

# MILITARY LAW REVIEW

## *The Second Legal Assistance Symposium*

### *Articles for the Legal Assistance Practitioner*



Pamphlet

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## MILITARY LAW REVIEW — VOL. 112

The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative administrative, and judicial developments.

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**MILITARY LAW REVIEW**  
**TABLE OF CONTENTS**

<i>Title</i>	<i>Page</i>
<b>INTRODUCTION</b>	
Major General Hugh R. Overholt .....	1
<b>PART I: A VIEW FROM THE TOP</b>	
Practical Pointers for Legal Assistance Officers: A View From the Top	
Brigadier General Donald W. Hansen .....	3
<b>PART II: FAMILY LAW</b>	
Family Support, Child Custody, and Paternity	
Lieutenant Colonel Alfred F. Arquilla .....	17
Military Child Advocacy Programs: Confronting Child Maltreatment in the Military Community	
Captain Thomas J. Hasty, III .....	67
The Soldiers' and Sailors' Civil Relief Act of 1940 as Applied in Support Litigation: A Support Enforcement Attorney's Perspective	
Major Stephen R. Hooper .....	93
Practical Considerations in Handling Army Nonsupport Cases	
Major Charles W. Hemingway .....	105

## MILITARY LAW REVIEW

### TABLE OF CONTENTS

<i>Title</i>	<i>Page</i>
<b>PART III: LEGAL ASSISTANCE OVERSEAS</b>	
A Practical Guide to German Divorce Law	
Mr. Peter Holzer .....	121
Rights of Family Members Who Separate While Residing in the Federal Republic of Germany	
Mr. Jerry E. Shiles .....	131
Dissolution of Marriage in Japan	
Mr. Omar I. Ojeda.....	149
Tying the Knot at Sea	
Lieutenant Colonel James B. Smith.....	155
<b>PART IV: ESTATE LAW</b>	
Uniform Gifts to Minors Act	
Major Dominick J. Delorio .....	159
Non-Probate and Probate Administration of Small Estates Involving Deaths of Military Personnel: Thoughts of a Probate Judge	
Captain Richard M. Morton .....	175
Summary Courts and the Disposition of Deceased Soldiers' Effects	
Captain L. D. Jentzer .....	185

**MILITARY LAW REVIEW**  
**TABLE OF CONTENTS**

<i>Title</i>	<i>Page</i>
<b>PART V: PROACTIVE LAW</b>	
Preventive Medicine and Preventive Law: Fort Stewart's "Corporate Fitness" Program for Senior Officers	
Major Thomas L. Bryant and Major Charles W. Hemingway.....	211
Computer-Assisted Wills Program	
Captain James J. Gildea .....	227
Developing a Legal Assistance SOP	
Major Mark E. Sullivan.....	249
Continuing Powers of Attorney: A Military Use	
Captain Kent R. Meyer .....	257
<b>PART VI: PHYSICAL DISABILITY</b>	
The Army Physical Disability System	
Captain Eva M. Novak .....	273
<b>PART VII: PROPERTY LAW</b>	
Primer on Analyzing Oil and Gas Leases From the Landowner's Viewpoint	
Major Joseph W. Hely, Jr. ....	289

## MILITARY LAW REVIEW

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## INTRODUCTION

by Major General Hugh R. Overholt  
The Judge Advocate General, U.S. Army

It gives me great pleasure to introduce this Legal Assistance Symposium issue of the *Military Law Review*. The Army Legal Assistance Program has made great strides in recent years. This Symposium issue is one more example of how far we have come.

A common thread, that runs from my early legal assistance days at Fort Chaffee through the time I supervised a busy legal assistance office as Staff Judge Advocate at XVIII Airborne Corps, Fort Bragg, is that our soldiers and their families depend upon the Judge Advocate General's Corps for quality legal assistance. In my recent duties, conducting Article 6 inspections, I have always made it a priority to visit Legal Assistance Offices. I not only talk to the attorneys, but also like to visit with clients to get their feedback on the quality of services provided. I am constantly impressed with the morale, initiative, and dedication of our legal assistance officers. Their clients seem well-satisfied with their services.

Let me reemphasize some of the points which I addressed to staff judge advocates in Policy Letter 85-9, 17 December 1985. First, legal assistance is an important job and must be given the recognition it deserves. Accordingly, in larger offices, the Chief, Legal Assistance, should be a field grade officer or a senior captain who has completed the Graduate Course. Policies that result in assigning only new officers to legal assistance, or which limit the duration of a tour in legal assistance, detract from our high standards for the program. Similarly, it is beneficial to have a judge advocate who is a member of the local bar assigned to legal assistance. It is invaluable for legal assistance officers not licensed to practice in the jurisdiction to have the opportunity to consult with a "local" practitioner. This also creates the opportunity for participation in an expanded Court Representation Program. The locally licensed judge advocate may either represent eligible clients in local courts or sponsor other legal assistance officers before those courts. Also, the active participation of our fine Reserve Officers further extends our ability to provide local assistance.

Military lawyers must show initiative in developing preventive law programs. Although preventive law remains a command responsibility, commanders frequently have more than enough to

worry about without attempting to develop such a program on their own. If the local Legal Assistance Office develops and implements such a program on behalf of commanders, we all — attorneys, commanders, soldiers and their families — will reap the rewards.

The legal assistance office must have necessary support, to include secretaries, notaries, and state-of-the-art office equipment. The office must also maintain adequate reference and resource materials. A wide range of publications are now available to legal assistance officers that were not available when I saw my first legal assistance client at Fort Chaffee, Arkansas. Copies of this Symposium issue, and the prior Legal Assistance Symposium issue (Volume 102, *Military Law Review*) would make excellent additions to your libraries. These Symposium editions are designed to be practical guidance in a succinct form which will answer many of the tougher questions faced by legal assistance officers. This issue, for example, contains an excellent section on legal assistance practice overseas, with particular emphasis on German family law considerations.

We have built the Army Legal Assistance Program on a strong foundation. It is time to reach out and provide even greater services to our clients. We must take a proactive approach to legal assistance and develop imaginative and innovative programs. I have been extremely pleased, for example, with the worldwide implementation of our Tax Assistance Program. While the final statistics have not been compiled, initial indications are that we have saved our soldiers thousands of dollars. In addition, we have begun a program to develop computer software to enhance the Legal Assistance Program. This software will enable us to manage our legal assistance client case files and to prepare wills, not only in deployment settings, but in the office as well. We are also exploring a new disputes settlement program that could obviate much potential litigation. In the main, the possibilities are limited only by our imagination and desire.

## PART I: A VIEW FROM THE TOP

### PRACTICAL POINTERS FOR LEGAL ASSISTANCE OFFICERS: A VIEW FROM THE TOP

by Brigadier General Donald W. Hansen\*

*The following article is adapted from an address by Brigadier General Hansen to students at the 17th Legal Assistance Course at The Judge Advocate General's School on 24 October 1985.*

#### I. INTRODUCTION

Of all the work that lawyers do in the military, it would be fair to say that the toughest job is truly that of the legal assistance officer. One of the many reasons for this is that we had a terrible habit of assigning our newest and most inexperienced judge advocates to that position. Newly commissioned judge advocates know little about the practicalities of legal assistance in the military and few know anything about the military itself, for example, who the important players are in our military communities. In the past, we assigned these young attorneys to Fort

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\*Judge Advocate General's Corps, U.S. Army. Brigadier General Hansen has been assigned as the Assistant Judge Advocate General for Military Law, U.S. Army, since July 1984. He was formerly assigned as the Commander, U.S. Army Legal Services Agency and Chief Judge, U.S. Army Court of Military Review, December 1981 to June 1984; Executive to The Judge Advocate General, U.S. Army, July 1981 to November 1981; Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army, July 1979 to June 1981; Staff Judge Advocate, Fort Dix, New Jersey, July 1976 to June 1978; as well as several other notable assignments, including Vietnam. LL.M., University of Michigan School of Law, 1973; J.D., University of Colorado School of Law, 1958; B.A., University of Colorado, 1956; Aspen Institute for the Humanities, Aspen, Colorado, 1984; Center for Creative Leadership, Greensboro, North Carolina, 1982. U.S. Army War College, 1979; Command and General Staff College, 1970; Judge Advocate Officers Advanced Course, 1965; Judge Advocate Officer Basic Course, 1960. Brigadier General Hansen authored *Judicial Functions for the Commander?*, 41 Mil. L. Rev. 1 (1968); *Miranda and the Military Development of a Constitutional Right*, 42 Mil. L. Rev. 55 (1968); *Discharge for the Good of the Service: An Historical, Administrative and Judicial Potpourri*, 74 Mil. L. Rev. 99 (1976); *Conflict Resolution in the Military Society*, a paper presented in 1984 to the University of San Diego School of Law Annual Conference on Law and Anthropology; and *The United States Courts of Military Review: Unique Processes, Powers and Responsibilities for an Appellate Court*, a paper presented to the 1984 Annual Meeting of the Academy of Criminal Justice Sciences. Member of the bars of the Supreme Court of the United States, the Supreme Court of Colorado, the U.S. District Court for the State of Colorado, the U.S. Court of Military Appeals, and the U.S. Army Court of Military Review.

Indiantown Gap or Sinop, Turkey, handed them a copy of Martindale Hubbell, told them to practice the law of all the fifty states, and then admonished them not to "commit any malpractice." I think that in spite of this we have been extremely fortunate. So far I am aware of only one claim of legal malpractice against the Army. Nevertheless, assigning new Army attorneys to be legal assistance officers is fraught with peril. When I told my civilian practitioner friends how we sometimes did business, they were astounded.

Today we are doing a much better job of preparing new judge advocates for the all-encompassing legal assistance practice they will encounter. TJAGSA Basic Course instruction on legal assistance has been increased in the areas of law most often encountered in military practice and there is increased emphasis on practical exercises such as will drafting, separation agreement negotiations, and interviewing and counselling. OTJAG is increasingly performing a vital "resource" function by mailing materials that we either produce or procure on a regular basis to the more than 200 Army legal assistance offices. In addition, The Judge Advocate General, Major General Hugh R. Overholt, has been taking a hard look at our assignment policies to prevent the posting of inexperienced Army attorneys at isolated locations.

During my time as a legal assistance officer - and that was some time ago - at Fort Jackson, South Carolina, and Camp Zama, Japan, one of the most important events each month was receiving the package we used to get from a fellow by the name of Colonel Winkler. Colonel Winkler was an Army Chief of Legal Assistance who collected and distributed all sorts of things that were very essential to legal assistance officers—where to write for records, handouts on lemon laws, *etc.* We survived thanks to those materials and their arrival was a big event. The biggest problem, however, was that when the legal assistance officer left, he always took those useful materials with him and his successor had to collect a new batch. I understand that remains a problem even today.

## II. VIEW FROM THE TOP

In this "view from the top" I want to emphasize to you the importance that Major General Overholt places on the Army Legal Assistance Program. Within the Department of the Army there are indeed only two services where we help good soldiers and their families: claims and legal assistance. Most of our time,

unfortunately, is spent putting bad soldiers in jail or out of the service.

As the Assistant Judge Advocate General for Military Law, the legal assistance side of the Corps is my responsibility. In my OER support form, there are several major items dealing with legal assistance upon which I am evaluated. I can tell you that legal assistance is important to The Judge Advocate General because he personally added at least two of those legal assistance items to my support form. This is one of the reasons that causes me to be very concerned about the Army Legal Assistance Program also.

When Major General Overholt and Major General Suter, The Assistant Judge Advocate General, make their Article 6, UCMJ visits, they are going to talk to the legal assistance officers and look at their offices. Even "worse," or better depending on how good a program you have, they will try to talk to some of your clients and find out how long it takes to get an appointment to see you, how they were treated, and what the results were. Some of that feedback will be provided to your rater. With that as background, I will now discuss several things about legal assistance, set some tones, and particularly for the Army legal assistance officers, give you some advise on how to get promoted.

### **III. CONGRESSIONAL RECOGNITION OF LEGAL ASSISTANCE**

We in the JAGC have a very "proactive" attitude toward legal assistance for our soldiers and their families—we are "leaning forward in the legal foxhole" as it were. But what about the Congress? Congress statutorily recognized legal assistance in the military for the first time in the DOD Authorization Act of 1984. This recognition has been codified at 10 U.S.C. § 1044. The problem with the Act is that establishing a legal assistance program in each military service is still discretionary and subject to availability of resources. Unfortunately, Congress did not make legal assistance a statutory entitlement, which is what we were after—an entitlement just like medical care. Nonetheless, the Act did statutorily create and clarify the status of the legal assistance attorney and that is certainly a good step forward. Unfortunately for practitioners at the post, camp, and station level, there was no authority in the Act for appropriations which would have permitted us to ask for additional resources for the Army Legal Assistance Program. The statute remains, however, a recognition

by the Congress that the military services should have legal assistance programs. Also, the Act's recognition of legal assistance programs may give the legal assistance officer some protection against possible legal malpractice claims arising from legal assistance services rendered by that officer.

#### **IV. EMPHASIZING INNOVATIVE, HIGHLY VISIBLE, LEGAL ASSISTANCE PROJECTS**

One of the challenges for legal assistance officers is overcoming a traditionally low profile—a matter I will address again when I talk about how to get promoted. Usually, legal assistance officers sit in their offices quietly rendering valuable legal services to soldiers and their families, but often without anyone knowing what they are doing. You perform a valuable service in the Army and I want you and your programs to be more visible on your installations. I would, therefore, like to challenge you to be visible in several areas.

One way to increase your visibility is to become involved in the Army Family Action Plan. The Army Family Action Plan is an ongoing plan designed to upgrade and improve the quality of life for our military families. This program is among the most visible in the Department of the Army, especially because the DA program meetings are chaired by either General Maxwell Thurman, our Vice Chief of Staff, or Lieutenant General Robert Elton, our Deputy Chief of Staff for Personnel. The DA staff representatives are all general officers; I am the junior general officer on the committee. If you legal assistance officers at the posts, camps, and stations are not on the local Family Action Council, you are missing a good opportunity to be visible. The Army-wide director for the Family Action Plan said at a recent meeting: "This is a great program, we're doing wonderful things out there, the problem is there's only one organization that I see at every one of our posts, camps, and stations helping the soldier and his family." I was all set to receive that accolade for the JAG Corps. Unfortunately, he was speaking about the post chaplain not the legal assistance officer.

My hope is that we can turn this around and be the organization most involved in the Family Action Plan. I have asked Major General Overholt and Major General Suter to find out during their Article 6 visits whether the local legal assistance officer is participating in the Family Action Council. If you are a

legal assistance officer and you are not a member, you ought to ask to join the Council. In my opinion, this is the place where you can do good deeds and make the kind of "points" I am going to talk about later that will help you, the legal assistance officer, get promoted.

The second area in which you can be visible and which is critical to the Army Legal Assistance Program is the Army Tax Program. In the past we have limited our involvement in tax matters to providing advice. The Judge Advocate General's School has distributed an innovative model tax program to the field. What we hope to do now is put as many commercial tax preparers as possible out of business at Army posts, camps, and stations by actually sitting down with the client and assisting him or her in preparing tax returns. Some of our installations have had very successful programs where legal assistance officers, the unit tax advisors, or Army Community Service VITA personnel help prepare tax returns. In 1984, for example, a legal office in Vicenza, Italy, moved a trailer to the PX parking lot and filled out tax forms for clients. Why should soldiers pay \$50-\$75 to a commercial tax preparer when we can do it just as well on the installation?

General John Wickham, the Army Chief of Staff, sent a message to the field telling commanders that he wants this type of tax program. So, when your commander asks you about it, you will be able to "make his day" and make the tax program work. Although the program includes a number of post organizations, it falls within the direct responsibility of the legal assistance officer. Make it work!

## V. COURT REPRESENTATION PROGRAMS

The next area I would like to discuss briefly is that of court representation. In my days as a legal assistance officer, the idea of going into court on behalf of a legal assistance client never even crossed my mind. The policy was clear: we had to sign in blood that all we would do was provide advice. If it was a court case we would send the client downtown to a civilian lawyer and that was the end of it.

As you know, in the Army we now have three kinds of expanded legal assistance programs which allow legal assistance attorneys to represent their clients in local courts. In one, the state approves the program and permits our attorneys to appear

in its courts. Unfortunately, to establish this type of program we often have to go "hat-in-hand" to local bar associations and ask them for their support to appear in court. The second type of program is where we use a Reserve component attorney to do legal assistance who is admitted to practice in the local jurisdiction. He or she becomes the lead counsel of record and we do the work. Sometimes the Reserve component attorney does the work in exchange for retirement points. This is very similar to most clinical programs at law schools. The third program, which we are trying to improve, is where we have a military attorney assigned to an installation in a state where he or she is admitted to practice: that attorney can represent clients in that state's local courts as a matter of right.

These expanded legal assistance programs give legal assistance officers an opportunity to engage in the real practice of law with real clients in real courts. If you do not have an expanded program on your CONUS installation, you should certainly consider beginning one.

## VI. AUTOMATION

Automation is here. If you have not yet automated your legal assistance office, do so. We have a computer at OTJAG dedicated to legal assistance. We are testing several programs for preparing wills, powers of attorney, and office management that will be fielded at a later time. If there is a mobilization requirement for your office because some of your units are on alert or have deployment missions, you can tailor wills or powers of attorney to the needs of each individual client quickly and efficient with a computer. But, to automate your practice you have to get into the resource business. You must tell your SJA: "Hey, boss, when we do the resource allocation for this year, this is what I need and this is what I want." Specifically, computer hardware and software for your office must be included as a part of the resource plan for your SJA office. No one is going to come to your office and gratuitously offer you equipment or software; nor is it going to magically appear. If you want it, you must get in there and fight for it just like everybody else on your post.

## VII. LEGAL ASSISTANCE OFFICE MANAGEMENT

I would like to touch on the problems of management. You must understand that a legal assistance office is always going to

be understaffed given the number of our potential clients. That means that you have to run your legal assistance office like a business. It has to be time-managed. It is not enough to say, "I'll start in the morning and I'll end in the evening." Depending on the nature of your operation, you may need to set up appointments in a way that makes the most effective use of your valuable time. You need to use non-lawyer assistance, if it is available. You have to have form books, SOPs, and a good secretary. When I was in private practice in Denver before I came on active duty, we had a secretary who knew more about probating estates than any attorney in the state. She was the one who prepared all the documents for review and execution by the attorneys. Now that was a money-making operation for my employer. Depending on the personnel in your office, you can do similar things to save the attorney's time. As Lincoln said, "Time is the lawyer's stock in trade." One resource that is often overlooked is Reserve judge advocates. There are attorneys out there in Reserve units who are experts in almost every field of law having special importance to the legal assistance function. There is sometimes an unfortunate tendency to not want to use our Reserve attorneys.

When I was with the Army Court of Military Review, we initially used our Reservists to do research and the "gofer" sort of thing. We had state supreme court justices and appellate court judges assigned to us, but we never used them as appellate judges for ACMR. It was a poor use of a valuable asset. That was changed and they are now used as full-fledged members of the Army Court of Military Review during their active duty tours. The same is true of the Reservists assigned to your office. Their legal expertise should be used properly. The only matter of concern is the potential conflict of interest between their duties as legal assistance officers and their private practices. The rules are pretty clear, however, and you need only ensure that they are followed in order to maximize the benefit of using Reserve judge advocates in legal assistance.

## VIII. DUAL REPRESENTATION PROBLEMS

Another area of potential conflict of interest in your office occurs when a soldier and his wife both want legal assistance in a domestic relations matter. Dual representation is fraught with peril; there are, however, all sorts of ways to avoid it. When I was at Fort Dix we had an arrangement with McGuire AFB whereby

we would represent one spouse and they would take the other. That arrangement worked out extremely well. A second possible solution is to work out a similar arrangement with Reserve judge advocates. For isolated offices where these arrangements may be impossible, have someone from another section in the SJA office, *e.g.*, administrative law section, take one of the spouses or arrange with TDS to take the other spouse. As The Judge Advocate General's policy letter on legal assistance representation of both spouses states, use different attorneys within the same legal assistance office to represent the husband and the wife only as a last resort. Even then, the SJA must approve the representation and both spouses must give their informed consent to the arrangement. Besides being contrary to JAGC policy, having attorneys from the same office represent both parties to a domestic dispute is just not smart. If either of those parties is dissatisfied and wants a "whipping boy," it is going to be your legal assistance office because that client knows those attorneys work together, go to the Club together, *etc.*, and may conclude that "his or her attorney" failed to properly represent him or her because of this.

Also, you must ensure that a conflicting client is actually referred for representation. In two recent cases, the wife came into the legal assistance office and was seen. The husband then came in and was told: "We can't help you because we're helping your wife." That was the end of it as far as the husband-soldiers were concerned. In an inspector general complaint in one of the cases, and in an attack on the divorce in the other case, the soldiers asserted that no one in legal assistance would help. These were self-inflicted wounds to the Army Legal Assistance Program. Ensure that the conflicted spouse has an appointment to see counsel.

## IX. LEARNING TO SAY "NO"

The last thing I would like to talk about in terms of limitations is the tendency to want to do all things for all people. You have to be able to say, "No." "No, Commanding General, I don't know enough about wills and trusts and estates to set up a \$4 million estate for you. You need to go talk to somebody downtown who specializes in them." At an earlier assignment, my commander's wife was one of the heirs to a very large fortune in Texas. He was always trying to get me to interpret the estate plan that had been put together by the family attorneys. It was hard to keep telling him, "No, I don't know enough about it. It was set up by a

private attorney to do specific things, and I'm not going to advise you on it." You have to be able to say "No" when the requested legal advice is beyond your expertise. Of course, your obligation does not end when you say "No." You must then refer the client to an attorney who is competent in that area.

## **X. THE IMPORTANCE OF MAKING YOUR OFFICE LOOK LIKE A LAW OFFICE**

The appearance of your office affects your clients' perception of you. Your office must look like a law office. How does one look? If you do not know, go downtown and look at some. They look nice, they are freshly painted, they have pictures on the wall, and the attorneys have their diplomas and bar association certificates hung on the walls. Simply put, they look professional and imply to the client that good, professional legal work takes place in those offices. When I was at the 3d Armored Division in Germany, The Judge Advocate General came to Europe on one of his Article 6 inspections. At that time, Army policy required that a soldier see a lawyer before he went into pretrial confinement. The Judge Advocate General said, "Wayne, let's go down to Mannheim [where the central confinement facility is]; I'd like to talk to some of your soldiers." "Yes Sir," I replied and off we went to Mannheim. He found a 3d Armored Division soldier in the facility and asked, "Soldier, did you get to see a lawyer before you went into pretrial confinement?" The soldier replied, "No sir, all I got to see was a JAG." This is the sort of misconception that all judge advocates have to overcome, not just legal assistance officers. We have to convince people that judge advocates really are lawyers.

Making your legal assistance office look like a law office will help convince your clients that you really are a lawyer. I have not been to a post, camp, or station yet where I could not find paint for my office, even though I had to do the painting myself. Keep in close contact with the claims officer. Find out when he or she turns in furniture to the Property Disposal Office, and, if it meets your needs, go over to the Property Disposal office and sign it out for your own office. Even if you do not have the best building or best offices, there is no excuse for having a law office that does not look professional. Besides, you spend at least eight hours a day there and no one wants to work in a dump.

## XI. "BLOWING YOUR OWN HORN": PROMOTION FOR LEGAL ASSISTANCE OFFICERS

Now I would like to discuss promotions, an especially difficult area for legal assistance officers. For one thing, your rater cannot observe you advising your clients. You are dealing one-on-one with a client behind a closed door, unlike a defense counsel or trial counsel whose rater can evaluate his or her performance by sitting in the courtroom or reading a record of trial. You also do not write brilliant legal opinions for the SJA and the commanding general like the administrative law attorney does. You are simply on your own doing your best for Private Smith and his family. It is extremely difficult, therefore, for your rater and your senior rater to evaluate you.

The second problem is lack of positive feedback from clients. You can have 10,000 clients who are as excited as they can be and pleased with the advice you give. How many of them will write to the commanding general and tell him what a great legal assistance officer you are? None! But if you have a client who is really upset with your advice or the way he or she was treated, what are the chances he or she will write to the CG? Great! So, your SJA may be ready to write your OER and may have three letters complaining about you and no "atta boy" letters. You are not going to get a glowing OER. This is not how to get promoted.

Third, you need good OERs. How do you get a good OER? The first thing you do is fix up your office. Make that one of your performance objectives on your support form. Second, come up with a list of projects and put them on your OER support form: "I'm going to write 10 articles for the post newspaper." To write these, you could use the excellent materials and articles provided to you by the Legal Assistance Branch, TJAGSA. Also, become involved in pre-development preparation if you are assigned to an organization that has short-term deployment requirements. Help the commander of that organization get his people overseas-qualified. Additionally, most military personnel have an annual dental checkup or an annual physical. How many times have you held an annual legal checkup for your commanders on post? Commanders are like lawyers. Like us, they never have their wills up to date, or their powers of attorney, or their legal affairs in order. Commanders say they are too busy. Well, they are not. Hound them, call them, insist on some time with them.

We have excellent materials for legal checkups. Sit down with the battalion commander and the brigade commander and ask, "Sir, when was the last time you looked at your will?" He may say, "Well, I don't have one." You tell him then that it is time to get one and talk to him about his legal affairs. The commander will then call the SJA and say, "Hey, I saw your legal assistance officer over here today. He has been bugging me to do my legal checkup and I found out so and so and such and such." This is one way to get positive feedback to your SJA and help you get a good OER.

Fourth, there is probably not an organization in the entire U.S. Army that does not welcome volunteers to come teach classes. Any company or battalion commander would give you some time at officer's call or commander's call to talk about important legal matters. Teaching classes can be an item on your OER support form.

These strategies will not only help you get promoted, they will also take you out of that little office and put you into the Army. Get involved in community staff meetings, the child abuse counsel, juvenile activities, and programs for newly arrived soldiers and their families. At every place I have been assigned, when new people come into the command they get a briefing on local law. This briefing is a good place for you to get up in front of potential clients and tell them about the important laws in that jurisdiction. In that sense I guess we can be accused of a little "ambulance chasing," but this is the essence of "proactive" legal assistance.

Remember, though, that even the best high visibility programs are absolutely meaningless if you neglect the day-to-day legal assistance business of advising clients. Soldiers whose own legal needs and those of their families are met are better soldiers. We owe that to them.

A well-balanced legal assistance program of highly visible "proactive" projects and effective representation of individual clients will result in that glowing OER that will help get you promoted. But, it is up to you to "toot your own horn" and tell your rater and your senior rater about your accomplishments. The worst OER I ever got was when the Deputy SJA called me in one day and said, "Wayne, it's time for your OER. You write it and I'll sign it." That was a terrible dilemma for me. I thought, "Gee, I've been doing a pretty good job, but if I write too good an OER he'll think I'm bragging. He might not sign it. On the other hand,

I have done a good job that I'm proud of and I deserve credit for it." That OER I wrote for myself was the worst one I ever got - maybe also the most honest. The point is that the OER support form provides you the opportunity to do what I have been talking about: the opportunity to tell the boss what good things you have done and how valuable you are to the Army. There is nothing wrong with this. However, if you say you have been conducting legal checkups, and you have not, you may have a little problem.

In addition to telling your boss what a good legal assistance officer you are, why not write the OTJAG Legal Assistance Office and then tell them of your new programs. We found on an Article 6 visit that either one of the local banks or the on-post banks was trying to force all soldiers to pay everything that had been charged to their credit cards when their credit cards had been stolen even though the law limits liability to \$50. A legal assistance officer got involved, straightened up the bank, and saved those soldiers a lot of money. That is a good illustration of something OTJAG Legal Assistance should be told about. Another example is the successful III Corps personal recognizance bond program run by the legal assistance office.\*\* A soldier who is arrested and jailed by the local police must appear before a judge for arraignment and setting of bail. Under the III Corps program, a legal assistance officer talks to the soldier's commander, makes a presentation to the judge, and advises the court, in appropriate cases, that the command assumes responsibility for the soldier's appearance at trial. The soldier is released on a personal recognizance bond which results in huge financial savings for the soldier. It is a good positive program. I found this to be an especially interesting program because I performed this duty at Petersburg, Virginia, while waiting for the basic course to begin. Sometimes we forget about good programs and end up reinventing the wheel. If you have these sorts of legal assistance programs in your command, tell us about them. What do we do with them? We tell Major General Overholt and Major General Suter about them. This is a chance for you to get your name before the JAGC front office. So let us hear about these excellent legal assistance programs you have developed.

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\*\*The III Corps program is discussed in Stout & Rosso, *The Fort Hood Personal Recognizance Bond Program*, *The Army Lawyer*, Apr. 1985, at 28.

## XII. CONCLUSION

My advice to you in this "view from the top" would be incomplete if I did not tell you, "Have Fun." JAG work has got to be fun. You do not get paid enough so your "extra compensation" must come from enjoying your job. Look up from the books occasionally. Enjoy your line associates, our clients. We have some really fine cannon cockers, tankers, and ground pounders out there. They are fun to be with and they are fun to be around. If you do not appreciate soldiers and enjoy soldiering, you probably ought not be in the Army. Know what is happening on your installation. Participate in the activities of your installation. While you cannot be forced to join the Officer's Club, it is a smart thing to do. That is where many of your clients are, that is where you will talk to them about what is good, what is bad, and what needs to be fixed in the Army.

You do not have fun by sitting in your little office waiting for clients to come to you. Look for adventure; it is out there. All you have to do is be prepared to seize the opportunity when it arrives. In legal assistance, you are helping our good soldiers and their families. But to be successful you have to be imaginative, you have to be innovative, you have to know what is going on in your command, and you have to take care of yourself.



## PART II: FAMILY LAW

### FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY

by Lieutenant Colonel Alfred F. Arquilla\*

#### I. INTRODUCTION

Army Regulation 608-99, Support of Dependents, Paternity Claims, and Related Adoption Proceedings<sup>1</sup> is no more. In its place is a new regulation, of the same number, entitled "Family Support, Child Custody, and Paternity."<sup>2</sup> The new regulation, published in the UPDATE system, was effective on 4 November 1985. The new regulation reflects input received from those at Department of the Army (DA) charged with making and implementing policy in these subject areas, as well as from legal assistance officers worldwide tasked with finding solutions to the family law problems covered by the regulation.

The purpose of this article is to provide background on the new regulation and to explain some of its new provisions. Much of the language of the new AR 608-99 is directed at correcting the problems of ambiguity, vagueness, and unenforceability experienced under the old one. The new regulation contains mandatory language on financial support, child custody, and paternity. The "shoulds" have been replaced with "wills," and explicit instructions have been substituted for much of the general guidance contained in the old regulation. There is little room left for interpretation and there is no question as to which provisions of the regulation are punitive and enforceable against soldiers.

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<sup>1</sup>Dep't of Army, Reg. No. 608-99, Support of Dependents, Paternity, and Related Adoption Proceedings (15 Nov. 1978) (hereinafter cited as the 1978 Regulation).

<sup>2</sup>Dep't of Army, Reg. No. 608-99, Family Support, Child Custody, and Paternity (4 Nov. 1985) (hereinafter cited as AR 608-99) (this regulation is part of the UPDATE system).

## II. BACKGROUND

The proponent agency of AR 608-99 is the Office of the Deputy Chief of Staff for Personnel (ODCSPER). The U.S. Army Community and Family Support Center (USACFSC), a field operating agency of ODCSPER, was activated on 1 December 1984 and assumed responsibility for the regulation, although ODCSPER retained proponentcy. The Personal Affairs Branch of USACFSC is responsible for updating and implementing the regulation, as well as for providing policy interpretation and guidance on unresolved cases brought to its attention by the field.<sup>3</sup> The personnel of this branch are the ones who contact a soldier's commander when, for one reason or another, a nonsupport, paternity, or child custody complaint comes to DA's attention.

Army Regulation 608-99 had been under revision since 1981. For numerous reasons this project never seemed to get off the ground. Several drafts of a revised regulation were circulated for comment to the Army staff and major commands between 1981 and 1985.<sup>4</sup> On several occasions the Office of The Judge Advocate General (OTJAG) and The Judge Advocate General's School (TJAGSA) provided recommendations as to content and format. Some of the suggestions were incorporated and others were not. The final product that was scheduled for publication in February 1985 was not much different or better than the old regulation. The old ambiguity and enforceability problems still remained. As a result, that revised draft regulation was withdrawn and, in the months following, completely rewritten.

In April 1985, USACFSC sent a message<sup>5</sup> to the field clarifying

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<sup>3</sup>*Id.* at para. 2-11c. The telephone number of the Personal Affairs Branch is AUTOVON 221-8951.

<sup>4</sup>One of the earlier drafts was forwarded to the Army staff with a recommendation that it serve as a basis for a uniform policy for all the services. The draft included formulas for determining the amount of the support obligation in the absence of a court order or support agreement. Air Force and Navy policies were considered, but the formula that was recommended more closely resembled the Navy's approach to the problem. In each family support situation, the Army proposal recommended that the amount of support be a certain percentage of soldier's basic pay. The Army staff, however, was reluctant to accept this formula. Based on guidance received from ODCSPER, the Army decided to retain the Basic Allowance for Quarters (BAQ) at the with-dependents rate as the Army minimum support standard. Furthermore, it was decided that the Variable Housing Allowance (VHA) would not be a part of this standard because the VHA amount often depended upon the cost of housing prevailing in the location of a soldier's duty assignment rather than the location of the supported family members.

<sup>5</sup>Message, CDR USACFSC, DACF-IS, 161400Z Apr 85, subject: Army Policy Concerning Support Of Dependents (Family Members) in Separation/Divorce Situations.

DA policy on the issue of financial support in multiple-family situations—that is, situations where a soldier is supporting more than one set of family members (e.g., children from a prior marriage in the former spouse's custody and children and an estranged spouse from a current marriage). This message was sent out in response to complaints from legal assistance attorneys that DA guidance as to the amount of support expected in such situations was unclear in the old regulation. Given the frequency with which multiple-support situations are encountered in the field, it was felt that guidance in this important area should not await publication of the new regulation. As will be discussed, the message directed that each family member receive an amount equal to his or her pro rata share of the Basic Allowance for Quarters entitlement at the "with-dependents" rate ("BAQ-with") for the soldier's grade.<sup>6</sup> From all indications, this clarification was well received by legal assistance attorneys in the field. As a result, this formula for computing the amount of support in multiple-family situations was incorporated (with one modification) into the new regulation.<sup>7</sup>

### III. SURVEY OF LEGAL ASSISTANCE OFFICERS

The Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA, initiated a survey of all legal assistance offices throughout the Army to obtain their opinions on the old regulation and their suggestions on ways to improve it. Their responses, which came in while the regulation was being rewritten, highlighted many of the deficiencies in the old regulation that had to be corrected if the new regulation was to be effective.<sup>8</sup>

Seventy surveys were returned by the legal assistance attorneys who responded to the questionnaires sent to their offices.<sup>9</sup>

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<sup>6</sup>The pro rata formula by which BAQ was to be divided between family members was first proposed by the Legal Assistance Office of OTJAG. Prior to this message being sent, the Personal Affairs Branch of USACFSC was advising those who inquired from the field that soldiers in multiple-family situations were expected to provide an amount equal to the soldier's "BAQ-with." No guidance was given on how—or if—this amount was to be divided among each set of family members. The message was sent to provide a realistic formula by which to measure the minimum financial support obligation to each set of family members.

<sup>7</sup>See AR 608-99, para. 2-4b. The one modification reduced the amount of support to children of military-member parents residing off post from "BAQ-with" to the difference between "BAQ-with" and BAQ at the without dependents rate ("BAQ-without").

<sup>8</sup>The author also wishes to acknowledge input received from personnel of the Administrative and Civil Law Division, TJAGSA.

<sup>9</sup>Statistics collected from a worldwide legal assistance report rendered in

Of these, a majority—

- a. Felt the Army should have a regulation covering the support of family members (90%).
- b. Favored the regulation remaining punitive in nature (77%).
- c. Was dissatisfied with the old regulation as written (73%).
- d. Felt that more explicit guidance in the regulation would save time and effort for them and their clients(73%).
- e. Characterized the response of commanders to nonsupport complaints as poor to fair (53%).
- f. Was satisfied with financial support based on the BAQ standard (56%).

The new AR 608-99 reflects the results of this survey. The problem of enforcing the regulation was one of the most troublesome areas mentioned by legal assistance attorneys. This, of course, was a problem, not for soldiers, but for family members trying to obtain financial support. Many legal assistance officers complained that commanders, often receiving only one side of the story, tended to side with their soldiers rather than with the family members making complaints against their soldiers. Ambiguous provisions in the regulation often were interpreted in such a way as to deny financial support to family members, rather than authorize it.<sup>10</sup> The input from legal assistance attorneys was

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September 1984 indicate that there are approximately 140 full-time legal assistance attorneys in the Army, both military and civilian. Although not all legal assistance attorneys returned the survey form, all major installations and offices in all major commands responded, indicating that the sampling was statistically sound.

<sup>10</sup>The new AP 608-99 did not entirely solve this problem. However, cases in which there is a lack of appropriate command response to nonsupport complaints are now more readily apparent than before. As a result of the greater visibility given to this problem, at the time of this article's publication other possible solutions to the nonsupport problem were being formally discussed at DA. One recommendation proposed reinstating something like the old "Class Q Allotment" whereby an allowance of a certain amount of money is automatically sent directly to a soldier's spouse each month. The mandatory Class Q Allotment was discontinued after 1 July 1973 when the Dependent's Assistance Act of 1950 expired. Bills were introduced in the 97th and 98th Congresses that would have authorized the service secretaries to involuntarily pay a portion of a service member's pay and allowances equal to the amount of BAQ to the dependents of such members living apart from that member. It has been the DOD and Army position, however, that the current voluntary support allotment system meets the needs of the majority of the members and is much less expensive to administer

clear: keep the regulation punitive and give commanders explicit guidance on what is required of their soldiers. This has been done.

The new regulation was not drafted, however, to make the job of lawyers easier, but to ensure that families entitled to financial support from soldiers receive it with minimum difficulty and delay. The most effective regulation would be one that never required the involvement of lawyers. Although this is too much to hope for, it is clear that the more precise the regulation is, the less likely it is that soldiers and the lawyers representing them will be in a position to advance spurious arguments that financial support is not required in a given situation. It was from this point of view, reached in no small part from the results of this survey, that the new regulation was drafted.

#### IV. THE REGULATION

Army Regulation 608-99 was revised to respond to two issues of the Army Family Action Plan II.<sup>11</sup> One issue is the failure of soldiers at times to provide financial support to their families—specifically, the problems encountered by family members in obtaining assistance from the chain of command in a timely manner.<sup>12</sup> The other issue is parental kidnapping and the enforcement of child custody decrees.<sup>13</sup> These problems are particularly aggravated when the soldier is serving overseas unaccompanied by his or her spouse. USACFSC was tasked to develop policies to address these problems; AR 608-99 contains those policies. As mentioned, the regulation is punitive.<sup>14</sup> A violation of the minimum support requirements of paragraph 2-4 or the child custody provisions of paragraph 2-5 constitutes a violation of a lawful general regulation under Article 92 of the Uniform Code of Military Justice (UCMJ).<sup>15</sup> The requirements placed on a soldier in each instance are clear and do not require further notice, clarification, or implementation by a soldier's commander.<sup>16</sup>

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than a mandatory system.

<sup>11</sup>Dep't of Army, Pamphlet No. 608-41, Army Family Action Plan II (20 May 1985) (this pamphlet is part of the UPDATE system).

<sup>12</sup>*Id.* at para. 3-4s.

<sup>13</sup>*Id.* at para. 3-4k.

<sup>14</sup>AR 608-99 also has been published in the Federal Register. 50 Fed. Reg. 52,447 (1985) (to be codified at 32 C.F.R. § 584).

<sup>15</sup>Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1982) (hereinafter cited as UCMJ). See AR 608-99, para. 1-7.

<sup>16</sup>"Paying BAQ" to one's family has been the accepted standard of financial support within the Army for a long time. Soldiers know when they have a support obligation to their families. Counselling is not likely to inform them of something they do not already know. Making punitive action dependent on counselling would only result in many families going without support until their complaints were

The intent of AR 608-99 is not to subject all soldiers who fail to support their families to trial by court-martial but to give the regulation "teeth."<sup>17</sup> The threat of punitive action is sometimes necessary to induce compliance. Idle threats do not work. As one legal assistance officer pointed out, the old support regulation was really only enforceable against soldiers who were "willing to provide support, were easily intimidated, or were concerned about their military careers." These punitive provisions are designed to get the attention of all the others, as well as the attention of their commanders. A commander's sympathy with the plight of a soldier or a commander's untimely investigation into the matter should not result in continued denial of financial support or child custody rights.

For one thing, the new regulation makes it very clear that sympathy, displeasure, and other such feelings toward the parties involved in a domestic dispute have no place in a commander's action under the regulation. A commander has no authority to excuse a soldier from his or her obligation to provide at least the minimum financial support required under the regulation.<sup>18</sup> The punitive nature of this provision, as well as the paragraph prohibiting parental kidnapping, allow no such discretion on the part of a commander.<sup>19</sup> As with any violation of the law, the commander still retains authority under the Manual for Courts-Martial to take no action against a soldier for violating the regulation.<sup>20</sup> Given the rigid language of the new regulation, however, a commander will be less able to use a strained interpretation of the regulation to explain his or her inaction in a particular case. The new regulation also requires the first-level

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received and acted upon by commanders. This was a common complaint about the 1978 Regulation. Also, as one legal assistance officer pointed out, soldiers "can stop and start BAQ payments and allotments with ease, and hence get away with denying support for months at a time until the system catches up with them again."

<sup>17</sup>The response from the survey of legal assistance attorneys disclosed only one reported instance where a soldier was tried by court-martial for a violation of the 1978 Regulation. The military judge ruled that the regulation was not punitive. Given the wording of the 1978 Regulation, that decision was probably correct. The same survey, however, revealed several instances where soldiers received nonjudicial punishment for nonsupport. It is not known whether punishment was imposed for violations of the regulation or for disobeying orders given by officers attempting to enforce the regulation. There are no reported court-martial cases decided by the Court of Military Appeals or the service courts of military review that involve charges arising out of the nonsupport of family members.

<sup>18</sup>AR 608-99, para. 2-4c.

<sup>19</sup>*Id.* at paras. 2-4 and 2-5.

<sup>20</sup>Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 306c(1) (hereinafter cited as MCM).

field grade commander (usually a battalion commander) to monitor all instances of a soldier's repeated failure to meet the requirements of the regulation.<sup>21</sup> Assistance from the inspector general and USACFSC can also be obtained in unresolved financial support and parental kidnapping cases.<sup>22</sup>

Martial misconduct is not an issue under the regulation with regard to a soldier's obligation to provide minimum financial support to family members<sup>23</sup> and to obey court orders on child custody. This is nothing more than a recognition of the obvious fact that a commander does not have the necessary time, training, or resources to make factual determinations in domestic dispute matters. The effect of fault or misconduct on the obligation to support is better left to the expertise of the court.

Under the regulation, both "runaround wives" and "deadbeat husbands" are entitled to financial support from their military spouses, and, if a court so decrees, to custody of the children. Soldiers or family members who are dissatisfied with the amount of financial support required under the regulation are encouraged to seek relief in court to resolve their differences by a written support agreement.<sup>24</sup> Similarly, if there is dissatisfaction with court ordered financial support or child custody, the place to resolve it is the courtroom, not the dayroom. A judge, not a commander, should decide these matters.

In response to some of the complaints received from legal assistance officers about the old regulation, the new regulation requires commanders to counsel soldiers when nonsupport and child custody complaints are received,<sup>25</sup> to answer letters sent by legal assistance officers,<sup>26</sup> to take appropriate action against soldiers who violate the regulation,<sup>27</sup> and to seek assistance from the staff judge advocate (SJA) when help is required.<sup>28</sup> To steer commanders away from taking their legal advice in these cases from the attorney representing the soldier, the SJA is defined in

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<sup>21</sup>AR 608-99, para. 1-4d.

<sup>22</sup>*Id.* at para. 2-11b and c.

<sup>23</sup>*Id.* at para. 2-1c. Note, however, that under para. 2-10c(8), marital misconduct, at least by implication, is one of several factors that commanders may consider prior to ordering temporary additional support for a spouse. It is not a factor with regard to child support.

<sup>24</sup>*Id.* at para. 2-1b.

<sup>25</sup>*Id.* at para. 1-4e(3).

<sup>26</sup>*Id.* at para. 1-4e(5).

<sup>27</sup>*Id.* at para. 1-4e(8).

<sup>28</sup>*Id.* at para. 1-4e(5).

the regulation's glossary as a judge advocate other than one serving as a legal assistance attorney or defense counsel.<sup>29</sup>

### A. THE NEED FOR THE REGULATION

A regulation on nonsupport, paternity, and child custody would not be necessary if it was not for the fact that the very nature of military service often places a family member or other person with a legitimate grievance in these areas (e.g., an unwed mother) at a disadvantage in relation to the accountable soldier. Even though family members are eligible for military legal assistance, sometimes they are at a legal disadvantage because the responsible soldier is overseas and beyond the reach of a state court. With over one-third of the Army stationed overseas, this includes a large number of situations. This legal disadvantage frequently is combined with an economic disadvantage because the complaining family member is unemployed or living a great distance from family and friends who might otherwise be available to lend financial or moral support.

The Army has a legitimate interest in seeing that soldiers handle their personal affairs satisfactory<sup>30</sup> so that such personal matters do not become official matters of concern. A personal grievance often becomes an official complaint and the Army is looked upon to resolve it. If the complaint—whatever it is—is not resolved by the soldier's commander, it quickly moves up the chain of command to be resolved at a higher level within the Army or the government. Official complaints on nonsupport, paternity, and child custody matters divert resources and consume time and effort that would be better spent on mission accomplishment.<sup>31</sup> The Army also has a continuing interest in the welfare of a soldier's family, as evidenced by the budget expenditures and existing programs designed to benefit Army families, such as family housing, medical care, child care, and legal assistance, to mention just a few.

Support paid under the regulation is intended to be only an interim measure. It is designed to regulate conduct between the time that the nonsupport, paternity, or child custody complaint arises until the matter is resolved in court or by agreement between the parties. AR 608-99 also requires continued compliance with court orders and written support agreements to ensure

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<sup>29</sup>*Id.* at Glossary, Section II.

<sup>30</sup>*Id.* at para. 1-5a.

<sup>31</sup>In the three months following the publication of the new AR 608-99 there was a noticeable decrease in the number of nonsupport complaints received at DA.

that these disputes do not recur and that a soldier is not using his or her military status or duty location "to deny financial support to family members or to evade court orders on child support or custody."<sup>32</sup>

## B. SUPPORT OF FAMILY MEMBERS

The problem of evading child support obligations is not peculiar to the military. A recent Census Bureau report disclosed that in 1983, 8.7 million women in the United States had children under twenty-one years of age whose fathers were absent from the home.<sup>33</sup> Of these, four million women had court orders or support agreements entitling them to child support payments.<sup>34</sup> Of these four million women legally entitled to child support payments, only 50.5% received the full amount of support; 25.5% received less than the full amount; and 24% received nothing.<sup>35</sup> There is no reason to believe that this statistical breakdown or child support evasion would be any different within the Army.<sup>36</sup> Indeed, legal assistance attorneys report that nonsupport and the abandonment of families is a serious problem, particularly overseas. As mentioned, the problem was significant enough to become an issue to resolve in the Army Family Action Plan II.

### 1. The Entitlement To Support.

The regulation covers support during and after marriage, and, with regard to paternity, in the absence of marriage. Except for paternity, the regulation is gender-neutral. The obligation to provide financial support to family members is the same for men and women soldiers.

The support obligation in chapter 2 of AR 608-99 is tied to the definition of family members in the glossary. The term "family member" is defined solely for the purpose of its use within the regulation. There is no suggestion here that the term, as defined,

<sup>32</sup>AR 608-99, para. 1-5d.

<sup>33</sup>Rich, *Child-Support Evasion*, Wash. Post, July 12, 1985, at A5, col. 1.

<sup>34</sup>*Id.* The remaining 4.7 million women did not receive financial support for their children for a large number of reasons. Some were no longer entitled to child support or had waived it in a property settlement. Others could not locate the father, establish paternity, or did not pursue legal action because they believed the father was financially unable to provide support.

<sup>35</sup>*Id.* This report also disclosed that only 14% of the 17.1 million women who were divorced or legally separated as of Spring 1984 were awarded alimony. The article did not reveal the number of these women who did not receive their alimony payments.

<sup>36</sup>Changes in the law which allow military pay to be garnished for the collection of child support arrearages only put soldiers on a par with their employed civilian counterparts.

is the accepted definition of "family member" as used within other Army regulations or publications. It is not. Elsewhere, "family member" is usually equated to the statutory term "dependent," the usage of which, like the term "service member,"<sup>37</sup> generally is frowned upon nowadays within the Army. Within AR 608-99, however, "family member" is defined as follows:

a. A soldier's present spouse. (A former spouse is not a family member. However, except as otherwise indicated, the term "family member" includes any former spouse for whom the soldier is required by any court order to provide support.)

b. A soldier's minor children from present and former marriages, including children legally adopted by the soldier. (A family member does not include the child of a soldier who has been legally adopted by another person.)

c. Minor children born out of wedlock to—

(1) A woman soldier.

(2) A male soldier if evidenced by a decree of paternity identifying the soldier as the father and ordering the soldier to provide support.

d. Any other person (for example, parent, stepchild, etc.) for whom the soldier has an obligation to provide financial support under the law of the domicile of either the soldier or the supported person.<sup>38</sup>

Under the regulation, a soldier is required to provide financial support only to family members as defined in the glossary. This does not include every "dependent" for whom the soldier is entitled to draw "BAQ-with."<sup>39</sup> This is a departure from past policy contained in the old regulation which required the support

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<sup>37</sup>The term "soldier" is now preferred in Army publications over the term "service member." (See message, HQDA DAPE-ZA, 121441Z Aug 85, subject: Addressing Soldiers and Army Civilians.) However, because the dictionary definition of "soldier" includes only enlisted men and because this regulation is punitive and applies to all grades, regardless of gender, the Glossary to AR 608-99 further defines "soldier" as used in the regulation to include "commissioned officers, warrant officers, and enlisted personnel." The adjective "all" was inadvertently omitted from the final draft, but will be added in the first UPDATE of the regulation to make it perfectly clear that the regulation applies to both male and female soldiers.

<sup>38</sup>AR 608-99, Glossary, Section II.

<sup>39</sup>*Id.* at para. 2-1a.

of all "dependents."<sup>40</sup> The legal basis of that requirement was questionable at best. BAQ is based on federal law; the legal obligation to support family members is almost always based on state law. Even though in certain instances the U.S. Government may authorize BAQ to support a "dependent" (e.g., parent, stepchild) the soldier may not have an equivalent legal obligation under state law to provide support for that "dependent."

The clearest example would be a stepchild entitled to receive support from a non-custodial natural parent in situations where the stepparent-soldier has separated from the custodial natural parent. The soldier may be entitled to "BAQ-with" on behalf of the stepchild under AR 37-104-3,<sup>41</sup> but may not have an obligation to support that stepchild under state law. But, if the soldier receives the "BAQ-with" solely on behalf of that stepchild (e.g., where the spouse of the soldier who was the natural parent is dead), he must provide support to that stepchild under Army finance regulations or face a recoupment of BAQ for any period in which adequate support was not provided.<sup>42</sup> However, unless required by state law, a soldier has no legal obligation to support that stepchild under AR 608-99.

A soldier is required by AR 608-99 to support a present spouse, a former spouse authorized support pursuant to a court order, minor children under eighteen who are not in active military service,<sup>43</sup> minor children born out of wedlock (as required by court order with regard to male soldiers), and all others as required by law. This latter category includes only those for whom the soldier has a legal obligation to provide financial support under the law of either the soldier's or the "family member's" domicile. If there is no legal obligation, that person is not included in the definition of family member and is not entitled to financial support from the soldier under the regulation. This legal obligation can be established by court order or by a written support agreement. In the absence of these documents, this legal obligation must be established by relevant case law or statute.

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<sup>40</sup>The 1978 Regulation, by its very title, required the support of dependents. Paragraph 1-3a(1) of the 1978 Regulation required Army members to provide financial support to "all primary legal dependents (spouse and children to include stepchildren, adopted children, or illegitimate children dependent on the member (part. 3, chap. 2, sec. B, AR 37-104-3).)" A "primary" legal dependent was not further defined.

<sup>41</sup>Dep't of Army, Reg. No. 37-104-3, Military Pay and Allowance Procedures, Joint Uniform Military Pay System (JUMPS-Army), para. 30213 (15 June 1973).

<sup>42</sup>Dep't of Defense Pay and Allowances Entitlement Manual, para. 30236 (C81 21 Dec. 1984) (hereinafter cited as DODPM).

<sup>43</sup>See the definition of minor children in AR 608-99, Glossary, Section II.

## 2. *The BAQ Standard.*

The Army is the only military service which ties the amount of the support obligation solely to the amount of the BAQ authorized for the soldier's grade. This has been done perhaps more out of tradition than for any other reason. The BAQ standard, however, probably serves as well as any schedule of support payments developed by the various states for use in their courts. Remember that under this regulation, the BAQ standard, unlike a state schedule, is used only in the absence of a court order or support agreement. BAQ is favored as a standard of support because the BAQ charts are readily available to commanders, the amount can be easily ascertained, and those amounts increase along with rank and pay.

The Army, after all, must manage a worldwide force in carrying out its mission. Although it is true that the cost of living may vary greatly from one locality to another, the Army cannot establish a comprehensive set of support schedules to take this and all other relevant factors into account. These factors would include such things as the number of children, their ages, the separate income of the parties, family savings and assets, separate and joint debts, and, where there has been a separation, the circumstance under which the parties separated. A court may consider these factors in ordering child support and alimony, but a commander is not a judge. The commander is seldom in a position to know all the facts and circumstances involving a soldier's family and financial problems.<sup>44</sup> The Appendix following this article lists the amount of support required under this standard in different family situations.

Remember, the BAQ standard is intended to be solely an interim measure of support and only applies in the absence of a court order or support agreement. This differs from state law. Under state law there may be a general obligation for a spouse or parent to provide support and pay for "necessaries," but there is no legal obligation to provide support in a specific amount in the absence of a court order or a support agreement.<sup>45</sup> The objective of AR 608-99 is to get the parties to resolve nonsupport problems by agreement or by recourse to the courts. The amount of support required under the BAQ standard is not intended to be so

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<sup>44</sup>It is for these reasons, as well as others, that the Army has never required commanders to conduct due process hearings to determine how much support soldiers should provide their families in each nonsupport case that arises.

<sup>45</sup>Support provisions of separation agreements are specifically enforceable. See, e.g., *Strasner v. Strasner*, 232 Ark. 478, 338 S.W.2d 679 (1960).

generous or so meager that it encourages either family members or soldiers to avoid resolution of their financial support problems by agreement or in court.<sup>46</sup>

The BAQ standard is only used to determine the *minimum* amount of financial support in the absence of a court order or support agreement. The rules governing the payment of BAQ are not used to determine the identity of those family members entitled to financial support. Nor does a soldier's entitlement or lack of entitlement to BAQ have any bearing on whether or not the soldier is required to support family members under the regulation.<sup>47</sup> Unfortunately, ambiguities perceived in the old regulation often resulted in family members being denied financial support because the soldier was not receiving BAQ or had

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<sup>46</sup>Although the objective of AR 608-99 is to encourage early resolution of financial support problems by agreement or in court, there are laws designed to protect the rights of soldiers and their spouses that work against that objective. Under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. app. §§ 501-591 (1982)), a soldier may request that proceedings be stayed, that the execution of a judgment be stayed or vacated, or that a default judgment be reopened. Under applicable state laws, a civilian spouse may also encounter difficulty in finding a court that has jurisdiction over the case or in serving judicial process on the soldier. Legal assistance attorneys responding to the survey, on the other hand, have reported instances where civilian spouses, particularly those without children, sometimes refuse to participate in support agreements or avoid service of process just to keep "drawing" soldiers' BAQ (which may be more than what, if anything, a court might award them) and to continue enjoying the use of medical, exchange, and commissary privileges. Also, under the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (1982), many spouses of soldiers in marriages of a longer duration have additional incentives to avoid or delay divorces in order to build up entitlement for obtaining a portion of retired military pay as their share of the marital property in state courts and for acquiring permanent entitlement to medical, exchange, and commissary privileges under federal law. Under AR 608-99, a soldier in most of these instances would be required to pay "BAQ-with" even though the soldier might be authorized "BAQ-without" in his or her own right by virtue of occupying non-government quarters. A change to the first UPDATE of the regulation will be proposed to address this problem. One possible solution may be to authorize a commander to excuse a soldier from paying an amount of support greater than the difference between "BAQ-with" and "BAQ-without" when the commander determines that the civilian spouse does not have custody of minor children from the marriage, is not suffering from any disability that would impair ability to earn a living, and is avoiding or delaying judicial resolution of the nonsupport complaint or other matters pertaining to the marriage.

<sup>47</sup>See AR 608-99, para. 1-8. The entitlement to BAQ should also be distinguished from the actual receipt of that allowance. Here again, with one exception, the receipt of BAQ does not give rise to a support obligation under the regulation. The one exception is where the soldier was the defendant and the court order is silent on child support. Under para. 2-6b(2)(b), financial support is not required in such an instance if the court had jurisdiction over the soldier to order support and the soldier is not receiving "BAQ-with" based "solely" on the support of the family members in question. See *infra* text accompanying notes 67-69.

forfeited BAQ because it was not being used to support dependents.<sup>48</sup>

### 3. *The Minimum Support Requirement.*

Most complaints regarding financial support involve instances where the soldier is providing no support whatsoever, as opposed to complaints that the support being provided is insufficient for the family. Admittedly, the amount of support required under the BAQ standard will not always be sufficient to support a family. At other times it may be too generous. But the thrust of the punitive provisions of the regulation is to require that the soldier provide under penalty of law a minimum amount of support to all family members. If this amount of support is too generous, the soldier should seek to establish a lower amount by agreement or in court. If the amount is insufficient to support the family, a family member is afforded the same opportunity to obtain additional support by agreement or in court. Additionally, in the absence of a court order or written support agreement, the family member may request, individually or through counsel, the soldier's commander to order additional support, *i.e.*, more than "BAQ-with."<sup>49</sup>

The minimum support requirements of AR 608-99 mandate compliance with the financial support provisions of court orders and written support agreements and, in their absence, the interim support provisions of the regulation.<sup>50</sup> These punitive provisions of the regulation prohibit nonsupport and insufficient support

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"DODPM, Part 3, Chapter 2, Section D, para. 30236e provides for recoupment of past BAQ payments made to a soldier who is unable to provide "proof of support" in an amount at least equal to the lesser of "BAQ-with" or "a reasonable amount requested by or on behalf" of the family member, but in no case may this amount of support be less than the difference between "BAQ-with" and "BAQ-without" for the soldier's grade. As this paragraph states, this smaller "amount of support required for entitlement to retain or receive BAQ on behalf of dependent(s) does not necessarily mean that such amount is deemed adequate to meet the policy of the service concerned as to what constitutes adequate support in the absence of a written mutual agreement or court order."

<sup>48</sup>AR 608-99, para. 2-10b. Note that a soldier does not have the same opportunity under the regulation to obtain relief from his or her commander to pay less than the minimum amount of support required under the BAQ standard where this amount may appear to be too generous. The reason for this is that a soldier always will have the opportunity to personally present his or her position to a commander any time a request to order more support is received from a family member. Also, soldiers, unlike family members, are always employed and receiving pay and allowances, and the Army is always available to provide soldiers with their minimum needs as to food, shelter, and clothing. Finally, soldiers, unlike family members, can more easily forestall a court resolution of a financial support issue under the Soldiers' and Sailors' Civil Relief Act. See *supra* note 46.

<sup>49</sup>AR 608-99, para. 2-4a.

under circumstances that can be readily ascertained. These provisions also require support in a specific amount to be made in a particular way<sup>51</sup> by a date certain.<sup>52</sup>

#### 4. Court Orders.

The regulation specifically prohibits a soldier from violating the provisions of a court order which requires "financial support to family members on a periodic basis."<sup>53</sup> Although a soldier is required by law to obey all provisions of a court order, the punitive provisions of the regulation only apply to those parts of a court order that require support on a periodic basis. A violation of a support provision of a court order is a violation of a lawful general regulation under Article 92, UCMJ.

This is not to suggest that commanders will not get involved with the enforcement of other provisions of court orders, such as those requiring the payment of court costs, attorney's fees, medical and other expenses, and outstanding loan balances, or those providing for visitation rights or the division of property.<sup>54</sup> The Army receives complaints from family members and their attorneys on these matters everyday, and commanders are required under the regulation to ensure that soldiers comply with *all* provisions of a court order.<sup>55</sup> Although a soldier may be punished for disobeying a lawful order of a superior who directs compliance with other provisions of a court order after a family member complains, a violation of such a provision in and by itself is not a punishable violation of AR 608-99.<sup>56</sup>

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<sup>51</sup>*Id.* at para. 2-8a. This provision requires that the payment of support be in cash, by check or money order, or by allotment.

<sup>52</sup>*Id.* at para. 2-4d. This provision requires that the payment of support be sent before the last calendar day of the month for which the support is due unless otherwise required by the terms of a court order or written support payment.

<sup>53</sup>*Id.* at para. 2-3c(1).

<sup>54</sup>Failure to pay debts incurred by a soldier and his or her spouse, particularly where a soldier has been ordered to pay such a debt by a court in a divorce or separate maintenance proceeding, may constitute a dishonorable failure to pay just debts, which offense is separately punishable under UCMJ art. 134. See MCM, part IV, para. 71. Note also that the broad definition of "court order" corresponds in wording to the explanation of the word "judgment" contained within the definition of the word "debt" in Dep't of Army, Reg. No. 600-15, Indebtedness of Military Personnel, Glossary, Section II (14 Mar. 1986) (hereinafter cited as AR 600-15).

<sup>55</sup>AR 608-99, para. 2-3c(1).

<sup>56</sup>The main reason a violation of these other provisions of a court order were not made punishable violations of AR 608-99 is that many such provisions frequently are vague or ambiguous, and hence require further clarification. If clarification is required, a commander, after obtaining legal advice, is in the best position to direct what the soldier must do in order to comply with the court order.

A court order is defined in the regulation as follows:

As used in this regulation, court order includes all judicial and administrative orders and decrees, permanent and temporary, granting child custody, directing financial support, and executing paternity findings. It also includes any foreign nation court or administrative order recognized by treaty or international agreement. Court orders are presumed valid in the absence of evidence to the contrary.<sup>57</sup>

This broad definition of court order is intended to be all encompassing. Foreign administrative and judicial orders, which are recognized by treaty or international agreement, are given full force and effect under the regulation, regardless of where the soldier is stationed at the time support is required to be paid.<sup>58</sup> Specific reference is made to Articles 32-37 of the Supplemental Agreement Concerning Foreign Forces Stationed in the Federal Republic of Germany.<sup>59</sup> Presently, the Army will garnish the pay of a soldier who has failed to comply with the financial support provisions of a German court order as long as the soldier remains stationed in Germany.<sup>60</sup> Upon return to the United States or upon retirement, pay deductions are automatically stopped by the U.S. Army Finance and Accounting Center (USAFAC).<sup>61</sup> Army Regulation 608-99, however, would continue to mandate the payment of support as long as the soldier remains on active duty. A soldier's obligation to comply with a foreign court order has nothing to do with the Army's ability or willingness to garnish the pay of that soldier for failing to comply with such orders.<sup>62</sup> Like state court orders, foreign court orders recognized by treaty or international agreement are presumed valid in the absence of evidence to the

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<sup>57</sup>AR 608-99, Glossary, Section II.

<sup>58</sup>This provision is consistent with Army policy regarding the indebtedness of military personnel. Note that the explanation of the word "judgment" under the definition of "debt" in AR 600-15, Glossary, Section II, includes administrative judgments by the Bundespost (German telephone company) on unpaid telephone bills regardless of where the soldier is stationed at the time the Bundespost is trying to collect the amount due.

<sup>59</sup>AR 608-99, para. 2-3c(2).

<sup>60</sup>DODPM, Part 7, Chapter 7, Section B, para. 70710a. Note also that under Article 3 of the Supplemental Agreement Concerning Foreign Forces Stationed In the Federal Republic Of Germany, garnishment of pay is only required while the soldier is on active duty and stationed in Germany.

<sup>61</sup>The information about stopping pay deductions is not contained in the DODPM, but was obtained over the telephone from an official in USAFAC.

<sup>62</sup>See *supra* note 42. ODCSPER, not the USAFAC, establishes Army policy on the support of family members.

contrary.<sup>63</sup> A successful collateral attack on a court order would be the type of evidence which would rebut the presumption of validity.<sup>64</sup>

Court orders that require financial support are to be distinguished from those that are silent on the issue of support. These so-called "silent divorce decrees" have been a troublesome issue in the Army, particularly with regard to the support of minor children. The 1978 version of AR 608-99 required that "BAQ — with" be paid to dependents in such situations until such time that a court order was issued or a separation agreement was reached that specified the amount of support.<sup>65</sup> That could be a long time, and this requirement was quite unrealistic given the broad definition of dependent, which included stepchildren.<sup>66</sup>

The new AR 608-99 requires that a soldier continue to support family members, other than a former spouse, when a divorce decree is silent on the issue of financial support.<sup>67</sup> The amount of support provided would be the amount required under a prior existing written support agreement or, in the absence of this, the amount required by the BAQ standard. A soldier can be excused by the commander from providing support if the soldier can demonstrate that the court issuing a final decree of divorce had

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<sup>63</sup>AR 608-99, Glossary, Section II.

<sup>64</sup>USACFSC has taken the position that it will not look behind a court order, foreign or domestic, to determine questions of jurisdiction and venue. Hence, in cases involving divorces obtained in Mexico, the Personal Affairs Branch has taken the position they are valid in the absence of a successful appeal or a collateral attack in another court, and that the Army will not require a soldier to pay financial support to the divorced spouse unless the Mexican court order so provides. The courts, not the military services, are the proper place to resolve questions of jurisdiction. A different position, to be discussed later, is taken with regard to minor children because they are still family members of the soldier after a divorce. Note that under DODPM, Section A, para. 30233e, a claim for allowances, such as "BAQ-with," may be denied in cases where the soldier or his or her present spouse have married following a foreign nation divorce where the court's jurisdiction was questionable based on the residency of the parties. The government does not pay allowances where the basis of the allowance is a "doubtful relationship." See Comp. Gen. Opinion B-128267, August 16, 1956. It would be impractical, however, for the Army to require a soldier to continue to support a former spouse following a foreign or state court divorce of doubtful validity, particularly where one or both of the parties have remarried and perhaps are estopped from ever collaterally attacking the validity of the divorce in the courts. If, on the other hand, a soldier's present "marriage" is of doubtful validity because of jurisdictional defects in a prior divorce involving one of the parties, an arguable basis would exist for asserting that AR 608-99 would not require the soldier to provide support on the basis of this purported marriage. "BAQ-with" would probably be denied to the soldier under these circumstances.

<sup>65</sup>1978 Regulation, para. 2-2c.

<sup>66</sup>*Id.* at para. 1-3a(1).

<sup>67</sup>AR 608-99, para. 2-6b(2)(a).

personal jurisdiction over the soldier to order child support, and the soldier is not receiving "BAQ-with" based solely on the support of the children.<sup>68</sup> This, of course, presupposes that the defendant in the divorce suit is the military member. When the soldier is the plaintiff, no such exemption would apply. In such a case the soldier could only be relieved of providing child support by a specific provision to that effect in the court order or in a written support agreement.

A different issue arises when a court, for whatever reason, orders a nominal amount of child support during the course of a divorce or separation proceeding. For example, there are reported cases where courts have ordered soldiers to pay anywhere from one to ten dollars a month in child support. In some cases this is done as an interim measure because the court does not have all the facts as to the soldier's income and, pursuant to local court rules, is merely maintaining its continuing jurisdiction over the issue of child support until a full hearing can be held at future date. Sometimes this is done when the court does not yet have personal jurisdiction over the soldier to order financial support. Regardless of the reasons, if a court issues either a permanent or temporary order for periodic financial support *in any amount*, that order will supersede an existing support agreement and the interim support provisions of AR 608-99.<sup>69</sup>

In the absence of a court order there is no requirement at all to provide support to a former spouse.<sup>70</sup> But, until such time that a court order is issued dissolving the marriage or otherwise specifically relieving the soldier of any obligation to provide support to the spouse, the soldier is required to provide financial support in accordance with the terms of an existing support agreement or the interim support provisions of the regulation.<sup>71</sup>

A soldier may always attack the jurisdiction of a court issuing an order requiring him or her to pay financial support. The place

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<sup>68</sup>*Id.* at para. 2-6b(2)(b).

<sup>69</sup>*Id.* at para. 2-4a. This conclusion is also based on the fact that under the regulation (Glossary, Section II) an order of a court is "presumed valid in the absence of evidence to the contrary." Therefore, under the regulation, although a soldier may properly assert that he or she should not pay support because a court having personal jurisdiction over the soldier chose not to order support, a family member, on the other hand, cannot argue that the court was without jurisdiction to order nominal support and hence the soldier should pay the full amount of support required by an existing support agreement or the interim support provisions of the regulation. However, a soldier paying only nominal support may lose entitlement to "BAQ-with." See *supra* note 48.

<sup>70</sup>AR 608-99, para. 2-6b(2)(a).

<sup>71</sup>*Id.* at para. 2-4a. See the Appendix to determine the amount of support.

to attack it is in court—either in the court which issued the order or in a collateral proceeding initiated by the soldier in another court. In any military proceeding against the soldier for violating the regulation because of noncompliance with a court order, the soldier may raise the issue of jurisdiction as a defense only if he or she can show compliance at all times with the financial support provisions of another court order, a written support agreement, or the interim financial support provisions of the regulation.<sup>72</sup> In other words, jurisdiction cannot be raised as a successful defense under AR 608-99 by one who is not providing financial support to family members.<sup>73</sup>

A similar situation arises when a soldier is required to pay financial support to family members under a court order issued in one jurisdiction, but where there is a lesser amount required or no amount of support required under an earlier or subsequent court order issued in another jurisdiction. The issue here is not collateral attack in one court of an order issued in the other court; the court issuing the second order may not have known about the prior order. Cases like this are not all that unusual in the Army. A common situation involves a wife obtaining a temporary order of child custody and child support from a court in one jurisdiction, followed by the husband obtaining a final decree of divorce from a court in a different jurisdiction. If there is no provision for child support in the second decree, the inquiry should begin with an examination of that decree to determine whether or not there is anything in it which is inconsistent with the first decree. If there is no provision for child support, it may very well be because the court issuing the divorce decree was aware of the prior court order awarding child support and respected that court's continuing jurisdiction over the children—which it may very well do, particularly if the children still reside in that jurisdiction. In such a case there is no conflict between the decrees and the soldier should abide by the temporary order of child support unless it has expired. Where there is a direct conflict between orders issued by courts in different jurisdiction, a more thorough inquiry may be required with application of basic conflict of law principles.

In any event, such inquiries are beyond most commanders' capabilities. In all cases involving multiple court orders, the SJA

<sup>72</sup>*Id.* at para. 2-6a(2)(b).

<sup>73</sup>A soldier who is not providing any financial support to family members in violation of an existing court order may be charged with violating AR 608-99, para. 2-4a(1), and, in the alternative, para. 2-4a(2) or (3), as appropriate, if the jurisdiction of the court issuing the order is likely to be raised as a defense.

(as defined in the regulation) should be consulted for assistance and advice. The SJA's advice, however, is not to the soldier, but to the commander. The SJA's advice should be required only when a court order is being violated. The soldier who chooses to violate a court order does so at his or her own peril. It makes no difference that another court order is being obeyed.<sup>74</sup>

### 5. Support Agreements.

Army Regulation 608-99 recognizes both oral and written support agreements, but, as a practical matter, only enforces support agreements which are in writing. A written support agreement is defined in the regulation as:

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"One area that AR 608-99 does not directly address is how a soldier's financial support obligation to his or her child under the regulation might be affected by child custody court decrees. The following points are clear under the regulation:

- a. A soldier having physical custody of a child, with or without a court order awarding legal custody to the soldier, has no obligation to pay child support to another not having physical custody of the child.
- b. A soldier not having physical custody of a child is required to provide financial support to the person who has physical custody of the child in behalf of that child, whether or not that physical custody is sanctioned by an existing court order.

Also not addressed under the regulation is the situation where physical custody of the child by the soldier or the soldier's spouse (or former spouse) is contrary to an existing court order. Some of these cases involve "parental kidnapping," either by the soldier or the soldier's spouse (or former spouse).

- a. If the soldier losing physical custody is ready, willing, and able to care for and support the child if physical custody is obtained I have advised the Personal Affairs Branch that the soldier has no obligation to pay child support to the spouse or former spouse under the regulation. To require otherwise would be to encourage continued violation of an existing court order and give legitimacy to a custody situation having no legitimacy. However, I have in such situations that child support under the regulation is required—

- (1) If the soldier has acquiesced in the change of physical custody, or
- (2) If the spouse (or former spouse) with physical custody has a conflicting court decree awarding custody to that spouse (thereby providing some legitimacy to the custody situation).

- b. If the soldier has physical custody of the child (other than during short-term periods of visitation) then financial support to the spouse (or former spouse) in behalf of the child is not required. Here it can properly be assumed that the soldier is providing financial support to the child in his or her custody and that the civilian spouse has acquiesced in the custody arrangement in the absence of a demand that the child be returned. Until the child is returned, financial support to the civilian spouse (or former spouse) on behalf of the child is not required in the absence of a court order to the contrary.

This footnote is taken from CMT2, paras. 3 & 4, DACF-ZJ, 4 Dec. 85, subject: Request for Legal Definition. The contents of this footnote likely will be incorporated into the first UPDATE to AR 608-99.

Any written agreement between husband and wife in which the amount of periodic financial support to be provided by the soldier spouse has been agreed to by the parties. A written support agreement may be contained in a separation agreement or property settlement. Also, the support agreement may be shown by letters exchanged between the parties in which the amount of support has been agreed to by the parties.<sup>75</sup>

As defined, a written support agreement is intended to be liberally construed by applying basic contract principles of offer and acceptance—to encompass any written agreement between the parties pertaining to periodic financial support. All that is required is a meeting of the minds and that the agreement be evidenced by a writing or writings signed by the parties. An exchange of letters in which the amount of support is agreed to by the parties will suffice. However, a stack of cancelled checks reflecting past payments of financial support, in the absence of a written support agreement, may be nothing more than evidence of an oral support agreement.

#### a. Oral support agreements.

An agreement, whether oral or written, generally binds the parties. AR 608-99, however, distinguishes oral and written agreements, not because of the law, but solely out of evidentiary considerations. A commander can easily determine what is required by a court order or, in the absence of a court order, by the interim support provisions of the regulation. Any difficulty here is likely to involve legal as opposed to factual issues. Likewise, when a commander is presented with a document which purports to be a written support agreement, the question again is one of law as opposed to fact: it either is or is not. If the commander requires any assistance he or she can ask the SJA. The commander usually does not have to question witnesses or determine any factual issues. The problem with oral support agreements is that when there is a dispute between the parties involved, it is not easy to determine who, if anyone, is telling the truth. The amount of money agreed to is unimportant. Whether high, low, or in between, the question will almost always boil down to one of who to believe.

