servicemember (SM) designated to be paid by the military pay center to a qualified allottee.

**Allowance:** A monetary amount paid to an individual in lieu of furnished quarters, subsistence, or the like; in general, allowances are non-taxable.

**AR:** Army Regulation.

**Armed Forces of the United States:** The U.S. Army, Navy, Marine Corps, Air Force, and Coast Guard.

**Basic Allowance for Housing (BAH):** A tax-free housing allowance that is provided to SMs (with or without family members) who are authorized to live off-base, or

sometimes to those who receive these funds due to the need to pay child support. BAH amounts are determined according to rank, location, and dependency status, that is, whether or not the member has dependents. Specific rates for BAH, depending on location of the SM, are available at the website for the Defense Finance and Accounting Service (DFAS), <http://www.dod.mil/dfas>.

**Basic Allowance for Subsistence (BAS):** An allowance that is meant to offset costs for a SM's meals. This allowance is based in the historic origins of the military in which the military provided room and board (or rations) as part of a member's pay. Beginning on January 1, 2002, all enlisted members get full BAS, but they pay for their meals (including those provided by the government). Because BAS is intended to provide meals for the SM, its level is linked to the price of the food. Therefore, each year it is adjusted based upon the increase of the price of food as measured by the USDA food cost index.

**Basic Pay:** The pay of an officer or enlisted member according to rank and longevity, before additional amounts are added for quarters, subsistence, flying status, overseas duty, and so on.

**COLA:** Cost of Living Adjustment.

**CONUS:** The continental United States (i.e., excluding Alaska and Hawaii).

**Combat Zone:** An area of potential or actual armed conflict, as defined by executive order of the President.

**Commander:** A commissioned or warrant officer who, by virtue of his or her grade and assignment, exercises primary command authority over a military organization, installation, or prescribed territorial area that under pertinent official directives is recognized as a command.

**DEERS:** Defense Enrollment Eligibility Reporting System.

**Dependents:** See Family Members.

**DFAS:** Defense Finance and Accounting Service.

**DD Form 2293:** The application form to send to DFAS with an order for garnishment for child support, alimony, or military pension division.

**DoD:** Department of Defense.

**Duty Station:** The place where a SM is assigned for regular duty; also, the place at which a SM performs an assigned duty.

**Enlisted Member:** A person enlisted, enrolled, or conscripted into the military service (pay grades E-1 to E-9).

**Enlistment:** Voluntary entrance into military service under enlisted status; also a period of time, contractual or prescribed by law, of service between enrollment and discharge.

**Family Members:** Family members, also known as "dependents," include:

1. A lawful spouse of a sponsor.
2. A sponsor's former spouse who is eligible for commissary and exchange privileges under the Uniform Services Former Spouses Protection Act and applicable regulations.
3. An unmarried child who is under 21 years of age and who is:
  - a. A legitimate child of a sponsor.

b. An illegitimate child whose parentage has been admitted in writing by a sponsor or whose sponsor has been determined to be the child's parent by a court order, or the functional equivalent of a court order.

c. An adopted or pre-adoptive child of a sponsor.

d. A stepchild of a sponsor.

e. A foster child (or ward) for whom a sponsor possesses a legal decree or other instrument issued by a court of law or placement agency awarding custody of the child to the sponsor

4. An unmarried child, as defined in 3.a. through 3.e. above, but who is 21 years of age or older and less than 23 years of age, and is dependent upon a sponsor for more than one-half of his or her support, and is enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of the Army.

5. An unmarried child, as defined in 3.a. through 3.e., above, but who is 21 years of age or older and incapable of self-support because of mental or physical handicap.

6. A parent, stepparent, parent by adoption, or parent-in-law of a sponsor who is dependent on the sponsor for more than one-half of his or her support. The relationship between a stepparent and stepchild ends if the stepparent divorces the parent.

**Government Quarters or Housing Facilities:** Lodging which includes the following:

1. Any sleeping accommodations or family-type housing owned or leased by the U.S. government.

2. Quarters obtained by U.S. government contract.

3. Dormitories or similar facilities operated by cost-plus-a-fixed-fee contractors.

4. Any sleeping or housing facilities furnished by a foreign government.

5. Transient facilities such as guest houses and hotel-type accommodations (accommodations built and operated by non-appropriated fund activities are considered to be rental quarters for the purpose of BAH eligibility); payment of service charges for laundering of linens, janitorial services, and so on, has no effect on whether the facilities are considered government quarters or housing facilities.

