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NEVADA FAMILY LAW REPORT

Volume 25, Issue 1 Winter 2012

2011 Legislative Update: Family Law

Photo of the Nevada Legislature building courtesy of Beau Sterling

By Katherine L. Provost, Esq. and Shelly Booth Cooley, Esq.

IN THIS ISSUE:

The 76th Legislative Session resulted in a number of bills affecting the area of family law. We have organized the bills by practice area and have provided links to the legislative history and the bills, as enrolled.

Adoptions

A.B.111 – Adoption/Sibling Visitation

- Effective July 1, 2011
- Revises provisions of NRS 127

Authorizes prospective adoptive parents who live outside Nevada to attend by telephone a hearing on petition for adoption of a child who is in the custody of an agency that provides child welfare services, if a representative of the agency responsible for supervising the child in that state attends the hearing and the court places the telephone call.

Authorizes the court to grant such a petition to a petitioner who has not resided in Nevada for six *(cont'd. inside on page 3)*

Nevada Family Law Report

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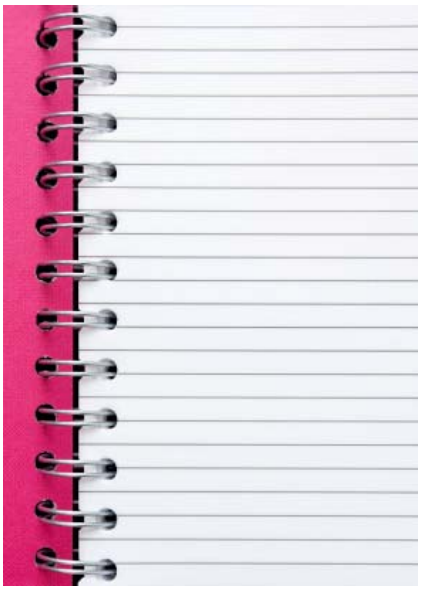
Editor's Notes

By Shelly Booth Cooley, Esq.



In our first feature, by Katherine L. Provost and myself, we provide summaries of the bills that were passed in the 76th legislative session. Our second and third features, by Mark E. Sullivan, outline the process necessary to obtain military health and education records, as well as a "Fact Sheet" regarding VA Payments and Family Support. Our fourth feature, by Bruce I. Shapiro, discusses alimony and provides suggestions for the court to adopt so that practitioners may reasonably predict spousal support awards.

Family Law Conference:

The Family Law Conference is scheduled for March 1 through 2, 2012, in Ely, Nevada. The theme of this year's conference is "When Custody Gets Dirty: High Conflict Custody Cases and Evidence." As always, there will be several interesting sessions on topics such as the complexities of custody, better ways to present your custody case and ethics and very hard choices in evidence, as well as some fun, extra-curricular activities.

The conference will take place at the Bristlecone Convention Center in Ely, and registration is still open. Visit the CLE live seminars page to learn more about the conference or to register!

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months, and to address a prospective adoptive parent by telephone, prior to entering an order, when the court inquires whether that person has knowledge of an agreement providing for post-adoptive contact.

Revises the provisions that apply to notice and scheduling of hearing on whether to include an order for visitation in an adoption decree relating to a child who is in the custody of a child welfare agency.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=256

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB111_EN.pdf

S.B. 23 – Adoption of Children with Special Needs

- Effective March 21, 2011
- Revises NRS 127.186

Clarifies that the agency that has custody of a child is responsible for scheduling any necessary evaluations of the child, notifying proposed adoptive parents about financial assistance and assisting the proposed adoptive parents in applying for and satisfying prerequisites for financial assistance.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=47

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB23_EN.pdf

Child Welfare

A.B. 148 – Voluntary Relinquishment of Infants

- Effective June 13, 2011
- Revises NRS 432B.630

Requires a provider of emergency services to notify a law enforcement agency within 24 hours of assuming possession of an abandoned child who is or appears to be not more than 30 days old. The law enforcement agency must notify the Clearinghouse of Missing Children established by the Attorney General, and to investigate further, if necessary, to determine whether the child has been reported as a missing child. Upon conclusion of the investigation, results of the investigation must be provided to the child welfare services agency, and the agency is required to maintain that information for statistical and research purposes.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=657

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB313_EN.pdf

A.B. 154 – Children's Bill of Rights

- Effective October 1, 2011
- Revises NRS 432B

Establishes certain rights of children placed in foster homes. These rights include the right to be treated with dignity and respect; receive appropriate food, shelter and medical care; and be free from abuse or neglect. In addition, children are granted the right to maintain personal income, communicate with any person involved in his or her case unless prohibited by the court; participate in his or her placement options and have access to education and related activities.