Army Regulation 608-99 approaches oral agreements from the point of view that, although they cannot be ignored, there are

<sup>75</sup>AR 608-99, Glossary, Section II.

practical reasons why they should not be enforced. For example, consider the situation where a soldier in Germany asserts in response to a complaint of insufficient support that he has an oral agreement to provide his wife and children in the United States only \$100 per month. The wife denies in her letter to the commander that there is such an agreement. Or consider slightly different facts where the wife claims that there is an oral support agreement for a monthly amount of support equal to three times the soldier's "BAQ-with." The soldier denies this. There is no way a commander can determine where the truth lies in such cases. Hence, the regulation specifically states that if an oral agreement is being followed, the Army need not interfere. If a dispute arises as to the terms or existence of an oral agreement, a commander will advise the soldier to send the amount required by the interim support provisions of the regulation.<sup>76</sup> A soldier cannot be punished under the regulation for violating the terms of an oral agreement as to financial support.<sup>77</sup>

#### b. Written support agreements.

Written support agreements are enforced under the punitive provisions of the regulation for the same reasons that court orders and the interim support provisions of the regulation are similarly enforced. To do otherwise would be inconsistent with and would discourage the use of written support agreements in the Army. In any event, there is more reason for the Army to enforce an amount of support that has been agreed to in writing by the parties than an amount that is mandated by regulation or by court order. If nothing else, such an amount is less likely to be arbitrary or unreasonable, particularly if the parties received the assistance of legal counsel in executing the agreement. Indeed, a soldier is likely to have a greater say in the amount of financial support required in a written support agreement than in the amount he or she is ordered to pay by a court.

Lawyers differ on the advisability of having soldiers or family members sign support agreements. Some have asserted that they

<sup>76</sup>*Id.* at para. 2-3d.

<sup>77</sup>When an oral agreement not to provide support exists between the parties, this can be raised as a defense by a soldier charged with not providing support in accordance with the interim support provisions of the regulation. An oral agreement to provide a lesser amount than that required by the interim support provisions of the regulation similarly can be raised as a defense to a charge that inadequate financial support was provided. A soldier cannot assert that a subsequent oral agreement modifies an already existing written support agreement. Note, however, a subsequent written agreement can modify an earlier one, provided it has not been incorporated into a court order. See *id.* at para. 2-6c.

would never advise a family member to sign a support agreement unless it provided for more support than required by AR 608-99; these same lawyers likewise would never counsel a soldier to sign an agreement that required more support than AR 608-99. Many lawyers frequently negotiate a support agreement between spouses to pay the exact amount required by AR 608-99. Is this a waste of time? Perhaps not. If the agreement settles other matters, such as the payment of joint debts, the rights of child custody and visitation, the payment of medical and insurance expenses, and the division of property, then the lawyers have accomplished much for their clients. A violation of the punitive provisions of AR 608-99 in regards to support agreements occurs only when a soldier fails to provide periodic financial support in accordance with the terms of a written support agreement.<sup>78</sup> One great advantage of written support agreements in the Army is that soldiers are less likely to violate something they have agreed to than something they have been ordered to do by a court or regulation.

#### *6. The Interim Support Requirements.*

Once again, the interim support requirements (or BAQ standard) of AR 608-99 apply only in the absence of a court order or written support agreement. The obligation to provide financial support under these circumstances is continuous and begins when the soldier acquires a family member as defined under the regulation. In the absence of a complaint of nonsupport or insufficient support, the Army can only assume that everything is copcetic within the family. This is different than asserting that a support obligation does not begin until after a family member complains and the soldier is counseled to provide financial support by his or her commander. The difference is that, under the regulation, a soldier can be punished for failing to provide support before the complaint or counseling occurs, which is no different than what can occur with other criminal acts.<sup>79</sup>

The amount of financial support required under the BAQ standard will vary on the basis of the soldier's grade, the residence of the family members (*i.e.*, whether they reside in government or non-government quarters), the actual custody of the children, the military status of each of the spouses, the income of the "supported" spouse, and, in multiple family situations, the total number of family members not authorized

<sup>78</sup>AR 608-99, para. 2-4a(2).

<sup>79</sup>See *supra* text accompanying note 16.

support under a written support agreement or court order. The manner in which "BAQ-with" and the difference between the "BAQ-with" and the "BAQ-without" (the "difference") is distributed in these various situations is demonstrated by the chart at the Appendix.

The way in which "BAQ-with" or the "difference" is distributed depends in many instances on whether or not the family members are residing in government quarters. It makes no difference, however, where the soldier is living. In a given situation, the same amount will be paid to the supported family members regardless of whether the soldier is living with them or living apart from them wherever they may be situated.<sup>80</sup> Likewise, if a soldier is residing in government family quarters and the soldier's spouse moves out, for whatever reason,<sup>81</sup> the amount of financial support owed the spouse under the regulation will depend on where the spouse takes up residence, regardless of whether or not the soldier remains in government family quarters. If the spouse takes up residence in non-government housing, the amount will be a portion of or all of "BAQ-with," depending on the number of other family members the soldier must support. The same is true if the spouse moves back home with his or her parents, unless those parents, as a separate military family, are residing in government quarters. In that case the soldier would only be required to pay the spouse the "difference."<sup>82</sup>

The income of the soldier, or the allowances the soldier may be drawing, also have no effect on the soldier's obligation to provide financial support to family members under the regulation. There is one exception, and that is where the civilian spouse "is receiving an annual income equal to or greater than the annual gross pay of the soldier."<sup>83</sup> Gross pay includes military pay and allowances paid to a soldier on a monthly or bi-monthly basis.<sup>84</sup>

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<sup>80</sup>AR 608-99, para. 2-4b(1)(a)2.

<sup>81</sup>*Id.* at para. 2-1c. Desertion and other forms of marital misconduct have no effect on the soldier's obligation to provide financial support under the regulation.

<sup>82</sup>*Id.* at para. 2-4b(1)(b). The regulation does not specify that the government quarters must be assigned to the soldier. A legal assistance officer reported one instance where the USAFAC was attempting to collect back payments of "BAQ-with" from a soldier where his sole basis for entitlement was the fact that he was supporting a wife who, unknown to the soldier, was living with her father, who was a military member residing in government quarters at the time.

<sup>83</sup>*Id.* at para. 2-6d.

<sup>84</sup>AR 608-99. Glossary, Section II. The Personal Affairs Branch has been advised that the civilian spouse has the burden of coming forward with documentation to establish that his or her income is less than the soldier's. This can be established by copies of the civilian spouse's wage and earnings statements or filed income tax returns.

The civilian spouse's income, however, has no effect on the soldier's obligation to provide financial support to children in the custody of the civilian spouse.<sup>85</sup>

The soldier's grade also has no effect on the obligation to provide financial support to family members, except to the extent that grade determines the amount of pay and allowances that is compared with the annual income of an employed civilian spouse in determining the support obligation, if any, to that spouse.

Where a soldier is married to another soldier, and there are no children, there is no support obligation.<sup>86</sup> It makes no difference how great the disparity is between the rank and separate incomes of the spouses. Similarly, this disparity, if it exists, has no effect on the obligation of the noncustodial soldier to provide financial support to the children in the other soldier's custody. Because each military member is entitled to pay and allowances in his or her own right, the financial support obligation to the children of the marriage is never greater than the "difference."<sup>87</sup> If custody of the children is split between the spouses, there is no financial support obligation, regardless of the number of children in the custody of each spouse.<sup>88</sup> These are all policy calls made from the point of view of keeping the regulation simple, while at the same time directing the thrust of the regulation at the serious problems of nonsupport that more frequently arise in the Army. Nonsupport between military spouses is not a serious problem in the Army. Also, the regulation cannot ignore the fact that both spouses are receiving pay, allowances, and other entitlements.

A soldier who is supporting only one family unit and is married to a civilian spouse is required to pay a certain amount of minimum support regardless of the size or needs of that family. In this regard, there is no change in AR 608-99 from that which was required under the 1978 regulation. As one legal assistance officer noted, an heiress married to a soldier for two weeks gets the same amount as a woman with six children married to a soldier for fifteen years.<sup>89</sup> There is no rational explanation for this approach other than the need to keep the regulation simple. Also,

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<sup>85</sup>*Id.* at para. 2-6d.

<sup>86</sup>*Id.* at para. 2-4b(3).

<sup>87</sup>*Id.* at para. 2-4b(4).

<sup>88</sup>*Id.* at para. 2-4b(4)(a)2.

<sup>89</sup>Under the revised regulation, however, the "heiress" would not be entitled to financial support from the soldier if she was receiving an annual income, earned or unearned, greater than the annual gross pay of the soldier. Wealth, or the expectation of wealth, without a greater income, is not a factor. See AR 608-99, para. 2-6d.

the purpose of the regulation is to require a minimum amount of support in all cases, backed by criminal penalties for noncompliance. There is no suggestion in the regulation that "minimum" support is the equivalent of "adequate" support in every case. A commander is authorized under the regulation to order additional support where the "minimum" is not "adequate."<sup>90</sup> Also, the regulation encourages the parties to resolve their differences as to what is adequate support by a written support agreement or in court.<sup>91</sup>

### 7. *Multiple Family Situations.*

Multiple family situations are distinguished under the regulation by the use of examples from single family units. Generally, a single family unit consists of one set of family members, whether living together or apart from each other, all of whom the soldier is required to support as the result of a single legal obligation. This obligation is usually based on marriage, but may also be based on a paternity judgment. For example, a soldier required to support a spouse and five children is supporting one family unit, even though two of the children may live with him in government quarters and three may reside off post with his wife. In the absence of a court order or written support agreement, the soldier would be required to pay two-thirds of an amount equal to his "BAQ-with," even though he might not be receiving BAQ. Similarly, a soldier supporting one or more children born out of wedlock to the same woman is supporting a single family unit. However, one child born to one woman and a second child born to another woman would constitute two family units insofar as the supporting soldier is concerned.

Multiple family units arise from multiple legal relationships, the most frequent examples of which are soldiers with children from prior and current marriages. If there are court orders and written support agreements pertaining to each family unit, then financial support must be provided in accordance with those documents. In the absence of these, however, a soldier is required under the regulation to provide financial support to each supported family member (or the parent or legal guardian of that family member) in an amount equal to his or her pro rata share of "BAQ-with." This share is determined by dividing the "BAQ-with" by the total number of supported family members, excluding former spouses. But support which is required by court order or written support

<sup>90</sup>AR 608-99, para. 2-10.

<sup>91</sup>*Id.* at para. 2-1b.

agreement is paid as required. As the examples in the regulation demonstrate, this amount has no effect on the amount of financial support to be paid to other family members. Also, supported family members residing in government quarters are entitled (as a unit) to no less than the "difference." Again, the amount paid to them has no effect on the amount of financial support to be paid to remaining family members who are not entitled to financial support based on a court order or written support agreement.<sup>92</sup>

#### 8. Former Spouses.

Former spouses are not family members under the regulation.<sup>93</sup> The term "family member" as used throughout the regulation includes, however, any former spouse to whom the soldier is required to pay financial support by virtue of a court order.<sup>94</sup> Therefore, a failure to pay court ordered alimony is a violation of the punitive provisions of the regulation.<sup>95</sup>

With regard to the pro rata formula, however, former spouses, even those receiving court ordered alimony, are not counted among the total number of family members in determining the division of "BAQ-with" among family members.<sup>96</sup> Therefore, the fact that a former spouse is receiving court ordered alimony from a soldier has no effect on the amount of money the soldier would be required to pay other family members under the regulation.

#### 9. Support in Kind.

Support in kind is a concept adopted from the Department of Defense Pay Manual (DODPM). Under the DODPM, a soldier can establish entitlement to BAQ—and prevent recoupment of BAQ for past periods of alleged nonsupport—by providing "proof of support."<sup>97</sup> There is no requirement that this support be in a form that is requested by the supported spouse. This is proper because the soldier is only required to show evidence of financial support to justify continuing entitlement to an allowance. Compliance with Army policy on support is not required in every instance to retain this entitlement.<sup>98</sup>

Therefore, to justify continuing entitlement to "BAQ-with," a soldier could present proof that he or she routinely paid the rent

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<sup>92</sup>*Id.* at para. 2-4b(2).

<sup>93</sup>*Id.* at Glossary, Section II.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at para. 2-4a(1).

<sup>96</sup>*Id.* at para. 2-4b(2).

<sup>97</sup>See *supra* note 48.

<sup>98</sup>*Id.*

for the family apartment and other expenses associated with food, shelter, and clothing for the family. The fact that the civilian spouse demanded a monthly cash payment instead of having these expenses paid directly by the soldier would make no difference insofar as entitlement to "BAQ-with" is concerned.

Under AR 608-99, however, support in kind is acceptable support only if it is provided "on behalf of, and with the agreement of, the supported family members."<sup>99</sup> In other words, a spouse must agree to the monthly installment payments on the family car as part of the financial support arrangement between the parties in order for those payments to be credited against the soldier's monthly financial support obligation under the regulation. The reason for requiring the consent of the supported spouse is to avoid situations, which often occur, where the supported spouse is receiving little or nothing from the soldier by way of cash payments, while at the same time the soldier is alleging full and adequate support because the soldier is making monthly installment payments on the jointly-owned car (which the soldier drives), the expensive stereo sound system (which the soldier enjoys), and other such debts they jointly incurred.

Support in kind only becomes a problem when the parties have not settled their financial support differences by either a court order or a written support agreement. Such documents will usually specify that payment of financial support be in cash (or cash equivalent) on a monthly basis. Other matters, such as the payment of medical expenses, insurance premiums, and the like, usually are discussed separately in those documents.

Support in kind can become a problem when there is no agreement between the parties on how family debts are to be paid. Under AR 608-99, a soldier is required to provide financial support to family members in cash, by check, or money order, or by allotment. In the absence of an oral or written agreement between the parties or a court order directing otherwise, support in kind is not recognized under the regulation.<sup>100</sup>

Where does this leave the soldier? Obviously, with regard to such matters as rent and utilities on a home not occupied by the soldier, or payments on personal property not claimed or used by the soldier, the soldier will have little objection to letting the spouse pay for those items from the monthly financial support provided under the regulation. If the spouse does not use the

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<sup>99</sup>AR 608-99, para. 2-8.

<sup>100</sup>*Id.*

financial support received from the soldier to pay those expenses, the spouse, not the soldier, will suffer the immediate consequences.<sup>101</sup> Eviction from the home and repossession of property will have an immediate effect on the spouse, not the soldier.

With regard to other expenses which are more directly attributed to the soldier than to the spouse, the soldier will not likely get the spouse to agree to credit payments on those expenses against the financial support obligation owed to the family under the regulation. Nor is the soldier likely to believe that payments made directly to the spouse will go toward the satisfaction of debts pertaining to property used or in the possession of the soldier.<sup>102</sup>

This is the intended effect of the regulation. Each spouse can be expected to act out of his or her own self-interest with regard to paying debts incurred by each of them. Regardless of who pays the debts, whether individually or jointly incurred, a soldier has a separate and distinct obligation under the regulation to provide financial support to family members on a periodic basis. The satisfaction of other legal obligations has nothing to do with meeting the support obligation, in the absence of a court order or support agreement to the contrary.

#### *10. Additional Support.*

The punitive provisions of the regulation pertain to a soldier's failure to provide minimum financial support to family members. In this regard, failure to provide the minimum amount of support required by a court order, a written support agreement, or the interim support requirements of AR 608-99 is a violation of a lawful general regulation punishable under Article 92, UCMJ.<sup>103</sup>

Minimum support, however, is not necessarily adequate support. In this regard, the regulation authorizes a commander to order a soldier to pay additional support but only in the absence

<sup>101</sup>Of course, if the soldier has signed the lease, or is jointly liable on those debts, nonpayment may have a future impact on the soldier's credit rating and may also subject the soldier to liability in any court suit subsequently brought to collect damages arising from breach of contract.

<sup>102</sup>A different situation exists with regard to expenses not pertaining to any particular property (e.g., cash loans) or relating to investment property (i.e., mortgage payments on a house). Here again, the approach taken by AR 608-99 is that, in the absence of an agreement between the parties, the payment of such obligations is governed more properly by AR 600-15 than by AR 608-99. Dishonorable failure to pay debts is also an offense under UCMJ art. 92. See MCM, part IV, para. 71.

<sup>103</sup>AR 608-99, para. 2-4c.

of a court order or written support agreement.<sup>104</sup> The theory here is that where the parties have signed a financial support agreement, or where a court has ordered financial support, those amounts should be deemed adequate. Obviously, under those circumstances, either a court or the parties themselves determined those amounts to be adequate at one time. Any increase in support should be obtained by agreement or in court.

With regard to the interim support requirements of the regulation, there is certainly a greater possibility that the minimum required may not be adequate to provide for the family's needs. In such instances the commander is authorized under the regulation to order the soldier to pay additional support beyond the minimum required.<sup>105</sup> The commander's legal authority to order "adequate" support for family members is premised on the same authority as the regulation's requirement that soldiers provide at least a "minimum" amount of support for family members.<sup>106</sup>

The regulation urges the soldier to provide additional support, within his or her ability, when necessary to meet the family's basic financial needs.<sup>107</sup> If there is a disagreement between the soldier and the supported family members on the amount of additional support required, a commander is authorized to order "temporary" additional support when "there is a demonstrated need for immediate and temporary additional support because of unexpected and unforeseen circumstances."<sup>108</sup> In determining the amount of additional support to order, a commander is directed to consider eleven factors including, but not limited to, the respective incomes of the parties, their savings, needs, debts and other financial obligations, their respective standards of living, and, with regard to spousal support, the "duration of the marriage and the circumstances under which the parties separated."<sup>109</sup>

Ordering additional support is not likely to occur frequently in the Army. Indeed, the minimum amount required under the regulation usually will be the actual amount required. In those situations where a commander is confronted by the family of a soldier in financial need, however, the commander has authority under the regulation to order the soldier to pay additional support

<sup>104</sup>*Id.* at para. 2-10.

<sup>105</sup>*Id.* at para. 2-10b.

<sup>106</sup>See *supra* notes 30-32 and accompanying text.

<sup>107</sup>AR 608-99, para. 2-10g.

<sup>108</sup>*Id.* at para. 2-10b.

<sup>109</sup>*Id.* at para. 2-10c.

when the soldier is financially able to provide more support than the minimum required under the regulation.

Additional support need not be periodic. It may constitute a one time payment of an unusual expense. For example, an overseas commander may order a soldier to pay for a return plane ticket home for the soldier's wife, who desires to return home but is financially unable to pay the plane fare herself.

### *11. Arrearages.*

Arrearages, like support in kind and "silent divorce decrees," has been a problem to DA policy makers, as well as to legal assistance attorneys and commanders in the field. The policy makers had to define the problem, determine how it arises, determine what the policy should be and, finally, if possible, find a way it can be legally enforced. The problem with arrearages has been one of enforcement.

Arrearages are defined under the regulation as the total amount of money owed by a soldier to his or her family members as a result of failing to comply with the minimum support requirements of the regulation.<sup>110</sup> As defined, arrearages can accrue when a soldier fails to comply with court orders, written support agreements, and the interim support requirements of the regulation. Arrearages cannot arise from a failure to pay additional support ordered by a commander.<sup>111</sup>

Arrearages often accrue because soldiers, although knowing they have financial support obligations, choose sometimes to ignore these obligations after they breakup with their families. Instead, they will often wait until a complaint of nonsupport is made to their commanders before they begin to think about providing support. Even then they may delay providing support until they have tried every possible ploy or excuse to avoid paying support. In the meantime, they have "pocketed" several months of "BAQ-with" which should have gone to their families. As mentioned previously, the source of the problem here is frequently not only the soldiers who refuse to provide support, but also the commanders who are supposed to counsel them. As one legal assistance officer stated in response to the survey, it is "very frustrating when the commander's inaction on prior com-

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<sup>110</sup>*Id.* at Glossary, Section II.

<sup>111</sup>Unlike arrearages, a failure to pay additional support does not constitute a violation of the regulation. AR 608-99, para. 2-9b(3). Failure to obey an order directing additional support, in my opinion, may constitute a violation of a lawful order under UCMJ art. 92.

plaints has been responsible for the delay" and the resulting accumulation of arrearages. Another problem with delay—as well as in defining what constitutes arrearages—is the inaction of some family members who wait several months or years before ever making a complaint about nonsupport. Until recently, the Personal Affairs Branch took the position that soldiers were required to pay the full amount of arrearages to family members, regardless of the total amount of money due, the delay involved in making or processing the complaint of nonsupport, and the source of these "debts." With regard to the latter, it made no difference whether arrearages arose from nonpayment of BAQ or other amounts required to be paid pursuant to written support agreements or court orders.<sup>112</sup>

Army Regulation 608-99, as revised, takes an entirely different approach to the problem of arrearages than the 1978 regulation. First of all, the mere accumulation of arrearages is a violation of the punitive provisions of the regulation,<sup>113</sup> and therefore punishable under Article 92, UCMJ. With regard to arrearages which have arisen from a past failure to comply with a court order or a written support agreement, a soldier is directed to pay this amount immediately and in a lump sum. If this is not possible, and the parties involved cannot work out a repayment schedule, then the commander is directed to intervene and "order payment of arrearages on a scheduled basis based on the soldier's ability to pay."<sup>114</sup>

A commander's need to intervene in cases where a written support agreement or court order is being violated is not likely to occur very frequently. A soldier's pay can already be garnisheed for arrearages arising from nonpayment of court ordered support.<sup>115</sup> Arrearages arising from noncompliance with the terms of a written support agreement also do not arise very often because soldiers, like others, are more likely to pay according to the terms

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<sup>112</sup>With regard to nonpayment of BAQ, there were many instances where those inquiring from subordinate commands were advised that soldiers were required to pay all the BAQ owed to their spouses and families for past periods of nonsupport. Some of these soldiers had not been providing any support for several years. In some cases their spouses finally caught up with them; in other cases the spouses waited several years before making a complaint. In all cases, USAFAC was already taking action to recoup the past payments of BAQ to these soldiers that were not used to support their families. Although there was little reason to sympathize with the plight of these soldiers, requiring them to pay thousands of dollars in arrearages under these circumstances was unrealistic, regardless of the legality of such a requirement.

<sup>113</sup>See AR 608-99, paras. 2-4a and 2-9a.

<sup>114</sup>*Id.* at para. 2-9b(1).

<sup>115</sup>42 U.S.C. § 659 (1982). See generally AR 608-99, ch. 8.

of an agreement they negotiated and signed than they are because of something that is dictated to them from afar by a court order or an Army regulation.

With regard to arrearages arising from a past failure to comply with the interim support requirements of the regulation, AR 608-99 specifically states that a soldier cannot be ordered to pay the amount in arrears.<sup>116</sup> There are several reasons for this. One is that, unlike written support agreements and court orders on financial support, the interim support provisions of the regulation apply throughout the soldier-family member relationship. Therefore, in many cases there is no readily ascertainable date as to when a violation of these provisions actually began. Written support agreements and court orders have dates; with these there are no problems in ascertaining when nonsupport began.

One alternative that was considered to solve the problem of interim support arrearages was to determine that the period of nonsupport began in the month in which the family member first complained about nonsupport.<sup>117</sup> Although this may be a good indication of when a violation of the punitive provisions of the regulation occurred, it was rejected as being rather arbitrary insofar as determining the total amount of money a soldier might owe a family member for past periods of nonsupport.<sup>118</sup>

Determining how much is owed is even more difficult than determining when the period of nonsupport began. A failure to complain about nonsupport may indicate that the division of cash and other property that occurred at the time the family broke up was adequate to meet the immediate or short-term financial needs of the family during the period preceding the complaint of nonsupport. Also, a failure to complain by the family member may be evidence of an oral agreement, tacit or expressed, that

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<sup>116</sup>AR 608-99, para. 2-9c.

<sup>117</sup>Determining when a complaint was first made becomes more difficult in cases involving several months or years of nonsupport. Another problem is a policy decision as to whether the period should begin when the complaint was first made to the soldier or when it was first brought to the attention of soldier's commander or a government official. In either case there are evidentiary problems involved.

<sup>118</sup>Ignoring the amount of arrearages that may have accumulated prior to a complaint being made is akin to applying the doctrine of estoppel by laches, the application of which would not be appropriate in nonsupport cases, particularly where the soldier has been collecting "BAQ-with" all along. In cases involving several years of nonsupport, the application of a regulatory "statute of limitations" might be a more appropriate way to limit the amount of arrearages that the Army might demand a soldier to pay because of past failures to comply with the interim minimum support requirements.

financial support was not required.<sup>119</sup>

Problems seldom arise in collecting arrearages relating to noncompliance with written support agreements and court orders because with them there are no ambiguities as to when the support obligation began, how much was to be paid, how it was to be paid, and when, if payments were made at all, the checks stopped coming. The total amount of arrearages that are due should be readily ascertainable. Also, the mere fact that a written support agreement or court order exists is a fair indication that the parties are fully aware of their legal rights, and are not likely to sit idly by for a period of several months or years while their rights under these legal documents are being continuously violated.

Commanders must concentrate their attention on the present and the future; correcting past wrongs should be left to the courts. This is the whole philosophy behind AR 608-99. Although USAFAC may recoup past payments of "BAQ-with" that were not used to support family members,<sup>120</sup> and commanders may take disciplinary actions against soldiers who have violated the regulation by not providing support,<sup>121</sup> the main purpose of the regulation is to ensure that family members receive financial support from soldiers to meet their present and future needs.<sup>122</sup> Family members, on the other hand, are encouraged to obtain relief in court if they cannot resolve their differences by agreement or if the provisions of the regulation are inadequate to meet their demands. A claim for what amounts to a request for a monetary judgment against a soldier for past periods of nonsupport, where the entitlement is purely regulatory, is a matter for a court to handle if the parties cannot resolve their differences by agreement.

Almost all nonsupport complaints received by a commander are going to contain demands for present and future support under the interim financial support provisions of the regulation, as well

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<sup>119</sup>See AR 608-99, para. 2-3a. This paragraph of the regulation, relating to the enforcement of oral agreements on financial support, indicates that the Army will not "involve itself in disputes over the terms or enforcement of oral support agreements." There is nothing in the regulation which prohibits an oral agreement between the parties not to provide financial support. However, USAFAC will recoup all past payments of "BAQ-with" which were not used to support family members regardless of the nature of any agreements that may have existed between the parties. See *supra* notes 48 and 77.

<sup>120</sup>See *supra* note 48.

<sup>121</sup>AR 608-99, para. 1-4e(8).

<sup>122</sup>*Id.* at para. 1-5.

as an assertion that financial support has not been provided in the past. Obviously, if there were no arrearages, there would be no complaint. Under AR 608-99, a commander is required to counsel soldiers on their responsibilities to provide financial support in the future<sup>123</sup> and to consider disciplinary action for past failure to provide financial support as required by the regulation.<sup>124</sup> With regard to arrearages, the commander is advised to encourage the soldier to pay the amount in arrears.<sup>125</sup> But, the soldier cannot be ordered to pay this amount.<sup>126</sup> Also, the commander may report the soldier's past failure to provide support to the installation finance and accounting office, which in turn can recoup past amounts of "BAQ-with" that were not used to support family members.<sup>127</sup> Finally, among other factors, the commander can consider the amount owed in arrears by the soldier in deciding whether or not to order the soldier to pay additional support to family members beyond the amount required by the interim financial support provisions of the regulation.<sup>128</sup> In such instances, additional support may be appropriate where the failure to provide financial support in the past has caused the family members serious financial hardship.<sup>129</sup>

### C. PATERNITY

DOD policy requires that a soldier be informed of a paternity allegation made against him. When such an allegation results in a decree of paternity or a court order of child support, the commander must advise the soldier of his legal rights and his legal and moral obligations.<sup>130</sup> The 1978 version of AR 608-99 required more than just counselling. The old regulation required the commander to obtain a "voluntary signed statement" from

<sup>123</sup>*Id.* at para. 1-4e(3).

<sup>124</sup>*Id.* at para. 1-4e(8).

<sup>125</sup>*Id.* at para. 2-9c.

<sup>126</sup>*Id.*

<sup>127</sup>See *supra* note 48. The "BAQ-with" that is recouped from a soldier's pay is returned to the U.S. Treasury. This is perceived by many as being counterproductive. Because of recoupment, the complaining family member is not likely to receive any money from the soldier for past periods of nonsupport, and the soldier is going to be less financially able than before to provide financial support in the future. The longer the period of nonsupport, the worse the prospects are for future support. As a result of this, one recommendation being considered at DA is to propose a change in the law that would authorize the recouped BAQ to be transferred directly from the soldier's pay to the family members who were denied support.

<sup>128</sup>AR 608-99, paras. 2-9 and 2-10c(1).

<sup>129</sup>*Id.* at para. 2-10b.

<sup>130</sup>Dep't of Defense Directive No. 1344.3, Paternity Claims and Adoption Proceedings Involving Members and Former Members of the Armed Forces, para. C1 a, b (1 Feb. 1978).

the soldier admitting or denying paternity and, if paternity was admitted, a further statement as to whether or not the soldier was willing to marry the mother or prospective mother.<sup>131</sup> If the soldier was willing to marry the complainant, his commander was then required to ask the complainant if she was willing to marry the soldier. If both indicated a willingness to marry, the commander was directed to grant the soldier leave in order to marry the claimant.<sup>132</sup> Having arranged the marriage, the commander was not required to play role in the ceremony itself.

The old regulation did not require support, even if paternity was admitted, unless it was backed by a paternity judgment ordering support.<sup>133</sup> The new regulation takes the same approach, but, unlike the old regulation, recognizes that commanders are not in the best position to advise soldiers of their legal rights and obligations.

Under the new regulation, a commander must inform a soldier of a paternity claim.<sup>134</sup> If the soldier is suspected of a criminal offense, such as rape or indecent acts with a minor, the commander is further required to advise the soldier of his rights to remain silent under Article 31, UCMJ, and his right to counsel under the sixth amendment before the soldier is questioned about the paternity claim.<sup>135</sup> The commander is directed in such cases to inform law enforcement officials of the suspected offense and to coordinate further action under the regulation with the SJA.<sup>136</sup>

In the absence of conduct warranting a criminal investigation, the commander is directed to allow the soldier an opportunity to consult with a legal assistance attorney.<sup>137</sup> The attorney, not the commander, is the one given the responsibility of advising the soldier of his legal rights and obligations. The commander is required to advise the soldier of Army policy on the support of family members and about the possible consequences of failing to comply with a court order on child support.<sup>138</sup> The soldier is also given the opportunity, if he desires, to submit a written state-

<sup>131</sup>1978 Regulation, paras. 3-2c, 3-3a.

<sup>132</sup>*Id.* at para. 3-4a.

<sup>133</sup>*Id.* at para. 3-3c.

<sup>134</sup>AR 608-99, para. 3-1b.

<sup>135</sup>*Id.* at para. 3-2a(2). The regulation here, as well as at paras. 2-7d(3) and 2-12b(5)(c), cites the fifth rather than the sixth amendment as the basis for advising a soldier of his right to counsel prior to questioning. This will be corrected in the first UPDATE of the regulation.

<sup>136</sup>AR 608-99, para. 3-2a.

<sup>137</sup>*Id.* at para. 3-2b(1).

<sup>138</sup>*Id.* at para. 3-2b(3), (4).

ment admitting or denying the paternity claim and stating his intentions, if any, regarding the claim.<sup>139</sup>

With regard to paternity claims not reduced to judgment, unless the soldier admits paternity and agrees to provide financial support, the commander is directed to advise the claimant that the Army can offer no assistance in the absence of a court order identifying the soldier as the father and directing financial support for the child.<sup>140</sup> A court order requiring financial support of a child born out of wedlock brings that child within the definition of a family member under the regulation.<sup>141</sup> Hence, a failure to comply with a court order of financial support in a paternity case is a violation of AR 608-99.<sup>142</sup> Note that a soldier, even one who admits paternity, is not in violation of the regulation in the absence of a court order.<sup>143</sup> For those soldiers who admit paternity and agree to provide financial support, the commander is directed to assist the soldier in obtaining a military identification card for the child, where the relationship is properly documented, and in making allotments and obtaining "BAQ-with."<sup>144</sup> A request to take leave to marry the claimant should be favorably considered if leave will not interfere with military requirements.<sup>145</sup>

In the area of paternity, the regulation removes the commander from the role of marriage broker. A soldier is not required to do anything under the regulation unless it is backed by a court order. If the soldier disagrees with the fairness of the court order, his relief is through the court system, not the military chain of

<sup>139</sup>*Id.* at para. 3-2b(5).

<sup>140</sup>*Id.* at para. 3-3a.

<sup>141</sup>*Id.* at Glossary, Section II. Under DODPM, Part 3, Chapter 2, Section D, para. 30237.2(c), (d), a soldier must present a court order establishing parentage of an illegitimate child and documentary evidence to substantiate that the amount of monthly financial support to the illegitimate child is at least equal to "BAQ-with" or, for a soldier not residing in government quarters, the greater of an amount equal to over one-half of the child's support or the difference between "BAQ-with" and "BAQ-without." Compare this provision with the lesser amount of support required for legitimate children in order to retain entitlement to "BAQ-with." See the discussion at footnote 48. A soldier paying just a dollar less than the full amount of his "BAQ-with" entitlement to support his illegitimate child may have his BAQ recouped. Under AR 608-99, however, the amount of support required for an illegitimate child is no different than that required for a legitimate child. In many cases however, it may be to the overall financial advantage of the soldier to pay more than the amount required by court order and AR 608-99 to an illegitimate child in order to retain entitlement to "BAQ-with."

<sup>142</sup>*Id.* at para. 2-4c(1).

<sup>143</sup>*Id.* at para. 3-3a.

<sup>144</sup>*Id.* at para. 3-3c(2)-(5).

<sup>145</sup>*Id.* at para. 3-3c(6).

command. He has the same rights as any other citizen. In this regard, requests from others within and outside the Army to change DA policy to require financial support in cases where the soldier simply admits paternity, or voluntarily provides financial support and then ceases to do so, have been denied. Similarly, in the absence of a court order, no consideration is given to state statutes that presume a man to be the natural father of a child simply because he has consented to have his name placed on the child's birth certificate. If, however, he then marries the mother, financial support would be required because this usually would make the child legitimate under most state laws.

A final area of concern has been the matter of court ordered blood testing. A state court judge suggested to the Army that soldiers—particularly ones stationed overseas—be required to submit to—and pay for—blood tests when ordered to do so by state courts in response to paternity suits and that the blood samples taken—or the test results recorded—be forwarded to the courts, which, based on the results, would render judgments for or against soldiers. Although this proposed procedure was attractive from the standpoint of efficiency, AR 608-99 takes no position on efforts by state courts to acquire jurisdiction over soldiers or to enforce orders in aid of their jurisdiction. However, as with other pending court litigation involving support and custody claims by family members, commanders are cautioned to consider whether a soldier's "overseas assignment will adversely affect the legal rights of family members" before recommending approval of a request for—or an extension of—an overseas assignment.<sup>146</sup>

#### ***D. PARENTAL KIDNAPPING***

The first problem in any parental kidnapping case is finding the child. For the victim-parent (*i.e.*, the parent or guardian from whom the child has been wrongfully taken or concealed), this is often a difficult and time-consuming effort during a very emotional period. When the parent who abducts the child is a soldier, locating the child may become even more difficult—particularly if the child is removed to an overseas duty location, which is almost always the case.

In the past, commanders hesitated to become involved in child custody disputes; perhaps for good reasons. There was no Army policy or regulation which prohibited parental kidnapping. Al-

<sup>146</sup>*Id.* at para. 1-5d.

though forty-eight states make parental kidnapping a crime,<sup>147</sup> commanders were not likely to get involved in these cases until there was a criminal complaint or indictment. This was little help to the victim-parent seeking prompt return of a missing child, who perhaps was unable to establish who took the child or where the child was located.<sup>148</sup>

As revised, AR 608-99 for the first time addresses the problem of parental kidnapping. Commanders now must assist victim-parents in obtaining the return of children wrongfully taken from their custody by soldiers.<sup>149</sup> Commanders are also advised that they may inform a victim-parent of a soldier's port call or future duty assignment, the general whereabouts of the child, if known, and, after consulting the command legal advisor, the soldier's residential address, if known.<sup>150</sup> Although AR 608-99 does not address the means of the cost of returning abducted children, offending soldiers should properly bear the expense of commercial travel if government transportation is not authorized or not available. The soldier-parent has an incentive to promptly correct the wrong: the soldier can avoid punishment under the regulation by voluntarily returning the child to the lawful custodian within ninety-six hours after the lawful custodian demands return.<sup>151</sup>

The language of the punitive provisions of the regulation on parental kidnapping<sup>152</sup> generally is drawn from the criminal statutes of Illinois,<sup>153</sup> Maryland,<sup>154</sup> and Wisconsin.<sup>155</sup> All criminal statutes on parental kidnapping require a violation of an existing court order on child custody before criminal sanctions may be

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<sup>147</sup>Parental Kidnapping: How to Prevent an Abduction and What to Do If Your Child is Abducted at 2 (National Center for Missing and Exploited Children 1985).

<sup>148</sup>In one case involving the author several years ago, a commander in another service, backed by his lawyer, refused (under a strained interpretation of the Privacy Act) to disclose the port-call location and departure date of a departing military member who had just abducted his infant child from a mother having legal custody of the child pursuant to a court order.

<sup>149</sup>AR 608-99, para. 1-4e(10).

<sup>150</sup>*Id.* at para. 1-6d, e. Although AR 608-99 may be cited as a basis for release of information, it should never be referenced as a source for a refusal to release information. The listing of the types of information that could be released to inquiring family members under AR 608-99 was not intended to be all inclusive. Any refusal to release information should be based on applicable provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1982), or the Privacy Act, 5 U.S.C. § 552a (1982). See Dep't of Army, Reg. No. 340-17, Release of Information and Records from Army Files (1 Oct. 1982), and Dep't of Army, Reg. No. 340-21, The Army Privacy Program (5 July 1986).

<sup>151</sup>*Id.* at para. 2-5d(2).

<sup>152</sup>*Id.* at para. 2-6.

<sup>153</sup>Title 38, Section 2 of P. A. 80-1393 (Aug. 22, 1978).

<sup>154</sup>Fam. Law. Article 27, Section 2A (chapter 435) (July 1, 1982).

<sup>155</sup>Wis. Stat., Title 45, Section 946.71.

invoked. With one exception, the regulation is no different from those laws. Unlike state laws, no court order is required under AR 608-99 when the child was born out of wedlock to a soldier-father. Here, it was felt that a soldier, who may or may not be the father of a child born out of wedlock, has no established legal right to take the child away from the mother unless there is a court order awarding him custody. Courts are almost always going to award custody of a child born out of wedlock to the mother; little purpose would be served by having the mother obtain a court order granting her custody as a prerequisite to obtaining assistance from the Army in requiring the soldier to return the child to her.<sup>156</sup>

A soldier-parent violates the punitive provisions of the regulation if he or she abducts an unmarried child under the age of fourteen knowing that another person is the child's lawful custodian or, if after gaining such knowledge, withholds, detains, or conceals the child from the lawful custodian.<sup>157</sup> The regulation defines a "lawful custodian" as

a person authorized, either alone or together with another person or persons, to have custody and exercise control over a child less than 14 years of age by order of a court. The fact that joint custody has been awarded to both parents by a court order does not preclude a violation of this paragraph by the soldier parent. However, in the absence of a court order to the contrary, the mother of a child born out of wedlock who is not then, nor has never been, married to the father of the child is deemed the "lawful custodian" of that child for the purpose of this regulation.<sup>158</sup>

With regard to abduction, both the court order and knowledge of the court order must precede the taking of the child in order to come within the purview of the regulation. However, a soldier who takes a child away from the other parent when there is no court

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<sup>156</sup>The author was involved in two cases that arose during prior assignments where a soldier abducted a child born out of wedlock. Both were married to women other than the mothers of the children abducted. One soldier took the child overseas with him and his wife to Germany. The other soldier took the child out of state to stay with his friends while he served an unaccompanied tour in Korea. Both soldiers, after several months, were eventually persuaded to return the children to their mothers. Although the mothers did not possess court orders granting them custody, the soldiers nevertheless returned the children to the mothers to avoid threatened prosecution on state criminal charges of parental kidnapping.

<sup>157</sup>AR 608-99, para. 2-5a.

<sup>158</sup>*Id.* at para. 2-5b.

order or knowledge of one, violates the regulation when he or she withholds, detains, or conceals the child after learning that a court order has awarded custody of the child to the other parent.

The regulation addresses not only the abduction of the soldier's natural children, but also the abduction of stepchildren, adopted children, wards, and siblings.<sup>159</sup> It also covers abductions that occur in some joint custody situations. For example, if a soldier-mother is entitled by court order to custody of her child for nine months of the year while the father is entitled to custody of the child during the three summer months, the mother would be violating the regulation if she wrongfully withheld the child from the father during the summer. Abduction situations where joint custody decrees do not grant either parent exclusive custody during a given time period generally are not covered by the regulation. In a joint custody situation, however, a lawful custodian may violate the regulation by withholding, detaining, or concealing a child from the other joint custodian.

The regulation only prohibits parental kidnapping of children under fourteen. This is a policy decision based on a number of practical and legal considerations. Drawing the line at "under fourteen" eliminates unnecessary command involvement in most cases involving "runaways" or other older children who refuse, for one reason or another to live with the lawful custodian.<sup>160</sup> Prosecution in such situations would be difficult, if not impossible. Also, most parental kidnapping cases in the Army involve children much younger than fourteen, usually infants and toddlers. The regulation is primarily designed to protect these children. Children who are fourteen and older are less likely to be concealed by a parent or forced to live with a parent. In any event, the regulation certainly does not preclude soldiers from being prosecuted and punished under state laws for the abduction and concealment of older children.

Although the parental kidnapping provisions of the regulation are punitive in nature, the regulation's objective is to deter this type of misconduct or, failing that, to persuade the soldier who has abducted a child to promptly return the child to the lawful

<sup>159</sup>*Id.* at para. 2-5c.

<sup>160</sup>*But see* AR 608-99, para. 1-4e(10), regarding assistance by the commander in returning such children to their lawful custodians, and para. 1-6d and e, with regard to providing information to the lawful custodian as to the children's whereabouts. These provisions still apply with regard to children 14 years and older. It should be noted, however, that courts frequently will go along with the wishes of older children in awarding custody.

custodian. The incentive to return an abducted child within ninety-six hours has already been mentioned. When a child has been abducted, particularly to an overseas location, it is hoped that the regulation will facilitate the prompt return of the child within a few days, as opposed to the several months of effort it often took in the absence of this punitive regulation.

A few final observations should be made at this point with regard to the parental kidnapping and denial of visitation cases handled by the Personal Affairs Branch. All these cases have involved children abducted to or located in an overseas location whose return was demanded by a parent in the United States.

While it can generally be stated that people who demand financial support are always happy to receive the money, the same is not always true of those who seek custody of children. Unfortunately, children are often used as pawns in an unending battle between divorced parents. Perjury and slander motivated by revenge or jealousy are not uncommon occurrences.

Although the Army should assist in the prompt return of a child abducted by a soldier, there is a need to be wary of the one-time demand for custody unaccompanied by any manifestation of panic, emotional loss, or even concern for the child's present welfare. A case in which the demand is made long after the child was taken is particularly suspect. Also, old court orders granting custody do not always reflect present-day realities. No one desires to return a child to a home in which the child is not really wanted. Although AR 608-99 mandates that soldiers comply with court orders on child custody, there are some cases in which some degree of caution is warranted. The Army in such cases should not assist in the return of a child to the lawful custodian with any greater sense of urgency than that which is displayed by the lawful custodian who has demanded custody.

These cases are to be distinguished from those in which the soldier seeks to obtain command support in an on-going child custody battle that has been decided against the soldier on the issues he or she is raising. Spurious allegations of child sexual abuse are not all that uncommon. In one case, a woman soldier, after making that charge without success, next argued that her former husband was not really the father of the child whose custody he had been awarded by the court. In other cases, many facts are revealed by both sides which may raise serious questions as to whether either parent is fit to raise the child. But all these are matters beyond the capability of a soldier's commander to

decide. The courts have a difficult enough time deciding these issues. Once decided, a commander's obligation under AR 608-99 is to ensure that a soldier does not use his or her duty location or military status to evade enforcement of court orders.<sup>161</sup>

International law and conflict of law considerations may sometimes arise with enforcement of AR 608-99 overseas when a soldier-parent, in response to a parental kidnapping complaint from the United States, obtains an order from a foreign court granting custody to the soldier. A commander in such cases should consult with the SJA on the proper course of action to follow.<sup>162</sup> Conflicting court orders on child custody may preclude punishment under the UCMJ. Even when there is no legal basis whatsoever for a foreign court to assume jurisdiction in the matter, international considerations may weigh against taking punitive action against the soldier or directing the soldier to comply with the order from the state court. On the other hand, most parents caught in this dilemma in the United States are not going to have the financial capability to obtain formal execution of a state court child custody order in a foreign court. Certainly, in such a case a commander should disapprove any request by the soldier to extend his or her overseas assignment.<sup>163</sup> The only other possible remedy is to curtail the soldier's overseas tour. This will return the soldier, and most likely the child, to a jurisdiction within the United States where the state court judgement and AR 608-99 can be more easily enforced against the soldier.<sup>164</sup>

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<sup>161</sup>AR 608-99, para. 1-5d. A similar obligation applies with regard to visitation rights. See *id.* at para. 2-3c. After a complaint is made, a commander has a responsibility to ensure that a soldier-parent who has custody of a child obeys the provisions of a court order granting visitation rights to the noncustodial parent. Again, this is a problem primarily with soldiers stationed overseas. Violations are not always obvious. In one case a soldier overseas effectively denied visitation rights to a noncustodial parent in the United States by demanding that the noncustodial parent first post a \$5,000 bond guaranteeing the child's return after completion of a Christmas holiday visit, and that the noncustodial parent also pay for a two-way airplane ticket for an adult to escort the child to and from the city where the noncustodial parent resided. No such preconditions were in the court order.

<sup>162</sup>AR 608-99, para. 2-12b(2).

<sup>163</sup>*Id.* at para. 1-5d.

<sup>164</sup>Although AR 608-99 does not apply to a soldier's civilian spouse who kidnaps his or her child from a previous marriage and takes the child to the overseas duty location of the soldier-spouse, the commander of the soldier should, based upon the same policy considerations with the regulation, refuse any request for extension of the overseas assignment and may, in appropriate cases, also recommend curtailment of the soldier's overseas duty assignment.

## V. CONCLUSION

AR 608-99 is an improvement over the old regulation. It will be fine-tuned as time goes on. Changes will be made to correct inequities that recur with any degree of frequency. Legal assistance officers are encouraged to send their comments or proposed changes, using DA Form 2028, to the Personal Affairs Branch, USACFSC, or to the USACFSC Command Judge Advocate. Future changes to the regulation should reflect the continuing input received from legal assistance attorneys. Lawyers, after all, are in the best position to know the strengths and weaknesses of the regulation.

The Army is also looking at what the other services are doing in the areas addressed by the regulation. There are vast differences in the approaches taken by the military services, for example, in the area of financial support of family members. Although a uniform approach to these matters may not be possible, it is hoped that some common areas of agreement can be reached. Military lawyers frequently advise clients from services other than their own. Some uniformity in policy not only would be helpful to the lawyers, but would also subject the services to less criticism from those who might question our differing policies in these areas.

Finally, the regulation itself will not ensure that soldiers and family members receive quality legal assistance in the domestic relation matters covered by the regulation. Although the regulation should make the job of legal assistance attorneys much easier, much can still be done to lessen the burden of these problems upon the client. For example, because one of the goals of AR 608-99 is to encourage families experiencing financial support problems to resolve their differences by a written support agreement or by recourse to the courts, SJAs and legal assistance officers should do all within their power to make access to legal assistance and the courts as inexpensive and easy as possible. Support agreements should be drafted by legal assistance attorneys upon request. These agreements, as drafted, should cover more than just financial support. Where there is an understanding between the parties, support agreements should also contain provisions on the payment of existing debts, the division of property, and child custody and visitation rights. With the extensive use of word processing equipment in Army legal offices, there is no reason why soldiers and their families should not receive complete legal service in these areas.

Also, the legal service should be without cost to both the soldier and his or her spouse. Conflict of interest problems within an Army legal office should be resolved in a way that will not require either party to pay for initial legal advice or assistance on a domestic relations problem. Help in negotiating a support or separation agreement should never require the paid services of a private attorney.<sup>165</sup>

Finally, when obtaining court orders on financial support or acquiring a divorce or legal separation on behalf of a client is beyond the scope of the legal assistance program at the installation, we, as judge advocates, can certainly do more to ensure that clients are effectively represented by private attorneys at a reasonable cost. Our referral procedures should include more than just handing a client a copy of a telephone directory or local bar referral listing. Our referral lists should contain the names of private attorneys who repeatedly provide satisfactory service to our clients in domestic relations matters. We could do more to monitor the quality of this service in light of the means available to us. Lay persons working within Army Community Service, spouse abuse shelters, hospital emergency rooms, and state social services agencies have filled the void when we have been deficient in the quality of our referrals to the private bar. Although their referrals may be less informed than those that could be made by military lawyers, an effort is at least being made to steer families in the right direction. That effort also should be made by all legal assistance lawyers.

The revised AR 608-99 is designed to ensure that the rights of soldiers and families are protected in the area of financial support, child custody, and paternity. There are no entitlements under the regulation. The regulation exists—and is enforced—only because in a military environment a different approach to these problems must be taken from that which would suffice in a civilian community. As revised, the regulation should result in less involvement on the part of lawyers and commanders in resolving many of the nonsupport and custody problems that arose under the old regulation.

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<sup>165</sup>Policy Letter 85-11, The Judge Advocate General, U. S. Army, 30 Dec. 1985, subject: Legal Assistance Representation of Both Spouses, *reprinted in The Army Lawyer*, Feb. 1986, at 4. This letter directed that each Army legal office establish procedures to avoid inadvertent conflicts of interest and that judge advocates actively assist conflicting clients make appointments with judge advocates from other offices in domestic relations matters.

## APPENDIX

SITUATION	REQUIRED PAYMENTS TO FAMILY MEMBERS		AR 608-99, PARAGRAPH
	<u>Gov't Housing</u>	<u>Non-Gov't Housing</u>	
1. Spouse:	Difference	BAQ-with	2-4b(1)(a)&(b)
2. Spouse and child(ren):	Difference	BAQ-with	2-4b(1)(a)&(b)
3. Spouse and step-child(ren):	Difference	BAQ-with	2-4b(1)(a)&(b)
4. Former spouse—no court ordered support:		0	2-6b(2)(a)
5. Former spouse and step- child(ren)—no court ordered support:		0	2-6b(2)(a) & Glossary
6. Former spouse and child(ren)— no court ordered support:		BAQ-with	2-4b(1)(a)
7. 2 children in former spouse's custody and one child in soldier's custody—no court ordered support; payment to 2 children:		2/3 BAQ-with	2-4b(2)

SITUATION	REQUIRED PAYMENTS TO FAMILY MEMBERS		AR 608-99, PARAGRAPH
	<u>Gov't Housing</u>	<u>Non-Gov't Housing</u>	
8. Child from prior marriage; no court order; Spouse and 2 children from current marriage:		1/4 BAQ-with	2-4b(2)
	Difference	3/4 BAQ-with	2-4b(2)
9. Child from prior marriage; court order for \$175; Spouse and 2 children from current marriage:		\$175	2-4a(1)
	Difference	3/4 BAQ-with	2-4b(2)
10. 2 children from prior marriage; court order for \$225; Spouse and 2 children from current marriage:		\$225	2-4a(1)
	Difference	3/5 BAQ-with	2-4b(2)b
11. 2 children from prior marriage; court order for \$225; Spouse (earning greater income than soldier) and 2 children from current marriage:		\$225	2-4a(1)
	Difference	2/5 BAQ-with	2-4b(2) and 2-6d

SITUATION	REQUIRED PAYMENTS TO FAMILY MEMBERS		AR 608-99, PARAGRAPH
	<u>Gov't Housing</u>	<u>Non-Gov't Housing</u>	
12. Spouse with greater income than soldier:	0	0	2-6d
13. Soldier married to soldier:	0	0	2-4b(3)
14. Soldier married to soldier, each with custody of one or more children of the marriage:	0	0	2-4b(4)a2
15. Soldier married to soldier; payment to spouse having custody of the child(ren) of the marriage:	Difference	Difference	2-4b(4)a1
16. 2 children born out-of-wedlock; paternity order for \$200: Former spouse; court order for alimony of \$150: Spouse of current marriage and with one of the 3 children of the marriage in her custody:		\$200  \$150	2-4a(1)  2-4a(1)
	Difference	1/3 BAQ-with	2-4b(2)

SITUATION	REQUIRED PAYMENTS TO FAMILY MEMBERS		AR 608-99, PARAGRAPH
	<u>Gov't Housing</u>	<u>Non-Gov't Housing</u>	
17. Child from prior marriage; court order for \$150; Spouse and child from current marriage:		\$150	2-4a(1)
	Difference	2/3 BAQ-with	2-4b(2)
18. Former spouse; court ordered alimony of \$150; Spouse and child from current marriage:		\$150	2-4a(1)
	Difference	BAQ-with	2-4b(2)



# MILITARY CHILD ADVOCACY PROGRAMS: CONFRONTING CHILD MALTREATMENT IN THE MILITARY COMMUNITY

by Captain Thomas J. Hasty, III\*

## I. INTRODUCTION

Each year in this country, thousands of innocent children are beaten, burned, poisoned, or otherwise abused by adults.<sup>1</sup> The Child Abuse Prevention and Treatment Act of 1978 (CAPTA)<sup>2</sup> defined child abuse and neglect as "the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen . . . by a person . . . who is responsible for the child's welfare under circumstances which indicate that a child's health or welfare is harmed or threatened."<sup>3</sup> Child abuse and neglect can take many forms.<sup>4</sup> In this article, child abuse and neglect will be referred to as "child maltreatment."

The magnitude of the child maltreatment problem is difficult to measure because many incidents go unreported; however, there is little doubt that the problem is significant.<sup>5</sup> The National Center on Child Abuse and Neglect (NCCAN) estimates that over one million incidents of child maltreatment occur in the United States each year.<sup>6</sup> About two thousand deaths are reported from such incidents annually, and child maltreatment has been reported as the fifth leading cause of death for children of all ages.<sup>7</sup> Maltreatment occurs in families of all social and economic levels, educational backgrounds, races, religions, and nationalities.<sup>8</sup>

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<sup>1</sup>H.R. Rep. No. 685, 93d Cong., 2d Sess. 2, reprinted in 1974 U.S. Code Cong. & Ad. News 2763, 2764.

<sup>2</sup>42 U.S.C. §§ 5101-5107 (1982).

<sup>3</sup>*Id.* § 5102.

<sup>4</sup>See Breger, *Patterns of Abuse and Their Psychological Consequences for the Child*, 73 U.S. Navy Med. 1 (Jan. 1982).

<sup>5</sup>GAO, *Military Child Advocacy Programs—Victims of Neglect*, Rep. to Cong. 1 (May 1979) (hereinafter cited as GAO Report).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>See Breger, *Child Abuse and Strategies for Navy Health Care Professionals Working With Abusive Parents*, 72 U.S. Navy Med. 5, 6 (Dec. 1981).

The various military communities, located in the United States and abroad, are not immune from this problem.<sup>9</sup> It makes little difference to the victim of child abuse or neglect whether the parent is a civilian or a member of the armed services. Only recently, however, has child maltreatment been recognized as a serious problem within the military community.<sup>10</sup> In fact, one civilian study aimed at assessing the potential for child maltreatment among parents awarded ten points for "high risk" merely for being in the armed services.<sup>11</sup> Research on the problem of abuse in military families has attempted unsuccessfully to compare incidence in military populations with that of civilian communities.<sup>12</sup> Nonetheless, it is generally believed that child maltreatment occurs as frequently in the military as it does in the civilian community.<sup>13</sup> In addition, studies have identified characteristics that appear to be specific to abuse in military families.<sup>14</sup>

The military's response to the problem of child maltreatment within its ranks has lagged behind the civilian sector's response;<sup>15</sup> but, at present, each of the military services (the Army, Air Force, and Navy) has established a child protective program to meet the needs of military children and families.<sup>16</sup> In spite of nearly identical program goals, the three military programs are organized, managed, and administered somewhat differently.<sup>17</sup> These fundamental differences affect the scope of coverage and potential effectiveness of these child advocacy programs.<sup>18</sup>

This article will address the problem of child maltreatment in the military community. Characteristics specific to abusive military families will be discussed, including the reasons for the differences between incidents in military versus civilian communities. The child advocacy programs of each of the three services

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<sup>9</sup>Allen, *Child Maltreatment in Military Communities*, Juv. Just. 11 (May 1975) (hereinafter cited as Allen).

<sup>10</sup>E. Hunter, *Families Under the Flag* 53 (1982) (hereinafter cited as Hunter).

<sup>11</sup>Miller, *Perspective on Child Maltreatment in the Military*, printed in *Child Abuse and Neglect: The Family and the Community* 267, 268 (R. Helfer & C. Kempe eds. 1976) (hereinafter cited as Miller).

<sup>12</sup>Hunter, *supra* note 10.

<sup>13</sup>GAO Report, *supra* note 5.

<sup>14</sup>Hunter, *supra* note 10.

<sup>15</sup>*Id.* As late as 1970, no family welfare programs or juvenile/family courts were made available in the military to promote family adjustment or to handle family matters requiring legal intervention. *Id.*

<sup>16</sup>*Id.*

<sup>17</sup>Myers, *Innovative Aspects of Child Advocacy in the Military: Research and Administration*, printed in *Child Abuse and Neglect: Issues On Innovation and Implementation* 120, 121 (M. Lauderdale, R. Anderson & S. Cramer eds. 1978) (hereinafter cited as Myers).

<sup>18</sup>GAO Report, *supra* note 5, at 4.

will be addressed, including the problems confronted in administering the programs. Finally, jurisdictional issues that affect interaction with state child advocacy programs will be explored.

## II. CHILD MALTREATMENT IN THE MILITARY COMMUNITY

### A. Profile of the Abusive Military Family

Little research has been done on child maltreatment in the armed services, but that which has been conducted indicates that there is probably not much difference between military and civilian maltreatment in terms of either the underlying causative factors or clinical manifestations.<sup>19</sup> It is possible, however, to distinguish the nature of child maltreatment in the military from that in the general population. One such study was conducted at Madigan Army Medical Center in Tacoma, Washington.<sup>20</sup> The study was undertaken to better understand what influence, if any, the "military life style" of service families has on the reported incidence of child maltreatment.<sup>21</sup>

The Madigan study involved 225 families who were identified by an Army child advocacy program as having abusive and/or grossly neglectful<sup>22</sup> parents during the four-year period from

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<sup>19</sup>Miller, *supra* note 11, at 275. *But see* Wichlacz, Randall, Nelson & Kempe, The Characteristics and Management of Child Abuse in the U.S. Army—Europe, *Clinical Pediatrics* 546 (June 1975) (indicates abuse in military families significantly greater than rate among civilians); Schnall, Characteristics and Management of Child Abuse and Neglect Among Military Families, *printed in Children of Military Families: A Part and Yet Apart* 141 (E. Hunter & D. Nice eds. 1978) (reported rate of child abuse and neglect proportionally higher among civilian than military families).

<sup>20</sup>Lanier, Child Abuse and Neglect Among Military Families, *printed in Children of Military Families: A Part and Yet Apart* 101, 103 (E. Hunter & D. Nice eds. 1978) (hereinafter cited as Lanier). Madigan is one of the Army's major medical teaching centers. It provides outpatient care and hospitalization support to over 142,700 active duty and retired personnel and their families. It is a specialty referral center for all military and VA medical facilities in the Northwestern United States, Alaska, and the Far East. Primary medical care is also provided to personnel and families from a number of other major headquarters and command elements which are located in the immediate area. *Id.*

<sup>21</sup>*Id.* The military families were compared on similar variables with families from national studies on child abuse and neglect published by D. Gil in *Violence Against Children: Physical Abuse in the United States* (1970) and with a survey of child abuse literature by M. Maden in *Significant Factors in Child Abuse: Review of the Literature* (1974). Lanier, *supra* note 20, at 105.

<sup>22</sup>As used in this study, child abuse and neglect refer to the intentional or nonaccidental use of physical force to maltreat or injure a child by parent(s) or other guardians, and to nonaccidental acts of omission on the part of a parent or other caretaker aimed at hurting, injuring, or destroying that child. Lanier, *supra* note 20, at 104.

January 1972 through December 1975.<sup>23</sup> Referrals came from twelve different sources: the Madigan Army Medical Center Emergency Room—28%; the Madigan Department of Pediatrics—23%; neighbors—11%; schools, the county children's protective services agency, parents (self-referrals), relatives, military police, civilian police, community health nurse, the community mental health activity, and babysitters—30%; and miscellaneous sources—8%.<sup>24</sup>

The Madigan study found similarities and differences between civilian and military abusive families. Military child abusers and their victims tended to be younger; military victims were more likely to suffer from abuse rather than neglect; the sex of the abused child was not substantially different with the military victim; and mobility per se did not seem to make a difference in incidence of abuse with the military abusive family.<sup>25</sup> Where other studies have usually discussed lack of income as a major factor in child abuse, the lack of income did not appear to be a major factor with the military child abuser.<sup>26</sup> A factor more significant than income was the position of the abusing parent within the military rank structure, the type of military unit to which he or she was assigned, and the feelings of self esteem which he or she received from the job he or she performed.<sup>27</sup> The types of child abusers, *i.e.*, acute,<sup>28</sup> episodic,<sup>29</sup> and chronic,<sup>30</sup> did not differ from the military to the civilian sector.<sup>31</sup> Both military and civilian parents tended to abuse their children for the same general reasons, *e.g.*, immaturity, unrealistic expectations, unmet emotional needs, frequent crises, lack of parenting knowledge, social isolation, poor childhood experiences, and problems with drug and

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<sup>23</sup>*Id.* at 103.

<sup>24</sup>*Id.* at 105. The large number of referring agencies lends some credence to this being a military community-based program rather than merely a medical/hospital program. *Id.*

<sup>25</sup>*Id.* at 119.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>Acute abuse is likely to occur as the result of stress within the family and is likely to occur in families who are socially isolated. Such parents experience frequent crises and "take it out" on their child due to the lack of other readily available alternatives. *Id.* at 115.

<sup>29</sup>Episodic abuse is likely to occur when parents perceive that they have no viable alternatives in dealing with their children. The parents usually lack knowledge of parenting skills and have not had models of successful families from which to learn. *Id.* at 114.

<sup>30</sup>Chronic child abusing parents usually were abused and/or maltreated themselves as children, have poor self-image, or are likely to be so involved with alcohol and drugs that it affects their social and job functioning. The safety and welfare of the child is usually at stake with the chronic abusing parent. *Id.*

<sup>31</sup>*Id.* at 119.

alcohol abuse.<sup>32</sup> In addition to the pressures that lead to child maltreatment in civilian life, military families face the added pressures of long absences by one parent (especially in the Navy), frequent changes of residence which preclude development of permanent community ties that can aid in preventing or stopping acts of maltreatment, and periods of residence in relatively isolated areas within both the United States and foreign countries.<sup>33</sup> Thus, military life can add stress to military family life that is not present in civilian family life. There is a great deal of evidence suggesting that the likelihood of child maltreatment increases with the amount of stress with which a family must cope.<sup>34</sup>

In considering the results of the Madigan study, we must keep in mind that measuring the incidence of child maltreatment at the national level and within the military is problematic due to several factors.<sup>35</sup> Definitional distinctions, variance in reporting facilities and criteria, and the fact that many cases never come to public attention all contribute to the measurement problem.<sup>36</sup> Most authorities agree that just the "tip of the iceberg" of child maltreatment has been sighted.<sup>37</sup> What must be realized, however, is that in terms of the need for discovery and treatment, the incidence and nature of child maltreatment in the military community are at least as significant as they are in society as a whole.

### *B. The Incidence of Child Maltreatment in the Military Community*

As stated above, measuring child maltreatment is problematic due to several factors; nonetheless, data concerning the incidence of child maltreatment in the armed forces is currently being compiled for statistical purposes.<sup>38</sup> The tables in the Appendix following the article contain current statistical data concerning military child maltreatment. Table 1<sup>39</sup> contains the established

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<sup>32</sup>*Id.* at 115-17.

<sup>33</sup>GAO Report, *supra* note 5.

<sup>34</sup>NCCAN, *Child Abuse and Neglect Among the Military*, DHHS Publication No. (OHDS) 80-30275 at 3 (Aug. 1980) (hereinafter cited as NCCAN No. 80-30275).

<sup>35</sup>Myers, *supra* note 17, at 120.

<sup>36</sup>*Id.*

<sup>37</sup>Carmony, Lanier & Bardill, *Prevention of Child Abuse and Neglect in Military Families*, *Children Today* 16 (Mar.-Apr. 1979).

<sup>38</sup>Interview with JanaLee Sponberg, Program Analyst of the Department of Defense (DOD) Military Family Resource Center, in Arlington, VA. (Nov. 19, 1985) (hereinafter cited as Sponberg).

<sup>39</sup>Child and Spouse Statistical Report—FY 1985, obtained from JanaLee

cases<sup>40</sup> of child maltreatment reported by the military services for Fiscal Years 83, 84, and 85. As Table 1 indicates, there were 5,908 cases of child maltreatment in FY 85. Based on the number of children by service and the number of the established cases, Table 2<sup>41</sup> shows the estimated annual rate of child maltreatment for FY 85. The estimated annual rates for each of the services equate to an overall Department of Defense (DOD) rate of 3.7 incidents per 1,000 children. Table 3<sup>42</sup> compares the estimated child maltreatment rate for FY 85 with the maltreatment rate for FY 84. A summary of child abuse perpetrator information is presented in Table 4.<sup>43</sup> Ninety percent of the perpetrators are parents. Of the perpetrators identified by paygrade, 41% were at the E-4 to E-6 level. Where paygrade was not applicable, dependent spouses and civilians comprised 38% of the perpetrators.

These statistics show that child maltreatment is a matter of great concern within the military community and that both civilian and military personnel contribute to the problem. The following section will examine the development of military child advocacy programs designed to address these concerns.

### III. CHILD ADVOCACY PROGRAMS IN THE ARMED SERVICES

#### *A. Historical Development*

Military officials responded slowly to the problem of child abuse and neglect on the national level.<sup>44</sup> The failure of the armed services to develop a coordinated response to child maltreatment by the late 1960s, at a time when nearly every state had enacted child abuse reporting laws, created the impression of a lack of commitment to solving the problem.<sup>45</sup> As late as 1974, formal child abuse programs in the military were being characterized as "essentially nonexistent."<sup>46</sup>

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Sponberg, Program Analyst of the DOD Military Family Resource Center, in Arlington, VA. (Feb. 4, 1986) (hereinafter cited as MFRC Report).

<sup>40</sup>Established cases are those cases in which, after thorough investigation and evaluation by an official body, the evidence in a particular case substantiates the belief that maltreatment did occur. This does not include cases in which abuse is alleged or suspected. Consequently, the actual incidence of child abuse during these periods is likely to be greater than indicated. Sponberg, *supra* note 38.

<sup>41</sup>MFRC Report, *supra* note 39.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>Allen, *supra* note 9.

<sup>45</sup>NCCAN No. 80-30275, *supra* note 34.

<sup>46</sup>*Id.*

There were a number of reasons for the military's slow recognition of and reaction to the problem. Unlike states which are a distinctive geographic entity, military installations are scattered throughout the world. This caused a fragmented perspective of the problem and encouraged those in command to view child abuse cases as isolated incidents on particular bases, rather than as manifestations of a military-wide problem.<sup>47</sup> Comprehension of the problem was further frustrated by difficulties in communications among the various military installations.<sup>48</sup> Moreover, while military commanders respond quickly and effectively to social problems that clearly threaten military effectiveness, they did not initially see child maltreatment as posing such a threat.<sup>49</sup> In contrast to other social problems such as racial discrimination or narcotics addiction, child maltreatment was seen as less of an obvious threat to the cohesiveness of the organization and the effectiveness of military command.<sup>50</sup> Whatever the reasons for their slow recognition of child maltreatment during the mid-1960s and early 1970s, by the mid 1970s the services knew there was a problem and were responding.<sup>51</sup>

Years before service-wide regulations were established, there were several innovative programs on individual installations which served to encourage the development of child advocacy regulations and as models for other programs.<sup>52</sup> One of the best known was the Infant and Child Protection Council (ICPC), established in 1967 at the William Beaumont Army Medical Center in El Paso, Texas.<sup>53</sup> The ICPC was an interdisciplinary committee whose members were all actively involved in child maltreatment cases and who represented the following specialty areas: social work, pediatrics, the Army health nurse section, psychiatry, the Army Community Service, the hospital staff judge advocate, and the Child Welfare Office of the State of Texas.<sup>54</sup> This program attempted to provide a nonpunitive response to child maltreatment<sup>55</sup> and has served as a model for many other military medical facilities in their efforts to set up child abuse programs.<sup>56</sup>

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<sup>47</sup>*Id.*

<sup>48</sup>Allen, *supra* note 9.

<sup>49</sup>NCCAN No. 89-30275, *supra* note 34.

<sup>50</sup>Allen, *supra* note 9.

<sup>51</sup>Bowen, *Military Family Advocacy: A Status Report*, Armed Forces & Soc'y 583, 584 (Summer 1984) (hereinafter cited as Bowen).

<sup>52</sup>NCCAN, *supra* note 34.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>Allen, *supra* note 9, at 12.

<sup>56</sup>NCCAN No. 80-30275, *supra* note 34.

The growth of these independent installation programs in each of the military services showed that without command attention and service-wide regulations, child maltreatment programs would lack the support required to be effective.<sup>57</sup> In July 1973, representatives from the three services and the Office of the Assistant Secretary of Defense for Health and the Environment met to discuss maltreatment programs for military children.<sup>58</sup> Congressional enactment of the Child Abuse Prevention and Treatment Act<sup>59</sup> in January 1974, gave additional impetus to the project.<sup>60</sup> In January 1975, a Tri-Service Child Advocacy Working Group, designed to monitor existing programs in the services, was established in the Office of the Assistant Secretary of Defense for Health Affairs.<sup>61</sup> As a result, child advocacy regulations were drafted for the services.

### *B. The Child Advocacy Regulations*

In 1975 and 1976, the three military services formally established their own child advocacy programs, recognizing that the quality of a service member's family life can affect performance, which in turn affects the morale and discipline of the command.<sup>62</sup> It was also recognized that incidents involving brutality, insensitivity, and neglect reflect unfavorably on all members of the military.<sup>63</sup>

These independent programs were initially developed without overall guidance from DOD.<sup>64</sup> This led to inconsistent policies within the different services' programs regarding several important issues, such as the appropriate placement of child advocacy programs within the organizational structure of each service, age differences in the definition of a child, and organization and management of the programs at the installation level.<sup>65</sup> In addition, the initial programs were sometimes neglected. A leading figure on child maltreatment problems described the military child abuse programs in the following manner:

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<sup>57</sup>Myers, *supra* note 17, at 120.

<sup>58</sup>Bowen, *supra* note 51.

<sup>59</sup>42 U.S.C. §§ 5101-5107 (1976) (amended in 1978 by the Child Abuse Prevention and Treatment Act of 1978, 42 U.S.C. §§ 5101-5107 (1982)).

<sup>60</sup>NCCAN No. 80-30275, *supra* note 34, at 4.

<sup>61</sup>Bowen, *supra* note 51.

<sup>62</sup>GAO Report, *supra* note 5, at 2.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.* at 21.

<sup>65</sup>*Id.*

Like those they serve to protect, child protection programs in the military services have sometimes been the victims of neglect. The reasons for this are complex, but in an oversimplification it may be speculated that although no one in the higher echelon of the defense establishment is opposed to good child protection, its importance in maintaining a national defense posture has not been viewed as critical. Clearly these programs have not received the attention given to drug abuse, alcoholism and equal opportunity endeavors, all of which have more direct impact upon active duty troops and military effectiveness.<sup>66</sup>

In May 1979, a study by the General Accounting Office (GAO)<sup>67</sup> identified these and other problems and recommended that the Secretary of Defense improve the organization and operation of the military's child advocacy programs. The GAO recommended that the Secretary establish a small centralized group to serve as a focal point for (1) bringing consistency to the services' child advocacy regulations; (2) developing education and training materials to improve child advocacy programs at the installation level; (3) providing guidance to the services regarding how to handle the difficulties posed by exclusive jurisdiction installations when dealing with child maltreatment problems; and (4) communicating with military installations and the NCCAN regarding child advocacy matters in general.<sup>68</sup> These and other recommendations by the GAO had a significant impact on DOD policy and have influenced modifications in the military's child advocacy programs.

### *1. Department of Defense Program.*

Spurred by the GAO recommendations, DOD established a Family Advocacy Committee in 1979 to develop a single policy for all services.<sup>69</sup> On May 19, 1981, DOD issued a policy directive<sup>70</sup> establishing a Family Advocacy Program,<sup>71</sup> which mandated that each service create a program to address the prevention, identification, evaluation, treatment, followup, and reporting of child maltreatment.<sup>72</sup> The directive ordered the

<sup>66</sup>*Id.* at 4.

<sup>67</sup>See generally GAO Report, *supra* note 5.

<sup>68</sup>*Id.* at 22.

<sup>69</sup>Bowen, *supra* note 51, at 594.

<sup>70</sup>Dep't of Defense Directive No. 6400.1, Family Advocacy Program (May 19, 1981) (hereinafter cited as DOD Dir. 6400.1).

<sup>71</sup>*Id.* at para. A1.

<sup>72</sup>*Id.* at para. D2.

Family Advocacy Committee to collaborate with the NCCAN to establish a Military Family Resource Center.<sup>73</sup> As a response to the GAO recommendation to create a resource center to serve the military worldwide, the Military Family Resource Center was created to support family advocacy in the services and to assist professionals who provide help to military personnel and their families.<sup>74</sup> Although initially created as a three-year demonstration project under a grant from the NCCAN, the resource center now has been incorporated into DOD's overall family support system.<sup>75</sup>

The DOD directive is a policy statement, not a working instrument with specific program elements.<sup>76</sup> It provides a broad structure for implementing programs within the services and advocates a coordinated, but not necessarily uniform, approach to family advocacy.<sup>77</sup> The responsibility to implement the directive is left to each individual service based upon its own individual requirements and resources.<sup>78</sup>

## 2. Individual Service Programs.

The Air Force organized the first official military child advocacy program on April 25, 1975, under Air Force Regulation 160-38.<sup>79</sup> Army Regulation 600-48,<sup>80</sup> which established the Army Child Advocacy Program, became effective on February 1, 1976. Finally, the instruction that established the Navy's Child Advocacy Program, Bureau of Medicine and Surgery Instruction 6320.53,<sup>81</sup> was issued on February 4, 1976.

A major weakness of the Navy's program was that the instruction and its successor instruction, BUMEDINST 6320.57, applied only to the Navy's medical service. Navy nonmedical activities were not required to comply with the instruction and

<sup>73</sup>*Id.* at para. E2j.

<sup>74</sup>Bowen, *supra* note 51, at 593.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 595.

<sup>77</sup>*Id.*

<sup>78</sup>DOD Dir. 6400.1, para. E4.

<sup>79</sup>Dep't of Air Force, Reg. No. 160-38, Air Force Child Advocacy Program (Apr. 25, 1975), amended by AFR 160-38, Air Force Family Advocacy Program (Nov. 5, 1981) (hereinafter cited as AFR 160-38).

