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NEVADA FAMILY LAW REPORT

Volume 27, Issue 2 Fall 2014

DRUCKMAN V. RUSCITTI: A CONTROVERSIAL CHILD CUSTODY OPINION

By Keith Pickard, Esq.

The Supreme Court of Nevada recently issued a number of opinions, one of which affects parents, parents who never married in particular, and what they may do relative to relocation with their children when their relationship ends. Rather than clarifying or protecting the custodial rights of parents, the opinion in *Druckman v. Ruscitti*, 130 Nev. Adv. Op. 50 (June 26, 2014), has arguably clouded the general understanding of parents who desired to relocate outside of Nevada with their children. As it stands today, parents will not be punished for moving outside of Nevada before obtaining permission if they can demonstrate they did so for a good reason, even after the fact.

Normally, it's the state legislature that has a hard time foreseeing the various consequences of the language it uses in drafting laws, and it's the Supreme Court that interprets those laws in ways that make sense and keep the outcomes within the boundaries the Legislature intended. After all, the Legislature is made up of a cross-section of the population, with few people trained in the law and how the language might be misinterpreted. Granted, the Legislature enjoys the support of the Legislative Counsel Bureau, a body of skilled lawyers hired specifically to draft bills and advise and assist the various legislators on the plethora of bills before them. But it is practically impossible for this body to adequately consider all of the possible consequences of the bills given the massive undertaking and the short period of time provided them by the 120-day legislative session. No slight to their abilities, but it's just too much to expect, and that's one of the principal purposes of judicial review. When aspects of the law are challenged, or when decisions are made in court that result in odd outcomes, the Supreme Court tailors course-corrections to keep litigants within the boundaries the legislature intended. If an issue has not been considered in the past – called "a matter of first impression" – the court provides guidance to the lower courts in order to deal with issues and outcomes the Legislature didn't anticipate. Otherwise, the court's main goal is to keep outcomes predictable and within the intended limits of the law. This time though, the court's decision has a number of child custody lawyers scratching their heads.

Nevada law traditionally protected an unmarried parent's right to maintain a relationship with his/her children. Indeed, the United States Supreme Court has said that right is a fundamental constitutional one. *Troxel v. Granville*, 530

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A Note from the Editor

By Shelly Booth Cooley, Esq.

In our first article, Keith F. Pickard discusses the *Druckman v. Ruscitti* opinion. In our second feature, Kim Surratt addresses the US Supreme Court's decision in *United States v. Windsor*, 570 U.S. ___ (2013), which struck down Section 3 of the Defense of Marriage Act (DOMA) as unconstitutional under the Due Process Clause of the Fifth Amendment. In our third article, Kathy DiCenso explains what a Certified Divorce Financial Analyst is and how a CDFA can assist divorcing parties (and their counsel). Lastly, in the first of a two-part article, Mark E. Sullivan addresses retirement issues for Reserve Component members.

Specialization Exam:

The Family Law Section is offering a test date on February 28, 2015 (the Saturday prior to the Family Law Conference). If you are interested in taking the Specialization Exam, the deadline to submit your completed application is December 31, 2014.

- Specialization Applications
- Family Law Specialization Standards

Family Law Conference:

If you haven't registered for the Annual Family Law Conference, may I recommend doing so as soon as possible? The Family Law Conference is March 5 through 6, 2015, in Ely, Nevada, and space is limited. Early bird rates run through October 31, 2014.

This year the section is pleased to present:

- An advanced track on e-discovery
- A discussion regarding child witnesses
- Tax implications in divorce and
- much more.

I hope to see you there!

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U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) ("The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court."). NRS 126.031(1) states "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." This law is intended to put both parents on equal footing when it comes to resolving custody matters. Further, the Legislature set forth one important rule regarding relocation cases: that, absent a parent fleeing domestic violence, neither parent is permitted to move out of state with the child without first obtaining permission from the other parent or the courts. NRS 125C.200. The problem is, however, Nevada's statutory scheme is set up in a very fragmented way. Rules regarding custody of children of married parents are found in one place, while rules regarding custody of unmarried parents are found in a different place, and typically, those rules are incomplete in both places. This means that the courts have to apply rules from one set of laws to the other, even though doing so creates confusion.

For example, there has been some confusion in just how the trial courts are to decide whether to allow the relocation of a parent when the other parent objects. Most often, the court will look at the existing custodial arrangement (the time share of the parents, the living arrangements of the child, the relationships that child has with its parents and others, etc.) and try to determine if that arrangement should be disrupted to allow the move. In instances of married couples, the starting point is that of an assumed equal custody standpoint, but unmarried parents have historically started on unequal footing, despite the express pronouncement of the Legislature that the fundamental right to their children exists in both parents equally without regard to marital status. NRS 126.031-036.

NRS 126.031 provides:

> 2. Except as otherwise provided in a court order for the custody of a child:
>
> (a) Except as otherwise provided in paragraph (b), the mother of a child born out of wedlock has primary physical custody of the child if:
>
> (1) The mother has not married the father of the child; and
>
> (2) A judgment or order of a court, or a judgment or order entered pursuant to an expedited process, determining the paternity of the child has not been entered.
>
> (b) The father of a child born out of wedlock has primary physical custody of the child if:
>
> (1) The mother has abandoned the child to the custody of the father; and
>
> (2) The father has provided sole care and custody of the child in her absence.

This law would appear to say that, absent an order from a court, the mother of a child born to unmarried parents has primary physical custody, but the law was often interpreted differently at the trial court level. Some judges ruled that an acknowledgment of paternity by a father had the same effect as a court order, thus placing the child in a presumed joint custody arrangement with both parents. This acknowledgement most often came in the form of the father's affidavit of paternity signed for the purposes of appearing on the child's birth certificate. *See* NRS 126.053 and NRS 440.283. Married couples enjoy a presumption that they hold joint legal custody until a court decides otherwise. *See* NRS 125.465. Other judges interpreted the law to mean that unless and until a father filed a lawsuit to judicially establish paternity and obtain ***any*** custody rights, the mother had primary custody. This difference is important when viewed through the lens of the strong persuasive impact that an initial custody arrangement has when considering what the final arrangement should be after the relationship ends. Several cases in Nevada have established that the existing and ongoing living arrangements and custodial considerations of a child should continue as undisturbed as possible. *See e.g.* NRS 125.480(4); *Rennels v. Rennels*, 127 Nev. Adv. Op. 49, 257 P.3d 396, 401 (2011) (internal citations omitted) ("...the child's need for stability becomes a paramount concern").

