THE SERVICEMEMBERS CIVIL RELIEF ACT: PROTECTING VICTIMS OF DOMESTIC VIOLENCE IN PROTECTION ORDER CASES INVOLVING THE MILITARY

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Every attorney who represents petitioners in protection order cases must be versed in the significant procedural requirements of the Servicemembers Civil Relief Act (SCRA).[1] Before September 11, 2001, the primary players working with the questions and issues posed by the SCRA were judges and attorneys practicing law within close proximity to a military installation. When the War on Terror began and local Guard and Reserve units were mobilized, the SCRA began to impact court proceedings in hometowns around the country.

The issues presented by the SCRA are now being heard in courts far from military installations. Since September 2001, in communities around the country, significant numbers of local National Guard and Reserve Component members have been called to active duty. In April 2004, there were more than 210,000 National Guard and Reserve personnel who had been mobilized to active duty

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[1] 50 U.S.C. app. § 501 (2006 & Supp. 2009).

service.[2] As of March 10, 2009, there were nearly 124,000 active duty National Guard and Reservists.[3] More than forty percent of the armed forces serving in Iraq in 2006 were members of a local Reserve or National Guard unit.[4]

The Soldiers and Sailors Civil Relief Act (SSCRA), predecessor to the SCRA, did not historically protect National Guard and Reservists. After September 2001, Congress amended the SSCRA to provide protections for these citizen soldiers. In 2003, the SSCRA was completely revised and was renamed the Servicemembers Civil Relief Act (SCRA). The revised law provides important protections for members of the National Guard and Reserve units called to active duty for thirty days or more.[5]

The SCRA provides procedural safeguards for servicemembers, beginning with the filing of any civil action where either party may be on active duty military service. The SCRA provides protection for servicemembers from the impact of default judgments, as well as a method for obtaining a stay of proceedings, due to the obligations imposed by military service.

This article explores the intersection of the SCRA and protection order cases filed under state statutes; specifically, procedural issues which have the potential to delay court orders needed to protect the petitioner and the parties' children. The first section examines the procedural protections found in the SCRA as applied to protection orders. The second section explores procedural steps required prior to entry of any court order. The third section surveys case law from around the country concerning requests to stay the protection order

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[2] OFFICE OF THE ASSISTANT SEC'Y OF DEF. FOR RESERVE AFFAIRS, U.S. DEP'T OF DEF., NATIONAL GUARD AND RESERVE EQUIPMENT REPORT FOR FISCAL YEAR 2009 1-2 (Stuart Taylor ed. 2008), http://search.dma.mil/search?q=cache:h9TDCaWhdhkJ:ra.defense.gov/documents/NGRER%2520FY2009.pdf+NGRER+2009&site=DEFENSE_gov&output=xml_no_dtd&client=DEFENSE_frontend&ie=UTF- 8&proxystylesheet=DEFENSE_frontend&access=p&oe=UTF-8.

[3] U.S. DEP'T OF DEF., DEF. MANPOWER DATA CTR., RESERVE COMPONENTS NOBLE EAGLE / ENDURING FREEDOM /IRAQI FREEDOM 1 (2009), http://www.defenselink.mil/news/Mar2009/d20090310ngr.pdf.

[4] Mark E. Sullivan, *The New Servicemembers Civil Relief Act*, 11 N.C. ST. B.J. 22, 22 (2006).

[5] 50 U.S.C. app. § 511(a)(ii).

proceeding and extrapolates creative legal arguments to convince the court that the ex parte order can be extended and that temporary orders for support, custody, and possession of property can be entered to protect the petitioner and the children although a stay is granted.

I. SCRA AND PROTECTION ORDERS

A. Domestic Violence and the Military

When a judge is faced with issues involving the rights of a servicemember under the SCRA, sometimes the judge will choose to err on the side of caution and take a "hands off" approach to the case. These judges are aware of some of the basic protections of the SCRA but have had few encounters with the intricacies of the Act and prefer to defer to the servicemember and delay or stay the matter. An advocate who understands the fine points of the Act can request protection for their client and their client's children by giving the judge specific provisions of the Act, which permits the court to rule in favor of protecting the petitioner.

Victims alleging intimate partner violence at the hands of a servicemember may face an uphill battle in the court of public opinion, which can spill over into state courts. Sympathy and public support for those who serve in our military is at an all-time high. When referring to a returning servicemember, our lexicon contains terms like "warriors" and "patriots." There are no similar sympathetic terms that describe the spouse who handles the family household and is a single parent to the children while the servicemember is deployed. Even the language of the United States Supreme Court reflects this patriotic fervor when describing the purpose of the SCRA as necessary to "protect those who have been obliged to drop their own affairs to take up the burdens of the nation."[6]

Yet, domestic violence remains a serious issue among military families. Many family members of returning combat veterans are in

[6] Boone v. Lightner, 319 U.S. 561, 575 (1943).

need of protection and legal assistance. Domestic violence rates among veterans with post-traumatic stress disorder (PTSD) are higher than those of the general population. A 1995 study found that 63% of veterans seeking help for PTSD had been aggressive to their partners in the last year.[7] A 1996 study of fifty volunteer Vietnam combat veterans and their partners found that 42% of the men had engaged in physical aggression against their partners in the previous year, 92% had been verbally aggressive, and 100% had used psychological aggression.[8] A recent 2006 study suggests that "treatment seeking veterans with PTSD or depression are more apt to perpetrate violence, especially severe violence, than are numerous other clinical or population-based groups that have been studied."[9] The findings of the study note:

> [A]pproximately 81% of PTSD and 81% of depressed veterans engaged in at least one act of violence toward their partners in the last year. These rates are more than six times higher than rates in the general population and are almost double the rate found when using volunteer Vietnam combat veterans and their partners . . . . Further, approximately 45% of PTSD veterans and 42% of depressed veterans perpetrated at least one severe violent act in the last year (based on a combined report). These rates were 14 times higher than were rates from the general population.[10]

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[7] T. M. Keane, B. T. Litz & F. W. Weathers, Psychological Assessment and Treatment of Posttraumatic Stress Disorder (Nov. 1995) (unpublished manuscript) (presented at the annual meeting of the Association for Advancement of Behavior Therapy, Washington, D.C.).

[8] Christina A. Byrne & David S. Riggs, *The Cycle of Trauma: Relationship Aggression in Male Vietnam Veterans with Symptoms of Posttraumatic Stress Disorder*, 11 VIOLENCE & VICTIMS 213, 213-25 (1996) (based on combined veteran/partner report of violence).

[9] Michelle D. Sherman et al., *Domestic Violence in Veterans with Posttraumatic Stress Disorder Who Seek Couples Therapy*, 32 J. MARITAL & FAM. THERAPY 479, 486-87 (2006).

[10] *Id.* at 486.

The deep sympathy that Americans have for returning soldiers and sailors who are suffering from depression, post-traumatic stress disorder, or traumatic brain injury must not, consequently, result in underestimating the danger that the servicemember's family may be facing. Deborah Tucker, Executive Director of the National Center on Domestic and Sexual Violence (NCDSV) and Co-chair of the U.S. Department of Defense Task Force on Domestic Violence (DTFDV),[11] warns in her article about domestic violence, PTSD, and traumatic brain injuries: "When we struggle in considering a case of domestic violence assault, it is important that no matter the reason behind the assault that the offender be held accountable; and the victim supported and assisted to ensure her future safety."[12]

The Defense Task Force on Domestic Violence was established in 2000 to study domestic violence within the military system and to make recommendations to the Department of Defense. In 2002, the entire country became aware of a possible link between domestic violence and combat related military service after the highly publicized deaths of the wives of four Ft. Bragg soldiers. Funding for the military's Family Advocacy Program (FAP) increased and additional non-lawyer victim advocates were hired to assist victims of domestic violence who live in or near a military installation. While the increase in support services by FAP victim advocates provided advocacy and support within the military system, there was no additional funding to provide attorneys for these victims of family violence. Also, family members of active duty National Guard or Reservists who do not live in or near a military installation have limited access to any type of advocacy and assistance.

While victims of intimate partner violence have few resources, there are multiple referral services that will provide a pro bono lawyer for the servicemember. The American Bar Association has organized the Military Pro Bono Project, which coordinates with many state bar associations, to refer servicemembers in need of legal assistance to a

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[11] Deborah D. Tucker, *Domestic Violence, PTSD and Brain Injury: Military and Civilian Challenges Part 1*, http://www.ncdsv.org/images/MFLJ_Domestic%20Violence%20and%20PTSD_Tucker_Pt%201_4-2009.pdf.

[12] *Id.* at 5.

local attorney.[13] Family members who are seeking protection from a servicemember are not eligible for assistance from this project. Thus, when victims have attorney representation, it is paramount that the advocate understands both the SCRA and the need for holding perpetrators accountable for their actions. When attorney advocates educate the judiciary on the fine points of the SCRA and the need to hold servicemembers accountable, the effects of that particular case may be far reaching, going beyond the represented client, and helping victims who later appear before that judge without an attorney. When the judge is later faced with a similar issue by a self-represented petitioner in a protection order case, perhaps, the judge will be less likely to take the "hands off" approach and instead consider the various mechanisms available to protect petitioners and their minor children.

B. History and Purpose of SCRA

Understanding the history and the legislative purpose behind the SCRA is essential for an attorney advocate. Any arguments advanced in court must be consistent with the purpose of the SCRA, or the argument is bound to fail. To understand the purpose of the Act, one must understand the history of the Act. The SCRA stems from a series of legislative acts designed to protect servicemembers from court related obligations while serving their country. Congress generally considers civil protections for servicemembers when the country is engaged in a military action. Congress enacted the first legal protections for servicemembers during the Civil War.[14] The first Soldiers and Sailors Civil Relief Act was codified during World

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[13] MILITARY PRO BONO PROJECT, AM. BAR ASS'N, INFORMATION FOR SERVICEMEMBERS AND THEIR FAMILIES SEEKING PRO BONO LEGAL HELP, http://www.militaryprobono.org/about/item.667-Information_for_servicemembers and_their_families_seeking_pro_bono_legal_he (last visited Oct. 13, 2010) (stating that while the project does make referrals for family members, "the family member needs to be acting as a surrogate for the servicemember in the legal issue").

[14] Act of June 11, 1864, ch. 118, 13 Stat. 123 (1864); *see also* Christopher Missick, *Child Custody Protections in the Servicemembers Civil Relief Act: Congress Acts to Protect Parents Serving in the Armed Forces*, 29 WHITTIER L. REV. 857, 860 (2008).