<sup>80</sup>Dep't of Army, Reg. No. 600-48, Army Child Advocacy Program (Feb. 1, 1976) (hereinafter cited as AR 600-48), superceded by Dep't of Army, Reg. No. 608-1, Army Community Service Program (July 8, 1985) (hereinafter cited as AR 608-1).

<sup>81</sup>Dep't of Navy, Bureau of Med. & Surgery Instruction No. 6320.53, Navy Child Advocacy Program (Feb. 4, 1976), superceded by Dep't of Navy, Bureau of Med. & Surgery Instruction No. 6320.57, Family Advocacy Program (July 11, 1979) (hereinafter cited as BUMEDINST 6320.57).

installation commanders were not responsible for the program.<sup>82</sup> This arrangement was criticized on the grounds that Navy families on installations lacking a large medical facility may have been denied the assistance of a child advocacy program.<sup>83</sup> The GAO recommended that the Navy place responsibility for its child advocacy program at a high enough level to encompass all Navy installations and personnel.<sup>84</sup> In response, Secretary of Navy Instruction 1752.3<sup>85</sup> was issued on January 27, 1984. Unlike BUMEDINST 6320.57, this family advocacy instruction applies throughout the Department of the Navy.<sup>86</sup>

The current versions of the service regulations are similar in scope and intent. Each is concerned with identification, treatment, and rehabilitation of the maltreater, as well as treatment of the maltreated child.<sup>87</sup> Each establishes the responsibilities of various personnel in setting up and operating the child advocacy program.<sup>88</sup> In addition, each regulation establishes a multidisciplinary child advocacy committee on which various installation agencies are represented.<sup>89</sup>

Of the three, the Air Force regulation is perhaps the most explicit in its choice of a nonpunitive response to maltreating parents.<sup>90</sup> Commanders are directed not to deny promotions solely on the basis of a person's entrance into the Air Force Family Advocacy Program.<sup>91</sup> In addition, commanders are directed to "review the duty assignment status of all military members responsible for an abused or neglected child to determine whether current duties may be contributing to the situation."<sup>92</sup> This humane way of dealing with members of troubled families has the blessing of nearly every child abuse researcher and practitioner, and demonstrates the extent to which the services have incorporated accepted treatment methods into their programs.<sup>93</sup>

In evaluating the effectiveness of the military child advocacy programs, the 1979 GAO study identified five basic elements that

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<sup>82</sup>GAO Report, *supra* note 5, at 9.

<sup>83</sup>NCCAN No. 80-30275, *supra* note 34, at 4.

<sup>84</sup>GAO Report, *supra* note 5, at 22.

<sup>85</sup>Dep't of Navy, Sec'y of Navy Instruction No. 1752.3, Family Advocacy Program (Jan. 27, 1984) (hereinafter cited as SECNAVINST 1752.3).

<sup>86</sup>*Id.* at para. 2.

<sup>87</sup>AFR 160-38, para. 2; AR 608-1, para. 7-1; SECNAVINST 1752.3, para. 1.

<sup>88</sup>AFR 160-38, § B; AR 608-1, para. 7-3; SECNAVINST 1752.3, para. 9.

<sup>89</sup>AFR 160-38, para. 8; AR 608-1, para. 7-4; SECNAVINST 1752.3, para. 7c.

<sup>90</sup>NCCAN No. 80-30275, *supra* note 34, at 4.

<sup>91</sup>AFR 160-38, para. 26.

<sup>92</sup>*Id.* at para. 25.

<sup>93</sup>NCCAN No. 80-30275, *supra* note 34, at 4.

GAO believed were essential to the success of any program: prevention and identification, intake and assessment, treatment, followup, and reporting.<sup>94</sup>

Prevention and identification programs are educational efforts aimed at increasing the awareness of and the ability to recognize child maltreatment.<sup>95</sup> The broad objective of prevention is to stop child maltreatment before it occurs.<sup>96</sup> To be effective, prevention programs should be directed toward parents and be designed to help strengthen family life and to improve parenting skills.<sup>97</sup> Identification programs are educational efforts directed toward recognizing signs of possible child maltreatment and reporting suspected cases to the proper officials.<sup>98</sup> An effective identification program must convey an understanding of what constitutes child maltreatment to professionals having frequent contact with children, such as physicians, nurses, and school teachers.<sup>99</sup>

Intake and assessment refers to the actions that take place from the time installation personnel are notified of a possible maltreatment case until the case is evaluated by the installation child advocacy committee.<sup>100</sup> This function is intended to receive and enter into the system suspected child maltreatment cases, assure the immediate safety of the child, provide any needed emergency services, evaluate the case, and recommend appropriate treatment.<sup>101</sup>

Treatment programs provide medical care for the maltreated child and therapy and counseling for the family.<sup>102</sup> The first priority, however, is to provide immediate care for any of the child's physical injuries.<sup>103</sup> The objective of family treatment is to protect the child from further harm by helping the mother and father become better parents and change their abusive or neglectful patterns.<sup>104</sup>

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<sup>94</sup>GAO Report, *supra* note 5, at 2.

<sup>95</sup>*Id.* at 14.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.*

<sup>98</sup>*Id.* at 16.

<sup>99</sup>*Id.* Educating nonmedical personnel is important because studies show that they report a significant portion of all cases identified at a military installation.

<sup>100</sup>*Id.* at 17.

<sup>101</sup>*Id.*

<sup>102</sup>*Id.* at 18.

<sup>103</sup>*Id.*

<sup>104</sup>*Id.* at 19.

Finally, followup programs provide a means of checking on the family situation after treatment to assess the effectiveness of services and to determine whether more help is needed.<sup>105</sup>

### C. Administrative Problems

It would seem that the highly organized structure of the military system, in particular its single health care system, would allow for effective administration of the child advocacy programs. Because of the tightly knit structure of the health care system, treatment and prevention of almost any medical problem can be easily monitored and evaluated.<sup>106</sup> Despite these positive features of military organization, however, problems have been encountered while managing these programs.

#### 1. Insufficient Resources.

None of the military's child advocacy programs are directly funded.<sup>107</sup> In that context, the programs essentially serve as administrative mechanisms to use existing resources, both civilian and military, in dealing with child maltreatment.<sup>108</sup> The vast majority of the programs are staffed by individuals who are given child advocacy responsibilities as an additional duty.<sup>109</sup> Improving the child advocacy programs at the installation level will require DOD to direct more resources to these programs.<sup>110</sup> Resources are needed to increase education and training efforts aimed at preventing and identifying child maltreatment.<sup>111</sup> Furthermore, additional staff could be used at virtually all DOD installations to carry out child advocacy responsibilities,<sup>112</sup> especially in the family treatment and followup programs.<sup>113</sup>

The establishment of the Military Family Resource Center in 1980 was a step in the right direction. The center serves as a central point of contact for all military child abuse matters worldwide.<sup>114</sup> Among its responsibilities, the center collects, documents, and disseminates information on child protection research and practices.<sup>115</sup> In addition, the center provides techni-

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<sup>105</sup>*Id.*

<sup>106</sup>Allen, *supra* note 9.

<sup>107</sup>GAO Report, *supra* note 5, at 4.

<sup>108</sup>*Id.* at 5.

<sup>109</sup>NCCAN No. 80-30275, *supra* note 34, at 4.

<sup>110</sup>GAO Report, *supra* note 5, at 21.

<sup>111</sup>*Id.* at 14.

<sup>112</sup>*Id.* at 21.

<sup>113</sup>*Id.* at 19.

<sup>114</sup>Bowen, *supra* note 51, at 593.

<sup>115</sup>GAO Report, *supra* note 5, at 20.

cal assistance and training for personnel involved in preventing and treating child maltreatment among military families.<sup>116</sup>

## 2. *Ineffective Reporting Systems.*

Another problem which confronts military child advocacy programs is the difficulty in maintaining accurate information on maltreatment incidents.<sup>117</sup> Each of the military services has established a child maltreatment registry for recording and maintaining certain information on suspected or confirmed child maltreatment cases.<sup>118</sup> The registries serve two purposes. First, they provide the capability to identify individuals previously involved in child maltreatment incidents.<sup>119</sup> This knowledge is especially useful given the fact that military personnel make frequent moves. Second, these registries can accumulate statistics on the incidents reported.<sup>120</sup> The accumulated data could help identify trends and justify resources for more effective child advocacy programs.

The information contained in these registries, however, is incomplete because of the reluctance to report incidents of child maltreatment.<sup>121</sup> The primary reason is apparently a concern that the information could be used to the detriment of the service member's career.<sup>122</sup> Maintaining and using information on child abuse incidents, particularly when it involves suspected abusers, is an extremely sensitive issue because there is a potential for misuse of the information.<sup>123</sup> Another reason for incomplete reporting concerns the child advocacy officials at the installation level. Because of other duties and time constraints, these officials place more emphasis on crisis intervention and care management than on their reporting duties.<sup>124</sup>

The Department of Defense possibly could solve, or at least alleviate, these problems by creating a central registry.<sup>125</sup> A single policy could be established concerning the collection and use of information on suspected and confirmed child maltreatment incidents. Before DOD could take this action, however, it would have to consider the sensitive nature of the issues relating to a

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<sup>116</sup>*Id.*

<sup>117</sup>*Id.* at 31.

<sup>118</sup>AFR 160-38, para. 4a; AR 608-1, para. 7-11; SECNAVINST 1752.3, para. 6m.

<sup>119</sup>GAO Report, *supra* note 5, at 24.

<sup>120</sup>*Id.*

<sup>121</sup>*Id.* at 29.

<sup>122</sup>*Id.*

<sup>123</sup>*Id.* at 32.

<sup>124</sup>*Id.* at 30.

<sup>125</sup>*Id.* at 32.

central registry, including the individual's right of privacy and the public's freedom of information, especially in the area of suspected cases.<sup>128</sup>

#### IV. INTERACTION OF MILITARY AND STATE ADVOCACY PROGRAMS

The child advocacy regulations of all three services stress the importance of interaction between local military and civilian social service programs.<sup>127</sup> This interaction expands the military installation's capability to deal with child maltreatment problems. Civilian resources generally are not utilized by military installations located outside the United States because of language barriers and differing laws, customs, and attitudes toward child maltreatment in other countries.<sup>128</sup> The extent of interaction between military and state social service organizations in the United States varies from installation to installation. Interaction is determined partly by the attitudes of the agencies involved and by the availability of resources on the military installations and in the local civilian communities.<sup>129</sup> A major concern affecting interaction is jurisdiction, which makes coordination with the civilian community difficult to develop and maintain.<sup>130</sup>

##### A. JURISDICTIONAL PROBLEMS

Due to the jurisdictional status of military installations, the management of child maltreatment cases involving military families is sometimes hampered.<sup>131</sup> The various kinds of jurisdiction on military installations often affects the way a child maltreatment case is handled, *i.e.*, criminal versus civil, who investigates, who supervises the services, and who is empowered to authorize temporary or permanent removal of a child whose life is endangered.<sup>132</sup> Also, the substantive law which applies in child maltreatment cases depends upon the type of jurisdiction associated with the particular military installation.<sup>133</sup>

<sup>128</sup>*Id.*

<sup>127</sup>AFR 160-38, para. 7d; AR 608-1, para. 7-2c(3); SECNAVINST 1752.3, para. 61.

<sup>128</sup>GAO Report, *supra* note 5, at 12.

<sup>129</sup>*Id.*

<sup>130</sup>Schlie, Management and Supervisory Issues on Military Child Abuse Programs, printed in 2 Child Abuse and Neglect: Issues on Innovation and Implementation 125, 126 (M. Lauderdale, R. Anderson & S. Cramer eds. 1978).

<sup>131</sup>J. Stern & J. Haley, Jurisdiction Over Child Abuse and Neglect Cases Among Military Families 1 (unpublished paper) (hereinafter cited as Stern & Haley).

<sup>132</sup>Allen, *supra* note 9, at 16.

<sup>133</sup>Stern & Haley, *supra* note 131.

There are varying degrees of jurisdiction that may be exercised by the federal government over military installations. Federal ownership of a parcel of land does not necessarily mean that federal power is absolute on that land in all respects or that state authority is totally excluded.<sup>134</sup> Various combinations or divisions of federal and state jurisdiction over that land are possible. To determine the exact type of jurisdiction over an installation, it is necessary to examine the specific transaction by which the land was acquired.<sup>135</sup> There are four general categories which describe federal-state jurisdictional relationships:

1. *Exclusive Jurisdiction.* Those in which the federal government has received all of the authority of the state to legislate within the land area in question.
2. *Concurrent Jurisdiction.* Those in which the state has reserved the right to exercise its authority concurrently with the federal government.
3. *Partial Jurisdictions.* Those in which both the federal government and the state have less than complete authority.
4. *Proprietorial Jurisdictions.* Those in which the federal government has acquired some degree of ownership or right to use an area in the state, but has not obtained any legislative authority.<sup>136</sup>

Exclusive federal jurisdictions, which constitute a substantial percentage of total military installations, are the most problematic.<sup>137</sup> Military personnel, while on base, are considered to be federalized citizens and are subject only to military and federal law.<sup>138</sup> Theoretically, state civil laws have no operation or effect. It is in the area of the legal framework of child protection, however, that state laws could be most beneficial to the military community. The problem, simply stated, is that there is no legal framework for child protection on exclusive federal jurisdictions because there is no federal law pertaining to child maltreatment.<sup>139</sup> The lack of adequate federal laws has been called the

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<sup>134</sup>Broadhurst, Estey, Hughes, Jenkins, & Martin, *Child Protection in Military Communities*, DHHS Publication No. (OHDS) 80-30280 at 15 (May 1980).

<sup>135</sup>*Id.*

<sup>136</sup>*Id.*

<sup>137</sup>Allen, *supra* note 9, at 16.

<sup>138</sup>*Id.*

<sup>139</sup>NCCAN No. 80-30275, *supra* note 34, at 4.

"single deficiency . . . that most severely handicaps child protection programs in the military services."<sup>140</sup>

### B. APPLICATION OF STATE LAW

Normally, state laws set forth comprehensive procedures for dealing with child maltreatment.<sup>141</sup> These laws also require involvement by the local department of social services and authorize protective custody of the child in certain cases of suspected maltreatment.<sup>142</sup> Because there are no adequate or specific federal procedures applicable in child abuse cases occurring on military installations of exclusive federal jurisdiction, application of state law and procedures could benefit the military community.<sup>143</sup> Yet, efforts to determine a standardized approach to the application of state law on these installations have been unsuccessful.<sup>144</sup>

The traditional view has been that exclusive federal jurisdiction over an area precluded a state court from assuming jurisdiction and applying state law. State criminal law may be applied, however, in areas of concurrent and exclusive jurisdiction through the Assimilative Crimes Act.<sup>145</sup> The Act adopts state criminal law as federal criminal law and provides a comprehensive federal criminal code for military installations.<sup>146</sup> Prosecutions under the statute are not prosecutions to enforce state law, but to enforce federal criminal law whose details have been adopted from state law by reference.<sup>147</sup> The Act applies only in those cases where there is no federal statute defining a certain offense or providing for its punishment.<sup>148</sup> Therefore, a service member cannot be prosecuted under the Act for conduct which is punishable under a specific punitive article of the UCMJ.<sup>149</sup> Given that there is no specific federal law in the area of child abuse, if state law makes

<sup>140</sup>Miller, *supra* note 11, at 286.

<sup>141</sup>See Estey, *State Jurisdiction in Child Abuse Cases*, *The Army Lawyer*, Feb. 1979, at 11.

<sup>142</sup>*Id.*

<sup>143</sup>*Id.*

<sup>144</sup>*Id.*

<sup>145</sup>18 U.S.C. § 13 (1982).

<sup>146</sup>Dep't of Army, Pamphlet No. 27-21, *Military Administrative Law*, para. 2-19c (Oct. 1, 1985) (hereinafter cited as DA Pam 27-21).

<sup>147</sup>*Id.*

<sup>148</sup>*Id.* When federal law or policy exists, there is no need for assimilation; indeed it is precluded by the terms of the Act itself. In addition, state criminal laws contrary to federal policies and regulations cannot be assimilated. *Id.*

<sup>149</sup>See, e.g., *United States v. Irvin*, 21 M.J. 184 (1986) (in the prosecution for the involuntary manslaughter of a two-year-old child in which the child abuse consisted only of assaults, the accused could not be convicted pursuant to the Assimilative Crimes Act because assault is punishable under UCMJ).

child maltreatment a criminal offense, the Act would assimilate that law.<sup>150</sup> Consequently, any person, whether military or civilian, could be tried in a federal court for the offense.

One problem with the Assimilative Crimes Act is that it only assimilates state criminal law.<sup>151</sup> Where an act is not defined as a crime under state law, it cannot be assimilated, even if the act is subject to civil penalties under state law.<sup>152</sup> Most states have child maltreatment laws which are not part of their criminal code.<sup>153</sup> As the violation would be one of civil law, not criminal law, that part of the state law would not be assimilated under the Act.

This makes military child advocacy programs difficult to administer effectively. Although the primary emphasis of the programs is to protect the child and help the parents, the only laws applicable are punitive in nature, contrary to opinion about the most effective way to handle child maltreatment.<sup>154</sup> The result has been a move for a cooperative approach between military and civilian agencies. Several arguments supporting application of state child abuse laws to land areas of exclusive jurisdiction have been advanced, including:

1. An examination of federal law reveals that Congress has determined not to assert jurisdiction in the area of child abuse. The only federal legislation in this area is the CAPTA, which in essence provides funding for states establishing child abuse programs. While Congress could legislate in the area of child abuse on federal enclaves, it has not done so. Congress has decided to act solely by providing funding to the states so that they may deal with the problem. Consequently, the currently existing state child abuse laws should be applied to an otherwise unregulated area of exclusive federal jurisdiction.<sup>155</sup>

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<sup>150</sup>For example, some state child abuse statutes require personnel to report suspected cases of child abuse. Because the UCMJ does not impose a reporting requirement, it is through the Act that the state child abuse reporting laws would be enforced on military installations, making military medical personnel criminally liable for failing to report. DA Pam 27-21, para. 2-19c.

<sup>151</sup>Miller, *supra* note 11, at 287.

<sup>152</sup>DA Pam 27-21, para. 2-19c.

<sup>153</sup>Stern & Haley, *supra* note 131, at 9.

<sup>154</sup>*Id.*

<sup>155</sup>Estey, *supra* note 141, at 12-13. See also *Paul v. United States*, 371 U.S. 245 (1963) (the state law applied in a federally unregulated land area of exclusive U.S. jurisdiction may be the current state law if some form of state regulation of the subject existed at the time of acquisition of the land by the United States).

2. A federal military reservation may be considered part of the state within which it is located. Consequently, the state may properly apply and enforce its child protection laws on the installation. Not only is there no interference with a federal assertion of jurisdiction, but such state action is in furtherance of a clear federal policy expressed in the CAPTA.<sup>156</sup>

3. Because child abuse legislation confers a benefit on abused and neglected children, the cases dealing with rights of federal enclave residents to benefits of state law are relevant.<sup>157</sup>

4. There are several examples where concurrent jurisdiction already exists, even on installations where it theoretically does not. Children born in federal hospitals, on federal land, receive state birth certificates. When killed on federal land, they receive state death certificates. Divorce actions are done through state courts. Military members who marry get licenses from local governments. Now, if a state can decide if one was born, married, divorced, and died, there should be some precedence for the state intervention in child abuse matters as well.<sup>158</sup>

5. The DOD encourages the military departments to relinquish such legislative jurisdiction as may be required, subject to military needs, to ensure the applicability on military installations of state laws pertaining to child protection.<sup>159</sup>

The arguments given above present strong justification for applying state child abuse laws to residents of military installa-

<sup>156</sup>Estey, *supra* note 141, at 13. See also *Howard v. Commissioners*, 344 U.S. 624 (1953) (rejected concept that a Federal enclave was a state within a state and noted that the Federal enclave continued to be part of the state within which it was located); *In re Terry Y.*, 101 Cal. App. 3d 178, 161 Cal. Rptr. 452 (Ct. App. 1980) (because federal enclaves remain geographically and legally a part of the state in which they are located, court determined that federal policy contemplated that the state would make its services available to children on federal enclaves); *Board of Chosen Freeholders v. McCorkle*, 98 N.J. Super. 451, 237 A.2d 640 (App. Div. 1968) (children residing on federal enclaves were entitled to benefits provided by state Bureau of Children's Services); *State v. Interest of D.B.S.*, 137 N.J. Super. 371, 349 A.2d 105 (N.J. Super. 1975) (state juvenile delinquency laws could be applied to a juvenile living on a federal enclave).

<sup>157</sup>Estey, *supra* note 141, at 13. See also *Evans v. Cornman*, 398 U.S. 419 (1970) (state would violate the equal protection clause of the fourteenth amendment if it denied state voting rights to state domiciliaries living on a federal enclave).

<sup>158</sup>Miller, *supra* note 11, at 289.

<sup>159</sup>DOD Dir. 6400.1, para. D3.

tions with exclusive jurisdiction. In fact, DOD contemplates such a result in its own directive. As a practical matter, state laws and services are being used on an installation-by-installation basis.<sup>160</sup> The greatest obstacle to applying state child abuse laws on exclusive jurisdiction installations has been money; many local jurisdictions may not have the resources necessary to expand local programs to military installations. It is doubtful, however, that any judge faced with this issue would ignore the best interests of the child and deny the protections of the law to an abused child who could otherwise remain unprotected.<sup>161</sup>

### ***C. APPLICATION OF THE UNIFORM CODE OF MILITARY JUSTICE***

As previously mentioned, there are no specific federal procedures pertaining to child abuse within the military. But, the military member who is involved in child maltreatment can be dealt with under applicable provisions of the Uniform Code of Military Justice.<sup>162</sup> Even though child maltreatment is not directly addressed by the UCMJ, physical abuse of a child may be punishable under its provisions as assault,<sup>163</sup> battery,<sup>164</sup> maiming,<sup>165</sup> murder,<sup>166</sup> or manslaughter.<sup>167</sup> Similarly, sexual abuse<sup>168</sup> of a child and some forms of neglect<sup>169</sup> are also punishable under the UCMJ.

Despite these provisions, relatively few cases within the military speak specifically to child abuse.<sup>170</sup> Based on this fact, one

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<sup>160</sup>Estey, *supra* note 141, at 11.

<sup>161</sup>*Id.* at 15.

<sup>162</sup>10 U.S.C. §§ 801-940 (1982) (hereinafter cited as UCMJ).

<sup>163</sup>UCMJ art. 128.

<sup>164</sup>*Id.*

<sup>165</sup>UCMJ art. 124.

<sup>166</sup>UCMJ art. 118.

<sup>167</sup>UCMJ art. 119.

<sup>168</sup>UCMJ art. 120 (rape and carnal knowledge); UCMJ art. 125 (sodomy).

<sup>169</sup>Possibly, the prohibition against conduct unbecoming an officer and a gentleman in UCMJ art. 133 might be extended to neglect cases, but it could well be argued that this section was not intended to apply to child neglect. Besides, this section only applies to commissioned officers, cadets, and midshipmen. A more viable catch-all to retain jurisdiction may be UCMJ art. 134, which covers "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital." Offenses under the Assimilative Crimes Act, discussed below in Section IV, could be used to justify the application of this section, provided the offenses are not covered by a specific UCMJ article. Stern & Haley, *supra* note 133, at 3-4.

<sup>170</sup>See, e.g., *United States v. Moore*, 12 C.M.A. 696, 31 C.M.R. 282 (1962) (parent becomes criminally liable if punishment exceeds due moderation); *United States v. Houghton*, 13 C.M.A. 3, 32 C.M.R. 3 (1961) (parental acts cannot go beyond

might conclude incorrectly that child abuse is not a problem in the military. Several factors explain the lack of cases. Due to evidentiary problems and other considerations, e.g., trauma to the victim if required to testify, usually only the severe cases are tried by court-martial.<sup>171</sup> Rather than trial by court-martial, the less severe cases are likely to result in nonjudicial punishment.<sup>172</sup> Nonjudicial punishment can be used to justify the administrative separation of the military member. Thus, it is possible that the low number of cases tried is due in part to the fact that some maltreatment incidents are handled administratively, rather than by courts-martial. In my opinion, another explanation may be that prosecution for child maltreatment is simply too distasteful for the military structure, especially in the less severe cases.<sup>173</sup> Adverse publicity, the connotation that commanders are not effective leaders, and the effect such a charge has upon the military career of the accused are all factors which militate against prosecution for child maltreatment within the military.<sup>174</sup>

Another problem is that while most states have enacted civil statutes to deal with child maltreatment, military authorities still must rely predominantly on criminal law because of the lack of federal law in this area. This is contrary to the nonpunitive approach advocated by child abuse researchers and practitioners as being the most effective approach.<sup>175</sup> Also, a military member who lives off post may be treated differently by the civilian community than a fellow member who commits similar misconduct on post who would be treated by military authorities.<sup>176</sup>

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permissible limits of parental discipline); *United States v. White*, 19 M.J. 995 (A.C.M.R. 1985) (evidence of battered child syndrome permitted in prosecution for voluntary manslaughter of two-year-old son); *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R. 1978) (in prosecution for maiming baby daughter, father's acts were beyond scope of permissible physical discipline); *United States v. Schiefer*, 28 C.M.R. 417 (A.B.R. 1959) (punishment of child must not exceed bounds of moderation); *United States v. Spivey*, 23 C.M.R. 518 (A.B.R. 1956) (in prosecution for unpremeditated murder of child, punishment inflicted exceeded bounds of reasonable punishment which parent is entitled to impose).

<sup>171</sup>Telephone interview with Major Suzanne J. Awalt, Special Projects Supervisor of the DOD Military Family Resource Center, in Arlington, Va. (Feb. 4, 1986) (hereinafter cited as Awalt).

<sup>172</sup>*Id.*

<sup>173</sup>Lehman, *Suffer the Little Children: Child Maltreatment in the Military Community* 38 (Mar. 1973) (unpublished thesis). [Author Note: The opinions and conclusions in this article are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, U.S. Army, or any other government agency].

<sup>174</sup>*Id.*

<sup>175</sup>See Miller, *supra* note 11, at 288.

<sup>176</sup>*Id.*

With regard to offenses committed by the dependents of military members, such as physical injury to a child by a dependent spouse, the military authorities lack jurisdiction under the UCMJ to try the civilian spouse even if the offense occurred on a military installation.<sup>177</sup> Depending upon the seriousness of the offense, however, military dependents who commit federal offenses<sup>178</sup> can be tried in either a magistrate court or a U.S. district court.<sup>179</sup> Even so, unless serious maltreatment has occurred, in my opinion, magistrates and U.S. attorneys generally hesitate to get involved in these "domestic matters."<sup>180</sup> One solution available to military authorities may be to force the maltreating family to move into the civilian community where they will be subject to state civil law and child protection programs. This is not often done, however.<sup>181</sup>

## V. CONCLUSION

Child maltreatment is a national tragedy. It exists within every social and occupational stratum of our country; the armed forces are no exception. The three military services have recognized the seriousness of the problem and have established child protective programs. These military programs, like their civilian counterparts, stress child protection rather than abuser punishment. However, insufficient funding and personnel have hampered the effectiveness of the programs. In addition, reluctance to report maltreatment impedes data accumulation which could be used to justify additional resources. The Department of Defense has responded to these problems by modifying program policies and providing the necessary training for child advocacy personnel. But, unless the child advocacy program within the military are given a higher priority, policy alone will not suffice.

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<sup>177</sup>UCMJ art. 2. See Stern & Haley, *supra* note 131, at 2.

<sup>178</sup>Federal offenses include those enumerated in Title 18, United States Code, as well as those offenses applicable under the Assimilative Crimes Act, discussed below at Section IVC. Offenses contained in Title 18 that may be applicable in child maltreatment cases include assault (sec. 113); murder (sec. 1111); manslaughter (sec. 1112); rape (sec. 2031); and sexual exploitation of children (sec. 2251).

<sup>179</sup>DA Pam 27-21, para. 2-19d. A U.S. magistrate may try misdemeanors and lesser offenses committed by adults on military installations. Installation commanders can seek to have a magistrate designated to try cases which arise on the military installation. Trial before a magistrate is voluntary and can proceed only with the defendant's written consent. Where the defendant does not consent to a trial before the magistrate or the offense is not a misdemeanor, the defendant must appear before the district court. *Id.*

<sup>180</sup>Awalt, *supra* note 155.

<sup>181</sup>Miller, *supra* note 11, at 289.

Jurisdictional problems also hamper the effectiveness of the programs. Presently, all military child advocacy regulations encourage interaction with local child advocacy agencies. Complex jurisdictional issues and questions sometimes block this interaction, however, especially with regard to military installations with exclusive federal jurisdiction. The result has been an installation-by-installation approach in determining whether the state may exercise its jurisdiction in the area of child maltreatment.

The Department of Defense has set the stage by encouraging the application of state laws in child protection cases; this directive, however, is nothing but a broad policy statement. To be effective, DOD must develop specific guidelines on how to coordinate the military child advocacy programs with state programs. If it does not use state programs, the military will have to rely on punitive measures in dealing with child maltreatment. Even though this result may provide immediate protection to the maltreated child, it conflicts with the emphasis placed on rehabilitating the maltreater in the civilian community. The Department of Defense must ensure that the benefits of an effective child advocacy program, including the benefits under applicable state child abuse laws, are made available to all military families.

## APPENDIX

Table 1

DEPARTMENT OF DEFENSE  
ESTABLISHED CASES OF CHILD MALTREATMENT  
FY 1985

<u>FY 85</u>	<u>Physical Abuse</u>	<u>Neglect</u>	<u>Abuse &amp; Neglect</u>	<u>Sexual Abuse</u>	<u>Emotional Maltreatment</u>	<u>Deaths</u>	<u>Total Child Abuse &amp; Neglect</u>
Quarters 1-2							
Army	508	586	60	168	30	5	1,357
Navy	480	260	133	253	54	6	1,186
Air Force	237	203	54	122	22	3	641
SUBTOTALS	1,225	1,049	247	543	106	14	3,184
Quarters 3-4							
Army	569	714	59	215	37	3	1,597
Navy	323	161	62	164	45	2	757
Air Force	146	119	12	80	13	0	370
SUBTOTALS	1,038	994	133	459	95	5	2,724
Total FY85	2,263 38.3%	2,043 34.6%	380 6.4%	1,002 17.0%	201 3.4%	19 .3%	5,908
Total FY84	2,887 40.0%	2,405 33.3%	759 10.5%	925 12.8%	230 3.2%	13 .2%	7,219
Total FY83	2,604	2,155	586	738	192	14	6,369*

\*80 Cases Classified as "Other Abuse"

**Table 2**  
**ESTIMATED CHILD MALTREATMENT RATES**  
**FY 1985**

<u>Service</u>	<u>Children</u>	<u>Established Cases</u>	<u>Annual Rate/1000</u>
Army	651,865	2,954	4.5
Navy/Marine Corps	476,888	1,943	4.1
Air Force	489,426	1,011	2.1
TOTAL	1,618,179	5,908	3.7

The above Table depicts an annual rate of child maltreatment by service. Population data on number of dependent children are published in "Defense '85," page 31, September, 1985. Established cases of maltreatment are as reported by the services for FY 1985. Annual rates per 1000 are determined by dividing the established cases by the number of children, and multiply that amount by 1000.

**Table 3**  
**CHILD MALTREATMENT RATES**

<u>Service</u>	<u>1984</u>	<u>1985</u>
Army	5.9	4.5
Navy/Marine Corps	5.0	4.1
Air Force	2.6	2.1
TOTAL	4.6	3.7

**Table 4**  
**ESTABLISHED CASES**  
**FOR PERPETRATORS OF**  
**CHILD ABUSE AND NEGLECT**  
**FY 1985**

<u>Relationship to Victim</u>	<u>Army</u>	<u>Navy/MC</u>	<u>Air Force</u>	<u>Total</u>	<u>Percent</u>
Mother	1648	656	311	2615	38.5%
Father	1368	771	398	2537	37.3%
Step Mother	62	28	20	110	1.6%
Step Father	489	228	109	826	12.1%
Sister	13	14	11	38	.6%
Brother	3	1	1	5	.1%
Babysitter	52	66	49	167	2.5%
Other	179	108	69	356	5.2%
Unknown	32	70	43	145	2.1%

<u>Perpetrator Paygrade</u>	<u>Army</u>	<u>Navy/MC</u>	<u>Air Force</u>	<u>Total</u>	<u>Percent</u>
O8					
O7					
O6	2	1	1	4	.1%
O5	6	2	3	11	.2%
O4	13	8	4	25	.4%
O3	30	6	18	55	.8%
O2	5	3	2	10	.2%
O1	4	2	3	9	.1%
W4	3	2		5	.1%
W3	14	3		17	.2%
W2	10	7		17	.2%
W1	3	3		6	.1%
E9	5	9	3	17	.2%
E8	39	29	11	79	1.2%
E7	231	139	37	407	6.1%
E6	438	290	112	840	12.6%
E5	506	318	201	1025	15.3%
E4	466	268	138	872	13.0%
E3	175	149	59	383	5.7%
E2	57	55	13	125	1.9%
E1	13	21	1	35	.5%
Civilians	1801	450	323	2574	38.5%
Unknown		175		175	2.6%

# THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 AS APPLIED IN SUPPORT LITIGATION: A SUPPORT ENFORCEMENT ATTORNEY'S PERSPECTIVE

by Major Stephen R. Hooper\*

## I. INTRODUCTION

This article is designed to provide a legal and practical discussion of the Soldiers' and Sailors' Civil Relief Act of 1940<sup>1</sup> as it is applied in family support litigation in a state, county, or municipal law office, from the perspective of one who is obligated to assist a plaintiff in family support cases against a military defendant.

By approaching the Act from the author's perspective as an attorney in the district attorney's (DA) office,<sup>2</sup> Army lawyers should receive a new and unique understanding that perhaps will differ from what they have normally seen.<sup>3</sup> No one can be an expert in this field. Practical experience with other jurisdictions suggests that the Act may operate differently, not only from state to state, but from county to county. This aspect is important because legal assistance attorneys need to be sensitive to the position of the civilian lawyers opposing their military clients. They must consider the effect that a "knee-jerk" invocation of the Act could have on their clients. To illustrate this point, it will be useful to isolate the law of one particular jurisdiction. For purposes of illustration, the law of California has been selected.

Under various California statutes, the district attorney has broad authority to obtain and enforce orders for child support.<sup>4</sup> In

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<sup>1</sup>50 U.S.C. app. §§ 501-591 (1982) (hereinafter cited as the Act or the SSCRA).

<sup>2</sup>In this article, the term "DA" refers to the District Attorney for the County of Monterey, California. It includes deputies acting on behalf of the District Attorney.

<sup>3</sup>For example, Dep't of Army, Pamphlet No. 27-166, Soldiers' and Sailors' Civil Relief Act (15 Aug. 1981).

<sup>4</sup>For example, Cal. [Welf. & Inst.] Code §§ 11350, 11350.1, 11350.5, 11475.1,

the area of spousal support, the authority is somewhat different. These orders are not obtained by the DA, but once they are entered they will be enforced for spousal support. An order for "family support" is treated as though it were for "child support."<sup>5</sup> The DA may file a new action for support, get involved in a pending dissolution action, or seek post-judgment modification of an existing child support order. It does not matter whether the case involves welfare; the DA's services are available to the custodial parent<sup>6</sup> without regard to financial condition.

## II. WHEN THE SOLDIER RESPONDS

Attorneys who have worked in legal assistance offices will recognize that the collective ability of soldiers to get into trouble exceeds the ability to describe all the possible problems. Nevertheless, there are certain generalizations that can be made in describing how the SSCRA may be applied. The typical situation features a young, unmarried woman who names a soldier as the father of her child. Because there is only an obligation to provide support for one's own children, the DA's first action is to file a complaint to establish parentage and determine the amount to be provided for support.

The common perception among civilian attorneys is that this soldier is a free-spending GI stationed at a distant post. When served with a summons and complaint naming him as a defendant in a paternity suit, the perception is that the soldier will take this matter straight to the legal assistance office. Thereupon, the legal assistance office will immediately send off a standard request for a stay as authorized by the SSCRA. But what strategies are employed to prevent the soldier from entering an appearance and preserving his SSCRA rights?

One approach is for the legal assistance officer to contact the DA's office directly. Whether made by itself or in conjunction with the standard request for a stay, this approach has benefits for both sides. In a DA's office, the soldier is seen not as merely seeking delay, but as showing a real interest in resolving the dispute by either settlement or orderly litigation. It opens an

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11476, 11476.1, 11477, and 11478; Cal. [Civil] Code §§ 248, 4700, 4701, and 4702; Cal. [Civ. Proc.] Code §§ 1674, 1680, and 1698.2; and Cal. [Penal] Code § (West 1985).

<sup>5</sup>Cal. [Civil] Code § 4811 (West 1985).

<sup>6</sup>The "custodial parent" is the party with actual, physical custody of the child and, in the District Attorney's office, is referred to as "C." The "non-custodial parent" is referred to as the "absent parent," "A," "AM" (for "absent mother"), or "AF" (for "absent father").

avenue for negotiation between the DA's office and the soldier's legal assistance attorney. These negotiations may break down, but both sides have a chance to consider settlement. Failing settlement, the soldier may still assert the protections of the Act. It is unfortunate that this approach is so rarely used by legal assistance officers.

Typically, the legal assistance officer sends out a request for a stay. In California, it goes to the clerk of the superior court who sends it to the DA for comment. Experience has shown that the stay provisions of the SSCRA are generally used as a device to delay litigation. Thus, although the response made in each case is based on its unique circumstances, if insufficient information is initially sent documenting the basis for a stay, one of the first steps is to obtain a court order requiring the soldier to provide more information on the request for a stay. The form currently being used is similar to the one at Appendix A. In determining whether to grant a stay, the court will consider any response the soldier makes to its order.

Depending upon the circumstances of the case, a request for a stay may cause the DA to write to the soldier's commander. We do this to verify the information provided by the soldier. We ask questions such as:

- (1) What has the soldier done to obtain ordinary and/or emergency leave to attend any necessary hearings and/or trial in this court? What results did these efforts produce?
- (2) Did the soldier take any leave in the last three months? If so, how much and for what purpose? How much leave does he currently have as reflected on his/her latest Leave and Earnings Statement?
- (3) What has the soldier done to obtain a transfer to a military installation near this court on either a temporary or permanent basis? What results did these efforts produce?
- (4) When was the soldier assigned to the present duty station? When is the soldier due to be transferred on normal rotation or reassignment? To what station will the soldier probably be transferred?
- (5) What is the date of the soldier's present enlistment contract? When does it expire? Do you expect the soldier

to re-enlist? Does the soldier's service record contain a bar to reenlistment? Are there any plans to release the soldier from active duty and, if so, when is this expected to occur?

When the soldier's children are the product of a lawful marriage or when the soldier's parentage is legally presumed, Army Regulation 608-99<sup>7</sup> covers a soldier's obligation to provide support for his or her dependents and describes command responsibilities on this issue. Commanders are asked by DAs to review the regulation and discuss it with the soldier. Commanders are also asked to recommend that the soldier establish an allotment for support of his or her dependents in an appropriate amount payable to the district attorney. A commander may be asked to determine whether the soldier has been unjustly enriching himself or herself by drawing BAQ at the "with dependents" rate while failing to provide support.

If a stay is granted, litigation will be deferred under the conditions ordered by the court. If, however, the court ultimately determines that the soldier is the father, its judgment will include a provision for back support covering the period while the action was stayed. This arrearage could be huge and might have a long-term adverse effect on the soldier-client. One must consider what the effects of such a large arrearage would be on a credit application for a real estate or auto loan.

### III. WHEN THE SOLDIER DOES NOT RESPOND

It is where the soldier does not file an answer that the Act again intervenes. Under 50 U.S.C. app. § 520, the court must appoint an attorney for the soldier before a default may be entered. It is up to the DA as the one seeking relief to arrange for the appointment of counsel. This is normally done by way of a motion submitted *ex parte*, supported by a declaration justifying the appointment. Basically, these facts are that the defendant is in the military service, that he or she is not represented by counsel, that he or she has been served with a copy of the summons and complaint, that the time within which to file an answer has expired, and that the defendant has neither appeared nor filed a responsive pleading. An example appears at Appendix B.

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<sup>7</sup>Dep't of Army, Reg. No. 608-99, Family Support, Child Custody, and Paternity (4 Nov. 1985).

The court responds to the motion by appointing an attorney in an order similar to the one set forth at Appendix C. In practice, this is accomplished by the court clerk who simply selects the next name up on the attorneys list. The process is not secret and it is handled entirely by the court. This is fortunate because calls may be received from disgruntled attorneys wondering why they were picked for the appointment. This is understandable when one considers that there are no provisions for paying fees to attorneys appointed under the Act.

The next step is for the attorney who has been appointed as counsel to be provided with a copy of the summons and complaint and the address of the soldier. The attorney is then responsible for contacting the defendant-client. An unusual variation on this procedure results when the soldier has a civilian attorney, but has not filed an answer or otherwise appeared. This generally involves a defendant who, after being served with process, hires a lawyer. The lawyer contacts the DA and some preliminary arrangements are made. In a paternity case, these typically are for blood tests. At some point, the DA may discover that the defendant has been transferred out of the area. The important question here is whether the soldier has an attorney of record.<sup>8</sup> If so, before seeking a default judgment, the DA will ask the court to appoint the soldier's own attorney to represent him. This complies with the requirements of the Act and protects the record.

Commonly, the appointed attorney will seek the DA's help in making contact with the client.<sup>9</sup> Problems here are usually

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<sup>8</sup>See *Reynolds v. Reynolds*, 21 Cal. 2d 580, 134 P.2d 251 (1943).

<sup>9</sup>The District Attorney does not get involved in the relations between the soldier and counsel. There are two reasons for this position. The first is legal: contact with a party represented by an attorney is prohibited by the Rules of Professional Conduct. Formerly, Rule 12 of the Rules of Professional Conduct of the State Bar of California, Business and Professions Code following section 6076; now, Rule 7-103 of the Rules of Professional Conduct of the State Bar of California.

The second reason is practical: it is often much easier to deal through an attorney than it is to deal directly with an unrepresented party. Nevertheless, the relations between the soldier and the attorney may affect the litigation and in some cases the DA has been asked to intervene.

There the request is from the defendant-soldier, we respond that the DA cannot become involved in the relationship between the attorney and the client. The soldier is told that he or she may take the matter up with the local bar association or with the State Bar. Depending on the circumstances, we may notify the attorney of the client's attempt to deal directly with us.

The more common situation, however, is where the appointed attorney seeks the DA's help in contacting the client. This problem is usually resolved by providing the attorney with the client's current address. Even with accurate addresses, many attorneys report that soldiers simply do not answer their correspondence. When this happens, we have no choice but to move for a default relief, while the attorney moves to be relieved as counsel of record.

resolved when the attorney is provided with the soldier's updated address. Even with current addresses for the clients, many attorneys report that soldiers simply do not answer their correspondence. When this happens, there is no choice but to move for default relief—while the attorney moves to be relieved as counsel of record.

Costs and fees are another source of friction between appointed attorney and client. Many applications for stays under the SSCRA still include requests for the appointment of counsel at no cost to the soldier. However, the SSCRA does not address payment of attorneys fees, so relief of this nature would have to be determined by state law.<sup>10</sup>

The superior court clerk has discretion to waive filing fees for the appointed attorney who is taking the first steps in protecting the client's interest in the case.<sup>11</sup> Where a meaningful attorney-client relationship has been established, however, or where it is obvious that the litigation is being seriously pursued, then normal filing fees are required.

In the vast majority of cases in which attorneys are appointed under the SSCRA, there will be one of two results. When the soldier answers the attorney's letters there is usually a negotiated settlement. When the soldier does not respond, the attorney is allowed to withdraw and a default judgment is obtained.

#### IV. WHEN A JUDGMENT IS TAKEN

Once judgment has been entered, appropriate enforcement action is taken—including requesting modifications of child support orders and seeking garnishment orders—regardless of whether the defendant is in the service. The Act applies in the post-judgment context,<sup>12</sup> and this practice seems reasonable. It allows orderly litigation of issues of support. Remember that the parent-child relationship has already been determined and the DA does not get involved in issues of custody and visitation. Therefore, the only remaining question has to do with how much support should be provided. In California, these issues are almost always submitted to the court on the declarations, which can be

<sup>10</sup>United States v. Henagan, 552 F. Supp. 350 (M.D. Ala. 1982).

<sup>11</sup>Interview with Ms. Mary Prehoden, Supervising Deputy County Clerk, Monterey, on 23 August 1985.

<sup>12</sup>Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251 (1943); Allen v. Allen, 30 Cal. 2d 433, 182 P.2d 551 (1947); Miller v. Miller, 26 Cal. 2d 119, 158 P.2d 931 (1945); *In re Marriage of Lopez*, 115 Cal. App. 3d 776, 173 Cal. Rptr. 718 (1981).

filed by mail. The Agnos Child Support Standards Act of 1984<sup>13</sup> makes the calculation of the support amount even more predictable than it has been in the past.

Now that a judgment has been obtained, can the arrearage be collected? Section 526 of the SSCRA establishes a 6% ceiling on interest on *pre-service* debt—unless a court finds that the ability to pay interest in excess of 6% is not materially affected by military service.

Up to this point, interest has not been an issue in state family law cases for a simple, practical reason: state court bookkeeping systems cannot handle it. Even if interest is provided for in the order, many state court enforcement offices ignore it. This has the effect of providing the soldier with an interest free loan at the expense of either the local county or the "dependents." This may change with the advent of better bookkeeping systems. However, very few military cases involve a *pre-service* support obligation. Should the issue ever arise, support enforcement attorneys expect to argue that the 6% limit for *pre-service* obligations is unconstitutional as being a taking without just compensation and being violative of due process.

Because of the transient nature of the military population, it is not uncommon for a soldier in one jurisdiction to have "dependents" in another. An overlooked remedy for these "dependents" is to use the URESA<sup>14</sup> statute of their home jurisdiction to have the case sent to the jurisdiction in which the soldier is stationed. Under its URESA statute, the state in which the URESA petition is initiated has the case forwarded to the court nearest to the soldier's duty station, thus placing the litigation in the soldier's neighborhood.

## V. CONCLUSION

This is a quick overview of issues which arise under the SSCRA from a support enforcement attorney who regularly encounters requests for relief under the statute. Legal assistance attorneys

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<sup>13</sup>Cal. [Civil] Code §§ 4720-4732 (West 1985).

<sup>14</sup>Uniform Reciprocal Enforcement of Support Act. This is actually a reference to the 1950 version of the uniform act. California adopted the 1968 version which is known as the Revised Uniform Reciprocal Enforcement of Support Act of 1968 and is found in sections 1650-1699 of the California Code of Civil Procedure. Both acts are still in effect and while the term "URESAs" is widely used to refer to both acts, the terms are treated as being interchangeable. The initiating state is the one in which the proceeding is commenced. The responding jurisdiction, the jurisdiction in which the absent parent is located, "responds" to the action from the initiating state.

should recognize that not all state attorneys are hard-nosed when dealing with soldiers named in support or paternity actions. Within reason, most are willing to work out arrangements for payment of support. It is the soldier who invokes the SSCRA as a means of potentially forestalling an obligation forever who raises the ire of a support enforcement attorney. Given the long range effects on a soldier who obtains an SSCRA stay (liability for arrearages, plus interest), legal assistance officers should communicate more with state attorneys. That should lead to negotiating suitable arrangements for their clients.

## APPENDIX A

### ORDER REQUIRING INFORMATION

SUPERIOR COURT OF CALIFORNIA, COUNTY OF  
MONTEREY

MONTEREY COUNTY

No.

Plaintiff.

ORDER

vs.

Defendant.

Counsel for Plaintiff presented to the Court a letter dated \_\_\_\_\_, addressed to the Court, requesting a stay on behalf of Defendant pursuant to the Soldiers' and Sailors' Civil Relief Act 50 U.S.C. app. 521.

The Court finds that it does not now have sufficient facts to determine whether Defendant's military status materially affects his ability to defend this suit. The Court also finds that Defendant is in a better position than Plaintiff to initially produce evidence on this issue. Therefore, the Court orders Defendant to answer the following questions in writing and under oath:

1. Have you made any effort to obtain counsel to represent you in this case?
2. If so, explain what actions you have taken and the results. If not, state why you have not done so.

3. If you have not been able to retain an attorney, state any reasons why you cannot be adequately represented by an attorney appointed by the court in this action.

4. State any reasons why you believe pre-trial proceedings should not be conducted in your absence.

5. If you dispute any of the allegations contained in the complaint, state what matters you dispute.

6. State any defenses you have to the allegations in the complaint.

7. What efforts have you made to obtain ordinary and/or emergency leave to attend any necessary hearings and/or trial?

8. What efforts have you made to obtain a transfer to a military facility in Monterey County?

9. When are you due to be transferred from your present duty station?

10. Do you know where you will be assigned after completion of your present tour of duty?

11. How long do you expect to be assigned to that duty station?

12. When does your present enlistment expire?

13. When do you expect to be released from active duty?

14. What is the address of your permanent home of record?

15. To what address may mail be sent to you after your release from active duty?

16. State the names and addresses of two individuals who will know how to contact you after your release from active duty.

17. What actions have you taken to insure adequate financial support for your alleged child, \_\_\_\_\_?

18. If you do not deny being the parent of the child, did you know that if you admit paternity that you may be able to obtain extra BAQ to support the child?

19. State any additional reasons why your military duty materially affects your ability to defend against the action.

The Court further orders that Defendant's answers to these questions shall not be deemed an appearance in this case or a

waiver of any of Defendant's rights under the Soldiers and Sailors Civil Relief Act. The Court shall use the answers only to decide the propriety of granting Defendant's request for a stay. The court orders counsel for Plaintiff to mail a copy of this order to respondent as soon as possible. The court will consider the Defendant's request for a stay on \_\_\_\_\_.

DATED: \_\_\_\_\_

JUDGE OF THE SUPERIOR COURT

**APPENDIX B**

**REQUEST FOR ORDER APPOINTING  
ATTORNEY**

SUPERIOR COURT OF CALIFORNIA, COUNTY OF  
MONTEREY

MOTION TO APPOINT  
ATTORNEY FOR  
DEFENDANT,  
SUPPORTING  
DECLARATION AND  
POINTS AND  
AUTHORITIES (Soldiers'  
and Sailors' Civil Relief Act  
of 1940)

\_\_\_\_\_  
  
Plaintiff hereby moves the court to appoint an attorney to represent the defendant in the above captioned action on the grounds that defendant is in the military service and is entitled to the protection of the Soldiers' and Sailors' Civil Relief Act of 1940.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Deputy District Attorney

## DECLARATION

The undersigned Deputy District Attorney declares: On information and belief that the defendant is in the military service and not represented by counsel in the present action.

That on (insert date) the defendant was served with a copy of the summons and complaint on file herein.

That the time within which to answer the complaint has expired and defendant has not appeared nor filed a responsive pleading.

That declarant is informed and believes that the defendant's present address is:

(insert address)

WHEREFORE, declarant prays that the court issue its order appointing an attorney to represent defendant in the above-entitled proceeding pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, as amended.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at \_\_\_\_\_, California, on \_\_\_\_\_.

\_\_\_\_\_  
Deputy District Attorney

## POINTS AND AUTHORITIES

50 USC app 520, Default judgments, affidavits, bonds, attorneys for persons in service

(1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment.

**APPENDIX C**  
**ORDER APPOINTING ATTORNEY**  
**SUPERIOR COURT OF CALIFORNIA, COUNTY OF**  
**MONTEREY**

ORDER APPOINTING  
ATTORNEY

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The motion of plaintiff for appointment of an attorney for defendant pursuant to the Soldier' and Sailors' Civil Relief Act of 1940, as amended, having duly come before the court and upon the declaration filed it is hereby ordered and decreed that (insert name of attorney) is appointed attorney to represent defendant in the above-entitled cause and to take such steps to protect the interest of defendant as to him may seem advisable under the circumstances.

DATED: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

# PRACTICAL CONSIDERATIONS IN HANDLING ARMY NONSUPPORT CASES

by Major Charles W. Hemingway\*

## I. INTRODUCTION

New military attorneys working in legal assistance frequently spend an inordinate amount of time learning how the military system works or how it can work for their clients in nonsupport cases. Nonsupport cases are those where the soldier is providing an inadequate amount of support, or, more frequently, no support at all to those family members he or she is required to support by court order or Army Regulation 608-99.<sup>1</sup>

Army Regulation 608-99 specifies Army policy for support of family members. What it does not spell out, however, is how the legal assistance attorney can use the regulation to obtain relief for a client. That is the aim of this article. These "practical considerations" are discussed in *The Legal Assistance Officer's Deskbook and Formbook*, a deskbook published by The Judge Advocate General's School,<sup>2</sup> but these considerations are of general interest to all military or civilian attorneys who may be required to counsel clients in nonsupport cases.

## II. LOCATING THE NONSUPPORTING SOLDIER

### A. WORLDWIDE LOCATOR SERVICE

The nonsupported spouse may not know where the soldier is currently assigned. Many will not know the soldier's social security number. If the nonsupported spouse has a U.S. Armed Forces Identification Card, ask to see it. Block 12 of the card will contain the soldier's SSN. This number will be useful in attempting to locate the soldier because each of the armed services has a

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<sup>1</sup>Dep't of Army, Reg. No. 608-99, Family Support, Child Custody, and Paternity (4 Nov. 1985) (hereinafter cited as AR 608-99).

<sup>2</sup>This deskbook consists of two volumes and may be ordered by registered users from the Defense Technical Information Center (DTIC). See the Current Material of Interest Section in any current issue of *The Army Lawyer* for ordering information and information on how to become a DTIC user.

worldwide locator service. But, even if you know the soldier's SSN, it is not easy to locate a soldier using these services. First, it takes from three to six months for a recently reassigned soldier's new unit of assignment to be available through the locator service. Second, the telephone lines at the services are busy constantly and it is rare that a caller will be able to get through on the first call. The locator services, however, are invaluable in locating soldiers in most cases. It just may take a while. The locator addresses and telephone numbers for the various services are listed below:

*1. Army.*

To telephonically locate active duty soldiers, call (512) 221-2948; (512) 221-3315; or AUTOVON 699-4211, 4212, or 4213.

To write to obtain addresses of officers, address the request to

HQDA  
Office of The Adjutant General  
Personnel Records Division  
Washington, D.C. 20310

To write to obtain addresses of enlisted personnel, address the request to

US Army Personnel Service Support Center  
Fort Benjamin Harrison, IN 46249

*2. Air Force.*

Addresses of Air Force personnel may be obtained from

Air Force Worldwide Locator Service  
Randolph AFB, TX 78150  
(512) 652-5774 or  
AUTOVON 487-2652

*3. Navy.*

Addresses of Navy personnel may be obtained from

HQ, Department of the Navy  
Chief, Bureau of Naval Personnel  
Washington, D.C. 20370  
(202) 694-2768

*4. Marine Corps.*

Addresses of Marine Corps personnel may be obtained from

Headquarters, Marine Corps  
CODE MSRP - 22  
Washington, D.C. 20380

#### 5. *Coast Guard.*

The addresses of all Coast Guard personnel may be obtained from

Commandant, U.S. Coast Guard  
ATTN: PE  
2100 Second Street, S.W.  
Washington, D.C. 20593  
(202) 426-8898

### ***B. OTHER LOCATION METHODS***

If the soldier cannot be located by using the worldwide locator service, try locating the soldier by contacting the old unit or by using the JUMPS-Army Caller List. In those circumstances where the soldier's new unit of assignment is not in the worldwide locator service, there are two ways to proceed. First, using the old unit address, contact the mail clerk at the old unit, or the old unit's servicing Personnel Administration Center (PAC), and inquire if the soldier's change of address card remains on file. Or, through your local Finance and Accounting Office, request that a finance representative use the JUMPS-Army Caller List<sup>3</sup> to determine the soldier's current Disbursing Station Symbol Number (DSSN). The DSSN is a unique set of four digits assigned to every Army finance office which has authority to disburse funds of the United States Treasury. DSSNs are assigned to particular geographical areas of the world and often will be helpful in locating a soldier. For example, if the soldier's DSSN is the one assigned to the Fort Sill Finance Office, the soldier is assigned to a unit located at Fort Sill or a unit serviced by the Fort Sill Finance Office. The DSSN will not, however, pinpoint the soldier's unit of assignment.

When you ask the local finance office to determine the soldier's current DSSN, also ask them to obtain the address to which the soldier's paycheck is being sent by requesting a read-out of the soldier's pay account. If the soldier has not opted for a check-to-bank pay option, his or her check is probably being sent to his or her current unit of assignment. If the soldier has a check-to-bank pay option, however, the post locator for the

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<sup>3</sup>This list is discussed in detail at *infra* Section III.

installation identified as having the soldier's DSSN should be contacted. The post locator will be more current than the worldwide locator and should list the soldier's current unit of assignment.

### III. USING THE JUMPS-ARMY CALLER LIST TO ASSIST IN NONSUPPORT

Time is often of the essence in nonsupport cases. Using the JUMPS-Army Caller List can cut through time-consuming delays and often resolve many nonsupport issues that would otherwise take weeks or months to resolve. Nothing is more frustrating for a legal assistance officer representing a nonsupported spouse, particularly when dealing with a nonsupporting soldier assigned overseas, then to waste weeks waiting for a response to a nonsupport letter only to learn that the soldier asserts that he or she has no pay due or that the soldier asserts that an allotment check is being sent to the complaining spouse.

The JUMPS-Army Caller List is a centralized list maintained at the U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indiana, by the Centralized Pay Operations Branch. Government employees, most typically those who work with a finance office which has a DSSN, may have their names placed on the access list and are authorized to call the Finance Center and obtain any information concerning any soldier's pay account. This includes information from the soldier's current and past Leave and Earnings Statement (LES).

#### *A. ACCESS TO THE LIST*

Only certain employees in the installation finance office will be placed on the list. These are employees whose job includes making inquiries on behalf of a soldier about his or her pay account, or inquiries on behalf of other government officials such as inspector generals, CID agents, military police officers, and judge advocates with an official "need to know." There is no regulatory restriction, however, which states that only finance office employees may be placed on the list. The local finance office may have such a policy, but the staff judge advocate should seek to have at least one member of his or her office placed on the list. A logical person is a legal assistance officer. Because the policy on who may be placed on the list varies from installation to installation, legal assistance officers should always request to be placed on the list. If not placed on the list, it simply means that the legal assistance

officer must deal through a person whose name appears on the list to obtain the required information. If placed on the list, the legal assistance officer will be authorized to obtain a telephonic computer readout of the current or any past LES of any soldier.

When a client makes a nonsupport complaint, a quick telephone call to the JUMPS-Army Caller List will:

- (1) Identify the soldier's DSSN;
- (2) Verify that a support allotment has been initiated or terminated, and if terminated, when (necessary to know when establishing accrued arrearages);
- (3) Verify a soldier's financial condition, including
  - (a) That the soldier has no pay due and that is why the support allotment stopped;
  - (b) That the soldier's pay has stopped (including any allotment) because he or she is AWOL; and
  - (c) That the soldier is channeling excessive pay into an allotment so that the "net pay due" box of the LES reflects a minimal amount upon which support payments will be based.
- (4) Catch the spouse or person who lodges a spurious support complaint. (Most state welfare agencies will require a person who applies for welfare payments on behalf of minor children and who indicates that the other parent of the children is in the military to obtain a statement from the military that the soldier is not providing support. Unfortunately, some welfare applicants may already be receiving support from the soldier but may apply for welfare nonetheless and seek the required statement from a legal assistance officer.)

### ***B. UPDATING THE LIST***

The access list is required to be updated twice a year (no later than 28 February and 31 August) by finance officers pursuant to AR 37-101-1<sup>4</sup> and 37-101-2.<sup>5</sup> The finance officer forwards the

<sup>4</sup>Dep't of Army, Reg. No. 37-101-1, Field Organization and Operating Instructions Under the Joint Uniform Military Pay System (JUMPS-Army) (31 Jan. 1979).

<sup>5</sup>Dep't of Army, Reg. No. 37-101-2, Field Organization and Operating Instructions Using the Joint Uniform Military Pay System-Army (JUMPS-Army) Automatic Coding System (JACS), para. 1-6 (20 Sept. 1985).

names and AUTOVON telephone numbers of all individuals authorized at that installation to access the list to the U.S. Army Finance and Accounting Center. Those requesting to access the list must provide their names, DSSN, and AUTOVON number. If the requestor's name appears on the list, any information on the soldier's pay account will be provided, including, as stated above, a complete readout of the soldier's current and past LES.

### *C. PRIVACY ACT CONSIDERATIONS*

There is no inherent right for a representative of the staff judge advocate's office, including a legal assistance officer, to be placed on the access list. That decision rests with the discretion of the local finance officer. Finance officers may resist placing the legal assistance officer on the list for a variety of reasons; the most frequently cited will be the Privacy Act.<sup>6</sup> Legal assistance officers in their official capacity are authorized access to the finance records of soldiers.

However, the information obtained may be disclosed only within the agency or to a state agency or court. Legal assistance officers should not disclose the information obtained from the JUMPS-Army Caller List to the client. On the other hand, release of information to a state welfare agency that requests information about a soldier has been determined not to violate the Privacy Act.<sup>7</sup> AR 340-21<sup>8</sup> generally prohibits the release of personal information about a soldier, but provides that, under certain circumstances, compelling and overriding interests may be sufficient to outweigh privacy protection considerations. In one case, a county department of social services sought the home address of a military retiree to locate the retiree for nonsupport of children. The Judge Advocate General opined that it was appropriate to release information to the social service department that otherwise would not be releasable under the Privacy Act because the "compelling and overriding interests" of society in having individuals support their dependents and the interest of a minor child to be supported by the father overrode any Privacy Act considerations.<sup>9</sup>

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<sup>6</sup>5 U.S.C. § 552a (1982).

<sup>7</sup>See DAJA-AL 1976/4008 (26 Mar. 1976) (release proper to county dep't of social services). See also DAJA-AL 1981/2996 (20 May 1981) (similar release for paternity claim also proper).

<sup>8</sup>Dep't of Army, Reg. No. 340-21, The Army Privacy Program (5 July 1985).

<sup>9</sup>DAJA-AL 1976/4008 (26 Mar. 1976) (digested at 76-9 JALS 32 (1976)).

## IV. LODGING NONSUPPORT COMPLAINTS BY ELECTRIC MESSAGE

### A. *EXIGENT CIRCUMSTANCES*

When the financial situation of the nonsupported spouse is critical, either because of nonresponse to prior letters or because pending eviction, *etc.*, one possibility is to lodge the nonsupport complaint by electric message (or TWX, as it is known). A TWX must be in the prescribed format and typed with a special typewriter element.

Army Regulation 105-31<sup>10</sup> provides that, consistent with mission requirements, only messages requiring delivery within speed of service timeframes and which cannot be accommodated by other means are authorized to be sent by TWX. Legal assistance officers, therefore, should fully justify the exigent or emergency nature of the nonsupport complainant's case. Such messages will typically be sent "routine," as opposed to a higher classification such as "priority" or "immediate." The timeframe goal for a routine message is that it be available for delivery to an addressee's Telecommunications Center (TCC) in six hours. This does not include time required for internal headquarters processing. The TWX can be sent "official" or "unofficial," but most probably will be sent "unofficial."

The TWX is prepared on DD Form 173, Joint Message Form. Chapters 2 and 3 of AR 105-31 give detailed instructions for preparing the message form. Additionally, Army Regulation 105-32,<sup>11</sup> contains a complete list of addresses worldwide where messages may be sent. Guidance in preparing TWXs should be sought from the appropriate office at the local installation.

### B. *PRIVACY ACT CONSIDERATIONS*

AR 105-31, paragraph 1-5, provides that all electric messages will be treated with the utmost privacy. A soldier who is the subject of a nonsupport complaint by TWX may nonetheless complain that his or her privacy has been violated by the TWX. The discussion above about the use of the JUMPS-Army Caller List indicates, however, that disclosure of personal information within the agency is permissible if it pertains to official business and, even if it does not, any privacy considerations of the soldier

<sup>10</sup>Dep't of Army, Reg. No. 105-31, Record Communications (15 Apr. 1985).

<sup>11</sup>Dep't of Army, Reg. No. 105-32, Authorized Addresses for Electrically Transmitted Messages (Oct. 1985).

against nondisclosure are outweighed by the societal considerations for a soldier to provide support for his or her dependents, thus justifying disclosure.

## V. WHERE TO SEND THE NONSUPPORT LETTER

One of the first issues to broach in a nonsupport case is with whom to lodge the complaint in military channels. Should it be the soldier, the soldier's commander, or some other authority? Often the wishes of the client will dictate the answer. It is not uncommon for a nonsupported spouse to request that the soldier's commander not be notified. The attorney should always inquire about the client's wishes. Many nonsupport clients do not want to "ruin the soldier's career."

### A. TO THE SOLDIER

When the circumstances concerning nonsupport are not critical (or where the client has requested that the soldier be contacted first), the initial letter should be sent to the soldier. The attorney should be careful, however, in drafting the letter to the soldier.<sup>12</sup>

Although grade should make no difference, it is not uncommon for legal assistance officers to write first to the soldier instead of the commander when the soldier is a senior NCO or an officer.

### B. TO THE SOLDIER'S IMMEDIATE COMMANDER

Typically, the financial situation of the client dictates that the first contact be with the commander. AR 608-99, chapter 2, assumes that, in most cases, it will be the commander rather than the soldier with whom contact is made. The regulation requires commanders to respond promptly to nonsupport complainants.<sup>13</sup> Unfortunately, some commanders are not aware of this requirement. It is good practice, therefore, to state verbatim the language regarding the commander's responsibilities in the letter to the commander.

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<sup>12</sup>See DAJA-AL 1976/6182 (29 Dec. 1976), *digested in* The Army Lawyer, May 1977 at 13 (A letter in which the legal assistance officer advised the soldier that he could be court-martialed for failing to support his dependents violated the Code of Professional Responsibility by threatening criminal prosecution.) This opinion is republished in Chapter 10 of the Legal Assistance Officer's Deskbook and Formbook, *supra* note 2.

<sup>13</sup>AR 608-99, para. 1-4e.

Another good practice when dealing with the commander is to request the commander's assistance in having the soldier initiate a support allotment (a Support-V allotment). However, because it typically takes from two to three months for a nonsupported spouse to receive the first check (because of the processing time for an allotment through finance channels), measures for interim support should be specified, such as sending the first two month's support by certified check or cashier's check.

It is also good practice to specify a time limit within which the commander should respond to the nonsupport letter.

### ***C. NO RESPONSE FROM THE SOLDIER OR THE IMMEDIATE COMMANDER***

Generally, it is best to resolve nonsupport issues at the lowest level practicable. Therefore, it is uncommon that the first contact on a nonsupport complaint be with a military official higher in the chain of command than the soldier's immediate commander. When there has been no timely response from the immediate commander, however, or when the response is inadequate, a letter to the immediate commander's commander, with a copy of the initial letter to the immediate commander enclosed, can be highly effective.

### ***D. THE U.S. ARMY COMMUNITY AND FAMILY SUPPORT CENTER***

The U.S. Army Community and Family Support Center serves, *inter alia*, as a central processing facility for complaints received at DA concerning nonsupport complaints, paternity complaints, questions concerning overseas marriages, and indebtedness complaints.<sup>14</sup>

In that receipt of a request for action from Department of the Army level typically generates greater activity at the unit command level, lodging complaints with this organization can be highly effective.

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<sup>14</sup>See generally Legal Assistance Items, *The Army Lawyer*, Jan. 1985, at 79, for a detailed description of this new command. See also Arquilla, *Family Support, Child Custody, and Paternity*, published in this issue.

## VI. OTHER POSSIBILITIES FOR RELIEF

### A. ARMY EMERGENCY RELIEF

When the soldier's dependents are in immediate need of financial assistance, they may be referred to the installation Army Emergency Relief (AER) to request either a grant or a loan. AER's primary purpose is to provide emergency financial assistance to Army personnel and their families and to needy spouses and orphans of deceased Army members. If the dependents receive an emergency grant, there will be no obligation on the soldier to repay it. AER loans, however, are deducted from the soldier's pay by allotment. In most cases where the dependents are given a grant, AER officials will seek to have the soldier convert it to a loan and repay it. The operation of AER is governed by Army Regulation 930-4.<sup>15</sup>

Chapter 2 of AR 930-4 specifies AER policies for assistance. Paragraph 2-9*m* provides that assistance to legal dependents in nonsupport cases will be provided *only* to meet their essential needs, e.g., food, rent, and utilities, and usually will be provided on a one-time basis. Legal assistance officers, therefore, should be prepared to fully justify the need for assistance when referring clients to AER for emergency assistance.

Grants or loans up to \$500 can be approved by the local AER officer. Grants from \$500 to \$750 generally require approval by the deputy or installation commander, with higher level approval required for the maximum grant or loan of \$1,000.<sup>16</sup>

### B. RED CROSS

The Red Cross Service Program for Army personnel is governed by Army Regulation 930-5.<sup>17</sup> Paragraph 2-1*f* of this regulation states that Red Cross funds may be used to provide financial assistance to dependents in the form of an outright grant or loan without interest on the basis of need. Loans or grants for basic maintenance may be made to the spouse and children of soldiers during the period pending first receipt of a family allotment. The regulation (which is out of date) refers to this allotment as the "Q" allotment, which has not been authorized since 1974. This

<sup>15</sup>Dept't of Army, Reg. No. 930-4, Army Emergency Relief (1 Apr. 1985).

<sup>16</sup>See AR 930-4, Appendix C for worldwide approval authorities.

<sup>17</sup>Dept't of Army, Reg. No. 930-5, American National Red Cross Service Program and Army Utilization (19 Nov. 1969) (reprinted w/basic incl. C1-3) (hereinafter cited as AR 930-5).

has been interpreted to mean "Support-V" allotment, however. The regulation also provides that funds may be expended during periods when allotment payments are due but have been delayed or interrupted.<sup>18</sup>

### ***C. STATE SOCIAL SERVICES AGENCIES***

Another possible source of aid for military family members in severe financial need is financial assistance through a state social services agency. Statutory changes in federal "welfare" law which took effect in 1982 have limited the prospects of financial assistance for family members of military personnel, but in certain cases a client may be eligible for benefits. Each state and territory has a program to provide assistance for minor children deprived of care, guidance, or financial support by one or both parents. "Care and guidance" and "support" are terms of art used by state agencies. A child (or children) may be found to be in need of "care and guidance" and qualify for certain state programs, which may or may not include financial assistance; or the minor(s) may be receiving sufficient "care and guidance," but may need support; or there may be a need for both "care and guidance" assistance and financial assistance.

Typically, it is the financial assistance which is imperative for applicants for state welfare benefits, whether they are civilians or military dependents. Each state program receives the majority of its funding from the federal government. To qualify to receive federal funds, states are required to submit their plans for approval to the Department of Health and Human Services (HHS). HHS specifies general parameters and minimum requirements for all state plans. Within these guidelines, states are free to establish eligibility requirements and minimum monetary levels of assistance for those who qualify. As a result, the programs vary widely from state to state and even in locals within a single state.

Most attorneys know the term "welfare," but may be unfamiliar with the terms "ADC" and "AFDC." Military attorneys who wish to refer clients to state agencies for assistance must be familiar with the distinction between "ADC" and "AFDC." "ADC" means "aid for dependent children." "AFDC" means "aid for families with dependent children." The key word is "families." States may choose whether they will have an "ADC" program or an "AFDC" program. The distinction is critical for military

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<sup>18</sup>AR 930-5, para. 2-1f(1)(b).

personnel and their families. In a state with an AFDC program, both parents must be physically or constructively present in the household for the family to be eligible for welfare payments. In an ADC program, the presence, actual or constructive, of a nonsupporting parent would cause the family to be ineligible for welfare benefits. Thus, in the case of a soldier absent from the home only because of duty (for example, on an unaccompanied assignment to Korea) when the family is left behind in a state with an AFDC program, the family could qualify for welfare if need existed because the soldier is deemed to be constructively present. In the same situation in an ADC state, however, the family would not qualify, even if need existed, because the soldier would be deemed to be constructively present in the home.

The protection given to military families in AFDC states prior to 1982 no longer exists. In 1972, the U.S. Supreme Court, in *Carleson v. Remillard*,<sup>19</sup> held that a state, in determining entitlement for AFDC benefits, could not deny welfare benefits to a child who would otherwise qualify for welfare simply because the nonsupporting parent's absence was due to military service. The Court held that under the Social Security Act regulations existing at that time, a child could qualify for AFDC payments if the parent was "continually absent" from the home and, if that absence was due to military service, the absence could be considered "continually absent." However, the law was changed in amendments to the Social Security Act relating to the AFDC and ADC programs contained within the Tax Equity and Fiscal Responsibility Act of 1982.<sup>20</sup> Now, a parent whose absence is "occasioned *solely* by reason of the performance of active duty in a uniformed service of the United States is *not* considered absent from the home."<sup>21</sup> In summary, prior to 1982, a nonsupported spouse with minor children married to a soldier could generally qualify for welfare in the soldier's absence. Now, it will be much more difficult to qualify.

The 1982 amendments allow each state to determine when the soldier's absence is not *solely* due to active duty. Generally, the nonsupported spouse has the burden of establishing that there would be continued absence of the soldier from the home regardless of an absence caused by performance of active duty. Basically, this means that a legal assistance officer referring a

<sup>19</sup>406 U.S. 598 (1972).

<sup>20</sup>Pub. L. No. 97-248, 96 Stat. 317 (1982).

<sup>21</sup>*Id.* (emphasis added). See Fed. Reg. 28,398, at 28,402 (June 21, 1983) for a discussion of the final regulation implementing this change.

client to the local state social services in an ADC state should have the client establish that the separation occurred prior to the soldier's active duty, or that the marriage is so irretrievably broken that, even if military service was not a factor, the parties would be separated.

Experience has shown that most social services workers are sympathetic to the situation of nonsupported spouses of soldiers and in spite of the change in the law, will attempt to help the applicant qualify.

Many clients will be reluctant to apply for welfare, but if the client does indicate a desire to seek an appointment with the state social services office, this is what to advise the client to expect. All applicants are first seen by an intake officer, who determines initial eligibility. The applicant is then assigned a caseworker. The application processing time generally takes about thirty days. Social service offices are required to either approve or deny applications within forty-five days. If the applicant is denied benefits, there is a limited administrative appeal right in what is known as a "fair hearing."

Additionally, in return for receiving AFDC or ADC payments, the nonsupported spouse is required to assign any right to receive child support to the state. The applicant is also required to provide the name and address of the nonsupporting parent and is referred to the child enforcement bureau or an equivalent agency. The first \$50 of any money collected from the nonsupporting parent goes to the nonsupported spouse with minor children. The remainder, up to the amount of the monthly welfare payments received by the nonsupported spouse, goes to the state. When the monthly amount collected from the nonsupporting spouse exceeds the amount of monthly benefits to which the nonsupported spouse is eligible, the money is paid to the nonsupported spouse and his or her benefits are terminated.

Whether or not the nonsupported spouse qualifies for ADC or AFDC, he or she may qualify for food stamps. The military rule discussed above for "continued absence" does not apply in food stamp cases. Thus, an absent soldier's income would not be considered in determining a food stamp applicant's eligibility for this benefit. In emergency situations, where the applicant has no food at all, there are procedures for expedited approval of food stamps. The typical approval time for food stamp applications is approximately thirty days.

