Clearinghouse REVIEW
Journal of Poverty Law and Policy
September–October 2009
Volume 43, Numbers 5–6

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Five Tips that Pro Bono Attorneys Need to Know When a Servicemember Is a Party to a Family Law Case

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When a party to a family law case is a current or former member of the military, there may arise legal and practice issues unfamiliar or unknown to a domestic relations attorney. Here are five informative tips to help nonmilitary attorneys both represent their military-associated clients optimally and ensure that the legal rights of servicemembers are recognized and respected when on the other side of a family law matter.

The Nature of Military Legal Assistance

Civil legal assistance is provided to servicemembers by either civilian lawyers employed by the military or judge advocates. Such assistance is authorized by regulation, and in the Army that regulation is Army Regulation No. 27-3.[1] Due to resource limitations, the form that this legal assistance most commonly takes is analogous to the kind of legal advice and limited or brief services most familiar to pro bono and legal aid attorneys.[2] The regulation also permits in-court representation of Army legal assistance clients in civil matters when the clients have no substantial income beyond their military pay and, if the client earns above the pay grade of E4, the client would incur a substantial financial hardship.[3] The regulation, however, confers no absolute entitlement to legal assistance in civil matters, and the availability and the extent of assistance are limited by resources available and can vary from installation to installation.[4] Free representation in one's divorce, then, is simply not a "perk" of National Guard service, despite widely held beliefs to the contrary.

For those citizen-soldiers serving "part-time" in the military, such as those in the Reserves or National Guard, additional complications arise in the delivery of legal assistance. Army Regulation No. 27-26 further makes clear that the Army organization to which the lawyer is assigned is that lawyer's client.[5] Thus, in my own position as full-time general counsel, the Ohio Army National Guard is my client, and I am unavailable (unlike the civilian attorneys or judge advocates assigned to deliver legal assistance

[1]Army Regulation (A.R.) 27-3 (1996), www.army.mil/usapa/epubs/pdf/r27_3.pdf. Under the regulation, legal assistance given to military, not civil, actions takes precedence. A legal assistance attorney's first priority is to assist servicemembers in defending against adverse military personnel actions (e.g., recoupments of pay) to ensure due process to the servicemember, after which the government may impose the adverse action.

[2]See *id.* para. 3-7 (types of services through military legal assistance), para. 3-6 (prescribing substantive areas of law in which legal assistance may be provided). See also U.S. Army Legal Assistance Policy Division, Client Services Branch, Available Services, http://bit.ly/3pzrLf.

[3]See A.R. para. 3-7(g).

[4]While eligible servicemembers generally have access to free legal advice and some forms of limited legal help, in-court representation by a judge advocate or civilian military legal assistance attorney—particularly in domestic relations—is extremely rare and subject to a number of restrictions and conditions (see *id.*).

[5]A.R. 27-26 (1992), www.army.mil/usapa/epubs/pdf/r27_26.pdf.

services) to enter into an attorney-client relationship with any individual soldier; this means that I am not allowed to deliver legal assistance to fellow National Guard personnel. Furthermore, because most National Guard personnel are part-time soldiers, their civilian income is substantial compared to their military income, rendering them ineligible for military legal assistance. Determining whether representing a soldier would incur substantial financial hardship would involve me and Ohio's state judge advocate in reviews of soldiers' finances. We are neither equipped nor inclined to make any such determinations so that the general rule is that citizen-soldiers need to be represented by civilian attorneys.

Ideally a servicemember in need of civilian counsel can locate and retain an attorney who practices part-time as a judge advocate and who is likely familiar with the specific legal issues that pertain to servicemembers.[6] This is, of course, not always possible, and available counsel may not understand how military-service connectedness can come into play in a civil case, such as a family law matter. Below I set forth five tips on issues that I have confronted in my own practice as both civilian and military attorney.

1. Custody and Visitation Issues Arise When Single Parents and Dual-Service Couples Are in the Military

Military regulations require parents who are single or who are married to another servicemember to create family care plans for the care of their minor children while the servicemember is performing military duties. In what may be intervention into family law, Army Regulation No. 600-20 prescribes the use of several Department of the Army Forms in the creation of these plans.[7] These forms are the DA 5305 (Family Care Plan), the DA 5841 (Power of Attorney), and the DA 5840 (Certificate of Acceptance as Guardian or Escort).[8]

The regulation also permits the use of an "equivalent delegation of legal control" by the servicemember to the caretaker.[9] In the Ohio Army National Guard a special power of attorney specifically conforming to state law completes the family care plan. The power of attorney allows enrollment in school, access to school counseling records, and consent to any needed medical, dental, or optical treatment. Such a power of attorney has proven to work well in allowing a stepparent or grandparent to act *in loco parentis*.