A provider of foster care must inform a child of his or her rights and provide a written copy to the child. A child who believes his or her rights have been violated may raise and redress a grievance.

An employee of a school district is prohibited from publicly disclosing any information relating to the fact that the pupil is in foster care.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=364

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB154_EN.pdf

A.B. 350 – NRS 432B Jurisdiction of Children Over Age 18

- Effective May 18, 2011
- Revises NRS 424.013

Allows a juvenile court to retain jurisdiction over a child who turns 18 years of age while in the custody of the court if the child is not likely to be returned to his or her parents and the child requests an extension of jurisdiction. The child must be offered pro bono legal services upon reaching 17 years of age to be advised of the consequences of remaining under jurisdiction. The agency responsible for providing child welfare services is also required to meet with the child before the child reaches 18 years of age to determine if the child wants to remain under jurisdiction and develop a transition plan toward independent living.

If the child chooses to remain under the jurisdiction of the juvenile court, the child shall enter into a written agreement with the child

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welfare agency to be filed with the court. The child under jurisdiction would still be eligible to receive monetary payments from the child welfare agency in the form of a payment not to exceed the rate of payment for foster care.

Termination of the jurisdiction would occur when the child turns 21 years of age, or if other conditions are met prior to that date. The bill also prescribes the process for terminating jurisdiction, which includes providing an opportunity for the child, the child welfare agency, and the child's attorney to attempt to resolve differences prior to requesting a hearing before a court. The child welfare agency must notify the juvenile court if the jurisdiction will be terminated.

Establishes an order of priority for placing a child in protective custody.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=728

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB350_EN.pdf

S.B. 57 – Pick-Up Orders for Abducted Children

- Effective July 1, 2011
- Revises NRS 432

Authorizes the Children's Advocate (through the Office of Advocate for Missing or Exploited Children within the Office of the Attorney General) or his or her designee to apply to a court for a warrant to take physical custody of a child if, during an investigation, it appears that probable cause exists to believe a child located in Nevada has been abducted

and the act was not committed to protect the child from abuse or the person who abducted the child from domestic violence. If the court determines no exigent circumstances exist, the bill authorized the court to issue the warrant after holding a hearing. If the court finds that exigent circumstances exist, the court may issue the warrant after an ex parte hearing, in which case the court must give the person or persons alleged to have abducted the child and having possession of the child, is different, to be heard at the earliest possible time and within 48 hours if possible.

Directs the court to assume temporary emergency jurisdiction and issue a temporary emergency custody order if the court finds, by a preponderance of the evidence presented at a hearing, that the act of abduction was committed to protect the child or the person who abducted the child. No filing fee may be charged for an application for a warrant and the court must expedite the application. The Children's Advocate acts on behalf of the court, not a party.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=145

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB57_EN.pdf

S.B. 111 – Placement of Children Into Childcare Institutions

- Effective October 1, 2011
- Revises NRS 432B.3905

Requires each agency that provides child welfare services to develop and implement a written plan to ensure that the provisions and exceptions for such placement of children in protective custody are understood and carried out.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=264

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB111_EN.pdf

S.B. 113 – Care of Children During a Disaster

- Effective July 1, 2011
- Revises NRS 424

Requires the Division of Child and Family Services, in consultation with other agencies that provide child welfare services, to adopt regulations to establish minimum requirements and procedures for plans regarding the care of children in their custody during a disaster. Requires each foster home, facility for detention of children and agency that provides child welfare services to develop and implement a plan for the care of children in its custody during a disaster that is consistent with those regulations. Each child welfare agency must also provide a copy of that plan to each person or entity under its jurisdiction that has physical custody of such children. The division is required to develop a plan for the care of children in the custody of other child welfare agencies to

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ensure that the division is prepared to meet the needs of those children during a disaster if any of those other agencies is unable to meet those needs.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=266
Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB113_ EN.pdf