Under the federally-mandated ADC and AFDC programs, there are no provisions for emergency one-time financial grants, although an individual state may have such provisions under its own law. Where an emergency exists (most state agencies define emergency as no food or heat or if the client is in receipt of an eviction notice or utility cut-off notice and if eviction or cut-off will occur before the application process can be completed), most state agencies rely on community resources, such as churches, *etc.*

#### ***D. STATE AND LOCAL CHILD SUPPORT ENFORCEMENT OFFICES***

Under Title IV-D of the Social Services Amendments of 1974 and its subsequent amendments,<sup>22</sup> states are required to establish a mechanism to collect delinquent child support from nonsupporting parents. The methods which states use to implement this requirement vary from state to state, and sometimes vary within the same state from county to county. Most states will have a child support enforcement office at county level. In some localities, it operates as an adjunct to the local court system. But it may also be an office which operates independently of the state social services offices; it may even be a division of the local prosecutor's office. As an incentive to foster aggressive child support collection programs and to make these programs self-sufficient, states are entitled to keep a percentage of amounts of child support collected. In some states the program is practically moribund, while other states, such as Pennsylvania and California, collect millions of dollars annually in delinquent child support.

As indicated above, each applicant for state welfare payments is required to disclose the name and address of the nonsupporting parent and is required by law to cooperate with the state's efforts to obtain support. An applicant's noncooperation may result in disqualification for welfare benefits.

Nonsupported spouses with minor children who are not on welfare are authorized to use the child support enforcement procedures. It may cost the client nothing to open a case with the support enforcement office, but non-AFDC or non-ADC clients should expect to pay an initial minimal fee. The fee may not exceed \$25 and may vary to reflect ability to pay. The state may, however, charge the custodial parent the fee, pay the fee itself

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<sup>22</sup>Pub. L. No. 93-647, §101a, 88 Stat. 235 (1975) (codified at 42 U.S.C. §§ 651-665 (1982)).

(without seeking federal reimbursement), or seek to recover the fee from the nonsupporting spouse. When support is received, the state is authorized to deduct a certain amount each month from amounts received as a processing fee before giving the amount collected to the nonsupported spouse.

The support enforcement office first attempts to contact the nonsupporting parent by letter and have that person voluntarily begin providing support. The case is handled by a support enforcement officer, who typically will not be an attorney. If no response is forthcoming, the support enforcement officer will prepare a case file for a support enforcement attorney. Some states have support enforcement attorneys in a centralized location, generally the state capital. These attorneys are assigned geographical areas of the state and "ride circuits." In some states the attorneys are physically located in the areas they serve, while in other states the attorney will be a deputy prosecutor with the county. For nonsupporting parents located within the state, the state's particular child support laws (and if there is a pre-existing court order, any provisions of the order) are used to obtain support. For nonsupporting parents located outside the state, the state's child support laws, any provisions of a pre-existing court order, and the state's version of the Uniform Reciprocal Enforcement of Support Act<sup>23</sup> are used to enforce the support obligation.

In areas where there is a local Legal Services Corporation office, it may be possible to refer a client to it. But there are stringent indigency requirements, and cutbacks in funding and services in recent years have limited the possibility of such offices as a resource. Some offices assign domestic relations cases a low priority. Legal assistance officers should conduct liaison with local Legal Services Corporation offices, however, to determine the types of cases they will handle.

## VII. CONCLUSION

This article has discussed some of the ways legal assistance officers can help get necessary financial support for their clients. It often takes time, patience, and perseverance. It always requires knowledge of the Army's support requirements and procedures, as well as those of the federal and state governments. This is a critical area of practice for legal assistance officers and an area where the results are tangible—a family able to afford the necessities of life.

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<sup>23</sup>42 U.S.C. § 654 (Supp. II 1985).



## **PART III: LEGAL ASSISTANCE OVERSEAS**

### **A PRACTICAL GUIDE TO GERMAN DIVORCE LAW**

by Mr. Peter Holzer\*

#### **I. INTRODUCTION**

In the daily legal assistance practice, legal assistance attorneys in the U.S. and in Germany are frequently confronted with the following situations:

1. A married couple, both American citizens, no longer get along with each other. He is a soldier assigned in Germany and is trying to divorce his wife, but wants to use the German court system.

2. A U.S. soldier, living in Germany, is trying to obtain a divorce from his German wife. They were married in the United States.

3. A German woman, married to a U.S. soldier, wants to file for divorce; both are living in Germany. They were married in Germany.

4. A German wife is trying to obtain a divorce from her U.S. husband in a German family court; her husband is simultaneously filing for divorce in a U.S. court (California, for example).

There would be no legal problem in these cases if only German citizens were involved (for example, marriage and divorce of a German couple where one of the parties was living exclusively in Germany). In those cases, undoubtedly, German procedural and substantive laws would apply.

#### **II. BASES FOR GERMAN COURT JURISDICTION**

The question of the application of the rules of international law is usually raised when jurisdiction of the German courts is sought

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and one of the parties involved is an alien/non-national/foreigner, or if one of the parties involved is domiciled in a country other than Germany or is residing in a foreign country.

In those cases, the legal assistance attorney, or the potential judge, must ask the following three questions:

1. Can a German family court get involved in a case under the purported exclusive jurisdiction of a foreign court, such as a state court in California? This is what the German legal system refers to as the "international competence" question.
2. Which procedural laws does an internationally competent German court apply?
3. Which country/state substantive laws must be applied?

German private international law answers these questions. German family law is found in various sections of the Introductory Law to the German Civil Code<sup>1</sup> and in the German Code of Civil Procedure.<sup>2</sup>

Additionally, an attorney who wants to give complete and detailed information to his foreign client must consider whether the client's home state will recognize a divorce decree issued by a German family court. That issue, however, is beyond the scope of this article.

Very frequently, the international jurisdiction of courts of different countries is of a concurrent nature, i.e., both courts,

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<sup>1</sup>This is known in German as the *Bürgerliches Gesetzbuch (BGB)*. One of the more popular commentaries used by German practitioners is named after its founder, Otto Palandt, published annually by Beck. See O. Palandt, *Bürgerliches Gesetzbuch* (42d ed. 1983), published in 7 Beck'sche Kurz-Kommentare (Beck Concise Commentaries). For American legal assistance practitioners, a good English-language translation of the German Civil Code is the German Civil Code by Ian S. Forrester, Simon L. Goren and Hans-Michael Ilgen. This is a 1975 German Civil Code translation published by the North-Holland Publishing Company in Amsterdam and Oxford, England. A regularly updated supplement by Mr. Goren is available from the Rothman Company of Littleton, Colorado. See generally R. Lansky, *Legal Research In The Federal Republic of Germany: A Concise Presentation of Basic Publications*, 16 *Van. J. Trans. L.* 537 (1983).

<sup>2</sup>The German Code of Civil Procedure of 1877, or "ZPO," was enacted shortly after the founding of the German Reich to establish a uniform law of procedure in Germany. It has undergone several substantial amendments, one of the more notable of which was in 1933. This amendment ended the so-called "sporting theory of justice" and established judicial procedure as an institution of public welfare. See generally P. Gottwald, *Simplified Civil Procedure in West Germany*, 31 *Am. J. Comp. L.* 687 (1983).

German as well as American and other foreign courts, can declare themselves courts of competent jurisdiction. German international jurisdiction cannot be excluded by the fact that a court of a foreign country has assumed jurisdiction. Under generally accepted principles of private international law, no country can negate the jurisdiction of another country by an act of its own legislation. According to sections 606 and 606b of the German Code of Civil Procedure, the following rules apply:

1. International jurisdiction of a German family court may always be assumed and exercised in divorce cases, even if only one of the spouses has German citizenship. Thus, domicile, legal residence, or status of the party (plaintiff or defendant) does not matter. Nor does it matter whether the divorce decree will be recognized by a foreign country. The main point is the German nationality of the spouse. Regardless of who files, if a German spouse is involved, the German court will assert international jurisdiction.

2. If neither of the spouses is of German nationality, German international jurisdiction can only be assumed or established, according to section 606b(1) of the German Code of Civil Procedure, if either the husband or the wife has a domicile in Germany, and if the decision rendered by a German court will be recognized by the home state of the *husband*.

The reason to make recognition a legal prerequisite in the latter case is to avoid "limping" legal situations, which could result in a divorce being recognized in Germany but not in the United States.

It is doubtful, however, whether the provisions of section 606b(1) of the German Code of Civil Procedure, which relies on the law of the home state of the *husband* as the decisive factor, complies with the equal rights for both sexes mandated by Article 3 of the German Basic Law. This is not an issue in those situations where the judgment will be recognized by the home state of the wife.

The recognition of German divorce decrees in foreign countries is determined by the law of that country. Applicable international agreements must be observed. For example, there is an agreement that divorce decrees will be recognized between Germany and

Turkey, Spain and Italy. There is no similar agreement between Germany and the United States.<sup>9</sup>

Based on the foregoing discussion of international German jurisdiction, the four fact situations discussed in the Introduction can be resolved as follows:

1. The American citizen couple: Section 606b(1) of the German Code of Civil Procedure applies, which means that a German court has international German jurisdiction if either the husband or the wife has a domicile in Germany, *and* if according to the law of the home state of the husband, the divorce decree will be recognized.

2. The German wife married in the U.S. and residing in Germany: A German court has jurisdiction under section 606 of the German Code of Civil Procedure because Germany will always assume jurisdiction over a German citizen.

3. The German wife married in Germany and residing in Germany: The third case is no different from the second one; it does not matter where the couple was married.

4. The German wife with the U.S. husband who is filing in a U.S. state court: Generally, the German court will assume jurisdiction because of the German nationality of the wife. It may be possible, however, that the German court will set the proceedings aside until the U.S. court decides the case.

### III. INTERNATIONAL JURISDICTION OVER SUPPLEMENTAL PROCEEDINGS IN DIVORCE CASES

In addition to the dissolution of marriage itself, German family courts also decide custody of a legitimate child, visitation rights of the noncustodial parent, legal obligation to pay child support, spousal support and alimony, statutory pensions and rights (old-age pensions and equalization of property for divorced

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<sup>9</sup>The author is aware of no reported case from the United States where a German divorce decree has not been recognized. See *Arquilla, Family Support, Child Custody, and Paternity*, at text accompanying notes 58-64, printed in this issue, for a discussion of the enforceability of German court orders under AR 608-99 and the NATO SOFA.

spouses), and rights concerning the home and the household goods.

These matters are not expressly addressed in either the German Civil Code or the German Code of Civil Procedure, but section 623 of the Code of Civil Procedure connects the dissolution of the marriage with supplemental proceedings. This, in effect, means that no divorce will be granted in Germany without a decision concerning supplemental proceedings at the same time. Because of the close connection between dissolution of marriage and supplemental proceedings, international jurisdiction of the German court for both proceedings is usually established.

This principle can be overruled by the provisions of the Hague Treaties concerning the protection of minors. Even though the United States has not signed the treaties, German courts will, based upon Article 13, § I, apply the provisions of the treaties in matters involving minors who have their domicile in Germany. The practical consequence is that in cases of child custody and child visitation, the rules of the Hague Treaties concerning the protection of minors will establish jurisdiction of a German court, regardless of whether the child is of German nationality or is a citizen of a state which has not signed the Hague Treaties. The only jurisdictional prerequisite is that the child is residing in Germany.

#### **IV. INTERNATIONAL GERMAN JURISDICTION REGARDING INTERLOCUTORY ORDERS**

Interlocutory orders usually are summary proceedings necessary for the period of time between presentation of a divorce petition to the German family court and the dissolution of marriage by the German court. For example, concerning spousal support or use of the family apartment.

The general principle, stated in section 620 of the German Code of Civil Procedure, is that if a German court can establish international jurisdiction over a matrimonial cause, it has—at the same time and for the same reasons—international jurisdiction to issue interlocutory orders. An interlocutory order will be issued by a German court even if it has not been determined whether the courts of the home state of the husband would recognize the decision. This is a consequence of all summary proceedings and shows the German courts' emphasis on issuing quick decisions in domestic matters.

## V. INTERNATIONAL JURISDICTION OVER "ISOLATED FAMILY MATTERS"

Usually, the same court dissolves the marriage and decides all related family matters. The term "isolated family matters" is used when a couple residing in Germany has already submitted a petition for dissolution of the marriage to a state court in the United States and requests a German family court to decide custody of a legitimate child, visitation rights, child support, alimony, or division of household goods.

There is no general rule regarding the international jurisdiction of German courts over *all* family matters. The character of the "isolated family matters" is the deciding jurisdictional factor. When dealing with child custody and visitation rights of the noncustodial parent while the child is residing in Germany, the international jurisdiction of the German family court derives from the Hague Treaties concerning the protection of minors. When dealing with support (child and spousal support) and matrimonial property questions, the following principles apply:

1. If, according to sections 12 *et seq.* of the German Code of Civil Procedure, a German court is *locally competent*, it can at the same time exercise international jurisdiction.
2. If only one of the spouses is residing in Germany, a German family court can always assert its competence in support and matrimonial property cases, regardless of the nationality of the parties.
3. In cases where the defendant is living in Germany, the family court of the town where he has his domicile will be competent. If the plaintiff is living in Germany and the defendant has no domicile in Germany, the plaintiff can file the petition at the family court where he has his domicile.

When dealing with equalization of old-age pensions as an "isolated family matter," a German court can only assert jurisdiction if dissolution of the marriage was granted abroad *and* one spouse has German citizenship. When dealing with family apartment and household goods as an "isolated family matter," German international jurisdiction derives from the law concerning distribution of matrimonial household effects.

## VI. PROCEDURAL ISSUES

### A. WHICH PROCEDURAL LAW SHOULD BE APPLIED?

The overriding principle is that a German court exercising international jurisdiction will apply the procedural law of the German Code of Civil Procedure. One of the oldest principles of private international law, its most common justification is that a judge dealing with his or her own procedural rules is able to issue faster and more accurate decisions than if he or she is required to apply the procedural code of a foreign country.

### B. PENDING DIVORCE PETITION ABROAD WHILE FILING FOR DIVORCE IN GERMANY

It happens quite frequently that a soldier has already filed for divorce in the United States and his wife, while staying in Germany, tries to file for divorce in a German court. The U.S. divorce action can be regarded as an impediment to an action in the German court. The German judge will suspend his pending action after he finds out that a U.S. court also has international jurisdiction *and* that the forthcoming decision of the U.S. court will be recognized in Germany.

There may be a legitimate reason, however, for the German court to proceed, even though a U.S. decision may be forthcoming. If the initiation of the spouse's proceeding in the U.S., while residing in Germany, was made spitefully or in bad faith, or if the proceedings in the U.S. court threaten delay, the German court will issue its own order.

### C. RECOGNITION OF FOREIGN DECREES IN GERMANY

According to another principle of international law, a court's decree is considered an act of sovereignty of a state, with primary binding effect upon its own territory. The validity and effectiveness of such a decree usually ends at the borders of the state which issued the decision. A judicial decision made in a foreign country, therefore, can be binding in another country only if acknowledged by that state. In Germany, this acknowledgment is usually called "recognition."

According to German law, there is a distinction between recognition and execution of a foreign decision. Pursuant to

sections 722 and 723 of the German Code of Civil Procedure, there is a reciprocal effect between both: a judgment will be executed only if recognition of the decree is not excluded under section 328 of the German Code of Civil Procedure.

If, for example, a soldier has a U.S. court decree awarding him or her custody of a child, and asks the German courts to execute the U.S. court order, the German authorities will determine at the same time the question of recognition of the U.S. judgment. Again, there are agreements between Germany and numerous other countries regarding recognition and execution of judgments; however, there is no such agreement between Germany and the United States.

In the absence of mutual agreements, recognition of U.S. judgments are ruled by section 328 of the German Code of Civil Procedure. There is no problem with a German court recognizing a U.S. court order in the following situation. Both spouses are U.S. citizens and legal residents of California. While residing in Germany, they obtain a divorce from a California court. No recognition is required because recognition of a foreign judgment will be denied only if the foreign judgment was issued under serious violation of right (for example, the right of one party to be heard). If, however, a U.S. court has granted a divorce to a U.S. citizen from his German wife, recognition by the Administration of Justice is required for the divorce to be binding in Germany. The local competence of a German court to recognize a foreign decree is ruled by the domicile of the German spouse. For example, if the German spouse is domiciled in Kaiserslautern, the request for recognition has to be filed with Administration of Justice in Mainz, which has jurisdiction over the geographical area which includes Kaiserslautern.

As long as the foreign judgment has not yet been recognized by a formal act of the Administration of Justice, it has no legal effect in Germany, *i.e.*, the marriage is still valid. Recognition by the Administration of Justice gives retroactive legal effect to the judgment, back to the time the judgment was issued in the U.S. Note, however, that a recognition of the dissolution of marriage by the Administration of Justice does not necessarily include the question of the supplemental proceedings; however, both questions may be answered at the same time.

## VII. SUBSTANTIVE ISSUES

### ***A. WHICH SUBSTANTIVE LAW REGARDING THE DISSOLUTION OF MARRIAGE SHOULD BE APPLIED?***

This question is answered by German private international law. These conflict of law rules can be found in the Introductory Law of the German Civil Code. This is also a field where mutual agreements have preference; however, there is no such treaty between Germany and the U.S. In the absence of a treaty, article 17 of the Introductory Law of the German Civil Code applies. Because of its very complex nature, I will explain it using the following examples:

Situation 1: Marriage between two US citizens (no German national involved); both spouses are legal residents of Virginia. If both spouses have the same foreign nationality, the substantive divorce and family law of their home state will be applied by the German family court. Under German law, the important factor in determining the applicable law is nationality.

Situation 2: Marriage between two foreigners (for example, the husband is a U.S. citizen-soldier and the wife is a Mexican citizen). If both spouses never had a common citizenship, the substantive law of the state where they are both residing together applies. Thus, if residing in Germany, German substantive law applies.

Situation 3: Marriage between a U.S. citizen-soldier and a German spouse, and the German spouse is filing for divorce. In this case, German law provides that if a German wife files for divorce, German substantive law will always be applied. Because a German husband must not be placed in a worse situation than a German wife, the Federal High Court of Justice has held that in all cases where a German spouse initiates a divorce, German substantive law will apply.

Situation 4: German/American marriage; the husband is a U.S. citizen filing for divorce in Germany, and so does his wife. The Federal High Court of Justice has held that if both spouses file for divorce simultaneously, the substantive law of each spouse's country will be applied, *i.e.*, if the U.S. citizen files for divorce based upon fault grounds (for example, adultery—a ground abolished in German law in 1977), the German judge will investigate the question of guilt and will incorporate the results of

his findings in the grounds of judgment, but not in the tenor or operative part of the judgment.

### ***B. GERMAN SUBSTANTIVE LAW IN SUPPLEMENTAL PROCEEDINGS***

In numerous judgments, the Federal High Court of Civil Justice has held that in supplemental proceedings the same substantive law applies as would apply for the dissolution of marriage. The determination, *i.e.*, whether German substantive law will or will not be applied, should always be made in conjunction with the various provisions of the Introductory Law of the German Civil Code.

## **VIII. CONCLUSION**

When one of the parties in a potential divorce proceeding is domiciled in or residing in Germany, the careful legal assistance attorney should consider all applicable aspects of German and U.S. law when counselling the client. Even though this article is not exhaustive, it should provide American attorneys with sufficient background to alert them to several procedural and substantive issues which may arise. The German attorney-advisors who work for the U.S. Army overseas should be consulted for additional in-depth advice.

# RIGHTS OF FAMILY MEMBERS WHO SEPARATE WHILE RESIDING IN THE FEDERAL REPUBLIC OF GERMANY

by Mr. Jerry E. Shiles\*

## I. INTRODUCTION

It is difficult enough to counsel a client seeking assistance on a marital separation or a divorce when both of the parties reside in the United States. It is even more troubling when one or both of the parties reside overseas. This grafts complex questions of the status of family members under international agreement or rights and entitlement to benefits and services overseas onto an already emotionally-charged situation. The purpose of this article is to discuss the basic rights of family members who separate from the military sponsor while residing in Germany, and to explain strategies or approaches legal assistance officers may take to resolve these issues. This article will generally discuss:

Eligibility of children residing with a custodial nonmilitary family member to attend Department of Defense Schools;

Rights to employment of the nonmilitary spouse after separating from a soldier in Germany;

Return transportation rights for nonmilitary family members and their belongings to the United States;

Entitlement to government housing and furniture upon separation in Germany;

Entitlement to exchange and commissary privileges in Germany following marital separation;

Authorization for medical care following martial separation; and

Tax considerations of living separately from the military sponsor.

These issues are important not only for legal assistance attorneys in Germany, but also for stateside attorneys who may encounter questions in this area.

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## II. ATTENDANCE AT DEPARTMENT OF DEFENSE DEPENDENT SCHOOLS

Attendance at Department of Defense Dependent Schools (DODDS) is governed generally by USAREUR Regulation 352-5,<sup>1</sup> DOD Directive 1342.13,<sup>2</sup> DOD Instruction 1342.10,<sup>3</sup> and DSG 7739.1.<sup>4</sup>

If the parents of a school-age child separate and the soldier's or DOD civilian employee's spouse obtains custody of the child, the child is still authorized to attend DODDS as long as the soldier or the DOD civilian employee agrees to act as the child's sponsor. Annex B of USAREUR Reg. 352-5 only requires that soldiers be on active duty and stationed in the European overseas area. DOD civilians must not only be employed in the European theater, but also must have been hired from the Continental United States (CONUS) with full logistical support or, if hired in Europe, must provide proof that at the time of appointment they maintained a bona fide residence in the United States.

If the soldier or DOD civilian is transferred from U.S. Army Europe (USAREUR) during the school year, the child will still be entitled to complete the school year on a tuition-free basis.<sup>5</sup>

If the custodial spouse is employed in a nonappropriated fund (NAF) position and the noncustodial parent refuses to sponsor the child, the child may be authorized schooling on a space-required basis, but either the parent or the employing NAF activity will have to pay all tuition and associated costs.

If a child does not qualify for space-required DODDS schooling under the above paragraphs, he or she may attend on a space-available, tuition-paying basis. If all else fails, it may be possible to obtain tuition-free admission by having an authorized soldier or DOD civilian act *in loco parentis* for the child.<sup>6</sup> An *in loco parentis* affidavit must be submitted to the school officials, at which time the child will be enrolled without collection of

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<sup>1</sup>U. S. Army, Europe, Reg. No. 352-5, Dependents Education (1 July 1984) (hereinafter cited as USAREUR Reg. 352-5).

<sup>2</sup>Dep't of Defense Directive No. 1342-13, Eligibility Requirements for Education of Minor Dependents in Overseas Areas (July 8, 1982) (hereinafter cited as DOD Dir. 1342-13).

<sup>3</sup>Dep't of Defense Instruction No. 1342.10 (superceded by DOD Dir. 1342.13).

<sup>4</sup>Dep't of Defense Dependent Schools, Germany, Reg. No. 7739.1, Sponsor/Pupil Reporting (Mar. 1984) (hereinafter cited as DSG 7739.1).

<sup>5</sup>USAREUR Reg. 352-5, para. 15b.

<sup>6</sup>DOD Dir. 1342.13. See also DODDS Germany Policy Letter, In Loco Parentis (Dec. 1985).

tuition pending final command approval of the *in loco parentis* claim. If the claim is denied, however, tuition will be charged from the date of initial attendance and continued education will be provided on a space-available, tuition-paying basis only. Until May 1985, *in loco parentis* requests were routinely approved. This policy has been reconsidered, however, and such requests are now very carefully scrutinized before approval is granted. Sponsors should be counseled on the possibility of administrative or punitive action if applications are found to be fraudulent.

The child is authorized to attend the local German schools as long as he or she is residing in Germany. This requires a knowledge of the German language and will normally result in the child being set back two or more grades because of the accelerated German curriculum.

### III. SPOUSAL RIGHTS TO EMPLOYMENT FOLLOWING MARITAL SEPARATION

Spousal rights to employment following marital separation are covered by Army Regulation 690-300,<sup>7</sup> USAREUR Supplement 1 to Army Regulation 690-300,<sup>8</sup> and USAREUR Regulation 690-35.<sup>9</sup>

The employment status of a spouse following marital separation from a soldier or a DOD civilian is determined by the spouse's position. If the spouse is employed as a dependent-hire in an appropriated fund position, employment will normally terminate thirty to sixty days after the parties separate, whether or not a formal separation agreement has been executed.<sup>10</sup> The critical question is whether the spouse is "residing with" the sponsor. If not, the period begins to run. A one-year waiver can be requested by the supervisor if no other qualified family member is available to fill the position, but this normally is not granted.

If the spouse is employed in a NAF position for which he or she was given preferential hiring status as a dependent, the employment will terminate thirty to sixty days after marital separation.<sup>11</sup> If the spouse is employed in a NAF position which is available to anyone, including tourists and foreign nationals, he or

<sup>7</sup>U. S. Army, Europe, Reg. No. 690-300, Employment (1 Aug. 1985) (hereinafter cited as AR 690-300).

<sup>8</sup>U. S. Army, Europe, Supp. 1 to Dep't of Army, Reg. No. 690-300, Employment (16 Sep. 1982)(hereinafter cited as USAREUR Supp. 1, AR 690-300).

<sup>9</sup>U. S. Army, Europe, Reg. No. 690-35, Civilian Personnel-Overseas Separations (21 Nov. 1974)(hereinafter cited as USAREUR Reg. 690-35).

<sup>10</sup>USAREUR Supp. 1, AR 690-300, ch. 301, para. 6-5a(2).

<sup>11</sup>USAREUR Supp. 1, AR 690-300, ch. 301, para. 6-5a(2).

she will be permitted to retain the position indefinitely.<sup>12</sup> The marital separation has no relevance in this situation.

If the spouse is employed as a dependent-hire in a government service (GS) position which qualifies for full logistical support, he or she may be able to remain in that position, but only if a final decree of divorce or legal separation is issued by a court of competent jurisdiction prior to the expiration of the thirty to sixty day period.<sup>13</sup>

A spouse may seek employment with a German business, but must first obtain a German work permit (*Arbeitserlaubnis*) from the proper authorities. Once he or she applies for this permit, it will normally be necessary to register with the *Auslaenderpolizei* or the *Auslaenderamt* (Alien Registration Office), and to apply for a residence permit (*Aufenthaltserlaubnis* or *Aufenthaltsbescheinigung*).

If a spouse desires to remain in Germany after a final decree of divorce is granted and is not employed by the U.S. forces, he or she has one week (ninety days if living as a tourist in a hotel or pension) in which to register with the *Auslaenderpolizei* or *Auslaenderamt*. The same time limitations apply if the spouse is separated from a sponsor who has already departed Germany and the spouse is subsequently terminated from U.S. employment. So long as the sponsor remains in Germany with the U.S. forces and a final decree of divorce or legal separation has not been granted, the spouse need not register with the German authorities.

#### IV. RETURN TRANSPORTATION RIGHTS FOR FAMILY MEMBERS AND THEIR BELONGINGS

This area is generally covered by Army Regulation 55-46<sup>14</sup> and its USAREUR Supplement,<sup>15</sup> Army Regulation 55-47,<sup>16</sup> and the

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<sup>12</sup>U. S. Army, Europe, Supp. 2 to Dep't of Army, Reg. No. 690-300.335.1, Employment—General Provisions, App. C, para. C-4d (3 May 1984) (hereinafter cited as USAREUR Supp. 2, AR 690-300.335.1).

<sup>13</sup>AR 690-300, ch. 301, para. 4-4.

<sup>14</sup>Dep't of Army, Reg. No. 55-46, Travel of Dependents and Accompanied Military and Civilian Personnel To, From, or Between Oversea Areas (6 Oct. 1975)(hereinafter cited as AR 55-46).

<sup>15</sup>U. S. Army, Europe, Supp. 1 to Dep't of Army, Reg. No. 55-46, Travel of Dependents and Accompanied Military and Civilian Personnel To, From, or Between Oversea Areas (15 Feb. 1983) (hereinafter cited as USAREUR Supp. 1, AR 55-46).

<sup>16</sup>Dep't of Army, Reg. No. 55-47, Use of United States—Owned Foreign Currencies in the Procurement of Transportation and Related Costs (7 Feb. 1974)

Joint Travel Regulation.<sup>17</sup>

If family members are command sponsored, they are entitled to be returned to the United States at government expense. This may be pursuant to a request for advance return of dependents or in conjunction with the sponsor's normal permanent change of station (PCS). If the sponsor was authorized to transport family members to USAREUR at government expense, but has since been reduced to grade E-3 or below, the government is still obligated to return the family to CONUS at no expense to the family members or the sponsor.<sup>18</sup>

If family members have been "abandoned" in the overseas area by the sponsor, the government will normally make an exception to Army policy and return them to the United States on a space-available basis.<sup>19</sup>

Major overseas commanders will approve space-available travel for family members acquired overseas during a soldier's tour if applicable command regulations were compiled with and, for foreign nationals, if requirements of the U.S. Immigration and Naturalization Service have been met. Such space-available travel by Military Airlift Command (MAC) aircraft is authorized to the CONUS port of debarkation in conjunction with the soldier's PCS even if the parties have since separated.

The military sponsor, with the concurrence of family members, may request advance return of family members to a designated location in CONUS, Alaska, Hawaii, Puerto Rico, or to a U.S. territory or possession. A civilian employee may also request advance return of family members, but only to CONUS, Alaska, or Hawaii. A spouse or family member over the age of eighteen cannot be forced to return to the U.S. When, because of marital difficulties, it is determined that the best interest of all concerned will be served by the advance return of the family members, return transportation will be authorized. If the sponsor declines to request such transportation, the spouse may do so. If the sponsor refuses to request advance return orders, the commander can determine that advance return is warranted and initiate the necessary paperwork on the family member's behalf.<sup>20</sup>

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(hereinafter cited as AR 55-47).

<sup>17</sup>Joint Travel Regs. for the Uniformed Services, paras. M7008, 7063, 7102-7103, 7106, and 8303 (22 Dec. 1950, as amended)(hereinafter cited as JTR).

<sup>18</sup>AR 55-46, para. 5-8.

<sup>19</sup>USAREUR Supp. 1, AR 55-46, para. 5-4f.

<sup>20</sup>AR 55-46, para. 5-7a(2). See also JTR.

Transportation must be completed within one year of the effective date of any divorce or annulment, or within six months after the sponsor's PCS, whichever occurs first. If the soldier is separated from the military before return travel has been accomplished by all family members, the family's entitlement to return travel will remain in effect for a period of one year following the soldier's separation from the service.<sup>21</sup>

If the soldier agrees that the spouse may return to the U.S. but objects to the return of the children, the spouse may obtain a temporary custody order, temporary support order, and temporary restraining order from the local German court without requiring the services of a German attorney. Most courts have a legal representative called a *Rechtspfleger* (government paralegal) who will assist spouses in filing the necessary court documents, obviating the need for the services of a German attorney. Once the spouse has a legal custody order from the court, the military must permit the return of the family members to the U.S. with the spouse, despite the soldier's objection.

Regarding the shipment of household goods (HHG), several factors need to be considered. Assume the soldier involved is a Major, has two children, and is entitled to ship 12,000 pounds of HHG from USAREUR. If the parties are divorced, each spouse will receive a full 12,000-pound weight allowance.<sup>22</sup> There will be no offset for the weight allowance given to the other party. Should the Major remarry and the new spouse become command sponsored, the Major and his former spouse will still each receive a full 12,000-pound weight allowance.<sup>23</sup> If the parties are merely separated and not divorced, however, the Major will receive a 3,000-pound weight allowance, plus an additional 600 pounds hold baggage. It is important, therefore, that the attorney and the client discuss all aspects of the relationship before entering into any agreement on the shipment of HHG.

Finally, if the family members are no longer residing with the sponsor in government quarters, but will not be traveling immediately to CONUS on advance return orders, storage of HHG is authorized either in CONUS or overseas.<sup>24</sup> Transportation of HHG from government quarters to economy quarters, however, is *not* authorized. The expense of transporting HHG to a temporary economy address becomes a matter of fiscal concern

<sup>21</sup>AR 55-46, para. 6-4a(1).

<sup>22</sup>JTR, para. M8303(4).

<sup>23</sup>JTR, para. M8303.

<sup>24</sup>JTR, para. M8017.

to the parties and should be addressed specifically in the separation agreement.

## V. ENTITLEMENT TO GOVERNMENT HOUSING AND FURNITURE UPON SEPARATION IN USAREUR

Entitlement to government housing and furniture is governed by USAREUR Supplement 1 to AR 210-50.<sup>25</sup> Government quarters are an entitlement of the military or civilian sponsor. The spouse and other family members have no independent right to occupy government quarters. Therefore, the authorization to occupy family quarters will terminate thirty to sixty days after the sponsor and spouse cease to reside together (assuming there are no children).<sup>26</sup> If there are children and they continue to reside with the sponsor in quarters, the entitlement will continue. If, however, the spouse and children continue to reside in quarters and the military sponsor moves to another location, the entitlement will terminate.

If a spouse elects to vacate government quarters, but wants to remain in Germany, he or she may obtain a temporary support order from the German court to assist in meeting housing expenses. This will normally equal three-sevenths of the military sponsor's pay or, if the spouse is employed, three-sevenths of the difference between the spouse's income and that of the sponsor.

Government furniture is also an entitlement of the military sponsor and not of the family member or spouse. If the sponsor agrees to be accountable for the furniture, the spouse will be permitted to use it in his or her economy quarters during the remainder of the sponsor's stay in USAREUR.<sup>27</sup> The sponsor remains ultimately liable for any damage which might occur to the furniture while it is in the spouse's possession.

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<sup>25</sup>U. S. Army, Europe, Supp. 1 to Dep't of Army, Reg. No. 210-50, Family Housing Management (1 July 1980) (hereinafter cited as USAREUR Supp. 1, AR 210-50).

<sup>26</sup>USAREUR Supp. 1, AR 210-50, para. 10-28c(2). See also Dep't of Air Force, Reg. No. 90-1, Family Housing Management, para. 9-3f, (draft)(22 July 1985) (hereinafter cited as AFR 90-1).

<sup>27</sup>U. S. Army, Europe, Reg. No. 210-6, Furniture and Household Equipment Support for Family and Unaccompanied Personnel Housing in USAREUR, para. 13b(3) (10 Jan. 1983) (hereinafter cited as USAREUR Reg. 210-6).

## VI. ENTITLEMENT TO EXCHANGE AND COMMISSARY PRIVILEGES FOLLOWING MARITAL SEPARATION

Entitlement to exchange and commissary privileges is governed by USAREUR Regulations 27-3,<sup>28</sup> 600-702,<sup>29</sup> 608-81,<sup>30</sup> and by Army Regulation 640-3.<sup>31</sup> While the sponsor and the spouse are married, except as addressed below, the spouse is entitled to a dependent identification card and access to commissary and Army and Air Force Exchange Service (AAFES) facilities. Once the parties are divorced, this entitlement terminates, unless the former spouse qualifies for privileges under the Uniformed Services Former Spouses' Protection Act.<sup>32</sup> If there are minor children age ten or older, they are issued identification cards in their own right. If they are under ten years of age and living with a divorced parent who is not authorized military privileges, the children will be issued identification cards of their own and authorized access to Military Treatment Facilities (MTFs) and AAFES facilities for the purpose of purchasing items for their own personal use.<sup>33</sup>

If the sponsor and spouse (or children, if the parties are divorced) are living in Germany, the soldier's lawful dependents retain their eligibility to use military facilities, even though residing at separate locations, including military treatment facilities (MTFs). Once the sponsor departs Germany pursuant to PCS

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<sup>28</sup>U. S. Army, Europe, Reg. No. 27-3, Misconduct by Civilians Eligible to Receive Individual Logistic Support (5 Jan. 1982) (hereinafter cited as USAREUR Reg. 27-3).

<sup>29</sup>U. S. Army, Europe, Reg. No. 600-702, Ration Policy (14 Feb. 1985) (hereinafter cited as USAREUR Reg. 600-702).

<sup>30</sup>U. S. Army, Europe, Reg. No. 608-21, Establishment of Members of Household (7 July 1983).

<sup>31</sup>Dept of Army, Reg. No. 640-3, Identification Cards, Tags, and Badges (17 Aug. 1984) (hereinafter cited as AR 640-3).

<sup>32</sup>See Pub. L. No. 97-252, §§ 1004, 1005, 96 Stat. 730, 737 (1982) (codified at 10 U.S.C. § 1072). A former spouse who was married to a soldier or retiree for twenty years, during which time the soldier or retiree served twenty or more years of service creditable toward retirement, qualifies for medical benefits as long as the former spouse is unremarried and is not covered by an employer-sponsored health plan. The former spouse who meets this "twenty-twenty" test will also qualify for commissary and exchange privileges. Under a special category created by the Department of Defense Authorization Act of 1985, former spouses whose twenty years of marriage do not overlap with the twenty years of service qualify for medical benefits as long as the former spouse is unremarried, is not covered by an employer sponsored health plan, has a decree of divorce final before 1 April 1985 and there is at least a fifteen year overlap between years of service and years of marriage. 10 U.S.C. § 1072(2)(G). See also AR 640-3, Table B-2.

<sup>33</sup>AR 640-3, para. 3-4d.

orders, however, the unaccompanied dependents retain full logistical support for only ninety days, at which time their privileges are limited to medical care, theater, recreational services,<sup>34</sup> and possibly, limited commissary and exchange privileges.<sup>35</sup> Additionally, if the family members have official or "no fee" passports, they must turn them in and apply for fee passports through the American Consulate or Embassy.<sup>36</sup>

As long as the family members continue to qualify as dependents, they can use all exchange and commissary facilities in the United States.

If a family member commits misconduct, the Civilian Misconduct Action Authority (CMAA) may suspend any or all logistical support privileges, except access to MTFs, if the CMAA deems such action to be appropriate.<sup>37</sup> The family member can appeal the suspension to the community commander. The CMAA is the only person who can suspend such privileges and only in cases of misconduct. The sponsor, for example, cannot arbitrarily have family members' privileges rescinded because the family members refuse to return to CONUS. Barring misconduct on their part, family members will retain their privileges as long as they qualify under applicable Army regulations.

## VII. AUTHORIZATION FOR MEDICAL CARE FOLLOWING MARITAL SEPARATION

Authorization for medical care is governed by USAREUR Regulation 600-700 and by Army Regulations 40-121<sup>38</sup> and 40-3.<sup>39</sup> If the sponsor is stationed in USAREUR, family members are authorized to use all USAREUR MTFs, including dental clinics. Once the sponsor PCSs, family members usually will qualify only for emergency medical care in MTFs; other medical services must

<sup>34</sup>U. S. Army, Europe, Reg. No. 600-700, Individual Logistic Support, Annex M, Appendix II (17 Jan. 1985) (hereinafter cited as USAREUR Reg. 600-700).

<sup>35</sup>USAREUR Reg. 600-700, Annex M, Appendix III (requires acquisition of German customs certificate).

<sup>36</sup>U. S. Army, Europe, Supp. 1 to Dep't of Army, Reg. No. 600-290, Passports and Visas, para. 1-4e (19 Apr. 1979) (hereinafter cited as USAREUR Supp. 1, AR 600-290).

<sup>37</sup>USAREUR Reg. 27-3, para. 14.

<sup>38</sup>Dep't of Army, Reg. No. 40-121, Uniformed Services Health Benefits Program (15 Sep. 1970) (hereinafter cited as AR 40-121). See *supra* note 32 for a discussion of former spouse eligibility for medical care.

<sup>39</sup>Dep't of Army, Reg. No. 40-3, Medical, Dental, and Veterinary Care (15 Feb. 1985) (hereinafter cited as AR 40-3).

be obtained from German facilities, which requires prior approval from the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) if reimbursement will be sought. In addition, because most foreign facilities are not "participating" agencies, the family can expect to pay the difference between what CHAMPUS says the service is worth and what the facility elects to charge. The military assumes no responsibility for any charges which might be incurred.

If family members elect to remain in Germany, they may qualify for the German *Krankenkasse* (health insurance program). Usually they must be employed on the German economy, but it may be worthwhile to pursue this avenue further if such a situation presents itself.

## VIII. TAX CONSIDERATIONS OF LIVING SEPARATELY FROM THE SPONSOR

Internal Revenue Code sections 62, 71, 143, 151, 152, and 215<sup>40</sup> determine the tax considerations involved when the spouse lives apart from the sponsor. So long as they are still married and agree to do so, the sponsor and spouse may file either joint or separate federal and state tax returns. If the parties elect to file separately, the sponsor will be permitted to deduct from his or her gross income any sum paid to the spouse which qualifies as alimony under I.R.C. § 71, provided the support is paid pursuant to a written separation agreement or court order. The spouse must report this amount as income and pay any taxes due thereon.

If there are children involved, the military sponsor will be permitted to claim the dependency exemption if:

- (1) The parties were divorced or separated pursuant to a written separation agreement or decree which became final prior to 1985,
- (2) The court decree or agreement grants to the sponsor the right to claim the dependency exemption for the children,
- (3) The sponsor provides support of at least \$50 per month per child, and

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<sup>40</sup>26 U.S.C. §§ 62, 71, 143, 151, 152, and 215 (1982) (hereinafter cited as I.R.C.).

(4) This support constitutes over fifty percent of the child's support needs.<sup>41</sup>

If the sponsor meets the tests in (1), (2), and (4) above, and provides at least \$100 per month per child in child support, the sponsor presumptively will be entitled to claim the dependency exemption for the children, regardless of the provisions of the separation agreement or written decree. To overcome this presumption, the custodial parent must prove that he or she contributes more than this amount before he or she will be permitted to claim the tax exemption.<sup>42</sup>

Be aware that there has been a material change in the dependency exemption rules for divorce decrees and separation agreements executed after 31 December 1984.<sup>43</sup> Effective with the 1985 tax year, the custodial parent will be permitted to claim the dependency exemption for *all* children in his or her care *unless* he or she provides a written statement to the noncustodial parent (to be attached to that person's tax return) stating that he or she (the custodial parent) will *not* claim the exemptions for that tax year.<sup>44</sup> Merely stating this in the separation agreement probably will *not* be sufficient. The Commissioner of the IRS has designed a form (IRS Form 8332) for this purpose and it would be a good idea to have it signed with the separation agreement (in appropriate cases). The waiver may be made for one year, for a specified number of years, or for all future years, in which case a copy of the signed permanent waiver must be attached to each tax return filed thereafter.

Generally, the transferor will not incur income tax or estate tax liability for transfers of property pursuant to divorce. It should be noted, however, that the recipient spouse will receive the property with the transferor's basis or carryover basis.<sup>45</sup> This means the spouse who receives the property may later become liable for any capital gain (and recapture of accelerated depreciation or investment tax credit previously taken) if the property is subsequently transferred. The potential reduction in actual value of the property to the recipient because of liability for capital gains tax upon a future disposition of the property should be considered

<sup>41</sup>I.R.C. § 152(e) (2) (A).

<sup>42</sup>I.R.C. § 152(e) (2) (B).

<sup>43</sup>See generally Mulliken, *The Tax Reform Act of 1984 and Divorce Taxation*, *The Army Lawyer*, Oct. 1984, at 16. For the tax treatment of property between spouses and former spouses, see Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) (codified in scattered sections of the Internal Revenue Code).

<sup>44</sup>I.R.C. § 152(e) (1).

<sup>45</sup>I.R.C. § 1041.

and discussed with your client when placing a value on the property.

There is an important exception to this general rule: when the property is transferred to a nonresident alien spouse, the transfer is treated as a taxable transaction and the transferor will be liable for capital gains tax on any capital gain measured by the difference between the fair market value of the property at the time of the transfer and its basis.<sup>46</sup> Be aware, also, of the possible loss of the right to defer any capital gains from the sale of the family residence. Recent court decisions have taken positions adverse to the interests of some military personnel, especially where one party has retained the right to reside in the residence for a period of time prior to its sale.<sup>47</sup> The other, nonpossessory party may lose the right to claim the residence as his or her personal residence.

## IX. CONCLUSION

The challenges of legal assistance family practice in Germany are unique but not insurmountable. The foregoing discussion covers most of the areas in which clients will have questions. To aid clients in better understanding these issues, a series of Appendices, which may be used for office handouts, follow the article.

## APPENDIX A—FACT SHEET ON STATUS OF CHILDREN

### 1. Where will my children attend school?

Your children can attend either Department of Defense schools or German schools. If your child has been educated previously in American schools, he or she will probably be placed in a lower grade in the German school than he or she would have attended in a comparable American school because the German curriculum is more accelerated and demanding than that of American schools. This is not to say that one is better than the other; German schools merely teach certain subjects at an earlier age. Normally, such intercultural education will benefit your child in the long run.

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<sup>46</sup>I.R.C. § 1041.

<sup>47</sup>*E.g.*, *Young v. Commissioner*, No. 20389-80 (T.C. 1985) (mem.).

**2. Are there curfews in Germany for children?**

There is a curfew imposed by the Army in military housing areas. If your child is under eighteen, he or she must be in quarters by eleven p.m. If there are repeated violations of the curfew, administrative action can be taken, including advance return of your child to CONUS.

**3. What happens if my child gets into trouble with the German authorities?**

The German Juvenile Court and the *Jugendamt* (Youth Welfare Office) have responsibility for children. They emphasize the public service approach rather than pure punishment, usually requiring volunteer work. There are no "detention homes" for youths. If the offense is serious enough, the child will be tried as an adult and, if convicted, will be sentenced to confinement in the adult prison. This is discretionary between the ages of eighteen and twenty-one.

If your child must go to court, you can obtain the advice of a *Rechtspfleger* (government paralegal) at the courthouse. This person is not an attorney, however, and cannot represent your child in court. You must obtain a private attorney and interpreter at your own expense for civil cases. In criminal cases, the government may pay these expenses under certain circumstances. If your child is acquitted, the German Government will pay all expenses.

**4. Can children be arrested for driving while under age?**

Yes, and the penalties are harsh. In one case, a minor was caught driving while under age eighteen for the second time and was sentenced to seven months in the adult prison.

**5. Can my children be sent back to the United States?**

The community commander can direct advance return of dependents if he or she receives such a recommendation from the Dependent Advisory Board. This normally only occurs if a child gets into serious or repeated trouble with the local authorities. The sponsor may also be charged with failure to control dependents if there is continual misconduct.

**6. Once their dependent status ends, can my children stay and work in Germany?**

The age of majority in Germany is twenty-three. Once your son or daughter reaches that age, he or she must get a work permit, whether or not the sponsor remains in the country. The only

exception is if the child is employed in a logistically supported U. S. position. This can be an appropriated fund, nonappropriated fund, or contract position. The child will have to obtain a residence permit before the work permit will be issued.

If the child remains in Germany after the sponsor departs (even if under age twenty-three), he or she has only one week (or ninety days if living in a hotel or pension) in which to register with the *Verbandsgemeinde* (Regional Office) or *Ortsvertreter* (Mayor or City Representative) and to apply to the *Auslaenderpolizei* (Alien Office) for a six-month renewable residency permit.

## APPENDIX B—FACT SHEET ON VISA/RESIDENCY PERMITS

**If I am a soldier married to a non-German civilian, is it necessary for my spouse or children to obtain visa or residency permits?**

1. American family members automatically qualify for a NATO SOFA stamp in their passports. This replaces the visa or residency permit and is valid while the sponsor is in Germany, unless the family relationship is terminated by divorce.
2. If your family member is a third country national and was married to you at the time of your assignment to Germany, the same entitlements exist, that is, your family member falls under the NATO SOFA Agreement and no further action is necessary.
3. There is one area in which problems might arise. If you are single and your third country national spouse-to-be is coming to Germany for the purpose of marrying you, be aware that Germany requires citizens of certain third countries to obtain visitor visas in order to enter the country. If your fiancée obtains such a visa prior to the marriage, it will be necessary to contact the *Auslaenderpolizei* (Alien Police) and have the records amended to reflect the new NATO SOFA status. Otherwise, if the spouse is stopped by the *polizei* (police) and the visa has expired (even if he or she has a NATO stamped passport) it may be difficult to correct the situation. If he or she does not have the NATO-stamped passport along at that time, you may find your spouse on the other side of the border looking in.

## APPENDIX C—FREQUENTLY ASKED QUESTIONS ABOUT SEPARATION AND DIVORCE IN GERMANY

### DIVORCE

#### 1. How do I get a divorce when I am in Germany?

If both you and your husband are U. S. citizens, it will be possible to go into German court only if one of you is "ordinarily resident" in the Federal Republic of Germany. If you decide to proceed in the local court, you must have been legally separated for one year. This can be established by counting from the date of filing of the divorce or by submitting a written separation agreement indicating an earlier separation date. Quicker divorces can be obtained only where there has been gross misconduct, such as adultery or spouse abuse, by the other spouse. If one of the parties protests, you will have to wait three years before the divorce can be granted. The cost of a German divorce is determined by the court based on the value of the controversy, but it will usually run about DM 2500 to DM 3500 (approximately \$1,000.00 to \$1400.00, computed at 2.5 DM per \$1.00).

Three states (California, Texas, and Washington) presently allow a divorce by affidavit under certain circumstances. If you are a resident of one of these states, you may be able to file for divorce in that state while in Germany without either of you having to appear in court. The divorce must be consensual, both parties must sign all necessary papers, there can be no children involved, and the marriage must have been of a short duration, normally not longer than six months to a year.

If you are filing for divorce in any other state, you must personally appear in court during the final hearing and, if you are seeking alimony or child support from your spouse, the divorce must be filed in his or her place of domicile to be enforceable.

The legal assistance office will refer you to an attorney in a state which you can file for divorce. Under the Soldiers' and Sailors' Civil Relief Act, some states will grant your soldier spouse a delay of up to six months or longer so he or she can obtain a local attorney. Others, however, will merely appoint an attorney on the spouse's behalf so the divorce can go forward. Still others will issue temporary custody, restraining, and support orders to compel the spouse to get to court more quickly and to

provide you support until a final hearing can be scheduled. Be sure you consider all the options when you file any such action.

**2. Can I resume my maiden name?**

Any name change request should be incorporated into the petition for divorce. Some courts will not allow a wife to change her name if there is a minor child or children bearing the husband's name. Most, however, will not restrict you in this way. Remember it is cheaper to include the change of name in the divorce petition itself, rather than be forced to bring a separate action later.

**3. Will the German courts force my husband to comply with the provisions of an American divorce decree?**

Yes, if the German courts have personal jurisdiction over all concerned.

**4. If I want to, can I stay and work in Germany after a divorce?**

You may stay and work, but you must comply with German law on alien registration. The same is true if your sponsor PCSs.

**5. What benefits will my children and I retain after a divorce?**

Your children will retain their military benefits until age 18 (or 23 if they are enrolled full time in a school of higher learning). You may be able to retain all or some of your benefits if you qualify under the Uniformed Services Former Spouses' Protection Act. The requirements are that you have been married twenty years during which your soldier or retiree spouse was serving creditably with the Armed Forces and you have not remarried. You may qualify for medical privileges *only* if there is at least a fifteen year overlap between the years of service and years of marriage *and* you are not covered by an employer sponsored health plan. If you do not qualify under the Act, your military benefits end when your divorce becomes effective.

Once you receive a final divorce decree, if your ex-spouse fails to provide the required support, you can have his or her pay garnished by the U. S. Army Finance and Accounting Center by obtaining a garnishment order from any court of competent jurisdiction.

## SEPARATION

### 1. If I want to separate from my husband, can I leave Germany without his, or the military's, consent?

You can leave without your husband's consent by submitting a request to his commander for advanced return of dependents. If approved, the return will be at Government expense. The commander can prepare the request, add his or her recommendation, and then forward it on to the approving authority, all without your husband's knowledge or consent. You may also depart at your own expense at any time without anyone's consent.

### 2. If we separate, can I remain in government quarters?

If you are a dependent and your husband moves out of the government facility in which you are living, you will be allowed to live in the housing only for an additional forty-five to sixty days. At the end of this time, you will have to move out of government housing. If your husband will not provide you with sufficient money to find suitable alternate living quarters, you should not hesitate to either contact his commander or seek a temporary support order from the German court. Remember—you do not need an attorney to get a temporary support order—the *Rechtspfleger* (government paralegal) will help you complete the form.

### 3. Can I stay in Germany after separation?

As long as you are not divorced, the German Government considers you to be an approved dependent and will permit you to remain in Germany without a visa. After a divorce is obtained, you will have a short period of time in which to apply for a residence permit, as explained previously.

### 4. Can my husband send me back to the states against my will?

Your husband can always follow the procedures outlined above for obtaining orders for advanced return travel, but you cannot be required to use those orders to depart Germany. This also applies to your children who are over age eighteen.

### 5. What is a separation agreement?

A separation agreement is a legal document which sets out the terms concerning custody, child support, alimony, and property division to which both parties have agreed. It is usually made by a married couple who are about to get a divorce or legal separation. It must be voluntarily entered into by both parties

and must be signed by both your husband and you in the presence of witnesses and a notary public. To obtain one, call the legal assistance office and make an appointment. Be aware, though, that some office policies prohibit both parties from being seen in the same facility. Others grant priority to the sponsor, whether or not he has already been seen by an attorney in the office, or not. If this is the case, you will have to make an attempt to see an attorney at a location within driving distance. Both of you must speak with and be considered by attorneys before you actually enter into any formal, binding agreement.

# DISSOLUTION OF MARRIAGE IN JAPAN

by Mr. Omar I. Ojeda \*

## I. INTRODUCTION

There are several thousand members of the U.S. armed forces stationed in Japan. Of these, many get married and many get divorced. What does the legal assistance officer advise the soldier who desires to obtain a divorce in Japan? The purpose of this article is to provide a basic guide for legal assistance officers on annulment and divorce law in Japan. It is, however, only a general overview and should not be cited as a complete, authoritative source on this area. Instead, complex questions in this area should be referred to a Japanese attorney.

## II. JURISDICTION AND COURTS

### A. APPLICABLE LAW

Dissolution of marriage in Japan is based on Japan's civil law system, which was patterned primarily on the modern German legal system. In the case of non-Japanese citizens, however, a divorce in Japan is governed by the law of the home country of the husband at the time of the occurrence of the facts constituting the grounds for dissolution, except that the court may not adjudicate a divorce unless those grounds also constitute grounds for divorce under Japanese law.<sup>1</sup> In the case of annulment, Japanese law applies.

### B. RESIDENCE

In most divorce cases, both parties must physically reside in Japan, especially if both parties are non-Japanese citizens. But there is no minimum period of residence required prior to filing.<sup>2</sup> The petition should be filed with the court where the respondent resides, but this is not mandatory.

### C. COURTS

A divorce can be obtained in a district court or in a family court. An annulment may be obtained in a district court. The

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<sup>1</sup>Hōrei zensho (Law Concerning the Application of Laws in General), Law No. 10 of 1898, art. 16.

<sup>2</sup>Minpo (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, arts. 21-24 (hereinafter cited as Minpo).

district courts, where contested divorce cases are heard, are called courts of general original jurisdiction. They handle all cases except those specifically coming under the exclusive jurisdiction of other kinds of courts. They also have appellate jurisdiction over cases decided in the lower courts. Cases are handled by a single judge or a three-judge panel, depending on the nature and importance of the case. In practice, the majority of the cases are disposed of by a single judge, except for appeals. There are fifty district courts having jurisdiction over their respective judicial districts, which is the same area as a prefecture.<sup>3</sup> The entire district court system has 800 judges and 440 assistant judges.<sup>4</sup>

The family court specializes exclusively with family affairs and with juvenile delinquents. The court has jurisdiction over all family disputes and conflicts, as well as over all domestic affairs, including support, custody, and division of property. The procedure to resolve marital disputes in the family court is called conciliation. The parties must first go through the conciliation procedure where an attempt is made to resolve the dispute. The result could be reconciliation or a mutually agreed upon divorce. When no agreement is reached, either party may bring a contested action before the district court. The family court branch offices are established at the same place where the district courts are located. There are about 200 family court judges and 150 assistant judges.<sup>5</sup>

### III. ANNULMENT

A marriage maybe void *ab initio*<sup>6</sup> or may be voidable.

#### A. AB INITIO

A marriage is void *ab initio*, or not valid from the onset, in the following situations:

1. Lack of intention on the part of either of the parties or if there was a mistake as to identity.

2. Lack of compliance with Japanese law such as failure to properly register the marriage in the Family Register.

#### B. VOIDABLE

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<sup>3</sup>A prefecture is a political subdivision somewhat equivalent in the United States to a county or a parish.

<sup>4</sup>Kenpō (Japanese Constitution of 1946), art. 76; Court Organization Law No. 59 of 1947; see also Justice in Japan (Supreme Court of Japan 1975).

<sup>5</sup>Justice in Japan (Supreme Court of Japan 1975).

<sup>6</sup>Minpō arts. 731-736, and 742-749.

A marriage may be annulled for the following reasons:

1. Age, in the case of male under eighteen years of age or a female under the age of sixteen. But, if either continues to cohabit with the other for three months after reaching the age of consent, this ground is not available.

2. Bigamy.

3. Remarriage of the female spouse before six months have elapsed after a divorce.

4. Marriage between relatives. The parties must be related by blood, such as parents and children, or be collateral relatives by blood, such as brothers and sisters and cousins up to the third degree. This ground also applies to marriages between lineal relatives by affinity, such as parents-in-law and children-in-law.

5. Fraud or duress. This is only available for a period of three months after the victimized party has discovered the fraud or is freed from the duress.

### C. PROCEDURE

An application for annulment is made to a district court by the parties, the relatives, or by a public prosecutor. However, in cases of bigamy and remarriage of a female within six months after divorce, only the victimized spouse has standing to apply for an annulment.<sup>7</sup>

## IV. DIVORCE

A divorce may be consensual or judicial.<sup>8</sup>

### A. CONSENSUAL DIVORCE

A consensual divorce may be obtained simply by filing documents in the Japanese Family Register. Both parties must fully agree to divorce and both must sign the application. This type of divorce is available only to those couples who have registered their marriage in the Japanese Family Register.<sup>9</sup>

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<sup>7</sup>Hōrei zensho (Law and Procedure of Personal Affairs), Law No. 13 of 1898; Minji soshō hō (Code of Civil Procedure), Law No. 29 of 1890.

<sup>8</sup>Minpō art. 728.

<sup>9</sup>Id. arts. 739, 763, and 764.

## B. JUDICIAL DIVORCE

As stated above, a judicial divorce can be obtained in a district court or in a family court. A divorce in a district court is usually a contested one. The parties must first have exhausted the family court conciliation procedures to obtain a divorce from a district court. The grounds for divorce in a district court are:

1. That either spouse has committed an act of unchastity.
2. Malicious desertion.
3. That a spouse has not known for three years or more whether the other spouse is alive or dead.
4. That either spouse is afflicted with severe mental disease and recovery therefrom is hopeless.
5. For any other grave reason which makes it difficult for either spouse to continue the marriage.

In the case of grounds 1 through 4, the court may dismiss the action if it determines that the marriage can be continued.<sup>10</sup> A contested divorce is more expensive and could take as long as a year. Due to the conflict of applicable laws, cases involving non-Japanese citizens may take even longer.<sup>11</sup>

Family court divorce is called conciliation because the purpose is reconciliation.<sup>12</sup> The court may, however, grant a divorce if both parties are in full agreement. Forms and instructions for filing before the court are available at the office of the family court. Birth certificates and marriage certificates must be translated into Japanese. In addition, a summary of the divorce law of the husband's legal residence is required. After the petition is filed, the court will summon both parties to a hearing. This is an informal meeting in which the court tries to create a family atmosphere that may lead to a resolution of the marital problems. The presence of attorneys is discouraged, but most non-Japanese will retain an attorney who may also serve as an interpreter. The parties are not required to make any argument, but will be asked questions by the court. After the hearing, the judge will order the preparation of the divorce decree, or "protocol," if the parties cannot reconcile and they agree to the divorce and its terms. It could take as little as a week to issue the "protocol." The

<sup>10</sup>*Id.* art. 770.

<sup>11</sup>See *supra* section I B.

<sup>12</sup>Hōrei zensho (Law for the Adjudication of Domestic Matters), Law No. 152 of 1947, art. 21.

document will describe the parties and indicate their presence at the hearing. It will include the grounds for divorce, which in most cases is that the marriage is irretrievably broken. Other matters agreed to by the parties such as support, custody, division of property, and even a provision for the wife to reassume her maiden name may be included. The "protocol" is then sealed and signed by the court clerk. The original is kept in the court's archives and the parties are issued a true copy.<sup>13</sup> United States citizens can have a "protocol" translated and certified by a United States Consul.

### ***C. ALIMONY, SUPPORT, CUSTODY, DIVISION OF PROPERTY***

District courts and family courts make awards in these areas, but the authority of the family court to impose such awards is questionable. Alimony is not recognized as such, but may be granted by the court as part of a division of property in the form of a lump sum payment.<sup>14</sup> Child support is an obligation of the parents under Japanese law. The courts may award child support after considering the needs of the child, the financial situation of the parties, and other pertinent circumstances.<sup>15</sup> Child custody will be determined by taking into consideration what is best for the children.<sup>16</sup>

The parties' property rights will also be decided under Japanese law.<sup>17</sup> Separate property is that which was obtained by either party prior to the marriage and that property which is acquired solely in the name of the husband or in the name of the wife during the marriage. Joint property is that property obtained during the marriage and it is uncertain whether it belongs to the husband or to the wife. The law implies that any division of marital property will be based on the principle of equitable distribution.

### ***D. RECOGNITION OF A JAPANESE DIVORCE***

The position of the U.S. armed forces on recognizing a foreign divorce depends on the facts of a particular case. Generally, the position of both the Army and the Air Force is to recognize a foreign divorce which has been obtained in accordance with the

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<sup>13</sup>*Id.*

<sup>14</sup>Minpo' art. 768.

<sup>15</sup>*Id.* arts. 877-881.

<sup>16</sup>*Id.* art. 766.

<sup>17</sup>*Id.* arts. 755-762 and 768.

laws of the country where the divorce is granted, until a court of competent jurisdiction in the United States has ruled such a divorce to be invalid.<sup>18</sup> Questions as to recognition in the United States should be referred to a civilian attorney or to a legal assistance office in the state where the recognition is sought.

### ***E. ATTORNEY AND FILING FEES***

Attorney's fees may vary in different prefectures. Suggested fees are established by the local bar association, but may also depend on the experience and prestige of the attorney.

Filing fees are required by the courts for mailing costs and for revenue stamps (a form of tax). These also differ by prefecture, depending on the type of court, location, and nature of the case.

## **V. CONCLUSION**

Based on this brief overview of Japanese law, it is obvious that a legal assistance officer must first advise a client seeking a divorce or annulment in Japan whether it would be best to bring the action in Japan or whether the soldier should bring the action in the United States. Japanese law is very different from the laws of the United States. This article demonstrates the importance of close coordination with members of the local bar in foreign countries when advising clients on issues of foreign law.

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<sup>18</sup>See 6 Dig. Op. 335 (1956) (Army); OpJAGAF Nos. 1966/14, 8 Feb. 1966, and 1972/62, 20 Apr. 1972 (Air Force). See also Dep't of Defense, Pay and Allowance Entitlements Manual, para. 30233e for a discussion of the validity of foreign nation divorces.

## TYING THE KNOT AT SEA

by Lieutenant Colonel James B. Smith, USAR\*

If you ask anyone whether a ship's captain can perform a marriage ceremony, the chances are the response will be "of course." After all, who can forget the scene in the "African Queen" where Humphrey Bogart and Katherine Hepburn are married by the skipper of the German gunboat? Weddings by ships' captains are a movie cliché based upon one of those rules of law that we all just "know" is correct. But is it? Or is it just a bit of apochrypha that we all accept as gospel? Well, as with most "folk law," there is some truth in it.

There is some divergence of opinion in this area,<sup>1</sup> and there appears to be only a few cases on the subject. The better and generally more accepted view, however, is that a determination of the validity of a marriage performed upon the high seas can be made by applying "the doctrine of the flag."<sup>2</sup>

Under the "doctrine of the flag," the ships of a nation carry the nation's sovereignty onto the high seas and into the territorial waters of a foreign country.<sup>3</sup> The problem is that there is no federal statute which prescribes the formalities for marriage ceremonies in general, much less for those performed aboard ships of United States registry. Therefore, when an American ship is embarked, it must carry with it some law in addition to federal statutory law. According to the New York Court of Appeals in the leading American case on the subject, the municipal law of the state where the vessel's owner is domiciled is controlling.<sup>4</sup>

In *Fisher*, the parties were New York residents. They were not married when they embarked in New York for Southampton, England, aboard the *Leviathan*, a ship registered in New York. When forty miles out to sea, the ship's captain performed a marriage ceremony wherein the parties were the principals. Evidently the romance of the cruise wore off and Mrs. Fisher sued for a separation. Mr. Fisher responded by denying the

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<sup>1</sup>See Annot., 61 A.L.R. 1521 (1920).

<sup>2</sup>*Bolmer v. Edsall*, 90 N.J. Eq. 299, 310, 106 A. 646 (Ch. 1919); Annot., 61 A.L.R. 1528, 1531 (1929).

<sup>3</sup>*Bolmer*, 90 N.J. Eq. at 310.

<sup>4</sup>*Fisher v. Fisher*, 165 N.E. 460 (1929), reprinted in 61 A.L.R. 1523 (1929).

validity of the marriage. He asserted that he had been married and divorced before in New York. Under the terms of New York law at that time, Mr. Fisher was forbidden to remarry during the lifetime of the first Mrs. Fisher because she had divorced him for adultery. The case does not say whether the co-respondent had been the second Mrs. Fisher, but it does say the first Mrs. Fisher was still very much alive. Mr. Fisher argued that, because the *Leviathan* was of New York registry, New York law followed the vessel and made his second marriage invalid.

Not so said the New York Court of Appeals. The court held that, although Mr. Fisher was precluded from remarrying in New York, New York would recognize a remarriage performed in a sister state if the remarriage was valid in that state. The *Leviathan* was owned by the United States Shipping Board, an agency of the United States Government. Although the vessel was registered in New York, its owner was domiciled in the District of Columbia. Therefore, the validity of the marriage at sea would have to be determined under District of Columbia law.

The court assumed that the general common law rule regarding marriage prevailed in the District of Columbia. The common law rule is that marriage is a thing of right between competent parties and that all consensual marriages between such people are sanctioned by the law in the absence of a bar imposed by statute.<sup>5</sup>

The common law rule relies upon the status of the parties as consenting competent adults, not upon the status of the person officiating at the marriage ceremony. Thus, at common law, the captain of the vessel need not officiate. In New Jersey's only reported case regarding a shipboard marriage, the person who officiated was the ship's surgeon, who was alleged also to be a clergyman.<sup>6</sup>

If state legislatures had not tampered with the common law, it would seem that high seas marriages performed on American vessels generally would be valid. Since the days of *Fisher* and *Bolmer*, however, many states have abolished the common law rule of marriage. New Jersey, for instance, passed a statute in 1939<sup>7</sup> which states that for a marriage to be valid the ceremony must be performed before a person authorized under the statute. The list of authorized officials does not include ships' officers. In

<sup>5</sup> 1 W. Blackstone, Commentaries 427.

<sup>6</sup> *Bolmer v. Edsall*, 90 N.J. Eq. 299, 309 (Ch. 1919).

<sup>7</sup> N.J. Stat. Ann. § 37:1-10 (1939).

1860, England had a statute which required all marriages to be solemnized by an ordained clergyman of the Church of England. Therefore, in *DuMoulin v. Druitt*<sup>8</sup>, the court held invalid a marriage performed by the captain aboard an English ship bound from Cork to Sydney solely because the captain was not such an ordained clergyman.

Yet, in *Fisher v. Fisher* in 1929, the New York Court of Appeals indicated that, despite a lack of sanction in the municipal law following the vessel, a marriage can still be valid. The court based its reasoning upon a long-standing federal statute regulating ships' log books. The pertinent part of the statute states:

Every vessel making voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall have an official log-book; and every master of such vessel shall make, or cause to be made therein, entries of the following matters, that is to say:

....

Eighth. Every marriage taking place on board, with the names and ages of the parties.<sup>9</sup>

The New York court interpreted this as follows:

"Every marriage taking place on board" is *certainly inclusive of marriages other than those sanctioned by the municipal laws of the state of the ship's ownership*. We take it that Congress had thus recognized that on board a ship at sea, notwithstanding the absence of municipal laws so carried, there is nevertheless a law of marriage. That law can be none other than the law, common to all nations, which pronounces valid all consensual marriages between a man and woman who are, in the view of all civilized people, competent to marry. In this view, the marriage between the parties to this action, by force of a federal statute, which Congress was fully empowered to enact was a valid marriage.<sup>10</sup>

The California Supreme Court, on the other hand, reached exactly the opposite conclusion in *Norman v. Norman*.<sup>11</sup> In that

<sup>8</sup>13 Ir. R.-C.L. 212 (1860).

<sup>9</sup>46 U.S.C. § 201 (1928) (recodified at 46 U.S.C. § 11301 (1982)).

<sup>10</sup>*Fisher*, 61 A.L.R. at 1527-28 (reprint) (emphasis added).

<sup>11</sup>121 Cal. 620, 64 P. 143 (1898).

case the argument was made that the federal statute on log book entries amounted to a congressional declaration that the common law of marriage prevails upon American vessels embarked upon the high seas. The court rejected the argument, stating:

We can find no law of Congress . . . in which the [federal] government has undertaken or assumed to legislate generally upon the subject of marriage on the sea. Nor, indeed, can we find in the grant of powers to the [federal] government by the several states, as expressed in the national Constitution, any provision by which Congress is empowered to declare what shall constitute a valid marriage between citizens of the several states upon the sea, either within or without the conventional 3-mile limit of the shore of any state.<sup>12</sup>

In the author's opinion, the *Norman* case rather than the *Fisher* case is probably correct on this point. First, the *Fisher* decision depended primarily upon the application of the municipal common law followed in the District of Columbia. Second, if we accept the reasoning of the New York Court of Appeals that Congress had recognized a "law of marriage" in addition to state law, then we must accept the proposition that there is some general federal common law. In *Erie R. R. Co. v. Tompkins*,<sup>13</sup> the United States Supreme Court declared: "There is no federal general common law." And in *Ex parte Burrus*,<sup>14</sup> the Court stated: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."

It would seem then that under the "doctrine of the flag" the validity of a marriage performed at sea will be determined by the law of the domiciliary nation of the vessel's owner. If the marriage is valid in that nation, then it will be recognized. In nations such as the United States, however, where state law dictates the necessary formalities required for a valid marriage, a further inquiry must be made to determine the state of domicile of the ship's owner. That state law will determine whether a marriage performed at sea on that ship is valid.

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<sup>12</sup>*Id.* at 621, 54 P. at 144.

<sup>13</sup>304 U.S. 64 (1938).

<sup>14</sup>136 U.S. 586 (1890).

## PART IV: ESTATE LAW

### UNIFORM GIFTS TO MINORS ACT

by Major Dominick J. Delorio\*

#### I. INTRODUCTION

The Uniform Gifts to Minors Act (UGMA)<sup>1</sup> provides a simple and inexpensive procedure for transferring legal title of property to a minor while allowing a custodian to retain control of the property until the child reaches the age of majority. Today, every state and the District of Columbia has enacted a version of the UGMA or its successor, the Uniform Transfers to Minors Act (UTMA).<sup>2</sup> The legal assistance officer who intends to provide estate planning and tax advice must become familiar with the provisions of the UGMA and the tax consequences of UGMA gifts.

This article is intended to provide a basic overview of the UGMA. It must be remembered, however, that like all Uniform Acts, the UGMA began as a proposal to the states from the National Conference of Commissioners on Uniform State Laws.<sup>3</sup> In enacting their versions of the UGMA, most states modified various provisions. As a result, while the basic purpose and procedures of the UGMA are common among the states, there are

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<sup>1</sup>8A U.L.A. 405 (1956) (Revised as the Unif. Gifts to Minors Act, 1966 Revised Act, 8A U.L.A. 317 (1966) (Hereinafter cited as UGMA); Revised and Restated as the Uniform Transfers to Minors Act, 8A U.L.A. 104 (1985 Cumulative Annual Pocket Part).

<sup>2</sup>Seven states have enacted the 1956 Uniform Gifts to Minors Act: Fla., La., Mich., N.C., Ohio, R.I., and Utah.

Forty states and the District of Colum. have enacted the revised UGMA: Ala., Alaska, Ariz., Ark., Conn., Del., D.C., Ga., Hawaii, Ill., Ind., Iowa, Kan., Ky., Me., Md., Mass., Minn., Miss., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., N.D., Okla., Or., Pa., S.C., S.D., Tenn., Tex., Vt., Va., Wash., W. Va., Wis. and Wyo.

Three states have enacted the Uniform Transfers to Minors Act: Cal., Colo., and Idaho.

Citations to the current state statutes can be found in 8A U.L.A. 42, 54, and 104 (1985 Cumulative Annual Pocket Part).

<sup>3</sup>For a brief explanation of the procedures used by the Nat'l Conference of Comm'rs on Uniform State Laws in proposing uniform laws, see Explanation, 8A U.L.A. iii (1983).

some substantive differences. Although the general provisions of the UGMA will be addressed in this article, prudence dictates that the legal assistance attorney review the pertinent state statute prior to advising on a specific situation. This review will begin by looking at the development of the UGMA.

## II. WHY A UGMA?

The UGMA had its origin in the Act Concerning Gifts of Securities to Minors (Model Act) sponsored by the New York State Stock Exchange and the Association of Stock Exchange Firms in 1954.<sup>4</sup> The impetus behind the Model Act was the need to provide a simple, inexpensive method of making gifts of securities to minors.<sup>5</sup> Prior to the Model Act, there were three principal ways to give gifts of securities to minors: an outright gift; gifts through a legal guardian; or gifts in trust.<sup>6</sup> Each of these methods had serious practical or financial drawbacks.

An outright gift of securities to a minor was not desirable because it often resulted in the minor being unable to sell or reinvest the securities during his or her minority. Bankers, brokers, and transfer agents were reluctant to transact business with minors because they could disaffirm transactions made during their minority.<sup>7</sup> Additionally, outright gifts provided no protection from the spendthrift youth.

Gifts of securities to a minor through a legal guardian, or by means of trust, resolved the difficulties associated with the outright gift, but had their own disadvantages. At inception they incurred the added legal expense associated with the drafting of the arrangements. Additionally the legal guardian was often required to be bonded, was required to file periodic accountings with the court, and was restricted in investment and disbursement opportunities.<sup>8</sup> The trust arrangement, while more flexible,

<sup>4</sup>Comm'rs' Prefatory Note to the Unif. Gifts to Minors Act, 1966 Revised Act, 8A U.L.A. 317, 318 (1983); *Report on Uniform Gifts to Minors Act of a Subcomm. of the Comm. on Estate and Tax Planning of the ABA Section of Real Property, Probate, and Trust Law*, reprinted in *Trusts & Estates*, Oct. 1964, at 983 (hereinafter cited as Comm'rs' Prefatory Note).

<sup>5</sup>For a discussion of the development of the Model Act, see generally Newman, *The Uniform Gifts to Minors Act in New York and Other Jurisdictions—Tax Consequences, Possible Abuses, and Recommendations*, 49 Cornell L.Q. 12 (1963-64); Peirsol, *Gifts to Minors: How Effectively Has the Uniform Act Functioned?*, 25 Inst. on Fed. Tax'n 1099 (1967) (hereinafter cited as Peirsol).

