



Family Law and Military Issues

By James P. Cunningham

Family law has developed into a complex blend of divorce, custody, parenting time, support, property division, and a number of additional issues which make it a specialty in and of itself. Representing military personnel on active duty and their families makes the practice of family law even more challenging. This article highlights some of those challenges.

Some differences are a result of federal acts and regulations, and state law peculiar to military service. The underlying policy affords procedural protection to active duty personnel serving in the armed forces. The United States Supreme Court has said that

statutes should be read “with an eye friendly to those who dropped their affairs to answer their country’s call.”¹

Service of process

Generally, rules governing service of process on civilian litigants apply to members of the armed forces stationed off post and not outside of the United States.² However, service of process on an active duty service member stationed in a military unit (including a base or ship, or overseas) is complicated because of

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federal control over the installation. In that case, military regulations affect how service may be accomplished.³

If court rule for service by mail on the individual⁴ is unsuccessful—that is, the member refuses service—the challenge lies in gaining access to the installation for proper personal service. The importance of knowing the unit and its commanding officer cannot be overemphasized, since a unit commander’s consent for service is required where the installation is located.⁵ A service member’s unit commander should be contacted directly.

Unit commanders usually will assist with access, although regulations are clear that they are not required to act as process servers.⁶ That said, the unit commander is generally an ally in motivating the service member who is refusing to accept service to cooperate and resolve family law litigation with minimal disruption to the unit.

Protection against default

The Servicemembers Civil Relief Act protects service members on active duty against default in many situations. The act “applies to any civil action or proceeding...in which the defendant does not make an appearance.”⁷

Generally, a default judgment against a service member is voidable if the service member’s ability to appear in the action was “materially affected” by his or her active duty military service and if he or she has a meritorious defense to the action (or some part of it) applicable in almost every family law situation.⁸

When a judgment or order is sought against a party who has not made an appearance, the court must determine whether that party is in the military. The plaintiff must file an affidavit specifically stating his or her knowledge of the defendant’s military service or inability to determine if the defendant is in the military.⁹

An important provision of the Servicemembers Civil Relief Act enables a service member to correspond *directly* with a court having jurisdiction over a divorce action to request a stay of proceedings by invoking the statute. An application for stay does not constitute an appearance for jurisdictional purposes nor a waiver of any substantive or procedural defense.¹⁰

At a minimum, a stay will be granted for 90 days; however, the court has the discretion to authorize a stay for a longer period if circumstances warrant. If the court does not grant a longer stay period, counsel must be appointed to represent the service member in the action.¹¹

If a judgment has been entered against a service member while on active military duty or within 60 days of the end of active duty, the court can vacate the judgment and allow the service member to participate.¹²

Stays when the member has notice

A stay is a “temporary suspension.”¹³ Even if a service member has notice in an action in which he or she is a party, the Servicemembers Civil Relief Act and state regulations still afford protection. Under the Michigan Military Act, actions in state courts “pending against any such person when he or she enters active service, or commenced at any time during the service, stand adjourned until after the termination of the service.”¹⁴

The fact that a party is in the military does not mean an automatic entitlement of a stay to a member who has notice. Most service members in common divorce matters are stationed in the continental United States, and active duty service members stationed in the U.S. generally are not entitled to a stay of proceedings because they are usually relieved from duty to attend court



functions. Similarly, stays are generally not granted on requests involving support.

Clearly, the policy of the Servicemembers Civil Relief Act and the Michigan Military Act is to protect service members against “runaway” divorce actions and possible default judgments. However, the policy does not act as a mere shield for a reluctant defendant. Its protections can be waived unless affirmatively asserted and do not apply if no “material affect” can be proved.¹⁵

Custody proceedings

If a Michigan court properly has jurisdiction over the marriage and the parties, it will have jurisdiction over the children and determine custody under the Child Custody Act of 1970.¹⁶ This act prohibits a court from entering a final judgment on child custody while a parent is on active military duty. Active military duty includes “when a reserve unit member or national guard unit member is called into active military duty.”¹⁷

The immediate needs of the child can be protected by providing for a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child pending final adjudication of custody and parenting time.¹⁸

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custody order in effect immediately preceding that period of active duty.”¹⁹ This provision seeks to restore the service member’s parental custody status to what it was before the parent went on active duty to prevent the disadvantaged and probable determination of a changed established custodial environment during active military duty.²⁰

Domicile and the Uniform Child Custody Jurisdiction and Enforcement Act

Military families relocate frequently, and military parents are often separated from their families during deployment for prolonged periods. Place of domicile can become an issue. In this case, the Uniform Child Custody Jurisdiction and Enforcement Act²¹ should be considered. This act provides a procedural determination of jurisdiction for states to address child custody proceedings involving more than one state or foreign country and encourage cooperation and communication between the courts.