War I and ended when the war was over.[15] The Act was reenacted during World War II and underwent revisions during the Korean War, the Vietnam War,[16] Operation Desert Shield, and Desert Storm.[17]

During the Iraq and Afghanistan deployments, legislation was introduced in Congress to rewrite many of the outdated sections of the SSCRA. The various bills sought to bring the SSCRA's World War II protections into the 21st century.[18] A complete restructuring of the Act was signed into law in December of 2003, and the Act was renamed the Servicemembers Civil Relief Act (SCRA). The SCRA is considered a "restatement" of the SSCRA, as opposed to a repeal of the former act.[19] As a result, case law under the SSCRA is still persuasive and may be considered by the courts when interpreting the SCRA.[20]

The United States Supreme Court once said that the SSCRA "must be read with an eye friendly to those who dropped their affairs to answer their country's call."[21] In consideration of the legislation's purpose, the Supreme Court has held that the statute must be

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[15] Soldiers' and Sailors' Civil Relief Act, ch. 20, 40 Stat. 440 (1918); *see also* Colin A. Kisor, *Who's Defending the Defenders?: Rebuilding the Financial Protections of the Soldiers' and Sailors' Civil Relief Act,* 48 NAVAL L. REV. 161, 163 (2001) (stating that the Solders' and Sailors' Act of 1918 "expired by its provision six months after the end of World War I").

[16] Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, 54 Stat. 1178 (1940); Kisor, *supra* note 15, at 163.

[17] Gregory M. Huckabee, *Operation Desert Shield and Desert Storm: Resurrection of the Soldiers and Sailors Civil Relief Act,* 132 MIL. L. REV. 141, 158-59 (1991).

[18] Terry M. Jarrett, *The Servicemembers Civil Relief Act: Important New Protections For Those In Uniform,* 60 J. MO. B. 174, 175 (2004); Deborah F. Buckman, Annotation, *Construction and Application of Federal Servicemembers Civil Relief Act, 50 app. U.S.C.A §§501 et seq.,* 37 A.L.R. FED 2d 1, 13 (West 2009).

[19] 149 CONG. REC. H. 3688-99 (daily ed. May 7, 2003) (statement of Rep. Smith, Chairman, Comm. on Veterans' Affairs on the SCRA) ("A 'restatement' of a law has long been understood to mean a law that has been updated, clarified and strengthened, including a gathering of the relevant judicial interpretations and a measured casting aside of those few interpretations that do not comport with the author's understanding of the law's intent.").

[20] Sara Estrin, *The Servicemembers Civil Relief Act: Why and How This Act Applies to Child Custody Proceedings,* 27 LAW & INEQ. 211, 221 (2009).

[21] Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).

construed liberally in order "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." [22] Congress has codified this case law history into the current purpose section of the SCRA.

The current act contains a two-fold purpose and reads as follows:

> (1) to provide for, strengthen, and expedite the national defense through protection extended by this Act [said sections] to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and
>
> (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.[23]

C. Application of the SCRA to Protection Orders

This section addresses the application of the SCRA to cases where the petitioner has requested the issuance of a protection order under the state law framework, allowing an independent cause of action to protect victims of family violence. Protection orders may also be issued within a divorce proceeding or as part of a criminal proceeding.[24] The federal Violence Against Women Act defines "protection orders," which are entitled to full faith and credit, as including:

> [A]ny injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violence or threatening acts or harassment against, sexual

[22] Boone v. Lightner, 319 U.S. 561, 575 (1943).
[23] 50 U.S.C. app. § 502 (2006 & Supp. 2009).
[24] ALA. CODE § 30-5-3 (LexisNexis 1998) (stating that a protection order may be brought as part of a criminal action as a condition of pre-trial release, condition of sentencing, or condition of probation).

> violence or contact or communication with or physical proximity to, another person, including any temporary or final orders issued by civil or criminal courts whether obtained by filing an independent action or as a *pendente lite* order in another proceeding . . . .[25]

This article primarily addresses the application of the SCRA to an independent action for a protection order, but the Act's provisions may also apply to protection orders which are part of another proceeding.

1. Who is covered by the SCRA?

The definitions contained in the Servicemembers Civil Relief Act describe who is covered by the Act with specificity.[26] Individuals who are on active duty[27] in the Army, Navy, Air Force, Marine Corps, and Coast Guard are "servicemembers" covered under the Act. Reservists called to active duty are included under the definition of "servicemembers." Interestingly, commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration (NOAA) who are on active service are also "servicemembers" covered by the SCRA.[28] Members of the National Guard called to active duty service under Title 32 for more than thirty days in response to a national emergency declared by the President and supported by Federal funds under Title 32 are also covered by the Act.[29]

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[25] 28 U.S.C. § 534(f)(3)(B) (2006) (emphasis added).
[26] 50 U.S.C. app. § 511(2) (clarifying who is covered under the act by defining "military service").
[27] 10 U.S.C. § 101(d)(1) (2006) (defining "active duty" as "full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."); 50 U.S.C. § 511(2)(i) (explaining that the definition of "active duty" under 10 U.S.C. § 101(d)(1) should be used under this Section).
[28] 10 U.S.C. § 101(d)(1,6).
[29] 50 U.S.C. app. § 511(2).

Servicemembers who are in a military prison have been denied the protections of the SCRA. The definition of "military service" includes servicemembers who are absent from duty as retaining the protections of the SCRA, but only if the servicemember is "absent from duty on account of sickness, wounds, leave, or other lawful cause."[30] In *Reed v. Albaaj*,[31] the Minnesota Court of Appeals held that "[b]ecause Albaaj was incarcerated in military prison for crimes that he committed while on active duty, we conclude that he was not on active duty at the time of the dissolution proceeding and was, therefore, not entitled to benefit from the protections of the SCRA."[32]

The *Reed* court relied upon a prior case decided by the Ohio Court of Common Pleas under the SSCRA. In *Mantz v. Mantz*,[33] the Ohio court ruled that a soldier who was incarcerated by the military was not protected under the SSCRA. The language used in the *Mantz* opinion is useful when dealing with a servicemember who may be incarcerated by the military or even the local authorities. When considering whether Mr. Mantz was entitled to the protections of the SSCRA, the court stated: "The benefits of the Soldiers' and Sailors' [Civil] Relief Act are extended to those who are in active service or duty and do not inure to benefit or protect those who through their voluntary aggressions and conduct remove themselves from the role of soldiers and sailors in active service or duty."[34]

Servicemembers who are AWOL have also been denied the protections of the SCRA for similar reasons. In *Means v. Means,*[35] the Pennsylvania court said of an AWOL soldier: "Can it be said in logic or reason that to permit [an AWOL servicemember's] wife to proceed with her divorce action prevents him from devoting his full energy '. . . to the defense needs of the Nation', or can it say that he has absented himself for any 'lawful cause?'"[36]

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[30] 50 U.S.C. app. § 511(2)(c).
[31] 723 N.W.2d 50 (Minn. Ct. App. 2006).
[32] *Id.* at 55.
[33] 69 N.E.2d 637 (Ohio Com. Pl. 1946).
[34] *Id.* at 639.
[35] 45 Pa. D. & C.2d 228 (Pa. Ct. C. P. 1968).
[36] *Id.* at 231.

2. Application of the Act to Protection Orders

Protection Orders are creatures of state law and are considered civil actions in most jurisdictions.[37] The SCRA "applies to *any* judicial or administrative proceeding commenced in *any* court or agency in *any* jurisdiction subject to this Act."[38] The SCRA does not apply to criminal proceedings;[39] thus, if the protection order is brought as part of a criminal proceeding, the provisions of the SCRA do not apply.[40]

The procedural protections of the Act apply to judgments. The term "judgment" is broadly defined as "any judgment, decree, order, or ruling, final or temporary."[41] A final protection order entered after notice and opportunity to be heard is clearly subject to the procedural protections of the SCRA. Temporary orders entered after notice and an opportunity to be heard are also clearly subject to the procedural protections of the Act. Ex parte orders entered as injunctive relief without notice or opportunity to be heard require a more in-depth analysis and are discussed in detail in the subsequent sections.

3. Application of the Act to Custody Issues

When the SCRA was revised and enacted into law in 2003, it did not specifically address child custody proceedings as being covered

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[37] *See* D.C. CODE § 16-1003 (2001) (showing that the District of Columbia entitles its statutory framework as "Petition for Civil Protection"); FLA. STAT. ANN. § 741.30(1)(b) (West 2010) (allowing an injunction for protection against domestic violence regardless of whether there are any other causes of action pending between the parties); 750 ILL. COMP. STAT. ANN. 60/205(a) (West 2009) (stating that the Rules of Civil Procedure apply to protection order hearings).

[38] 50 U.S.C. app. § 512(b) (2006 & Supp. 2009) (emphasis added) (explaining that the Act applies to the United States and all territories under the jurisdiction of the United States).

[39] *Id*.

[40] ALA CODE § 30-5-3(b)(3) (LexisNexis 1998) (allowing Protection Orders to be brought as part of a criminal action as a condition of pre-trial release, condition of sentencing, or probation); COLO. REV. STAT. ANN. § 18-1-1001(1) (3)(b)(5) (2004) (requiring a Protection Order be issued against any person charged with a domestic abuse violation).

[41] 50 U.S.C. app. § 511(9).

by the Act. § 521, which applies to default judgments, and § 522, which applies to a request to stay proceedings, simply read "this section applies to any civil action."[42] Since the enactment of the SCRA, there has been controversy about whether the federal government intended that the SCRA procedural protections apply in a custody proceeding, such as a juvenile court dependency proceeding[43] or a post-divorce proceeding.[44] The question was whether the best interests of the children could be taken into consideration and weighed against the rights of the servicemember about to be deployed.

On May 5, 2007, the Associated Press published a story documenting the number of military parents who were losing custody of their children during their deployments.[45] The prime example cited was the unhappy case of Eva Crouch,[46] who lost custody of her daughter due to her one-year deployment to Fort Knox, Kentucky. The article documented multiple cases where children stayed with their non-military parent during the deployment and subsequently permanent custody remained with that parent after the servicemember's return. Representative Mike Turner, a Republican member of the House of Representatives, 3rd District, Ohio,[47] reacting to the national firestorm created by the article, introduced legislation in 2007 and 2008 mandating specific rights for servicemembers in custody disputes. The Pentagon opposed the legislation, stating that

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[42] *Id.* §§ 521-522 (2006 & Supp. 2009).

[43] San Diego County Health & Human Servs. Agency v. Robert, 170 Cal.App. 4th Supp. 733, 741 (Dep't Super. Ct. 2009) (holding that the SCRA does apply to dependency proceedings).

[44] Missick, *supra* note 14, at 869 (discussing the history of the controversy concerning application of the SCRA to custody proceedings, including Rep. Mike Turner's work on strengthening the protections for servicemembers).

[45] The Associated Press, *Deployed Troops Fight for Lost Custody of Kids: Children Taken from Single Parents in Uniform When They Are Mobilized*, May 5, 2007, http://www.msnbc.msn.com/id/18506417 (last visited July 12, 2010).