<sup>6</sup>Peirsol, *supra* note 5, at 1100.

<sup>7</sup>*Id.* at 1100; Comm'rs' Prefatory Note, *supra* note 4, at 318; Mahoney, *The Uniform Gifts to Minors Act: A Patent Ambiguity*, 34 Vand. L. Rev. 495, 509 (1961) (hereinafter cited as Mahoney).

<sup>8</sup>Peirsol, *supra* note 5, at 1100; Mahoney, *supra* note 7, at 510.

was typically subject to management fees and financial reporting requirements.<sup>9</sup> The net result was to discourage, if not totally prevent, small gifts of securities to minors.<sup>10</sup>

The UGMA, as it developed from the Model Act, first with the 1956 Act,<sup>11</sup> and then with the Revised Act of 1966,<sup>12</sup> has been expanded far beyond its original intended scope.<sup>13</sup> The states in enacting their versions of the UGMA have further modified and expanded its provisions. However, it still serves the basic need that prompted its development—a simple and inexpensive tool for making a gift to a minor that allows for flexibility and yet protects the gift from the young spendthrift.

### III. THE BASIC PROVISIONS

The UGMA provides that "[a]n adult person may during his lifetime make a gift of a security, a life insurance policy or annuity contract or money."<sup>14</sup> Many states have modified this section to allow for testamentary gifts.<sup>15</sup> Several states have also expanded the nature of the property that may be given, including interests in real estate,<sup>16</sup> interests in partnerships,<sup>17</sup> and tangible personal property.<sup>18</sup> The gift must be given to a "minor."<sup>19</sup> The UGMA uses age twenty-one for the minor/adult dichotomy. The states in enacting this section have used ages from eighteen to twenty-one.<sup>20</sup>

<sup>9</sup>Peirsol, *supra* note 5, at 1100.

<sup>10</sup>Comm'r's Prefatory Note, *supra* note 4, at 318.

<sup>11</sup>Uniform Gifts to Minors Act, 8A U.L.A. 405 (1956).

<sup>12</sup>8 U.L.A. 317 (1983).

<sup>13</sup>Among other changes, many states have expanded the nature of the property that may be given and the manner in which it may be given. As this has resulted in much non-uniformity, the National Conference of Comm'r's on Uniform State Law proposed the Uniform Transfers to Minors Act (UTMA) in 1983. As of this writing only 3 states have enacted the UTMA, *see supra* note 2. This article will concentrate on the UGMA, as it is the current law in one version or another in 48 jurisdictions. Additionally, as the UTMA expands rather than restricts the provisions of the UGMA, the principles set forth in this article will generally continue to be applicable in those jurisdictions that have enacted the UTMA. It is anticipated that within a very few years the UTMA will be the standard rather than the exception. For a discussion of the development of the UTMA and its text, *see* 8A U.L.A. 104 (1985 Cumulative Annual Pocket Part).

<sup>14</sup>UGMA § 2(a).

<sup>15</sup>Ala., Cal., Colo., Del., Fla., Idaho, Ill., Ind., Iowa, Mass., Me., N.Y., N.C., Ohio, Okla., Or., Pa., S.C., S.D., Tenn., Tex., Utah, Va., and Wash.

<sup>16</sup>Cal., Colo., Conn., Del., Idaho, Ill., Md., Nev., N.Y., Ohio, Or., Pa., S.C., Tex., and Utah.

<sup>17</sup>Cal., Colo., Conn., Idaho, Ill., Md., N.J., N.Y., Ohio, Pa., and S.C.

<sup>18</sup>Cal., Colo., Conn., Del., Idaho, Ill., Md., Nev., N.J., N.Y., Ohio, Or., Pa., S.C., Tex., and Utah.

<sup>19</sup>UGMA § 2(a).

<sup>20</sup>Age 18: Alaska, Ariz., Cal., Del., D.C., Fla., Hawaii, Kan., Ky., La., Me., Md.,

The UGMA provides specific guidance on how to make a gift.<sup>21</sup> Failure to comply with those procedures may result in the gift not being afforded the protection of the UGMA.<sup>22</sup> Typically, the property is placed in the name of the custodian and explicitly reflects his or her interest "as custodian for [name of minor] under the [name of enacting state] Uniform Gifts to Minors Act."<sup>23</sup> In this area it is especially important to examine the relevant state statute for specific procedures to be followed.

A gift made under the UGMA is "irrevocable and conveys to the minor indefeasibly vested legal title."<sup>24</sup> The donor in making the gift under the UGMA incorporates all its provisions<sup>25</sup> and retains no rights, legal or equitable, to the conveyed property.<sup>26</sup> Although the minor has legal title to the property, control rests with the custodian.<sup>27</sup> A single gift can be made to only one minor and there can be only one custodian per gift.<sup>28</sup>

The custodian is selected by the donor and, except in the case of a gift of unregistered securities, the donor can select himself or herself as custodian.<sup>29</sup> The custodian has broad powers to collect, hold, manage, invest, and reinvest the custodial property<sup>30</sup> and is held to the standard of "a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital."<sup>31</sup> Records of all transactions with respect to the custodial property should be maintained and made reasonably available for inspection by the parent or legal representative of the minor or by the minor if he or she has attained the age of fourteen.<sup>32</sup>

Mass., Mich., Minn., Mont., N.M., Nev., N.C., N.D., N.Y., Ohio, Pa., R.I., S.C., S.D., Tenn., Tex., Vt., Va., Wash., W. Va., and Wis.

Age 19: Ala., Neb., and Wy.

Age 21: Colo., Conn., Ge., Idaho, Ill., Ind., Iowa, Miss., Mo., N.H., N.J., Okla., Or., and Utah.

Ark. uses age 18 for females and age 21 for males.

<sup>21</sup>UGMA § 2(a).

<sup>22</sup>Heintz v. Comm'r, 49 T.C.M. (P-H) para. 80,524 (1980); Application of Muller, 38 Misc. 2d 91, 235 N.Y.S.2d 125 (1962).

<sup>23</sup>UGMA § 2(a).

<sup>24</sup>*Id.* § 3(a).

<sup>25</sup>*Id.* § 3(b).

<sup>26</sup>Gordon v. Gordon, 70 A.D.2d 86, 419 N.Y.S.2d 684, *aff'd* 51 N.Y.2d 773, 436 N.Y.S.2d 621, 417 N.E.2d 1009 (1979).

<sup>27</sup>*In re Levy*, 97 Misc. 2d 582, 412 N.Y.S.2d 285 (1978).

<sup>28</sup>UGMA § 2(b).

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* § 4.

<sup>31</sup>*Id.* § 4(e).

<sup>32</sup>*Id.* § 4(h).

The custodial property is subject to being expended "for the support, maintenance, education and benefit of the minor, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper."<sup>33</sup> Additionally, a court upon petition of a parent or guardian of the minor, or upon petition of the minor if he or she has attained the age of fourteen, may order the custodian to expend custodial funds for the minor's support, maintenance, or education.<sup>34</sup> Note that, subject to a court order, the custodian has complete discretion in deciding whether to expend or accumulate the funds. Any property not expended must be delivered to the minor when he or she attains age twenty-one.<sup>35</sup> Once again, in enacting this provision many states have chosen to lower the age at which the custodial property must be delivered to the minor to either eighteen or nineteen.<sup>36</sup> Some states vary the age at which the gift must be distributed to the minor depending upon the nature of the gift, the means of the gift, and the wishes of the donor.<sup>37</sup>

The custodian is entitled to reasonable reimbursement for expenses and, unless he or she is also the donor, may receive reasonable compensation for services rendered.<sup>38</sup> A custodian is not required to give a bond for the performance of his or her duties.<sup>39</sup> A court, upon petition of a minor who has attained the age of fourteen, a donor, or an adult member of the minor's family, may require an accounting by the custodian.<sup>40</sup>

#### IV. TAX IMPLICATIONS

The proponents of the Model Act and the UGMA intended that the gifts would be complete when made for federal gift tax purposes and that the property would then be included in the donee's estate for federal estate tax purposes.<sup>41</sup> The income from the gifts was to be taxable to the minor. While the proponents were successful in attaining their goal of providing an easy and

<sup>33</sup>*Id.* § 4(b).

<sup>34</sup>*Id.* § 4(c).

<sup>35</sup>*Id.* § 4(d).

<sup>36</sup>18: Alaska, Ariz., D.C., Fla., Hawaii, Kan., Ky., La., Me., Mass., Mich., Minn., Mont., N.M., Nev., N.C., N.D., Ohio, R.I., S.C., S.D., Tex., Vt., Wash., W. Va., and Wisc.

19: Ala. and Wy.

<sup>37</sup>Age varies for type of property, manner of gift, or at option of donor in Cal., Colo., Del., Idaho, Md., N.J., N.Y., and Va.

<sup>38</sup>UGMA § 5.

<sup>39</sup>*Id.* § 5(d).

<sup>40</sup>*Id.* § 8(a).

<sup>41</sup>Mahoney, *supra* note 7, at 516.

inexpensive method for transferring property to a minor, they were much less successful in obtaining their tax goals.

This lack of success was due primarily to an inconsistency in the provisions of the UGMA.<sup>42</sup> Section 3(a) of the UGMA provides that the gift is "irrevocable and conveys to the minor indefeasibly vested legal title." Section 4(b) of the UGMA, however, allows the custodian to expend custodial funds for the "support, maintenance, education, and benefit of the minor with or without regard to the duty of himself or of any other person to support the minor." So, though the property belongs to the minor, the custodian is authorized to use it to pay for the minor's support. Therein lies the inconsistency. State law places upon the parent the obligation to support the minor. However, to the extent that the custodian expends custodial funds to support the child, the parental support obligation is reduced and the parent, not the minor, enjoys the benefit of the gift. Clearly it is not in the minor's interest to have custodial funds expended for his or her support when another already has the legal obligation to provide that support. Taken to the extreme, these provisions would enable a parent to make a UGMA gift of income-producing securities to his or her child and thereby shift the income to the child. The parent, as self-appointed custodian, could then, pursuant to Section 4(b) of the UGMA expend the income from those securities to support the child and thus reduce the parental support obligation. Unwilling to accept such a result, the Internal Revenue Service carefully scrutinizes UGMA gifts.

### ***A. GIFT AND ESTATE TAX IMPLICATION***

The IRS, relying on section 3(a) of the UGMA, has ruled that UGMA gifts are complete for federal gift tax purposes at the time the gift is made and that they therefore qualify for the annual federal gift tax exclusion authorized by section 2503(b) of the Internal Revenue Code.<sup>43</sup> This remains true even when the donor acts as the custodian.

In determining the estate tax consequences of UGMA gifts, the IRS has ignored section 3(a) of the UGMA's provision that the gifts are irrevocable and absolute, and has relied instead on section 4(b) of the UGMA's provision that allows the custodian to disburse funds for the minor's support, maintenance, and educa-

<sup>42</sup>For an excellent analysis of the inconsistency between section 3(a) and section 4(b) of the UGMA, see Mahoney, *supra* note 7.

<sup>43</sup>See, e.g., Rev. Rul. 86, 1956-1 C.B. 449; Rev. Rul. 357, 1959-2 C.B. 212.

tion.<sup>44</sup> Using a trust analogy, the IRS has viewed the custodian's authority as a power to amend, revoke, or terminate the custodial funds. Consequently, it has ruled that where the donor also acts as custodian of the UGMA gift, then pursuant to section 2038(a)(1) of the IRC, the custodial funds will be included in the donor's estate for federal estate tax purposes should he or she die before the minor and before the minor reaches the age of majority.<sup>45</sup> If the minor dies before reaching the age of majority or after the funds have been delivered, their value is included in the minor's gross estate. If the donor appoints someone else as a custodian, the custodial property will be included in the minor's estate in all cases.<sup>46</sup>

### B. INCOME TAX IMPLICATIONS

In determining the income tax liabilities for the income from UGMA gifts, the IRS has once again relied upon section 4(b) of the UGMA. Interpreting that section as allowing the custodian complete discretion in expending custodial funds to provide support of the minor, the IRS has ruled that to the extent income from custodial funds is used to satisfy the support obligations as determined by state law, that income is taxed to the person with that support obligation.<sup>47</sup> This would hold true regardless of the relationship of the donor or the custodian to the donee.<sup>48</sup> For example, if the custodian is the donee's grandfather and he expended income from the custodial funds to provide necessities for the donee, the income so expended would be taxable to the minor's parent (assuming the parent has the support obligation under state law).<sup>49</sup> To the extent that the income from the custodial property is not expended to relieve a support obligation, the income is taxable to the minor.

## V. PRACTICAL CONSIDERATIONS

The UGMA should play a significant role in the financial planning of many families. This section of the article will address

<sup>44</sup>Rev. Rul. 366, 1957-2 C.B. 618; Rev. Rul. 357, 1959-2 C.B. 212.

<sup>45</sup>Rev. Rul. 366, 1957-2 C.B. 618; Rev. Rul. 357, 1959-2 C.B. 212.

<sup>46</sup>That is unless each spouse appoints the other as guardian for gifts to their children. This arrangement leaves the donors in the same economic position as if they had appointed themselves as custodian and consequently the gifts are taxed to the decedent parent's estate. See *Exchange Bank & Trust Co. of Florida v. United States*, 694 F.2d 1261 (Fed. Cir. 1982).

<sup>47</sup>Rev. Rul. 484, 1956-2 C.B. 23; Rev. Rul. 357, 1959-2 C.B. 212 (examples of how carefully the IRS scrutinizes these gifts).

<sup>48</sup>Rev. Rul. 484, 1956-2 C.B. 23.

<sup>49</sup>Peirson, *supra* note 5, at 1111.

the most important advantage and the most serious disadvantage of using the UGMA.

In addressing these considerations, the discussion will deal with what may be considered a typical situation that might confront the military legal assistance officer. For purposes of our discussion it will be necessary to create an "average" military family. This family consists of Staff Sergeant Smith, his wife, and two minor children: a daughter and a son. As a result of gifts from grandparents and frugal planning, the Smiths have managed to accumulate \$2,000 in savings for each of their children. The Smiths have earmarked this money for the children's education and intend to deposit the money into a financial institution or to invest it in some type of investment plan. They come to the legal assistance office to seek advice on how to proceed.

### A. TAX ADVANTAGE

The sole advantage of using the UGMA to make a gift to a minor is the tax benefit. If taxes were of no consequence, a potential donor could simply maintain control of the property and dole out funds to benefit the minor as the need or inclination arose. Upon the donor's death, the property could be left to the child by will. This would result in ultimate flexibility and control for the donor. Tax considerations are important, however, and use of the UGMA can result in significant tax savings.

As noted earlier a UGMA gift qualifies for the annual federal gift tax exclusion.<sup>50</sup> Additionally, if the donor does not appoint himself or herself as the custodian, the custodial property is not included in the donor's estate for federal estate tax purposes.<sup>51</sup> Neither of these considerations will be of major significance for the typical client seen at a military legal assistance office. The annual gift tax exclusion of \$10,000.00 per year per donee (\$20,000.00 if a married couple is giving a joint gift)<sup>52</sup> will more than cover any gift that is likely to be seen in the legal assistance context. The unified credit,<sup>53</sup> which by 1987 will allow for an individual to pass a total of \$600,000.00 in assets free of federal gift or estate tax, will take care of those situations where the annual gift tax exclusion is exceeded and, in conjunction with the marital deduction,<sup>54</sup> should ensure that estates are passed free of

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<sup>50</sup>See *supra* note 43.

<sup>51</sup>See *supra* note 45.

<sup>52</sup>I.R.C. § 2503(b) (1982).

<sup>53</sup>I.R.C. § 2010 (1982).

<sup>54</sup>I.R.C. § 2056(a) (1982).

federal estate tax. The major tax consideration and the greatest benefit occurs with income taxes.

A UGMA gift allows a family to split the total family income among its members and thus take full advantage of lower income tax rates and additional personal exemptions, while allowing the custodian to maintain control of the property. The Smiths in this scenario have \$2,000.00 set aside for each of their children and they now want to "do something" with the money. An outright gift of the money to the children creates a problem because as minors they may be too young to open bank accounts in their own names and the parents lose control of the money. A second option that the Smiths have, and the one most frequently used by those unaware of the UGMA, is to open a bank account or investment plan in the parents' names in trust for the children.<sup>56</sup> This enables the parents to keep control of the assets, but has the major disadvantage that the interest from those accounts is taxable to the parents. Assuming these two accounts for the children each earned \$160.00 interest,<sup>57</sup> the inclusion of that interest in the parents' income results in an increased tax liability of \$57.60.<sup>57</sup> This is true despite that fact that the money is the "childrens'" and is to be used only for their college education. This tax liability will be repeated and increased each and every year until the funds are either given outright to the children or expended.

The Smiths can accomplish the same savings goal and avoid any tax liability by using the UGMA to split the total family income among the children. All that needs to be done differently is to open the accounts in one of the parent's name as custodian for the children under the applicable state's UGMA.<sup>58</sup> No expense is involved and the simple procedures are taken care of by the financial institution. The income for the accounts would then be taxable to each child.<sup>59</sup> Moreover, so long as the child's unearned income did not exceed the \$1,060.00 personal exemption,<sup>60</sup> or the gross income did not exceed the total of the personal exemption and the zero income tax bracket,<sup>61</sup> a federal income tax return for

<sup>56</sup>This has been widely referred to as a "Totten Trust." See *In re Totten*, 179 N.Y. 112 (1904).

<sup>57</sup>Assuming an 8% annual interest rate.

<sup>58</sup>Assuming the Smiths are in an 18% income tax bracket.

<sup>59</sup>Remember that there can be only one custodian and one donee for each UGMA account. See *supra* note 28.

<sup>60</sup>Rev. Rul. 484, 1956-2 C.B. 23.

<sup>61</sup>I.R.C. § 151 (1982).

<sup>62</sup>I.R.C. § 63(d)(2) (1982).

the child need not be filed. Even if a child's income exceeds these limits, the tax liability would be lower than the parents.' As mentioned earlier, any income from these accounts that is used to satisfy the parental support obligation will be taxable to the parents.

### ***B. FINALITY DISADVANTAGE***

Despite the favorable income tax treatment, there is one significant disadvantage to UGMA gifts. The disadvantage stems from the provision in section 3(a) of the UGMA that the gifts are irrevocable. It is important that the potential donor come to grips with this finality issue before making a gift, because once given it cannot be taken back.<sup>62</sup> This is sometimes difficult for the parent to understand and accept, particularly when the funds are in the local bank in a UGMA account in their name. The natural feeling is that because they gave the money to the child in the first place, they should be able to withdraw the money to benefit the family should the situation change. The potential donor must realize that once the money or property is given, it no longer belongs to them in any way.

This finality aspect of the gift has short and long term ramifications. On the short term, assume that the Smiths have changed duty stations and now want to purchase a home. The only way they can raise the money necessary for the downpayment for the house is to use the money from the children's accounts. They cannot do it. That money is no longer part of the Smith's family pool of money; it now belongs indefeasibly to the children.

Assume that instead of buying a house, the Smiths discover that their daughter needs \$4,000.00 worth of braces for her teeth. Can Staff Sergeant Smith withdraw the money from the two accounts to brighten up his daughter's smile? Clearly he cannot withdraw funds from his son's account to pay for his daughter's medical expenses as such would violate section 4(b) of the UGMA. As for withdrawing money from the daughter's account to pay her medical expenses, the answer, while not as clear, is still no. Section 4(b) of the UGMA allows the custodian to expend for the minor's benefit so much of the custodial funds as deemed advisable for the support, maintenance, education, and benefit of the minor "with or without regard to the duty of himself or of

<sup>62</sup>*Gordon v. Gordon*, 70 A.D.2d 86, 419 N.Y.S.2d 684, *aff'd*, 51 N.Y.2d 773, 436 N.Y.S.2d 621, 417 N.E.2d. 1009 (1979).

any other person to support the minor or his ability to do so." The plain language of the statute seems to give the custodian the authority to use the money in the account. That language conflicts, however, with section 3(a) which provides that the minor has indefeasible title to the custodial property. To the extent state law requires the Smiths to provide the medical care for their daughter, it is not in the daughter's interest to use her own money to pay the expenses. Therein lies the conflict: Staff Sergeant Smith, as the parent, has a legal obligation to provide the medical care; Staff Sergeant Smith, as custodian, appears to have the right to use *his daughter's money* to relieve himself of that legal obligation of support.

Courts have looked at the issue of whether a parent-custodian could use custodial funds to relieve his or her parental support obligation.<sup>63</sup> In *Erdmann v. Erdmann*,<sup>64</sup> the father was ordered, pursuant to a divorce decree, to pay child support and provide medical care and educational expenses for his children. The father was further ordered to initiate a UGMA account with himself as custodian to hold certain stocks for each of his children. Subsequently the father withdrew money from each of the custodial accounts to pay for medical care and college tuition. In a suit for the return of the custodial funds the Supreme Court of Wisconsin wrote:

[W]e see an obvious benefit to the appellant, as custodian, using the funds to make support payments that he would otherwise have had to make as parent out of his own funds. We do not see the benefit to the children deriving from the use of their property to make the payments that, if their fund was not used, their father would be required to make out of his income or assets.<sup>65</sup>

The court held that a father of sufficient means must support his child without regard to whether the child has independent means and required the father to return the custodial funds. It should be noted in analyzing the facts that the court treated this as more than just a UGMA problem. Because the lower court had ordered the UGMA accounts established, the appellate court viewed this as analogous to a guardianship. Whether the court

<sup>63</sup>*Newmann v. Newmann* 123 Cal. App. 3d 618, 176 Cal. Rptr. 723 (1981); *In re Marriage of Wolfert*, 42 Colo. App. 433, 598 P.2d 524 (1979); *Hoak v. Hoak*, 364 N.W.2d 185 (Iowa 1985); *Erdmann v. Erdmann*, 67 Wis. 2d 116, 226 N.W.2d 439 (1975).

<sup>64</sup>67 Wis. 2d 116, 226 N.W.2d 439 (1975).

<sup>65</sup>*Id.* at 124, 226 N.W.2d at 443.

would apply the same standards to a pure UGMA issue is an open question.

The next court to look at this issue was the Colorado Court of Appeals in *In Re Marriage of Wolfert*.<sup>66</sup> Once again this was a divorce case in which the father was ordered to pay support payments. But, unlike *Erdmann*, in this case the father had already established UGMA accounts for his children with himself as custodian. The divorce court ordered that the children's funds were not to be used by either party for any purpose "until there is a showing that such utilization would be beyond normal requirements of what a parent must do to support his or her children."<sup>67</sup> The father unsuccessfully appealed the court order arguing that section 4(b) of the UGMA allowed him, as custodian, to use the custodial funds to support the minors. In ruling against the father, the Colorado Court of Appeals stressed the parent's duty to support his minor children and concluded that section 4(b) "does nothing to relieve a parent of the separate duty to support the children, nor does it authorize the custodian to disburse the funds as a means of fulfilling the parent's obligation of support."<sup>68</sup> Note that while the court used broad language, once again there was a court order protecting the custodial funds.

The next case on this issue came from California and once again involved a divorce situation. In *Newman v. Newman*,<sup>69</sup> the California Court of Appeals held that a father could not use income from his children's UGMA accounts, of which he was the custodian, to satisfy his personal obligation to provide court-ordered child support because such property must be held for the benefit of the children.

A more recent case addressing the use of custodial funds to relieve parental support obligations, *Hoak v. Hoak*,<sup>70</sup> while also arising during a divorce dispute, differed from the prior cases in that the father, who wanted the funds used to support the children, was not the custodian of the UGMA account. The parents, while married, had given \$363,000 worth of stock to their children under the UGMA. The mother was named custodian. In a subsequent divorce action, the father requested, over the mother's objection, that the court order that the estimated \$36,000 a year income from the custodial funds be used for the

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<sup>66</sup>42 Colo. App. 433, 598 P.2d 524 (1979).

<sup>67</sup>*Id.* at 435, 598 P.2d at 525.

<sup>68</sup>*Id.* at 435, 436, 598 P.2d at 526.

<sup>69</sup>123 Cal. App. 3d 618, 176 Cal. Rptr. 723 (1981).

<sup>70</sup>364 N.W.2d (Iowa 1985).

day-to-day support of the children. The trial court agreed and ordered the custodial funds to be placed in trust for the support and maintenance of the minor children.

On appeal the Iowa Supreme Court reversed, ruling that the trial court exceeded its authority in ordering the custodial funds placed in trust. The court then reviewed the father's request as if it had been made pursuant to section 4(c) of the UGMA, which allows a parent or guardian to petition the court to order the custodian to expend custodial property as necessary for the minor's support. Finding that parents have a common law duty to contribute to the support of their children and that "[o]rordinarily, a parent who has sufficient means will not be entitled to compensation for the child's support from the child's estate,"<sup>71</sup> the court refused to order the mother-custodian to expend the custodial funds for the children's support. The court recognized that the children's resources should be considered under Iowa support law, but that "when parents have significant assets and income to support their children, gifts to minors should not be used to provide day-to-day support in the absence of contrary intent by the donor or other factors indicating that use for support is proper."<sup>72</sup> The parent's obligation to support their children is "not mitigated by gifts to the children prior to the divorce."<sup>73</sup> The court, ruling in favor of the children, noted, but did not address, the question of whether due process required that the children receive notice and legal representation prior to court-ordered expenditure of custodial funds.

These courts addressed the conflict between section 3(a) and section 4(b) of the UGMA and in each case came down in favor of the minor. In a situation where the marriage has been or is in the process of being dissolved, the courts do not hesitate to step in and protect the minor's interests. Also, there is nothing to suggest that should the issue of a parent-custodian using custodial funds to meet his or her support obligation arise in the context of an ongoing marriage, when he or she has the means to meet the obligations without use of those funds, that the courts would not rule on behalf of the child's interest.

In our case, assuming that he has other assets available, Staff Sergeant Smith could not use his daughter's custodial funds for her braces. Should he not have the means to otherwise meet this

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<sup>71</sup>*Id.* at 188.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

expense, use of the custodial funds would presumably be permissible.

The long term ramifications of the finality of a UGMA gift arise as the child nears the age at which any remaining funds must be delivered to him or her.<sup>74</sup> As discussed earlier, this age varies among the states. Assume that Staff Sergeant Smith's son is now seventeen-years-old and that his UGMA account has grown to \$6,000.00. The boy calmly tells his father that he does not want to go to college and that when he turns eighteen he is going to take the college money (the custodial funds), buy a van, and travel across the country. Understandably, Staff Sergeant Smith is not happy and seeks guidance from the legal assistance office.

Section 4(d) of the UGMA clearly states that when the child reaches the statutory age, the unexpended funds must be given to him or her. Staff Sergeant Smith cannot refuse his son the funds, cannot transfer the funds to his daughter's account because she wants to go to college, and, for the reasons discussed above, cannot try to expend the funds for his son's support prior to him reaching the age when the funds must be delivered to him. The funds will be accessible to the boy to spend as he wishes when he reaches the statutory age at which the funds must be delivered to him.

Suppose Staff Sergeant Smith foresees this problem when he opens the UGMA account and selects a state that does not require that the funds be delivered until the child attains age twenty-one.<sup>75</sup> This time, when his son reaches age eighteen he decides he wants to go to college. Now Staff Sergeant Smith has another problem. Arguably, to the extent that the state law requires the parent to pay for his child's college education,<sup>76</sup> the custodial funds cannot be used for the college expenses for the reasons discussed earlier. The boy may now receive a college education and, when he turns twenty-one also receives the \$6,000.00 in custodial funds which have not been expended.

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<sup>74</sup>See *supra* notes 36, 37.

<sup>75</sup>To present a UGMA gift under a particular state statute there must be some connection with the state. Either the donor, the donee, or the custodian must be a domiciliary of the state or the custodial property must be located in the state.

<sup>76</sup>The extent to which states consider a college education a necessity is an open question. Clearly, in the case of a dissolution of the marriage, a court could compel one parent to pay college costs. See, e.g., *Erdmann v. Erdmann*, 67 Wis. 2d 116, 226 N.W.2d 439 (1975). At least one court has said that in special or unusual circumstances a college education could be within the purview of necessities. See *Dicker v. Dicker*, 54 Misc. 2d 1089, 283 N.Y.S.2d 941 (1967).

The parent, in selecting the state in which to open the UGMA account, must take into consideration the age at which he or she wants the funds to go to the child. In doing so, the parent must realize that if he or she chooses a state that withholds delivery of the custodial property until the child is twenty-one, there may be some restrictions on the use of those funds for a college education. On the other hand, if the state statute provides for delivery of the custodial funds when the child is eighteen, the parent must be prepared to accept the child's decision on how to expend those funds.

## VI. CONCLUSION

The UGMA is a very important financial planning tool which, when used properly, can result in significant income tax savings. The legal assistance officer must remember two things when advising clients. First, the UGMA is anything but "uniform" among the states and that prior to giving specific legal advice a review of the state statute is essential. Second, the potential donor-custodian must be made aware of the finality of UGMA gifts so that they will only be made when the family's financial situation is such that the funds will not be needed later for normal support requirements.



# NON-PROBATE AND PROBATE ADMINISTRATION OF SMALL ESTATES INVOLVING DEATHS OF MILITARY PERSONNEL: THOUGHTS OF A PROBATE JUDGE

by Captain Richard M. Morton\*

## I. INTRODUCTION

The just and orderly transfer of title to property owned by a decedent at the time of his or her death need not always involve complex and expensive probate proceedings. In many cases, the combined impact of joint tenancy and community property principles leaves only a modest amount of property in the decedent's probate estate. The surviving spouse, the children, or the decedent's parents are usually in immediate need of these remaining probate estate assets and, in most cases, their respective entitlements under the applicable laws of intestacy or by the terms of an existing will will be clearly defined and uncontroverted.

Most state legislatures recognize that these small estates need not be administered under the cumbersome and often lengthy probate procedures necessary to properly regulate large complex estates. The likelihood of fraud or impropriety is remote in small estates and misconduct can be corrected when discovered. The need to settle small estates quickly and inexpensively by transferring title to the person or persons most financially disadvantaged by the death, greatly outweighs any need to protect heirs and devisees from such minimal risks of impropriety.

The December 12, 1985 tragedy in Gander, Newfoundland, created a pressing need for the delivery of legal assistance services to the families of the 248 soldiers who died in the air crash. But it also highlighted the need of any family affected by the sudden death of a soldier to have available, as needed, the advice and services of an experienced and understanding probate attorney. In a small estate, this assistance can be accomplished often without an appearance in court and without, at least

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initially, having to commence a probate proceeding. That experienced and understanding probate attorney may very well be an active duty or Reserve Component judge advocate.

Attorneys with little or no probate experience can assist with small estates because most small estate statutes are written for the layperson. After completing an initial legal analysis of the estate, the legal assistance officer will be accomplishing the same tasks which statutory drafters envisioned for lay heirs or devisees.

The following discussion will explain the various statutory formulas which have been developed to permit either the non-probate or the probate administration of small estates. Where community property concepts appear to impact on the estates of deceased soldiers, those effects will be highlighted. Finally, the probate issues presented by potential wrongful death or personal injury actions will be identified.

It would be unwise and probably improper for an article of this sort to attempt to comment definitively on the probate laws of any particular state. The purpose of this analysis is to familiarize active duty and Reserve Component attorneys with the varied approaches to small estates practice. Each attorney using this article must research the applicable statutes in his or her jurisdiction very carefully. If the attorney is not regularly involved with probate matters, he or she should contact the probate court having jurisdiction over the subject estate to become familiar with current forms and practice. Additionally, at least one active probate attorney should be identified in each state who can be used as a resource for guidance and general practice information. For the sake of brevity, this article reviews the probate statutes of eleven states (Maine, Massachusetts, New York, South Carolina, Kentucky, Indiana, Michigan, Texas, Arizona, California, and Washington) to illustrate the different small estate procedures. These eleven states represent a regional cross-section of this subject area, as well as a good mix of common law, model probate law, and community property law jurisdictions. Actual practice will vary in every state and even states using the same general small estates formula will have specific statutory conditions unique to that jurisdiction.

## II. EMPTY OUT THE PROBATE ESTATE— IDENTIFY AND ORGANIZE ASSETS

Even before the savings account passbooks, deeds, and stock certificates are available, the probate attorney should attempt to list all the decedent's assets, including the estimated value of each item or group of items and the title category that a particular asset falls into (*i.e.*, sole ownership, joint tenancy, payable on death, community property, *etc.*). This initial inventory will usually reveal immediately whether or not probate is required.

As will be discussed in detail below, each state places a maximum limit on the value of probate assets that can be collected and distributed under small estate procedures. Additionally, in some jurisdictions, title to all solely-owned real estate, stock certificates, automobiles, and bank accounts can be transferred only by a duly appointed executor or personal representative. Of the eleven jurisdictions reviewed, only Arizona permits the use of small estate procedures to establish a successor's title to a decedent's solely-owned real estate.<sup>1</sup>

Small estate procedures will be available only when statutory conditions are met and when more formal probate procedures are not otherwise necessary to deal with a particular asset. In many cases, however, the probate attorney will find that the initial inventory reveals an estate qualifying for small estate procedures. Married couples, in particular, who own their real estate and bank accounts jointly or under community property laws likely will qualify for small estate procedures when the first of them dies.

If the asset list reveals that real estate, stock certificates and/or bank accounts are owned jointly, sole title will remain in the surviving joint tenant and no portion of the jointly-owned asset will pass through the probate estate.<sup>2</sup> Additionally, jointly-held assets usually will not be subject to liability for the debts of the decedent or the expenses of estate administration.<sup>3</sup> Accordingly, in many instances the probate attorney will discover that once the jointly-held assets of a decedent are removed from the inventory, the remaining probate estate is quite small. The same result may

<sup>1</sup>Ariz. Rev. Stat. Ann. § 14-3971 (E) (West 1985 Supp.). Six months after death, a successor entitled to distribution of real estate of a value equal to or less than \$15,000 may establish title by filing affidavit with the Probate Court.

<sup>2</sup>Cal. (Prob.) Code § 632 (West 1986 Supp.).

<sup>3</sup>Washington Community Property Deskbook 39-35 (The Washington State Bar Association 1977).

occur in jurisdictions which have adopted some form of community property law.

In community property jurisdictions, even when joint tenancy is not used, one-half of the married couple's community property is owned outright by each spouse. Although the one-half owned outright by a surviving spouse may be subject to the community property debts of the decedent, it remains the property of the surviving spouse and is not part of the probate estate. In California, the remaining one-half of the community which is the decedent's estate goes directly to the surviving spouse, without any probate administration.<sup>4</sup> In Washington, however, even though the surviving spouse is entitled to receive title to the decedent's remaining one-half of the community property, it appears that probate proceedings may be required to complete the transfer of that one-half interest to the surviving spouse.<sup>5</sup> Recall, also, that in Arizona summary proceedings by affidavit are authorized for real estate transactions if no administration has been commenced within six months from the date of death.<sup>6</sup>

The practice of probate law has become the practice of code law in many states due to the adoption of all or parts of the Uniform Probate Code. Consequently, all code sections must be carefully reviewed to both characterize a particular asset and to determine the most effective way of distributing it to its proper recipient. Once the code is mastered, it actually becomes an easier and more reliable tool in probate matters than was the common law.

In addition to the above described treatment of jointly-held real estate, many jurisdictions have special statutes dealing with multiple-party bank accounts and automobiles. A survey of each state's law concerning these two categories is beyond the scope of this article. In Maine, to give one example, the motor vehicle statute authorizes the transfer of title to an automobile to a surviving spouse without probate, and multiple party bank accounts become the absolute property of the surviving account holder without probate procedures and without regard to the percentage of contribution by the deceased account holder.<sup>7</sup>

Particularly in jurisdictions where joint tenancy is used often, the initial asset list may reveal that there will be no probate estate at all, even if a valid will exists. In such cases it may be

<sup>4</sup>Cal. [Prob.] Code § 649.1 (West 1986 Supp.).

<sup>5</sup>Wash. Rev. Code Ann. § 11.04.015 (West 1986 Supp.).

<sup>6</sup>Ariz. Rev. Stat. Ann. § 14-3971 (West 1986 Supp.).

<sup>7</sup>Me. Rev. Stat. Ann. tit. 29, § 2372 (5) and tit. 18-A, § 6-104.

advisable to file or register any existing will to eliminate any suggestions of impropriety. This will also publically confirm the status of the successor spouse, child, or parent who would be the sole devisee under the will and who wants to use the small estate procedures rather than the will to obtain distribution of that entitlement. A "successor" is a person "entitled to property of a decedent under" the applicable state code or under the decedent's will.<sup>8</sup> Accordingly, some evidence of a successor's status may be all that is necessary to obtain distribution by affidavit and without probate; the filed will can provide that evidence.

In summary, joint ownership and, to some extent, community property concepts have substantially increased the likelihood that even small estate procedures will be unnecessary for some estates, even when the decedent had substantial real and personal property interests. Even if the probate attorney concludes that the small estate procedure is unnecessary, the issue of inheritance or estate taxes must still be resolved.

Many state taxing authorities have not allowed joint tenancy title law to prevent them from using death as a basis for raising state revenues. Any jurisdiction which has enacted some type of death, inheritance, or estate tax *will* almost certainly tax some portion of the value of the assets held jointly at death, and upon death, held solely by the survivor. Once the asset list has been compiled, it is a relatively simple task for the probate attorney to review the applicable tax provisions and to confirm his or her impressions with the appropriate taxing authorities. Often the clear title to real estate, owned jointly or otherwise, will depend upon the probate attorney's having satisfied the tax reporting requirements and having obtained the appropriate receipt of tax lien discharge.

### III. SMALL ESTATE PRACTICE

After setting aside all assets which are already in the hands of survivors by operation of joint tenancy or community property laws, the probate attorney is left with the actual probate estate. This estate consists of property which cannot pass to legitimate successors in interest except by authority of applicable probate statutes and procedures. By now, however, the probate estate may be relative small and may include only tangible personal property, cash, and a solely-owned bank account.

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<sup>8</sup>Me. Rev. Stat. Ann. tit. 18-A, § 1-201(42) (West 1985 Supp.) (this is the Uniform Probate Code definition).

The words "relatively small" should not mislead those dealing with the estate, however. "Small" does not necessarily mean \$5,000 or \$10,000. In New York, it is possible to administer a personal property estate of up to \$36,150, including special family allowances and exemptions, under small estate procedures.<sup>9</sup> In Texas, that figure is \$50,000, not including the homestead exemption and family allowances,<sup>10</sup> and in California that figure is \$60,000.<sup>11</sup> These maximum small estate limits also do not include the value of any jointly-held property or community property owned outright by the surviving spouse. Not all states have adopted uniformly high limits, however. Some have enacted modest limits, such as Maine's limit of \$10,000, which will be referred to in the next section. Others have limited small estates practice just to the aggregate of the exemptions and allowances provided the immediate family, as is apparently the case in Indiana.<sup>12</sup>

Because the family members who should benefit from these remaining assets usually can be easily identified, most states have adopted summary procedures for the administration and processing of the assets in these small estates. The jurisdictions use varied levels of supervision, ranging from unsupervised collection by affidavit to collection and distribution personally by the probate judge.

#### IV. ADMINISTERING AND CLOSING ESTATES BY AFFIDAVIT

Of the states reviewed, Maine, New York, Indiana, Texas, Arizona, Washington, and California allow for the collection and distribution of estate assets by affidavit. A typical statute is Maine's which provides:

**18-A M.R.S.A. § 3-1201—Collection of personal property of affidavit**

(a) Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument

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<sup>9</sup>N.Y. [Surr. Ct. Proc. Act] § 1301 (McKinney 1986 Supp.).

<sup>10</sup>Tex. [Prob.] Code Ann. § 137 (Vernon 1986 Supp.).

<sup>11</sup>Cal. Pro. Code § 630 (West 1986 Supp.).

<sup>12</sup>Ind. Code Ann. § 29-1-8-1 (Burns 1985 Supp.).

evidencing a debt, obligation, stock or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(1) The value of the entire estate, wherever located, less liens and encumbrances, does not exceed \$10,000;

(2) Thirty days have elapsed since the death of the decedent;

(3) No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(4) The claiming successor is entitled to payment or delivery of the property.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (a).

#### 18-A M.R.S.A. § 3-1202. Effect of affidavit

The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

The common requirements in the different state statutes are that no petition for probate has been filed, that a certain number of days have elapsed since death, that the total value of probate assets does not exceed a specified amount, and, finally, that the party claiming the right to collect the property would be entitled

to receive it under applicable intestacy laws or by the terms of an existing, but unprobated, will. Waiting periods vary from state to state and different states include different types of property which can be administered by affidavit and without court involvement.<sup>13</sup>

In the small estates affidavit procedure, any third party who delivers property to the affiant is protected from claims of misdirecting the property. Any potential heir, devisee, or creditor who is aggrieved by the actions of the affiant is free, within applicable time periods set out in the statute, to initiate regular estate probate proceedings, to inquire into and control the actions of the affiant, and to gain control of all estate assets.

## V. ADMINISTERING AND CLOSING ESTATES WITH MINIMAL COURT SUPERVISION

A second, slightly more restrictive small estates procedure can be found in Massachusetts, Kentucky, and Michigan. In these states, the probate court becomes involved in the process of estate administration either as a place where a record of collection and distribution of assets is kept or, more directly, as the approval authority for distribution. In Massachusetts, a probate form is obtained at the court which permits distribution of personal property of a value of \$5,000 or less (including the family car) to the surviving spouse, children, or parents. The form, apparently, is filed eventually with the court and serves as a first and final accounting.<sup>14</sup> Kentucky and Michigan limit small estate administration to amounts not exceeding the total amount of family allowances and exemptions (\$7,500 plus a \$1,000 bank account in Kentucky,<sup>15</sup> and \$5,000 in Michigan),<sup>16</sup> and the court must approve the distribution to the spouse, child, or parent.

Although these states do not permit administration by affidavit, they do allow collection and distribution without the formalities of publication, lengthy periods for notice to creditors, and appointment of administrators or personal representatives. Limiting qualifying distributions to those amounts identified as family allowances and exemptions preserves the usual protections for

<sup>13</sup>E.g., N.Y. [Surr. Ct. Proc. Act] § 1301 et. seq. (McKinney 1986 Supp.) (bank accounts); Ind. Code Ann. § 29-1-8-1 (Burns 1985 Supp.) (motor vehicles and stock); Ariz. Rev. Stat. Ann. § 14-3971 (stock, motor vehicles, real estate).

<sup>14</sup>Mass. Gen. Laws Ann. ch. 190, § 16 (West 1985).

<sup>15</sup>Ky. Rev. Stat. § 391.030 (1985).

<sup>16</sup>Mich. Comp. Laws Ann. § 700.101.102 (1985 Supp.).

claimants having an interest in estate assets which exceed these amounts. Accordingly, these states have not really adopted the belief that summary administration of small estates provides a benefit to families which outweighs the minimal risk of misconduct toward creditors or other claimants.

## VI. ADMINISTRATION OF SMALL ESTATES WITH SUBSTANTIAL COURT SUPERVISION

South Carolina is an example of a state in which all small estate procedures still involve the court. Up to \$7,500 of personal property in estates where there is no will can be distributed to statutorily identified family members (spouse, children, parents) without probate administration. The probate judge, however, apparently has sole distribution authority and accepts a fiduciary responsibility for the assets.<sup>17</sup>

## VII. WRONGFUL DEATH OR PERSONAL INJURY ACTIONS—EFFECT ON SMALL ESTATES

Legal assistance attorneys are confronted with thorny issues in this area when a soldier dies as a result of the tortious conduct of a non-military third party. This is best exemplified by the Gander air crash. Are the families of the young, single soldiers killed in the Gander crash precluded from using small estate procedures to expeditiously settle the estates of their loved ones? Or, must probate wait until the amount of any monetary judgment be determined? General practice among the states surveyed and reliance on the underlying purposes of small estate proceedings appears to dictate that these families need not wait to settle these estates: tort recoveries on behalf of the deceased soldier appear not to pass through the estate. However, each state law must be examined separately as to the issues presented by possible wrongful death or personal injury claims. Each state will specify the proper plaintiff and the individuals entitled to the proceeds realized in any suit. In California, the heirs or the personal representative may bring an action in the name of the decedent for damages suffered prior to death. Any damages recovered by the personal representative for the decedent's pain, suffering, or disfigurement will not, however, become assets of the decedent's

<sup>17</sup>S.C. Code Ann. § 21-15-1650 (Law. Co-op. 1985 Cum. Supp.).

estate, but, will be paid instead directly to the statutorily designated recipients outside of the probate process.<sup>18</sup>

The general rule appears to be that whenever the personal representative acts as plaintiff in a wrongful death action, the estate will recover only its costs of administration and attorney's fees and the balance of the proceeds will pass through to the immediate family members specified by statute; the award will not be subject to decedent's debts or obligations.<sup>19</sup>

The probate attorney, when presented with a possible wrongful death action, may still elect to use small estate procedures. Even if a personal representative may be necessary to commence the action, the claim may not represent a potential estate asset. Summary proceedings can be used, therefore, to distribute the available assets and the appointment proceedings can be initiated when that step is appropriate in the wrongful death action.

## VIII. CONCLUSION

Legal assistance attorneys should not hesitate to provide appropriate assistance to eligible families in settling small estates of deceased soldiers. The Gander air crash was a tragedy. Its impact on the lives of the families left behind will be long-lasting. It is and will be up to the military legal community to assist in minimizing or ameliorating this impact. The response to date has been laudatory. But the mission continues. Our prompt and competent assistance in alleviating the potentially traumatic and time-consuming effects of extended probate administration will be the real assistance we render to our clients in this time of need.

<sup>18</sup>Cal. [Civ. Proc.] Code §§ 377,573 (West 1986 Supp.).

<sup>19</sup>See Me. Rev. Stat. Ann. tit. 18-A, § 2-804; Ky. Rev. Stat. tit. XXXVI, § 411.130; 1985 Tex. Sess. Law Serv. §§ 71.000-71.021 (Vernon).

# SUMMARY COURTS AND THE DISPOSITION OF DECEASED SOLDIERS' EFFECTS

by Captain L. D. Jentzer\*

## I. INTRODUCTION

On December 12, 1985, an Arrow Air charter flight carrying 248 soldiers crashed near Gander, Newfoundland. There were no survivors. This tragedy sparked an interest in the Army's casualty procedures. One obscure area which has received a fair bit of attention is the summary court-martial procedure for the disposition of the personal effects of deceased soldiers.

The law governing such summary court procedures is codified at 10 U.S.C. § 4712,<sup>1</sup> and is implemented by Army Regulation 638-1.<sup>2</sup> In brief, the statute mandates that when a soldier dies at a place or command under the jurisdiction of the Army, and the soldier's spouse or legal representative is not present, the command will appoint a summary court to perform certain specified tasks. These tasks include collecting the soldier's effects located in camp or quarters, collecting local debts owed to the soldier, paying the soldier's undisputed local creditors, and sending the soldier's effects and remaining money to a prescribed list of beneficiaries.

As anyone who has ever been appointed a summary court knows, often it is no easy task to perform these duties. The statute is inapplicable to many of the situations a summary court will encounter and is unclear as to others; AR 638-1 provides very little additional guidance for performing these difficult duties. Moreover, there is virtually no case law or Department of the Army pamphlets interpreting the statute. Consequently, when the summary court encounters a problem area or unclear situation, there are no published references to consult.

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<sup>1</sup>10 U.S.C. § 4712 (1982). The statute is set forth in full in the Appendix following the article.

<sup>2</sup>Dep't of Army, Reg. No. 638-1, Deceased Personnel— Disposition of Personnel Effects and Missing Persons (Sept. 1972) (hereinafter cited as AR 638-1).

The primary purpose of this article is to explain AR 638-1 and to provide guidance on some common problem areas not addressed in the regulation.<sup>3</sup> The secondary purpose of the article is to propose changes which are needed to clarify the statute and make it more relevant to the needs of today's Army. Subparagraphs (e) through (g) of the statute are explained in detail in the regulation and should not pose any major problems for the summary court.

## II. DUTIES AND AUTHORITY OF THE SUMMARY COURT-MARTIAL

### A. *IN GENERAL*

The duties and authority of a summary court to dispose of the effects of deceased soldiers are set forth in 10 U.S.C. § 4712 (1982). The statute is not concerned with distribution or administration of estates and it does not confer authority upon the summary court to convey title.<sup>4</sup> The summary court is not a legal representative of the decedent.<sup>5</sup> The summary court is merely authorized to deliver certain property to the person designated in the statute to receive that property.<sup>6</sup> Legal title to the property must be determined by the civil courts in the state of the decedent's domicile.<sup>7</sup> Moreover, once the summary court transmits the effects, there is no legal basis for the Army to recover them even if they were erroneously sent to the wrong recipient.<sup>8</sup> The summary court also does not constitute an eligible applicant for correction of military records on behalf of the decedent's estate.<sup>9</sup>

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<sup>3</sup>While there is virtually no case law interpreting the statute, there are several opinions of The Judge Advocate General which provide useful guidance. This article relies heavily on these opinions. It must be pointed out that these opinions are advisory only and are not binding on any court which may later consider the issues concerned. Likewise, the propositions set forth in this article must be considered advisory only.

<sup>4</sup>See DAJA-AL 1979/2952, 26 July 1979; DAJA-AL 1978/2710, 26 May 1978; SPJGA 1943/3153, 3 Mar. 1943.

<sup>5</sup>See DAJA-AL 1979/1936, 8 Mar. 1979. See also Dig. Ops. JAG 1912-1940 § 470(2) (JAG 220.871, 25 June 1921) (summary court cannot endorse a negotiable instrument so as to effect its legal transfer). Cf. AR 638-1 para. 2-7b(5) (the summary court is authorized to endorse for collection negotiable instruments made payable to the deceased soldier in settlement of a debt owed by a local debtor).

<sup>6</sup>See DAJA-AL 1981/3170, 24 June 1981; DAJA-AL 1972/3860, 19 Apr. 1972; JAGA 1970/3538, 10 Feb. 1970.

<sup>7</sup>See also AR 638-1, para. 2-6b(2)(b) (requiring that the summary court notify the designated recipient that delivery of the effects does not vest title, but that the effects are to be retained for disposition in accordance with the civil law of the decedent's domicile).

<sup>8</sup>See JAGA 1971/4360, 2 June 1971.

<sup>9</sup>See DAJA-AL 1979/1936, 8 Mar. 1979.

In short, the summary court's function is to collect the deceased soldier's personal effects and expeditiously send them to the proper person as designated in the statute.<sup>10</sup>

## B. LOCATION OF SOLDIER'S DEATH

The statute provides, in relevant part, that upon the death of a person subject to the court-martial jurisdiction of the Army or Air Force "at a place or command under the jurisdiction of the Army," a summary court may be appointed to dispose of the deceased soldier's effects.<sup>11</sup> Clearly the language provides for the appointment of a summary court *only* where the soldier died on post. Nevertheless, it is a fairly common practice to appoint summary courts even when the soldier died off post. There is no statutory authority for such appointments, but neither is there any record of anyone ever challenging the practice.

There is no discernible reason for differentiating between soldiers who die on post and those who do not. It is the location of the soldier's personal effects that should control—not where the soldier died. No matter where the death occurred, the needs of the next of kin are the same: they need assistance in collecting the soldier's local effects and debts. Moreover, the situs of the soldier's death has no impact on the summary court's duties. Regardless of where the soldier died, the summary court will be concerned only with collecting the soldier's *local* effects and debts. So, there is no logical reason to predicate the appointment of a summary court on the location of a soldier's death. Nor does it appear that Congress intended such a limitation.

10 U.S.C. § 4712 was derived from Article of War 112 which provided for the disposition of the effects of "any person subject to military law."<sup>12</sup> Where the soldier died was irrelevant. The explanatory note to the current statute explains that "[i]n subsection (a), the words 'the court-martial jurisdiction of the Army or the Air Force at a place or command under the jurisdiction of the Army' are substituted for the words 'military law,' to reflect the creation of a separate Air Force."<sup>13</sup> No other reason for the change is provided. In my opinion, there was no intention to preclude the appointment of a summary court where a soldier dies off post.

<sup>10</sup>10 U.S.C. § 4712(d) (1982).

<sup>11</sup>*Id.* § 4712(a) (emphasis added).

<sup>12</sup>Act of June 4, 1920, ch. 227, subch. II, § 1 (Art. 112), 41 Stat. 809 (1920) (as amended by Act of May 5, 1950, ch. 109 § 6(c) 64 Stat. 145 (1950)).

<sup>13</sup>64 Stat. 145 (1950).

Obviously, the statute should be revised to clarify this issue. But it may be a long time until Congress considers this problem. Until that time, this provision of the statute should be liberally interpreted to authorize the appointment of a summary court in any case in which a soldier died while on active duty.

### C. COLLECTING THE EFFECTS

The statute provides that if there is no legal representative or surviving spouse present in the area, the summary court "will collect the effects of the deceased that are then in camp or quarters."<sup>14</sup> Although neither "effects" nor "in camp or quarters" is defined in the statute, the summary court must fully understand both terms to properly perform the prescribed duties. The meanings seem fairly apparent, but some clarifications are necessary.

#### 1. *What Are Effects?*

Effects are defined in AR 638-1 as household goods, clothing, items found on the deceased, personal property, motor vehicles, and mobile homes.<sup>15</sup> Not included in the regulatory definition, but nonetheless held to be "effects," are cash, stocks, bonds, and negotiable instruments.<sup>16</sup> This would include debts collected by the summary court officer in these forms which become "effects." Caution must be exercised, however, when dealing with funds on deposit in savings and checking accounts because these are *not* considered effects.<sup>17</sup>

#### 2. *In Camp or Quarters.*

While the items that comprise the deceased's effects are fairly well enumerated in the regulation, the meaning of "in camp or quarters" is not addressed. The opinions considering the issue are not very clear either.

Derived from the British Articles of War, the term "in camp or quarters" was included in the earliest articles of war our country enacted governing the disposition of the effects of deceased

<sup>14</sup>10 U.S.C. § 4712(b) (1982).

<sup>15</sup>AR 638-1, para. 1-4c.

<sup>16</sup>See JAGA 1957/7521, 24 Sept. 1957. AR 638-1, para. 2-7b tacitly recognizes that cash, stocks, bonds, and negotiable instruments are effects by providing that they are to be transmitted to the designated recipient along with the decedent's other personal effects.

<sup>17</sup>See DAJA-AL 1972/3860, 19 Apr. 1972; JAGA 1953/6910, 2 Sept. 1953, as digested in 3 Dig. Ops. 547 (1959). Funds on deposit, however, may be debts which are collectible. See *infra* note 21.

military persons.<sup>18</sup> In his treatise on military law and precedents, Colonel Winthrop cites an early British opinion from 1819 interpreting the terms as referring "only to movables or money actually found in quarters, 'and not to effects, debts, or money in the hands of third persons.'"<sup>19</sup> A more recent opinion determined that "in camp or quarters" limited the summary court's authority to collect the deceased's effects to those effects found in areas under the Army's jurisdiction.<sup>20</sup>

Even though the above definitions are less than satisfactory, later cases fail to further define the term. They skirt the issue and simply state that a summary court officer is not authorized or required to secure the custody of effects not found "in camp or quarters."<sup>21</sup>

The question therefore remains: what constitutes "in camp or quarters"? While this question cannot be answered conclusively, the opinions at least provide some examples of what is *not* in camp or quarters. Funds on deposit in a bank are not in camp or quarters.<sup>22</sup> Neither are items located off post for which a claim check is found on post.<sup>23</sup> Moreover, once the effects are sent off post to a recipient as designated in the statute, the Army has no authority to recover them even if they should have been sent to someone else who had a superior claim to the items.<sup>24</sup>

What about effects located in government leased housing, or in off-post housing overseas? Can these be considered in camp or quarters? There are no clear answers.

### 3. *Government Contract Housing.*

Is government contract housing considered "in camp or quarters"? This is a gray area which may well be faced by a summary court-martial. While there are no cases or opinions which provide direct guidance, there is a helpful criminal law opinion. In *United*

<sup>18</sup>See W. Winthrop, *Military Law and Precedents* 761 (2d. ed. 1920) (hereinafter cited as Winthrop).

<sup>19</sup>See *id.*

<sup>20</sup>See JAGA 1954/2927, 2 Apr. 1954 ("Department of the Army authority to secure and deliver to the next of kin the effects of a deceased member extends only to such effects as are found in areas under the jurisdiction of the Army.').

<sup>21</sup>See, e.g., DAJA-AL 1972/3860, 19 Apr. 1972 (opining that funds on deposit in a bank located on a USAREUR post are not effects located in camp or quarters, but may be collectible as a local debt); JAGA 1957/7521, 24 Sept. 1957 (opining that a savings bond located in a local bank is not collectible as an effect located in camp or quarters).

<sup>22</sup>See DAJA-AL 1972/3860, 19 Apr. 1972.

<sup>23</sup>See JAGA 1957/7521, 24 Sept. 1957.

<sup>24</sup>See JAGA 1971/4360, 2 June 1971.

*States v. Otero*,<sup>25</sup> The Judge Advocate General opined that a recruiting station located in a building leased to the General Services Administration was a military installation for the purpose of military jurisdiction because, by virtue of its lease, the government had a sufficient proprietary interest in the premises.

The same rationale is applicable to government-leased or contracted quarters. The Army's proprietary interest in the premise should afford sufficient jurisdiction to render the area "in camp or quarters" for the purposes of 10 U.S.C. § 4712.

#### 4. *Off-Post Housing.*

Another gray area the summary court may encounter is determining whether or not he or she has any authority to secure the personal effects in the deceased soldier's off-post housing. The easiest way to solve this problem is to obtain a power of attorney from the decedent's next of kin or legal representative authorizing the summary court to enter the off-post housing and secure the effects.

For overseas off-post housing there may be a quicker solution than waiting the two or three weeks it might take to receive the power of attorney in the mail. "In camp or quarters" has been defined by at least one opinion as an area under Army jurisdiction.<sup>26</sup> The Court of Military Appeals has held that, subject to certain requirements immaterial to this discussion, military authorities can authorize searches of the off-post quarters of soldiers stationed overseas.<sup>27</sup> It can be argued that if there is jurisdiction to search a soldier's off-post quarters, there is also jurisdiction to secure a deceased soldier's effects located in off-post quarters. It is obviously the better practice to obtain the power of attorney. But, if necessary to avoid delay, the overseas summary court can argue that he or she has the authority to act without a power of attorney.

It is obvious that clearer guidance as to the precise meaning of "in camp or quarters" is needed. The term is antiquated and ill-defined. If and when the statute is revised, this problem should be addressed.<sup>28</sup> But until such revision is enacted the guidance

<sup>25</sup>See SPCM 1980/4864, as digested in *The Army Lawyer*, Apr. 1984, at 34.

<sup>26</sup>See *supra* note 21 and accompanying text.

<sup>27</sup>See generally *United States v. Bunkley*, 12 M.J. 240 (C.M.A. 1982) (discussing the authority of commanders overseas to authorize searches of off-post housing in USAREUR. See also Mil. R. Evid. 315(c)(4)(B) (permits searches of property located in a foreign country to be authorized, but requires compliance with applicable treaty or agreement).

<sup>28</sup>See *infra* Section III for suggested revisions to the statute.

provided above should prove helpful.

### D. DEBTS DUE THE DECEASED

"The summary court-martial may collect debts due the decedent's estate by local debtors . . . ."<sup>29</sup>

For the most part, AR 638-1 provides sufficient guidance to carry out this function. Oddly enough, however, the regulation's language generally tells the summary court *how* to complete this function instead of explaining just what duties this function entails.<sup>30</sup> Reading between the lines, the regulation provides that the summary court will determine if there are any local debts owed to the decedent;<sup>31</sup> may collect those debts he or she is able to collect;<sup>32</sup> and will advise the designated recipient of all known unsettled debts owed to the decedent.<sup>33</sup> More explicitly, the regulation provides that the summary court may endorse for collection negotiable instruments made payable to the decedent in settlement of a debt due by a local debtor.<sup>34</sup>

The statute uses the phrase "may collect."<sup>35</sup> Accordingly, the summary court has authority to collect a local debt but is not compelled to do so.<sup>36</sup> In implementing the statute, the regulation mandates only that the summary court will file a report showing what means he or she used to assist the designated recipient in collecting the debts.<sup>37</sup> Therefore, collecting a debt is a matter of the summary court's individual judgment based on the particular facts of the case.

#### 1. Debt Must Be Local.

A debt need not be located "in camp or quarters" for it to be collectible.<sup>38</sup> It need only be "local," which means located in the vicinity of the camp or quarters (as distinguished from the locality of the decedent's home).<sup>39</sup> While the term is not further

<sup>29</sup>10 U.S.C. § 4712(c) (1982).

<sup>30</sup>AR 638-1, para. 2-5 provides that the summary court may assist the recipient of the effects in settling debts due or owed by the decedent. The means of assistance are then implied in para. 2-6b, which provides that the summary court will make a report showing what he or she did to accomplish this task.

<sup>31</sup>AR 638-1, para. 2-6b(1)(b).

<sup>32</sup>*Id.* at para. 2-6b(2)(e).

<sup>33</sup>*Id.* at para. 2-6b(2)(f).

<sup>34</sup>*Id.* at para. 2-7b(5).

<sup>35</sup>10 U.S.C. § 4712(c) (1982).

<sup>36</sup>See DAJA-AL 1972/3860, 19 Apr. 1972; Dig. Ops. JAG 1912-1940 § 470(2) (10 Jan. 1919).

<sup>37</sup>AR 638-1, para. 2-6b.

<sup>38</sup>See DAJA-AL 1972/3860, 19 Apr. 1972.

<sup>39</sup>AR 638-1, para. 2-7b(5); See L. Tillotson, *The Articles of War Annotated* 364

defined, common sense dictates that "local" will vary from case-to-case depending upon the distance from the installation or nearby towns and communities. Twenty-five to thirty miles, however, would probably define the outer limits of what is "local" in most cases.

At any rate, the summary court officer must understand that the authority to collect debts is broader than the authority to collect effects, which is limited to those in camp or quarters.

### 2. *Bank Accounts.*

While a local bank account is not collectible as an "effect," it has long been construed as a debt owed to the decedent which may be collected by the summary court.<sup>40</sup> Remember, the summary court has the authority to collect the debt, but is not required to do so.<sup>41</sup> While there is nothing to preclude the decedent's administrator or executor from collecting the amount on deposit,<sup>42</sup> in most cases it is more convenient for the next of kin if the summary court performs this function. The typical soldier leaves only a small estate, if the summary court closes out the account, it may save the next of kin from having to initiate formal legal proceedings to do so.<sup>43</sup> In cases of joint accounts or where ownership is disputed, however, the summary court would be better advised to let the properly appointed legal representative close out the account.

The method of collecting the amount on deposit should not be difficult. The summary court need only show the bank copies of the appointing orders and DD Form 1300, Report of Casualty.

### 3. *Determining the Existence of Local Debts.*

There are no opinions on how the summary court should go about determining the existence of local debts. Some debts will come to light when the summary court goes through the deceased soldier's effects and papers. Others will be disclosed by friends, next of kin, or the decedent's legal representative. The summary court should run a notice in the local daily or weekly bulletin

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(5th ed. 1949).

<sup>40</sup>See DAJA-AL 1972/3860, 19 Apr. 1972; Dig. Ops. JAG 1912-1940 Sec. 470(2) (JAG 210.871, 10 Jan. 1921).

<sup>41</sup>See DAJA-AL 1972/3860, 19 Apr. 1972.

<sup>42</sup>See Dig. Ops. JAG 1912-1940 § 470(2) (JAG 220.871, 12 Mar. 1919).

<sup>43</sup>Small estate probate procedures vary from state to state. Whether or not costly legal proceedings would be necessary must be determined on a case-by-case basis. See Morton, *Non-Probate and Probate Administration of Small Estates Involving Deaths of Military Personnel: Thoughts of A Probate Judge*, also published in this issue of the Military Law Review.

requesting those owing money to the decedent to contact him or her. If the notice is run at least three consecutive times, the regulatory requirements should be met.<sup>44</sup> Because the summary court is not the executor or administrator of the estate,<sup>45</sup> he or she need not comply with state or local procedures regarding notification of debtors or creditors.

#### 4. *Endorsing Negotiable Instruments.*

The summary court has limited authority to endorse for collection a negotiable instrument made payable to the deceased in settlement of a local debt.<sup>46</sup> The proceeds realized must be forwarded to the designated recipient in accordance with the procedures set forth in the regulation.<sup>47</sup> Remember that the summary court has no authority to convey title or property or money.<sup>48</sup> Therefore, the summary court cannot endorse a negotiable instrument so as to effect its legal transfer.<sup>49</sup>

### ***E. PAYMENT OF LOCAL CREDITORS***

"The summary court-martial may . . . pay undisputed local creditors of the deceased to the extent permitted by the money of the deceased in the court's possession . . ."<sup>50</sup>

As with the collection of debts due the deceased, this authority is permissive, not mandatory. The creditor must be local and undisputed. The term "undisputed" is not defined in either the statute or the regulation, but the meaning is clear. If there is any question as to the validity of the debt, the summary court should defer action on it, notify the person designated to receive the soldier's effects,<sup>51</sup> and let that person handle the matter. The summary court should keep careful records of all transactions and should always obtain written receipts.<sup>52</sup>

#### 1. *Where Liabilities Exceed Available Funds.*

Neither the statute nor the regulation provide any guidance as to how the summary court is to apportion available funds or order claims where the decedent's local liabilities exceed his or her local assets. The only opinion I have discovered on this topic states,

<sup>44</sup>AR 638-1, para. 2-6b(2)(d).

<sup>45</sup>See DAJA-AL 79/1986, 6 Mar. 1979.

<sup>46</sup>AR 638-1, para. 2-7b(5).

<sup>47</sup>*Id.* at para. 2-7.

<sup>48</sup>See Dig. Ops. JAG 1912-1940 § 470(2) (JAG 220.871, 25 June 1921).

<sup>49</sup>See *id.*

<sup>50</sup>10 U.S.C. § 4712(c) (1982).

<sup>51</sup>AR 638-1, para. 2-6b(2)(f).

<sup>52</sup>10 U.S.C. § 4712(c) (1982).

"[Q]uestions of apportionment of available funds or priorities of payments to local creditors should be resolved by the summary court upon a consideration of the facts and circumstances of each case."<sup>53</sup> This states the obvious and is of little use to the summary court. The easiest way to deal with the problem is to pay the unsecured, undisputed local creditors on a first-come-first-paid basis until the funds run out. Any creditors not fully paid should then be referred to the decedent's next of kin.

## 2. *Funds To Be Used.*

The statute provides that debts may be paid to the extent permitted by the money of the deceased in the summary court's possession.<sup>54</sup> The summary court may use money found among the decedent's effects for this purpose.<sup>55</sup> He or she also may use funds received from debtors of the deceased.<sup>56</sup> He may not, however, endorse for collection negotiable instruments payable to the decedent to pay creditors because this would transfer title.<sup>57</sup> The summary court may sell property and apply the proceeds to pay creditors only if he or she is expressly authorized to do so as the agent of the person entitled to receive the property.<sup>58</sup> It would be better, however, for the summary court to let this be done by the decedent's legal representative.

The summary court's function is to assist the recipient of the effects in settling local debts due or owed by the decedent,<sup>59</sup> not to settle the estate. The more entangled the decedent's finances are, the more likely it is that the estate will have to be probated. Probate is a matter of state law; the summary court should not become involved in the probate except, perhaps, to render limited assistance to the duly appointed executor or administrator in minor matters such as helping to contact local creditors.

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<sup>53</sup>See JAGA 1954/9834 21 Dec. 1954, as digested in 4 Dig. Ops. 402 (1955).

<sup>54</sup>10 U.S.C. § 4712(c) (1982).

<sup>55</sup>See Dig. Ops. JAG 1912-1940 § 470(10) (JAG 220.871, 24 Aug. 1927).

<sup>56</sup>See JAGA 1954/9834, 21 Dec. 1954, as digested in 4 Dig. Ops. 402 (1955) (by implication).

<sup>57</sup>See SPJGA 1945/12420, 12 Aug. 1945.

<sup>58</sup>Compare Dig. Ops. JAG 1912-1940 § 470(10) (JAG 220.871, 24 Aug. 1927) (sale of automobile with *only consent* of deceased soldier's next of kin to pay off local debts is an act of administration beyond the scope of the summary court's authority) with Dig. Ops. JAG 1912-1940 § 470(10) (JAG 210.871, 11 Oct. 1932) (sale of automobile by summary court upon the *express direction and authority* of the person entitled to the automobile to pay off a lien thereon does not constitute an administration of the estate and is permissible).

<sup>59</sup>AR 638-1, para. 2-5.

### 3. *Property Subject to Lien.*

In the case of property subject to a lien, the summary court should notify the lien holder and give him or her an opportunity to claim the property.<sup>60</sup> If the lien holder does not assert a claim, the summary court may turn the property over to the designated recipient.<sup>61</sup> If the lien holder makes a claim, the summary court is not authorized to sell the item and pay off the lien unless expressly directed to do so by the designated recipient.<sup>62</sup> A special power of attorney should be used for this purpose. However, this is also a function that would more properly be performed by the decedent's legal representative.

The summary court may return to a vendor any property which the decedent held under a conditional bill of sale, provided there is no cash available to pay the vendor's claim and the vendor withdraws the claim and asserts title under the terms of the conditional bill of sale.<sup>63</sup>

## ***F. PERSONS ENTITLED TO EFFECTS***

As soon as practicable after collecting the decedent's effects and money, the summary court shall send them at government expense, in order of priority, to decedent's (1) surviving spouse or legal representatives; (2) son; (3) daughter; (4) father, if he has not abandoned the support of his family; (5) mother; (6) brother; (7) sister, (8) next of kin; (9) beneficiary named in the decedent's will.<sup>64</sup> The regulation mandates that the summary court will accomplish this task and forward a report within thirty days for deaths occurring at posts in the continental United States and within forty-five days for death occurring overseas.<sup>65</sup>

Neither the statute nor AR 638-1 purports to vest title to the personal effects in the recipient; they merely transfer custody of the property to the designated person, leaving any question of title to be determined by agreement among the interested parties or, if necessary, the civil courts in the state of decedent's domicile.<sup>66</sup> AR 638-1 orders the summary court to advise the recipient that delivery of the effects does not vest title and that

<sup>60</sup>See Dig. Ops. JAG 1912-1940 § 470(10) (JAG 220.871, 24 Aug. 1927).

<sup>61</sup>See *id.*

<sup>62</sup>See Dig. Ops. JAG 1912-1940 § 470(10) (JAG 210.871, 11 Oct. 1932).

<sup>63</sup>See Dig. Ops. JAG 1912-1940 § 470(8) (JAG 220.871, 6 Oct. 1931).

<sup>64</sup>10 U.S.C. § 4712(d) (1962).

<sup>65</sup>AR 638-1, para. 2-8b(4) (this paragraph also permits extensions if necessary).

<sup>66</sup>See DAJA-AL 1981/8170, 24 June 1981; DAJA-AL 1972/3860, 19 Apr. 1972; JAGA 1970/3588, 10 Feb. 1970.

the effects are to be retained for disposition in accordance with the civil law of the decedent's domicile.<sup>67</sup>

Despite the statute's seeming specificity on the order of priority of recipients, and the mandatory disclaimer that the delivery does not vest title, problems frequently arise in determining to whom the effects should be delivered. For instance, there may be questions of eligibility of potential recipients or conflicting claims may be asserted. Because the claimant to whom the property is not sent will be forced to assert a claim to the property in a state court, many claimants will press the issue at the summary court level hoping to avoid costly litigation. It is necessary, therefore, for the summary court to fully understand exactly who the eligible recipients are.

### *1. Surviving Spouse.*

The law of the decedent's domicile is used to determine who qualifies as a surviving spouse,<sup>68</sup> including questions as to the continued existence of a marital relationship while the parties are pending a divorce, or while they are legally or otherwise separated.<sup>69</sup> Likewise, questions as to the validity of a common law marriage would also be determined by the law of the decedent's domicile. The summary court should consult a legal assistance officer for help in determining questions of state law.

If there is a doubt as to the legal status of the surviving spouse and if a legal representative has been appointed, the summary court should deliver the effects to the legal representative.<sup>70</sup> This will obviate the need for the summary court to decide the issue of the surviving spouse's status. Also, if the surviving spouse has been charged with murdering the soldier, delivery should be made to the legal representative.<sup>71</sup> One opinion held that if there was no legal representative appointed, the summary court could withhold delivery until the termination of the murder trial or the appoint-

<sup>67</sup>AR 638-1, para. 2-6b(2)(b).

<sup>68</sup>See DAJA-AL 1974/4380, 15 July 1974.

<sup>69</sup>See SPJGA 1944/4499, 16 May 1944, as digested in 3 Bull. JAG 192.

<sup>70</sup>See SPJGA 1943/4147, 27 Mar. 1943, as digested in 2 Bull. JAG 144.

<sup>71</sup>See Dig. Ops. JAG 1912-1940 § 470(6) (JAG 210.871, 22 Sept. 1923).

<sup>72</sup>See SPJGA 1943/3153, 3 Mar. 1943.

<sup>73</sup>See generally Dig. Ops. JAG 1912-1940 § 470(5) (JAG 220.81, 9 June 1924) (delivery of effects to sister rather than father where there were no higher priority recipients was erroneous, but the United States was not legally liable; the matter was one for adjustment between the parties claiming the property). See also SPJGA 1943/3153, 3 Mar. 1943 (The Article is not a statute of distribution. It merely provides a method of disposing of the effects by military authorities, and when complied with, the War Department is relieved from further responsibility.).

ment of a proper legal representative.<sup>72</sup> This procedure, however, seems untenable. It could be months or even years before the matter is settled. The law of the state where the decedent was domiciled should be consulted. If it imposes no disqualification on the spouse because of the pending charge, delivery may be made to that spouse. If that spouse is disqualified under state law and no legal representative has been appointed, delivery may be made to the next person on the priority list. The concerned parties could settle their claims to title among themselves.<sup>73</sup>

## 2. *Legal Representative.*

Legal representative means a duly appointed executor or administrator of the decedent's estate,<sup>74</sup> or "an individual authorized by power of attorney to act in behalf of *the person eligible to receive the decedent's effects.*"<sup>75</sup>

Confusion is bound to arise over whether the legal representative or the surviving spouse has priority because the statute uses the alternative expression "[s]urviving spouse or legal representative."<sup>76</sup> It has been opined that, while not required, the better practice is to give the legal representative preference over the surviving spouse.<sup>77</sup> Certainly, this would be the easier course to follow if there is any doubt as to the surviving spouse's legal status. But where there is no such question, it is up to the summary court to decide whether to deliver the effects to the surviving spouse<sup>78</sup> or to the legal representative.

To qualify as a legal representative, an individual must present duly certified copies of letters testamentary, letters of administration, or other evidence of final qualification issued by a proper court of competent jurisdiction.<sup>79</sup> The summary court need not inquire into the jurisdiction of the appointing court; the letters are prima facie evidence of the holder's qualification.<sup>80</sup>

When there are two administrators, both appointments being prima facie valid, the summary court may deliver the effects to either one, but it is recommended that they be delivered to the

<sup>72</sup>See DAJA-AL 81/3170, 24 June 1981; Dig. Ops. JAG 1912-1940 § 470(6) (JAG 210.871, 22 Sept. 1923); Dig. Ops. 1912-1940 § 470(4) (JAG 220.8, 24 June 1918).

<sup>73</sup>AR 638-1, para. 1-4d.