Family care plans are, however, submitted to commanders, not judge advocates. Commanders may not, while reviewing family care plans among other responsibilities, determine whether there is a conflict with any custody or visitation order. More than one family care plan has gone awry when the other parent demands to know why the child is staying with a stepparent or grandparent rather than the natural parent while the servicemember is deployed. More than one soldier has related to me the soldier's desire that the other parent be completely cut off from the child while the soldier is deployed. Aside from the obvious lack of cooperation conveyed by such sentiments, termination of parental contact frequently conflicts with existing custody or visitation orders. Once deployed, however, the servicemember can invoke the Servicemembers Civil Relief Act to delay resolution of the matter for at least ninety days.[10] This can cause the court to order a change in custody while the servicemember is deployed.

[6]A part-time judge advocate with a civilian practice is permitted to represent a military client only while both are in civilian status and if contact is made at the lawyer's civilian office. A part-time judge advocate is not allowed to undertake paid civilian representation if contact is made while in military status (see A.R. 27-26 Rule 1.5, cmt. Military Representation and Referral).

[7]A.R. 600-20 para. 5-5 (2008), www.army.mil/usapa/epubs/pdf/r600_20.pdf.

[8]Family Care Plan, www.army.mil/usapa/eforms/pdf/A5305.pdf; Power of Attorney, www.army.mil/usapa/eforms/pdf/A5841.pdf; Certificate of Acceptance as Guardian or Escort, www.army.mil/usapa/eforms/pdf/A5840.pdf.

[9]A.R. 600-20 para. 5-5a(3)(a).

[10]See 50 U.S.C. app. § 522 (2005). See also Matthew T. Besmer, *Appointment Practice Under the Servicemembers Civil Relief Act: The Duties of Court-Appointed Counsel*, in this issue.

Child custody and visitation decrees must recognize the transition of the National Guard and Reserve to operational, rather than strategic, reserve forces. This transition means that members of the Guard and Reserve are called to active duty frequently (indeed, some members of the National Guard and Reserve could readily be on active duty indefinitely), and the decree needs to reflect that reality. Far too many custody and visitation orders, even of those already serving, fail to consider what is to be done in the event of a long deployment, although the "extra" pay received by the servicemember for military duties may have been used to increase the servicemember's support obligation. Counsel and family court judges need to inquire if either parent is a part-time servicemember and to require those who later become part-time servicemembers to report that fact to the court, just as they report changes in employment or income. Family care plans should be prepared consistently with resulting custody and visitation orders.

If the courts were to expedite custody hearings for deploying servicemembers, that, too, would be helpful. Recently several states enacted legislation that requires a court given notice of the parent's deployment to advance the case on the docket, not to change custody permanently while the servicemember is deployed, and to permit the servicemember to testify electronically while deployed.[11]

2. Changes in Paternity Laws Have Not Yet Had an Impact on the U.S. Department of Defense

In the 1990s the federal government directed states to enact measures making it easier for willing fathers to acknowledge paternity, and enactment of such laws was made a condition of receiving welfare funds by the state.[12] In Ohio, for example, the Child Support Enforcement Agency, known as the Ohio Department of Job and Family Services, promulgated JFS Form 7038, Acknowledgment of Paternity Affidavit.[13] Each state's child support enforcement agency and its administrative parentage process may be located at the U.S. Department of Health and Human Services' Office of Child Support Enforcement site.[14] Once the mother and the father acknowledge paternity, a new birth certificate may be issued, and the paternity of the father is established as a matter of law.

Military rules tend to disregard the legal processes described above. When single-parent servicemembers entering active duty want to collect the basic allowance for housing (BAH) at the higher rate authorized for servicemembers with dependents, they are not required to show proof of paternity. Instead Army servicemembers are governed by the Army Regulation on Family Support, Child Custody, and Paternity when they claim the BAH.[15] This regulation requires the servicemember to complete the form "Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ), and/or Variable Housing Allowance (VHA)," which contains a "certification of dependent support."[16] The servicemember signs the form under the penalties prescribed by the False Claims Act, indicates the rent or support paid, and submits the form along with the child's birth certificate. A single-father servicemember is not, however, required to establish paternity legally or present a

[11]Jeffrey P. Sexton & Jonathan Brent, *Child Custody and Deployments: The States Step in to Fill the SCRA Gap*, Army Lawyer, Dec. 2008, at 9, 13, www.loc.gov/rr/frd/Military_Law/pdf/12-2008.pdf.