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This difference is magnified in the cases where a mother wants to move out of state without the father's permission. Where parents started with joint physical custody, a parent was not allowed to move until that parent first petitioned the court for primary custody, and then proved that the child would be better off in the new state with the relocating parent, than to remain in Nevada with the remaining parent. *See Potter v. Potter*, 121 Nev. 613, 618, 119 P.3d 1246, 1249-50 (2005) (When a parent with joint physical custody of a child wishes to relocate outside of Nevada with the child, the parent must move for primary physical custody for the purposes of relocating. The district court must consider the motion for primary custody under the best interest of the child standard established for joint custody situations in NRS 125.510 and *Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994). (Any order for joint custody may be modified or terminated by the court ... if it is shown that the best interest of the child requires the modification or termination. In considering this motion, the district court must determine whether the moving parent will be relocating outside of Nevada with the child if he or she obtains primary custody. The district court may also consider, among other factors, the locales of the parents and whether one parent had de facto primary custody of the child prior to the motion. The moving party has the burden of establishing that it is in the child's best interest to reside outside of Nevada with the moving parent as the primary physical custodian. The issue is whether it is in the best interest of the child to live with parent A in a different state or parent B in Nevada). In the courtrooms where the trial judge believed that an acknowledged father has an equal right to his child, the father was therefore afforded the opportunity to demonstrate that the then-existing living arrangements, when coupled with the child's school, relationships, and other factors, were important enough in the life of the child to keep the child in Nevada.

In practical terms, the father already had an uphill climb in that one of the factors the courts regularly considered was who was the primary caregiver of the child. NRS 125.480(4)(h). More often than not, if both parents were not working equal amounts of time outside of the home, it was the mother who spent fractionally more time with the children. *See e.g.* "America's Families and Living Arrangements: 2012," Jonathan Vespa, Jamie M. Lewis, and Rose M. Kreiderat, U.S. Census Bureau, August 2013, at 26 (available at: www.census.govprod/2013pubs/p20-570.pdf.); See also "Employment Characteristics of Families Summary," U.S. Department of Labor, Economic News Release, Friday, April 25, 2014 (available at: www.bls.gov/news.release/famee.nr0.htm).This presented a natural bias in favor of the mother, in spite of the statutory intent of equality. But the joint physical custody starting point of the Potter analysis allowed fathers the opportunity to put on a case before relocation was permitted, and certainly before the child's life was disrupted.

In the cases where the mother who wanted to move already had primary physical custody, the hurdle to get over was considerably lower. In considering the request of this custodial parent, the trial courts needed only to consider whether the child's best interests were met. This "best interests" standard was defined in *Schwartz v. Schwartz*, 107 Nev. 378, 382-83, 812 P.2d 1268, 1271 (1991), and is noticeably different from the *Potter* standard.

In determining the issue of removal, the court must first find whether the custodial parent has demonstrated that an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence that weekly visitation by the noncustodial parent is virtually precluded. If

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the custodial parent satisfies the threshold requirement set forth above, then the court must weigh the following additional factors and their impact on all members of the family, including the extent to which the compelling interests of each member of the family are accommodated:

1. The extent to which the move is likely to improve the quality of life for both the children and the custodial parent;
2. Whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent;
3. Whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court;
4. Whether the noncustodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise;
5. Whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent.

In weighing and balancing the above factors, the court will, of course, have to consider any number of subfactors that may assist the court in reaching an appropriate decision. For example, in determining whether, and the extent to which the move will likely improve the quality of life for the children and the custodial parent, the court may require evidence concerning such matters as:

1. Whether positive family care and support, including that of the extended family, will be enhanced;
2. Whether housing and environmental living conditions will be improved;
3. Whether educational advantages for the children will result;
4. Whether the custodial parent's employment and income will improve;
5. Whether special needs of a child, medical or otherwise, will be better served; and
6. Whether, in the child's opinion, circumstances and relationships will be improved.

See Schwartz v. Schwartz, 107 Nev. 378, 382-83, 812 P.2d 1268, 1271 (1991).

Schwartz only requires that the moving parent demonstrate that the move is being made for a good-faith reason and will have the potential to enhance the child's situation, but it does not require the court to compare it to what the child is leaving behind. Even under *Schwartz*, the relocating parent would have to get permission first and the noncustodial parent would have at least a fighting chance to maintain their relationship with their child.

In the *Druckman* opinion, the Supreme Court has put the non-relocating party's chances of maintaining their relationship with their child in jeopardy. The court issued its opinion in *Druckman v. Ruscitti* without fanfare, but not without a fair amount of anticipation. The Family Law Section of the State Bar of Nevada provided an A*micus Brief*, and it was hoped by many Nevada child custody attorneys that the court would take this opportunity to clarify a number of the incongruities found in the application of the fragmented statutory scheme. And, indeed, it did in many instances. For example, the brief conclusively declared that the voluntary acknowledgment of an unmarried father is deemed to have the same effect as a judgment or order of the court. The brief also concluded that NRS 125C.200's relocation by a "custodial parent" (one with primary physical custody) does not apply to cases where no primary custodial order had been issued by a court. Further, the Court started out by confirming that both mother and father should have equal ground upon which to stand, and that both parent's rights and familial relationships should be preserved. *Druckman*, 130 Nev. Adv. Op. at 5-6. But then the Court made a wrenching change in direction that seemed to ignore its stated goals.

Before getting into the weeds of the case, it is appropriate to touch on some of the overarching goals of any published Supreme Court opinion. As was mentioned above, one of the principal goals of any opinion is to maintain stability and predictability in the law. It does

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no one any good to have sharp turns and changes, making adhering to the law impossible for want of understanding it. Instead, the court will try to interpret and clarify the laws in a way to assure that current decisions do not depart from prior decisions in major ways, absent clear reasons for doing so. This is what is meant by the oft-heard legal term "*stare decisis*." The courts try to balance changing political and social mores against the need for finality and predictability, so except in the face of overwhelming change, the courts generally try to make only small changes. Think civil rights and equal education: the courts made a significant change only in light of the tidal wave of political and legislated support for it. Otherwise, the court tries to maintain stability in the law.

The court also tries to establish predictability in the lower courts by upholding cases where the lower court had a reasonable and justifiable reason for doing what it did. In cases such as *Druckman*, where the trial court is considering the facts of the case in support of its decision, the Supreme Court will overturn the trial court only if it deems the trial court has "abused its discretion" and made a decision that is unsupported by the facts or runs contrary to established law. This is a very important goal in that it makes it easier for attorneys to predict the outcome in a given case and properly advise their clients accordingly.