S.B. 246 – Medication Management for Minors

- Effective January 1, 2012
- Revises NRS 449

Requires a medical facility that accepts custody of children pursuant to court order to adopt policies regarding the administration and management of medication to a child in the facility. The facility must ensure each employee receives a copy of and understands the policy. This applies to public or private institutions where a child is committed, including a facility for detention of children; state facility for detention or commitment of children; specialized foster home or group foster home; child care facility which occasionally or regularly has physical custody of children pursuant to the order of a court; treatment facility and other facility of the Division of Child and Family Services of the Department of Health and Human Services into which a child may be committed by a court order.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=606
Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB246_ EN.pdf

S.B. 371 – Psychiatric Care for Children

- Effective October 1, 2011
- Revises NRS 432B

Requires court appointment of a legally responsible person for the psychiatric care of a child in the custody of a child welfare agency, and such person shall make decisions concerning services, treatment, and psychotropic medication provided to the child. The child welfare agency shall nominate a person to be legally responsible for the psychiatric care although the court with jurisdiction shall make the appointment. The legally responsible person must provide written consent or denial for routine treatment of psychiatric care and notify the parent, legal guardian or child welfare agency.

The legally responsible person must approve or deny the administration of psychotropic medication and prohibits the administration without consent from the legally responsible person. The measure prescribes the circumstances in which a child may receive psychotropic medication without the approval of the legally responsible person, including cases of emergency. The bill requires certain health care providers to obtain written consent for the legally responsible person before providing psychiatric care to a child in the custody of a child welfare agency and the provider must keep a copy of the consent in the child's health care records.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=885
Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB371_ EN.pdf

S.B. 447 – Block Grants for Child Welfare Services

- Effective July 1, 2011
- Revises NRS 432B

Requires the Division of Child and Family Services, to the extent that money has been appropriated, to award block grants to counties whose population is 100,000 or more for the provision of child welfare services in those counties. The counties may use the money without restriction for child welfare services and without requirement to revert unspent money to the General Fund. The division must provide a categorical grant to the same counties for adoption assistance services within the counties.

The division shall implement a performance improvement plan requiring each agency that provides child welfare services to submit improvement plans biennially to improve the safety, permanency and well-being of children in the agencies' care and to administer an incentive program for the counties that provide child welfare services; to make fiscal inventive payments based upon the counties' achievement of specific goals for improvement proposed by the counties and approved by the division. The division is required to submit a report to the Governor and Legislature each year on the county child welfare agencies progress in achieving performance improvement targets and achievement of specific goals related to the

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fiscal incentive program. Develops corrective action plan to be implemented in instances where noncompliance with federal or state laws or regulations is identified and penalties to be implemented if corrective action plans are not submitted or carried out.

The budgetary incentives of this bill shall be provided during the 2011 – 2013 biennium regardless of achievement goals.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=885

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB371_ EN.pdf

S.B. 480 – Child Protective Services in Rural Counties

- Effective July 1, 2011
- Revises NRS 432B

Requires all rural counties to pay to the Division of Child and Family Services an assessment for the provision of child protective services. The measure allows a county to request an exemption from the assessment by submitting a proposal to the governor for the county to carry out child protective services for the county. The measure requires the division to provide reports of certain information about the provision of child protective services and to provide to each rural county the total proposed budget of the division for providing child protective services in that county for the next succeeding biennium.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=1119

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB480_ EN.pdf

Child Custody

A.B. 313 – Parents In Military

- Effective October 1, 2011
- Revises NRS 125.510

Limits modification of custody orders based on a parent's actual or potential military deployment (including temporary duty) and authorizes temporary modifications in order to accommodate deployment of a parent. Applies to families where one or both parents are members of the military (armed forces of the United States, a reserve component thereof or the National Guard). The court may hold expedited hearings and allow testimony by affidavit or electronic means for a parent whose ability or anticipated ability to appear in person at a regularly scheduled custody or visitation hearing is materially affected by his or her military duties.