[46] Crouch v. Crouch, 201 S.W.3d 463 (Ky. 2006).

[47] Office of the Clerk of the U.S. House of Representatives, *Member Information*, http://clerk.house.gov/member_info/mem_contact_info.html?statdis=OH03 (last visited July 13, 2010).

this is "a matter of state law concern."[48] After much debate, the resulting amendment to the SCRA simply added the following language to §§ 521-522: "this section applies to any civil action, *including any child custody proceeding*."[49] At the time of writing this article, Rep. Turner continues to ask for more extensive federal protections of the rights of servicemembers to custody of their children; however, these efforts have not been successful to date.[50]

Many state legislatures have passed legislation protecting the interests of deployed servicemembers regarding continued custody of their children, and these statutes must be reviewed prior to proceeding on a request for custody in a protection order case.[51] Most of these

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[48] Secretary of Defense, Robert Gates, *Ensuring Child Custody Protection*, THE WASHINGTON TIMES, Oct. 8, 2009, *available at* http://www.washingtontimes.com/news/2009/oct/08/ensuring-child-custody-protection (last visited Sept. 5, 2010).

[49] 50 U.S.C. app. §§ 521-22 (2006 & Supp. 2009) (emphasis added).

[50] Rep. Turner has introduced this proposal four times, the last time as part of the National Defense Authorization Act of 2010. He was not successful. Rep. Turner's proposal includes:

> * No court may permanently alter an existing custody agreement while a military parent is deployed.
>
> * A court may issue a temporary order if it's in the best interest of the child.
>
> * Upon the return of the service member from deployment, any temporary change in custody shall be immediately reversed, unless the change is not in the best interest of the child.
>
> * No court may consider a military parent's past deployment or possible future deployment as a basis for determining the best interests of the child in custody court cases.
>
> * Allows states to adopt stricter protections for parents, and upholds state jurisdiction over custody matters.

[51] **Arizona**: ARIZ. REV. STAT. ANN. § 25-411 (2007) (requiring pre-deployment custody orders to address post deployment custody).
Arkansas: ARK. CODE ANN. § 9-13-110 (2009).
California: CAL. FAM. CODE § 3047 (West 2004 & Supp. 2010).
Colorado: COLO. REV. STAT. ANN. § 14-10-131.3 (West 2005) (applying only to custody decisions due to deployment).
Delaware: DEL. CODE ANN. tit. 13, § 727(d) (2009) (prohibiting permanent custody orders during deployment).
Florida: FLA. STAT. ANN. § 61.13002 (Supp. 2010) (applying only to custody decisions due to deployment).

Georgia: GA. CODE ANN. § 19-9-122(a), (b)(6) (2010) (allowing the delegation of caregiving authority to a grandparent during the parent's active duty military service by a written power of attorney).
Idaho: IDAHO CODE ANN. § 32-717(6) (2006) (applying only to custody for deployed Guard and Reserves).
Illinois: 750 ILL. COMP. STAT. ANN. § 5/602(a)(10) (West 2009 & Supp. 2010) (stating that the terms of the family care plan are a "best interests" statutory factor); 750 ILL. COMP. STAT. ANN. § 5/610(e) (West 2009 & Supp. 2010) (providing that absence due to deployment does not mean a change of custody is in order).
Indiana: IND. CODE ANN. § 10-16-7-22 (West 2008) (allowing compensatory visitation for National Guard); IND. CODE ANN. § 31-17-4-10 (West 2008) (allowing compensatory parenting time for both Guard and Reserve).
Iowa: IOWA CODE ANN. § 598.41C (West 2008) (applying only to custody decisions due to deployment).
Kansas: KAN. STAT. ANN. § 60-1629 (2005) (comprehensive statute).
Kentucky: KY. REV. STAT. ANN. § 403.340 (West 2008) (providing that modifications due to deployment are temporary).
Louisiana: LA. REV. STAT. ANN. § 9:348 (2006) (allowing compensatory visitation when military parent is absent due to military duty).
Maine: ME. REV. STAT. ANN. tit. 18-A, § 5-104 (1998) (allowing a member of the National Guard or Reserves who is mobilized to delegate caregiving authority during this period of active duty).
Maryland: MD. CODE ANN. FAM. LAW § 9-108 (West 2006 & Supp. 2009) (referring only to custody decisions due to deployment).
Michigan: MICH. COMP. LAWS ANN. § 722.27(c) (West 2002) (comprehensive statute).
Mississippi: MISS. CODE ANN. § 93-5-34 (2004 & Supp. 2009) (very comprehensive statute).
Missouri: MO. ANN. STAT. § 452.412 (West 2003 & Supp. 2010) (demonstrating that comprehensive statute or deployments specifically include protection orders).
Montana: MONT. CODE ANN. § 40-4-216 (2009) (allowing for an expedited hearing if parent has military orders).
New York: N.Y. DOM. REL. LAW § 75-i (McKinney 1999 & Supp. 2010) (applying only to custody decisions due to deployment).
North Carolina: N.C. GEN. STAT. § 50-13.7 (2009) (comprehensive statute).
North Dakota: N.D. CENT. CODE ANN. § 14-09-06.6 (2009) (modification of custody).
Oklahoma: OKLA. STAT. ANN. tit. 43, § 112 (West 2001 & Supp. 2010).
Oregon: OR. REV. STAT. ANN. § 109.056 (West 2003 & Supp. 2010) (permitting a power of attorney, which transfers custody, with some restrictions).
Pennsylvania: 51 PA. CONS. STAT. ANN. § 4109 (West 1976 & Supp. 2010) (comprehensive statute).
South Carolina: S.C. CODE ANN. § 63-5-920 (2009) (comprehensive statute).

statutes are found in the state divorce statutes, but judges who hear protection order matters may require the petitioner to follow the same statutory provisions. Many of these state statutes do not apply to servicemembers who have volunteered for active duty service, but rather apply to servicemember parents who are members of the National Guard or the Reserves and have been called to active duty service.

D. Delays and Stays Under the SCRA in Protection Order Cases

The SCRA has two sections that directly impact filing a petition for a protection order and proceeding to a final order. § 521 mandates steps that must be followed when the defendant is a servicemember prior to any default judgments being entered. § 522 addresses requests for a stay by a servicemember after learning about the filing of a civil action.

II. THE SCRA NOTICE REQUIREMENTS: DEFAULT JUDGMENTS WHERE THE SERVICEMEMBER HAS NOT MADE AN APPEARANCE

§ 521 of the SCRA mandates certain procedures that must be followed prior to a court entering a default judgment. The legislative

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South Dakota: S.D. CODIFIED LAWS § 33-6-10 (2004).
Tennessee: TENN. CODE ANN. 36-6-113 (2006 & Supp. 2009) (applying only to modification of a previous custody order).
Texas: TEX. FAM. CODE ANN. §§ 156.105, 153.3161 (West 2008).
Utah: UTAH CODE ANN. § 30-3-40 (LexisNexis 2007) (applying only to modification of custody decisions with a military parent).
Vermont: VT. STAT. ANN. tit. 15, § 681 (West 2010).
Virginia: VA. CODE ANN. § 20-124.8 (2008) (modifications due to deployment); VA. CODE ANN. § 20.124.9 (2008) (allowing for an expedited hearing for initial custody order); VA. CODE ANN. § 20-124.10 (requiring a non-military parent to maximize child's communication with military parent while deployed).
Washington: WASH. REV. CODE ANN. § 26.09.010 (West 2005) (allowing for expedited hearings and electronic testimony); WASH. REV. CODE ANN. 26.09.260 (West 2005) (modifications).
West Virginia: W. VA. CODE ANN. § 48-9-404 (LexisNexis 2009) (comprehensive statute).

intent is to protect a servicemember who has been served but who may be absent from the jurisdiction due to military service from a default judgment being entered against him or her. All of the provisions of § 521 apply to a servicemember who has not made an appearance in the case.

A. A Military Affidavit Must be Filed Prior to Entry of a Default Judgment

All civil proceedings, including protection orders, must contain a sworn affidavit stating either that the respondent is in the military service, is not in the military service, or that the petitioner is unable to determine whether the respondent is in military service. This affidavit must be filed prior to any judgment being entered where the respondent has not yet appeared.[52] § 521(b)(1) states: "In *any action or proceeding* covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit."[53] If the petitioner avers that the respondent is or is not in the military service, the petitioner must also include the necessary facts to support the allegation.[54] Courts have interpreted the affidavit and supporting facts requirements to require "an investigation" into the military status of the defendant.[55] A person who "makes or uses" an affidavit knowing it to be false is guilty of a criminal offense punishable by a fine and possible incarceration.[56]

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[52] 50 U.S.C. app. § 511(2); 10 U.S.C. § 101(d)(1) (defining military service as active duty service with the Army, Navy, Air Force, Marine Corps, or Coast Guard, called by the President or the Secretary of Defense for a period of more than 30 consecutive days); *see also* 32 U.S.C. 502(f), for purposes of responding to a national emergency declared by the President, supported by Federal funds, and commissioned officers in the Public Health Service or the National Oceanic and Atmospheric Administration.

[53] 50 U.S.C. app. § 521(b)(1) (emphasis added) (applying the affidavit requirement to "any civil action or proceeding in which the defendant does not make an appearance[]").

[54] *Id.*

[55] Citibank, N.A. v. McGarvey, 765 N.Y.S.2d 163, 168 (Civ. Ct. 2003).

[56] 50 U.S.C. app. § 521(c).

If the petitioner is not able to determine whether the respondent is currently in the military, the petitioner or the court can apply for this information. The application may be filed with the Defense Manpower Data Center (DMDC), Military Verification, 1600 Wilson Blvd, Suite 400, Arlington, VA 22209-2593.[57] A self-addressed stamped envelope should be enclosed for the return of a certificate from the Director of the DMDC. Under the terms of the SCRA, the certificate is prima facie evidence as to whether the respondent "is, is not, has been, or has not been in military service."[58]

This certificate can also be obtained from a DMDC website.[59] After entering the necessary information,[60] the website will produce a report signed by the Director of the DMDC which is suitable for printing and filing. No foundation needs to be laid for the court to consider the certificate as the certificate itself is prima facie evidence as to "its contents and of the signer's authority to issue it."[61] If DMDC does not have information as to whether the individual is on active duty, the generated report will only list the supplied last name, first name and middle initial (if supplied), with the text: "Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty." This certificate may be attached to the petitioner's affidavit as proof that an effort has been made to determine whether the respondent is in the military service.

The best practice is to file this affidavit as part of the initial filing of the petition for a protection order. The Act is silent as to when the affidavit should be filed, except that it must be filed prior to the court entering a judgment against a servicemember defendant who has not entered an appearance.[62] A judgment is defined as "any judgment,

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[57] Contact DMDC by calling (703) 696-6762.