In *Druckman*, however, the court started out by stating that it intended to uphold the established principles that protect a parent's fundamental rights to their child, but then seemingly invited an unmarried parent to ignore those principles and take a substantial step of "self-help," which is loosely defined as steps a person can take outside the legal system to accomplish their goals. Audria Ruscitti and Ian Druckman, the parties in the case, were unmarried, but Druckman had voluntarily acknowledged his paternity, and the parties were found to have "lived and parented the child together," suggesting an equal custodial arrangement. *Druckman*, 130 Nev. Adv. Op. at 2. During the course of their relationship, they had "discussed moving out of Nevada together," but instead, their relationship failed and they separated. Then, without Druckman's knowledge, let alone his consent or consent of a court, Ruscitti simply moved to California with their child.

After learning of the move after the fact, Druckman filed a motion in the Nevada court to obtain the child's immediate return. He did not overreach by seeking sole legal custody, but asked merely for joint legal custody – and primary physical custody, given Ruscitti's demonstrated willingness to ignore Druckman's constitutional rights and the child's existing relationships. Though it will not be discussed at length here, there are statutory factors the court must consider in establishing custody of children. *See* NRS 125.480(4). Here, Ruscitti's unilateral actions should have worked against her considering NRS 125.480(4)(c) and others. For a more in-depth discussion of these considerations, *see* Keith F. Pickard, Esq., Child Custody in Nevada: The Beginning of Everything You Ever Wanted to Know, available at http://ppk-law.com/2014/06/child-custody-in-nevada/. Ruscitti opposed the motion and asked for the extreme: sole legal custody and primary physical custody of the child.

Judge William B. Gonzalez, the Family Court judge who heard the case, sided with Ruscitti. Even though the court acknowledged that Ruscitti had left the state without permission of either Druckman or the court, and even though she had never alleged abuse but was moving simply because she claimed she had a better job, he found that Ruscitti's move was based upon a "good faith reason." This suggests Judge Gonzalez was applying the "best interest" standard of *Schwartz*, not the higher standard required in *Potter*. But *Schwartz* applies to cases where the relocating party already has primary custody, which was not the case. To be sure, both the trial court and the Supreme Court acknowledged that Ruscitti did not possess primary physical custody when both held that NRS 125C.200 does not apply in this case. Druckman appealed.

In its opinion, the Supreme Court started out with a lengthy discourse of how unmarried parents share equal legal rights, neither possessing superior rights over the other. It affirmed this longstanding rule, stating "removal without consent violates the spirit of the law and may subject the offending parent to negative consequences." *Druckman*, 130 Nev. Adv. Op. at 8. It also ruled unequivocally, "we hold that when parents have equal custodial rights of their child, one parent may not relocate his or her child out of state over the other

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parent's objection without a judicial order authorizing the move." *Id*. at 6. Finally, the high court acknowledged that "the requesting parent must demonstrate a sensible, good faith reason for the move before the court considers the motion." *Id*.

Then, in a surprising change of direction, the court appeared to have looked past its affirmations and essentially said a parent could act unilaterally without fear of punishment by the court by merely stating they did so for a good faith purpose. At least one commentator has already pointed out "not only is the court condoning unauthorized parental departure in joint custody cases, but it is also sending a signal that "good faith reason" is almost equivalent to "any reason at all." Zacharia B Parry, Nevada Supreme Court Condones Relocating Child Without Father's Or Court's Permission, Las Vegas Informer, June 27, 2014, available at http://lasvegas.informermg.com/2014/06/27/nevada-supreme-court-condones-relocating-child-without-fathers-or-courts-permission/

One might give the majority of the Court a pass in this departure from long-standing practice and logic were it not for the fact that two of the justices, Justices Saitta and Cherry, called them out on it. Writing for the dissent, Justice Saitta called Ruscitti's unilateral removal of the child without permission "wrongful." *Druckman*, 130 Nev. Adv. Op. at 11. She went further to state "I am deeply concerned that the majority opinion may encourage an unmarried parent to relocate the child without the other parent's knowledge or consent in an effort to create an unfair advantage in a custody determination." *Id*.

Indeed, Justice Saitta laid out the incongruity of the majority opinion by pointing out that the majority's pronouncements of the need to protect unmarried fathers' rights was expressly and unavoidably undermined by supporting the lower court's ruling that Ruscitti's actions were not to be sanctioned. She pointed out that, by the majority's own holding that a father's acknowledgement of paternity established a joint custodial presumption and that Druckman's fundamental rights to maintain a relationship with his children meant that he should have been afforded a say before the move, by law, Ruscitti was prohibited from relocating with the child until she obtained permission from Druckman or the court.

The dissent continued with an exposition of multiple "factors that weigh against awarding custody to a parent who has improperly removed a child without the other parent's consent." *Id*. at 13. Factors such as a parent's ability to cooperatively meet the child's needs, as well as which parent is more likely to foster the child's association with the other parent, are critical considerations in preserving a child's relationships with its parents. Justice Saitta went so far as to suggest that the act of a parent relocating a child without permission should be a basis in awarding custody to the other parent – just as trial courts have done for some time. *Id*.

Justice Saitta also logically disassembles the majority's suggestion that "if a parent unlawfully relocates his or her child out of Nevada and later moves for primary physical custody, the district court should not consider any factors from the child's time in the new state – such as the child's new school, friends, or routine – in the best-interest determination." *Id*. at 8. To say nothing of the damage sudden relocations may have on children or the fact that the majority just acknowledged that removal without permission is, indeed, unlawful, the dissent points out that the court's attempt to save itself is untenable. She states:

> Removal of the child before deciding the case necessarily creates an advantage for the relocating parent who has an opportunity to establish a new environment and status quo for the child, which cannot be

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easily disregarded, especially if the child has been in the new environment for a lengthy period of time. A court would be hesitant to disrupt the stability of a child living in a new home, established in a school and community and surrounded by new friends. The need for stability in a child's life is of utmost importance. The relocating parent should not be rewarded for disregarding the other parent's legal custody rights."

Id. (internal citations omitted).

Even the majority states that the appropriate logic to be applied to all relocation cases where parents have joint physical custody is for the application of the *Potter* standard – that when parents have a joint legal custodial arrangement and one of them wants to relocate, they must first seek a change of custody to that of primary physical custody, then to establish that it is not only in the child's best interest, but that they must show the child will do better in the new state than to remain with the non-relocating parent in Nevada. *Id*. at 6-7. The majority even said that doing so without permission "violates the spirit of the law and may subject the offending parent to negative consequences." *Id*. at 8 (while reaffirming a parent's right to relocate under exigent circumstances, such as to avoid continued domestic violence). But then, as Justice Saitta points out, the court utterly ignores that statement and held that the trial court did not abuse its discretion when it found that the move was made in good faith ***after the unlawful relocation***, and condones Ruscitti's conduct without any negative consequences. This inconsistency seems apparent.