If military duties preclude adjudication of custody orders prior to deployment, parents are required to cooperate to reach a mutually agreeable resolution to the issues. If the court has issued a temporary custody order, the bill deems the absence of a child from Nevada during a deployment to be temporary.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=657

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB313_ EN.pdf

Courts/Procedure

A.B. 87 – Discovery-Repeals Uniform Foreign Deposition Act and Replaces with Uniform Interstate Depositions and Discovery Act

- Effective October 1, 2011
- Revises NRS 53

Applies to discovery in cases pending or initiated after effective date. Repeals the Uniform Foreign Deposition Act and replaces it with the Uniform Interstate Depositions and Discovery Act. When a party in another state seeks discovery from a person in Nevada, the measure required the party to submit a subpoena from that state to the clerk of the court in the county where discovery is sought. The clerk must then promptly issue a subpoena, the service and enforcement of which must comply with Nevada's laws and rules of civil procedure.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=887

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB887_ EN.pdf

A.B. 156 – Service of Process

- Effective May 12, 2011
- Revises NRS 648

Prohibits a person from engaging in the business of a process server if the person is not licensed as a process server and has, because of certain violations in law, received a citation and order to cease and desist conduct. A cease and desist conduct order issued to a business must state that the order applies to any person acting in the name of the business. Additional-

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ly, the measure requires that a proof of service of process filed with a court must include the name, residential or business address, and telephone number of the person who performed the service of process; the date and time the legal process was served; the manner in which the legal process was served; if practicable, the name of the person who was personally served or the physical description of the person; and a notation of the license number of the process server or the registration number of the employee of a licensed process server who performed the service of process. A court may construe a proof of service of process that does not include this information as legally insufficient.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=156

Bill, As Enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB156_ EN.pdf

A.B. 223 – Garnishment/ Attachment Reform
- Effective October 1, 2011
- Revises NRS 21

Makes various changes to the enforcement of civil judgments. If a writ is levied on the personal bank account of a debtor, and if money has been deposited electronically in the account within the last 45 days that is reasonably identifiable as exempt from execution, $2,000 or the balance in the account, whichever is less, is not subject to execution.

If a writ is levied on the personal bank account of a debtor, and money has not been deposited electronically within the last 45 days that is reasonably identifiable as exempt from execution, $400 or the balance in the account, whichever is less, is not subject to execution unless recovery of the money is for the support of a person (child support). If a debtor has more than one bank account with the bank to which the writ is issued, the amounts not subject to execution apply in the aggregate.

Changes the deadline for serving a claim of exemption from eight to 10 days after the notice of a writ is served on a debtor and, if the levy is on earnings, requires the claim to be filed within 10 days of each withholding.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=223

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB223_ EN.pdf

S.B. 66 – Multidisciplinary Teams
- Effective October 1, 2011
- Revises NRS 228

Allows the Attorney General to organize or sponsor multidisciplinary teams to review the death of domestic violence victims if a court or local government agency does not organize such a team or request assistance from the attorney general. Teams may share information with similar teams created to review the death of a child. The results of a team's review are not admissible in any civil action or proceeding. Team members may obtain relevant information and records, including information from reports and investigations concerning the abuse or neglect of children, and meet with others who may have relevant information.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=56

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB56_ EN.pdf

Guardianships

S.B. 128 – Private Professional Guardians
- Effective October 1, 2011
- Revises NRS 159.0595

Requires a private professional guardian to submit to and pay for a background investigation and to make the results available to the court upon request. A guardian must file a verified acknowledgment of the duties and responsibilities of a guardian and authorizes filing of a general acknowledgment if the guardian is responsible for multiple wards. Prohibits a court from removing a guardian if the sole reason for removal is the lack of the wards assets to pay the compensation and expenses of the guardian.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=294

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB128_ EN.pdf

S.B. 167 – Release of Information in Actions Involving Guardianship of Child
- Effective July 1, 2011
- Revises NRS 432B.290

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Authorizes information relating to the abuse or neglect of a child over whom guardianship is sought to be released to the court which has jurisdiction over the proceeding; the person who filed or intends to file the petition; the proposed guardian or proposed successor guardian; the parent or guardian of the child; and the child if he or she is at least 14 years of age.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=413

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/SB/SB167_ EN.pdf

Health and Human Services

A.B. 110 – Kinship Guardian Assistance Program

- Effective July 1, 2011
- Revises NRS 432B

Requires the Department of Health and Human Services to establish and administer the Kinship Guardianship Assistance Program in accordance with federal law to provide assistance to a relative of a child who is seeking appointment as the legal guardian of the child under certain circumstances. The child has to have been removed from his or her home, eligible for federal payments for foster care and adoption assistance for no less than six consecutive months, does not have an option for reunification or adoption, and demonstrates a strong attachment to the relative. Siblings of eligible children may be placed with the child and be deemed eligible for assistance.