<sup>74</sup>10 U.S.C. § 4712(d)(1) (1982).

<sup>75</sup>See SPJGA 1943/4147, 27 Mar. 1943, as digested in 2 Bull. JAG 144; Dig. Ops. JAG 1912-1940 § 470(6) (JAG 210.871 22 Sept. 1923).

<sup>76</sup>See Dig. Ops. JAG 1912-1940 § 470(6) (JAG 210.871, 22 Sept. 1923).

<sup>77</sup>See Dig. Ops. JAG 1912-1940 § 470(4) (JAG 220.872, 8 May 1922).

<sup>78</sup>See Dig. Ops. JAG 1912-1940 § 470(6) (JAG 210.871, 22 Sept. 1923).

first one appointed.<sup>81</sup> The summary court should advise both administrators that the delivery merely transfers possession of such effects, not title, and is not a recognition or determination by the Department of the Army as to the ownership of the property.<sup>82</sup>

### 3. Children.

After the surviving spouse and legal representative, the next priority goes first to sons, then to daughters.<sup>83</sup> Even if the daughter is older, the son takes first. The sexist overtones of this order are obvious and have been criticized.<sup>84</sup> If the soldier is survived by more than one son, the effects should be sent to the oldest one.<sup>85</sup> The same would apply if there are no sons and there is more than one daughter; the oldest daughter will take.

Often the deceased soldier is survived by a minor child who is living with the soldier's ex-spouse. If there is no legal representative appointed, that child has priority and the effects should be delivered to the child—even if it means the ex-spouse will gain effective control of the property.<sup>86</sup> As there is often friction, or even antagonism, between the ex-spouse and the soldier's family, this situation can become a bitter dispute with the summary court caught in the middle. The summary court should not become personally involved. He or she should strictly follow the order of priority set forth in the statute and notify the unhappy family members that delivery does not vest title in the recipient. In the event a legal representative is subsequently appointed, any

<sup>81</sup>See JAGA 1946/9821, 14 Nov. 1946, as digested in 5 Bull. JAG 342 (1947).

<sup>82</sup>See *id.*

<sup>83</sup>10 U.S.C. § 4712(d)(2), (3) (1982); See Dig Ops. JAG 1912-1940 § 470(5) (JAG 210.8, 12 Aug. 1918).

<sup>84</sup>S. 3008, 97th Cong., 1st Sess. (1981). A bill to amend the laws to eliminate gender-based discrimination was introduced in 1981 but apparently never made it out of committee. This bill included provisions to amend 10 U.S.C. § 4712(d) (1982) to eliminate the gender preference for recipient children. The bill would simply base priority on age. A similar proposed bill has been drafted by the Air Force legislative liaison but has not been submitted to date. Several The Judge Advocate General opinions have discussed the issue and all have advocated eliminating the gender preference. Until the statute is revised, however, the implementing regulation cannot change the order of priority. See generally DAJA-AL 1981/2915, 18 May 1981 (no objection to provisions of S. 3008, 97th Cong., 1st Sess. (1981) eliminating gender-based discrimination); DAJA-AL 1976/3717, 25 Feb. 1976 (concerning the revision on Dep't of Army, Reg. No. 600-10, Army Casualty System (15 Oct. 1984) (hereinafter cited as AR 600-10), to eliminate similar gender based discrimination); DAJA-AL 1975/5271, 17 Dec. 1975 (concerning the elimination of priority of male over female in Dep't of Army Reg. No. 638-40, Care and Disposition of Remains (7 Sep. 1984)).

<sup>85</sup>See Dig. Ops. JAG 1912-1940 § 470(5) (JAG 210.8, 12 Aug. 1918).

<sup>86</sup>See DAJA-AL 1981/3170, 24 June 1981.

further distributions should be made to that representative.<sup>87</sup> The summary court has no obligation, however, to recover the items sent to the child prior to the appointment.<sup>88</sup>

#### 4. *Parents.*

Next in priority after the children are the deceased soldier's parents.<sup>89</sup> The father is given preference over the mother unless he abandoned the support of the family at a time when the decedent was not yet emancipated.<sup>90</sup> Unless there is evidence in the soldier's records indicating the father deserted or abandoned the family, the burden is on the mother to establish such abandonment and her right to priority.<sup>91</sup> The procedures the summary court is to follow in these circumstances are detailed in the appendix to AR 638-1.

The order of priority between fathers and mothers has sparked considerable debate.<sup>92</sup> Of particular concern is the perceived unfairness of the support test. This issue should not concern the summary court. Whether the test is fair or not, once the summary court determines that the father did not abandon support, the course is clear: the father must be given priority.

The summary court should be alert to evidence in the records which may indicate the parents are divorced. If the summary court discovers such evidence, he or she should not deliver or ship the effects until after determining which parent is entitled.<sup>93</sup> Once the effects are delivered, however, the summary court has no authority to recover them even if subsequent evidence comes to light which shows that he or she incorrectly decided the issue of priority.<sup>94</sup> Legal title will have to be settled between the parties in the civil courts of the decedent's domicile.

#### 5. *Foster Parents.*

Under the statute, individuals who stand *in loco parentis* to the deceased are not considered parents even though both natural

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<sup>87</sup>See *id.*

<sup>88</sup>See Dig. Ops. JAG 1912-1940 § 470(5) (JAG 220.871, 9 June 1924)

<sup>89</sup>10 U.S.C. § 4712(d)(4), (5) (1982).

<sup>90</sup>10 U.S.C. § 4712(d)(4) (1982); AR 638-1, appendix; see DAJA-AL 1971/4360, 2 June 1971.

<sup>91</sup>See JAGA 1971/4360, 2 June 1971; JAGA 1970/3538.

<sup>92</sup>A proposed bill to amend 10 U.S.C. § 4712(d) (1982) to eliminate the gender preference was drafted by the Air Force legislative liaison in 1985. The bill would give priority to the custodial parent. To date, the bill has not been submitted.

<sup>93</sup>AR 638-1, appendix.

<sup>94</sup>See JAGA 1971/4360, 2 June 1971.

parents may have abandoned the decedent.<sup>95</sup> They may, however, qualify as next of kin under AR 638-1.<sup>96</sup> Questions as to their rights to legal title of the decedent's effects will have to be determined in civil court.

#### 6. *Siblings.*

Priority among siblings goes first to the brothers in order of age and then to the sisters in order of age.<sup>97</sup>

#### 7. *Next of Kin.*

The decedent's effects may be sent to the next of kin when the decedent is not survived by a spouse, children, parents, or siblings, and no legal representative has been appointed.<sup>98</sup> In order of priority, the next of kin are grandfathers in order of age; grandmothers in order of age, other blood relatives of legal age; and persons standing in loco parentis to the deceased.<sup>99</sup>

#### 8. *Beneficiary Named in Will.*

Beneficiaries named in the will are last on the list of potential recipients.<sup>100</sup> A recent senate bill proposed amending the statute to give persons designated in the decedent's will the highest preference.<sup>101</sup> The Army opposed this amendment on the grounds that the proposed new order of priorities would be difficult to administer, especially in combat, and would raise issues the Army would rather not address, such as validity of a purported will, authentication, etc.<sup>102</sup> The bill never made it out of committee.

#### 9. *Beneficiaries Named in Life Insurance Policies.*

If a life insurance policy naming a specific beneficiary is found among the decedent's effects, it should be forwarded directly to the named beneficiary.<sup>103</sup> If the named beneficiary cannot be located, the policy may be given to the person highest on the list provided in the statute<sup>104</sup> who can be found.

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<sup>95</sup>See DAJA-AL 1979/2952, 26 July 1979; JAGA 1953/6910, 2 Sep. 1953, as digested in 3 Dig. Ops. 547 (1954).

<sup>96</sup>AR 638-1, para. 1-4e(4).

<sup>97</sup>10 U.S.C. § 4712(d)(6), (7) (1982); see Dig. Ops. JAG 1912-1940 § 470(5) (JAG 210.8, 12 Aug. 1918).

<sup>98</sup>10 U.S.C. § 4712(d)(8) (1982).

<sup>99</sup>AR 638-1, para. 1-4e.

<sup>100</sup>10 U.S.C. § 4712(d)(9) (1982).

<sup>101</sup>S. 3008, 97th Cong., 1st Sess. (1981).

<sup>102</sup>See DAJA-AL 81/2915, 18 May 1981 (no legal objection to eliminating gender-based distinctions, but opposed giving persons designated in the decedent's will the highest precedence).

<sup>103</sup>See Dig. Ops. JAG 1912-1940 § 470(6) (JAG 210.871, 22 Sep. 1923).

<sup>104</sup>10 U.S.C. § 4712 (1982).

*10. Eligible Recipient Not Known or Cannot Be Contacted.*

If the summary court cannot locate any persons in any of the designated categories, he or she may sell by public sale all effects except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other keepsakes.<sup>105</sup> AR 638-1, para. 2-10 provides detailed guidance as to the procedures to follow.

### **G. SHIPPING THE EFFECTS**

After collecting the effects, the summary court will ship them to the designated recipient pursuant to AR 638-1, para. 2-9.

Although the summary court is authorized to collect the deceased soldier's effects that were found "in camp or quarters,"<sup>106</sup> shipment of all the deceased's baggage and household effects is authorized under title 37 of the United States Code.<sup>107</sup> There is an obvious tension between the provisions of 10 U.S.C. § 4712(b) and 37 U.S.C. § 406(f). On the one hand, the only authority for the Army to dispose of the property of a deceased soldier is 10 U.S.C. § 4712 which limits the summary court to collecting the effects located in camp or quarters and shipping them to the persons designated in the statute.<sup>108</sup> On the other hand, the installation commander is tasked under the Army regulation which implements 37 U.S.C. § 406(f) with shipping the deceased soldier's property located off post to the next of kin, legal heir, or an administrator.<sup>109</sup>

The result of this inherent conflict is bound to be confusion where there are effects located off post. There is no clear procedure for the command to follow to inventory these items so they can be shipped. The best way to deal with this situation is to advise the legal representative or next of kin of the problem and have that person come to the off-post quarters to inventory the items and arrange for shipment. If this is impractical due to the distances involved, the legal representative or next of kin may

<sup>105</sup>*Id.* § 4712(e).

<sup>106</sup>*Id.* § 4712(b).

<sup>107</sup>*Id.* § 406(f) ("Under regulations prescribed by the secretary concerned transportation for dependents, baggage, and household effects of a member is authorized if he dies while entitled to basic pay under Chapter 3 of this title").

<sup>108</sup>See JAGA 1971/3559, 10 Feb. 1971. See *infra* note 118.

<sup>109</sup>Dep't of Army, Reg. No. 55-71, Transportation of Personal Property and Related Services, ch. 10 (1 June 1983). The regulation at para. 1-1c(1) provides that property of deceased soldiers will be disposed of under AR 638-1. It may be inferred that "next of kin, legal heir, or an administrator" is shorthand for and equates to the list of recipients set forth in 10 U.S.C. § 4712(d) and in AR 638-1, para. 1-5a.

provide a power of attorney to the deceased soldier's commander or the summary court to accomplish the task. Coordination between the unit commander and the summary court is obviously needed to ensure that at least one of them advises the legal representative or next of kin of the alternatives available. It would be easiest, perhaps, if the summary court included this advice, along with a completed special power of attorney, in his or her initial letter to the designated recipient.<sup>110</sup> The power of attorney can be prepared by the servicing legal assistance officer.

### ***H. SALE OF EFFECTS***

AR 638-1 permits the summary court to sell certain effects if the sale is in the interest of both the person designated to receive the effects and the government, and provided that the summary court has notified the recipient of the proposed sale and has obtained from that person a power of attorney to sell the effects by public sale.<sup>111</sup> Also, motor vehicles and other bulky items may be sold if it is in the government's interest, an emergency exists, and, if practicable, a reasonable effort has been made to determine the desires of the person eligible to receive custody of the effects.<sup>112</sup> The procedures to follow are clearly set forth in AR 638-1, paragraph 2-10. The servicing legal assistance office can draw up the power of attorney, and, to save time, it may be enclosed with the initial letter to the designated recipient.

### ***I. DESTRUCTION OF ITEMS OF NO SENTIMENTAL OR SALABLE VALUE***

The summary court is authorized to destroy all effects of no sentimental or salable value.<sup>113</sup> He or she is also authorized to destroy all items which may cause "embarrassment or added sorrow" if forwarded.<sup>114</sup>

The summary court obviously needs to use discretion and common sense in deciding which items should be forwarded and which should be destroyed. Destruction or loss of the deceased's personal items, or conversely, the forwarding of gruesome or obnoxious items, may cause severe emotional distress to the designated recipient.

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<sup>110</sup>AR 638-1, fig. 2-3.

<sup>111</sup>AR 638-1, para. 2-8a(1).

<sup>112</sup>*Id.* at para. 2-8a(2).

<sup>113</sup>*Id.* at para. 2-10a(4).

<sup>114</sup>*Id.* at para. 2-2.

In *Kohn v. United States*,<sup>115</sup> a case involving the death of a soldier at Fort Campbell, the soldier's family sued the government in New York under the Federal Tort Claims Act,<sup>116</sup> alleging that the Army's failure to provide an honor guard at burial, the summary court's disposal of certain of their son's personal effects, the loss of other effects in shipment, and the subsequent mailing of recruitment literature and autopsy pictures to the family home, in aggregate, rose to the level of the tort of intentional infliction of emotional distress. The judge in this case found against the plaintiffs, holding that they had not proven that any of the acts rose to the level of the New York tort of intentional infliction of emotional distress. But, it is conceivable that in another case the result might be different. While it is unlikely that the destruction of certain of the decedent's effects by itself would rise to the level of this tort, such destruction might, as in this case, be a factor in determining if the plaintiff has a valid cause of action.

### J. OTHER DUTIES

This article has discussed the major discretionary duties that a summary court performs. There are other duties that the summary court performs that have not been discussed. For the most part these are purely mechanical duties that are thoroughly explained in AR 638-1. The summary court should refer to the regulation if he or she has any questions about these duties. If the answer cannot be located or the guidance is unclear, the summary court should consult the U.S. Army Memorial Affairs Agency or the local legal assistance officer.

## III. PROPOSED REVISIONS TO 10 U.S.C. § 4712

It should be apparent now that 10 U.S.C. § 4712 is somewhat antiquated in some sections and somewhat unclear in others. In particular, subsections (a)(1) and (b) should be revised to refine ambiguous language and to provide clearer guidance to summary courts. Subsection (d) should be amended to eliminate any gender preference for recipient children and to clarify the parental recipient when the parents are divorced or separated.

Note that all revisions proposed below for 10 U.S.C. § 4712 would be equally applicable to 10 U.S.C. § 9712 which is the analogous Air Force statute. Note also that the revisions pro-

<sup>115</sup>591 F. Supp. 568 (E.D.N.Y. 1984), *aff'd*, 760 F.2d 253 (2d Cir. 1985).

<sup>116</sup>28 U.S.C. §§ 1346, 2671-2680 (1982).

posed for subsection (d) would also be applicable to 10 U.S.C. § 4713(a)(2) and 10 U.S.C. § 9713(a)(2) which govern the disposition of effects of deceased persons by the United States Soldiers' and Airmen's Home.

### A. SUBSECTION (a)

#### 1. Current Provision.

"(a) Upon the death of—

(1) a person subject to the court-martial jurisdiction of the Army or Air Force at a place or command under the jurisdiction of the Army."<sup>117</sup>

#### 2. Proposed Revision.

Delete the words "at a place or command under the jurisdiction of the Army."

#### 3. Explanation.

The present wording of the statute is confusing and would seem to exclude from its coverage situations when a soldier dies off post. The revision would clarify the statute to encompass such situations, and would bring the statute in line with 37 U.S.C. § 406(f) which authorizes shipment of a deceased soldier's effects without regard to where he or she died.<sup>118</sup>

### B. SUBSECTION (b)

#### 1. Current Provision.

"(b) If there is no legal representative or surviving spouse present, the commanding officer shall direct a summary court-martial to collect the effects of the deceased that are then in camp or quarters."<sup>119</sup>

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<sup>117</sup>10 U.S.C. § 4712(a)(1) (1982) (emphasis added).

<sup>118</sup>See JAGA 1971/3559, 10 Feb. 1971, which opined:

The only authority for the Department of the Army to dispose of property belonging to a deceased member is section 4712, title 10, United States Code, which permits the disposition of the effects of a member who dies "at a place or command under the jurisdiction of the Army." Although paragraph M8350, JTM authorizes the shipment of a deceased member's property, it does not provide authority for the Department of the Army to determine the legal disposition of the property.

<sup>119</sup>10 U.S.C. § 4712(b) (1982) (emphasis added).

### 2. *Proposed Revision.*

Delete the words "in camp or quarters" and substitute therefore the words "located on the military installation, or in government-leased quarters, or in non-government owned housing within the immediate vicinity of deceased's duty station." This substitute language should be used wherever "in camp or quarters" appears in the statute.

### 3. *Explanation.*

This revision will expand the authority of the summary court to collect the effects of a deceased soldier who was living off post. Today, many soldiers reside off post. Their families have just as much need for the services the summary court provides as do the families of soldiers residing on post. Because the off-post quarters must be located in the immediate vicinity of the installation, this duty will not impose a disproportionately heavy burden on the command.

The revision also will bring the statute more in line with 37 U.S.C. § 406(f) and facilitate inventorying property located off post so it can be shipped more expeditiously.

Simple disputes as to ownership of certain effects located off post or claims for rent due would be handled under the authority of subparagraph (c). Anything more complex would be turned over to the decedent's legal representative for resolution.

## C. *SUBSECTION (d)*

### 1. *Current Provision.*

"(d) As soon as practicable after the collection of the effects and money of the deceased, the summary court-martial shall send them at the expense of the United States to the living person highest on the following list who can be found by the court:

- (1) Surviving spouse or legal representative.
- (2) Son.
- (3) Daughter.
- (4) Father, if he has not abandoned the support of his family.
- (5) Mother.
- (6) Brother.
- (7) Sister.

(8) Next of kin.

(9) Beneficiary named in the will of the deceased.<sup>120</sup>

## 2. *Proposed Revision.*

Delete the present categories (1)—(9) and substitute therefore the following categories:

(1) Beneficiary designated in writing in such manner as the concerned secretary shall prescribe.

(2) Legal representative.

(3) Surviving spouse.

(4) Children, in order of age.

(5) Parents in order of age if they are neither divorced nor separated at the death of the deceased. A parent who has abandoned the support of his family shall be ineligible to receive the effects and money of the deceased.

(6) Custodial parent when parents are divorced or separated and the deceased was a minor at the time of his or her death. In shared or joint custody arrangements, the "custodial parent" is that person having physical custody of the deceased the majority of the time.

(7) Noncustodial parent where parents are divorced or separated and the deceased was a minor at the time of his or her death.

(8) Oldest parent when parents are divorced or separated and the decedent had reached the age of majority at the time of his or her death.

(9) Youngest parent when parents are divorced or separated and the decedent had reached the age of majority at the time of his or her death.

(10) Siblings in order of age.

(11) Next of kin.

(12) Beneficiary named in the will of the deceased.<sup>121</sup>

## 3. *Explanation.*

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<sup>120</sup>*Id.* § 4712(d).

<sup>121</sup>The proposals for determining the priority between parents were originally drafted by Mr. J. Stucky of the Air Force Congressional Liaison Office.

The proposed revision will simplify the summary court's duties and remove the offensive gender-based preferences currently found in the statute. In particular, the soldier will now designate the person he or she wishes to receive the effects. The designation could be made on a modified DD Form 93.

This change will provide the summary court with a readily identifiable recipient in most cases. It will also eliminate the problems that can occur when the deceased was pending a divorce at the time of his or her death. Upon the filing of the divorce petition, the soldier could update the DD Form 93 to delete the spouse. As with the current law, the mere delivery of the property to the designated recipient would not vest title.

In the event that the soldier has failed to designate a beneficiary or such beneficiary cannot be located or has predeceased the soldier, the next in line to receive the effects would be the decedent's legal representative. By giving the legal representative priority over the spouse, the confusion caused by using the alternative expression "surviving spouse or legal representative" is avoided. The legal representative and the surviving spouse will often be the same person. The legal representative is given priority over the surviving spouse in the event they are not the one and the same because, ultimately, it will be the legal representative who is responsible for the estate.

Also, the priority of male over female for both children and siblings has been deleted to avoid any unwarranted gender preference. The priority of the parents has been revised to put them on a more equal footing. The current statute utilizes a support test to determine the priority between the parents. The support test provides that as long as the father did not abandon his obligation to financially support the family during the soldier's minority he will have priority over the mother. This priority has been deemed unfair because, when parents are divorced, it is typically the custodial parent who has more influence on the child. In situations where there was a divorce and the mother received custody, the father would nonetheless have priority even if he never visited the family and only provided minimal support.

This proposed revision uses a custodial test rather than a support test. A custodial test is used in AR 638-40, para. 4-4 to determine which parent will be entitled to direct disposition of the soldier's remains. With this revision, it will no longer be possible for one parent to receive the remains and the other to receive the

effects. The parent who had custody of the soldier when he or she was a minor, and who presumably has had more contacts with the soldier, will receive both.

#### IV. CONCLUSION

This article has explored a rather murky area: the powers and functions of summary courts with regard to the disposition of the effects of deceased soldiers. It has discussed some common problem areas and proposed some solutions to these problems. However, real progress in resolving these problems cannot be made until 10 U.S.C. § 4712 is revised and brought up to date. Until such time as it is, this area will continue to be a quagmire for all parties concerned.

#### APPENDIX

10 U.S.C. § 4712. Disposition of effects of deceased persons by summary court-martial.

(a) Upon the death of—

(1) a person subject to military law at a place or command under the jurisdiction of the Army; or

(2) an inmate of the United States Soldiers' and Airmen's Home who dies in an Army hospital outside the District of Columbia when sent from the Home to that hospital for treatment;

the commanding officer of the place or command shall permit the legal representative or the surviving spouse of the deceased, if present, to take possession of the effects of the deceased that are then in camp or quarters.

(b) If there is no legal representative or surviving spouse present, the commanding officer shall direct a summary court-martial to collect the effects of the deceased that are then in camp or quarters.

(c) The summary court-martial may collect debts due the decedent's estate by local debtors, pay undisputed local creditors of the deceased to the extent permitted by money of the deceased in the court's possession, and shall take receipts for those payments, to be filed with the court's final report to the Department of the Army.

(d) As soon as practicable after the collection of the effects and money of the deceased, the summary court-martial shall send

them at the expense of the United States to the living person highest on the following list who can be found by the court:

- (1) Surviving spouse or legal representative.
- (2) Son.
- (3) Daughter.
- (4) Father, if he has not abandoned the support of his family.
- (5) Mother.
- (6) Brother.
- (7) Sister.
- (8) Next of kin.
- (9) Beneficiary named in the will of the deceased.

(e) If the summary court-martial cannot dispose of the effects under subsection (d) because there are no persons in those categories or because the court finds that the addresses of the persons are not known or readily ascertainable, the court may convert the effects of the deceased, except sabres, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, into cash, by public or private sale, but not until 30 days after the date of death of the deceased.

(f) As soon as practicable after the effects have been converted into cash under subsection (e), the summary court-martial shall deposit all cash in the court's possession and belonging to the estate with the officer designated in regulations, and shall send a receipt therefor, together with any will or other papers of value, an inventory of the effects, and articles not permitted to be sold, to the executive part of the Department of the Army for transmission to the United States Soldiers' and Airmen's Home.

(g) The summary court-martial shall make a full report of the transactions under this section, with respect to the deceased, to the Department of the Army for transmission to the General Accounting Office for action authorized in the settlement of accounts of deceased members of the Army.



## PART V: PROACTIVE LAW

### PREVENTIVE MEDICINE AND PREVENTIVE LAW: FORT STEWART'S "CORPORATE FITNESS" PROGRAM FOR SENIOR OFFICERS

by Major Thomas L. Bryant\*  
and  
Major Charles W. Hemingway\*\*

#### I. INTRODUCTION

It has long been recognized that a soldier concerned about legal problems or plagued by medical difficulties is not effective in combat. Even more serious, a leader with such worries could cause an entire unit to be unprepared for combat.

In response, an innovative program was initiated by the Commanding General of the 24th Infantry Division (Mech) and Fort Stewart in 1985, under which judge advocates, personnel officers, and medical personnel have joined forces to ensure that senior officers at Fort Stewart, Hunter Army Airfield, and the 24th Infantry Division (Mechanized) are and remain medically and legally fit. Known as the "Victory Life" Corporate Fitness Program, it combined an initiative begun in 1984 by the Office of the Staff Judge Advocate at Fort Stewart called the "Senior Leaders' Legal Preparedness for Victory" Program with a separate fitness program which emphasized preventive medicine.

Officers who are promotable majors and above and their spouses are eligible to participate in the program. The medical portion of the program involves comprehensive initial screening and follow-up monitoring. The legal portion of the program offers each participant the opportunity to meet individually and confidentially with a senior lawyer to discuss personal legal issues. The lawyer will provide advice and prepare all necessary legal documents. If a legal issue arises outside the scope of the Army Legal Assistance Program, the participant is referred to a civilian

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attorney. An important aspect of the program is that this senior lawyer will continue to be the family lawyer for the officer and his or her family during the officer's tour of duty at Fort Stewart.

## II. MEDICAL "CORPORATE FITNESS" ASPECTS

The division surgeon is the group physician for the program and is the medical point of contact for all participants. Participants are given an initial medical screening which may include a complete physical examination, treadmill testing, an assessment of the individual's weight, physical readiness test scores, and a disease risk assessment.

An underlying tenet of the medical portion is promotion of a healthy life style. This includes stressing five major areas with participants:

1. Specific Disease Risk Assessment. Participants are screened using a risk factor analysis for certain specified diseases, including coronary artery disease, cancer, high blood pressure, the related illnesses of kidney disease and stroke, glaucoma, hearing loss, and diabetes. The risk factors include personal medical history, family medical history, medical laboratory tests, and screening tests such as x-rays. Participants who evidence a high risk factor for any of the illnesses are offered a more in-depth diagnostic evaluation, frequent monitoring, and/or an individualized risk reduction program.

2. Nutrition. Participants are provided information and are encouraged to follow low fat, low cholesterol, low sodium, and high fiber diets, and are also encouraged to follow the diet at official functions and at group events.

3. Toxin Exposure Reduction. This area involves information and guidance on reducing the damaging effects of consuming toxic substances such as caffeine, nicotine, and alcohol. Both group-oriented and individual programs are used.

4. Stress Management. Stress risk profiling is used to identify program participants who are particularly vulnerable to stress-induced illness and a confidential individualized plan is developed for each to reduce the negative impact of stress.

5. **Aerobics.** Recognizing that most senior leaders maintain at least a moderate level of aerobic fitness, this aspect is designed to expose these leaders to activities beyond the "daily dozen" or unit runs that will promote good health even after retirement. Emphasis is also on injury prevention and on involving the spouse and other family members in organized physical activities.

A portfolio is provided to each participant. This notebook contains the individual participant's health risk analysis, laboratory data in chart form, keys to any monitoring cycle, and articles focusing on topics of general interest to these senior leaders.

### **III. Senior Leaders' Legal Preparedness Aspects**

The deputy staff judge advocate serves as legal counsel for the program. After potential participants are identified, they are sent letters advising them of the program and encouraging them to come to the legal assistance office with their spouse to discuss wills, powers of attorney, insurance, the Survivor Benefit Plan, and general family protection principles.

The Senior Leaders' Legal Preparedness portion of the program involves three major areas:

1. **Wills.** The participant's need for a will, or need for a will update, is reviewed individually and in confidence.

2. **Powers of Attorney.** The power of attorney is reviewed to ensure that it provides the protection required for the officer and his or her family during the officer's absence and is tailored to the officer's needs.

3. **Individual Preparation for Deployment.** This review includes such items as arrangement of bank accounts to assure a ready supply of cash for survivors in the event of death, collection of legal documents and their retention at an accessible location, review of insurance policies for war-risk clauses, review of current legal domicile and legal issues presented by domicile, family protection in the event of death, and information on various services available to military members.

Any other legal issues raised by the participant, or identified by the senior judge advocate, will be discussed, including contracts, real estate, consumer affairs, and related matters. Participants are

advised that all discussion with the senior judge advocate are privileged communications and cannot be disclosed without the participant's consent. Any general interest articles of a legal nature will be included in the participant's portfolio notebook. Arrangements are made for follow-up appointments after the initial legal screening session. These follow-ups are based on subsequent birthdays, on the occasion of the senior officer turning forty, on an as-needed basis, or on other circumstances or events.

#### **IV. OTHER ASPECTS OF THE PROGRAM**

The program participants meet monthly, usually at a dinner featuring a guest speaker. Each monthly meeting has a theme and information on that theme is given to the participants for inclusion in their portfolio. The guest speakers are recognized experts in their field, members of the military or civilian community, or members of the "Victory Life" Program itself. These meetings may result in the development of subgroups involving topics of common interests, such as stop smoking groups.

All potential participants receive an information letter from the commanding general which describes the program. A sample letter is at Appendix A. A synopsis of the program, which is reprinted at Appendix B, is enclosed with the letter.

Also, senior officers who are interested in the legal portion of the program are provided with a preprinted Disposition Form on which they can request a priority consultation, Emergency Deployment Readiness Exercise (EDRE) related legal documents, or consultation on other legal matters.

The Fort Stewart Legal Assistance Office has developed an extensive Annual Legal Checkup Form to assist participants in remaining current on their legal affairs. This form is reprinted at Appendix C. Although DD Form 1543 (Annual Legal Checkup) is also available, the form developed at Fort Stewart is an easy-to-use alternative which can be indexed and tabbed by the senior officer for easy reference.

#### **V. CONCLUSION**

The Fort Stewart Victory Life "Corporate Fitness" Program can be adapted for use by other installations or divisions. If leaders are educated concerning their legal and medical needs, and if their problems are addressed, they receive more than just peace of mind. They will also be able to better perform their crucial

military duties, and almost as important, they will serve as examples and effective advocates for "corporate fitness" for all soldiers.

## APPENDIX A

### NOTIFICATION LETTER FROM COMMANDING GENERAL

Dear (Name of Officer and Spouse):

Recently, I directed that a program be developed to assess and monitor the medical and legal fitness of senior commanders and staff officers within this command. This program is now available to both of you.

The Army has a tremendous investment in both of you, and is genuinely concerned about your medical health, legal welfare, and overall fitness. I feel confident that you will recognize the value of this program and give it your full support. Participation is voluntary for spouses, but I sincerely encourage you to take advantage of this opportunity.

A synopsis of the program is enclosed. All medical test results will be strictly confidential and provided to you for determination of your needs. Additionally, all legal counseling will be governed by the confidential relationship that exists between a lawyer and a client.

( ) will be contacting you soon with more details. I hope you both will find this program beneficial.

Sincerely,

Major General, USA  
Commanding

Enclosure

## APPENDIX B

### FACT SHEET PROVIDED TO PROGRAM PARTICIPANTS

#### SENIOR LEADERS' LEGAL PREPAREDNESS FOR VICTORY

I. ELIGIBLE PARTICIPANTS: Promotable majors and above, and their spouses.

**II. SERVICES OFFERED:** Personalized legal assistance in the areas of wills, survivors benefits, contracts, real estate, powers of attorney, and consumer affairs, as well as many other legally-related matters.

**III. GOALS:**

A. To improve overall division legal fitness by ensuring that its leaders, and eventually all its soldiers, are able to concentrate on their military duties without concern that their legal needs have not been met.

B. To give each officer and spouse in this program the opportunity to consult with their family lawyer.

C. To ensure that every individual in this program has a valid will.

D. To ensure that necessary arrangements have been made in the event of deployment; such as the preparation of powers of attorney.

**IV. PROCEDURES:** Each participant is offered the opportunity to meet individually and confidentially with a senior lawyer to discuss any legal issues which may be of concern to the participant. The lawyer will provide advice, and prepare all necessary legal documents. This lawyer will continue to be the family lawyer for the officer and his or her family during the officer's tour of duty at Fort Stewart. If a legal issue arises, however, which is outside the scope of the Army Legal Assistance Program, necessary referrals to a civilian attorney will be made.

## APPENDIX C

### ANNUAL LEGAL CHECKUP

**FOR:**

**GRADE:**

**SOCIAL SECURITY NUMBER:**

**PERMANENT LEGAL ADDRESS:**

**DATE PREPARED:                      DATE REVIEWED:**

**DATE REVIEWED:                      DATE REVIEWED:**

**DATE REVIEWED:                      DATE REVIEWED:**

**DATE REVIEWED:                      DATE REVIEWED:**

<u>TAB</u>	<u>Description</u>
A	Family Birth Certificates
B	Marriage Certificates
C	Divorce Decree
D	Family Death Certificates
E	Certificate of U.S. Citizenship (Child born OCONUS)
F	Last Will and Testament, Husband (H) and Wife (W)
G	Statement of Social Security Account Earnings, H & W
H	Social Security Cards, Address, and Benefits
I	Individual Retirement Accounts, H & W
J	Veterans' Administration, Address & Benefits
K	Powers of Attorney, H & W
L	Income Tax Returns, H & W (Federal, State, Local)
M	Real Estate and Personal Property Tax Records
N	Deeds, Title Insurance, and Home Insurance Policy
O	Automobile Insurance Policies and Vehicle Registration Certificates
P	Property Insurance Policy on Household Furnishings
Q	Credit Card Records (account numbers, emergency telephone numbers, and creditor addresses)
R	Securities Records (account numbers, telephone and address information, proof of ownership, maturing dates, liquidation procedures, and location of securities)





NAME:  
 DATE OF BIRTH:  
 PLACE OF BIRTH:  
 ADOPTION/NATURALIZATION/CITIZENSHIP DATA:

### Section 2—Estate and Probate Matters

WILL? Yes/No            EXECUTOR/RIX'S NAME:  
 DATE:                    ADDRESS:  
 WHERE MADE:

Have there been any significant changes in family personal or financial conditions since the execution of your will? Yes/No  
 If Yes, explain:

Check if any of the following have occurred to you or any family member or beneficiary: Marriage? Yes/No      Divorce? Yes/No  
 Birth? Yes/No      Adoption? Yes/No      Death? Yes/No  
 Major Illness? Yes/No  
 If Yes, explain:

Have there been any changes in:      Assets? Yes/No  
 Liabilities? Yes/No      Home ownership? Yes/No  
 Availability of witnesses? Yes/No  
 Legal Capacity of family members? Yes/No  
 If Yes, explain:

Have you made any substantial gifts in recent years? Yes/No If Yes, explain:

Does your spouse have a Will? Yes/No  
 Is it a part of an overall estate plan? Yes/No  
 Do you or your spouse (or children) have any rights or expectations with regard to estates of others? Yes/No  
 If Yes, explain:

### Section 3—Powers of Attorney

TYPE? (General or Limited)  
 DATE EXECUTED:            EXPIRATION DATE:  
 If limited, for what purpose?  
 NAME and ADDRESS of Grantee:

TYPE? (General or Limited)  
 DATE EXECUTED:            EXPIRATION DATE:  
 If limited, for what purpose?  
 NAME and ADDRESS of Grantee:

**Section 4—Taxes**

**INCOME TAXES PAID:** Federal? Yes/No  
 State? Yes/No  
 Where filed: Where filed:

Have you retained copies for past four years? Yes/No

**REAL ESTATE TAXES PAID:** Yes/No  
 Where filed?

**PERSONAL PROPERTY TAXES PAID:** Yes/No  
 Where filed?

**FICA TAXES ON HOUSEHOLD EMPLOYEES PAID:**  
 Yes/No FULL TIME?

**Section 5—Financial Position**

(Provide info for each piece of property owned)

**DESCRIPTION OF REAL ESTATE OWNED:**  
**NAME(s) IN WHICH HELD:**  
**HOW HELD:** (Joint tenancy, tenancy by entirety, etc.)  
**PERCENTAGE OF PURCHASE PRICE PAID BY CO-OWNER:**  
**DATE ACQUIRED:**  
**PURCHASE PRICE:**  
**PRESENT VALUE:**  
**DEED RECORDED?** Yes/No  
**SURVEY OF PROPERTY?** Yes/No  
**TITLE INSURANCE?** Yes/No  
**ABSTRACT?** Yes/No  
**TITLE OPINION?** Yes/No  
**ENCUMBRANCES:** (Mortgage, Lien, Deed of Trust, etc.)  
**NAME OF MORTGAGEE:**  
**BALANCE DUE:**  
**MONTHLY PAYMENTS:**  
**DESCRIPTION OF ALL LEASES:** (Landlord or tenant, period  
 of time rental, etc.)  
**TYPE OF INSURANCE:** (Fire, Theft, Comprehensive)  
**LIMITS:**  
**NAME OF INSURANCE COMPANY:**  
**ADDRESS OF INSURANCE COMPANY:**  
**POLICY NUMBER:**  
**EXPIRATION DATE:**

**Section 6—Automobile**

Provide info for each auto owned

MAKE: MODEL: YEAR:

SERIAL NUMBER:

TITLE (State number, date):

JOINT OWNER? Yes/No

If Yes, percentage of purchase price paid by co-owner.

FINANCED BY:

BALANCE DUE:

MONTHLY PAYMENTS:

NAME OF FINANCE COMPANY:

ADDRESS:

INSURANCE COVERAGE:

Bodily Injury? Yes/No LIMITS: EXPIRATION DATE: COST

Property Damage?

Yes/No

LIMITS: EXPIRATION DATE: COST

Public Liability? Yes/No LIMITS: EXPIRATION DATE: COST

OTHER: (Explain)

**Part C—Other Property**

Provide info for each piece of property owned

LIST PROPERTY OF GREAT VALUE:

VALUE:

AMOUNT OF LIEN:

MONTHLY PAYMENTS:

LIEN HELD BY:

INSURANCE INFORMATION:

POLICY NUMBER: LIMITS: EXPIRATION DATE: COST:

NAME OF COMPANY:

ADDRESS:

**Part D—Credit Cards**

Provide info for each card owned

NAME OF ISSUING CORPORATION:

NUMBER OF CARDS:

PERSONS HAVING AUTHORITY TO PURCHASE:

OUTSTANDING BALANCE:

**Part E—Stocks, Bonds, Mutual Funds, Other Securities**

Provide info for each item owned

NAME OF COMPANY:  
ADDRESS:  
NAME(s) OF CO-OWNERS:  
PURCHASE PRICE PAID:  
TYPE SECURITY:  
DATE PURCHASED:  
ORIGINAL VALUE:  
PRESENT VALUE:  
NAME OF BROKER:  
ADDRESS:

**Part F—Bank Accounts and Savings Deposits**

NAME OF BANK:  
ADDRESS:  
NAME(s) OF JOINT-OWNER:  
TYPE OF ACCOUNT:  
ACCOUNT NUMBER:  
PRESENT BALANCE:  
ANNUAL INCOME:

**Part G—Miscellaneous Assets**

Provide info for each item owned

DESCRIPTION OF ASSETS:  
CO-OWNER:  
PERCENTAGE OF PURCHASE PRICE PAID:  
VALUE:  
ANNUAL INCOME  
:

**Part H—Liabilities Other than Current Debts**

Provide info for each debt

PERSON TO WHOM OWED:  
DEBT:  
LEGAL DOCUMENT EVIDENCING LIABILITY:  
BALANCE:  
ANNUAL PAYMENTS:

**Section 6—Family Protection****Part A—Insurance (Life, Annuity and Accident, Education)**

Provide info for each policy

TYPE OF INSURANCE:  
 NAME OF COMPANY:  
 ADDRESS:  
 NAME OF BENEFICIARY:  
 RELATIONSHIP  
 POLICY NUMBER:  
 EXPIRATION DATE:  
 LIMITS:

Do any of your life insurance policies have war risk clauses?  
 Yes/No

**Part B—Survivor Benefit Plan**

ELECTION MADE? Yes/No  
 If no, explain:

DATE OF ELECTION:  
 YEARS OF SERVICE ON DATE OF ELECTION:  
 OPTIONS:

**Part C—Military Survivor's Benefits**

List amounts of benefits family would receive if you should die today. Six months gratuity payment \$ \_\_\_\_\_. Dependents indemnity compensation \$ \_\_\_\_\_ monthly, reduced to \$ \_\_\_\_\_ on \_\_\_\_\_. Social Security benefits \$ \_\_\_\_\_ monthly, reduced to \$ \_\_\_\_\_ on \_\_\_\_\_.

**Part D—Retirement Benefits**

DATE BEGINS:  
 TYPE PAYMENT:  
 ANNUAL INCOME TO SELF:  
 ANNUAL INCOME TO SURVIVORS:  
 DEPENDENT ELIGIBLE:

**Part E—Record of Emergency Data**

RECORD OF EMERGENCY? Yes/No  
 DATE RECORD LAST REVIEWED:

NAME OF BENEFICIARY NAMED ON RECORD TO RECEIVE SETTLEMENT OF PAY AND ALLOWANCES, INCLUDING SERVICEMAN'S DEPOSITS:

**Section 7—Location of Valuable Documents**

SAFETY DEPOSIT BOX? Yes/No

BOX NUMBER:

NAME OF BANK:

ADDRESS

:

NAME OF JOINT-OWNER:

ADDRESS:

NUMBER OF KEY(s):

LOCATION:

List below documents contained in the Safety Deposit Box:

Social Security Card? Yes/No

Birth Certificate? Yes/No

Certificate of Citizenship? Yes/No

Marriage Certificate? Yes/No

Divorce Decree? Yes/No

Real Estate Documents? Yes/No

Automobile Papers? Yes/No

Other Personal Property Papers? Yes/No

Will? Yes/No

Power of Attorney? Yes/No

Tax Records? Yes/No

Insurance Policies? Yes/No

Stocks? Yes/No

Bonds? Yes/No

Bank Deposit Book? Yes/No

Savings Deposit Book? Yes/No



# COMPUTER-ASSISTED WILLS PROGRAM

By Captain James J. Gildea\*

## I. INTRODUCTION

One of the vital missions of a legal assistance office is to contribute to the combat readiness of its assigned units.<sup>1</sup> There are a number of ways in which this important mission is accomplished. Legal assistance offices, for example, are required to establish preventive law programs to decrease the volume of personal legal problems facing military personnel.<sup>2</sup> Preventive law programs reduce greatly the countless personnel hours spent in remedial counseling and enhance the morale, efficiency, and prestige of the individual soldier.<sup>3</sup> The most direct way in which the legal assistance office contributes to combat readiness, however, is the support it is required by regulation to provide troops during readiness exercises and actual emergency deployment.<sup>4</sup> This article describes the system developed at Fort Leonard Wood, Missouri, to comply with the regulatory directive that legal assistance offices draft simple legal instruments for completion and execution by the soldier at the deployment site.<sup>5</sup>

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<sup>1</sup>Dep't of Army, Reg. No. 27-3, Legal Assistance, para. 1-5 (1 Mar. 1984) (hereinafter cited as AR 27-3).

<sup>2</sup>AR 27-3, para. 2-7.

<sup>3</sup>Dep't of Army, Reg. No. 600-14, Preventive Law Program, para. 1 (30 Sept. 1985).

<sup>4</sup>Ar 27-3, para. 2-7c, provides that legal assistance offices will become actively involved in processing soldiers for overseas movements. This service includes educating and advising soldiers concerning the legal documents they may need. Such service also includes drafting simple instruments that can be completed and executed during deployment processing. The support which a legal assistance office renders to deploying troops is not limited to the support provided at the deployment site. Such support should also include an on-going periodic legal review program designed to minimize the time needed to process personnel during Emergency Deployment Readiness Exercises (EDREs), Preparation for Overseas Rotations (PORs), and Preparation for Overseas Movements (POMs). See Legal Assistance Officer's Deskbook and Formbook at B-1 (TJAGSA 1985).

<sup>5</sup>The directive to prepare simple legal instruments is not merely limited to an actual deployment. AR 27-3 provides that legal assistance offices may draft simple documents during a readiness exercise if time and conditions permit. AR 27-3, para. c(1). While providing simple legal instruments to troops during readiness exercises is not directive in nature, the legal assistance office at Fort Leonard Wood experienced a unique problem in this regard. A unit at Fort Leonard Wood is part of the Army's Rapid Deployment Force. To simulate an actual deployment, commanders often schedule their EDREs in conjunction with a training exercise in which that unit actually deploys to another part of the continental United States. As the risk of severe injury and death increases when the soldiers participate in

## II. THE MISSION

In recognition of the increasing number of Emergency Deployment Readiness Exercises (EDREs) conducted at Fort Leonard Wood, the legal assistance office in 1985 began examining ways to improve the quality of legal services provided to deploying units. Our mission was to draft and execute wills and powers of attorney for deploying troops "on-site" during their preparation for overseas movement (POM).<sup>6</sup> To meet this directive, the legal assistance office was required to develop an interview and execution system which would permit attorneys to process wills in less than four minutes.

Two methods of processing wills were examined to meet this mission. The first method examined was the use of "fill-in-the-blank"-type wills designed to be completed during a POM line and executed on site.<sup>7</sup> The "fill-in-the-blank"-type wills developed at Fort Leonard Wood were designed to handle four categories of soldiers: soldiers who are married and have no children; soldiers who are married and have children; soldiers who are not married and who have no children; and soldiers who are not married and who have children. After some testing, the "fill-in-the-blank"-type wills were rejected for two main reasons. First, the legal validity of such wills was highly questionable.<sup>8</sup> Second, the wills were very

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such training exercises, the legal assistance office did not have the luxury to schedule appointments for soldiers requiring wills and powers of attorney. Before the Computer Assistance Wills Programs, the legal assistance office was forced to discontinue routine client services during EDREs and the entire staff worked very late hours to produce documents for soldiers to execute prior to their departure. Commanders were also faced with the dilemma of having to take troops away from loading operations to execute documents that were created during the interviews at the EDRE. Taking soldiers away from their duty severely hampered the commanders' ability to accomplish their mission.

The drafters of AR 27-3 did not define "simple legal instruments." Some installations have interpreted "simple legal instruments" to mean powers of attorney only. Fort Leonard Wood has defined the term "simple legal instruments" to include basic wills.

See Appendix A following the article for an example of the "fill-in-the-blank"-type will developed at Fort Leonard Wood to accommodate a soldier who is not married and has no children.

It is generally agreed that a will may be written in any way upon anything as long as the completed document is fairly permanent and legible. Unnecessary gaps or spaces in wills, however, should be avoided to preclude any possibilities of forgery or fraudulent alterations. The attorney should strive to remove any ambiguities in a will which might result in will contests during probate. In the "fill-in-the-blank"-type wills tested at Fort Leonard Wood, there was a serious problem with gaps left in the body of the will when the soldier's information did not entirely fill a line. Also, if each entry was not initialed and dated by the testator and the witnesses, questions of fraudulent entries might arise which could lead to future will contests.

cumbersome and time consuming to complete.<sup>9</sup>

The second method examined by the legal assistance office was using a computer to generate simple wills. This second method proved to be very successful and resulted in the eventual development of the Computer-Assisted Wills Program.<sup>10</sup>

### III. COMPUTER-ASSISTED WILLS PROGRAM

The Computer-Assisted Wills Program is a system of rapid will execution designed specifically to produce high quality, simple wills during an actual deployment or readiness exercise. The heart of the system is the Fort Leonard Wood "WILLS" program.<sup>11</sup> Personal computers are integrated into the legal assistance stations of the POM line to run WILLS. Instead of using the traditional single station approach, the legal assistance operation is divided into two stations to facilitate rapid will interviews and execution.<sup>12</sup>

### IV. COMPUTER SOFTWARE—WILLS

WILLS can produce four basic wills, using the same categories of soldiers as the "fill-in-the-blank" wills:

1. Soldiers who are married and who have children;
2. Soldiers who are married and who have no children;<sup>13</sup>

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<sup>9</sup>It was found, for instance, that soldiers could not fill out the will forms by themselves. An attorney was, therefore, required to conduct the interview and fill in the blanks. Typewriters were also used to fill in the blanks but this process was very time consuming and, under the pressure of producing high volumes of wills in a very short time period, prone to error. Even with the "fill-in-the-blank"-type wills, the formalities of execution cannot be cut short.

<sup>10</sup>The program only deals with the production of simple wills. "Fill-in-the blank" power of attorney forms are still used to produce powers of attorneys for those soldier desiring them. At this writing, a lack of computer hardware and power of attorney software has precluded this office from experimenting with computer-generated powers of attorney.

<sup>11</sup>"WILLS" was developed by 1LT Hugh M. Berglund, HHC, 5th Engineer Battalion (C), Fort Leonard Wood, and the author. The program was written using the IBM Advanced "BASIC" programming language. The program is compatible with any computer which uses the "MS-DOS" operating system.

<sup>12</sup>The goal of POM processing is to keep the line moving as quickly as possible. Under the two station approach, the soldier's will is prepared and assembled while he or she is processing through other stations. When the soldier reaches the second station, his or her will is waiting for review and signature.

<sup>13</sup>This will option has the following features:

1. The soldier's principal beneficiary will be the surviving spouse.

3. Soldiers who are not married and who have no children;<sup>14</sup> and

4. Soldiers who are not married and who have children.<sup>15</sup>

Although the documents created by WILLS are described as basic, they do contain a number of very nice features for the soldier. Each will option, for example, contains a "debt" clause which contains instructions to the personal representative regarding the apportionment and exoneration of debts against the estate.<sup>16</sup> Each will option also contains a survival clause<sup>17</sup> and an "Armed Forces" clause that directs the personal representative to contact a legal assistance office at the nearest military installa-

2. In the event the soldier's spouse predeceases him or her, the soldier can name two people as contingent beneficiaries. The property will pass to the contingent beneficiaries in equal shares.

3. The soldier's personal representative will be the surviving spouse.

4. The soldier can name one other person as an alternate personal representative.

"This will option has the following features:

1. The soldier can name two people as the principal beneficiaries.

2. The soldier can name two people as the contingent beneficiaries.

3. All beneficiaries take equally.

4. The soldier can name a principal and alternate personal representative.

"This will option contains the following features:

1. In the event the soldier dies, his or her property passes to the children in equal shares.

2. The soldier can name joint principal and alternate guardians for the minor children.

3. The soldier can name principal and alternate personal representatives.

"The "debt clause" as it would appear in a completed will follows:

*SECOND.* I direct that all of my personal debts be paid from my estate prior to distribution if the Personal Representative so desires, otherwise such debts will be apportioned to each devisee and legatee according to his or her share. Unless specifically provided otherwise, debts secured by any property shall not be required to be exonerated, but shall pass with the property.

"The "survival clause" as it would appear in a completed will follows:

#### SURVIVAL CLAUSE

*FOURTH.* Wherever in this my LAST WILL AND TESTAMENT it is provided that any person shall benefit hereunder if such person shall survive me such person shall be deemed not to have survived me if he or she shall die within thirty (30) days after my death or in a common disaster with me, or under such circumstances that it is difficult or impossible to determine which of us died first.

tion to ascertain if the deceased's dependents are entitled to any benefits because of the decedent's military affiliation.<sup>18</sup>

Because of the time constraints inherent in POM lines, however, the soldier is given very few options in disposing of his or her property. In the "married with children" option, for example, all of the soldier's property will pass entirely to the surviving spouse in the event of the soldier's death. In the event the spouse predeceases the soldier, the property will then pass to the children in equal shares.<sup>19</sup> Although the property disposition provisions are very limited, the program has adequately accommodated over ninety percent of the soldiers who have been processed in POM lines using WILLS.<sup>20</sup>

The newest feature to WILLS is the addition of the individual states' self-proving clauses.<sup>21</sup> Upon entering the soldier's state of residence, the computer generates a will with a self-proving clause that comports with that state's particular descent and distribution laws.<sup>22</sup>

<sup>18</sup>The "Armed Forces" clause as it would appear in a completed will follows:

*SIXTH.* I have served in the Armed Forces of the United States. Therefore, I direct my Personal Representative to consult the legal assistance officer at the nearest military installation to ascertain if there are any benefits to which my dependents are entitled by virtue of my military affiliation at the time of my death. Regardless of my military status at the time of my death, I direct my Personal Representative to consult with the nearest Veterans Administration and Social Security office to ascertain if there are any benefits to which my dependents may be entitled.

<sup>19</sup>The "married with children option" also contains the following features:

1. The program can accommodate a soldier who has up to seven children.
2. The program allows the soldier to name joint principal and alternate guardians for the minor children, should the spouse predecease the soldier.
3. The soldier's spouse will be the principal personal representative; the soldier can name an alternate personal representative should the spouse predecease him or her.

<sup>20</sup>The program has been tested at Fort Leonard Wood on five different occasions since its inception in June 1985. During the five exercises, the legal assistance office processed 968 soldiers and produced 210 wills. Of the 968 soldiers processed using WILLS, only twelve soldiers were turned away because they desired something other than that offered with WILLS.

<sup>21</sup>The first three versions of WILLS contained a general self-proving clause. The general self-proving affidavit was shorter than that of most states and facilitated speedier execution because it was the same for each soldier's will. To prevent possible court challenge, however, the individual state self-proving clauses were added to the program.

<sup>22</sup>WILLS produces will documents which are valid in forty-nine states. Because of the special requirements in Louisiana and Puerto Rico, however, WILLS will not generate documents for soldiers domiciled in either of those two places.

The actual operation of the computer program is very simple. WILLS is contained entirely on one floppy disc.<sup>23</sup> Once loaded, the computer asks the operator a series of questions.<sup>24</sup> In response to these questions, the computer generates a will catered to that particular soldier's family situation with a self-proving clause valid for his or her state.<sup>25</sup> The data on the notary public who notarizes the will's self-proving clause is entered only once, at the beginning of the POM line processing. The computer stores this information and prints it out on each will as it is generated.

## V. POM LINE STATIONS

To minimize waiting time, the legal assistance station at the POM line is split into two substations. Figure 1 at Appendix B contains a diagram of the legal assistance substations and their relationship to other support stations.<sup>26</sup> The first substation of the legal assistance station is the interview substation. The interview substation, located after the adjutant general in the POM line, is staffed by a paralegal, an attorney, and a computer operator.

The paralegal occupies the first position in the interview substation. He or she screens soldiers as they enter the station and fills in powers of attorney as per the supervising attorney's

<sup>23</sup>The current version of WILLS contains the "DOS" program, thereby allowing the operator to "boot-up" the system with one disk only.

<sup>24</sup>The program is very "user friendly." The questions are in simple, easy to understand language. Unlike certain word processing programs, the operator does not merge pre-loaded clauses to make a will document. He or she merely answers the questions presented on the display. The program automatically begins generating the will upon answering the last question. In the "married no child" option, the operator will be asked a maximum of nine questions.

<sup>25</sup>Two IBM personal computers are used by the computer operator at the interview substation. When a will is printing, it "locks up" the computer, thus preventing the operator from entering the next soldier's data. The computer operator enters data into the second IBM computer while the other is printing, thereby reducing printing time significantly. It takes 3 minutes and 16 seconds to print the longest will using an IBM Personal Computer Graphics Printer (Dot-Matrix). The graphics printer is used because of its speed in generating documents.

<sup>26</sup>The interview substation is located in the fifth position of the POM line. By being in the fifth position, the flow of soldiers is slowed as they process through the four earlier stations. Slowing the flow by spreading the soldiers out prevents large crowds of soldiers from gathering at the interview station. Even though the soldiers are spread out, crowds can gather as the attorney begins conducting interviews. The attorney, at the interview substation, must constantly monitor the station. Often, soldiers waiting in the line already have a will or do not desire one. If a large line develops, the attorney should interrupt the interview and do a quick screening of the line. Experience at Fort Leonard Wood shows that a large line can often be reduced in only two or three minutes after attorney screening.

instructions for those soldiers desiring them.<sup>27</sup> Soldiers not needing or desiring a will or a power of attorney are passed on to the next station. Soldiers desiring wills are referred to the attorney, who occupies the second position in the interview substation.<sup>28</sup>

The attorney interviews soldiers desiring wills by using will interview cards.<sup>29</sup> The questions on the card are listed in the same order they appear on the computer screen.<sup>30</sup> Once the interview card is completed, the soldier moves on to the next station. The completed interview card and power of attorney, if one was executed, are then passed to the computer operator, who staffs the final position at the interview substation.<sup>31</sup>

The computer operator inputs the data contained on the interview cards and assembles the will after it is generated by the computer.<sup>32</sup> The computer operator then attaches the power of attorney, if made, to the completely assembled will and the entire

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<sup>27</sup>See *supra* note 8 (describing method used to produce powers of attorney). Although the paralegal has primary responsibility for screening soldiers, the attorney is responsible for the preparation and execution of all legal documents.

<sup>28</sup>It is assumed that all legal assistance officers are familiar with TJAG Letter, DAJA-LA, 21 Feb. 1986, subject: Will Preparation and Execution. This letter emphasizes that, in the Army Legal Assistance Program, no will may be prepared before the client is interviewed by an attorney; each will must be reviewed by an attorney before it is presented to the client; when using word processors and computers, no change to a program may be made without a thorough review of the finished product; and that an attorney must supervise the execution of wills and review the executed will after it is executed.

<sup>29</sup>The cards are color-coded, one color for each of the four will options.

<sup>30</sup>Initially, the computer operator directly inputted the information given by the soldier. This manner of creating the wills proved quite unsuccessful. Having the computer operator conduct the will interview was a very slow and often error-filled procedure. By splitting up the inputting and interviewing functions, each person can perform at a much higher speed. The attorney, accustomed to interviewing people, can move the soldiers much more speedily through the station. As a trained attorney, he or she can, for example, explain more quickly the functions of a guardian or executor should the soldier have any questions. The computer operator, whose only focus is inputting data, can work at a very rapid pace. Splitting up the functions also proved to be less tiring on each individual. Fatigue is something that the supervising attorney must carefully monitor. It is recommended that the personnel serving the POM line switch positions frequently to alleviate the stress and strain inherent in processing large volumes of people in a short time period.

<sup>31</sup>Figures 2 and 3 of Appendix B contain the will interview forms for the "married with children" and "not married/no children" will options. The will interview normally lasts 60 to 90 seconds. It is the supervising attorney's job to keep the interviews as short and as quick as possible. This often entails giving brief explanations of the principal characters in the will such as a beneficiary or executors to help the soldier in making his or her decision.

<sup>32</sup>Two-sided continuous feed paper is used by the computer operator in generating the wills. One copy is retained on file at the legal assistance office while the original is signed by the testator at the execution substation.

packet is forwarded to the execution station for client review and execution.

The system is successful because the soldier's will is inputted and printed while he or she is processing at other stations. Upon reaching the execution substation, located at Position 8 of the POM line, the soldier's will is waiting for review and signature.

The second legal assistance substation is the execution substation. Ideally this substation is staffed by an attorney, a paralegal who is a qualified notary public, and three witnesses provided by the supported unit.<sup>33</sup> It is essential that the same three witnesses serve throughout a POM, so that confusion and errors at execution are kept to a minimum.<sup>34</sup>

At the execution substation, the soldier first reviews the will.<sup>35</sup> The soldier is then asked a series of questions relating to the will.<sup>36</sup> After the soldier is satisfied with the terms of the will, the paralegal-notary officiates the self-proving clause.<sup>37</sup> The will is then passed to the witnesses who, with the notary public,

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<sup>33</sup>During 4 of the 5 EDREs at which the program was tested, a second attorney supervised the execution substation. The second attorney greatly speeded up the execution of the wills. He also relieved the supervising attorney at the interview substation. It is highly recommended that a second attorney be present.

<sup>34</sup>After executing several wills, the witnesses become very adept at performing their function. During EDREs, they have also performed a vital preliminary review function and have, on occasion, called back a testator who forgot to sign every page of the will.

<sup>35</sup>The execution substation is located in the eighth position of the POM line directly after the medical activity's shot station. Soldiers, therefore, can review their wills while they are being observed by the medical personnel for negative reactions to the shots. In this way, a will can be signed and executed without delaying the soldier's POM processing.

<sup>36</sup>The following questions are asked:

1. Are you (soldier's name)?
2. Is this your Last Will and Testament?
3. Are you over 18 years of age or older?
4. Is anyone forcing you to make this will?
5. Is anyone forcing you to dispose of your property in any certain way?
6. Do you publish this as your Last Will and Testament revoking any previous wills that you have previously made?

It is important that a script of some sort is used. This ensures that the same questions are asked every testator.

<sup>37</sup>The questions in note 36 could be asked to more than one soldier at a time, provided an individual response is obtained from each and provided that the witnesses hear each individual response and could testify to a complete execution process for each individual testator/trix.

complete the execution process.<sup>38</sup>

Before departing the execution phase, the soldier signs a cover letter and addresses an envelope with the address of the person to whom he or she wants the documents sent.<sup>39</sup> The documents, signed and executed, are placed in the envelope and mailed by legal assistance personnel upon completion of the POM processing.<sup>40</sup>

## THE PROGRAM TODAY

One cannot lose sight of the limited purpose for which this program was developed. Simply put, it is a system designed to give the soldier a *temporary* will when time does not permit an office style interview. Even using the program effectively, a legal assistance office cannot hope to produce and execute more than

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<sup>38</sup>It has been recommended that a television with a five-minute videotape on wills be set up to play to soldiers while they are waiting to begin inprocessing. The tape would contain information on the different will types available at the legal assistance station and the execution process, including the effect of a self-proving clause. The videotape would also get the soldier thinking about the people he would like to name as beneficiaries, the guardians of the children, and the personal representatives. The videotape would also speed up the client review process as the soldier would know the basic disposition provisions contained in the will.

<sup>39</sup>Two cover letters are presently used. The letter contained at figure 5 of Appendix B is used during EDREs. It identifies the documents for the soldier. If he or she is actually deploying as part of the training exercise, his or her loved ones have the documents should something happen to the soldier during deployment. The letter stresses, however, that the documents are temporary in nature and the soldier is directed to report to the legal assistance office at his or her earliest possible convenience for a review of the computer-generated will. The letter contained at figure 6 of Appendix B is used during an actual deployment. Once again, the documents are mailed to a person who will safeguard them while the soldier is away.

<sup>40</sup>Two other methods of disposing of completed wills besides mailing have been tried at Fort Leonard Wood. Initially, soldiers took their completed wills with them. This method of disposition proved entirely unsatisfactory. Soldiers, who were often loading equipment or confined to certain deployment areas, were losing their completed legal instruments or simply throwing them away because they had no place to store them. During some exercises, completed documents were left in orderly rooms and were not reaching the soldier's family, who often required powers of attorney while the soldier was away. It is also clear that a soldier's will or power of attorney should not accompany the soldier should he or she actually deploy. After this initial failure, the wills were collected and sorted by unit. The completed documents were not given to the soldier, but were delivered to the rear detachment commander of the deploying troops. During an exercise, the unit would then disseminate the wills at a more convenient time. No method of forwarding the wills and powers of attorney, however, was in existence should the soldier deploy. Like the soldier taking the completed will, delivering the wills and powers of attorney to the unit proved to be unsatisfactory because the legal instruments were not getting to the people who needed them. In late 1985, mailing the documents directly to the families was used during a company size EDRE. The procedure was very successful and was favorably received by commanders and their soldiers.

fifteen to twenty wills per hour.<sup>41</sup> This program, therefore, is in no way a substitute for a vigorous preventive law program. Periodic legal reviews must still be conducted to ensure minimal processing during a POM. Even at twenty wills per hour, it would take over ten hours of constant work to produce wills for two hundred soldiers. This program, then, is designed for the soldier who needs a will because he or she is new to the Army or the unit, or has experienced a significant change in his or her personal life.<sup>42</sup>

Committed to the policy of sending troops into battle with their personal affairs in order, the Computer-Assisted Wills Program is a viable way of ensuring that the Army's goal with respect to a soldier's legal affairs is met.<sup>43</sup>

**APPENDIX A**  
**"FILL-IN-THE-BLANK"—TYPE WILL**  
LAST WILL AND TESTAMENT  
OF

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I, \_\_\_\_\_, a legal resident of \_\_\_\_\_, Social Security Account Number \_\_\_\_\_, now in the active military service of the United States and temporarily residing and/or stationed at FORT LEONARD WOOD, MISSOURI, being of sound and disposing mind and memory, and not acting under duress, coercion or undue influence of any person whomsoever and intending to dispose of my entire estate, do make, publish and declare this instrument as my LAST WILL AND TESTAMENT, hereby revoking all wills, testaments and codicils previously made by me.

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<sup>41</sup>During a test in October 1985, the legal assistance office processed 132 soldiers in two hours. 32 wills and 14 powers of attorney were executed. Only four support personnel from the legal assistance office staffed the stations. With more personnel, a legal assistance office could produce more documents per hour.

<sup>42</sup>All incoming personnel assigned to RDF units are required to report to the legal assistance office as part of their in-processing. A brief screening interview of incoming soldiers is conducted by a paralegal to identify those soldiers requiring follow-up will appointments.

<sup>43</sup>A copy of WILLS and an instruction manual may be obtained by mailing a 5¼-inch floppy disk to the Office of the Staff Judge Advocate, ATTN: ATZT-JALA (Ms. Cox-Love), Fort Leonard Wood, Missouri 65473-5000. An example of a completed will is attached at Appendix C.

GENERAL

FIRST. I declare that I am not now married. I have no children now living.

SECOND. I direct that all of my legal debts be paid from my estate prior to distribution if the Executor or Executrix so desires, otherwise such debts will be apportioned to each devisee and legatee according to his or her share. Unless specifically provided otherwise, debts secured by any property shall not be required to be exonerated, but shall pass with the property.

PROPERTY DISTRIBUTION

THIRD. I give, devise and bequeath all of my estate and property; real, personal or mixed; wherever situated and of whatsoever nature of which I may be seized or possessed or of which I may be entitled or have a power of disposition to at the time of my death, in fee simple absolutely and forever, to \_\_\_\_\_. In the event that my said beneficiary shall not survive me, I give, devise and bequeath all of my estate and property, absolutely and forever, to \_\_\_\_\_.

SURVIVAL CLAUSE

FOURTH. Wherever in this my LAST WILL AND TESTAMENT it is provided that any person shall benefit hereunder if such person shall survive me, such person shall be deemed not to have survived me if he or she shall die within thirty (30) days after my death or in a common disaster with me, or under such circumstances that it is difficult or impossible to determine which of us died first.

FIFTH. I hereby appoint \_\_\_\_\_ of \_\_\_\_\_ as Personal Representative of this my LAST WILL AND TESTAMENT, and I direct that (she) (he) be permitted to serve without bond or surety thereon and without the intervention of any court or courts, except as required by law; I hereby authorize and empower my said Personal Representative in (her) (his) absolute discretion to sell, exchange, convey, transfer, assign, mortgage, pledge, lease or rent the whole or any part of my real or personal estate, to invest, reinvest or retain investments of my said estate and to perform all acts and to execute all documents which my said Personal Representative may deem necessary, convenient or proper in regard to my property; in the event that my designated Personal Representative shall predecease me or shall for any reason refuse to or be unable to serve or to continue serving as

such hereof, then I hereby appoint \_\_\_\_\_ of \_\_\_\_\_ to serve without bond or surety and with the same powers and authority.

**SIXTH.** I have served in the Armed Forces of the United States. Therefore, I direct my Personal Representative to consult the legal assistance officer at the nearest military installation to ascertain if there are any benefits to which my dependents are entitled by virtue of my military affiliation at the time of my death. Regardless of my military status at the time of my death, I direct my executor or executrix to consult with the nearest Veterans Administration and Social Security Administration office to ascertain if there are any benefits to which my dependents may be entitled.

IN WITNESS WHEREOF, I have at Fort Leonard Wood, Missouri, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_ set my hand and seal to this my LAST WILL AND TESTAMENT, consisting of two typewritten pages, this included, the preceding pages hereof bearing my signature.

\_\_\_\_\_ (SEAL)

The foregoing instrument, consisting of two typewritten pages, this included, was at Fort Leonard Wood, Missouri, this \_\_\_\_ day of \_\_\_\_\_ 19\_\_, signed, sealed, published and declared by the above-named Testat to be LAST WILL AND TESTAMENT in the presence of all of us at one time and at the same time, we at request and in presence and in the presence of each other, hereunto subscribe our names as attesting witnesses, and we do verily believe that the said Testat is of sound and disposing mind and memory at the date hereof.

WITNESSES:

NAME	ADDRESS	SSN
_____	_____	_____
_____	_____	_____
_____	_____	_____

### SELF-PROVING AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, known to me to be the testator and the witnesses, respectively,

whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me first duly sworn, said \_\_\_\_\_, testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament and that he had willingly made and executed it as his free and voluntary act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at his request and that said testator, was at the time 18 years of age or over and was of sound mind; and that each of said witnesses was then at least 18 years of age.

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TESTATOR

WITNESS	ADDRESS	SSN
WITNESS	ADDRESS	SSN
WITNESS	ADDRESS	SSN

STATE OF \_\_\_\_\_ )  
 ) SS.  
 COUNTY OF \_\_\_\_\_ )

Subscribed and acknowledged before me by the said \_\_\_\_\_, testator and subscribed and sworn before me by the said \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, witnesses, this \_\_\_day of \_\_\_\_\_, 19\_\_\_.

(SEAL)

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NOTARY PUBLIC IN AND  
FOR THE STATE OF \_\_\_\_\_

MY COMMISSION EXPIRES:

APPENDIX B

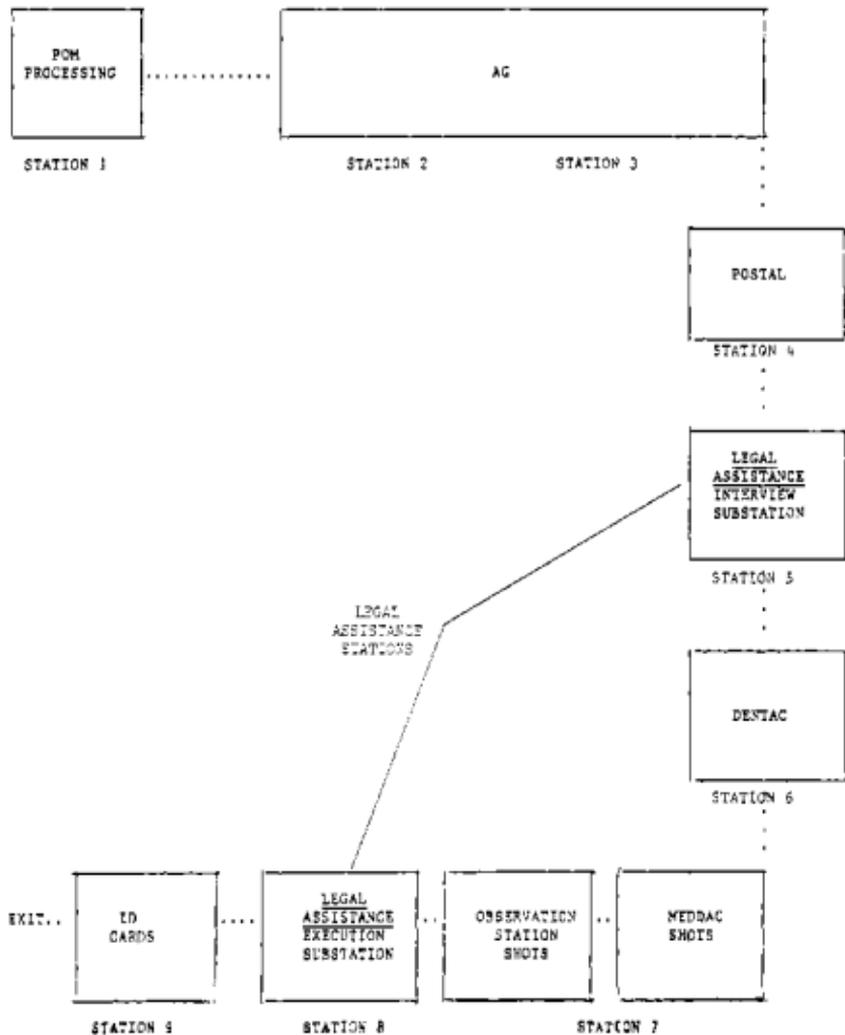


FIGURE-1

MARRIED/WITH CHILDREN

1. NAME (F,M,L,)	1.
2. GENDER	2.
3. RESIDENCY	3.
4. SSAN #	4.
5. 4	5. 4
6. SPOUSE'S NAME	6.
7. # OF CHILDREN	7.
8. CHILDREN'S NAMES	#1 _____ #2 _____ #3 _____ #4 _____ #5 _____ #6 _____ #7 _____
9. PRIN GUARD	9.
10. ALT GUARD	10.
11. ALT PER REP	11.

FIGURE 2

NOT MARRIED/NO CHILDREN

1. NAME	1.
2. GENDER	2.
3. RESIDENCY	3.
4. SSAN #	4.
5. 1	5. 1
6. # PRIN BENEF	6.
7. PRIN BENEF	NAME #1 _____ NAME #2 _____
8. # CONT BENEF	8.
9. CONT BENEF	NAME #1 _____ NAME #2 _____
10. PRIN PER REP	10.
11. ALT PER REP	11.

FIGURE 3

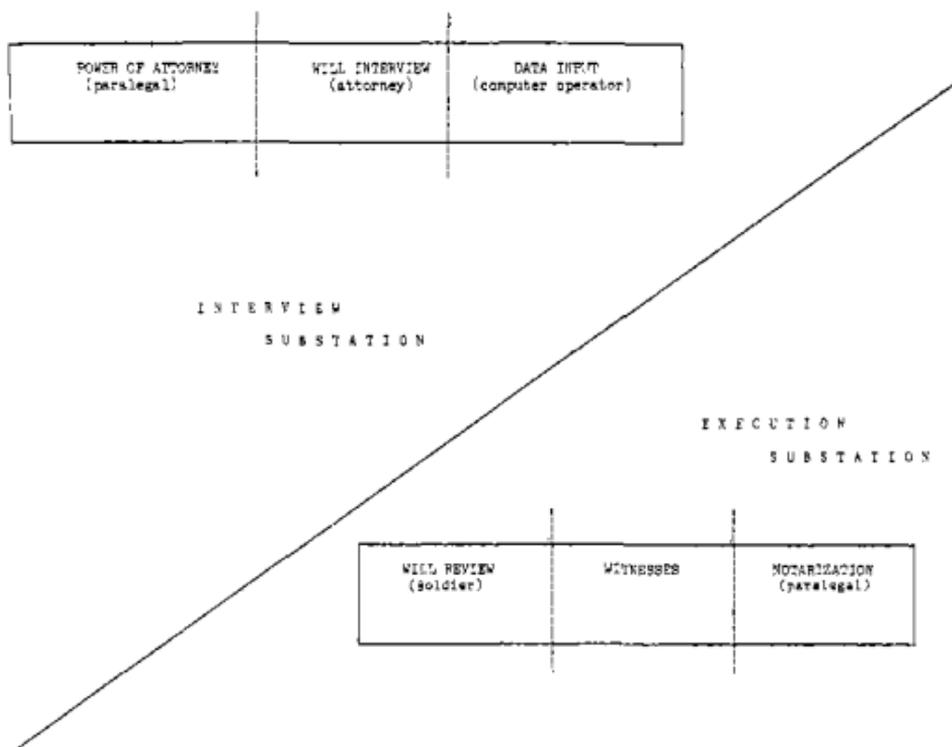


FIGURE 4

**DEPARTMENT OF THE ARMY**

**HEADQUARTERS  
US ARMY TRAINING CENTER ENGINEER AND FORT  
LEONARD WOOD  
FORT LEONARD WOOD, MISSOURI 65473-5000**

ATZT-JALA

SUBJECT: Instructions for Important Documents Prepared During EDRE

Dear \_\_\_\_\_:

This envelope contains important legal documents that were prepared for you at a recent Emergency Readiness Deployment Exercise (EDRE). I recommend that you keep these documents in a safe place with your other important papers. If you had a will prepared, you should notify your named Personal Representative of its location so that he or she can effectively represent your estate in the event of your death.