Indeed, Justice Saitta complains:

Going forward, no one should take away from the majority opinion that a parent with equal custody rights can remove a child and obtain permission later. Audria's actions left Ian in the position of having to file a motion for custody and return of the child. Yet Audria had the burden to establish that she was entitled to primary custody and that relocation was in the child's best interest ***before*** removing the child from the state. The district court failed to recognize that Audria's unilateral removal of the child was improper, but rather determined that Audria relied on proper legal advice that she did not need Ian's consent. By starting with this faulty premise, the district court disregarded the effect of Audria's actions on the custodial determination and failed to place the burden squarely on Audria to establish removal was in the child's best interest, And even though the district court made findings that relocation was in the child's best interest after the fact, the establishment of the child in a new environment necessarily gave Audria a strategic advantage, and Audria's actions should have factored against awarding custody in her favor. Instead, the district court determined that Audria's motives were honorable and that she would continue to foster a relationship between the child and his father. But removal of the child without first obtaining permission certainly casts doubt on the findings of honorable motives and that Audria had a good faith reason to move.

Id. at 14 (emphasis in the original).

Justice Saitta hits the problem squarely on the head. By allowing the district court to determine that Ruscitti should not only not be sanctioned, but allowed to continue in her course of conduct that is clearly inimical to Druckman's fundamental rights, is to openly encourage unmarried parents to merely get out of Dodge before anybody can say anything otherwise. The court has invited unmarried parents to move first and ask permission later, abrogating its historical support of the rights of both parents. Now it's going to be up to the Legislature to reassert itself in support of equality in parentage.

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This article first appeared on Pickard Parry Pfau's blog on June 30, 2014.

Where do We Go From here: What the Pending Ninth Circuit Decision Will do for Same-Sex Families in Nevada

By Kimberly M. Surratt, Esq.

On June 26, 2013, the United States Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA) as unconstitutional under the Due Process Clause of the Fifth Amendment in *United States v. Windsor*, 570 U.S. ___ (2013). This decision means that same-sex couples married in states, where it is legal, will receive the same federal benefits heterosexual couples receive. The Supreme Court did not find marriage a fundamental right that all states must respect; meaning, each state without marriage equality will remain status quo. The benefits for states that allow same-sex marriage are clear. For the remaining states, the Supreme Court decision caused a great amount of confusion and legal analysis. Nevada, at this very moment, is a non-recognition State.

In *Windsor*, Edie Windsor had a 44-year relationship with Thea Spyer. Windsor and Spyer were married in Canada in 2007. In 2009, Spyer passed away and left her entire estate to Windsor. They were residing in New York at the time of her death. Windsor attempted to utilize the estate tax exemption for surviving spouses. DOMA prevented her from utilizing the exemption because a same-sex partner is excluded from the definition of "spouse." Windsor then paid the $363,053 in estate taxes and on November 9, 2010 filed a lawsuit to challenge the constitutionality of the provision, arguing that DOMA discriminated against same-sex couples that were legally married versus "similarly situated couples without justification." On June 6, 2012, the District Court judge ruled that Section 3 of DOMA was unconstitutional and ordered the United States to issue a refund. The US Second Circuit Court of Appeals affirmed the decision on October 18, 2011. On June 26, 2013, the Supreme Court affirmed the decision in favor of Windsor, striking down Section 3 of DOMA, finding DOMA to be unconstitutional under the due process clause of the Fifth Amendment.

The decision in *Windsor* only applies to the federal government and it only struck down Section 3 of DOMA, which is the part that excluded legally married same-sex couples from federal benefits. *Windsor* does not change the statutory structure and definition of marriage in the individual states because Section 2 of DOMA still stands and it allows states to individually determine whether they allow same-sex couples to marry and to determine if they will recognize same-sex marriages legally obtained in other states. However, despite Nevada having a constitutional provision defining marriage as between only a man and a woman, Nevada citizens who marry in another state will still have some federal benefits from the marriage.

From a federal benefits position, and relying exclusively on the *Windsor* decision, married same-sex couples in the State of Nevada will receive only the federal benefits that are predicated on the marriage being legal in the place of ceremony. If the Nevada couple, who was married in another state, wants to receive state benefits as a married couple they will have to register as domestic partners in addition to the marriage from the other state. This will give them rights such as community property, alimony, adoption, etc. However, registration with the State of Nevada will not mean that they will pick up the remaining federal benefits that are based upon a legal marriage in the state of residence/domicile. Again, the federal laws do not recognize these other schemes. A couple that is only registered in the State of Nevada but does not have a legal marriage

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from another state will receive no federal benefits. Be aware, Nevada also does not recognize domestic partnerships and/or civil unions from other states unless the couple also registers with the State of Nevada.

While the *Windsor* and then the *Smithkline* decisions were coming down, Nevada had a pending federal case at the Ninth Circuit, *Sevcik v. Sandoval*. The Appellants argued that Nevada's constitutional amendment that bans same-sex marriage (1) harms same-sex couples and their children, (2) violates same-sex couples' fundamental rights and liberty interests, and (3) violates the 14th amendment's guarantee of equal protection.

After the *Windsor* decision and before the Ninth Circuit Oral Arguments, was a case, *Smithkline Beecham Corp, DBA GlaxoSimithKline v. Abbott Laboratories*, which determined that potential jurors could not be excluded by attorneys based solely on their sexual orientation. The decision elevated gay and lesbian people to a protected class with a heightened scrutiny, the same level as women and racial minorities. Thus, after the *Smithkline* decision, any law that discriminates against gay and lesbian people is presumed unconstitutional and requires the state to demonstrate greater legal justification. Nevada's Attorney General, Catherine Cortez Masto, and Gov. Brian Sandoval filed in opposition to the *Sevcik v. Sandoval*. Upon issuance of the *Smithkline* decision, the Attorney General withdrew the opposition, basing the withdrawal on the *Smithkline* decision. The Attorney General made a statement that, "After thoughtful review and analysis, the state has determined that its arguments grounded upon equal protection and due process are no longer sustainable."

WHERE DO WE STAND:

If the Ninth Circuit finds Nevada's ban unconstitutional, then a same-sex couple that is married and living in Nevada will be qualified for all of the same protections, responsibilities that any other married couple receives. However, the legal analysis still isn't that simple. There will be hundreds of couples that are still registered domestic partners but are not married. They may never get married. These couples, if registered in Nevada and not just registered in another state, will only receive the state benefits afforded to married couples, but will not be recognized by the federal government as married. Thus, as an example, they cannot file a joint federal tax return as married. The other legal consideration is that Nevada married same-sex spouses will need to heed the warning that travel and relocation in non-recognition states may impair their rights and responsibilities.