[12]See generally Paula Roberts, *Establishing Paternity Through Voluntary Acknowledgment*, 40 Clearinghouse Review 574 (March–April 2007).

[13]Ohio Department of Job and Family Services, Acknowledgment of Paternity Affidavit, www.odjfs.state.oh.us/forms/file.asp?id=47082.

[14]Administration for Children and Families, U.S. Department of Health and Human Services, State Links, www.acf.hhs.gov/programs/cse/extinf.html.

[15]32 C.F.R. pt. 584 (2009). For more information about the basic allowance for housing, see U.S. Department of Defense, A Primer on Basic Allowance for Housing (BAH) for the Uniformed Services (2009), www.defensetravel.dod.mil/perdiem/BAH-Primer.pdf.

[16]Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ), and/or Variable Housing Allowance (VHA), www.army.mil/usapa/eforms/pdf/A5960.PDF.

child support order in order to draw the Defense Finance and Accounting Service (DFAS) extra money, payable because he has a dependent—he needs only demonstrate that he is the father of a child. To permit servicemembers to tell DFAS that they have a dependent child whose paternity they are unwilling to recognize by affidavit so that they may receive extra money makes little sense because without the establishment of paternity the father may not be subject to a child support order. The Joint Federal Travel Regulation, which defines the level of paid BAH, might be beneficially amended to recognize the changes wrought by welfare reform in the 1990s so that servicemembers who want more money because they have a dependent must take the small steps required to legitimize that dependent and provide legally for the dependent's support. Until that occurs, counsel for mothers of such children should make paternity complaints to the servicemember's commander under service regulations because if the soldier does not deny his paternity, he is required to pay the mother the interim support required under the regulation.[17] Putative fathers should be served with process including paternity affidavits under the federal support regulations set forth by the U.S. Office of Personnel Management.[18] Assistance in serving process related to support can be obtained from the offices identified in Appendix B to those regulations.[19]

3. There Is a National, Single Point of Contact for Defense Department Employees' Family Support Matters

An alternative to obtaining pay and retirement pay information directly from the servicemember is to get it from DFAS. Under the Office of Personnel Management regulations set forth above, all garnishments of military pay for child or spousal support from any court nationwide for any member of any branch of the armed forces are directed to the DFAS Center in Cleveland, Ohio (also known as "DFAS-CL").[20] The Office of Personnel Management regulations prescribe the amenability of all compensation paid to military or civilian employees of the U.S. Department of Defense to garnishment for spousal or child support.[21] The regulations also allow for the service of interrogatories on DFAS-CL.[22] Regardless of the civil procedural requirements under local law, DFAS should not be named as a defendant, or DFAS may ask the U.S. Department of Justice to remove the case to federal court and dismiss DFAS as a defendant. Interrogatories may be served on DFAS-CL, and they will be responded to so long as the required identifying information is given.[23] Years ago I was told that I was the first attorney in the county to serve a federal agency with interrogatories in a support case. I received a timely response enabling me to locate the other party, serve him, and obtain a court order garnishing government retirement benefits to which he was otherwise entitled. He then took his support obligations to my client far more seriously than before his benefits were garnished. DFAS maintains an extensive garnishment information website.[24] The site has FAQs (frequently asked questions), instructions for service upon DFAS (for example, service by facsimile is permitted), and instructions for garnishment orders dividing military retired pay under the Uniformed Services

[17]See, e.g., 32 C.F.R. § 584.3 (2009) (for Army personnel); 32 C.F.R. §733.5 (2009) (Navy and Marine Corps personnel). For the formula to be used to calculate support payment amounts, see A.R. 608-99 para. 2-6 (2003), www.army.mil/usapa/epubs/pdf/r608_99.pdf.

[18]5 C.F.R. pt. 581 (2009).

[19]*Id.*, app. B.

[20]*Id.*, pt. 581, app. A.

[21]*Id.* § 581.103.

[22]See *id.* § 581.303.

[23]See *id.* § 581.203.

[24]Defense Finance and Accounting Service, Garnishment: Home, www.dfas.mil/garnishment.html.