You are reminded that these documents are simple legal instruments designed to serve you while you are away from your loved ones. At your earliest possible convenience, you should contact a Legal Assistance Office to have the documents reviewed and redrafted as required.

Sincerely,

Legal Assistance Office  
Building 1706  
Fort Leonard Wood, MO  
65473-5000  
(314) 368-8171

FIGURE 5

Dear \_\_\_\_\_:

This envelope contains important legal documents that I want you to take care of for me. Please do not worry about me because of these papers. I should have had them prepared before now, but just never got around to it. Today I had the chance to talk to a lawyer and get them made up for free, so I did.

I will write as soon as I can and send you an address where you can write me.

FIGURE 6

**APPENDIX C****COMPUTER-ASSISTED WILL****LAST WILL AND TESTAMENT****OF****JOHN PATRICK SMITHSON**

I, JOHN PATRICK SMITHSON, a legal resident of CALIFORNIA, Social Security Account Number, 123-44-5678, now in the active military service of the United States and temporarily residing and/or stationed at FORT LEONARD WOOD, MISSOURI, being of sound disposing mind and memory and not acting under duress, coercion or undue influence of any person whomsoever and intending to dispose of my entire estate, do make, publish and declare this instrument as my LAST WILL AND TESTAMENT, hereby revoking all wills, testaments and codicils previously made by me.

**GENERAL**

FIRST. I declare that I am now married to MARY JO SMITHSON. I have no children now living.

SECOND. I direct that all of my personal debts be paid from my estate prior to distribution if the Personal Representative so desires, otherwise such debts will be apportioned to each devisee and legatee according to his or her share. Unless specifically provided otherwise, debts secured by any property shall not be required to be exonerated, but shall pass with the property.

**PROPERTY DISTRIBUTION**

THIRD. I give, devise and bequeath all of my estate and property—real, personal or mixed, wherever situated and of whatsoever nature of which I may be seized or possessed or of which I may be entitled or have a power of disposition to at the time of my death, in fee simple absolute, absolutely and forever, to my spouse. In the event that my spouse should predecease me or die within thirty (30) days of my death, I give, devise and bequeath all my estate and property, absolutely and forever, to FRED C. SMITHSON.

**SURVIVAL CLAUSE**

FOURTH. Wherever in this my LAST WILL AND TESTAMENT it is provided that any person shall benefit hereunder if such person shall survive me such person shall be deemed not to

have survived me if he or she shall die within thirty (30) days after my death or in common disaster with me, or under such circumstances that it is difficult or impossible to determine which of us died first.

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JOHN PATRICK SMITHSON

Page One of Two Pages

PERSONAL REPRESENTATIVE (EXECUTOR)

FIFTH. I hereby appoint my spouse as Personal Representative of this my LAST WILL AND TESTAMENT, and direct that he or she be permitted to serve without bond or surety thereon and without the intervention of any court or courts, except as required by law; I hereby authorize and empower my said Personal Representative in his or her absolute discretion to sell, exchange, convey, transfer, assign, mortgage, pledge, lease or rent the whole or any part of my real or personal estate, to invest, reinvest or retain investments of my said estate and to perform all acts and to execute all documents which my said Personal Representative deem necessary, convenient or proper in regard to my property; in the event that my designated representative shall predecease me or shall for any reason refuse to or be unable to serve or to continue serving hereof, then I appoint HENRY J. SMITHSON to serve without bond or surety and with the same powers and authority.

SIXTH. I have served in the Armed Forces of the United States. Therefore, I direct my Personal Representative to consult the legal assistance officer at the nearest military installation to ascertain if there are any benefits to which my dependents are entitled by virtue of my military affiliation at the time of my death. Regardless of my military status at the time of my death, I direct my Personal Representative to consult with the nearest Veterans Administration and Social Security office to ascertain if there are any benefits to which my dependents may be entitled.

IN WITNESS WHEREOF, I have at Fort Leonard Wood, Missouri, this 31 day of OCTOBER, 1985, set my hand and seal to this my LAST WILL AND TESTAMENT, consisting of two

typewritten pages, this included, the preceding pages hereof bearing my signature.

\_\_\_\_\_(SEAL)  
JOHN PATRICK SMITHSON

The foregoing instrument, consisting of Two typewritten pages, this included, was at Fort Leonard Wood, Missouri, this 31st day of OCTOBER, 1985, signed, sealed, published and declared by JOHN PATRICK SMITHSON, the above-named Testator to be his or her LAST WILL AND TESTAMENT in the presence of all of us at one time and at the same time, we at his or her request and in the presence of each other hereunto subscribe our names as attesting witnesses, and we do verily believe that the said Testator is of sound and disposing mind and memory at the date hereof.

WITNESSES:

NAME	ADDRESS	SSN
_____	FORT LEONARD WOOD, MO.	_____
_____	FORT LEONARD WOOD, MO.	_____
_____	FORT LEONARD WOOD, MO.	_____

Page Two of Two Pages

### CALIFORNIA SELF-PROVING CLAUSE

On the date written below, JOHN PATRICK SMITHSON declared to us, the undersigned, that this instrument, consisting of two (2) pages including the page signed by us as witnesses, was his Will and requested us to act as witnesses to it. The Testator thereupon signed this Will in our presence all of us being present at the same time. We now, at his request, in his presence and in the presence of each other, subscribe our names as witnesses.

We declare under penalty or perjury that the foregoing is true and correct, and that this declaration was executed on 31 OCTOBER, 1985 at Ft. Leonard Wood, Missouri.



# DEVELOPING A LEGAL ASSISTANCE SOP

by Major Mark E. Sullivan, USAR\*\*

## I. INTRODUCTION

Developing an office SOP (Standing Operating Procedure) should be one of the first and most important responsibilities of the chief of legal assistance in each SJA office. A well-prepared SOP will ensure uniform treatment of clients in the legal assistance office.<sup>1</sup> Also, newly-assigned legal assistance officers will be able to learn from the SOP the policies and procedures of the office and become acquainted with their duties and responsibilities. The legal assistance SOP will help provide more stability and continuity in the legal assistance office, especially when there is a change in the chief of the division or, as more frequently occurs, in the personnel assigned to that division.

A well-drafted SOP is also an excellent means of briefing an incoming staff judge advocate or deputy SJA concerning the operation of the legal assistance program in that office. Finally, now that Congress has granted a statutory basis for the Army Legal Assistance Program,<sup>2</sup> a legal assistance SOP is one of the best ways of guaranteeing effective, thorough, and competent legal assistance in compliance with the statute. In summary, many potential legal assistance management problems can be avoided if the office has an adequate SOP.

## II. THE NEED FOR AN SOP

It is truly an awesome task to be assigned as a legal assistance officer given the complexity and variety of our clients' problems. For example, on the first day in the office, the new legal

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<sup>1</sup>For a model SOP, see *The Legal Assistance Officer's Deskbook and Formbook*, ch. 1 (TJAGSA 1985) (available to registered users from the Defense Technical Information Center. Information on ordering from DTIC is printed in each issue of *The Army Lawyer* in the Current Material of Interest section).

<sup>2</sup>10 U.S.C. § 1044 (Supp. II 1985).

assistance officer might very well meet clients who ask the following questions:

A. "My wife has sued me in Massachusetts for custody of our children. I have the kids here in North Carolina at Fort Quagmire and don't want to return to Massachusetts to fight the case there. Is there anything I can do? Can I keep the kids here? Do I need to get a civilian attorney?"

B. "My car was just wrecked and my husband was injured in the accident. How can I get my car fixed? Will I have to pay anything? My husband was treated at a civilian hospital and I need to know what to do about the medical bills. Can I have you handle this instead of a civilian attorney?"

C. "I just got this deed from a lawyer in Texas concerning mineral rights in some property that my grandmother left to her heirs. He says in his letter that this must be signed by me as well as my husband so that we can straighten out my grandmother's estate. Do I have to sign this? What am I giving up if I do sign it? Since my mother and father are dead, am I entitled to any share of my grandmother's estate?"

D. "I am divorced and I don't want my ex-husband to have any share of my estate upon my death. Since our children are under eighteen, can I get you to prepare a trust for them, with my sister as the trustee, instead of a simple will?"

E. "My landlord just evicted me because I complained to the City Health Department about the rats and cockroaches in our basement. Can he do this? Can I stop this eviction without the use of a private attorney? Can you help me? Am I going to be hurt because I was two months late in the rent when he served the eviction papers on me? He has locked my tools and lawnmower in the garage out behind our house and I need to get them out. What can I do to get them back?"

F. "I just bought this diamond ring from Sam's Friendly Jewelers downtown. Sam told me that the value of the ring was well over \$2000.00. After a lot of haggling, I paid him \$1800.00 for the ring. Last week I got two appraisals for insurance purposes. They show

values of \$600.00 and \$900.00 respectively. Can I get my money back? Can I sue him for unfair and deceptive trade practices? Do I have to return the ring, or can I get him to refund a portion of my money and keep the ring?"

G. "My wife just died and I need help in settling her estate. Do I have to go through probate? Do I need a civilian lawyer? What happens to the house we owned in joint names as husband and wife? Can I get the title to her car signed over to me so I can sell it? Since she left a lot of insurance money to our children, do I need a guardian to manage that money for them?"

Some of these questions, of course, can be answered only by a veteran legal assistance officer after thorough research into the matter or by contacting a cooperating private attorney who can provide competent and professional advice to assist the legal assistance officer in these areas. A newly-assigned legal assistance officer may find himself or herself overwhelmed by these questions, as would a good many civilian practitioners with equal or greater experience. He or she may go to the chief of legal assistance, who has a great deal more experience (one hopes) in handling these matters, for an "instant answer," but that would result in the chief becoming little more than a resource clearing-house or a source of second opinions. Little time, if any, would be left for the chief to perform his or her own duties.

### III. THE SOP

A well-written legal assistance SOP can solve this problem. The SOP, for example, should direct the officer to the appropriate sources of information (*e.g.*, books and treatises on local or interstate matters), list the resources that may be available for referral or telephone advice (*i.e.*, the American Bar Association's "Operation Stand-By," now in operation in nine jurisdictions), and detail other procedures to be followed in such a situation. A legal assistance SOP is also the best place to record the lawyer referral program used in the office.

It is essential that referral of cases to civilian attorneys be done on a neutral and independent basis, without any showing of favoritism for a particular lawyer. Many states already have in place a lawyer referral service which can be of great benefit to the LAO. In making a referral, the legal assistance officer must ensure that the client is referred to a competent civilian attorney who is willing and able to help with the problem and who is

available to consult with the client for a reasonable fee at the appropriate time.

The legal assistance SOP should also be a tool for maintaining liaison with the local bar or bar association. Local lawyers are familiar with the daily problems faced by legal assistance officers. More often than not, they are ready, willing, and able to provide guidance, telephone assistance, advice, and representation when contacted by the legal assistance officer. The SOP should outline sufficiently the relationship of the office with the local bar and provide guidelines for contacting local attorneys concerning matters of state law. It should also provide guidance for the legal assistance attorney for attending meetings of the local bar and establishing rapport and a good working relationship with local attorneys.

Several other areas should be detailed in the legal assistance SOP. An outline of a model SOP is printed at the Appendix. For example, the section on the Taxpayer Assistance Program should detail the responsibility for counseling individuals on tax problems, for handling inquiries on the completion of tax forms, for obtaining state and federal tax publications and forms, and for instructing unit Taxpayer Assistance Program counselors.

The section on preventive law should give sufficient information on how to prepare and publish pamphlets, hand-outs, and articles at the legal assistance office. It should also address conducting consumer protection and preventive law classes for units and other organizations.

In administrative areas, the SOP should provide specific guidance on counseling soldiers concerning reports of survey, line-of-duty determinations, adverse efficiency reports, and other administrative matters.

One section of the SOP should be devoted to standards for the office library. It is vitally important that legal assistance officers receive and review copies of local or regional materials to update them in matters of state law. The SOP should also establish minimum standards to be followed in maintaining and upgrading the office library, including necessary periodicals, books, treatises, and other documents.<sup>3</sup> A system should be established whereby

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<sup>3</sup>See Dep't of Army, Reg. No. 27-5, Army Law Library Service (1 Aug. 1980) (being revised during 1986) for information on obtaining publications and materials from the Army Law Library Service.

each officer is given an opportunity to review and forward incoming copies of books, hand-outs, magazines, and periodicals.

Another section of the SOP should deal with the procedure for preparing and dispatching correspondence in the office. Incoming correspondence, unless directed to a particular officer, should be reviewed first by the chief of legal assistance and forwarded, if necessary, to a particular lawyer in the office for review and reply. Initial answers to correspondence sent by the newly-assigned legal assistance officer should be reviewed, with the client's permission when necessary, for several weeks by the chief of legal assistance. A reading file, which complies with paragraph 2-8 of AR 27-3, should be circulated. Procedures should be established for setting up priorities for outgoing correspondence, based on the urgency of the correspondence as well as the availability of staff personnel for typing and other duties.

Specific instructions should be given in the SOP regarding counseling of clients with adverse interests, such as a husband and wife in a divorce case. This is especially critical at installations with a single legal assistance office.

The SOP should discuss the employment of reservists. A Reserve liaison officer should be appointed within the legal assistance office to maintain contact with reservists who visit the office on a regular basis or who may be assigned there during their annual training. Because of their limited contact with clients, reservists should be given a thorough orientation before undertaking legal assistance responsibilities using instructions set forth in the SOP.

On many occasions, it may be necessary to refer a client to a non-lawyer resource (*i.e.*, the local small claims court, the Armed Forces Disciplinary Control Board, or the county public health department). The SOP should describe these resources, including when to refer clients and how to monitor the responsiveness of the agency or individual in handling the complaint of the client.

Finally, all TJAG policy letters dealing with the Army Legal Assistance Program and information required during UCMJ art. 6 visits should be appended to the SOP. These letters offer important guidance, indeed they establish mandatory operating procedures, and should be readily available to everyone assigned to a legal assistance office, including reservists.

#### IV. HOW TO PREPARE THE SOP

The first step in preparing a legal assistance SOP is to survey the personnel in the office (officer, enlisted, and civilian) concerning present practices and problems. The SOP cannot be drafted and completed in a vacuum. It must be done with attention to the present capabilities of personnel, their input into problems and solutions, and their suggestions, ideas, comments and criticisms. Also, you must incorporate regulatory requirements and requirements from The Judge Advocate General into the SOP. Additionally, consider any special circumstances in the command. For example, are there units assigned to the installation that are part of the Rapid Deployment Force? If so, you may need a special section on predeployment counseling. The chief of legal assistance should be able to draft a Legal Assistance SOP that is simple as well as thorough. An outline for a model Legal Assistance SOP is provided below. An example of such an SOP is available for modification and use from the Chief of Legal Assistance, OSJA, XVIII Airborne Corps and Fort Bragg, Ft. Bragg, NC 28307. With the completed SOP in hand, the chief of legal assistance can be assured that the first important steps have been taken in providing thorough, competent and effective legal assistance for service members, retirees and their families.

After the "brainstorming" is completed, the SOP may be drafted. Sample formats are printed in chapter 1 of the Legal Assistance Officer's Formbook and Deskbook<sup>4</sup> and in the Appendix to this article. There may also be other SOPs in the SJA office that could be used as a model. Remember, though, that the SOP should be as detailed and complete as possible to ensure that it is a workable tool. Finally, the SOP must be reviewed and updated regularly for it to continue to be a workable tool.

#### V. CONCLUSION

This article is only a broad overview of what a legal assistance SOP should contain and how to prepare it. There is no "right" or "wrong" SOP. If an SOP clearly details the responsibilities and operating procedures of a particular office, and if those who use it find it helpful, then it is a "good" SOP. The most important point of the article is that every legal assistance office must have a complete and accurate SOP.

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<sup>4</sup>Supra note 1.

## APPENDIX

### OUTLINE OF MODEL LEGAL ASSISTANCE SOP

1. General
  - a. Purpose of SOP
  - b. Scope and jurisdiction (duties under AR 27-3, supplemented by those below)
    - i. Commands and personnel covered
    - ii. General instructions on scope of Legal Assistance Program (LAP)
    - iii. Special instructions (i.e., administrative discharge boards, Taxpayer Assistance Program, mobilization exercises (POM and EDRE), conduct of Preventive Law Program under AR 600-14, particular command programs)
2. Responsibilities
  - a. Chief of Legal Assistance
    - i. Supervision of subordinates and overall LAP
    - ii. Monitoring incoming correspondence and assigning same for replies
    - iii. Briefing incoming personnel
    - iv. Keeping SJA and DSJA informed on office statistics, current trends and problems and recent developments of importance
    - v. Alerting SJA and DSJA regarding cases and matters of unusual importance and sensitivity, consistent with ethical requirements of confidentiality
    - vi. Maintaining and upgrading library
    - vii. Monitoring continuing legal education opportunities for office personnel
  - b. Legal Assistance Officers
  - c. NCOIC and staff in office
3. Office Policies and Procedures
  - a. Procedure for seeing clients in office (i.e. walk-ins vs. appointments) and handling emergencies or telephone inquiries

- b. Use of handouts and pamphlets at front desk for routine inquiries
  - c. Liaison with Reservists
  - d. Referral procedures and associating private counsel
  - e. Specific provisions concerning confidentiality of counseling
  - f. Instructions on completion of legal assistance interview card (DA Form 2465)
  - g. Safeguarding documents, exhibits or objects of the client
  - h. Use of clerks and non-lawyer personnel
  - i. Instructions on correspondence
  - j. Referral procedures
  - k. Preventive law policies, including handouts, newspaper articles and classes
  - l. Continuing legal education policies
  - m. Incoming briefings for newly-assigned personnel
  - n. Standards of conduct and conflict of interest
  - o. Preparation of specific documents (i.e., wills, powers of attorney, separation agreements, OER rebuttals, adoptions and name changes)
  - p. Representation of spouses by different offices
  - q. Actions with a "suspense date"
  - r. Command inquiries
4. Standards for Office Library
    - a. Local or regional *Reporter*
    - b. Standard books and treatises (i.e., probate, real estate, family law, consumer protection, immigration and naturalization)
    - c. Local and state periodicals
    - d. *The Army Lawyer* and *Military Law Review*
    - e. *All States Guides*
    - f. *ABA Legal Assistance Newsletter*
  5. Conclusion

# CONTINUING POWERS OF ATTORNEY:

## A MILITARY USE

by Captain Kent R. Meyer\*

### I. INTRODUCTION

Military service demands that soldiers be ready to deploy for duty anywhere in the world with minimal notice. Therefore, it is important that soldiers ensure that their dependents and/or financial commitments will receive appropriate care during their absence. A power of attorney is an inexpensive and expedient means by which the soldier can authorize another to attend to his or her personal and financial affairs. This article will examine one type of power of attorney, the "continuing" power of attorney, the two subcategories of this type, and how they may benefit soldiers in safeguarding their dependents and their property.

### II. POWERS OF ATTORNEY

#### A. *IN GENERAL*

A power of attorney is an instrument in writing<sup>1</sup> by which one person, as principal, appoints another to act as his or her agent, giving the agent (attorney-in-fact) the authority to perform acts on behalf of the principal.<sup>2</sup> The ability to grant a power of attorney is limited by each particular state's law of agency, whether it be codified or part of that jurisdiction's common law. The only restrictions imposed on the use of powers of attorney are those statutory,<sup>3</sup> public policy,<sup>4</sup> and contractual<sup>5</sup> limitations recognized by the particular state which restrict the assignment

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<sup>1</sup>Although most powers of attorney are statutorily required to be in writing before they are valid, absent such statutory limitations some courts recognize that a valid principal-agent relationship can be created without a written instrument and will uphold oral powers of attorney. See *Brown v. Poulos*, 411 N.E.2d 712 (Ind. App. 1980).

<sup>2</sup>3 Am. Jur. 2d *Agency* § 23 (1962).

<sup>3</sup>An example of a statutory limitation is where the state statutes prohibit the granting of a power of attorney authorizing marriage by proxy.

<sup>4</sup>An example of a public policy restriction is the prohibition against the assignment of the right to vote in a public election to another person.

<sup>5</sup>An example of a contractual limitation is the application of the rule of contract law that an obligation owed under a personal services contract may not be delegated to another without the consent of the other contracting party.

and delegation of the power from the principal to the designated agent.

To create a power of attorney, the principal must have that degree of mental capacity necessary to enter into a valid contract.<sup>6</sup> At common law, a power of attorney could be terminated at the will of either the principal or the agent, when the purpose of the power had been accomplished, at the expiration of a specified time, or upon the death or incapacity of the principal.<sup>7</sup> At common law, a power of attorney could continue after the death or incapacity of the principal only when the power of attorney was coupled with an interest.<sup>8</sup>

### ***B. ENFORCEABILITY AND TERMINATION***

It is important to remember that the power of attorney creates an agency relationship only between the principal and the agent; it does not necessarily obligate any third party. Therefore, even though an agent is acting pursuant to the authority of a power of attorney, a third party is not required to recognize that authority or engage in a transaction based on that authority. It is apparent then that "[a]ny power of attorney is useful only to the extent the agent is able to persuade third persons to permit him to transact business on behalf of the principal."<sup>9</sup> To facilitate acceptance in the civilian community, the power of attorney should be drafted in a manner that, at a minimum, conforms to the state requirements for a power of attorney<sup>10</sup> and that provides information sufficient to convince a third party of its validity so that third parties will be willing to accept the offer of authority.<sup>11</sup> If the agent cannot persuade third parties to accept the grant of agency, then the purpose for which the power of attorney was drafted will not be served.

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<sup>6</sup>3 Am. Jur. 2d *Agency* § 24 (1962).

<sup>7</sup>3 Am. Jur. 2d *Agency* §§ 34-40 (1962); Restatement (Second) of *Agency* §§ 120 and 122 (1957).

<sup>8</sup>3 Am. Jur. 2d *Agency* § 60 (1962).

<sup>9</sup>Huff, *The Power of Attorney—Durable and Nondurable: Boon or Trap*, U. Miami 11th Ann. Inst. Est. Plan. 300, 306 (1977).

<sup>10</sup>Usually the power of attorney must be in writing and the principal's signature must be witnessed by a notary public and/or a designated number of witnesses.

<sup>11</sup>Third parties may have many concerns. For example, was the power of attorney properly created? Is the power still in effect? Does the power cover the transaction that is proposed? Is the exercise of the power appropriate and in the interests of the principal? See Whitman & Terry, *How Do Insurance Companies Regard the Durable Power of Attorney?*, 118 Tr. & Est. at note 3 (June 1979).

<sup>12</sup>Restatement (Second) of *Agency* § 120 (1957).

<sup>13</sup>*Id.* § 122.

At common law, the principal's death<sup>12</sup> or incapacity<sup>13</sup> would cause a power of attorney to automatically terminate at a time when it was probably needed most. In cases of incapacity, this meant that there would be no one to manage the principal's affairs until he or she recovered or until a conservator could be appointed. A growing number of states have amended statutorily the common law rule that a power of attorney terminates upon disability of the principal.

### C. LIKELIHOOD OF DISABILITY

Many attorneys and clients underestimate the high statistical probability that a client may become disabled. When insurance statistics are considered, the relatively young age of soldiers, compared with society as a whole, makes it a practical necessity to plan for disability.

Insurance statistics indicate that a twenty-two year old person is seven and one-half times more likely to suffer a disability of ninety days or more than he is to die. Such a disability is four and one-quarter times more likely to occur than death for a sixty-two year old. At age twenty, 789 persons out of 1,000 can expect to suffer a disability of ninety days or more during their lives. At age forty, 635 persons out of 1,000 can expect to suffer such a disability, and at age sixty, 221 persons out of 1,000 can expect to suffer a disability lasting ninety days or longer.

If the disability for a twenty-two year old person has continued for one year there is a fifty-two percent chance that it will continue for an additional two years and a thirty-two percent chance that it will continue for an additional five years. If the person is fifty-seven and the disability had continued for a year, there is a thirty-seven percent chance it will continue for two additional years and a fifty-five percent chance that it will continue for an additional five years.<sup>14</sup>

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<sup>14</sup>Moses & Pope, *Estate Planning, Disability and the Durable Power of Attorney*, 30 S.C.L. Rev. 511, 513 (1979) (citing Schlesinger, *Drafting the Estate Plan to Cover Disability*, U. Miami 7th Ann. Inst. Est. Plan. ¶73.201.1 (1973)).

### III. CONTINUING POWER OF ATTORNEY

#### A. DURABLE POWER OF ATTORNEY

The continuing power of attorney is a statutory development<sup>15</sup> which allows a power of attorney to remain in effect during the incapacity or disability of the principal. Although this concept had been recognized by several jurisdictions prior to the 1970s, the major impetus for the widespread enactment of statutes authorizing continuing powers of attorney was sections 5-501 and 5-502 of the Uniform Probate Code.<sup>16</sup> Section 5-501<sup>17</sup> permits a person possessing legal capacity to execute a power of attorney which becomes, or remains, effective if disability or incapacity occurs after the creation of the power. Under the current law of all fifty states (District of Columbia excluded), a power of attorney will terminate at the death of the principal, but will not automatically terminate if the principal becomes disabled.<sup>18</sup>

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<sup>15</sup>This is a development only in jurisdictions with common law traditions. In jurisdictions based on civil law (i.e., Louisiana) a power of attorney is not revoked by incapacity or disability unless the principal is placed under the control of a guardian. In Louisiana a power of attorney traditionally is durable.

<sup>16</sup>8 U.L.A. 1 (1983).

<sup>17</sup>This section reads:

Whenever a principal designates another his attorney-in-fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal, or This power of attorney shall become effective upon the disability of the principal, or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.

This section was amended in the 1978 version of the Uniform Probate Code. However, many states have not changed their durable power statutes to reflect that revision.

<sup>18</sup>Although many states statutes only use the term "disability," it appears that incapacity is included in that term. This potential problem was clarified in the 1978 revision of the Uniform Probate Code (§ U.L.A. 1 (1983)) and the creation of

Section 5-501 of the Uniform Probate Code provides for two types of continuing powers of attorney. The first type is the "durable" power of attorney which exists, in some form, in every state.<sup>19</sup> The durable power of attorney is not affected by the disability or incapacity of the principal. It is an elective power that, in order to be durable, must conform to the specific requirements of the statute for the particular jurisdiction. Most states require only that a durable power be in writing and contain the words, "This power of attorney shall not be affected by the subsequent disability or incapacity of the principal,"<sup>20</sup> or language to that effect. Several states require other special language or action for an effective durable power of attorney. Therefore, it is important to be aware of the particular statutory requirements of the state.<sup>21</sup>

In addition to complying with the minimal requirements for creating a durable power of attorney, the drafter should be aware that if the power will be used to pass an interest in real property, additional statutory requisites must be met in a number of states.<sup>22</sup> Making a valid conveyance by means of a power of

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the Uniform Durable Powers of Attorney Act (8A U.L.A. 275 (1983)) which uses the words "incapacity" and "disability."

<sup>19</sup>Ala. Code § 21-1-2 (1981); Alaska Stat. § 13.26.325 (1972); Ariz. Rev. Stat. Ann. § 14-6501 (1975); Cal. Civ. Code § 2400 (Deering 1981); Colo. Rev. Stat. § 15-14-501 (1983); Conn. Gen. Stat. § 45-690 (1981); Del. Code Ann. tit. 12, § 4901 (1982); Ala. Stat. § 709.08 (1982); Ga. Code Ann. § 10-6-36 (1980); Hawaii Rev. Stat. § 560:5-501 (1977); Idaho Code § 15-5-501 (1982); Ill. Rev. Stat. ch. 110 1/2, § 11a-23 (1981); Ind. Code Ann. § 30-2-1.5-1 (West 1976); Iowa Code § 633.705 (1983); Kan. Stat. Ann. § 58-610 (1983); Ken. Rev. Stat. § 386.093 (198 ); La. Civ. Code Ann. art. 3027 (West 1981); Me. Rev. Stat. Ann. tit. 18-A, § 5-501 (1981); Md. Ann. Code art. 93-A, § 13-601 (1974); Mass. Gen. Laws Ann. ch. 201B, § 1 (West 1981); Mich. Stat. Ann. § 27.5495 (Callaghan 1980); Minn. Stat. § 524.5-501 (1982); Miss. Code Ann. § 87-3-13 (1982); Mo. Rev. Stat. § 486.555 (1983); Mont. Code Ann. § 75-5-501 (1983); Neb. Rev. Stat. § 30-2662 (1979); Nev. Rev. Stat. § 111.460 (1983); N.H. Rev. Stat. Ann. § 506:6 (1977); N.J. Rev. Stat. § 46:2B-8 (1984); N.M. Stat. Ann. § 45-5-501 (1978); N.Y. Gen. Oblig. Law § 5-1601 (McKinney 1978); N.C. Gen. Stat. § 32A-9 (1983); N.D. Cent. Code § 30.1-30-01 (1976); Ohio Rev. Code Ann. § 1337.09 (1983); Okla. Stat. § 1051 (1974); Ore. Rev. Stat. § 126.407 (1981); Pa. Con. Stat. § 5604 (1982); R.I. Gen. Laws § 34-22-6.1 (1983); S.C. Code Ann. § 32-13-10 (Law Co-op. 1976 and Cum. Supp. 1984); S.D. Codified Laws Ann. § 59-7-2.1 (1976); Tenn. Code Ann. § 34-13-102 (1983); Tex. Prob. Code Ann. § 36A (Vernon 1980); Utah Code Ann. § 75-5-501 (1978); Vt. Stat. Ann. tit. 14, § 3051 (1982); Va. Code § 11-9.1 (1983); Wash. Rev. Code § 11.94.010 (1982); W.Va. Code § 27-11-6 (1983); Wis. Stat. § 248.07 (1981); Wyo. Stat. § 34-9-101 (1977).

<sup>20</sup>This is the wording used in section 1 of the Uniform Durable Power of Attorneys Act which was adopted from section 5-501 of the Uniform Probate Code.

<sup>21</sup>For an example, see the Connecticut statute, Conn. Gen. Stat. § 45-690 (1976).

<sup>22</sup>Alaska, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Missouri, Nevada, New Hampshire, New Mexico, Rhode Island, South Carolina, Tennessee, Utah, Washington, and Wisconsin.

attorney could require that the power of attorney be recorded in the same office where any other document evidencing the conveyance would have been recorded. Such a recorded power may remain in effect until a proper revocation is recorded or until the power is terminated by a marginal release on the power itself.<sup>23</sup>

### B. "SPRINGING" POWER OF ATTORNEY

It is important to realize that in the durable continuing power of attorney, the principal is granting a power that can be immediately exercised without the principal first being declared disabled or incapacitated. The disabling factors only prevent the power of attorney from being automatically terminated as it would have been at common law. Because many people are reluctant to grant a presently exercisable power of attorney to another while still capable of managing their affairs, most jurisdictions<sup>24</sup> allow the creation of a power of attorney that becomes effective only upon the occurrence of a future disability.

This second type of continuing power of attorney is the "springing"<sup>25</sup> power which is effective only when the principal becomes disabled or incapacitated. It is an alternative available to those individuals who want to ensure that their affairs will be managed upon their incapacity but who do not want their attorney-in-fact to assume management of their affairs while they remain capable.

To create a "springing" power, most states require only that the power of attorney be in writing and that it include the language, "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words that indicate the same intent.<sup>26</sup> Because the "springing" power would not be effective until there is a determination of incapacity,<sup>27</sup> it may be more difficult to create than the durable power because the "springing" power of attorney also should include the condition or occurrence that will make the power effective and define the method to be used to determine if that condition has in fact occurred. For example, where the power of attorney would

<sup>23</sup>For example, see the Kentucky statute, Ken. Rev. Stat. Ann. § 362.370 (1970).

<sup>24</sup>States that do not appear to allow the "springing" power of attorney are Connecticut, Florida, Georgia, Illinois, Louisiana, New Hampshire, New York, Ohio, Oregon, South Carolina, Texas, Virginia, West Virginia and Wyoming.

<sup>25</sup>This is analogous to a springing use. Black's Law Dictionary 1383 (5th ed. 1979).

<sup>26</sup>See Uniform Durable Power of Attorney Act § 1, 8A U.L.A. 277 (1983).

<sup>27</sup>A "triggering" condition is that event or condition which causes the power to become effective.

"spring" into being based on the medical disability of the principal, a certificate executed by a physician attesting to the disability may be required. Having that information in the power of attorney tells the agent when the authority begins and clearly establishes the agent's authority and the validity of the power of attorney to third parties.

Using the "springing" power also may be more difficult than using the durable power because when it is presented by the agent to a third party, that person may require documentary evidence that the "triggering"<sup>28</sup> condition has occurred. It is not recommended that the "springing" power require a judicial finding of incapacity to trigger its effectiveness. Although the relative certainty of a judicial determination of incapacity may make the power of attorney more acceptable to third persons, requiring such a determination would defeat its purpose. In addition to information about the "triggering" condition and the manner in which it will be determined, the "springing" power of attorney should also provide a means of notifying the agent that the condition transferring authority to him or her has occurred and that the fiduciary duty to the principal has commenced.

### C. PURPOSE OF THE UNIFORM ACTS

The goal of the Uniform Probate Code and the Uniform Durable Power of Attorney Act<sup>29</sup> was to promote uniform durable powers of attorney legislation throughout the United States. Although uniformity has not resulted, a majority of states have adopted the model language of one or both acts verbatim. A review of state continuing power statutes reveals several common trends. Sufficient differences also are apparent, however, so that an attorney drafting a continuing power of attorney must check the laws of the particular state. To illustrate the various differences that exist it will be helpful to review three states.

#### 1. Texas.

The Texas Probate Code<sup>30</sup> provides that a durable power of attorney can be created by using the specific wording in the statute or similar wording that indicates the principal's intent to

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<sup>28</sup>Some commentators contend that it may be possible for the principal to use a "self-certification" procedure by which the principal decides when the power becomes effective. See *Drafting the Durable Power of Attorney, A System Approach*, Francis J. Collin, J., John J. Lombard, Jr., Albert L. Moses, and Harley J. Spitzer, page 61 (1984).

<sup>29</sup>8A U.L.A. 275 (1983).

<sup>30</sup>Tex. Prob. Code Ann. § 36A (Vernon 1980).

create a durable power. No provisions exist for a "springing" power. It is unclear whether that type of power of attorney would be recognized by Texas courts. The power created must be in writing and the authority, once created, of the attorney-in-fact will terminate when a guardian has been appointed and qualified by the court. Because Texas has not adopted provisions allowing the agent to act for the principal until actual notice of the principal's death, the common-law rules concerning automatic termination at death apply. Although not stated in the Probate Code, if the principal wishes to authorize the conveyance of real property, it must be specifically authorized in the power of attorney.<sup>31</sup>

## 2. *South Carolina.*

The South Carolina durable power of attorney statute,<sup>32</sup> like that of Texas, only provides for the creation of a durable power of attorney. The "springing" power is not mentioned and does not appear to be permitted. Until 1984, the South Carolina statute appeared to require that the specific language provided in the statute be used to create a valid power of attorney because the "or similar words" language present in the Texas statute was not present. A 1984 amendment to the South Carolina statute now allows use of language different from that stated in the statute as long as it indicates an intent to create a durable power.

Although specific language is no longer required, other formal steps must be accomplished to create a valid durable power of attorney. The act requires that the power of attorney "be executed and attested with the same formality and with the same requirements as to witnesses as a will. In addition, the instrument shall be probated and recorded in the same manner as a deed."<sup>33</sup> Although the 1984 revision of the statute indicates that the power must be recorded in the county where the principal resides, to eliminate any problems, it may be wise not only to file in the principal's county of residence but also in the agent's county of residence and any county where the principal owns real property.

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<sup>31</sup>Tex. Prop. Code Ann. § 12.001 (Vernon 1984).

<sup>32</sup>S.C. Code Ann. § 32-13-10 (Law. Co-op. Cum. Supp. 1984).

<sup>33</sup>S.C. Code Ann. § 32-13-10 (Law. Co-op. Cum. Supp. 1984). South Carolina law requires that a will, to be valid, must be signed by the testator in the presence of three or more credible witnesses who each must sign in the presence of the testator and the other witnesses. See S.C. Code Ann. § 21-7-50 (Law Co-op. 1976 & Cum. Supp. 1984). For the recording requirements, see S.C. Code Ann. §§ 30-6-10 to 560 (Law Co-op. 1976 & Cum. Supp. 1984).

### 3. *Kansas.*

The Kansas durable power of attorney statute,<sup>34</sup> unlike those of Texas and South Carolina, permits the creation of a "springing" power of attorney in addition to the durable power. The only requirements for creation of a continuing power under Kansas law is that it be in writing and that it use the language provided in the statute or similar language showing the same intent. No formal execution is required; however, the power "may be acknowledged or proved in the same manner as conveyances of land."<sup>35</sup> The Kansas statute also recognizes that a power of attorney may contain provisions nominating a guardian for the principal's estate and/or person. If a guardian is appointed, the power of attorney is not automatically terminated,<sup>36</sup> but is merely terminable or subject to amendment at the guardian's discretion. The common law rule that powers of attorney terminate immediately upon the principal's death is not strictly applied. Instead the Kansas statute adopted the position promoted by section 5-502 of the Uniform Probate Code that a power of attorney is not revoked until the agent, acting in good faith, has actual knowledge of the principal's death.<sup>37</sup>

## D. CONFLICT OF LAWS

The lack of uniformity in state law matters more to those in the armed services than to those in the civilian population. Due to frequent reassignments, it is not unusual for a soldier to be domiciled in State *A*, presently assigned in State *B*, and own real property in State *C* or *D* that was purchased during previous assignments. The likelihood of such multi-state connections makes it important to know which state's law should be applied when drafting a continuing power of attorney.

Conflict of laws issues will result primarily when a continuing power of attorney drafted under the laws of one state (State *A*) is not recognized under the laws of another (State *B*) or, more commonly, when the requirements of State *B* for creating a

<sup>34</sup>Kan. Stat. Ann. §§ 58-610 to 617 (1983).

<sup>35</sup>Kan. Stat. Ann. § 58-601 (1983).

<sup>36</sup>Seven states require that a continuing power of attorney terminate immediately upon creation of a conservatorship/guardianship: Florida, Illinois, Kentucky, Louisiana, Mississippi, West Virginia, and Wyoming.

<sup>37</sup>Kansas also has extended the actual knowledge concept to non-continuing powers of attorney. If an agent is acting in good faith upon a non-continuing power of attorney, the disability or incapacity of the principal will not render the exercise of the power invalid as long as the agent acted without actual knowledge of the disability or incapacity of the principal. See Kan. Stat. Ann. § 58-613(b) (1983).

continuing power are more formal than those of State A where it was drafted. It can be argued that a power of attorney drafted pursuant to the laws of State A should be recognized in State B unless the transaction concerns real property located in State B or violates the public policy of State B. "In the field of conflict of laws, the rule that the forum of judicial acts is governed by the law of the place of execution is one of the oldest and best established legal precepts in private international law."<sup>38</sup> If real property is affected by the agent's exercise of a power of attorney, it is necessary that the power of attorney be drafted to comply with the law of the situs of the real property.<sup>39</sup>

When drafting a continuing power of attorney it is important to discover not only what degree of control the principal wishes to give the agent, but also what type of property is involved and where that property is located. The attorney would be wise to tailor the power of attorney, to the maximum extent possible, to comply with the legal requirements of each state in which its use is contemplated.<sup>40</sup>

### E. DRAFTING CONSIDERATIONS

Often the most difficult decision faced by the soldier is not whether to create a power of attorney but to whom should the authority be given. The attorney-in-fact (agent) selected should be completely trustworthy and should possess the experience necessary to effectively accomplish the objectives of the power. The agent usually selected by a soldier will be the spouse. If the soldier feels, however, that the spouse is not capable of performing some of the duties necessary, it may be advisable to divide

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<sup>38</sup>In *re Alexandravicus*, 83 N.J. Super. 303, 313, 199 A.2d 662, 667 (1964). The case also cites this excerpt from Elder, *Powers of Attorney in International Practice*, 98 U. Pa. L. Rev. 840, 863 (1950), which has general application to interstate conflict of laws: "The safest guide through the maze of Conflict of Laws should be the principle *et res magis valeat quam pereat* [that it may rather become operative than null]. Barring considerations of grave public policy, no honest legitimate intention of a party should ever be frustrated by the application of technical rules of law of one or the other jurisdictions involved." . . .

<sup>39</sup>See generally *Polson v. Stewart*, 167 Mass. 211, 45 N.E. 737 (1897); Restatement (Second) of Conflict of Laws § 232 (1969); 16 Am. Jur. 2d *Conflict of Laws* § 26 (1979).

<sup>40</sup>One commentator suggests that even a "springing" power properly executed in one state would be recognized in North Carolina even though the laws of that state do not provide for the creation of that type of continuing power. See Thigpen & Thigpen, *The Continuing Power of Attorney—An Essential Instrument*, 5 Comp. L. Rev. 305, 320 (1963).

the responsibility among several people.<sup>41</sup> If multiple agents are selected, it is important that the limitations of their individual responsibilities be clearly defined in the power of attorney. If the duties require joint determinations, the power of attorney must state how a decision will be determined, *i.e.*, whether it must be by unanimous action or by majority decision.

The evolution of the continuing power illustrates the necessity of providing for successive agents because the power of attorney may survive the agent selected. If this appears probable, it may be prudent to appoint alternate successive agents and clearly define the condition or event that would warrant a change of agents. This problem may be avoided by selecting a corporate instead of an individual agent.<sup>42</sup> If a corporate agent is to be appointed, the applicable state statutes should be reviewed to ensure that no restrictions concerning the activities conducted by corporate agents would render the power of attorney invalid.<sup>43</sup>

### ***F. DURATION AND TERMINATION OF THE POWER OF ATTORNEY***

As noted earlier, the primary difference between a power of attorney at common law and a continuing power of attorney is that a continuing power does not terminate upon the disability or incapacity of the principal, or, in the case of a "springing" power of attorney, comes into being only upon the occurrence of a specified event. Because the principal's potential liability for the actions of the agent are more extensive with a continuing power, it is even more important that the attorney ensure that the soldier-principal understands how the power may be terminated and the extent of his or her potential liability. Unless the power contains a specific date or other condition providing for termination, it remains in effect until one of the parties acts to terminate the power or the agent dies and no successive agent has been appointed. As long as the principal has the requisite mental capacity, he or she may revoke a continuing power of attorney at any time.<sup>44</sup> But, as at common law, the principal bears the burden of proving that revocation occurred.

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<sup>41</sup>One example would be to make the spouse responsible for the personal care of the principal, the principal's stockbroker responsible for certain investments, and the business partner responsible for business decisions.

<sup>42</sup>An example would be the appointment of an incorporated trust company to act as attorney-in-fact (agent) concerning the principal's financial investments.

<sup>43</sup>*See, e.g.*, Kan. Stat. Ann. § 59-1701 (1983); *but see* Kan. Stat. Ann. § 59-3001 (1983).

<sup>44</sup>3 Am. Jur. 2d Agency § 60 (1962).

Revocation may be oral or written. The principal may remain bound after terminating the agency relationship, however, if a third person innocently deals with an agent who does not disclose that his or her authority has been revoked.<sup>45</sup> This problem is not unique to continuing powers of attorney, but it may be aggravated in states that preclude revocation of a recorded continuing power until the revocation is filed in the same office where the power was recorded.<sup>46</sup> Also, most states provide that a continuing power will not terminate until the agent receives actual knowledge of the principal's death as long as the acts of the agent using that authority were done in good faith.<sup>47</sup>

### G. SCOPE OF AUTHORITY

The lawyer also should discuss with the soldier-principal how much authority to give the agent. This is important and should be carefully considered. The durable and the "springing" continuing powers of attorney, like the power of attorney at common law, either may be general, providing the agent with a broad grant of authority to act for the principal, or limited, restricting the scope or nature of the agent's authority. The durable nature of a continuing power carries with it an inherent danger of abuse; for the soldier's protection it would be advisable to limit the agent's authority to specific acts or duties. Not only will such specificity protect the principal by making the power of attorney more definite, it may also make it more readily acceptable to third parties. Many third parties will not accept a power of attorney if it does not specifically authorize the transaction the agent is attempting to engage in on behalf of the principal.<sup>48</sup>

As stated earlier, common law did not require third parties to accept a power of attorney and deal with the agent. This reluctance to accept powers of attorney prompted a number of states to include protections in their statutes for third parties who deal in good faith with an agent acting under the supposed authority of a continuing power of attorney.<sup>49</sup> As a result of this statutory protection for third parties, several commentators have

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<sup>45</sup>See generally *id.* §§ 37, 43, 44. For a discussion of what will be considered sufficient notice between a principal and his agent, see Restatement (Second) of Agency § 11 (1957).

<sup>46</sup>Ken. Rev. Stat. Ann. § 382.370 (1970).

<sup>47</sup>Only Georgia, Texas, and Hawaii require that the power terminate at the time of death (Georgia has an armed forces exception), rather than when the agent receives notice of death.

<sup>48</sup>See generally Whitman & Terry, *How do Insurance Companies Regard the Durable Power of Attorney?*, 118 Tr. & Est., June 1979, at 50.

<sup>49</sup>See, e.g., 20 Pa. Cons. Stat. § 5603(a)(5) (1982).

asserted that a third party is now legally obligated to accept and act on a power of attorney as long as it is valid.<sup>50</sup> There has been no litigation on this issue, but, even if the commentators are correct, drafters should continue to attempt to create a power of attorney that will be acceptable to third parties without having to resort to judicial enforcement because the typical agent in a continuing power will rarely be in the position, either financially or emotionally, to force the issue by suing the third party to compel acceptance of the power of attorney.

### ***H. USES FOR CONTINUING POWERS OF ATTORNEY***

Historically, the primary use of a power of attorney was to allow an agent to exercise control over the property and affairs of a principal who was capable of controlling the agent's acts. Because a durable or a "springing" power of attorney endures the principal's incapacity, both are useful tools for managing the principal's assets without having to resort to potentially expensive judicial mechanisms such as conservatorship, guardianship, or a revocable trust.<sup>51</sup> In many states a continuing power may continue to be effective after a conservatorship is judicially created,<sup>52</sup> and in several states the principal, using a continuing power, may nominate a conservator if protective proceedings are required.<sup>53</sup> By using a durable or a "springing" power, soldiers in the low to middle income levels can obtain the same protection that people with greater incomes can obtain who use the more expensive trust devices.

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<sup>50</sup>See generally Thigpen & Thigpen, *The Continuing Power of Attorney—An Essential Instrument*, 5 Comp. L. Rev. 305 (1983); Lombard, *Asset Management Under a Durable Power of Attorney—The Ideal Solution to Guardianships or Conservatorships*, 9 Prob. Notes 189 (1983).

<sup>51</sup>For a more complete discussion of the uses of continuing powers of attorney, see generally Hamann, *Durable Powers of Attorney*, 122 Tr. & Est., Feb. 1983, at 28.

<sup>52</sup>The states are divided on this issue. The minority requires that a continuing power of attorney terminate when a guardianship or conservatorship is created. The majority allows the continuing power to remain in effect; however, the attorney-in-fact is then accountable to the person (fiduciary) charged with managing the principal's property. The fiduciary then has the same power to revoke or amend the power of the attorney that the principal would have but for his incapacity or disability.

<sup>53</sup>States allowing nomination of a guardian are Alabama, Idaho, Illinois, Kansas, Ohio, and Wisconsin.

## ***I. MILITARY APPLICATION OF THE CONTINUING POWER OF ATTORNEY***

A continuing power of attorney can and should be used by soldiers in the same manner and for the same purposes as in civilian society. Because of the unique nature of military service, however, it may be advantageous to create "springing" powers that are effective upon events other than disability or incapacity. With the inherently mobile nature of military service, it is possible that a soldier may be required to deploy to a distant and remote location with little prior notice.<sup>54</sup> As a result, the soldier may have financial or family obligations that could be neglected if no arrangements for their care were made prior to movement. It is not uncommon for a soldier in the field to urgently require a power of attorney to send to his or her spouse to allow the spouse to cash the monthly paycheck or make withdrawals from a bank account solely in the soldier's name.<sup>55</sup>

A "springing" power of attorney that would become effective upon deployment could be prepared and placed in the soldier's deployment packet to be effective if deployment occurs. The "springing" power, in jurisdictions permitting them, would be more advantageous than the durable power because the agency relationship would be created only when the actual need arises.

As with a "springing" power that becomes effective upon incapacity or disability, the power used for deployment should specify the conditions that would make the agent's authority effective and should indicate the official or office responsible for certifying that the condition or event has occurred. This could be accomplished by having the unit adjutant or rear detachment commander execute a "certificate of deployment," or other semi-official document, attesting that the soldier has deployed in the manner prescribed by the power of attorney and attach it to the power of attorney.

Although there is no statutory basis specifically permitting the use of a "springing" power of attorney in this manner, a valid argument for such use can be asserted. The fundamental change in common law caused by the adoption of the Uniform Probate Code and Uniform Durable Powers of Attorney Act (or deriva-

<sup>54</sup>*E.g.*, the military action in Grenada in October 1983.

<sup>55</sup>Other typical uses of a power of attorney by military members or dependents are transporting and storing household goods, licensing and registering motor vehicles, selling personal property, and purchasing or selling real property.

tives of them) was not that a power of attorney could spring into existence at the occurrence of a specified event. Rather, the significance of those statutes was that they allowed powers of attorney to remain effective even if the principal's mental or physical condition would have caused the power to terminate at common law.

A contract between parties can be conditioned on the occurrence of an uncertain future event.<sup>66</sup> The same principle could be applied to permit the creation of an agency relationship in the form of a "springing" power of attorney. As long as the contingency used to initiate the power of attorney does not violate state law or public policy, and is defined with sufficient specificity to allow the agent to know when the authority arises, no legal prohibition should exist. In a continuing power of attorney, as with a regular power of attorney, the difficulty is not creating a legal power but creating one that is persuasive enough to cause a third person to accept the agent's authority to act for the principal.

#### IV. CONCLUSION

Durable and "springing" continuing powers of attorney can provide soldiers with limited estate-guardianship protection and/or allow soldiers to care for their families during absences due to deployment. Their use can promote the interests of the command in promoting smoother deployments by reducing the number of soldiers that need to see a lawyer before deployment. Because of this flexibility the judge advocate should work to maximize the use of continuing powers. The potential for the use of continuing and springing powers, in most instances, is limited only by that of the imagination of the judge advocate.

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<sup>66</sup>See generally S. Williston, Williston on Contracts §§ 663, 666A (1961).



## PART VI: PHYSICAL DISABILITY

### THE ARMY PHYSICAL DISABILITY SYSTEM

by Captain Eva M. Novak\*

#### I. INTRODUCTION

"My Legal Assistance Officer said the PEB obviously doesn't know what they're doing, they can't even add: 40+20 isn't 50!"

"The Legal Assistance Officer said the PEB probably lowered me to 10% because of the recent emphasis on trimming costs."

I am the judge advocate appointed to represent soldiers who have requested a formal hearing before the Washington Physical Evaluation Board. Comments like those above, and my own lack of knowledge while a legal assistance officer when presented with a soldier's partially amputated finger and the question, "What do I get for this?," prompted this article. It is not intended as a complete treatise on the Army physical disability system, but rather as a quick information source for legal assistance officers and defense counsel in the field.<sup>1</sup>

#### II. DISABILITY PROCEDURE

##### A. MOS/MEDICAL RETENTION BOARD

Army Regulation 600-60<sup>2</sup> established the Physical Performance Evaluation System on 1 July 1984, which provides for an MOS/medical retention board (MMRB) to screen all soldiers with a permanent "3" profile on their "PULHES"<sup>3</sup> on DA Form 3349.

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<sup>1</sup>For a more complete treatment of the Army disability system, see Pardue, *Military Disability in a Nutshell*, 109 Mil. L. Rev. 149 (1985).

<sup>2</sup>Dep't of Army, Reg. No. 600-60, Physical Performance Evaluation System (31 Oct. 1985) (hereinafter cited as AR 600-60).

<sup>3</sup>The Army physical profile series is known as PULHES. The letters symbolize areas affected by a disability: P (physical - conditions affecting overall health); U (upper body); L (lower body); H (hearing); E (eyes); S (psychiatric). Each area is assigned a number from one (unrestricted) to four (most restricted), and is used with the diagnoses and letter-coded physical limitations on DA Form 3349, Physical Profile Board Proceedings (1 June 1980) to describe a soldier's state of health and duty restrictions. The estimated number of soldiers with a "3" or "4"

Soldiers who received a "4" prior to 1 July 1984 are also required to appear before an MMRB. Soldiers with approved service retirements, Department of Army (DA) or locally imposed bars to reenlistment, or pending administrative separation need not be referred to an MMRB. The MMRB can recommend retention of the soldier in the primary military occupational specialty (MOS), a probationary observation period and return to the MMRB, reclassification into another MOS, or referral to the Army's physical disability system. This recommendation is based on a determination of whether the soldier is "fit," *i.e.*, if he or she "can perform satisfactorily in . . . [the] PMOS . . . in a worldwide field environment."<sup>4</sup> The soldier's rights to witnesses and presentation of evidence before the board are outlined in paragraph 3-3d(6) of AR 600-60. Legal counsel is not authorized. If the MMRB recommends reclassification and the requested MOS is not available, or if the MMRB recommends referral to the disability system, the soldier's case is processed as explained below.

### ***B. MEDICAL EVALUATION BOARD***

Soldiers whose ability to perform their duties is questionable because of a medical impairment are referred to a medical evaluation board (MEBD) for medical evaluation. The soldier is counseled concerning MEBD procedures and results by the medical treatment facility physical evaluation board liaison officer, a nonlawyer who is usually located in the patient administration division. Counseling follows the outline provided in AR 635-40, Appendix C.<sup>5</sup>

The MEBD is convened under AR 40-3, chapter 7.<sup>6</sup> It is composed of at least two physicians, three in mental cases. One of the physicians is often the soldier's treating physician, and, one must be a dentist in dental cases or a psychiatrist in mental cases. The board meets informally, and a soldier whose condition permits should be given the opportunity to appear in person to present his or her views. While there is no prohibition against representation by counsel or presentation of evidence or witnesses, these are not enumerated rights of the soldier and thus

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and corresponding physical limitations in the face of the Department of Army's goal to have as fit a fighting force as possible precipitated the Physical Performance Evaluation System.

<sup>4</sup>AR 600-60, para. 2-1a.

<sup>5</sup>Dep't of Army, Reg. No. 635-40, Personnel Separations—Physical Evaluation for Retention, Retirement, or Separation, Appendix C (C3, 13 Dec. 1985) (hereinafter cited as AR 635-40).

<sup>6</sup>Dep't of Army, Reg. No. 40-3, Medical Services—Medical, Dental and Veterinary Care (15 Feb. 1985).

would likely be left to the discretion of the MEBD convening authority. The MEBD will refer the soldier to the physical evaluation board (PEB) if a soldier has a condition listed in the retention standards in AR 40-501,<sup>7</sup> or has been referred to an MEBD by an MMRB. After approval by the approving authority, the MEBD proceedings are forwarded to the soldier, who has three working days, with reasonable delays upon request, to submit a written appeal. After reconsideration and final approval, the MEBD proceedings are forwarded to the physical evaluation board.

### *C. PHYSICAL EVALUATION BOARD*

The Army has four physical evaluation boards established by AR 635-40, which are charged with deciding whether soldiers are fit or unfit and what percentage disability rating, if any, their conditions merit. The general procedures within the U.S. Army Physical Disability Agency (USAPDA) will be discussed first, and the various possible findings of the PEB will then be discussed in turn.

#### *1. General Procedures.*

The PEB, consisting of at least two field grade line officers (the president and the personnel management officer) and a field grade physician or a DA physician, first makes its findings and recommendations in an informal hearing. Those findings and recommendations are provided to the soldier, who may agree, disagree, submit a written appeal, or demand a formal hearing with or without personal appearance and with a judge advocate appointed as counsel or with his or her own counsel hired at no expense to the government. The soldier is again counseled by a trained physical evaluation board liaison officer, a nonlawyer, concerning the basis for the findings and the percentage of recommended disability, the right to appeal, to request a hearing, representation by legal counsel, and the financial implications, including tax status, of temporary or permanent retirement, severance pay, Survivor Benefit Plan, civil service employment, and Veterans Administration and Social Security benefits, in accordance with AR 635-40, Appendix C.

The soldier's first option, if he or she disagrees with the informal findings, is to submit a written appeal. The PEB will reconsider the case and send the soldier the results for concur-

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<sup>7</sup>Dep't of Army, Reg. No. 40-501, Medical Services—Standards of Medical Fitness, ch. 3 (5 Dec. 1960) (C34, 1 Dec. 1983).

rence, nonconcurrence, or a request for a formal hearing. Unless a hearing is requested, the case will be forwarded to the USAPDA's Disability Review Counsel (DRC).

The soldier's second option is to request a formal hearing with or without personal appearance and with appointed counsel or counsel of choice. If appointed military counsel is requested, the soldier is represented by the counsel appointed to the local PEB. This position is staffed by rotation by judge advocates of the local SJA offices at the Fort Gordon, Fort Sam Houston, and Presidio of San Francisco PEBs. Counsel at the Walter Reed Army Medical Center PEB is generally assigned to HQ, USAPDA for a tour of duty. The soldier may be represented by other military counsel, if available and released by his or her supervising staff judge advocate, or by civilian counsel at his or her own expense; in either case, the regularly appointed counsel acts as associate counsel. The soldier's rights to testify, to present and cross-examine witnesses, and to submit evidence are detailed in AR 635-40, paragraph 4-20, and are similar to rights at other Army administrative board hearings.

After the hearing and consideration of the rebuttal to the findings, if the soldier submitted one, the case is forwarded to the DRC. The DRC is generally composed of the president and personnel management officer (both field grade line officers), a field grade judge advocate, and a DA physician. The council reviews all PEB cases for fairness and uniformity, and may also recommend revision of the PEB's findings and recommendations.

If there is no recommended revision, or if the soldier concurs with the revision or fails to submit a rebuttal, the case is finally decided by the CG, USAPDA, and forwarded to MILPERCEN for appropriate disposition. If the soldier does not concur with the revision of the PEB finding and recommendation and submits a rebuttal, the case is forwarded to the Army Physical Disability Appeal Board,<sup>8</sup> a component of the Army Council of Review Boards (ACRB), for final review. Finally, the soldier has two post-separation avenues of appeal: first, to the Army Disability Rating Review Board,<sup>9</sup> another component of the ACRB established to review disability percentage ratings on request of a soldier retired because of physical disability; and, second, to the Army Board for Correction of Military Records<sup>10</sup> which may

<sup>8</sup>For the procedures governing this board, see AR 635-40, paras. 3-8 and 4-22.

<sup>9</sup>For the procedures governing this board, see AR 635-40, paras. 4-26 and 4-27.

<sup>10</sup>For the procedures governing this board, see Dep't of Army, Reg. No. 15-185, Boards, Commissions, and Committees—Army Board of Correction of Military

review all cases. AR 635-40, chapter 8 details the minor variations on processing and disability pay for the Reserve Components, and AR 635-40, paragraph 4-22a(5), explains the additional review by the Office of the Secretary of Defense for general and medical corps officers.

## 2. Possible Findings.

*Fit or unfit.* A "fit" soldier is one who is physically able "to perform the duties of his [or her] office, grade, rank or rating . . . Army-wide under field conditions."<sup>11</sup> Thus a soldier performing garrison duties satisfactorily but who has a profile preventing field duty, or any other restriction preventing assignment to isolated areas, would not be deployable world-wide under field conditions and, therefore, may be "unfit" for retention on active duty.

*Fit by presumption.* AR 600-60, paragraph 2-2b, and AR 600-60, paragraph 4-5 explain that a soldier being processed for nondisability separation or retirement, and whose career has not been interrupted by a physical disability, is presumed physically fit at the time of separation and is not entitled to Army disability compensation. As will be discussed below, these soldiers may be entitled to Veterans Administration (VA) disability benefits upon the expiration of their term of service without reenlistment or upon retirement, but Army disability benefits are intended only for soldiers whose careers are interrupted by service-incurred or service-aggravated disabilities. This presumption is the source of bitter disappointment and frustration for soldiers who have endured progressive back, knee, or other ailments, and who feel that at retirement the Army, which caused the disabilities, not the VA, should recognize their service with its more lucrative disability payments.<sup>12</sup> Many of these soldiers unquestionably are

Records (1 Apr. 1977).

<sup>11</sup>AR 635-40, Glossary and the almost identical description of fitness in *id.* para. 2-1. The same "office, grade, rank, or rating under worldwide field conditions" language appears as the Army policy in AR 600-60, para. 2-1b.

<sup>12</sup>As an example, a married lieutenant colonel with twenty-four years of active duty service in 1986, one child, and disabilities rated at 40% would receive the following: if he or she requested retirement or faced mandatory separation because of a selective retention board, the retirement pay would be \$2183.04 (60% of the base pay as of 1 October 1985). The officer would generally be presumed fit and would turn to the VA for its tax-free disability benefits. The VA, from its rates effective 1 December 1985, would provide a tax-free offset of \$328, for a taxable income of \$1855. Assuming the officer is in a 20% tax bracket, the monthly income would be \$1812. If he or she was retired because of a service-connected disability interrupting the career, 40% of the basic pay would not be taxable, for a taxable income of \$728 or a monthly income, assuming the same tax bracket, of \$2037. For a full explanation of the tax consequences of disability income, see AR

not fit for retention in the Army. *But*, even through their long-standing and slowly progressing impairments and exemplary duty performance did not prevent successful military careers, they receive VA, not Army, disability compensation if they received a nondisability separation or retirement from the Army. Although the presumption was challenged in *Davidson v. United States*,<sup>13</sup> it has not yet been overturned and it is properly followed by the USAPDA. Soldiers contemplating retirement because their impairments are preventing full performance of their duties should be advised to have doctors and commanders begin disability processing before they submit applications for voluntary retirement.

*Existed prior to service.* A PEB may find that a soldier is unfit due to a condition that "existed prior to service" (EPTS). The governing principles are in AR 635-40, paragraph 2-3, and allow the PEB to use "accepted medical principles," based on such factors as biopsy reports, case histories, X-rays, or incubation periods, to determine that a condition is EPTS.<sup>14</sup> A condition need not have been symptomatic prior to entry on active duty (Basic Active Service Date, not Pay Entry Basic Date). The PEB then determines whether the condition has been permanently worsened over and above natural progression by service on active duty. If so, the degree of disability in excess of that existing at the time of entry on active duty will be determined. If not, the condition is not ratable and separation without disability benefits is indicated and recommended. Finally, if the condition has become "unfitting" through natural progression, continued progression after three years will be considered as evidence in support of service aggravation. (This rule is under review.) Thus a soldier with six years active duty who has back pain at the site of a congenital defect would be determined to suffer from service aggravation of an EPTS condition. His disability rating would reflect the service aggravation less an appropriate EPTS factor.

### 3. *Percentage of Disability*

After finding that the soldier is unfit for retention on active duty because of a ratable "unfitting" condition, the Army uses the Veterans Administration Schedule for Rating Disabilities (VASRD)<sup>15</sup> to determine the appropriate percentages for all the

635-40, Appendix C.

<sup>13</sup>650 F.2d 285 (Ct. Cl. 1980).

<sup>14</sup>See also Dep't of Army, Reg. No. 600-33, Personnel-General--Line of Duty Investigations, para. 2-8 (15 June 1980).

<sup>15</sup>38 C.F.R. Chapter 1, Part 4 (1984), as modified by AR 635-40, para. 4-18i and Appendix B.

soldier's disabilities. The VASRD lists medical conditions, subdivides each by severity, and assigns a percentage to each subdivision. Thus, soldiers dissatisfied with the percentage determined by the PEB at its informal hearing should gather evidence to present to the formal PEB hearing to show why their symptoms and conditions correspond to the subsections of the VASRD that are assigned a higher percentage. Doctors' statements estimating the value of a disability or the expectation of civilian employment, family members' statements of outstanding debts, or commanders' or neighbors' character references are often less likely to help the PEB accurately rate the soldier using the VASRD than full descriptions of the soldier's physical capabilities, and, especially, additional medical information.

Once a percentage is assigned to each disability, each is taken in descending order as a percentage of the remaining able soldier, starting with 100% able. The resulting number is then rounded to the nearest number divisible by ten. This is the percentage of disability. Thus, three disabilities of 30, 20, and 10 would be calculated as follows: 30% (1st disability) + (20% (2nd disability) of 70%).<sup>16</sup> Twenty percent of 70% is 14%. This totals 44% (30% + 14%). Thus we have a soldier who is 56% able. The third disability of 10% is applied against the 56% able soldier, i.e., 10% of 56% = 5.6%. The 5.6% is added to the 44%, resulting in a disability rating of 49.6%. The 49.6% is rounded to the closest number divisible by 10; in this case 50. Therefore, 30% + 20% + 10% = 50%. Simple.

The method for computing severance pay for soldiers with less than 30% disability and less than twenty years active duty, and retirement pay for those with a 30% or greater disability or over twenty years active duty, and the resulting tax consequences, is described in AR 635-40, Appendix C. That information is reproduced at the Appendix following this article.

#### 4. *Temporary Disability Retired List.*

A soldier whose disability is rated at at least 30% may be placed on the Temporary Disability Retired List (TDRL) when the physical disability is not stable and if he or she may recover and be fit for duty, or if the degree of severity may change within the

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<sup>16</sup>The first disability (30%) is seen as reducing an otherwise 100% able soldier to one who is only 70% able (100 - 30 = 70). Thus, the second 20% disability is applied against a soldier who is not actually 100% able, but 70% able (20% of 70). This rationale is followed for all subsequent lower rated disabilities. Which disability occurred first does not matter. Calculations start from the highest rated disability, no matter when incurred.

next five years so as to change his or her disability rating. The TDRL is administered under AR 635-40, chapter 7. The key is stability for rating purposes; the intent of temporary retirement is to allow the extent of the service-incurred or service-aggravated injury to be established over a period of time. The residual impairment, or the impairment of function appearing over the years, will be the subject of updated VA ratings. The soldier is reevaluated at least every eighteen months; however, nothing precludes an earlier reevaluation. The reevaluation MEBD is processed the same way as an active duty MEBD/PEB.

Depending on the circumstances, the PEB generally will make one of several recommendations: fit for duty; separation with severance pay if the soldier's disability is ratable at less than 30% and he or she has under twenty years *active* duty; permanent retirement if the soldier's disability has become permanent and is ratable at at least 30% or if he or she has at least twenty years of service; or retention on the TDRL if the disability is still unstable and is ratable at at least 30%. The rights to rebuttal and a rehearing apply unless the PEB has recommended retention on the TDRL, in which case there is no right to request a hearing. The TDRL period may last no longer than five years, but a soldier will be removed from the list as soon as his or her condition permits. TDRL pay is calculated the same as permanent retirement pay, except that no soldier will receive less than 50% of basic pay, even if his or her disability is less than that.<sup>17</sup>

##### *5. Continuation on Active Duty.*

A disabled soldier may have an "unfitting" condition that really is not preventing him or her from performing useful duty and may desire to remain on active duty. The soldier's and the Army's needs may be best served by the soldier's continued service; the Continuation on Active Duty (COAD) program was created to fulfill this need. The objective of the COAD program is to conserve personnel by effectively using needed skills or experience. A disabled soldier may submit a COAD request under the provisions of AR 635-40, chapter 6, despite a PEB finding that the soldier is not fit for retention on active duty, provided he or she is able to perform useful duty in his or her MOS and can maintain him or herself in a military environment. After USAPDA makes a final decision in the case, the request is considered by one of the several personnel centers, depending on the soldier's

<sup>17</sup>See also AR 635-40, Appendix C, para. C-9.

grade and MOS. If the request is approved, the soldier stays on active duty.

At separation or retirement, the soldier's disability is reviewed. While he or she may be found fit, normally, if the disabilities have remained the same or increased in severity, the PEB will find the soldier unfit because of a physical disability.

If the COAD request is disapproved, the case is forwarded to MILPERCEN for issuance of retirement or separation orders. If the soldier has not yet had one, he or she may demand a formal PEB hearing per AR 635-40, paragraph 4-20a(2). Thus, a soldier with seventeen years active duty service and minor but unfitting disabilities and who desires to remain on active duty is best advised to waive a formal hearing and await the acceptance of the COAD request. If it is denied, then argue his or her fitness at a formal PEB hearing.

The soldier may also submit letters from supervisors or commanders supporting his or her COAD request and explaining the benefits retention would bring to the Army. This strategy not only will preserve the one formal hearing, to the soldier's advantage, it will also benefit him or her in the long term. Depending on the degree of disability at the time of separation or retirement, a soldier continued on the COAD program is likely to be retired or separated with Army disability benefits. A soldier previously found fit by a PEB, however, is more likely to be found fit again, this time by presumption. The physical evaluation board liaison officer is charged with counseling the soldier about the COAD program and helping him or her prepare the application.

### III. LINE OF DUTY

Line of duty determinations and their appeals are governed by AR 600-33. AR 600-33, paragraph 1-3, and AR 635-40, paragraph 4-18, state that a soldier whose "unfitting" condition is found to be not in line of duty will not receive Army disability benefits. A soldier in this situation is entitled by statute to a formal PEB hearing<sup>18</sup> and may demand one if he or she is already being processed for the not in line of duty physical disability and has not yet had a hearing.<sup>19</sup> The hearing is not, however, an avenue for a line of duty appeal. The PEB need not consider the line of duty arguments, except to forward any new information relevant

<sup>18</sup>10 U.S.C. § 1214 (1982).

<sup>19</sup>AR 635-40, para. 4-20a.

to the line of duty finding to the appropriate authority. Because the hearing would only consider physical disability matters, the principal results of requesting and holding a hearing would be to delay processing the case, possibly affording more time for in-service line of duty appeals and additional paychecks. The hearing would not and could not affect the line of duty decision.

#### IV. SOLDIERS PENDING ADVERSE ACTIONS

If a soldier is charged with an offense or is under investigation for an offense which could result in dismissal or a punitive discharge, he or she may not be referred for disability processing unless the investigation ends without charges, the convening authority dismisses the charge, or the convening authority refers the charge to a court-martial not empowered to adjudge such a sentence.<sup>20</sup> A soldier under sentence of unsuspended dismissal or punitive discharge may not be processed for a disability.<sup>21</sup> If, however, the sentence is suspended, the soldier's case may be referred for disability processing.

An enlisted soldier may not be referred for physical disability processing when action has begun that may result in his or her administrative separation under other than honorable conditions.<sup>22</sup> The case must be forwarded to the general court-martial convening authority, who may waive the limitation and allow the soldier to be processed for the disability if he or she finds that:

1. The disability is the cause, or substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.
2. Other circumstances warrant disability processing instead of other administrative disposition.<sup>23</sup>

A soldier being considered for separation because of unsuitability under AR 635-200<sup>24</sup> may be referred for disability processing upon the approved recommendation of an MEBD.<sup>25</sup>

A commissioned or warrant officer will not be referred for disability processing instead of elimination action that could

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<sup>20</sup>AR 635-40, para. 4-1.

<sup>21</sup>AR 635-40, para. 4-2.

<sup>22</sup>AR 635-40, para. 4-3.

<sup>23</sup>AR 635-40, para. 4-3b.

<sup>24</sup>Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Personnel, ch. 13 (5 July 1984).

<sup>25</sup>AR 635-40, para. 4-3c.

result in dismissal or separation under other than honorable conditions.<sup>26</sup> Officers in this category who are believed also to be unfit because of physical disability will be processed for both administrative and disability separations at the same time.<sup>27</sup> The Secretary of the Army will decide the proper outcome of the case.

## V. VA DISABILITY

A soldier, like the PFC who presented his partially amputated finger to me, may have a service-incurred disability that does not cause him or her to be unfit for retention on active duty. He or she may progress to a voluntary or mandatory ETS or retirement without having been referred to the Army disability system or referral to the system may have resulted in a finding of fit by presumption. These soldiers should be advised to contact the VA *before* their separation to obtain applications for VA disability benefits. Also, they should reproduce copies of their entire medical records so that they can submit all necessary documentation for a VA disability claim immediately upon discharge. Normally, the processing of claims to the VA is accomplished concurrently with separation processing at the transfer point.

The VA will rate the claim using the principles explained above. The VA rating reflects the degree of disability of a veteran returning to the civilian sector and reflects the extent of disability for civilian employment. This emphasis on employability allows more flexibility in assessing a total rating, so the VA rating may differ from the Army rating. The VA is also charged with reevaluating the veteran periodically to determine whether a change in the extent of disability warrants a change in rating and benefits.

## VI. CONCLUSION

The above overview of the Army physical disability system should enable legal assistance officers and Trial Defense Service counsel to give general advice about the Army physical disability system as it affects the various groups of soldiers they are likely to serve as clients. Besides the regulations listed, the DOD/DA pamphlet on disability separation<sup>28</sup> is also an excellent source of summarized information, both as an office reference tool and as a hand-out to clients undergoing MEBD/PEB processing. Soldiers

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<sup>26</sup>AR 635-40, para. 4-4.

<sup>27</sup>*Id.*

<sup>28</sup>Dep't of Defense, Pamphlet No. 10/Dep't of Army, Pamphlet No. 36-506, Disability Separation (10 Apr. 1986).

with questions may also be referred to local medical treatment facility physical evaluation board officers or the local VA or Disabled American Veterans (DAV) offices for further information, as appropriate. While the physical disability system is a highly specialized area that legal assistance officers and defense counsel rarely have the time to master, it is hoped that this article has served as general background education to provide general advice and referral services to our soldiers.

## APPENDIX

AR 635-40, Appendix C (13 Dec. 1985 UPDATE)

### C-10. Pay and grade

a. *Grade.* Retired pay is computed on highest grade "satisfactorily" held or current grade. DA makes the final grade decision.

b. *Severance pay.* In computing pay for those with less than 20 years' active service and a disability percentage of less than 30 percent (separation with severance), figure 2 months' basic pay for every year of active duty with a maximum of 12 years' service. Consider 6 months or more as a whole year for computing years of service as a multiplier. A member with less than 6 months' service cannot receive severance pay. The member may apply to the VA for disability compensation.

c. *Retired pay.* A member is eligible for disability retired pay if he has a rating of less than 30 percent and has 20 or more years of active service for retirement (19 years and 6 months of active service is not 20 years for retirement) or a disability rating of 30 percent or more. The percentage multiplier is either the percent of disability or 2 1/2 percent of the total years of service (increase 6 months or more to the next higher whole year for this purpose). Use the highest percentage, but not more than 75 percent, as a multiplier of basic pay to arrive at the retired pay entitlement.

(1) *Example 1.* A member with 23 years and 7 months of service is entitled to (24 x 2.5 percent) 60 percent of his basic pay as retired pay. If he is rated as 90 percent disabled, he is entitled to 75 percent as a multiplier. All of the retired pay may be tax-free (see *d* below).

(2) *Example 2.* A member with 19 years and 6 months of service and 30 percent or more disability is retired because of disability. His retired pay entitlement (20 x 2.5 percent) is 50 percent of his basic pay. If his disability rating is less than 50

percent, only that portion (basic pay times the disability rating) of his retired pay *may* be tax-free (see *d* below).