If the Ninth Circuit does not strike Nevada' ban on same-sex marriage, a same-sex couple that is living in Nevada, but was married in a different state will continue to have access to some federal protections, benefits, programs and responsibilities, but not to others. To determine if a protection, benefit, program or responsibility is applicable to a same-sex married couple in a state that does not accept their marriage as legal, you must look at how that federal program defines marriage for qualification. You must determine if the program defines marriage for qualification on the law of the state where the couple resides (place of domicile/residence) or if it look to the law of the state where the marriage was obtained (place of celebration).

If the Ninth Circuit does not strike Nevada's ban on same-sex marriage then the next opportunity to strike the ban is through the Senate Joint Resolution that gained its first vote in the 2013 legislative session. That Resolution will go up for a second vote in the 2015 legislative session. If it passes, the 2015 legislative session then it will be put to the voters in the 2015 election.

Kimberly M. Surratt, JD, is principal of Surratt Law Practice where she maintains a family law practice in Reno and Las Vegas. She sits on the Executive Board for both the LGBT Section and the Family Law Section of the State Bar of Nevada as well as the Board of Directors for the Nevada Justice Association. She is the chair of the domestic lobbying committee for the Nevada Justice Association and assists both the LGBT Section and the Family Law Section with their lobbying efforts.

She is on the legal advisory board for the American Fertility Association and sits on the legislative watch committee for the American Academy of Assisted Reproductive Technology Attorneys. She represents and consults with various ART medical clinics, surrogacy agencies and donor programs nationwide. Kim is responsible for the drafting and lobbying of new reproductive laws for Nevada. She received her JD from Golden Gate University in 2002 and her BA from the University of Nevada, Reno in 1999.

What is a CDFA? How Do CDFAs Help People Going Through a Divorce?

By Kathy DiCenso, CDFA

After his divorce, David went to a financial advisor to determine how to best position his assets. Together, David and his planner decided to do a total financial plan for him. During the planning session, it became apparent that during his marriage his wife had done all of the investing. She chose all the investments, made all the decisions, and invested all the money.

At the time of their divorce she said, "Let's just split everything 50/50. You take this half of the assets and I will take that half. Is that OK?" David answered, "Well, I guess that sounds pretty fair. That's OK with me."

Unfortunately, there was something he neither knew nor understood. He didn't realize that he would have to pay taxes on his half of the assets when he tried to access them. His ex-wife, on the other hand, could access her half of the assets tax-free. His 50/50 split cost him an additional $18,000 in taxes. Had David and his lawyer collaborated with a CDFA™ before the divorce was finalized, he would have been in a better position to ask for a more equitable settlement.

This parable has an unfortunate ending, but pre-divorce financial counseling can help people going through a divorce arrive at a settlement that is fully understood by all involved.

Who do people turn to for such assistance? When people think about getting a divorce, the first professional that comes to mind is an attorney. Typically a financial advisor – whether it is a CPA, CFP®, or a CDFA™ – is not considered until later in the divorce process – or even until after the divorce is finalized.

Financial problems can tear a marriage apart, and are often the primary factor that leads to divorce. Once a decision to separate or divorce has been reached, all sorts of questions bubble to the surface. These questions are often clouded by wounded emotions and accompanied by mutual accusations, which comes as no surprise. If a couple cannot solve their financial difficulties while the marriage was underway, it is unlikely that they will be able to agree on pressing financial issues when it has fallen apart.

Many divorcing couples have questions such as:

- Where will the children live?
  Who will pay for their education and medical treatment?
- How do we value our property?
  Who gets what property?
- What tax issues must we be concerned with?
- How do we divide retirement funds and pensions?
- How will the lower-earning spouse survive financially?
  What additional financial support does that person need?
- Who gets the house?
  What happens if a paying ex-spouse dies?

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CDFAs

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These are the questions that divorce lawyers face with each divorce case. The struggle is with the intricate financial details that concern tax issues, capital gains, dividing pensions, and so on. Lawyers attend law school to become experts in the law, not to become financial experts. Additionally, even if lawyers happen to have accumulated a degree of financial expertise, they are not allowed to testify on behalf of their clients in court. This is why more and more lawyers have seen the virtue of bringing a financial expert into the divorce process at the very start. Solid information and an expert analysis are important resources in their search for the best possible resolutions for their clients.

What is the CDFA's Role?

To understand this role, we first have to distinguish between a CDFA™ and other financial experts, who go by various titles, such as: Chartered Accountant (CA), Certified General Accountant (CGA), Certified Financial Planner® (CFP®), and Chartered Financial Consultant (ChFC®).

Financial Planners Help Clients Achieve Goals

The role of the financial planner, CFP® or ChFC® is to help people achieve their financial goals regardless of whether they are divorcing or happily married. After identifying those goals, the next step is to take an inventory of the clients' current assets and liabilities, then examine what must be done to achieve those goals. Some goals might be reached within a year; others could be realized 50 years down the line. To look that far into the future, certain assumptions must be made. These include income, expenses, inflation rates, interest rates and rates of return on investments. After these assumptions are settled on and adjusted for changes, the scenario must be reviewed on a regular basis. If during the review process the planner determines that the client is not on track, he or she will recommend a number of necessary or advisable fine-tunings. In other words, the financial planner looks at financial results in the *future* based on certain assumptions made today, and keeps the client moving toward stated objectives.

Accountants Examine Details for Present Day

Conversely, accountants typically confine themselves to examining the details of a present-day scenario. If called upon to participate in a divorce proceeding, they might calculate the taxes on dividing property combined with the effect of child support and spousal support over a very short period of time. They typically *do not* project further into the future. They also may be retained to perform an audit of account activity or to perform forensic accounting functions to help uncover "hidden assets."

CDFA's Responsibilities and the Team Approach

To best meet the needs of a divorcing client, a blend of these two ideologies is needed. A new professional designation was created to meet this need – the Certified Divorce Financial Analyst™. The role of the CDFA™, as part of the divorce team, is to help the client understand how the financial decisions made today will impact the client's financial future, based on certain assumptions.