[58] 50 U.S.C. app. § 582(a)(1).

[59] Service Members Civil Relief Act (SCRA) Website, https://www.dmdc.osd.mil/appj/scra/scraHome.do (to seek military verification) (last visited June 21, 2010).

[60] Although all information is not required, match is improved by filing out complete information: social security number; first, middle and last name, and date of birth. *Id.*

[61] 50 U.S.C. app. § 582(b).

[62] *Id.* § 521(b)(1).

decree, order, or ruling, final or temporary."[63] Most protection orders seek an ex parte order at the outset, and by definition, this order will be entered prior to the appearance of the respondent. To prevent any argument that the terms of § 521 have not been followed, the best practice is to include the signed affidavit with the initial filing documents but prior to the entry of the ex parte order.

Most protection orders must be filed using state approved forms. Few state forms have the affidavit as part of the form. The affidavit requirement can be satisfied by including the requisite facts in a stand-alone affidavit filed with the court, or in "a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury."[64] Many states have approved standard forms for divorce and paternity actions which are in compliance with the SCRA; and many of these allow the affidavit to be part of the initial verified petition or complaint for relief. If the state approved forms include a stand-alone affidavit, attorney advocates should use that form when filing the initial petition for a protection order. If the state forms have approved paragraphs that are incorporated in the form for a verified divorce or paternity petition, that language should be included in the petition for a protection order.[65] Advocates who work with the agency or group charged with the responsibility of revising court-approved forms for protection order cases should raise this issue and create forms that comply with the SCRA's affidavit requirement.

B. An Attorney Must be Appointed to Represent the Respondent

§ 521(b)(2) requires the court to appoint an attorney to represent the respondent prior to entering any orders where the respondent has not made an appearance. Most petitions for protection orders request an ex parte order to be entered immediately. The ex parte order

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[63] *Id.* § 511(9).
[64] *Id.* § 521(b)(4).
[65] Bedwell v. Bedwell, 195 P.2d 1001 (Idaho Ct. App. 1948) (ruling that the affidavit requirement was met when there was a paragraph in the verified divorce complaint that set forth "very fully and completely and with great particularity" the facts as to the defendant's military status).

provides protection for the petitioner during a potentially dangerous window of time: after the initial triggering event and before the respondent appears before a judge. While the definition of "judgment" includes "temporary" orders,[66] the SCRA does not address whether ex parte orders or other types of injunctive relief fall under the definition of "judgment." Since the legislation is silent as to this type of court order, the best practice would be to provide the same protections required for a temporary order and appoint an attorney prior to entry of the ex parte order.

Appointing an attorney at this stage actually provides a benefit and added protection for the petitioner. Most state statutes provide that the ex parte order is enforceable when the respondent has actual notice of the order and completion of service of process is not required prior to enforcement. By appointing an attorney under the SCRA and providing a copy of the ex parte order to the appointed attorney, it is the responsibility of the appointed attorney to locate the respondent and provide actual notice of the pending civil action. The respondent may then have actual notice at an earlier time. Presumably, the appointed attorney would be advising the respondent to comply with the ex parte order until the case can be heard by the court and counseling the respondent on the negative consequences of a violation, not only under state law, but also possible negative effects on the servicemember's military career.

The role of the appointed attorney, according to the terms of § 521, is to "represent the defendant."[67] Other articles on the SCRA describe the role as protecting the interests of the servicemember and equate the attorney's duties to those of a guardian ad litem who protects the interests of a minor or other incompetent party.[68] The U.S. District Court for the Middle District of Alabama agrees; when considering the role of the appointed attorney under the SSCRA, the district court judge said:

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[66] 50 U.S.C. app. § 511(9).
[67] *Id.* § 521(b)(2).
[68] Capt. Charlton Meginley, *The Servicemembers Civil Relief Act: Protecting Those Who Protect America*, 52 LA. B.J. 94, 95 (2004); Mark E. Sullivan, *The New Servicemembers Civil Relief Act*, 18 S.C. L. 31, 33 (2006); *see* Rutherford v. Bentz, 104 N.E.2d 343, 346 (Ill. App. Ct. 1952).

> An attorney appointed for a serviceperson pursuant to [§ 520] [predecessor to § 521] is viewed as serving in a capacity similar to that of a guardian ad litem, since it is usually the case that the attorney is appointed to represent the interest of someone who cannot protect his or her interest; and further, it is usually the case that the person represented has neither employed the attorney nor consented to nor had knowledge of the attorney's appointment or rendition of services--that is, in the usual case the same reasons apply for the appointment and compensation of a [§ 520] attorney as for appointment and compensation of a guardian ad litem.[69]

This has been the historical role of the appointed attorney, but the role must be considered in light of the stated purpose of the statutory subsection, which governs appointment of the attorney. § 521 is entitled "Protection of Servicemembers Against Default Judgments" which suggests that the primary role of the appointed attorney is to find and notify the servicemember of the pending proceeding to avoid a default.

The Servicemembers Civil Relief Act Guide suggests that, historically, the primary obligation of the appointed attorney was to protect the interests of the servicemember until the servicemember can secure his or her own counsel.[70] The Guide points out that a California court held that there is no need to appoint an attorney for the servicemember if the servicemember has hired counsel.[71] According to *State v. Superior Court*, the SCRA Guide suggests that the appointed attorney should:

> 1. [C]ontact the defendant and assure that defendant has actual notice of the lawsuit,
> 2. [A]dvise the defendant of the protections of the Soldiers' and Sailors' Civil Relief Act,

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[69] U.S. v. Henagan, 552 F. Supp. 350, 351 (M.D. Ala. 1982).
[70] The Judge Advocate General's Legal Center & School, U.S. Army, JA 260, Servicemembers Civil Relief Act 3-18, 3-19 (Mar. 2006).
[71] *Id.*; *see* Reynolds v. Reynolds, 134 P.2d 251, 255 (Cal. 1943).

> 3. [A]dvise the defendant of the possibility of entry of default judgment and of the consequences of such a judgment,
> 4. [A]scertain whether the defendant's ability to appear and defend his or her legal interests is affected in any way by the defendant's military status, and
> 5. [I]f the defendant wishes, move for a stay of the proceedings to enable defendant to obtain counsel or prepare a defense on the merits of the case. [72]

The appointed attorney is considered the legal representative of the servicemember and any privileges accorded to a servicemember under the SCRA are also given to the servicemember's legal representative.[73] Such privileges include the ability to ask the court for a stay of proceedings for a minimum period of ninety days.[74] This stay must be granted if the court determines that the respondent may have a defense to any of the allegations or prayers for relief presented by the petition and the defense cannot be presented without the presence of the respondent.[75] In the alternative, the court can enter the stay if it finds that, after exercising due diligence, the appointed "counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists."[76]

The appointed attorney cannot waive any defense of the servicemember or otherwise bind the servicemember at this stage of the proceedings without a clear authorization from the servicemember.[77] This creates difficulty for the Court and for the

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[72] 907 P.2d 14, 15 n.2 (Alaska 1995); *see* The Judge Advocate General's Legal Center & School, *supra* note 70, at 3-21.
[73] 50 U.S.C. app. § 519 (2006 & Supp. 2009).
[74] *Id.* § 521(d); *see infra* Part III. A.
[75] 50 U.S.C. app. § 521(d)(1); *see also* The Judge Advocate General's Legal Center & School, *supra* note 70, at 3-19 (suggesting that this is the most important role of the appointed attorney).
[76] 50 U.S.C. app. § 521(d)(2).
[77] *Id.* § 521(b)(2); Sanders v. Sanders, 388 P.2d 942, 945 (Wash. 1964) ("It appears from the language of the [SSCRA] that the protection afforded a serviceman from any waiver of his rights by legal counsel was intended to apply only where the attorney acted under the authority of the court rather than the authority of the serviceman."); *see In re* Custody of Nugent, 955 P.2d 584, 589 (Colo. App. 1997)

appointed attorney. For example, if temporary support is needed, appointed counsel could not stipulate as to the servicemember's income to calculate guideline support without the authorization of the servicemember. As Colonel Mark Sullivan stated:

> Without elaboration in this area, the Act could mean that [the Appointed attorney] must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions for fear of violating the SCRA. Such conduct is, of course, at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.[78]

The SCRA is silent as to how the appointed attorney will be paid. A New Jersey court has suggested: "Ordinarily the services rendered by proctor and counsel so appointed are to be regarded as a patriotic duty for which no compensation would be expected by members of a profession deeply imbued by a sense of public responsibility. Certainly not as against a party in military service."[79] Following the Federal Court case *U.S. v. Henagan*, the Supreme Court of Wisconsin suggested that the attorney's compensation be paid in the same manner that guardian ad litems are paid under state law and procedure.[80] In a Maryland Court of Appeals case, when the appointed attorney's fees were assessed to the non-military spouse, the Court reversed, holding that when there are specific state statutes addressing the criteria courts use to assess attorneys fees in a family law case, the trial court cannot look to the guardian ad litem statutes.[81] The Maryland court noted: "We do not construe [the SSCRA] as necessarily precluding a chancellor from requiring a

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(stating that it is a "question of fact whether a member has authorized an attorney to act.").

[78] Sullivan, *supra* note 68, at 33.

[79] *In re* Cool's Estate, 18 A.2d 714, 717 (N.J. Orph. 1941).

[80] 552 F. Supp. 350 (M.D. Ala. 1982); *In re* Ehlke's Estate, 27 N.W.2d 754, 759 (Wis. 1947). *E.g.,* Heimbach v. Heimbach, 53 Pa.D. & C. 350, 352 (1944); Weynberg. Downey, N.Y.S.2d 600 (1941); *In re Cool's Estate*, 18 A.2d at 717.

[81] Dorsey v. McClain, 562 A.2d 1302, 1305 (Md. Ct. Spec. App. 1989).

military person to pay the fee of the attorney appointed to represent him or her. Surely, Congress did not intend that the attorney serve without compensation."[82]

If the servicemember engages an attorney, even the same attorney appointed by the court, then the role of the appointed attorney shifts.[83] Once the attorney is hired, the attorney is acting under the authorization of the servicemember and not the court. At this point, the actions of the attorney should be binding on the servicemember, and there is no longer a need to protect the servicemember from the unauthorized acts of an appointed attorney.[84] At least one court has opined that the duties of the appointed attorney, set forth in § 521, end when the servicemember is no longer on active military service.[85]

C. Failure to Comply with § 521 Requirements

Failure to file the affidavit concerning military service or failure to appoint an attorney to represent the servicemember respondent creates a proceeding that is out of compliance with the SCRA, but the Act does not provide any legal consequences for missing these important steps. § 521 provides that if these requirements are not met, the servicemember may petition to set aside any improperly entered default judgments.[86] The servicemember has the ability to set aside a default even if the affidavit was filed and an attorney was

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[82] *Id.* at 1304 n.2.