If residence is in question—that is, the parties may reside in Michigan but be domiciled in another state—the courts will require a determination of the “home state” of the children.²² The Uniform Child Custody Jurisdiction and Enforcement Act is applicable in almost every state, and though the statute is clear and well written, the practitioner should review it carefully.

Income determinations for military personnel

Although the Michigan Child Support Formula remains the appropriate vehicle for establishing support guidelines and instruction concerning how to determine income,²³ a service member’s income can be more complicated than a routine determination obtained from a paycheck.



In addition to a service member's basic pay, which is based on rank and years of service, there can be numerous allowances which—with the exception of cost-of-living adjustments—are not taxed and, therefore, should be included as in-kind income not addressed by the member's W-2 forms. These additional allowances have various names such as Basic Allowance for Subsistence and Housing that may be included under the child support formula.²⁴

A critical discovery document is a service member's leave and earning statement—essentially, the member's monthly pay stub. In addition to identifying the member's domicile, it documents pay and leave status on a monthly basis and provides a wealth of information regarding pay, benefits, and additional allowances.

Retirement and pension benefits

The Uniformed Services Former Spouse Protection Act²⁵ authorizes state courts to treat military retirement as marital property to be equitably divided during divorce proceedings. It leaves it to the state court to determine whether to divide military pay and at what amount.²⁶

In some cases, a former spouse may be eligible to receive payments directly from the military. A former spouse may receive direct payments from the Department of Finance and Accounting if the parties were married for 10 years or more, during which the member performed at least 10 years of service creditable in determining the member's eligibility for retirement.²⁷ However, direct payments to the former spouse cannot exceed 50 percent of disposal retirement pay. In cases in which there are payments for division of retirement pay, and pursuant to a child or spousal support order, the total amount of direct payments may not exceed 65 percent of disposal pay.²⁸

Retirement is calculated by multiplying the retired base pay by a member's years-of-service multiplier on the day before retirement. While there are exceptions to this rule and it can be complicated when there are concurrent retirement and disability benefits, the regulations and excellent resources are available to the practitioner.²⁹

Conclusion

Representing a member of the active duty armed forces or his or her spouse or former spouse is a rewarding personal and professional experience. Although this article covers a number of the basic differences in representation,³⁰ a family law practitioner may want to consider additional education on the subject or consult with a family lawyer with greater expertise in this field. Much like the growth of specialists in the area of discovery, analysis, and drafting of retirement benefits orders since the passage of ERISA, military law is quickly becoming a specialty in itself. ■



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ENDNOTES

1. *Le Maistre v Leffers*, 333 US 1, 6; 68 S Ct 371; 92 L Ed 429 (1948).
2. MCL 600.701 through MCL 600.705.
3. See, e.g., 32 CFR 516.10(d).
4. MCR 2.104.
5. Officials responsible for providing service of process for the major branches are Army, Office of Judge Advocate General, Attn: DAJA-LA, 220 Army Pentagon, Washington, D.C. 20310, (703) 697-3170; Navy, Bureau of Naval Personnel, Office of Legal Counsel (Pers 06), 2 Navy Annex, Washington, D.C. 20370, (703) 614-4110.
6. W. Mark C. Weidemair, Service of Process and the Military, Administration of Justice Bulletin No. 200418 (2004).
7. 50 USC 521.
8. *Boone v Lightener*, 319 US 561; 63 S Ct 1223; 87 L Ed 1587 (1943); 50 USC 521(g).
9. MCR 2.603(C); see Michigan State Court Administrative Office Form MC 07 and 07a.
10. 50 USC 521(d) through 50 USC 521(f).
11. 50 USC 522(b).
12. 50 USC 522(f).
13. *Black's Law Dictionary* (5th ed).
14. MCL 32.517.
15. *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008); 50 USC 517(a).
16. MCL 722.21 *et seq.*
17. MCL 722.22(a).
18. MCL 722.27(1)(c).
19. MCL 722.27(1)(c).
20. *Id.*
21. MCL 722.1201 *et seq.*
22. MCL 722.1102(g); *Atkinson v Atkinson*, 256 Mich App 531; 664 NW2d 249 (2003).
23. See MCL 552.605.
24. 2013 MCSF 2.01. Other examples include separation allowance, clothing and personal money allowances, and family separation allowance.
25. 10 USC 1408.
26. See MCL 552.18; *Booth v Booth*, 194 Mich App 284; 486 NW2d 116 (1992).
27. 10 USC 1408(d)(2).
28. *Turkette v Turkette*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2010 (Docket No. 287695).
29. See Defense Finance and Accounting Service, *Attorney Guidance* <<http://www.dfas.mil/garnishment/usfspace/attorneyinstructions.html>> (accessed January 13, 2015).
30. The author acknowledges an excellent resource: Michigan Department of Attorney General and Thomas M. Cooley Law School, *Michigan Guide to Military Family Law* <http://www.michigan.gov/documents/ag/Military_Family_Law_Booklet_463216_7.pdf?20141107160033> (accessed January 13, 2015).