A CDFA™ is someone who comes from a financial planning, accounting or legal background and goes through an intensive training program to become skilled in analyzing and providing expertise related to the financial issues of divorce. The CDFA™:

- Becomes part of the divorce team, providing litigation support for the lawyer and client, or becomes a member of a Collaborative Law team. In either event, the CDFA™ will be responsible for:
  - Identifying the short-term and long-term effects of dividing property.
  - Integrating tax issues.
  - Analyzing pension and retirement plan issues.
  - Determining if the client can afford the matrimonial home – and if not, what might be an affordable alternative.
  - Evaluating the client's insurance needs.

(cont'd. on page 13)

CDFAs

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- Establishing assumptions for projecting inflation and rates of return.
- Bringing an innovative and creative approach to settling cases.

The CDFA also:

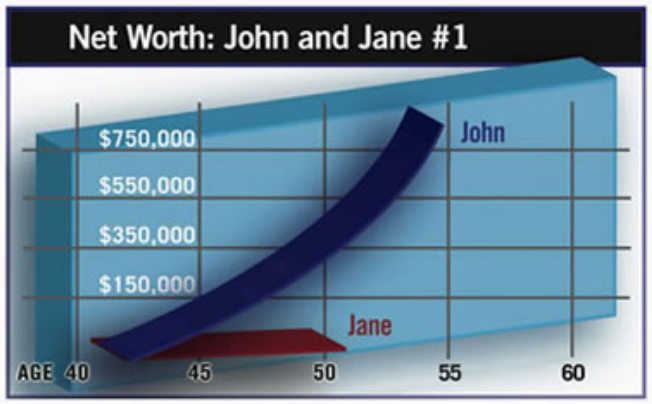
- Provides the client's divorce team with data that shows the financial effect of any given divorce settlement.
- Appears as an expert witness if the case should go to court, or in mediation or arbitration proceedings.
- Is familiar with tax issues that apply to divorce.
- Has background knowledge of the legal issues in divorce.
- Is trained to interview clients so as to:
  - Collect financial and expense data.
  - Help clients identify their future financial goals.
  - Develop a budget.
  - Set retirement objectives.
  - Determine how much risk they are willing to take with their investments.
  - Identify what kind of life style they want.
  - Determine the costs of their children's education.

How a CDFA™ Can Help a Divorcing Couple

John and Jane are 40 years old and have two children. They own a home worth $165,000 with a net equity of $77,500. Their retirement savings total $165,500. John earns $90,000 a year and has a take-home pay of $68,760 a year. Jane has never worked outside the home and has no job skills, but hopes to get a part-time job with take-home pay of $8,900 a year.

The following settlement has been suggested. After the divorce, Jane and the children will live in the matrimonial home, which will be deeded to her. She will also receive $44,000 of the retirement savings while John will receive the remaining $121,500, thus dividing the assets equally. John will pay Jane spousal support of $600 per month for five years and child support of $225 per month per child. He will also pay the children's college costs, starting in four years.

John's expenses include his normal living expenses, child support, spousal support and education costs. Jane's expenses include support for the children, and will be reduced as each child leaves home to attend college.



At first glance, this appears to be a reasonably fair settlement. However, a detailed analysis creates the financial future illustrated in Graph 1 (above). As you can see, Jane's assets will be completely depleted within seven years, whereas John's investments will grow dramatically.

To improve Jane's financial future, an alternative settlement could provide her with increased spousal support of $1,500 per month for 10 years, which would actually cost John $1,005 per month in after-tax dollars. The correct child support for two children according to the Child Support Guidelines in their area is $1,136 per month for a payor with John's income. Jane could also be awarded an additional $24,300 from the retirement savings plans, although she might need to cut her expenses by 10 percent. These changes in the original settlement would produce the results illustrated in Graph 2 (below). If they are made, John will still have a surplus, which he can add to his investments. If John stays within his budget and invests all of his extra income, his investments have the capacity to grow to $2.5 million by the time he is 60.

This example illustrates the value of financial planning as a means of reaching a more equitable di-

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CDFAs

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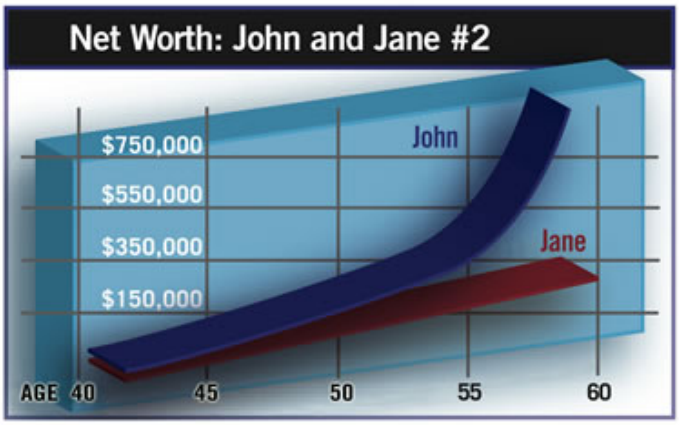

vorce settlement. If the court's intent is to treat both parties in a divorce as equitably as possible, it is essential to analyze the marriage as if it were a financial contract, and a CDFA™ is uniquely suited to do so.

This article was received from the Institute for Divorce Analysts and submitted by Kathy DiCenso a local Reno practicing CDFA.

Kathy DiCenso is President of DiCenso & Associates and can be reached at 775-336-0021 or at kathy.dicenso@lpl.com. Financial Planning and Securities offered through LPL Financial, Member FINRA/SIPC.

We Need Your Articles!

Articles are Invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in **February 2015**, with a submission deadline of **January 15, 2015**.

When submitting an article to the NFLR, please note that automatically embedded footnotes/endnotes do not carry over into the State Bar of Nevada's publishing program. As such, if at all possible, we would ask that you utilize endnotes that are not automatically embedded (please do not use the Footnote/Endnote function of your word processing program).

Please contact Shelly Cooley at scooley@cooleylawlv.com or Margaret E. Pickard at nevadamediator@gmail.com with your proposed articles anytime before the next submission date. We're targeting articles that are between 350 words and 1,500 words, but we're always flexible if the information requires more space.

Guard and Reserve Pensions on the Day of Divorce: Unraveling the Riddles

By Mark E. Sullivan, Esq.

Introduction – An Office Visit

"I need some help – I'm lost in the woods," exclaimed Sam Green when he sat down in his lawyer's office. "My soon-to-be-ex just told me she's putting in for retirement next year from the East Virginia Army National Guard. I don't know what the benefits are, when they arrive, what's my share – anything! Whenever I try to look it up on the internet, I get completely confused."

"Slow down, Sam," replied Amanda Allen, his divorce lawyer. "What is it you want to find out?"