A relative must demonstrate a strong commitment to the child, be a provider of family foster care and legal guardian, and enter into a written agreement for assistance. A relative may reside out of state which would require the agency that provides child welfare services to comply with any court orders associated with out-of-state guardianships. Finally, the bill prescribes the requirements for the written agreement between the child welfare agency and the relative.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=255

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB110_ EN.pdf

Probate/Intestate Succession

A.B. 147 – Inheritance

- Effective October 1, 2011
- Revises NRS 128.015

Provides that the termination of parental rights in cases of abandonment or neglect does not terminate the right of children to inherit from their parents, except that the right to inherit terminates if and when the child is adopted.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=147

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB147_ EN.pdf

S.B. 221 – Inheritance/Non-Probate Transfers

- Effective October 1, 2011
- Revises NRS 21.075

Defines "non-probate transfer" and allows designated beneficiaries to receive property through contract provisions upon death of the testator outside of probate.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=221

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/SB221_ EN.pdf

Real Property

A.B. 273 – Deficiencies Following Foreclosure

- Sections 1 to 3, 5, 5.5, 5.8 to 6 and 7 are effective June 10, 2011
- Sections 3.3 and 5.7 are effective July 1, 2011
- Revises NRS 40

Provides for various changes concerning deficiencies for first mortgages and second mortgages.

Legislative History:
http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=273

Bill, as enrolled:
http://www.leg.state.nv.us/Session/76th2077/Bills/AB/AB273_EN.pdf

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GETTING MILITARY HEALTH AND EDUCATION RECORDS

*by Mark E. Sullivan**

Obtaining Documents from the Government

When requesting government records, remember that personnel records are governed by the Privacy Act of 1974. Be prepared to jump over some hurdles to get what you want, and don't expect results overnight. When requesting personnel records, you will usually need to obtain consent of the individual concerned or else an order from a court of competent jurisdiction. This order could be a subpoena, but it still must be signed by a judge, and it is recommended that the records be returnable to the court.

An example that the author used in a custody case (with fictitious names and other information) is found in Attachment A. This is a motion to obtain Department of the Navy disciplinary and investigative records, along with a subpoena and a letter to the Office of General Counsel, Department of the Navy. All these documents were prepared pursuant to the regulations cited therein and with unofficial guidance by a command judge advocate at the installation involved, who knew the contents of the records and was willing to point out what needed to be done to obtain their release. Despite all these precautions, the Navy denied the request and directed the author to federal court if he wanted to challenge the ruling! Based on this experience, the author cautions that one should not assume that every document request, even when done properly, will result in compliance; some cases are just too sensitive for release of their documents to a court in a divorce case without the intervention of a federal district court judge, which most clients cannot afford.

The Department of Defense has established its own regulations, pursuant to the Act and to DoD Directive 5400.11, and this privacy publication is set out in "Department of Defense Privacy Program," DoD 5400.11-R (May 14, 2007). You can find the directives, publications, administrative instructions, memoranda, and forms you need from the "DoD Issuances" website, located at http://www.dtic.mil/whs/directives/. As an agency of DoD, the Defense Finance and Accounting Service is bound by these rules. The specific rules that DFAS has promulgated regarding release of information are found at DoD Financial Management Regulation, Volume 7B, Chapter 18, "Release of Information," which contains specific references to the regulations of each of the DoD branches of service. The DoDFMR can be found at http://comptroller.defense.gov/fmr. Rules for the Coast Guard, an agency of the Department of Homeland Security, are found at the CG-61 Reference Guide, published by the USCG Office of Information Management. Go to www.uscg.mil and type "CG-61 Reference Guide" into the SEARCH window. Extensive information about release of information from the Coast Guard may be found at the USCG's Freedom of Information & Privacy Act website located at http://www.uscg.mil/foia.

In addition to income documents, such as Retiree Account Statements and Leave and Earnings Statements, attorneys often need to see the discharge form of servicemembers to determine years of creditable service. The

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Military Records

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National Personnel Records Center (NPRC) has provided the following website for veterans to gain access to their DD-214s online: http://www.archives.gov/veterans. Military veterans and the next of kin of deceased former military members may now use a new online military personnel records system to request documents. Other individuals with a need for documents must still complete the Standard Form 180, which can be downloaded from the online website. Because the requester will be asked to supply all information essential for NPRC to process the request, delays that normally occur when NPRC has to ask veterans for additional information will be minimized. The new web-based application was designed to provide better service on these requests by eliminating the records center's mailroom processing time.