6. -Quarters in a state-owned National Guard facility.

**JAG Officer:** See Judge Advocate.

**Judge Advocate:** A lawyer who is a commissioned officer of the Judge Advocate General's Corps.

**Legal Assistance:** Legal advice, counseling, and other help provided by military attorneys to eligible clients regarding their personal legal affairs.

**LES:** Leave and Earnings Statement. The pay statement of a SM showing total entitlements (pay and allowances), taxes and other mandatory deductions, voluntary allotments, days of annual leave taken and available, state of residence for tax purposes, etc.

**Member (Servicemember):** An officer or enlisted member of the uniformed services.

**MTF:** Military treatment facility (e.g., hospital, clinic, etc.).

**Officer:** A commissioned or warrant officer.

**Permanent Change of Station (PCS):** The assignment or transfer of a member or unit to a different duty station under competent orders that neither specify the duty as temporary nor provide for further assignment to a new station or direct return to the old station.

**Permanent Station:** In general, the post of duty or official station to which the member is assigned for permanent duty.

**Rations in Kind:** Meals furnished to SMs by the military, in lieu of paying an allowance for the meals.

**RC:** Reserve Component (*see below*).

**Reenlistment Bonus:** Special pay to an enlisted member who reenlists under the provisions of 37 U.S.C. § 308.

**Reserve Component:** The U.S. Army National Guard, Army Reserve, Naval Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, Coast Guard Reserve, and the Reserve Corps, Public Health Service.

**SCRA:** Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*

**Separation:** Discharge, release from active duty or, in the case of enlisted members, the date when the enlisted member begins to serve on a voluntary extension of enlistment for any period of time. Some statutes consider retirement or death of a SM as “separation.”

**Servicemember (SM):** An officer or enlisted member of the uniformed services.

**SGLI:** Servicemembers Group Life Insurance, 38 U.S.C. § 765 *et seq.*

**SJA:** Staff judge advocate.

**SM (Servicemember):** An officer or enlisted member of the uniformed services.

**Sponsor:** A person who is entitled to military benefits by virtue of his or her military service or employment.

**Staff Judge Advocate (SJA):** The principal legal advisor on the staff of a military commander.

**TRICARE:** Military medical insurance program.

**Uniformed Services:** The U.S. Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

**Warrant Officer:** A person who holds a commission or warrant in a warrant officer grade.

#### NOTES

\*Portions of this glossary were reproduced or adapted from Marshal S. Willick, *Military Retirement Benefits in Divorce* (American Bar Association, 1998) at 341–351, and from Mark E. Sullivan, *The Military Divorce Handbook* (American Bar Association, 2006).

\* \* \*

SAMPLE ARMY NONSUPPORT LETTER

May 28, 2007

Commander of Corporal Jack A. Dewlap, 222-55-8888  
Company C, 12<sup>th</sup> Humvee Battalion  
Corps Intelligence Group  
Ft. Swampy, East Carolina 27409