"Well, for starters, I want to find out how much Janet is going to get for the Guard pension," he answered. "She's been drilling for over 24 years, and 20 years of that was during our marriage. Shouldn't I be entitled to some share of that pension benefit?"

"Yes," answered Allen. "Since she has 24 years of service, my calculations show that the court should grant you half of 20/24 of the pension."

"But when will I begin to get payments? How much will I receive? If Janet dies first, will I get anything? How can we find out this information?"

"Not to worry," responded Allen. "All Guardsmen begin drawing retired pay at age 60, so that's when you'll start to receive your share. As for her death, there's no way of telling whether she signed up for the Survivor Benefit Plan or not; if she did, she could have elected an option which cut you out entirely. To get the amount that she'll be receiving – and all the other information, for that matter – we'll have to serve a subpoena on the Army to require the release of that to us."

"Wow – you really know your stuff, Amanda! I feel better already," exclaimed Sam.

Riddles and Reality

Unfortunately, Sam didn't get the right advice. Virtually nothing that Allen told him was correct. While he asked the right questions, the answers from Allen were bogus. The purpose of this article is to set out the correct answers to the main concerns of the spouse of an RC member. "RC" stands for *Reserve Component*, meaning Reserves and National Guard. These issues, as expressed by the client, are usually the following:

- When do the payments begin?
- How much will I receive?
- What if my former spouse dies before me – will I be cut out of payments entirely?
- Does my ex pay me, or can the government send me a check?
- What options did my former spouse have for Survivor Benefit Plan Coverage, and how can we find out what choice she made?
- Are the future payments a flat amount? Do they go up with inflation? Can they ever go down?

The answers will be found in this two-part article.

RC Retired Pay – the Nuts and Bolts

Members of the Reserve Component (RC) have a defined benefit retirement system. The DoD Financial Management Regulation (referred to herein as DoDFMR), DoD 7000.14-R, Volume 7B, "Military Pay Policies and Procedures — Retired Pay" contains full details about retired pay for the Army, Navy, Air Force and Marine Corps. You can access it at http://comptroller.defense.gov/fmr. For a summary of military retirement, go to Chapter 1 of Volume 7B, "Initial Entitlements – Retirements," and review Section 0101, "Military Retirement Overview." This can be found at:
http://comptroller.defense.gov/fmr/07b/07b_01.pdf.

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Pension Pay Day of Divorce

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An RC member must meet all of the following minimum requirements to be eligible for what's known as "non-regular" retired pay:

- Be at least 60 years of age (The FY 2009 National Defense Authorization Act made it possible for certain RC members to start receipt of retired pay as early as age 50, depending on additional time spent on active duty after January 28, 2008. 10 USC § 12731(F). Generally speaking RC members can drop three months from their mandatory retirement age of 60, at which they begin to draw retired pay, for each period of 90 days served on active duty in any fiscal year. Qualifying time does not include weekend drill time or annual training. The reduced age for pay doesn't change the age-60 requirement for medical benefits. For the rest of this article, references to retired pay will state that it starts at age 60, even though there are excepts for those members who have served on active duty as above since 2008.);
- Have performed at least 20 years of qualifying service computed under Section 10 USC § 12732;
- Have performed the last six years (formerly eight years) of qualifying service while a member of the Active Reserve;
- Not be entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve;
- Must apply for retired pay by submitting an application to the Guard or Reserve.

When an RC member is under 60 and has applied for retired pay and stopped drilling, he or she is waiting for pension payments to begin. Avoid using the verb "retire" when referring to RC personnel, since it can have two meanings. One meaning is when Janet Green begins to receive retired pay. This is "pay status" for her and, as explained herein, it's usually (but not always) at age 60.

Another meaning is the point in time when Janet stops drilling and applies for retirement. These RC personnel are sometimes known as "gray-area retirees," since the color of the ID card for them used to be gray.

With two different meanings of retirement, there can only be problems when using "retire" in a pension division document. Assume, for example, that a pension division order involves an Army Reservist who has stopped drilling at age 40 with 20 years of creditable Army Reserve service, 16 of which were during the marriage. He has applied for transfer to the Retired Reserve, and the order states that the ex-spouse will receive 50 percent of the final retired pay of the member times a fraction, the numerator of which is 16 and the denominator of which is the number of years of service at retirement. The ex-spouse's interpretation of "retirement" would be "20 years," and thus the marital fraction would be 16/20. The Reservist, however,

might take the position that "retirement" means when he begins to draw retired pay, and at age 60 his years of service would be 40, since he transferred to the Retired Reserve (thus permitting the military to recall him in the future) instead of requesting a discharge. The difference for the ex-spouse is that she might receive half of 40 percent of the pension (under the Reservist's analysis) instead of half of 80 percent. The faulty wording could lead to an expensive battle in court or negotiations, and might result in her loss of half of the expected pension share benefit.

Retirement Points

When determining the retired pay of RC members, it is important to know how many points are involved and when the servicemember (SM) entered military service. The amount of retired pay depends on the number of points acquired during the minimum 20 years of service and also on one of two formulas.

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Pension Pay Day of Divorce

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RC members are awarded retirement points for weekend drills and various forms of active duty training. In general, an RC member may currently obtain up to 90 inactive duty points for each year of reserve service, plus an unlimited number of active-duty points. A weekend drill counts as four points (two mornings, two afternoons), while a two-week period of annual training counts as 14 points (Reserves) or 15 points (Guard) since the RC member is *serving on active duty*. RC SMs also receive points for online courses, serving at military funerals, and other special duties.

Twenty years of creditable service must be acquired for retirement application from the Guard or Reserves. To obtain a "good year" for retirement purposes – one that qualifies toward the minimum of 20 necessary – an RC SM must acquire 50 points in that year. The points acquired in each year, regardless of whether it is a "good year," count toward calculation of retired pay.

It's a different story when a mobilization occurs. If an RC member is "called up" or mobilized for a 12-month tour of duty, either individually or as part of a unit, the retirement points accounting statement, or RPAS, would show 365 points at the end of a full twelve months of duty – one point per day. No more than 365 points per year (366 for leap years) may be acquired.

When working one of these cases, counsel needs to obtain a current RPAS (or "points statement") in order to determine how many points have been acquired, both during the marriage and since the start of military service. The Guard and Reserves issue RC member an RPAS once a year, usually within two or three months after the RYE (Retirement Year End date) of the member. The document for the Army Reserve is AHRC Form 249-2E, DARC Form 249 or AGUZ Form 115. For National Guard points, see NGB Forms 22 and 23. The Air Force Reserve document is AF Form 526, and the Navy Reserve document is NAVPERS Form 1070-161. For the Coast Guard Reserve, obtain CG HQ Form 4973. Don't let the attorney for the member try to claim that there is no points statement, it cannot be located, or "it must have floated away in the big flood in Smallville last year." One is available to each Reserve Component SM online. All she or he has to do is log in to the RC website involved, insert his or her log-in name and enter his or her password. On the following page there is an example of what an Air Force Reserve points statement might look like for Sergeant John T. Doe.