[83] John Vento & Scott A. Kornspan, *Protection Under the Soldiers' and Sailors' Civil Relief Act for United States Military and Activated Reservists*, 65 FLA. B.J. 32, 33 (1991) (suggesting that if a serviceman wishes to work out an arrangement for the appointed attorney's full and independent service beyond the limited scope of the *guardian ad litem* relationship, the appointed counsel must agree to this change in the attorney-client relationship; notice should be provided to the plaintiff and the court; and fee arrangements should be made directly between the attorney and the serviceman).

[84] Sanders v. Sanders, 388 P.2d 942, 945 (Wash. 1964).

[85] Cobb v. Wells Fargo, No.2007-CA-001798-MR, 2009, at *5, WL 1636281 (Ky. Ct. App. June 12, 2009).

[86] 50 U.S.C. app. § 521(a) (2006 & Supp. 2009) (stating that a servicemember cannot have made any appearance in the action to be entitled to the right to set aside the default judgment).

appointed under § 521. In sum, there appears to be no difference in remedy, other than the fact that a reviewing court will be more likely to set a default aside when there was no attorney appointed and when the court was not put on notice, through filing the affidavit, that a servicemember was a party-defendant.

Courts that have considered the consequences of failing to file an affidavit under the SSCRA, have held that the judgment is not void, but rather is voidable.[87] The judgment is still a valid court order and enforceable prior to being set aside as a voidable order. It seems an anomaly in the drafting of § 521 that petitioners who file a false affidavit are subject to up to one year of imprisonment and/or a fine,[88] but failure to file any affidavit has no legal consequences.

The SCRA is silent as to the remedies for failure to appoint an attorney to represent the respondent prior to entering a default against a servicemember respondent who has not appeared. If the respondent is served with the petition and fails to appear at the hearing, and the court enters a protection order without appointing an attorney, the protection order is still valid and enforceable. Similar to the cases considering failure to file an affidavit, court decisions under the SSCRA have also held that when a default judgment is entered without appointing an attorney, the judgment is not void, rather it is voidable.[89]

Under the SCRA, if a default judgment is entered during the servicemember's period of service, the servicemember can seek to reopen the case.[90] The servicemember must show: (1) that the respondent's military service materially affected his or her ability to present a defense and (2) that the respondent has a meritorious defense.[91] The court has complete discretion as to whether the

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[87] Klaeser v. Milton, No. 2080722, 2010 WL 58286, at *1 (Ala. Civ. App. Jan. 8, 2010); *see also* Thompson v. Lowman, 155 N.E.2d 258, 261 (Ohio Ct. App. 1958); PNC Bank, N.A. v. Kemenash, 761 A.2d 118, 121 (N.J. Super. Ct. App. Div. 2000); Hawkins v. Hawkins, 999 S.W.2d 171, 174 (Tex. App. 1999); Hernandez v. King, 411 So.2d 758,759 (La. Ct. App. 1982).
[88] 50 U.S.C. app. § 521(c).
[89] *Hawkins*, 999 S.W.2d at 174.
[90] 50 U.S.C. app. § 521(g).
[91] *Id.*

servicemember has a meritorious defense and whether the servicemember's military service materially affected his or her ability to present that defense.[92] The servicemember can request this at any time during his or her military service and up to ninety days after being released from active duty service.[93]

III. STAY OF PROCEEDINGS

Stays of proceedings can be requested under two separate sections of the SCRA. § 521 allows the appointed attorney to request a stay on behalf of the servicemember and also allows the court to enter a stay of proceedings on its own motion.[94] This type of stay is requested prior to the servicemember making an actual appearance in the matter. § 522 allows the servicemember to request a stay.[95] The criterion used by the court to consider the stay depends greatly upon whether the request is pursuant to § 521 or § 522.

A. § 521: Servicemember does not appear and default is imminent

If the attorney advocate has properly filed the affidavit and an attorney has been appointed for the respondent, but the respondent has not appeared, the judge may consider granting a stay of proceedings. The respondent's appointed counsel can move for a stay or the Court may consider imposing a stay on its own motion.[96] The court has two alternative criteria that permit imposing a stay: If the

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[92] *Klaeser*, No. 2090722, 2010 WL 58286, at *6 ("The purpose of the Soldiers' and Sailors' Civil Relief Act was to protect persons in military service from having default judgments entered without their knowledge, not to prevent a judgment by default from being entered against such person, where that person was fully informed of the pendency of the action and had the time and opportunity to appear and defend himself or otherwise protect his rights."). *Accord* Wilson v. Butler, 584 So.2d 414, 417 (Miss. 1991) (citing La Mar v. La Mar, 505 P.2d 566, 568-69 (Ariz. App. 1973) and Burgess v. Burgess, 234 N.Y.S. 2d 87, 89 (1962)).

[93] 50 U.S.C. app. § 521(g).

[94] *Id.* § 521(d).

[95] *Id.* § 522(b)(1).

[96] *Id.* § 521(d).

Court finds that (1) the respondent may have a defense to the protection order or to certain prayers for relief, such as a custody request, and (2) the defense cannot be presented without the respondent being present at the hearing, the stay should be granted;[97] alternatively, if the appointed counsel has not been able to contact the servicemember respondent to determine if a meritorious defense exists, the court may choose to grant the stay to give counsel more time.[98] The court has complete discretion as to whether or not to grant the stay under § 521 since the court must make these specific findings.[99] The stay must be for a minimum of ninety days, but it can be for a longer period of time.[100]

If the court chooses to delay the final hearing in the protection order case, the court may enter temporary orders to protect the petitioner and the parties' minor children and to stabilize the family pending a hearing. The issue is whether the presence of the respondent servicemember is needed for the court to enter such temporary orders. Any relief that can be entered in an ex parte order is relief allowed without the presence or participation of the respondent, and such orders can be entered until the respondent servicemember can attend the final hearing.

Most state statutes divide the relief that can be granted in a protection order into two categories: (1) relief that may be granted in an ex parte order and (2) relief that may be granted only after notice and an opportunity to be heard. Ex parte relief typically includes injunctive relief, and most jurisdictions permit an ex parte order to do much more. For example, some states will freeze the custody arrangements or award temporary custody in the ex parte order. Some courts will remove the respondent from possession of the residence in the ex parte order. Generally, orders which affect property issues such as spousal support, temporary support, or who gets the vehicle, require notice and opportunity to be heard. Since it is intended that ex parte relief be entered without the participation of the respondent,

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[97] *Id.* § 521(d)(1).
[98] *Id.* § 521(d)(2).
[99] This is a major difference between the § 521 stay and the § 522 stay of proceedings.
[100] 50 U.S.C. app. § 521(d).

these types of orders can be entered to stabilize matters until the servicemember is available for a final hearing.

Temporary orders, which stabilize the family until the servicemember can be present, can be granted. Temporary support can be established without the physical presence of the servicemember. Most jurisdictions require that the servicemember be served before entering any orders addressing prayers for relief beyond extending the ex parte protection order. Temporary child support is based upon mathematical guidelines and the parents' respective incomes can be established through affidavits and payroll or tax documents.[101] The servicemember's income is readily ascertainable from published military pay charts if the petitioner knows the servicemember's rank and time in service.[102] Since the respondent has been served, the respondent could easily send an affidavit and include a copy of his or her Leave and Earnings Statement, which will show the respondent's income.[103]

Similarly, if there is a request for spousal support, the issue will be whether the amount of temporary support can be established without the physical presence of the servicemember. Each branch of the service requires its members to support their dependents as part of that branch's regulatory obligations.[104] Spousal support may be

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[101] Devin R. Odell, *The Servicemembers Civil Relief Act And Domestic Relations Cases*, 35-JAN COLO. LAW. 31, 32 (Jan. 2006) ("However, where information regarding the servicemember's pay and benefits is available in the form of pay stubs, for example, perhaps through appointed counsel or a certificate from the Defense Department, the court arguably could proceed at least with respect to temporary child support and possibly temporary maintenance.").

[102] http://www. dfas.mil/militarypay/militarypaytables.html [hereinafter *Military Pay Tables*] (follow "2010 Military Pay table" hyperlink; then follow "2009 Military Pay Tables" hyperlink; then follow "Military Paydays" hyperlink) (last visited June 27, 2010).

[103] http://www.dfas.mil/navy2/militarypay/requestingyourles.html (follow "myPay" hyperlink for directions on how to read a "Leave and Earnings Statement") (last visited on Apr. 22, 2009).

[104] ARMY REGULATION 608-99 § 2-6 (2003) (requiring court orders to be followed, but in the absence proof a court order, a soldier should pay the amount received as his or her Basic Allowance for Housing (BAH) at the "with dependent" rate); AIR FORCE INSTRUCTION 36-2906 § 7.2 (1998) (providing that in the absence of an agreement or court order, a servicemember should provide adequate financial

subject to guidelines in various states, or may be based upon the petitioner's need and the respondent's ability to pay. Both of these facts can be established by affidavits detailing each party's income and expenses. Again, the servicemember may have a defense, but the servicemember's presence is not needed to present that defense.

If temporary support is requested, the servicemember may assert as a defense that he or she has no legal obligation of support. If the issue is whether the petitioner is the spouse of the servicemember, the petitioner should be in possession of a military identification card issued to a spouse. Children typically are not issued a military identification card unless they do not reside with their military parent. If the servicemember has enrolled the children for medical benefits under the Tri-Care system, the servicemember has made an official statement to the government that these children are his or her legal dependents. The petitioner may be able to present proof of medical coverage for the children as an acknowledgment of paternity. This official statement can be rescinded by the servicemember and is not a formal acknowledgment of paternity. However, if the servicemember has declared to the military that the spouse or the children are his or her military dependents, then that declaration should suffice for a temporary order until the servicemember is available for a final hearing to contest dependency.

Temporary custody hearings generally require the participation of the respondent. The respondent might be unopposed to the request, but until contact is made with the attorney appointed to represent the respondent, the court cannot make this determination. Once the

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support to family members); MILPERSMAN 1754-030 ch. 15 (2006) (providing that in the absence of an agreement or court order that the sailor is required to pay a fraction of his or her gross pay, depending upon the number of dependents); MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, MCO P5800.16A ch. 15 (1999) (providing that in the absence of an agreement or court order, the Marine must provide a minimum amount of support based upon the number of family members up to 1/3 of his or her gross military pay); COAST GUARD PERSONNEL MANUAL M1000.6A ch. 8M (providing that in the absence of an agreement or court order, the servicemember must provide a percentage of his or her base pay plus the BAH-Diff; the percentages vary based upon the number of dependents (i.e. the difference between the BAH the servicemember would receive without dependents and the BAH at the "with dependent" rate)).

respondent has made an appearance or otherwise communicated with the appointed attorney, the respondent's position and possible defenses can be made known. If the children are in the physical possession of the petitioner, the court may make temporary orders, which preserve the status quo until the respondent is heard from.