Re: Nonsupport Complaint by Mrs. Anna Dewlap

Dear sir/madame,

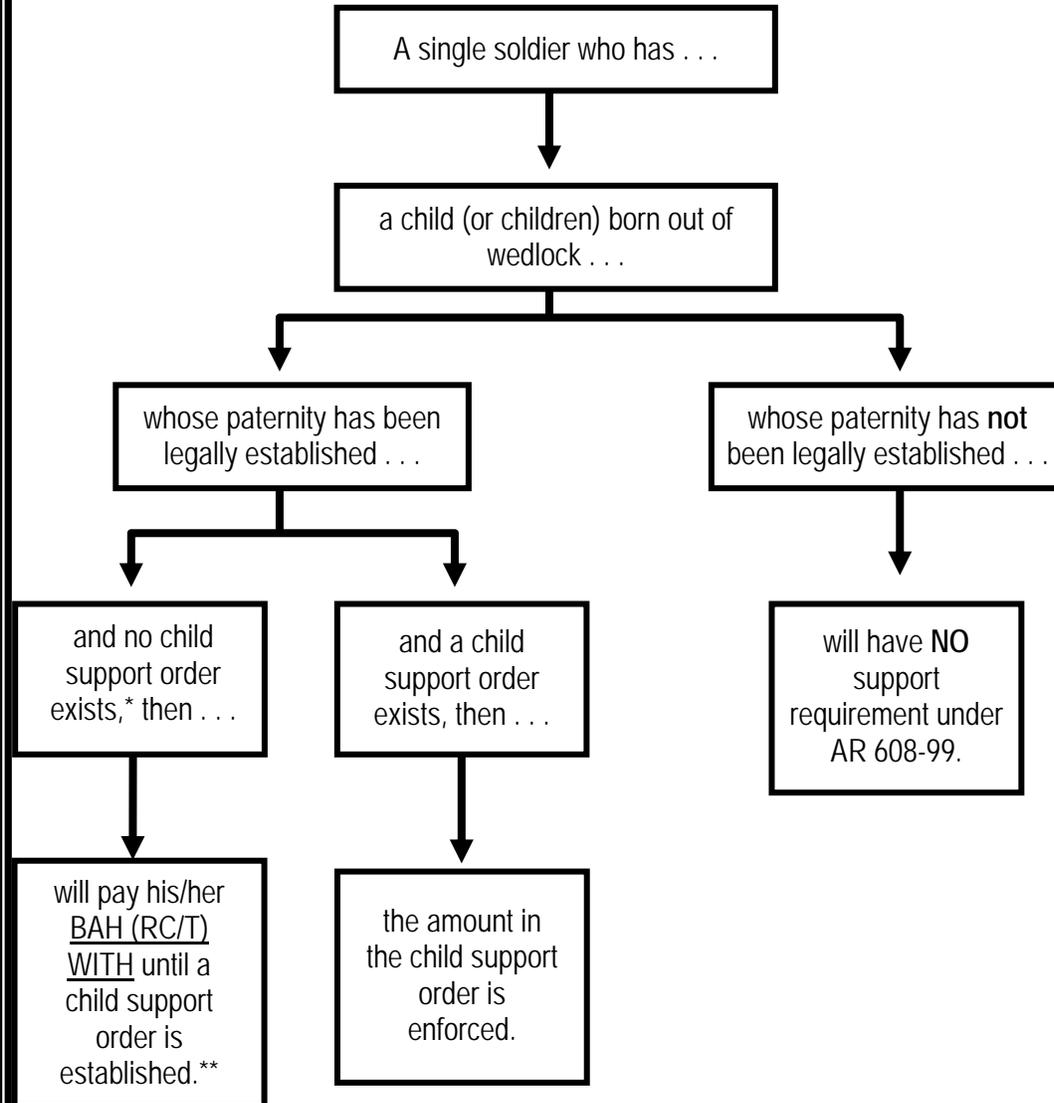
I am writing on behalf of Mrs. Anna Dewlap, the wife of Corporal Jack Dewlap, a member of your command. The parties separated on May 1, 2007, and at this point Mrs. Dewlap is residing here in King City, East Carolina, with her widowed mother. As her attorney, I am writing to ask that you assist in obtaining regular monthly support payments for Mrs. Dewlap and their three minor children. Mrs. Dewlap has had no payment of support this month, and she reports that her husband has told her by telephone that he intends to “bring her to her knees” until she returns to him and begs forgiveness.

I understand that, in the absence of an order or agreement for support, a soldier must comply with the interim support requirements of Army Regulation 608-99, and that you are required to counsel him and take action to ensure that the appropriate amount of support is sent each month. Thank you in advance for your help. We look forward to your prompt reply.