Calculating Retired Pay

RC points earned are computed based on an equivalent year of service with a standard of 360 days in a year. Thus, for instance, if an RC SM receives 3600 points, this equates to 10 years of equivalent service. From this example we can determine the RC SM's percentage share of retired pay. If a 20-year active-duty SM receives at retirement 50 percent of his or her base pay, then a 10-year RC SM would receive retired pay equal to 25 percent of base pay. The formula is:

At present there are two different computations for RC SMs. For those whose Date of Initial Entry into Military Service (DIEMS) is before September 8, 1980, years of creditable service are multiplied by 2.5 percent up. The resulting percentage is applied to the base pay in effect for the RC SM on the date retired pay starts to determine monthly retired pay. In the above example, the 25 percent figure would be multiplied by the base pay of the RC SM at the time of receipt of retired pay. If the active duty pay of a SM at retirement were $4,000 a month, then in this example he or she would begin receiving 25 percent of that, or $1,000 a month. This retirement plan is known as the Final Basic Pay plan. On some Leave and Earnings Statements (LESs), there are "RETPLAN" and "DIEMS" blocks, while on others these blocks don't appear. If the blocks appear on the LES, it is up to the member and member's servicing personnel office to ensure that the blocks are complete and the information is accurate. Since Active Guard/Reserve (AGR) personnel get Active Duty pay and benefits but are members of their RC paid using the RC pay system, there can be discrepancies.

Those RC SMs whose DIEMS is on or after September 8, 1980 but before 1988, have the same retired pay multiplier, namely, 2.5 percent per year times years of creditable service. The difference lies in how the actual retired pay is calculated. The retirement percentage is applied to the average of the highest 36 months

(cont'd. on page 18)

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ANG/USAFR POINT CREDIT SUMMARY for Sgt. DOE, JOHN T., 123-45-6789
Service History

From Date	Through Date	AD	IDT	ECI	IDS	MBR	RETIRE	SATSVC yr mo dy
1985 Jul 23	1985 Oct 07	Delayed Enlistment Program						
1985 Oct 08	1986 Oct 07	365	0	0	0	0	365	01 00 00
1986 Oct 08	1987 Oct 07	365	0	0	0	0	365	01 00 00
1987 Oct 08	1988 Oct 07	366	0	0	0	0	366	01 00 00
1988 Oct 08	1989 Oct 07	315	00	0	0	0	315	00 10 11
1989 Aug 19	1990 Aug 18	15	44	29	0	15	75	01 00 00
1990 Aug 19	1991 Aug 18	57	48	24	0	15	117	01 00 00
1991 Aug 19	1992 Aug 18	13	48	0	0	15	73	01 00 00
1992 Aug 19	1993 Aug 18	68	40	0	0	15	123	01 00 00
1993 Aug 19	1994 Aug 18	365	0	0	0	15	365	01 00 00
1994 Aug 19	1995 Aug 18	365	0	0	0	15	365	01 00 00
1995 Aug 19	1996 Aug 18	365	0	0	0	15	365	01 00 00
1996 Aug 19	1997 Aug 18	365	0	0	0	15	365	01 00 00
1997 Aug 19	1998 Aug 18	365	0	0	0	15	365	01 00 00
1998 Aug 19	1999 Aug 18	365	0	0	0	15	365	01 00 00
1999 Aug 19	2000 Aug 18	365	0	0	0	15	365	01 00 00
2000 Aug 19	2001 Aug 18	365	0	43	0	15	365	01 00 00
Points Summary		4486	180	96	0	180	4721	15 10 11

of basic pay of the SM, effective at age 60, to determine monthly retired pay. Thus, this retirement plan is known as "High-3." For one who transfers to the Retired Reserve, this is usually the rates of pay to which the RC member would have been entitled if serving on active duty immediately before the date when retired pay is to begin. DODFMR, Vol. 7B, ch. 1, § 010102. Members who request a discharge from the Retired Reserve before 60, however, can only use the basic pay for the 36 months prior to their discharge.

The Guard and Reserve are required to notify RC members when they have completed sufficient years for retired pay purposes. A letter with the subject "Notification of Eligibility for Retired Pay at Age 60," commonly referred to as the "20-year letter," accomplishes this. This is also referred to as the NOE, or Notice of Eligibility. The RC SM should receive this letter within one year of completing 20 qualifying years of service for retired pay purposes. A wealth of information about RC retirement, applicable to all RC branches of service, is found at the following Army Reserve web page: https://www.hrc.army.mil/site/reserve/soldierservices/retirement/index.htm The member is required to acknowledge receipt and to decline or accept the Survivor Benefit Plan (SBP). If the member is married or divorced from a spouse with an interest in military retired pay, the member cannot lawfully decline SBP without the written and notarized consent of the other party. Since the acknowledgement can take place before any notary public, it is not unheard of for a spouse or former spouse to find out that an impersonator has executed a waiver of SBP.

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Pension Pay Day of Divorce

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Janet's RC pension begins about one month after her 60th birthday. The payments to Sam, if all his papers are in order according to Defense Finance and Accounting Services (DFAS), will begin about two months later, or about 60-90 days after Janet turns 60. The pension payments will include an annual cost-of-living adjustment, or COLA, whenever that occurs. The only exception is when Sam's pension award is phrased as a "set dollar amount," as will be explained in Part 2 of this article.

At the beginning of this article, Sam asked about what the retired pay of Janet would be. Estimating this is difficult, but not impossible. Since she is still drilling, there is no way of telling how many points she will have accumulated at retirement, and those points determine what she will be paid. There is, however, a retired pay calculator at the Army's Human Resources Command website, and it works equally well for all Reserve Component (RC) branches of service. Go to www.hrc.army.mil and type "how to estimate your retired pay" into the SEARCH window. You'll find that there is a chart which asks for *Year Born, Grade at Retirement, Total Years of Service at Retirement*, and *Total Points at Retirement*. Once these are filled in, the form will generate a retired pay estimate.

Part Two of this article, which will appear in the next issue, will cover pension division, indemnification, disability, the Survivor Benefit Plan, the marital fraction (points vs. months of service) and the drafting of a dual-option clause to cover Sam if his wife goes on to earn an active-duty retirement.

Mark Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as an expert witness, as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

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