When an advocate believes that the best interests of the children require court intervention due to the case's unique circumstances, the advocate can request a temporary custody hearing, even when the servicemember has not made an appearance, and the appointed attorney has requested a stay. Consider this example, where there was an incident of domestic violence immediately preceding a deployment to Iraq. After the violent incident, the respondent removed the children and took them to his mother's house. The respondent has executed and delivered a power of attorney giving his mother the power to act in his stead as a parent for the children. The respondent has completed a family care plan with the military, which places the children with his mother in the event of a deployment.[105] The petitioner has done everything right, an attorney was appointed for the respondent and the respondent has been served, but is now in Iraq. The appointed attorney has asked for a stay until the respondent returns, which would keep de facto custody with the respondent's mother.

The first question is whether the servicemember has a defense. That cannot be known at this time if the servicemember is not in contact with the appointed attorney.[106] The second question is whether the servicemember's absence prevents him from presenting

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[105] *See* DEPARTMENT OF DEFENSE INSTRUCTION 1342.19 (2010), http://www.dtic.mil/whs/directives/corres/pdf/134219p.pdf (explaining the Department of Defense Directive 1342.17, which requires servicemembers who are single parents or dual-military couples with dependents, or who bear sole responsibility for their minor children, to have a family care plan which provides for their minor children in the event of a deployment.). *See generally* Darrell Baughn, *Divorce & Deployment: Representing the Military Servicemember*, 28 FAM. ADVOC. 8, 9 (2005) (citing U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-5 (May 13, 2002)).

[106] *See* 50 U.S.C. app. § 522 (2006 & Supp. 2009) (allowing the servicemember to request a stay if the servicemember is in contact with the attorney, which would be mandatory rather than a discretionary stay).

his defense. There are alternative methods for the respondent to participate in the temporary custody hearing. The respondent has the opportunity to participate in a hearing under the Uniform Child Custody Jurisdiction and Enforcement Act's provision for participation by telephone or other technological means.[107] Even if the servicemember is in Iraq, most military installations have access to Internet phone service using webcams such as Skype or Oovoo.

The court has great discretion as to whether it is appropriate to grant a § 521 request for a stay. Unlike § 522 stay requests, § 521 stay requests are not mandatory; the court is given the discretion to deny the request if the court finds that neither of the two alternatives necessary for the court to grant the stay are present. The language of § 521 states that the court *shall* grant the stay *if* the court determines that one of the two prongs is present.[108] Compare this to the language of § 522 where the servicemember requests the stay. § 522 states that the court *shall* grant the stay *if* the servicemember files the appropriate documents requesting the stay.[109] Under the § 521 stay, the court has the ability to consider the unique facts of each temporary custody case and make determinations considering the best interests of the children involved.

B. § 522: Servicemember has notice and requests a stay

In a protection order, petitioner or respondent may request a stay of proceedings under § 522 or the court may grant the stay on its own motion. § 522 stay requests are made by the servicemember after he or she has received notice of the proceeding.[110] The appointed attorney requests a § 521 stay when the attorney has not been able to

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[107] CHILD CUSTODY JURIS. & ENF. ACT § 111, 9 U.L.A. 668 (1999 & Supp. 2010) (allowing a party to "testify by telephone, audiovisual means, or other electronic means").

[108] 50 U.S.C. app. § 521(d).

[109] *See id*. § 522(b).

[110] *Id.* These stay requests are not considered an appearance by the servicemember. *Id.* (defining the servicemember defendant's request for a stay as "not an appearance all for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defenses challenging jurisdiction").

make contact with the respondent. § 521 stay applies only to requests concerning the respondent.

The application of the § 522 stay to both parties is a relatively new modification to the SCRA. Historically, only the respondent could ~~only~~ make a stay request under § 522. A 2004 amendment clarified that § 522 stay protections also extended to servicemember plaintiffs.[111] The servicemember can request a stay at any stage of the proceedings before a final judgment is entered.[112] The court can also issue a stay on its own motion.

When the servicemember requests a stay under § 522, the servicemember must follow the correct procedure. Failure to follow this procedure to the letter has caused appellate courts to uphold the trial court's denial of the request for a stay.[113] The servicemember must include the following information in his or her request for a stay:

> 1. A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear; and
>
> 2. A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave[114] is

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[111] *Id.* § 522(a) (stating that the ability to request a stay applies to either party who meets the definition of "servicemember" in § 511(1), who is in "military service" as defined in § 511(2), or who is within ninety days after termination of or release from military service); *see* City of Pendergrass v. Skelton, 628 S.E.2d 136, 137 (Ga. Ct. App. 2006) (the servicemember was the plaintiff in the action).

[112] § 522(b)(1).

[113] *Skelton*, 628 S.E.2d at 139; *In re* Marriage of Bradley, 137 P.3d 1030, 1034 (Kan. 2006).

[114] Aida Waserstein & Jody Huber, *Fighting A War On Two Fronts, The Servicemembers Civil Relief Act*, 24 DEL. LAW. 14, 15-16 (2006) ("The question of leave is significant since members of all branches of the military receive thirty days of leave annually, accruing at the rate of 2.5 days per month, but military necessity may limit when the leave may be taken. Moreover, for members in basic or

> not authorized for the servicemember at the time of the letter.[115]

If these requirements are met, § 522 mandates that the court enter a stay of at least ninety days. The court is no longer allowed any discretion whether to grant the stay if the supporting documentation is correctly filed.[116] Under the SSCRA, the court had the discretion to deny the request for a stay if the court did not find that the servicemember had a material defense or that the servicemember could make arrangements to be present. Since 2003 (when the SCRA was enacted), the court no longer has that discretion; the stay is mandatory if the servicemember has included the proper information required in § 522(b)(2).[117]

The motion requesting the stay should be served on the opposing party, and the opposing party should be given an opportunity to be heard.[118] At least one court has held that the court should not grant the stay without a hearing.[119] Advocates opposing the stay of proceedings should be allowed to challenge the sufficiency of the documentation,[120] as well as the length of time the stay is to be imposed. In *City of Pendergrass v. Skelton*, the trial court imposed an indefinite stay lasting until ninety days after the servicemember left military service. [121] The appellate court reversed, finding that imposing such a stay was "a manifest abuse of discretion."[122] Advocates opposing the stay should seek to limit the stay to the

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advanced training, missing training often means that one will have to repeat the same training program from the beginning.").

[115] 50 U.S.C. app. § 522(b)(2).

[116] *In re* A.R,. 88 P.3d 448, 455 (2009).

[117] *See* Odell, *supra* note 101, at 32; Waserstein & Huber, *supra* note 114, at 15; Jarrett, *supra* note 18, at 175.

[118] *See* Nakayama v. Cameron, No. 27746, 2007 WL 1147315, at *5 (Haw. Ct. App. 2007) (upholding an award of attorney's fees against the servicemember for filing his request for a stay by facsimile to the court and not furnishing a copy to the opposing party who had prepared for the hearing unaware of the request for a stay).

[119] *See* City of Pendergrass v. Skelton, 628 S.E.2d 136 (Ga. Ct. App. 2006).

[120] *In re* Marriage of Bradley, 137 P.3d 1030 (Kan. 2006).

[121] 628 S.E.2d 136 (Ga. Ct. App. 2006).

[122] *Id.* at 139.

minimum ninety days. Even though the first request for a stay is mandatory, subsequent renewals of the request are discretionary with the court and the court can take many things into consideration when balancing the rights of the parties.[123]

If the petitioner in a protection order proceeding requests a stay because his or her military service prevents the petitioner's appearance at the scheduled final hearing and the petitioner has met all of the requirements of § 522, the court must stay the proceedings for at least ninety days. The petitioner may request that any ex parte orders or temporary orders, which are in place, be extended to preserve the status quo. For example, the court might enter an order that not only prohibits threats or violence against the petitioner, but also prevents all contact with the petitioner or with third parties such as the petitioner's chain of command. Contact with the servicemember's chain of command can jeopardize his or her service record. Servicemembers in training or who are deployed generally have cell phone access and/or internet access and can be subject to manipulative communications, which will distract the servicemember from the military mission.

If the respondent requests a stay to prevent the entry of a final protection order and has met all of the requirements of § 522, the court must stay the proceedings for a minimum of ninety days. Unlike the petitioner's request for a stay where the petitioner does not object to entry of temporary orders, the respondent will most likely request that all proceedings be stayed, including entry of any temporary orders or even extension of the ex parte order of protection. The question then shifts to whether or not the court has the authority to enter temporary orders after a stay is requested.

1. Extensions of Ex Parte Orders Prohibiting Contact, Threats, or Violence

Judges may take the position that if the respondent is not available because of his or her military service then the petitioner is out of

[123] 50 U.S.C. app. § 522(d) (2006 & Supp. 2009); George P v. Superior Court, 24 Cal. Rptr. 3d 919, 922 (Ct. App. 2005).

danger: "After all," reasons the judge, "the petitioner cannot be harmed if the respondent is thousands of miles away in Afghanistan." Advocates must recognize that this may not be true. The respondent, in Afghanistan, still has the ability to text, e-mail, and otherwise communicate with the petitioner. The message can be threatening or simply controlling. The message could be that the respondent has "buddies" who are in the same town as the petitioner who are watching the petitioner. More importantly, the respondent could obtain leave[124] and be back in his or her hometown and neither the petitioner nor the court system would be aware of the servicemember's travel.

This section assumes that an ex parte order was issued at the beginning of the proceeding under the state's statutory scheme after an attorney was appointed to represent the military respondent. The advocate must examine the state statutory requirements for extension of an ex parte order. In some states, the ex parte order has an automatic expiration date, and requests can be filed to renew the ex parte order. In other states, the ex parte order extends until a specific hearing date, and the court has the discretion to extend the ex parte order at that time. Still other statutory schemes extend the ex parte order until the final hearing date. Missouri has enacted a statute specific to orders of protection and military deployments, which authorize extension of the ex parte order for the entire length of the deployment.[125]

Any stay will not affect ex parte orders that remain in effect until they are superseded by subsequent orders. The stay is prospective in nature, and does not alter the status quo. For example, if a court had entered a temporary support order and after entry of that order the servicemember requested a ninety-day stay, the temporary support order would stay in effect.[126]

An ex parte order that must be renewed or extended by the court after a certain period of time should be extended, even if the court grants the stay request. Renewal or extension of an ex parte order does not change the status quo, but instead preserves the status quo.