(3) *Example 3.* A member with 12 or less years of service and 30 percent or more disability is retired because of disability. His retired pay entitlement is his disability rating times his basic pay limited to 75 percent of basic pay. All of the retired pay *may* be tax-free (see *d* below).

*d. Tax exemption.* A member separated or retired because of physical disability may be entitled to certain income tax benefits. The Internal Revenue Service will make final decisions on Federal entitlements.

(1) Severance pay is not taxable under Federal income tax laws when—

(a) Payable to member who, on 24 September 1975, was serving in the US Armed Forces or was under a binding written commitment to become such a member or

(b) Any time entitlement occurs because of separation that results from combat-related injuries.

However, severance pay may be taxable in some States.

(2) If a member, on or before 24 September 1975, was entitled to receive disability retired pay, the portion of his retired pay that is based on his percentage of disability is not included in gross income for Federal income tax purposes, but may be taxable in some States.

(3) The portion of a person's retired pay that is based on his percentage of disability is not included in gross income for Federal income tax purposes, but may be taxable in some States if—

(a) He was a member of a uniformed service on 24 September 1975, or was under a binding, written commitment on that date to become such a member.

(b) He was later retired because of physical disability.

(4) A person may not be covered in either (2) or (3) above; he may have become a member of a uniformed service after 24 September 1975, and he may be retired because of physical disabilities. If so, the portion of his retired pay that is based on his percentage of disability is not included in gross income for Federal income tax purposes if—

(a) The portion of his retired pay attributed to disability is received by reason of combat-related injury.

(b) On the application to the VA, he would be entitled to receive disability compensation from the VA.

*Note 1:* For this subparagraph, the term "combat-related injury" means personal injury or sickness that is incurred as a direct result of armed conflict, while engaged in extra hazardous service, or under conditions simulating war; or personal injury or sickness that is caused by an instrumentality of war. The burden is on the individual to satisfy Internal Revenue Service requirements.

*Note 2:* Gross income excludable under (2), (3), and (4) above is not less than the maximum amount that a person, on application to the VA, would receive as disability compensation from the VA.

(5) A person who is retired because of physical disability may claim disability income (formerly sick-pay) exclusion from his gross income not to exceed \$100 weekly provided—

(a) He did not attain age 65 before the close of the tax year.

(b) He retired because of physical disability and, when retired, was permanently and totally disabled.

(6) A person generally may exclude up to \$5,200 a year of his disability payments if he qualifies for the disability income exclusion. The amount of the exclusion is limited and must be reduced dollar-for-dollar for his adjusted gross income that is more than \$15,000. (When adjusted gross income equals or exceeds \$20,000, an entitlement to disability income exclusion is no longer allowable. Adjusted gross income must equal \$25,400 if married and spouse qualifies for disability income exclusion before an entitlement to disability income exclusion is no longer available).

*Note:* In this subparagraph, "permanent and total disability" means that the person is unable to engage in any substantial gainful activity because of any medically decided physical or mental impairment that can be expected to last, for a continuous period of not less than 12 months. Proof of permanent and total disability must be furnished in such form and manner, and at such times as the Internal Revenue Service may require.

*e. Survivor Benefit Plan (SBP).* Retired members are automatically covered under the Survivor Benefit Plan unless they elect not to take part.

*f. Dual compensation.* Retired Regular Army officers may come within the limitations of "dual compensation" if they come back to work for the Federal Government unless—

- (1) They have a disability declared a direct result of armed conflict.
- (2) They have a disability caused by an instrumentality of war during a period of war.

*g. Civil service employment.* Special advantages accrue to persons who are veterans, disabled veterans, and preference eligibles in qualifying for civil service employment, non-competitive appointment, and retention rights. The Office of Personnel Management administers these special advantages and rights.



## PART VII: PROPERTY LAW

### PRIMER ON ANALYZING OIL AND GAS LEASES FROM THE LANDOWNER'S VIEWPOINT

by Major Joseph W. Hely, Jr.\*

#### I. INTRODUCTION

The extent of oil and gas production throughout the United States can be surprising to the lawyer who is not accustomed to representing oil and gas producers or landowners. The only states without oil and gas production during 1984 were (from East to West): Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, North Carolina, South Carolina, Georgia, Wisconsin, Minnesota, Iowa, Idaho, Washington, and Hawaii.<sup>1</sup> Even so, it is most common for lawyers not educated in or practicing in the major oil and gas producing states to have no formal or informal exposure to the law of oil and gas leases.

What follows is an entry-level discussion of the law and some of the practicalities involved in leasing land for exploration for oil and gas intended to be used by legal assistance officers to advise landowner-clients concerning proposed oil and gas leases. The terms "operator" and "producer" are used interchangeably to indicate the lessee under the lease in question.

For didactic purposes, and not as a template to follow, a sample oil and gas lease form, filled-in as it might be presented to a landowner by an oil and gas operator, follows the text as Appendix A. This sample lease has been chosen because it is particularly pernicious in that many of its provisions strongly favor the operator. Sample clauses benefitting the landowner, for inclusion in a lease in appropriate cases, are listed in Appendix B. This article is not intended as a nutshell reference on all oil and gas law, but only as a primer on analyzing proposed oil and gas leases.

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<sup>1</sup>Petroleum Independent, Vol. 55, No. 5, *The Oil and Gas Producing Industry in Your State, 1985-1986*, Petroleum Independent Publishers, Inc. (Sept. 1985).

Facts concerning the market conditions in the local area where your client's land is located are vital in determining the relative strength of your client's position in requesting amendments to a proffered lease. You and your client should make use of the applicable state regulatory agency records and publications, the county or parish deed records, and any informal information networks available to determine such facts as bonus, royalty, and primary term lengths being agreed to in the area; oil and gas production data; and the particular potential lessee's reputation, financial status, and track record.

The author has assumed that you and your client have made the threshold decision that the land should be leased if a beneficial lease can be obtained.

## II. THE SAMPLE OIL AND GAS LEASE

This article assumes that you have been presented with a lease form for review, commences with a discussion of the first printed words on the sample lease, and continues from there to the end of the completed form, tracking the structure of the sample form at Appendix A. Identifier numbers have been added to the lease form to facilitate reference to specific provisions. Unless otherwise stated, any law referred to is generalized United States oil and gas law or Texas law.

(1) **Form number and publisher.** Almost every pre-printed oil and gas lease form purports to be a "Producers 88."<sup>2</sup> The origin of this term is obscure, but the term is meaningless. The author keeps a supply of fifteen different "Producers 88" forms for use in various situations, and there are many more versions available. The point is that your client may assume that the language is "standard" because it is on a preprinted form. Remember that the stationary stores sell the great majority of these forms to oil and gas producers, not to landowners, and the contents have been adapted to suit the needs of the producer, not the landowner.

(2) **Instrument title.** There are volumes of cases construing the meaning of "minerals" in an oil, gas and mineral lease.<sup>3</sup> If you intend the lease to be for oil and gas only, which is usually the case, adapt the form accordingly, starting with deleting the words "and minerals" in the title of the form, and continuing through-

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<sup>2</sup> H. Williams & C. Meyers, *Oil and Gas Law* § 202.1 (1959) (hereinafter cited as Williams & Meyers).

<sup>3</sup> For a review of the issues involved, see Laity, *Oil, Gas, and Minerals*, 39 Sw. L.J. 351, 352 (1985); Laity, *Oil, Gas, and Minerals*, 38 Sw. L.J. 195-198 (1984); and Laity, *Oil, Gas, and Minerals*, 37 Sw. L.J. 133-135 (1983).

out the form. A good example is the suggested clause (a) in Appendix B.

Although the instrument granting lessee the rights to explore for and produce oil and gas from your client's property is termed a "lease," it is in reality grant of a defeasible or determinable fee.<sup>4</sup> It would be erroneous to attribute lessor and lessee in an oil and gas lease with the relationships inherent in the normal surface lease landlord/tenant scenario.<sup>5</sup>

(3) "This Agreement." Please note that in the usual format only the landowner signs the lease and the consideration on behalf of the lessee may consist of payment of bonus or an agreement to develop the mineral estate.<sup>6</sup>

(4) Date. The date entered here, not the date of execution, acknowledgment, or delivery, determines the primary term, payment of delay rentals, and payment of shut-in royalties.<sup>7</sup> A lease may be a "top lease," becoming effective upon expiration of an existing lease.<sup>8</sup> If so, the top lease should clearly reference the existing lease.

(5) Lessor. In order for the lease to effectively lease the mineral estate, it must be executed by the owner of the executive rights to the mineral estate. These rights usually accompany ownership of the mineral estate, although they can be alienated separately, either with or without accompanying mineral interests.<sup>9</sup> If your client warrants title to the minerals being leased, care should be taken to ensure that he or she in fact owns these executive rights through a title search. The lessee will have a drillsite title opinion made before beginning operations on the land, so if there is any question as to your client's right to lease the minerals, this should be cleared-up prior to execution.

(6) Lessee. This may be an oil company name or may be the name of a "landman,"<sup>10</sup> who will assign the lease to an operator. This is

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<sup>4</sup>1A W. Summers, *Oil and Gas Law* § 165 (1954) (hereinafter cited as Summers).

<sup>5</sup>McDonald, *The Anatomy of an Oil and Gas Lease* 10, State Bar of Texas, *Oil and Gas Leases* (1982).

<sup>6</sup>1 E. Brown, *The Law of Oil and Gas Leases* 3-1 to 3-5 (1984 rev.) (hereinafter cited as Brown).

<sup>7</sup>R. Hemingway, *Law of Oil and Gas* 253 (1983) (hereinafter cited as Hemingway).

<sup>8</sup>Nickum, *Negotiating an Oil and Gas Lease* 9-11, State Bar of Texas, *Oil and Gas Leases* (1982) (hereinafter cited as Nickum).

<sup>9</sup>McDonald, *Oil and Gas Leases* 7, State Bar of Texas, *Oil and Gas Law for the General Practitioner* (1980).

<sup>10</sup>Many are members of the American Association of Petroleum Landmen; some are Certified Petroleum Landmen. They can be independent landmen, taking leases

a significant point because a company that intends to drill the land itself may be willing to part with more bonus and royalty than a landman whose profit depends on the difference between the lease terms negotiated by your client and the terms a company is willing to pay him or her, either in cash or in overriding royalty. Of course, an oil company can and often does take leases for the purpose of selling them. This is where your background check on the operator is important. References such as Byram's *Oil Directory and Production Survey of Texas* (1985) and other such directives for other states, or the applicable state regulatory agency records, will tell you whether the proposed lessee actually produces oil and gas by drilling wells.

(7) **Cash bonus.** As in a cash surface estate deed, only nominal consideration is usually reflected on the lease.<sup>11</sup> Your client should visit with other landowners in the vicinity to determine what the going rate is for cash bonus and royalty. There is no general rule; market pressures will dictate where on a range from strictly nominal consideration to \$300 to \$500 per acre will be negotiable. Many times a producer is willing to trade-off cash bonus for a covenant to commence operations in a short period of time, and often the fractional amount of production paid the landowner as royalty can be negotiated up or down with respect to the amount of cash bonus to be paid when the lease is executed.

(8) **Recital of receipt of bonus.** Frequently, a landman will try to pay a bonus with a thirty-day (or longer) draft. This allows him time to either find a purchaser for the lease he has just obtained or to have a title search made on the land. Because in most jurisdictions inadequate consideration will support a lease,<sup>12</sup> and because your lease will state that only ten dollars or other nominal consideration was paid and received, it is advisable to negotiate payment by check or cash-equivalent. This also will prevent the heartache which occurs when the landowner spends the anticipated bonus money before the draft is paid. It is a frequent practice, although a universally despised one, that a landman who cannot find a buyer for the lease may "cold-draft" the landowner and refuse to pay the draft. In that case, prematurely spending the bonus can be catastrophic, and recovery for breach of contract may be difficult for various reasons.

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in their own names and turning them for a profit to various producers, or they can work on a salary or commission basis for a specific producer. See Nickum, *supra* note 8, at 8.

<sup>11</sup>See 3A Summers, *supra* note 4, at § 586.

<sup>12</sup>1 Brown, *supra* note 6, at 3-3.

(9) **Rights conveyed by the lease.** The sample form lease, in its unaltered state, grants broad rights to the lessee. If your landowner's property has valuable surface activities presently or will have them in the near future, you should specifically limit the lessee's rights to use the surface.<sup>15</sup> Appendix B contains sample clauses.

You can limit the mineral rights conveyed by depth,<sup>14</sup> by surface area,<sup>15</sup> and by usage.<sup>16</sup> Thus, you can reserve the deep rights, keep exploration off of your home place, or require that no drilling occur in some areas, that pipelines, roads and locations require advance approval of landowner, and generally limit activity to fit the situation.

Keep in mind that the mineral estate is the *dominant* estate,<sup>17</sup> and that, unless otherwise agreed, reasonable use of the surface automatically accompanies conveyance of the right to explore for and produce oil and gas.

(10) **Adjacent lands.** This language granting lessee use of your client's land for all the listed uses in connection with production from adjacent land allows the producer to build and operate refineries, gas processing plants, pipelines, and other major installations that would rely on production from more than your client's lease can provide. Unless your client has no other possible use for the land, you should delete language granting this broad authority. If the producer needs to locate a plant on the lease, negotiate separately for a surface lease for that specific purpose.

(11) **Legal description.** The property must be identifiable from the description listed, with the same certainty as any other conveyance.<sup>18</sup> Since most oil and gas leases deal with rural land which has not been subdivided, and which cannot be identified by reference to lot and block numbers on a registered plat, you should identify the leased lands by metes and bounds if available; if they are not, then identify them by reference to the deed by which lessor acquired the mineral interest being leased. A plat prepared by a surveyor is the best possible solution to this problem of description, and it additionally provides a graphic depiction of the lease property to facilitate discussions between landowner and producer.

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<sup>14</sup>3A Summers, *supra* note 4, at § 652.

<sup>15</sup>See Appendix B, clause (d).

<sup>16</sup>See *id.*, clause (e).

<sup>17</sup>See *id.* clause (f).

<sup>18</sup>*Ball v. Dillard*, 602 S.W.2d 529 (Tex. 1980).

<sup>19</sup>2 Summers, *supra* note 4, at § 229.

There is usually a large block of space left in a lease form for the legal description; this makes an opportune place for inserting the limitations as to depth, area, or usage discussed in paragraph (10) above. If metes and bounds are available but are too lengthy to fit in the space provided, attach the sheet with the metes and bounds as Exhibit A to the lease and reference it in this space. If you have additional clauses to add to the lease, this is a convenient space on which to reference the Addendum.

If your client owns executive rights for less than the entire mineral estate, it is advisable to insert the fractional minerals being leased by your client in this space also. Contact the other owners to ensure that only 100% of the minerals are claimed. If there is a discrepancy of this nature and a well or wells is completed, the purchaser of the crude oil or gas has no choice but to suspend payment of all royalties until the conflict is settled. These conflicts are easier to settle before there is royalty money on the table.

(12) "Mother Hubbard" clause.<sup>19</sup> The first two sentences can act to bring into the lease lands which the landowner did not intend to include; they should be struck out. If there is any question as to the identity of the lands to be leased, invite the producer to have a survey made, but do not allow the producer to decide which of landowner's lands should be included.

The next sentence compounds this problem, for no matter how much land not described above gets included under the Mother Hubbard clause, the bonus, delay rental, and shut-in royalty are paid solely on the number of acres inserted here. This sentence is not objectionable if the Mother Hubbard clause (two sentences) is deleted.

(13) Term (the Habendum clause). Two or three year primary terms are now much more common than ten year terms. The primary term in the period of time during which the lease is kept in force without production, often by payment of annual delay rentals as discussed above. Sometimes a very short term of six months or so can be negotiated in exchange for some of the cash bonus. Any producer who agrees to a short primary term is probably intending to drill a well. Because achieving production is the true goal of both landowner and producer, this may be the most desirable course to take if there is a good possibility that oil and gas will be produced. If the chances of production being

<sup>19</sup>1 Brown, *supra* note 6, at § 4.02.

achieved are slim, the landowner profits most from repeatedly leasing the land and pocketing multiple cash bonuses.

There are many examples of thousand-acre leases being maintained in full force and effect by one forty-acre oil well. To prevent this, you should negotiate a "Pugh" clause<sup>20</sup> which terminates the lease upon expiration of the primary term except for acreage already drilled or being drilled, unless a continuous operations program is complied with. This is fair to both parties in that the landowner gets the land explored and gets royalties from any producing wells drilled, and the producer gets to keep the acreage he paid bonus for and which he proved-up as producing acreage by drilling at least one well, so long as he continues exploration and development. Clause (b) in Appendix B is a workable Pugh clause.

**(14) Royalty.** The traditional royalty was one-eighth of all oil and gas produced. This has slowly inflated, so a more common royalty is three-sixteenth of all oil and gas produced.<sup>21</sup> Many wells produce both oil and natural gas, and many wells that produce natural gas produce gas rich in valuable liquids, known as condensates. This is the reason for the multiple statements of royalty in this section of the lease.

If you have limited the lease to oil and gas only, you should delete any reference to royalty to be paid on any minerals other than the ones you have defined as "oil and gas." Condensates and sulfur produced along with crude oil or natural gas are usually included in an "oil and gas only" lease, simply because it is frequently technically impossible to efficiently produce crude oil and natural gas without producing condensates or sulfur as a by-product.

Many landowners are successful in obtaining a minimum royalty provision (such as clause (f) of Appendix B) in their leases. This will help reduce the frequency with which a lease is held by marginal production.

**(15) Shut-in royalty.** The term "shut-in" is capable of many interpretations, but it typically means that the lessee has a right to continue the lease beyond its original term because of nonproduction. The concept of allowing a lease to be held in the absence of production arose out of gas production, where it is common to be waiting for considerable periods of time for

<sup>20</sup>2 Brown, *supra* note 6, at § 17.14(8).

<sup>21</sup>See Appendix B, clause (g).

construction of a pipeline through which to market the gas. To avoid your lease being held past the primary term by a nonfunctioning oil well, use clause (h) in Appendix B. You might also increase the dollar amount of shut-in royalty above the customary amount, the delay rental amount.

(16) **Assignment by lessee.** If the lease is large, it may be assigned in wellsite-sized parcels to various producers. Even if it is not large, lease trading is a major occupation and the person you lease to may very well not be the person responsible for the duties of lessee under your lease. You might try to insert a provision requiring your client's approval of any assignments, and settle for requiring written notice of assignment in whole or part, including name, address, and phone number of the assignee, before any assignment is effective.<sup>22</sup> This way your client will know who to contact regarding the lease, and will know whether the "oil-field trash" roaming around the property are entitled to entry or not.

(17) **Pooling.** Try to forbid pooling of your lease. It is a frequent cause of discord among previously friendly neighbors. If you are unsuccessful in ruling all pooling out, insist on clauses such as (j), (k), and (l) in Appendix B. Clause (j) will ensure that your client's property will constitute at least half of the pooled unit. This is important because it is discouraging to get a royalty check for a well that is theoretically producing from your land for less than half of the royalty due. Clause (k) prevents a pooled unit from holding the lease open after the expiration of the primary term for any of the land not included in the unit. Clause (l) will limit the underground horizons held after expiration of the primary term by a pooled unit to the actual producing formations.

Some jurisdictions have "forced pooling" statutes<sup>23</sup> which negate the effectiveness of your carefully worded clauses limiting pooling. It is still worthwhile to insert these types of clauses as typical forced pooling statutes require the operator to obtain an administrative hearing to approve the pooled unit, which may make the intended pooling more costly and less desirable.

There may be times when pooling would be to your client's benefit. If you have successfully limited the producer's right to assign land to a pool at his sole option, you can still voluntarily agree to a pool at a later date, perhaps for additional cash or other consideration.

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<sup>22</sup>See *id.* clause (i).

<sup>23</sup>6 Williams & Meyers, *supra* note 2, at § 905.

(18) **Delay rentals.** These are normally significantly less than the original cash bonus, but must be paid timely.<sup>24</sup> Notice how the sample lease gives the lessee thirty additional days in which to perfect payment if only partial payment is timely made. This is an example of the type of bias in favor of the lessee that is prevalent in preprinted form leases. Another problem posed by this paragraph is its use of the term "operations" as that term is defined in the lease. More on this in paragraph (19) below.

Delay rentals are payable to the grantor signing the lease, and the lease should reflect the actual amount to be paid the listed lessor, not the gross amount to be shared if there are multiple landowners.

(19) **Operations.** The last sentence of paragraph 6 of the sample lease contains a definition of "operations" which is unacceptable to a landowner. Because there is no other definition of the term "operations" in the form, this definition is applicable throughout the lease wherever the term "operations" appears. The main objection to this definition is that it allows production "whether or not in paying quantities" to hold a lease open past expiration of the primary terms.<sup>25</sup> A teaspoon a month should not hold a lease.

An example of a more acceptable definition of "operations" is contained in clause (m) of Appendix B. A useful definition would allow bona fide efforts to achieve production to maintain a lease, but would terminate the lease if only token or unproductive operations are being conducted.

Sometimes the landowner can commit the producer to a "drilling program," which requires that a well be drilled after expiration of a certain period of time following completion or plugging of the previous well. Clause (n) of Appendix B is an example of this type of provision. As you can see, this is very desirable because it requires continuous drilling (resulting in increased royalties) to continue the lease as to the undrilled acreages of the lease.

(20) **Surface damages.** In most jurisdictions, reasonable or non-negligent use of the surface estate in production of oil and gas is generally noncompensable to the landowner, because the mineral estate leased to the producer is dominant to the surface estate.<sup>26</sup>

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<sup>24</sup>Hemingway, *supra* note 7, at § 6.3(A).

<sup>25</sup>The usual standard is production "in paying quantities." See 3 Williams & Meyers, *supra* note 2, at § 604.5.

<sup>26</sup>3A Summers, *supra* note 4, at § 652.

Without a provision for payment of damages in the lease, the lessee may not have any duty to pay for surface damages. It should be recognized, though, that roads, gates, cattle guards, and other improvements made to the property by the producer for his or her use also benefit the landowner to some extent. The productive value of the surface estate should be an integral part of any damage-assessing formula because for example, an acre of South Texas brush country cannot equate with an acre of commercial investment property.

Clause (o) of Appendix B is a generally accepted format for assessing the monetary damages owed the landowner as the result of oil and gas operations. The landowner needs to be compensated for actual damages sustained, but producers are often sensitive to this issue and may decide not to lease the property of a "problem" landowner if a reasonable method of compensation cannot be agreed upon.

(21) **Notice of Assignment.** Notice how this sample form protects the producer from conflicting claims to royalties by requiring proof of assignment of the landowner's interest. The need for a reciprocal provision in the landowner's favor was discussed above.

(22) **Notice of breach.** This provision lets the producer violate any covenant in the lease without breaching the lease so long as he cleans up his act within sixty days of receipt of notice of the violation from landowner. This is the ideal structure for a producer who, through lack of funds or interest, cannot or does not fulfill requirements under the lease, but wishes to maintain the lease in hopes of selling it to another producer. Although it would be harsh on a producer to forfeit a lease for failing to put one lock on one gate, it is equally harsh on the landowner to forego money damages actually incurred or new bonus and royalties because the lease is maintained despite continued violation of its provisions. Thirty days would normally be sufficient time for a reasonably diligent operator to correct a deficiency.

This clause attempts to substitute money damages in place of forfeiture of the lease in cases of breach of covenant in a subsisting lease and also in place of termination of the lease under conditions placed on the grant of the mineral estate made by the lease. Importantly, this type of ameliorating clause would not be successful in keeping a lease from expiring at the end of the primary term if there is no production or operations at the end of the primary term.

This clause, in its sample format, appears to make notice a prerequisite to an ejection action should the producer claim extension of the term of the lease when there is actual failure of production and/or operations at the expiration of the primary term. This entire paragraph should be modified significantly to make it a fair provision from the landowner's viewpoint. At the very least, the notice period should be reduced to thirty days from sixty days and sentences two and three should be deleted.

**(23) Warranty of title and proportionate reduction.** Frequently, owners of rural land have had no title opinion or title insurance on their property. Additionally, most title opinions and policies connected with mortgages for purchase money or improvements specifically exclude mineral estate ownership from their coverage. As a result, your client may have no actual knowledge of mineral title defects in the interest he or she now owns.

As stated above, the producer will obtain a mineral title opinion which will uncover any defects in the mineral title either prior to paying the bonus draft or before commencing operations on the property. The producer usually will require the landowner's cooperation in curing the defects. If you are able to grant the lease without warranty, or with only a limited warranty, the defects will cause no repercussions on your client.

Proportionate reduction<sup>27</sup> of the monies paid the landowner should defects in title appear is fair because, in the absence of known multiple mineral owners, it is normally the parties' intent that the bonus and royalties negotiated and stated on the lease are to be paid in exchange for leasing the entire mineral estate. It is important to disclose any known mineral interests not owned by your client, as discussed in paragraph (5) above, so that the producer does not attempt to proportionately reduce royalty or bonus already reduced to reflect less than total ownership of the minerals.

**(24) Force Majeure.** The language in the sample lease form is overbroad and allows the producer discretion in determining whether an intervening obstruction is force majeure or not. In addition, a one year extension after removal of the obstruction is granted at the end of the primary term. A clause like clause (p) in Appendix B is much more reasonable to the landowner, but still allows for valid intervening causes of delay.

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<sup>27</sup>1 Brown, *supra* note 6, at § 14.04.

(25) **Execution.** All owners of the leased property may sign the same document, or each owner may sign a separate document. The terms can differ, although differing terms do cause administrative problems for the producer.

Because the lease probably will be recorded in the applicable public records, the signatures should be acknowledged. A memorandum of lease can be executed at the same time as the lease and recorded in place of the lease, either to save recording fees if the document is lengthy, or to keep the specific terms of the lease from becoming available to competing producers or landowners.

### III. A LANDOWNER'S LEASE

Appendix C to this article is a lease form developed by an institutional mineral owner. A quick review will reveal that it differs from the sample lease in Appendix A in most areas. This form was developed from the lessor's point of view just as the Producer's 88 forms were developed from the lessee's point of view.

If market conditions allow, replace the Producer's 88 form presented by the producer with a version of this lease, suitably adapted to the specific needs of your client and your client's property. One caveat on this form is that this particular institutional lessor does not own the surface estates to the acreage it leases, and, accordingly, is not as concerned with protection of the surface and payment of surface damages as your client might be. If you use this form, be sure to include clauses providing sufficient protection for the surface, such as clause (q) in Appendix B.

### IV. SUMMARY AND CONCLUSION

Most oil and gas lease offers are open to negotiation. If your client arms you with the pertinent facts about recent neighboring lease terms, production in the area, and the background information on the producer, you should be able to use this article to help negotiate a fair and profitable lease for your client. If you have access to specialized law library materials, you should also review the law of the jurisdiction containing the leased property to insure compliance with its peculiarities. A short bibliography of standard reference materials on oil and gas leases is located in Appendix D of this article.

## APPENDIX A

\***(1)** Producers 88 (7-69)

With 640 Acres Pooling Provision

**(2)** OIL, GAS AND MINERAL LEASE

**(3)** THIS AGREEMENT made this **(4)**

day of \_\_\_\_\_19\_\_\_\_, between

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**(5)** A. J. Landowner and B. K. Landowner

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lessor (whether one or more), whose address is: *Box 55A, Route 1, Eureka Springs, Arkansas*, and **(6)** *Great Southwest Exploration and Drilling, Inc.*, lessee, WITNESSETH:

1. Lessor, in consideration of **(7)** Ten and no hundredths Dollars, **(8)** receipt of which is hereby acknowledged, and of the covenants and agreements of lessee hereinafter contained, does hereby grant, lease and let unto lessee the land covered hereby for the purposes and with the exclusive right **(9)** of exploring, drilling, mining and operating for, producing and owning oil, gas, sulphur and all other minerals (whether or not similar to those mentioned), together with the right to make surveys on said land, lay pipe lines, establish and utilize facilities for surface or substance disposal of salt water, construct roads and bridges, dig canals, build tanks, power stations, telephone lines, employee houses and other structures on said land, necessary or useful in lessee's operations in exploring, drilling for, producing, treating, storing and transporting minerals produced from the land covered hereby or **(10)** any other land adjacent thereto. The land covered hereby, herein called "said land," is located in the County of Bexar, State of Texas, and is described as follows:

**(11)** 160.0 acres of land, more or less, being all of the Justo Gonzales Survey No. 1600, Abstract 42, Bexar County, Texas, and being the same land conveyed to Grantors by Fred R. Smudlapp in Deed dated April 21, 1954, recorded in Volume 55, Page 17, Deed Records of Bexar County, Texas.

**(12)** This lease also covers and includes, in addition to that above described, all land, if any, contiguous or adjacent to or adjoining

\*The boldface numbers in parentheses correspond to the numbered paragraphs in the text.

the land above described and (a) owned or claimed by lessor by limitation, prescription, possession, reversion or unrecorded instrument or (b) as to which lessor has a preference right of acquisition. Lessor agrees to execute any supplemental instrument requested by lessee for a more complete or accurate description of said land. For the purpose of determining the amount of any bonus, delay rental or other payment hereunder, said land shall be deemed to contain 160.0 acres, whether actually containing more or less, and the above recital of acreage in any tract shall be deemed to be the true acreage thereof. Lessor accepts the bonus and agrees to accept the delay rental as lump sum considerations for this lease and all rights and options hereunder.

(13) 2. Unless sooner terminated or longer kept in force under other provisions hereof, this lease shall remain in force for a term of ten (10) years from the date hereof, hereinafter called "primary term," and as long thereafter as operations, as hereinafter defined, are conducted upon said land with no cessation for more than ninety (90) consecutive days.

(14) 3. As royalty, lessee covenants and agrees: (a) To deliver to the credit of lessor, in the pipe line to which lessee may connect its wells, the equal one-eighth part of all oil produced and saved by lessee from said land, or from time to time, at the option of lessee, to pay lessor the average posted market price of such one-eighth part of such oil at the wells as of the day it is run to the pipe line for storage tanks, lessor's interest in either case, to bear one-eighth of the cost of treating oil to render it marketable pipe line oil; (b) To pay lessor on gas and casinghead gas produced from said land (1) when sold by lessee, one-eighth of the amount realized by lessee, computed at the mouth of the well, or (2) when used by lessee of said land or in the manufacture of gasoline or other products, the market value, at the mouth of the well, of one-eighth of such gas and casinghead gas; (c) To pay lessor on all other minerals mined and marketed or utilized by lessee from said land, one-tenth either in kind or value at the well or mine at lessee's election, except that on sulphur mined and marketed the royalty shall be one dollar (\$1.00 per long ton. (15) If, at the expiration of the primary term or at any time or times thereafter, there is any well on said land or on lands with which said land or any portion thereof has been pooled, capable of producing oil or gas, and all such wells are shut-in, this lease shall, nevertheless, continue in force as though operations were being conducted on said land for so long as said wells are shut-in, and thereafter this lease may be continued in force as if no shut-in

had occurred. Lessee covenants and agrees to use reasonable diligence to produce, utilize, or market the minerals capable of being produced from said wells, but in the exercise of such diligence, lessee shall not be obligated to install or furnish facilities other than well facilities and ordinary lease facilities of flow lines, separator, and lease tank, and shall not be required to settle labor trouble or to market gas upon terms unacceptable to lessee. If, at any time or times after the expiration of the primary term, all such wells are shut-in for a period of ninety consecutive days, and during such time there are no operations on said land, then at or before the expiration of said ninety day period, lessee shall pay or tender, by check or draft of lessee, as royalty, a sum equal to the amount of annual rental provided for in this lease. Lessee shall make like payments or tenders at or before the end of each anniversary of the expiration of said ninety day period if upon such anniversary this lease is being continued in force solely by reason of the provisions of this paragraph. Each such payment or tender shall be made to the parties who at the time of payment would be entitled to receive the royalties which would be paid under this lease if the wells were producing, and may be deposited in a depository bank provided for below. Nothing herein shall impair lessee's right to release as provided in paragraph 5 hereof. (16) In event of assignment of this lease in whole or in part, liability for payment hereunder shall rest exclusively on the then owner or owners of this lease, severally as to acreage owned by each.

(17) 4. Lessee is hereby granted the right, at its option, to pool or unitize any land covered by this lease with any other land covered by this lease, and/or with any other land, lease, or leases, as to any or all minerals or horizons, so as to establish units containing not more than 80 surface acres plus 10% acreage tolerance; provided, however, units may be established as to any one or more horizons, or existing units may be enlarged as to any one or more horizons, so as to contain not more than 640 surface acres plus 10% acreage tolerance, if limited to one or more of the following: (1) gas, other than casinghead gas, (2) liquid hydrocarbons (condensate) which are not liquids in the subsurface reservoir, (3) minerals produced from wells classified as gas wells by the conservation agency having jurisdiction. If larger units than any of those herein permitted, either at the time established or after enlargement, are required under any governmental rule or order, for the drilling or operation of a well at a regular location, or for obtaining maximum allowable from any well to be drilled,

drilling, or already drilled, any such unit may be established or enlarged to conform to the size required by such governmental order or rule. Lessee shall exercise said option as to each desired unit by executing an instrument identifying such unit and filing it for record in the public office in which this lease is recorded. Each of said options may be exercised by lessee at any time and from time to time while this lease is in force, and whether before or after production has been established either on said land, or on the portion of said land included in the unit, or on other land unitized therewith. A unit established hereunder shall be valid and effective for all purposes of this lease even though there may be mineral, royalty, or leasehold interests in lands within the unit which are not effectively pooled or unitized. Any operations conducted on any part of such unitized land shall be considered, for all purposes, except the payment of royalty, operations conducted upon said land under this lease. There shall be allocated to the land covered by this lease within each such unit (or to each separate tract within the unit if this lease covers separate tracts within the unit) that portion of the total production of unitized minerals from the unit, after deducting any used in lease or unit operations, which the number of surface acres in such land (or in each such separate tract) covered by this lease within the unit bears to the total number of surface acres in the unit, and the production so allocated shall be considered for all purposes, including payment or delivery of royalty and any other payments out of production, to be the entire production of unitized minerals from the land to which allocated in the same manner as though produced therefrom under the terms of this lease. The owner of the reversionary estate of any term royalty or mineral estate agrees that the accrual of royalties pursuant to this paragraph or of shut-in royalties from a well on the unit shall satisfy any limitation of term requiring production of oil or gas. The formation of any unit hereunder which includes land not covered by this lease shall not have the effect of exchanging or transferring any interest under this lease (including, without limitation, any delay rental and shut-in royalty which may become payable under this lease) between parties owning interests in land covered by this lease and parties owning interests in land not covered by this lease. Neither shall it impair the right of lessee to release as provided in paragraph 5 hereof, except that lessee may not so release as to lands within a unit while there are operations thereon for unitized minerals unless all pooled leases are released as to lands within the unit. At any time while this lease is in force lessee may dissolve any unit established hereunder by filing

for record in the public office where this lease is recorded a declaration to that effect, if at that time no operations are being conducted thereon for unitized minerals. Subject to the provisions of this paragraph 4, a unit once established hereunder shall remain in force so long as any lease subject thereto shall remain in force. If this lease now or hereafter covers separate tracts, no pooling or unitization of royalty interests as between any such separate tracts is intended or shall be implied or result merely from the inclusion of such separate tracts within this lease but lessee shall nevertheless have the right to pool or unitize as provided in this paragraph 4 with consequent allocation of production as herein provided. As used in this paragraph 4, the words "separate tract" mean any tract with royalty ownership differing, now or hereafter, either as to parties or amounts, from that as to any other part of the leased premises.

(18) 5. If operations are not conducted on said land on or before the first anniversary date hereof, this lease shall terminate as to both parties, unless lessee on or before said date shall, subject to the further provisions hereof, pay or tender to lessor or to lessor's credit in the XYZ Bank at San Antonio, Texas, or its successors, which shall continue as the depository, regardless of changes in ownership of delay rental, royalties, or other moneys, the sum of \$\_\_\_\_\_, which shall operate as delay rental and cover the privilege of deferring operations for one year from said date. In like manner and upon like payments or tenders, operations may be further deferred for like periods of one year each during the primary term. If at any time that lessee pays or tenders delay rental, royalties, or other moneys, two or more parties are, or claim to be, entitled to receive same, lessee may, in lieu of any other method of payment herein provided, pay or tender such rental, royalties, or other moneys, in the manner herein specified, either jointly to such parties or separately to each in accordance with their respective ownerships thereof, as lessee may elect. Any payment hereunder may be made by check or draft of lessee deposited in the mail or delivered to lessor or to a depository bank on or before the last date for payment. Said delay rental shall be apportionable as to said land on an acreage basis, and a failure to make proper payment or tender of delay rental as to any portion of said land or as to any interest therein shall not affect this lease as to any portion of said land or as to any interest therein as to which proper payment or tender is made. Any payment or tender which is made in an attempt to make proper payment, but which is erroneous in whole or in part as to

parties, amounts, or depository shall nevertheless be sufficient to prevent termination of this lease and to extend the time within which operations may be conducted in the same manner as though a proper payment had been made; provided, however, lessee shall correct such error within thirty (30) days after lessee has received written notice thereof from lessor. Lessee may at any time and from time to time execute and deliver to lessor or file for record a release or releases of this lease as to any part or all of said land or of any mineral or horizon thereunder, and thereby be relieved of all obligations as to the released acreage or interest. If this lease is so released as to all minerals and horizons under a portion of said land, the delay rental and other payments computed in accordance therewith shall thereupon be reduced in the proportion that the acreage released bears to the acreage which was covered by this issue immediately prior to such release.

(19) 6. If at any time or times during the primary term operations are conducted on said land and if all operations are discontinued, this lease shall thereafter terminate on its anniversary date next following the ninetieth day after such discontinuance unless on or before such anniversary date lessee either (1) conducts operations or (2) commences or resumes the payment or tender of delay rental; provided, however, if such anniversary date is at the end of the primary term, or if there is no further anniversary date of the primary term, this lease shall terminate at the end of such term or on the ninetieth day after discontinuance of all operations, whichever is the later date, unless on such later date either (1) lessee is conducting operations or (2) the shut-in well provisions of paragraph 3 or the provisions of paragraph 11 are applicable. Whenever used in this lease the word "operations" shall mean operations for and any of the following: drilling, testing, completing, reworking, recompleting, deepening, plugging back or repairing of a well in search for or in an endeavor to obtain production of oil, gas, sulphur or other minerals, excavating a mine, production of oil, gas, sulphur or other mineral, whether or not in paying quantities.

(20) 7. Lessee shall have the use, free from royalty, of water, other than from lessor's water wells, and of oil and gas produced from said land in all operations hereunder. Lessee shall have the right at any time to remove all machinery and fixtures placed on said land, including the right to draw and remove casing. No well shall be drilled nearer than 200 feet to the house or barn now on said land without the consent of the lessor. Lessee shall pay for

damages caused by its operations to growing crops and timber on said land.

(21) 8. The rights and estate of any party hereto may be assigned from time to time in whole or in part and as to any mineral or horizon. All of the covenants, obligations, and considerations of this lease shall extend to and be binding upon the parties hereto, their heirs, successors, assigns, and successive assigns. No change or division in the ownership of said land, royalties, delay rental, or other moneys, or any part thereof, howsoever effected, shall increase the obligations or diminish the rights of lessee, including, but not limited to, the location and drilling of wells and the measurement of production. Notwithstanding any other actual or constructive knowledge or notice thereof of or to lessee, its successors or assigns, no change or division in the ownership of said land or of the royalties, delay rental, or other moneys, or the right to receive the same, howsoever effected, shall be binding upon the then record owner of this lease until thirty (30) days after there has been furnished to such record owner at his or its principal place of business by lessor or lessor's heirs, successors, or assigns, notice of such change or division, supported by either originals or duly certified copies of the instruments which have been properly filed for record and which evidence such change or division, and of such court records and proceedings, transcripts, or other documents as shall be necessary in the opinion of such record owner to establish the validity of such change or division. If any change in ownership occurs by reason of the death of the owner, lessee may, nevertheless pay or tender such royalties, delay rental, or other moneys, or part thereof, to the credit of the decedent in a depository bank provided for above. In the event of assignment of this lease as to any part (whether divided or undivided) of said land, the delay rental payable hereunder shall be apportionable as between the several leasehold owners, ratably according to the surface area or undivided interests of each, and default in delay rental payment by one shall not affect the right of other leasehold owners hereunder.

(22) 9. In the event lessor considers that lessee has not complied with all its obligations hereunder, both express and implied, lessor shall notify lessee in writing, setting out specifically in what respects lessee has breached this contract. Lessee shall then have sixty (60) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by lessor. The service of said notice shall be precedent to the bringing of any action by lessor on said lease for any cause, and

no such action shall be brought until the lapse of sixty (60) days after service of such notice on lessee. Neither the service of said notice nor the doing of any acts by lessee aimed to meet all or any of the alleged breaches shall be deemed an admission or presumption that lessee has failed to perform all its obligations hereunder. If this lease is cancelled for any cause, it shall nevertheless remain in force and effect as to (1) sufficient acreage around each well as to which there are operations to constitute a drilling or maximum allowable unit under applicable governmental regulations, (but in no event less than forty acres), such acreage to be designated by lessee as nearly as practicable in the form of a square centered at the well, or in such shape as then existing spacing rules require; and (2) any part of said land included in a pooled unit on which there are operations. Lessee shall also have such easements on said land as are necessary to operations on the acreage so retained.

(23) 10. Lessor hereby warrants and agrees to defend title to said land against the claims of all persons whomsoever. Lessor's rights and interests hereunder shall be charged primarily with any mortgages, taxes or other liens, or interest and other charges on said land, but lessor agrees that lessee shall have the right at any time to pay or reduce same for lessor, either before or after maturity, and be subrogated to the rights of the holder thereof and to deduct amounts so paid from royalties or other payments payable or which may become payable to lessor and/or assigned under this lease. If this lease covers a less interest in the oil, gas, sulphur, or other minerals in all or any part of said land than the entire and undivided fee simple estate (whether lessor's interest is herein specified or not), or no interest therein, then the royalties, delay rental, and other moneys accruing from any part as to which this lease covers less than such full interest, shall be paid only in the proportion which the interest therein, if any, covered by this lease, bears to the whole and undivided fee simple estate therein. All royalty interest covered by this lease (whether or not owned by lessor) shall be paid out of the royalty herein provided. This lease shall be binding upon each party who executes it without regard to whether it is executed by all those named herein as lessor.

(24) 11. If, while this lease is in force, at, or after the expiration of the primary term hereof, it is not being continued in force by reason of the shut-in well provisions of paragraph 3 hereof, and lessee is not conducting operations on said land by reason of (1) any law, order, rule or regulation, (whether or not substantially

determined to be invalid) or (2) any other cause, whether similar of dissimilar, (except financial) beyond the reasonable control of lessee, the primary term and the delay rental provisions thereof shall be extended until the first anniversary date hereof occurring ninety (90) days following the removal of such delaying cause, and this lease may be extended thereafter by operations as if such delay had not occurred.

**IN WITNESS WHEREOF**, this instrument is executed on the date first above written.

(25)

\_\_\_\_\_

A.J. Landowner

\_\_\_\_\_

B.K. Landowner

\_\_\_\_\_  
 [An acknowledgment follows but is not reproduced in this  
 Appendix]

## APPENDIX B

### OPTIONAL CLAUSES FOR OIL AND GAS LEASES

*These clauses are intended for use in an addendum to an oil and gas lease, identified as such with reference to the particular lease by date, lessor, lessee, and brief legal description, and should be prefaced by language such as:*

**NOTWITHSTANDING** anything to the contrary hereinabove provided, it is expressly agreed and stipulated by and between the Lessor and Lessee that:

(a) The terms "oil and gas" shall include oil, gas, casinghead gas and the byproducts thereof, and such other hydrocarbon substances and sulphur as are produced with, incidental to, and as a part of the production of oil and gas;

(b) When the primary term of this oil and gas lease has expired and any well drilling at such time on lands covered by this lease [optional: or lands unitized therewith] has been completed, then all acreage which is outside a duly constituted drilling and/or spacing unit on which there is neither a well producing or being worked on, and all depths deeper than 100 feet below the deepest producing formation in any well on the developed acreage [optional: or lands unitized therewith] shall be released back to lessor;

(c) This lease covers the above-described acreage, but only from the surface of the ground down to the depth of five thousand feet below the surface of the ground. Rights to the depths lower than five thousand feet below the surface of the ground are retained by Grantor;

(d) This lease shall not cover the one hundred acres described above adjoining state highway 97, although said property is included in the metes and bounds description set forth above;

(e) There shall be no drilling on the forty acre tract containing Grantor's home, which forty acres are outlined in bold lines on Exhibit A hereto. This acreage may be included in a drilling or spacing unit consisting solely of other lands included in this lease, but no drilling or other operations shall occur on these forty acres;

(f) The royalties which are to be paid under the terms of this lease for the production of oil or gas shall never be less than twenty-five dollars per acre per annum for the number of acres which are being held under this lease, based on the anniversary date of this lease.

(g) The royalties to be paid Lessor by Lessee herein shall be three-sixteenths of  $\frac{8}{8}$  rather than the one-eighth of  $\frac{8}{8}$  stated above, and in all instances where one-eighth appears above it shall be replaced by three-sixteenths;

(h) The provisions above for payment of shut-in royalties and maintenance of this lease by such payment in the case of a shut-in well or wells shall apply only to wells classified as gas wells, and shall not apply to wells classified as oil wells;

(i) No assignment or partial assignment of this lease by Lessee shall be effective until Lessor or its successor in interest shall be notified thereof in writing, which shall include the following information: effective date of assignment, acreage assigned, percentage assigned, and assignee's name, address, and phone number;

(j) Should any of the acreage subject to this lease be placed in a pooled unit, at least half of the acreage constituting the pooled unit shall consist of acreage subject to this lease; no pooling shall be effective until a designation of same is duly recorded with the county clerk;

(k) At the expiration of the primary term of this oil and gas lease, should acreage included in this lease be included in a pooled

unit from which production is being realized, said production shall maintain the lease only as to the acreage contained in the pooled unit.

(l) At the expiration of the primary term of this oil and gas lease, should acreage included in this lease be included in a pooled unit from which production is being realized, said production shall maintain this lease only for the pooled acreage and only from the surface of the ground down to one hundred feet below the bottom of the lowest producing formation in the pooled unit at the time of expiration of the primary term;

(m) "Operations" as used herein shall commence with spudding of a well and shall include drilling, reworking, and producing a well or wells;

(n) That after the expiration of the primary term of this lease, the same shall terminate and be of no further force and effect, EXCEPT as to acreage actually allotted to and included within each producing unit of oil and/or gas as established by the [Railroad Commission of Texas], UNLESS the Lessee herein shall enter into a continuous drilling program commencing within ninety days after the expiration of the primary term so as not to allow more than ninety days to elapse between the abandonment or completion of one well and the commencement of a subsequent well until the entire leasehold estate has been fully developed in accordance with the spacing rules applicable as established by the (Railroad Commission of Texas) for the field wherein this is situated, and at such time as the Lessee herein fails to meet the drilling requirements hereunder, this lease shall terminate as to all acreage then included in the lease but not included within a spacing unit from which oil and/or gas is being produced in paying quantities, as to such acreage on which there is production, this lease shall continue in force and effect in accordance with the other terms and provisions of this lease;

(o) Should Lessor suffer damage to livestock, water wells, springs, fences, trees, vegetation (native or cultivated), roads, personal property, buildings or other improvements on this leased property as a result of operations of Lessee, Lessee agrees to pay Lessor the actual amount of said loss;

(p) Paragraph 11 above is deleted and the following set forth in its place:

Should Lessee be prevented from complying with any express or implied covenant of this lease, from conducting drilling or

reworking operations thereon or from producing oil or gas therefrom by reason of scarcity of or inability to obtain or to use equipment or material, or by operation of force majeure, any federal or state law or any order, rule or regulation of governmental authority, then while so prevented, Lessee's obligation to comply with such covenant shall be suspended, and Lessee shall not be liable to damages for failure to comply therewith; and this lease shall be extended while and so long as Lessee is prevented by any such cause from conducting drilling or reworking operations on or from producing oil or gas from the lease premises; and the time while Lessee is so prevented shall not be counted against lessee;

(q) The following provisions for the protection of the surface estate shall apply to this lease:

(i) Lessee agrees to bury all permanent pipe lines, flow lines, or electrical lines which it installs upon the lease premises in a reasonable and prudent manner not less than thirty-six inches below the surface of the ground;

(ii) No firearms shall be taken upon the lease premises by any person without the prior written consent of Lessor, whether for hunting or other purposes, and Lessee shall instruct its employees, contractors, agents and representatives of such restriction. Any breach of this covenant shall make such party liable as a trespasser under the laws of the State of [Texas];

(iii) Lessee agrees that in the event any pump jacks or slush pits are placed upon or maintained on any of the premises leased hereby, that the same shall be enclosed by a substantial fence to prevent the cattle of Lessor from either becoming injured by the operation of such equipment or from falling into any slush pits as may be placed upon said premises. This obligation shall not in any way limit Lessee's liability to pay for damages set forth above;

(iv) Lessee shall establish only such roads as designated by Lessor. Lessor agrees that he will, upon Lessee's request and in consultation with Lessee, designate the most direct route feasible therefor consistent with terrain, preservation of ranch improvements, and the conduct of ranching, farming, and livestock operations thereon;

(v) Lessee shall prevent the escape of salt and other noxious waters, and will not permit the same to run into any surface water tank, water well, creek, ravine, or upon or over the premises, nor to penetrate, seep or flow into any subsurface potable water stratum, but will contain and dispose of the same in keeping with applicable governmental rules and regulations;

*Following are additional clauses not discussed in the article above which may be appropriate to include in a lease:*

(r) Lessee shall be responsible for Lessor's reasonable attorney's fees in the event of Lessee's default under any of the terms and provisions hereof;

(s) Lessee shall be solely responsible for insuring compliance of its operations on this lease with all governmental laws and regulations, including plugging;

(t) That in the event that Lessee does not remove all property and fixtures placed on the leased premises within ninety days of the expiration of this lease, title to all of such property on the premises shall pass to and vest in Lessor;

(u) Lessee shall, upon the abandonment of any well drilled on the premises, install a removable swage at the top and a plug at the bottom of the surface casing in compliance with applicable regulations, and the surface casing therein shall become the property of Lessor and such well may be thereafter completed by surface owner at surface owner's sole risk and expense as a water well;

## APPENDIX C

(Lease Form Developed By Institutional Mineral Owner)\*

### OIL, GAS AND HYDROCARBONS LEASE

THIS AGREEMENT, made this \_\_\_ day of \_\_\_\_\_, 19 \_\_, between \_\_\_\_\_, acting by and through its duly authorized President, Lessor, the address of which is \_\_\_\_\_, San Antonio, Texas 78205, and \_\_\_\_\_, hereinafter referred to as Lessee, whose mailing address is \_\_\_\_\_;

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\*See Section III of this Article for a brief description of this lease.

*WITNESSETH:*

1. For and in consideration of Ten and No/100 Dollars (\$10.00) in hand paid, of the rents and royalties herein provided, and the agreements of Lessee herein contained, Lessor hereby GRANTS, LEASES AND LETS exclusively unto Lessee for the purposes of investigating, exploring, drilling for and producing oil and gas only (for the purposes of this lease, references to "oil and gas" shall include oil, gas casinghead gas and the by-products thereof, and such other hydrocarbon substances and sulphur as are produced with, incidental to and as a part of the production of oil or gas), laying pipe lines, building tanks, roads, powers stations, telephone lines and other structures thereon to produce, save, transport, own and dispose of said products, the following described lands in Atascosa County, Texas, to-wit:

## [INSERT PROPERTY DESCRIPTION HERE]

For the purpose of determining any bonus, delay rental, or other payment provided for herein, the described land shall be deemed to comprise \_\_\_ acres, whether it actually comprises more or less.

2. TERM: Subject to the other provisions herein contained, this lease shall be for a term of \_\_\_\_\_ from the date of execution of this lease (called "primary term") and as long as thereafter as oil, gas or other hydrocarbons are produced from said lands in paying quantities or operations for the discovery, development and production of oil, gas or other hydrocarbons are being continuously conducted on said lands in accordance with all of the terms, conditions and provisions of this lease.

3. ROYALTIES: The royalties to be paid by Lessee are:

(a) On oil: \_\_\_\_\_ ( \_\_\_ ), of all oil and other liquid hydrocarbons produced and saved from said land, to be delivered at Lessor's option into joint storage available on lease, the same to be furnished by Lessee free of risk, charge and expense to Lessor, or to the credit of Lessor into the pipe line or storage to which wells may be connected. In the event Lessor fails to make an election, Lessee shall run Lessor's oil to storage on the lease so long as available; thereafter until notified by Lessor, Lessee shall run

Lessor's oil to pipe line or dispose of the same along with Lessee's oil, Lessor shall have the right from time to time throughout the existence of this lease, by giving Lessee ninety (90) days written notice, to tender to Lessee royalty oil from the premises at the highest posted price in the field for oil of like grade, gravity and quality on the dates of delivery thereof. Lessee agrees to purchase the same at such price. In the event Lessor elects to tender its oil to Lessee, Lessor shall not withdraw said oil from Lessee without first notifying Lessee in writing ninety (90) days prior to the effective date of such withdrawal.

(b)(1) On gas, including casinghead gas or other gaseous substances produced from said land and sold in good faith arms length transactions by Lessee to bona fide third parties, who are neither associates, affiliates or subsidiaries of Lessee, \_\_\_\_\_ ( ) of the sales price at the well, to be computed with respect to character, quality and quantity at the same time or stage of operations and by the same methods or formula as used by Lessee in sales to such third parties. "Sales price" as used herein is defined as being all monies and other things of value of every kind and character received by Lessee or to which Lessee is entitled under such sales contract or arrangement entered into through good faith negotiations for gas produced from the lands covered by this lease at the place where such gas is available for sale on the date of the sales contract arrangement.

(b)(2) \_\_\_\_\_ ( ) of the market value at the well of gas, including casinghead or other gaseous substances produced from said land and used by Lessee, either on or off the premises (except for development purposes as provided in subparagraph (c)(1) of this paragraph 3) or sold by Lessee to associates, affiliates or subsidiaries of Lessee, or used by Lessee or Lessee's associates, affiliates or subsidiaries in the manufacture of gasoline or other products, or \_\_\_\_\_ ( ) of the market value of the product produced therefrom whichever is more favorable to Lessor. It is expressly understood and agreed: (A) in either of said events the royalty to be paid hereunder shall be computed with respect to character, quality and quantity of the gas at the time of production (1) by the method or formula most favorable to Lessor as is being used on the date of payment by the oil and gas industry in the Texas and Louisiana Gulf Coastal area, or (2) by such method or formula as is being used by Lessee in bona fide sales to third parties not associates, affiliates or subsidiaries of Lessee, whichever method or formula is most favorable to Lessor, and (B) in no event shall the market value of the gas, casinghead

gas, or other gaseous substances produced from the land covered by this lease be deemed to be less than the price at which said products are sold by Lessee.

(b)(3) Such gas, casinghead gas, residue gas or gas of any other nature or description whatsoever, as may be disposed of for no consideration to Lessee, through unavoidable waste or leakage, or which is returned to the ground, or which is used to recover oil or other liquid hydrocarbons, shall not be deemed to have been sold or used, within the meaning, express or implied, of any part of this lease; Lessee agrees to exercise reasonable diligence to prevent all such waste and leakage and to assume and pay any tax or other charge levied against such gas, or the privilege of wasting or disposing of the same as herein provided.

(b)(4) On sulphur, the royalty shall be two dollars (\$2.00) per long ton.

(b)(5) Where gas from a well producing gas only is not sold or used because of lack of a suitable market, Lessee may pay as royalty an amount per year equal to five dollars (\$5.00) for each lease acre subject to lease at the time such well was shut-in or the delay rental as herein provided for or \$600.00 per well per year, whichever is greater, on or before ninety (90) days from the date such well is shut-in, and thereafter annually on or before the anniversary date of such first shut-in gas royalty payment and while such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof; provided, however, that this lease may be maintained in force by the payment of shut-in gas royalty for a period not exceeding two years after the expiration of the primary term, and then only if the shut-in gas well or wells are capable of producing gas in paying quantities. In the event, however, a suitable market for gas produced from this lease having been established shall thereafter cease and no other suitable market is then available for such gas by reason of which the well or wells producing such gas should be shut-in, Lessee may commence or resume the payment of shut-in gas royalty within the time and in the manner above provided at any time within or after the primary term, provided this lease may not be kept in force by payment of shut-in gas royalty only for any such period in excess of two consecutive years, or for shorter periods at various intervals not to exceed in the aggregate two years in all. The term "gas only" as used in this shut-in gas provision means and includes both gaseous and liquid hydrocarbons produced or producible from a well classified

as a gas well by the Railroad Commission of Texas or other governmental body having authority to classify such wells. It is understood and agreed that during any year that this lease is maintained in force solely by reason of this shut-in gas well provision, then in that event the minimum royalty provision contained in Paragraph 21 hereof shall not apply and the minimum royalty deficiency payments provided for therein need not be made for the producing year as defined in Paragraph 21 in which such gas well(s) are shut-in.

It is expressly understood and agreed that said shut-in royalty shall not relieve Lessee of its obligations to maintain drilling operations as provided in this lease, and thereafter diligently to develop said lands and to continue the production of oil and other hydrocarbons therefrom in paying quantities, as herein provided.

(c) Lessee shall not have free use of Lessor's oil or gas or other hydrocarbons for any operations hereunder except as provided in this Paragraph 3, subparagraph (b), subdivision (3) hereof provided, however, that should Lessee utilize any portion of its working interest in oil or gas for conducting operations under this lease, Lessor agrees to furnish without risk, charge, or liability, but at Lessee's sole risk and expense of delivery and use, Lessor's pro rata part of oil or gas or other hydrocarbons for such operations.

(d)(1) In no event shall Lessor or Lessor's royalty be charged any portion of Lessee's investment in or the cost of construction of, or the cost of maintenance of, or expense (including rents and royalties) of operating any plant, machinery, appliance, implement, or process, constructed, used or otherwise employed by Lessee in the production and/or separation and/or treatment of the oil or gas and/or in the manufacture of any products which may be produced therefrom.

(d)(2) Except as herein otherwise provided, Lessor's royalty shall never bear, either directly or indirectly, any costs whatsoever, except its attributable share of production taxes.

All royalties that may become due hereunder shall be paid to Lessor by mailing checks to Lessor promptly after the sale of such production and not later than the tenth (10th) day of the second month following the month or sale or use thereof. Lessor shall have the right at all reasonable times, by its agents, to inspect the books, accounts, contracts, records, and data of Lessee

pertaining to the development, production, saving, transportation, sale, and marketing of the oil and/or gas from the leased premises.

If production is obtained by Lessee hereunder, Lessee agrees, at his sole cost and expense, to care for, preserve, compress, dehydrate and transport Lessor's part of such production from the reservoir to the pipe line provided by the purchasers thereof ("point of sale") in the same manner as Lessee cares for, preserves, compresses, dehydrates, and transports his part of such production, at all times utilizing and following the best practices as recognized in the industry for all of such purposes; and if Lessee is the purchaser of such production, Lessee will furnish Lessor a monthly statement reflecting the delivery of all of such production and the price for which Lessee's portion thereof was sold.

(e)(1) Lessor shall have the right and option, but not the obligation to take in kind or market separately Lessor's share of natural gas (being Lessor's royalty interest) produced from the leased premises.

Lessor or its successor or assigns may take in kind, at the point of sale, or separately dispose of Lessor's royalty share of oil and/or gas produced from the leased premises. Any extra expenditure incurred in the taking in kind or separate disposition by such party of such share of the production shall be borne by the party electing to take such production in kind.

Until such time as Lessor elects, by written notice to Lessee, to take royalty in kind, and makes the arrangements necessary to take in kind or separately dispose of Lessor's portion of the royalty share of the oil or gas produced from the leased premises, Lessee shall, subject to revocation by delivery of sixty (60) days written notice to that effect by Lessor, purchase such oil and gas or sell it to others or otherwise contract for its treatment and sale for the time being, with royalty thereon payable as set out herein. Any such purchase, sale or other disposition by Lessee shall be subject always to the right of the Lessor, its successors or assigns after delivery of sixty (60) days written notice to Lessee to exercise at any time the right to take in kind, or separately dispose of, Lessor's share of all oil and gas not previously delivered to a purchaser or processor. Notwithstanding the foregoing, Lessee shall not make a sale into interstate commerce of Lessor's share of gas production without first giving Lessor sixty (60) days notice of such intended sale, and receiving written consent from Lessor. No contract made by Lessee for the sale of

Lessor's share of gas or oil shall be for a term longer than is commensurate with the minimum needs of the industry under the circumstances and no such contract shall in any event be for a term exceeding \_\_\_\_\_ .

4. Lessee, at its option, subject to the provision of Paragraph 20 appearing hereafter, is hereby given the right and power to pool or combine the acreage covered by this lease or any portion thereof as to oil and gas, or either of them, with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order to properly develop and operate said premises in compliance with the spacing rules of the Railroad Commission of Texas, or other lawful authority, or when to do so would, in the judgment of Lessee, promote the conservation of the oil and/or gas in and under and that may be produced from said premises, such pooling to be into a unit or units not exceeding \_\_\_ acres for oil, nor \_\_\_ acres for gas, plus a tolerance of 10% thereof, provided, however, if the spacing rules prescribed for that particular field or area by any regulatory body or agency having jurisdiction should be smaller or larger than the maximum herein provided for, then such pooled units shall be reduced or enlarged accordingly to conform to such spacing. Lessee under the provisions hereof may pool or combine acreage covered by this lease or any portion thereof as above provided as to oil in any one or more strata and as to gas in any one or more strata. The units formed by pooling as to any stratum or strata need not conform in size or area with the unit or units into which the lease is pooled or combined as to any other stratum or strata, and oil units need not conform as to area with gas units. The pooling in one or more instances shall not exhaust the rights of the Lessee hereunder to pool this lease or portions thereof into other units. Lessee shall execute in writing an instrument identifying and describing the pooled acreage, and file same in the office of the County Clerk of the aforesaid county. The entire acreage so pooled into a tract or unit shall be treated, for all purposes except the payment of royalties on production from the pooled unit, as if it were included in this lease. If production is found on the pooled acreage, it shall be treated as if production is had from this lease, whether the well or wells be located on the premises covered by this lease or not. In lieu of the royalties elsewhere herein specified, Lessor shall receive, on production from a unit so pooled, only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis bears to the

total acreage so pooled in the particular unit involved. The option to pool hereunder may be exercised by Lessee from time to time, whether before or after production has been established.

5. In the event this acreage or any portion thereof is pooled with other land, lease, or leases, in the immediate vicinity thereof and drilling operations and/or production is obtained thereon, only the amount of acreage necessary to form the unit may be held by such operations and/or operations and/or production, the remainder to be subject to the rental, during the primary term, after which it shall revert to the Lessor unless held by reason of continuous drilling operations or production in paying quantities thereon as outlined herein.

6. Notwithstanding the pooling authority contained in Paragraph 4 above, it is expressly understood and agreed that no strata or horizons under this lease shall be included in any unit formed pursuant to that paragraph unless the entire unit so formed shall include the same strata or horizon, and operations conducted on any such unit shall not maintain this lease in effect as to any other strata or horizon out of or under this lease that is not included in that unit; and further, no such unit shall be created unless at least one-half of the surface area embraced in any such unit and the mineral interest thereunder included in this lease is taken from this lease if the available area out of this lease for inclusion in such unit will permit, and if not, then all such part of this lease as then is available for inclusion in the formation of any such unit.

7. If at the expiration of the primary term oil or gas is not being produced and saved on the leased premises (or on land pooled therewith) but Lessee is then engaged in drilling or reworking operations thereon or shall have completed a dry hole thereon within sixty (60) days prior to the end of the primary term, this lease shall remain in force so long as operations on said well or for the drilling or reworking of any additional well are prosecuted with no cessation of more than sixty (60) consecutive days, and if they result in the production of oil, gas or other mineral, so long thereafter as oil, gas or other mineral is produced from said land. Drilling operations shall be deemed to have commenced hereunder when the bit is first spudded into the ground. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and draining the leased premises, Lessee agrees to drill such offset wells as a

reasonably prudent operator would drill under the same or similar circumstances.

8. It is understood that Lessor does not own any interest in the surface estate as such, but only such rights as are incidental to its mineral ownership that is covered by this lease and the rights granted to Lessee hereunder for the use of the surface are only such as are incidental to Lessor's mineral estate. Lessee agrees to and shall protect Lessor and keep it safe and harmless from any and all claims that may arise from or are incidental to its ownership of the mineral leasehold estate and its operations on the land on and under which the mineral interest covered by this lease is located.

9. Lessee shall have the right at any time during or within a reasonable time after the expiration of this lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. When required by Lessor, Lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessor's consent.

10. All mineral rights and interests of Lessor not included in this lease are reserved to Lessor with the right of ingress and egress to and from said leased premises for the purpose of investigation, exploring, mining and producing, transporting and selling same.

11. The rights of either party hereunder may be assigned in whole or in part, and the provisions hereof shall extend to their heirs, successors and assigns; but no change or division in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee; and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished by registered or certified U.S. Mail at Lessee's principal place of business with a certified copy of recorded instrument or instruments evidencing same. In the event of assignment hereof in whole or in part, liability for breach of any obligation hereunder shall rest exclusively upon the owner of this lease or of a portion thereof who commits such breach. Likewise, no assignment of this lease in whole or in part by Lessee, its successors or assigns shall be binding on the Lessor until Lessor shall be furnished by registered or certified U.S. Mail with a certified copy of the recorded instrument evidencing such assignment. Lessee, its successors or assigns, agrees to promptly

furnish to Lessor the names and business addresses of all assignees.

12. Lessee may at any time or times execute and deliver or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations except prior obligations and obligations for surface damages as to the acreage surrendered, and thereafter any payments dependent on lease acres then in force shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases; provided, however, that all such acreage released by Lessee shall be in a contiguous tract which shall not have a boundary situated within 1,320 feet of any boundary of the leased premises unless the boundary of such tract coincides with the boundary of the leased premises.

13. All express or implied covenants of this lease shall be subject to all valid and irremediable Federal and State laws, Executive Orders, Rules or Regulations, and this lease shall not be terminated in whole or in part, nor Lessee held liable in damages for failure to comply therewith, if compliance is prevented by, or failure is the result of, any such valid and irremediable Law, Order, Rule or Regulation, or if prevented by an Act of God or of the public enemy. "Irremediable" means that either (a) the Lessee has sought unsuccessfully to have the law, order, rule or regulation set aside, modified or held unconstitutional or inapplicable insofar as necessary to enable the Lessee to fulfill its obligations to the Lessor and has pursued its efforts to the last tribunal having jurisdiction, or (b) a competent lawyer, paying due regard to the interests of both Lessor and Lessee, would adjudge such an attempt to be clearly useless.

If oil or gas is discovered but production is prevented by any of the causes in Paragraph 13, this lease shall be considered producing and shall continue in full force and effect until Lessee is permitted to produce the oil or gas, and as long thereafter as oil or gas actually is produced in paying quantities, provided, however, that Lessee, as an express condition for the extension of the lease without production, shall pay to Lessor the sum of \_\_\_\_\_ per annum, for each acre of the leased premises, subject to this lease at the time such shut-in well was commenced by actual drilling. Surrender of any part of the leased premises thereafter shall not operate to reduce the amount of this shut-in royalty payment, payment to be made within ninety (90) days

from the date that production is prevented and annually upon such payment date until production is resumed. In addition, Lessee agrees to use his best efforts to cure the cause of any delay so as to commence or recommence operations or production as soon as practicable and to promptly inform Lessor as to causes of delay and efforts to cure same.

14. After the discovery of oil and/or gas, including condensate and other hydrocarbon substances, in paying quantities on the leased premises, Lessee shall develop the leased acreage then retained hereunder as a prudent operator but in discharging this obligation Lessee shall in no event be required to drill more than one well per unit area to each producing horizon included in that unit in the further development thereof, the size of any such unit area to be governed by the then applicable spacing regulations of the Railroad Commission of Texas, if any, and if not, then such unit area shall not be in excess of that provided for in Paragraph 4 above.

15. In the event Lessor considers that operations, either express or implied, are not at any time being conducted in compliance with this lease, Lessor shall notify the Lessee in writing setting out specifically in what respect Lessee has breached this contract, and Lessee, if in default, shall have sixty (60) days after such notice in which to comply, or commence to comply, with the obligations imposed by virtue of this instrument.

16. Lessor hereby warrants and agrees to defend the title to its undivided interest in said land, by, through and under it, and agrees that Lessee at its option may discharge any tax, mortgage or other lien against the same, either in whole or in part, and in event Lessee does so, it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same. Without impairment of Lessee's rights under the warranty in event of failure of title, it is agreed that if Lessor owns an interest in said land less than the entire fee simple estate, then the royalties to be paid Lessor shall be reduced proportionately. It is understood that Lessor owns an undivided mineral interest only in the lands covered by this lease and that this lease covers and includes all of that undivided ownership interest in the leased substances in said land as described above. This lease is made without warranty, expressed or implied, and covers only Lessor's present interest.

17. No express obligation assumed by Lessee herein shall relieve it of any duty otherwise resting upon it hereunder to

explore, develop, operate, save, transport or market production from and under this lease, except to the extent of direct conflict with such express obligation, and all such express obligations shall be construed as providing minimal standards only.

18. Lessor, at its own risk, through its selected representative or representatives, shall have the right of ingress and egress, at any and all times to all drilling and other operations being conducted on the leased premises, including the derrick floor of any drilling or producing well or any well being worked on, for the purpose of observing the nature and extent of the operations being conducted by Lessee, and Lessor shall be furnished by Lessee, upon request by Lessor, promptly as taken with samples of all cuttings and cores, including but not by way of limitation, sidewall samples from all wells drilled on all of said described lands; and Lessee shall mail or deliver to Lessor each week a progress report covering the drilling and completion of each well drilled hereunder during the immediately preceding seven (7) day period, which report shall show a summary of all information usually shown on a daily drilling report, including particularly, but not by way of limitation, (a) drilling depths with corresponding lithological information, (b) difficulty and delays, (c) types of cores taken and of tests made with corresponding depths, and (d) size and quantity of casing, pipe and tubing used. However, in lieu thereof at the request of Lessor, Lessee shall currently mail or deliver copies of Lessee's daily drilling reports. Lessee shall furnish Lessor, promptly each analysis, report or log obtained or furnished Lessee covering any core, sample, survey, drill stem or production test and other surveys of whatever nature made of each well drilled and upon the completion of each well drilled and not later than ten (10) days thereafter, Lessee shall furnish Lessor, with a true, accurate and complete statement embodying all drilling, completion and production data, and a copy of all reports made to the Railroad Commission of Texas relating to the leased premises. Lessor, through its representative or representatives, shall have access at any and all times to all producing wells drilled under the terms of this lease and to the stock tanks into which the production therefrom is being run for the purpose of inspecting the operations thereof and the gauging of the production therefrom. Lessor may, at any time, install and maintain flow meters on any and all producing wells drilled under the terms of this lease for the purpose of measuring the production therefrom.

19. It is expressly understood and agreed, that the rights to oil, gas, gaseous hydrocarbons and sulfur granted herein shall extend

only to a depth one hundred (100) feet below the depth penetrated in the deepest well drilled or commenced by actual drilling with adequate tools on lease premises or on land pooled therewith during the stated \_\_\_\_\_ primary term.

20. The authority to pool granted herein is limited to pooling as to gas only. Provided, however, that after the first well classified as an oil well is completed and producing oil in paying quantities, the Lessee may, subject to provisions of this lease, pool acreage and horizons from this lease not included within the boundaries of the producing oil unit for oil as well as gas.

21. If this lease becomes productive and the royalty from production payable Lessor during any producing year does not equal the amount of the annual delay rental during the primary term or \$ \_\_\_\_\_ per acre after the end of the primary term for each lease acre being kept in force by production as of the first of the producing year, then within sixty (60) days after the end of the producing year, Lessee shall pay Lessor at its business address the difference between the amount of royalty paid to it and the minimum royalty sum of \$ \_\_\_\_\_ per acre. A producing year, for the purpose of this lease, shall be deemed to commence on the first day of the calendar month following the day in which production commences.

22. Notwithstanding the other terms and provisions hereof if this lease is in force and effect as to all or any part of the lands covered hereby one (1) year after the expiration of the primary term, it shall nevertheless terminate as to all acreage then covered by this lease at all depths one hundred (100) feet below the deepest depth from which commercial production is then being obtained in any well drilled by Lessee on the premises or on land pooled therewith in accordance with the provisions of this lease. Lessee binds \_\_\_\_\_ and assigns, to execute, deliver and record a proper release.

23. Notwithstanding anything contained in this lease to the contrary, Lessee shall conduct a continuous development operation on the leased premises which shall commence 180 days from the completion date (where the term "completion date" is used in this paragraph it shall be defined to mean that date upon which a potential test report with respect to a well capable of producing oil or gas in commercial quantities is filed with the Railroad Commission of the State of Texas or that date upon which a plugging report with respect to a dry hole is filed with the Railroad Commission of the State of Texas, and where used herein

"commence" and "commencement" shall mean the beginning of the actual drilling (i.e., spudding in) of a well in search for oil or gas with adequate tools on the drill site) of the first producing well on the leased premises or on lands pooled therewith and shall thereafter continue drilling on the leased premises or on lands pooled therewith with no cessation of more than 180 days between the completion of a well as a producer or a dry hole and the commencement of the next succeeding well until such time as the total number of surface acres of the leased premises included within the spacing, proration or pooled units on which the wells have been completed hereunder or within the units, as prescribed by the Railroad Commission of the State of Texas or other regulatory body having jurisdiction, equals the total number of surface acres covered herein. In the absence of field rules prescribed by the Railroad Commission of the State of Texas or other regulatory body having jurisdiction, 80 acres shall be allocated to an oil well and 320 acres to a gas well, each plus a tolerance of 10% thereof. If Lessee fails to commence or having commenced, fails to drill any well provided by this paragraph and within the time limit set forth, then this lease shall automatically become null and void as to all the leased premises save and except the number of acres as near as possible in the form of a square surrounding each producing well or wells allocated above set forth.

IN WITNESS WHEREOF, THIS INSTRUMENT IS EXECUTED ON THE DATE FIRST ABOVE WRITTEN.

ATTEST:

\_\_\_\_\_  
Secretary

\_\_\_\_\_  
LESSOR  
President

\_\_\_\_\_  
LESSEE

## APPENDIX D

### ABRIDGED BIBLIOGRAPHY ON OIL AND GAS LEASE LAW

1. Richard W. Hemingway, *Law of Oil and Gas* (West Publishing Co. Hornbook Series, 1983).
2. Earl A. Brown, *The Law of Oil and Gas Leases* (Matthew-Bender, 1985), 2 Volumes.

3. Howard R. Williams and Charles J. Meyers, Oil and Gas Law (Matthew-Bender, 1985), 8 Volumes, including Volume 8, Manual of Terms.
4. W. L. Summers, The Law of Oil and Gas (West Publishing Co., 1985), 10 Volumes.
5. Frank W. Elliott and Richard W. Hemingway, West's Texas Forms, Volumes 6 and 7, Minerals, Oil and Gas (West Publishing Co., 1985).

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.  
General, United States Army  
Chief of Staff

Official:

R. L. DILWORTH  
Brigadier General,  
United States Army  
The Adjutant General