Medical and School Records

In many domestic cases involving one or both parents who are in the armed forces, it may be necessary to obtain school and medical records of the children involved. Far from being a minefield, as most civilian practitioners suspect, the procedures for access to military educational and health records are simple and straightforward.

Obtaining Health Records

Obtaining health records sometimes is necessary in a custody case. There is nothing unique about obtaining medical information from a military medical treatment facility (MTF), as opposed to a civilian facility; both are governed by HIPAA when the disclosure is voluntary. The primary legal and regulatory references pertaining to the release of medical information are the following:

- Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. §§ 1320d–1320d-8 (1996);
- DoD Reg. 6025.18-R, DoD Health Information Privacy Regulation and DoD Directive 5405.2; and
- AR (Army Regulation) 40-400, Patient Administration, AR 40-66, Medical Record Administration and Health Care Administration and AR 27-40, Litigation.

The references in #3 above are for cases involving U.S. Army records.

Perry Wadsworth, a hospital attorney for Womack Army Medical Center at Fort Bragg, North Carolina, and an Army Reserve JAG Lieutenant Colonel,[1] describes the records access issues as follows:

The old "Privacy Act versus FOIA" analysis used to be one of our standards for determining release of medical information, but HIPAA is now the most controlling Federal legal authority. The law was not written for the military per se; this has caused some confusion in its application, particularly because military functions and command authority are fairly broad-based in comparison to civilian institutions. One key distinction between the Privacy Act and HIPAA analyses is that health information survives the death of the patient. The protections afforded by the Privacy Act for information typically do not survive the death of the subject.

Requesting records from a military treatment facility (MTF) can be both easy and hard. The request is easy, but getting the records is sometimes hard. The spectrum, from easy to hard, is summarized as follows:

> Easy. If the patient is requesting the records himself or completes a HIPAA release form giving authority to someone else to get the records, then the request is straightforward. The MTF will release copies of the records in the normal course of business. This is the preferred method. If an attorney is representing a client whose records are needed, then he can simply have the client complete the appropriate release form with the HIPAA language. The attorney then mails the request and release form to "Medical Correspondence, Patient Administration Division, ___MTF." If the case involves a tort action, it may behoove the attorney to state the purpose of the request, such as the case "involves a motor vehicle accident," or the case "involves a potential federal tort claim." If the government has an interest in the case, whether it is the opportunity to recover money for the treatment it provided or it is likely to be accused of a tort, then the case can flow more smoothly through a forthright request. If you have points of

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contact in the JAG claims office, they can usually assist you in getting the records in these cases because they have an interest in obtaining the records as well.[2]

Moderately Easy. When litigation is involved and the judge signs an order or a subpoena for the release of records, the release process is relatively easy. Attorneys for the patient or party opponent often make it difficult by not getting a judge's signature on the subpoena or order. They frequently issue subpoenas in their own names. This makes it more difficult and delays the whole process, because the MTF will contact its servicing JAG office, and the request for records will be denied. Private attorneys do not have subpoena powers over federally maintained records. The other factor that most commonly causes a denial or delay of the release is the failure to make a timely request. An Army facility needs to get the judge's order or subpoena at least 14 days in advance of the date the materials are due. AR 27-40 details this from the Army's perspective.

Hard. Whether litigation is involved or not, when there is no judge's order and no release authorization signed by a proper representative, the analysis becomes more nuanced. We then have to look to exceptions under HIPAA and implementing agency regulations for release of medical information. Child custody disputes seem to bring out the worst case scenarios. Other common examples include criminal investigations or social service involvement (e.g., child abuse) or command-directed mental health evaluations. The main reason these types of cases can be more complicated is because often there is one party who does not want the records released; yet, the requesting party argues that some other interest is more compelling than the individual's right to privacy, such as the best interest of a child, a government investigation, or the need for justice.[3] An MTF may choose to honor the request, but if legal grounds exist to release PHI (Protected Health Information),

the requestor's desire to restrict the release of his health information is not ultimately dispositive.