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[124] For example, emergency leave to deal with a problem at home.
[125] *See* MO. ANN. STAT. § 452.412 (West 2003).
[126] *See* Odell, *supra* note 101, at 32.

The definition of an ex parte[127] order is that only one side is heard from prior to entry of the order. The order is in place prior to the stay request. If the stay is granted, the imposition of the stay should not place the parties in limbo, but rather preserve the position of each party until a hearing can be held with the participation of the respondent.[128] The purpose of the SCRA is "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service."[129] Preserving the status quo does not adversely affect the civil rights of the respondent.

What happens if the time for extension of the ex parte order expires? For example, Georgia has a very limited time frame in which to hold the hearing. Georgia statutes[130] provide that if a hearing is not held within thirty days of filing the petition for a protection order, that the case must be dismissed. § 526(a) of the SCRA tries to provide a remedy and tolls "any period limited by law, regulation, or order for the bringing of any action *or proceeding in a court* . . . by or against the servicemember."[131] If the action is stayed by the servicemember, any time period required by law for extension of the ex parte order should also be tolled and the ex parte order should remain in effect.

2. Entering Temporary Orders Pending a Final Hearing

Can the court change the status quo and enter temporary orders pending a final hearing? This section will suggest arguments advocates can use to convince the court that it has the authority to enter temporary orders concerning support, custody, possession of the home and car, and other types of relief allowed by statute in a protection order. Almost all state protection order statutes characterize any orders for support, custody or visitation, possession

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[127] BLACK'S LAW DICTIONARY 616 (8th ed. 2004) (defining ex parte as "On or from one party only, usually without notice to or argument from the adverse party").
[128] *See* Lenser v. McGowan, 191 S.W.3d 506, 511 (Ark. 2004).
[129] 50 U.S.C. app. § 502(2) (2006 & Supp. 2009).
[130] GA. CODE ANN. § 19-13-3 (2010).
[131] 50 U.S.C. app. § 526(a) (2006 & Supp. 2009).

of the residence, and other orders affecting property interests as "temporary orders" even when entered at the final hearing. Many of these state statutory schemes prohibit the entry of this type of relief as part of an ex parte order. However, it may be necessary for the protection of the petitioner and the children that orders concerning temporary support, temporary custody, possession of the residence or a vehicle be entered while the servicemember is deployed for a significant period of time.

Does the term "stay" mean an immediate freeze on the litigation, or does the court have the authority to enter temporary orders to remain in place until the servicemember can take up the litigation? There are no court decisions that consider § 522 stay as equivalent to the automatic stay in bankruptcy. The stay provision in bankruptcy law requires immediate cessation of all collection activity once a bankruptcy petition is filed.[132] Case law that has examined the meaning of the term "stay" in § 522 has held that it is not an order that prevents the court from entering any type of orders.

In *Lenser v. McGowan,* the Arkansas Supreme Court examined a decision entered in response to the servicemember's request for a stay.[133] In considering the request for a stay of proceedings, the trial court entered a temporary custody order that changed custody from the servicemember to the other parent pending a final hearing, and also granted the stay of proceedings. The servicemember argued that since the stay was mandatory and not discretionary under the new act, the court lacked the authority to enter any orders and should have entered the stay order and nothing else. The trial court's position was that the temporary custody order was entered first, before the entry of the stay order.

The Arkansas Supreme Court rejected the servicemember's argument, and held that the sequence in which the two orders were entered was irrelevant.[134] The SCRA does not define "stay" nor does it contain any language suggesting that the stay is an immediate cessation of all judicial action. The Court relied on a previous

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[132] 11 U.S.C.A. § 362 (2010).
[133] *Lenser,* 191 S.W.3d 506.
[134] *Id.* at 511.

decision where the definition of "stay" was taken from Black's Law Dictionary.

> A stay is generally defined as 'suspension of the case or some designated proceedings within it. It is a kind of injunction with which a court freezes its proceedings at a particular point. It can be used to stop the prosecution of the action altogether, or to hold up only some phase of it, such as an execution about to be levied on a judgment.'[135]

In *Lenser*, the court held that the stay of the Civil Relief Act does not freeze a case in permanent limbo and leave a circuit court with no authority to act at all."[136]

When determining whether temporary orders are needed, courts should also look to whether the servicemember is using the protections of the SCRA to frustrate or harass the opposing party.[137] Historically, the stay allowed by SSCRA, was to be used defensively, not offensively.[138] The protections afforded by the act were to be used as a shield, not a sword, and a servicemember should not use the SCRA to obtain an unfair advantage over the other party.[139]

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[135] *Id*. (quoting State Game & Fish Comm'n v. Sledge, 42 S.W. 3d 427 (Ark. 2001) (quoting BLACK'S LAW DICTIONARY 1413 (6th ed. 1990)).

[136] *Id.*

[137] Missick, *supra* note 14, at 869; *see also* City of Pendergrass v. Skelton, 628 S.E.2d 136, 139 (Ga. App. 2006) (finding an abuse of discretion and ruled that the plaintiff servicemember should have been held accountable for his actions and the defendants' motion for sanctions should have been heard prior to imposing the stay); Hunt v. Jacobson, 33 N.Y.S.2d 661, 664 (Sup. Ct. 1942) (requiring that the Act "is not to be employed as a vehicle of oppression or abuse . . . . Such statutes were enacted . . . for the protection of the service [member's] rights and remedies, but not to be unjustly taken advantage of").

[138] *See* Boone v. Lightner, 319 U.S. 561, 575 (1943); *In re* Marriage of Grantham, 698 N.W.2d 140 (Iowa 2005).

[139] William S. Friedlander, *Protecting Those Who Serve: Family Law for Military Personnel*, 42 J. ASS'N TRIAL LAW. AM. 22, 26 (2006) ("The courts' willingness to condition or override an SSCRA or SCRA stay is based on the longstanding principle that both laws function as a shield that can help protect servicemembers from disadvantages arising from military service, but not as a sword to give them unfair advantage over other litigants."); s*ee also Lightner*, 319 U.S. at 575;

In *Slove v. Strohm*, the Court stated, "this Act may not be used as a sword against persons with legitimate claims against servicemen. Some balancing between the rights of the respective parties must be arrived at."[140]

a. Temporary Support

Under the previous act, the SSCRA, courts routinely denied requests for a stay when temporary support was the issue.[141] In *Shelor v. Shelor*, the Georgia Supreme Court reversed the trial court's decision to grant a stay and delay a hearing on modification of child support. The Georgia court held that such decisions are temporary in nature, and do not prejudice the rights of the servicemember. [142] Servicemembers already have a regulatory duty to support their dependents, no matter which branch of the service the member belongs to.[143] Support requests are generally retroactive back to the date the request was filed, and delaying the entry of a support order will cause harm to all parties. The children go without support for at least ninety days, and the respondent will be facing a judgment for back support upon his or her return to court.[144]

The servicemember can also defend a request to set support in a protection order case without being physically present.[145] Every state

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Semler v. Oertwig, 12 N.W.2d 265 (Iowa 1943); Lenser v. McGowan, 191 S.W.3d 506, 510-11 (Ark. 2004); *In re Marriage of Grantham*, 698 N.W.2d 140.

[140] 236 N.E.2d 326, 328 (Ill. App. 1968).

[141] Jelks v. Jelks, 181 S.W.2d 235 (Ark. 1944) (upholding a lower court decision which entered a stay in a divorce suit and imposed temporary child support and spousal support orders upon the servicemember pending the final hearing).

[142] 383 S.E.2d 895 (Ga. 1989).

[143] *See supra* note 104.

[144] Odell, *supra* note 101, at 33 ("[A] motion to modify that is stayed for several months or even years may result in a substantial retroactive support obligation. Given the high statutory interest rate on child support arrearages, a servicemember who would not be able to pay a large arrearage at the conclusion of military service may wish to allow for modification and pay any increased support from the beginning of the military service. More important, clients may wish, and should be encouraged, to make sure that they are providing adequate support to their families during their military service.").

[145] Friedlander, *supra* note 139, at 25 ("Also, in balancing servicemembers' needs

has guidelines for child support, and the issue is typically a math problem. Both parties can submit their income and any additional information required by the state's child support guidelines to determine an appropriate amount of support.[146] These documents can be supplied to the court and the court can determine an appropriate amount of child support, pending the servicemember's return to the jurisdiction, without the necessity of a hearing.

The logic used in the SSCRA has been adopted by at least one court when considering a request for a stay under the SCRA in a child support matter. In *Krutke v. Krutke*, the servicemember requested a stay in a proceeding to modify his child support obligation. [147] The Wisconsin appellate court denied the request under the SCRA, stating: "Krutke already had several months to gather materials and prepare for a hearing before he was called to service; he was represented by counsel; the issue was very straightforward, and relevant financial evidence could have been submitted in documentary form."[148]

b. Temporary Custody

Temporary custody and visitation decisions may be a necessity if the servicemember parent will be absent due to a deployment. The question of whether the mandatory nature of the ninety-day stay prohibits a court from making any temporary orders for the protection

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against their dependents' needs, courts may be willing to push the definition of a servicemember's "availability" under the SCRA's stay and default provisions, to allow for video or telephone appearances or to consider pendente lite issues, particularly regarding child support, on papers alone.").

[146] *Military Pay Tables*, *supra* note 102 (showing that the income of a servicemember is generally a matter of public record if the petitioner knows the servicemember's rank, and how long he or she has been in service). The pay chart will show base pay, and a Basic Allowance for Housing (BAH) at the "with dependent" rate. *Id.* The servicemember also receives a "Leave and Earnings Statement (LES)" which is a document detailing pay and leave. *Id.*

[147] No. 04-1939-FT, 2005 WL 22436, at *2 (Wis. Ct. App. Jan. 6, 2005) (This is an "unpublished" opinion which is not intended to be cited for precedential value in further proceedings.).

[148] *Id.*

of the children has been a topic of legal discussion since the passage of the SCRA in 2003.[149] State court judges are charged with the responsibility of looking out for the children's best interests and protection, and courts are opposed to holding that protecting the civil rights of the servicemember are more important than protecting the best interests of the children involved.[150] Nowhere is this more serious than in a protection order proceeding where domestic violence is at issue.[151]

Lenser v. McGowan is the only appellate court that has directly addressed the question of whether a trial court can balance the interests of children with the interests of the servicemember under the SCRA.[152] This was a divorce case where the trial court granted the

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[149] Lauren S. Douglass, *Avoiding Conflict at Home When There is Conflict Abroad: Military Child Custody and Visitation*, 43 FAM. L. Q. 349, 353 (2009); Friedlander, *supra* note 139, at 24.