Very truly yours,

[signature block]

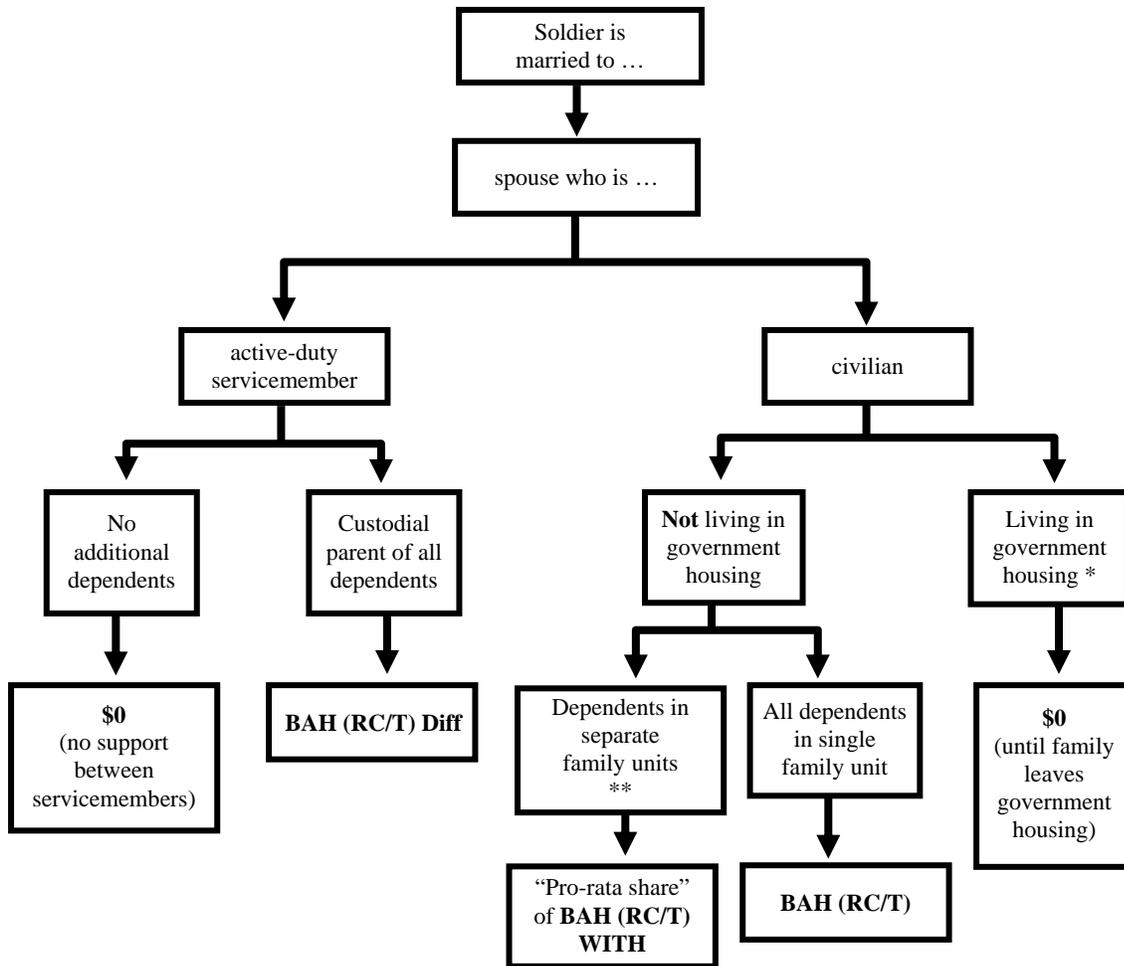
## AR 608-99 and the Single Soldier



\* Of course, it is rare that a judicial establishment of paternity exists without an accompanying child support order. It is not rare to have paternity legally established without support these days when the paternity is established by the birth certificate

\*\* If the soldier is supporting multiple children who reside in different family units, each child who is not covered by a child support order will receive a "pro-rata share" of the soldier's BAH (RC/T)

## Family Support for the Married Soldier under AR 608-99



NOTE – A servicemember must pay BAH (RC/T) to his dependents only when there is no court order (*i.e.*, divorce decree, child support order, etc.) or separation agreement with a financial support provision. BAH (RC/T) is intended to be interim support only, not a permanent means of family support.

\* For Army purposes, “government housing” means on-post quarters (*i.e.*, family housing), NOT low-income housing (*i.e.*, HUD homes).

\*\* For example, a servicemember’s dependents reside in “separate family units” when the soldier is married to his/her current spouse, but has a child from a previous relationship who lives with a former spouse. Another example would be if a male soldier has two children with different mothers.