Former Spouses Protection Act.[25] Note that if a married servicemember retires on disability and draws benefits from the U.S. Department of Veterans Affairs (VA), those benefits may not be garnished even though they are offset against military retired pay. Counsel should be aware that such benefits may, however, be apportioned under VA regulations.[26]

4. Regulations Govern the Testimony that May Be Given by Defense Department Personnel in Litigation

Federal regulations generally preclude testimony by Defense Department personnel or production of Defense Department records in litigation to which the United States is not a party.[27] Thus most attorneys who subpoena such records or witnesses are frustrated when they receive a letter from a judge advocate explaining why the records will not be produced or the witness will not be testifying in the absence of a court order to the contrary. In most domestic matters, the information sought can be obtained from the servicemember, who can, in turn, get it from his unit or perhaps elsewhere. In support matters, for example, servicemembers receive a leave and earnings statement (LES) each month.[28] While active-duty personnel have more information on a LES than do Reserve and National Guard personnel because those on active duty are entitled to more pay and allowances, the LES has all the pay and allowances needed to calculate child or spousal support. If information about retired pay is needed under the Uniformed Services Former Spouses' Protection Act, that information can be obtained by the servicemember under the retirement point accounting system. Any servicemember can request a retirement point history statement reflecting all periods of military service and the retirement points earned for that service. That statement may then be presented by the servicemember to the party needing to know the servicemember's likelihood of earning military retirement and its amount.

5. Federal Employees and the Records They Maintain Are Not Subject to Subpoena

As the full-time judge advocate for the Ohio National Guard, I respond, on average, once a week to attorneys attempting to subpoena the personnel and finance records of members of the Ohio Army National Guard and Air National Guard. These attorneys are simply doing what they do with private-sector employers, and they may not recognize that a state's National Guard falls under the sovereign immunity enjoyed by the government of the United States except insofar as that immunity is waived under the litigation regulations.[29] All members of any state or territory's Army and Air National Guard are also members of the Army National Guard of the United States and the Air National Guard of the United States, respectively.[30] Their military personnel records are kept on forms prescribed by the Department of the Army or Air Force and by the National Guard Bureau, the joint activity of the Army and Air Force that administers (but does not command) the states' National Guards. These records are maintained either by soldiers or airmen on full-time National Guard duty or by National Guard technicians who are civilian employees of the Army or Air Force.[31] While the military duties of National Guard units are state-controlled,

[25]See Defense Finance and Accounting Service, Uniformed Services Former Spouses' Protection Act Q&A, www.dfas.mil/militarypay/garnishment/fs-qa.html.

[26]See 38 C.F.R. § 3.452 (2009).

[27]32 C.F.R. pt. 97 (Department of Defense); see also 32 C.F.R. pt. 725 (Navy); 32 C.F.R. pt. 516 (Army).

[28]Defense Finance and Accounting Service (DFAS) Form 702; see explanatory information, www.dfas.mil/airforce2/militarypay/yourleaveearningsstatmentles.html.

[29]See 32 C.F.R. § 97.6 (Department of Defense); 32 C.F.R. § 516.47 (Army); 32 C.F.R. §725.7 (Navy and Marine Corps).

[30]32 U.S.C. § 101(5), 101(6) (2005).

[31]*Id.* §§ 502(f), 709.

they are administered by TAGs (The Adjutants General) of the states and territories under federal laws and regulations.

Compensation for all members of the armed forces, whether they are active, reserve, or National Guard, comes from DFAS. These full-time unit support personnel are federal employees for purposes of their amenability to subpoena and accordingly fall within the federal regulations containing limited waivers of the sovereign immunity of the United States. Among these regulations are the above-mentioned support regulations waiving the sovereign immunity of the United States to implementing support orders, provided that those orders are directed to and served on the correct agency, DFAS-CL, as the Office of Personnel Management regulations directs. Service of a subpoena upon a financial or personnel clerk at the National Guard's state headquarters is ineffectual because the finance or personnel clerk is a federal employee; the records contain Privacy Act–protected information, and the personnel or finance clerk is not truly the custodian of pay records when the servicemember is paid by DFAS. If all parties to a lawsuit agree to the production of copies of federal records, and the local rules of evidence permit copies of public records to be admitted into evidence without authenticating testimony such as under Federal Rules of Evidence 902 and 1003, arranging for the records to be copied and an appropriate certification furnished may be possible. In this way federal employees are not required to attend hearings only to authenticate records whose authenticity is not in question.

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These five tips, if my experience with them is a reliable guide, are not well understood by most civilian attorneys representing servicemembers or their spouses in family law matters. I hope that this information aids those who are representing those who have volunteered to defend our nation and our way of life.

Author's Note

The views and opinions expressed here are my own and are not endorsed by the U.S. Army, the National Guard Bureau, or the Ohio Army National Guard.

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—The Editors

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