[150] Sara Estrin, *The Servicemembers Civil Relief Act: Why And How This Act Applies To Child Custody Proceedings*, 27 LAW & INEQ. 211, 212 (2009) ("Oregon Circuit Court Judge Dale Koch, who is also former President of the National Council of Juvenile and Family Court Judges, commented that as a judge, '[y]ou don't want to penalize a parent because they've [sic] served their country. On the other hand . . . you don't want to penalize the child.' Family court judges often feel 'a continuing obligation to consider what's in the best interest of the child' even though many of these considerations directly conflict with military service." (quoting Pauline Arrillaga, *Soldier-Parents Fight on 2 Fronts, Deployed GIs Lose Child Custody, and a Federal Law is of Little Help*, FORT WAYNE J. GAZETTE, May 6, 2007, at A8)).

[151] Missick, *supra* note 14, at 869 ("More importantly, the well-being of children may be placed at risk if protections afforded servicemembers trumped current child-protection laws. Further, courts are loath to allow the SCRA to be used offensively as a tool for harassment or simply to frustrate another party.").

[152] *See* Henneke v. Young, 761 N.E.2d 1140, 1143 (Ohio App. 2001); Catlin v. Catlin, 494 N.W.2d 581 (N.D. 1992); Trevino v. Trevino, 193 S.W.2d 254, 256 (Tex. Civ. App. 1946) (cases reflecting what was typically done under the SSCRA cases when the stay was discretionary). In reviewing a trial court decision that allowed the court to balance the child's interest against the servicemember's interests (under the SCRA) and enter a temporary custody order until the servicemember returned from deployment, the Kansas Supreme Court avoided the question by ruling that there were defects in documentation presented to support the request for a stay. *In re* Marriage of Bradley, 137 P.3d 1030 (Kan. 2006). A Maryland Court of Appeals denied a request for certiorari rather than issue an opinion affirming the trial court's balancing of right, although three justices

stay request, but entered temporary orders of support and custody until the servicemember could return from his deployment. The Supreme Court of Arkansas reviewed the trial court record and succinctly responded, "The circuit court stayed the domestic relations case until Michael's return, but that does not put Carson in suspended animation. His life goes on, and the circuit court properly entertained the issue of who should receive temporary custody."[153] The court considered the servicemember's argument that once the stay is requested, the court had no ability to enter any temporary custody orders and found this argument disingenuous. Such an argument would allow an unfair advantage to the servicemember, as he or she would always gain temporary custody by having the child with him or her at the time of the hearing on the stay.

A Maryland Court of Appeals Judge agrees that a state court should be able to rule on temporary custody pending the servicemember's return from deployment. In *Whittaker v. Dixon*, the mother was the servicemember. [154] She and the husband had joint legal custody of the children and she had primary physical custody. In readiness for her upcoming deployment, she arranged for her mother to have temporary custody of the children. The father filed a petition requesting that the children live with him until the mother's return from her deployment. The trial court agreed. The mother filed a petition for certiorari with the Court of Appeals. The Court of Appeals denied the petition for certiorari, and Justice Murphy wrote the dissenting opinion, calling for the court to make a definitive statement on the issue of entering temporary custody orders when servicemembers are facing deployments. Justice Murphy, joined by two other justices quoted from a recent article in Family Law Quarterly with approval:

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dissented. Whitakker v. Dixon, 984 A.2d 232 (Md. 2009) (Murphy, J. dissenting) (stating that it was his preference that the court address the balancing of rights under both the SCRA and the Maryland statute regarding custody modifications of a servicemember subject to a deployment).

[153] Lenser v. McGowan, 191 S.W.3d 506 (Ark. 2004).

[154] 984 A.2d 232, 234 (Md. App. 2009).

> Though the servicemember can request a stay of the proceeding under the Servicemember Relief Act (SCRA), a lack of familiarity with the law often creates confusion among both the lawyers and judges involved, resulting in a denial or misapplication of the stay. Even if it is granted, a judge must balance the parents' rights with those of the child and may decide that the child's best interests trump the federal mandate and issue a new custody order in spite of the federal law.[155]

A Pennsylvania trial court[156] followed much of the same logic used by Justice Murphy in the *Whitakker v. Dixon* dissenting opinion. Even though the court agreed to issue a stay of proceedings, the court awarded temporary custody to the non-military mother during the father's deployment and ruled against the grandmother's request for custody. Citing *Lenser*, the court stated, "[A] child does not exist in" suspended animation" during the pendency of any stay entered pursuant to the SCRA."[157]

If the respondent wants to be heard on the issue of temporary custody, and cannot be physically present for the hearing, there are many options available for the Respondent to meaningfully participate in the hearing. When the respondent's commanding officer submits the communication required for the §522 stay request that "the servicemember's current military duty prevents appearance" the court cannot inquire further as to whether there are alternative ways to allow the servicemember to participate in considering whether to grant the initial stay request. The issue is whether the servicemember can participate prior to temporary orders being entered pending the servicemember's return to the jurisdiction.

Section 111 of the Uniform Child Custody Jurisdiction and Enforcement Act[158] provides options for parents to participate in

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[155] *Id.*

[156] Tallon v. DaSilva, 153 PITTSBURGH LEGAL J. 164 (2005) (opinion from the Pennsylvania Court of Common Pleas); *see* Odell, *supra* note 101, at 32.

[157] *Id.* at 165 (citing *Lenser*, 191 S.W.3d at 511).

[158] CHILD CUSTODY JURIS. & ENF. ACT (Taking Testimony in Another State) § 111, 9 U.L.A. 668 (1999 & Supp. 2010) (providing that each state will have its own

custody hearings when it is not feasible for them to be physically present for the hearing.[159] The party may offer to present their own testimony in this way, or "[t]he court on its own motion may order that the testimony of a person be taken in another State and may prescribe the manner in which and the terms upon which the testimony is taken."[160] The court is authorized to take testimony by deposition or by "telephone, audiovisual means or other electronic means."[161] Since the UCCJEA was approved and recommended for enactment in 1997, technology has made huge leaps that will allow for meaningful participation in hearings from a distance.[162] Advocates must also examine their state statutes, which may have specific procedures that allow parties to meaningfully participate in hearings without being physically present through the use of technology. Other state statutes, which have been enacted to protect the custody rights of servicemembers, have made a provision for testimony by technological means.[163]

c. Other Temporary Orders affecting property interests

Other temporary orders may be necessary when the respondent is facing an absence due to military training or deployment. For example, it might be appropriate for the petitioner to be awarded possession of the respondent's residence since he or she will not be living there while on military duty, thereby conserving the parties' resources. Similarly, the respondent going to Iraq or Afghanistan may not need the car or truck while deployed, but the petitioner may

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numbering system and may have made revisions to the uniform act).

[159] *Id.* (showing that the UCCJEA has been passed by 48 states, Puerto Rico, the District of Columbia and Guam).

[160] *Id.* § 111(a).

[161] *Id.* § 111(b).

[162] Waserstein & Huber, *supra* note 114, at 17 ("Given the SCRA's provision for the appointment of counsel and the realities of modern technology, communication with counsel through the use of e-mail and participation in the litigation by parties activated in the military through mechanisms such as videotape depositions suggest that the "knee-jerk" response of always invoking the mandatory stay for the duration of the first 90 days may not always be the best or obvious solution.").

[163] *See* WASH REV. CODE. ANN. § 26.09.010(7)(b) (West 2010).

need transportation to get to and from work. Advocates should think creatively and advance their client's position concerning temporary orders during the respondent's military absence.

d. Fall-Back Position

If the court does not agree that it has the authority to enter temporary orders under the state's laws or if the court believes that the court *must* enter the stay if the proper paperwork is filed with the court, the advocate has one last argument. If the language of §522 is interpreted as mandatory, the mandatory language only applies to a stay of ninety days in duration. The court can enter minimum duration of ninety days and require the servicemember to reapply for an additional stay. § 522(d)(1) provides: "A servicemember who is granted a stay of a civil action or proceeding under subsection (b) may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear."

§ 522(d)(1) is clear that the additional request for a stay is discretionary with the court and not mandatory. Appellate courts have affirmed decisions when the trial courts have denied the request for an additional stay, simply stating that this decision is discretionary with the trial court.[164] The court will be more likely to balance the interests of the parties and the children when the statutes give the court discretion to do so.[165]

Since the court has discretion, it is an appropriate time to determine whether the servicemember's military duties prevent his or her participation in the proceeding. It is an appropriate time for a court to inquire into alternative means of participating in the final

[164] George P. v. Superior Court, 24 Cal. Rptr. 3d 919, 920 (Cal.App. 2005); Jarrett, *supra* note 18, at 176.

[165] *George P.*, 24 Cal. Rptr. 3d at 925 (upholding a denial of the stay, "Unquestionably, trial courts should be reluctant to hear a civil matter when one party is serving his country in an area of the world engulfed in conflict . . . But the goal of providing a stable and safe home for petitioner's young child should not be delayed unnecessarily if the record shows that his legitimate interests were fully protected by personal participation in the proceeding and representation of counsel."); *see In re* A.R., 88 Cal. Rptr. 3d 448 (2009).

protection order hearing using technologies available to the servicemember.[166] If the request for an additional stay of proceeding is denied, and the servicemember is proceeding without counsel, the court is required to appoint an attorney at that time to represent the servicemember.[167]

IV. CONCLUSION

The Servicemember's Civil Relief Act provides important procedural protections for men and women in the military that allows them to focus their attentions on their military duties. Used appropriately, these procedural safeguards should not endanger victims of domestic violence who are seeking the court's protection. When the provisions of the SCRA are used offensively, and delays and stays are sought in such a way to prevent protection orders from being put in place, victims and their families may be placed in harm's way.

Attorney advocates who understand the complexities of SCRA, attorneys who have the knowledge to effectively respond to requests to delay or stay the protection order proceeding, will enhance safety for their clients. Armed with information, these attorneys will advocate for court orders that protect their clients and their clients' families, while balancing the rights of the servicemembers. In today's courts, where victims of domestic violence are overwhelmingly unrepresented by counsel, the attorney advocate will be making arguments that will resonate through the halls of the courthouse and may increase protection for these unrepresented individuals.

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[166] In Wagner v. Wagner, 887 A.2d 282, 284 (Pa. Super. Ct. 2005), the appellate court faced two issues in is review of a trial court denial of a servicemember's request for a stay where the trial court conducted a custody hearing using video conferencing equipment available to the military mother: (1) Whether the trial court had jurisdiction under the UCCJEA and (2) whether the court erred in denying the stay (finding that the trial court lacked jurisdiction, the court never ruled on the second issue.); *see also* Foster v. Alexander, 431 S.E.2d 415, 416 (Ga. Ct. App. 1993) (finding that the trial court acted within its discretion under the SSCRA when it lifted the stay due to the sailor's ability to testify using technology).

[167] 50 U.S.C. § app. 522(d)(2) (2006 & Supp. 2009).