The constraints on release of medical information also apply to conversations with or testimony of health care providers, not just the release of medical records. Some attorneys would like to get information directly from the physicians as a back-door approach to avoid requesting the records. Unfortunately, this can backfire on the attorneys. If or when the physician mentions it to his legal counsel (the JAG officer or federal attorney representing the MTF), he or she will be reminded of the rules of release and may be hesitant to cooperate in the future. AR 27-40 provides a great deal of leeway in allowing a military command (through its attorney) to determine whether a physician can provide testimony and, if so, what the limits of that testimony will be. Overall, it is better for attorneys and patients to be candid and honest about their intentions in a case. Most of them are, but there are exceptions. It leaves a bad taste in one's mouth and decreases the spirit of cooperation that might otherwise prevail. For example, I've seen doctors who were willing to bend over backwards just a few days before their deployment or change of duty station or discharge from service to provide testimony or talk to an attorney about the patient – even if they had not received timely notice. This is because they cared about their patients and the patients' attorneys were fully honest about the type of testimony they were seeking. If the providers had felt they were being tricked or misled by the patient or his/her attorney, then they would not have assisted in the legal aspects of the case. There are also patients who doggedly pursued their doctors to take sides in custody disputes or domestic cases. Rather than asking the doctor to help in

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providing factual information to assist in the determination of the child's best interest, these patients only succeeded in killing any interest that the doctor had to help out. In such situations, a doctor may use any excuse available, including technical regulatory excuses, to avoid testifying.

Note that some medical information related to children may not be protected by HIPAA if it is in the school system records. The release of this information is covered under The Family Educational Rights and Privacy Act (FERPA) (20 USC § 1232g; 34 CFR Part 99.).[4]

It is helpful to have a copy of 32 CFR §§ 516.40-46 for information on Army litigation policies regarding the release of information. Briefly summarized, this regulation provides as follows:

> Except as provided in the regulation, Department of the Army (DA) personnel will not disclose official information in response to subpoenas, court orders, or requests.

The appropriate legal authority (e.g., staff judge advocate or hospital legal advisor) must approve in writing the release of information.

If DA personnel receive a subpoena, court order, or request for attendance at a trial, deposition, or interview that reasonably might require disclosure of official information, they should immediately contact the appropriate legal authority, who will attempt to satisfy the subpoena, order, or request informally under the regulation or will consult with the Litigation Division, Headquarters, Department of the Army.

Those who seek official information must submit at least 14 days before the desired date of production a specific written request setting out the nature and relevance of the official information sought, and DA personnel may only disclose those matters specified in writing and approved by the appropriate legal authority.[5]

DA personnel will not release originals; only authenticated copies will be provided when disclosure is authorized.

AR 37-60 provides a schedule of fees and charges for searching, copying, and certifying Army records for release in response to litigation-related requests.

If the request complies with the regulation, it is DA policy to make the information available for use in court unless the information is classified, privileged, or otherwise restricted from public disclosure.

There are a number of factors that must be considered in determining whether to release information; such factors are found at 32 CFR § 516.44(b)

If the deciding official determines that all or part of the requested documents or information shall not be disclosed, then the official will promptly communicate directly with the attorney who requested the documents or information to attempt to resolve the matter informally. If the order or subpoena is invalid, the official should explain to the attorney why it is invalid and why the records requested are privileged from release. The official should try to obtain the attorney's agreement to withdraw or modify the subpoena, order, or request.

A subpoena duces tecum or other legal process signed by an attorney or a clerk for DA records protected by the Privacy Act, 5 USC § 552a, does not justify the release of the protected records. The deciding official should explain to the requester that the Act precludes the release of such records without the written consent of the individual involved or "pursuant to the order of a court of competent jurisdiction."[6] Such an order is one signed by a judge or magistrate.

If the records are unclassified and are otherwise privileged from release under 5 USC § 552a, they may be released to the court if there is an order signed by a judge or magistrate directing the person to whom the records pertain to release the specific records, or that orders copies of the records to be delivered to the clerk of court and indicates that the court has determined the materiality of the records and the absence of a claim of privilege. The clerk must be empowered to receive the records under seal subject to a request that they be withheld from the parties until the court determines whether they are material to the issues and until any question of privilege is resolved.

A subpoena or court order for alcohol abuse or drug abuse treatment records is processed under 42 USC §§ 290dd-3 and 290ee-3 and Public Health Service regulations published at 42 CFR. §§ 2.1–2.67.

The HIPAA Privacy and Security Rules are implemented within the Military Health System (MHS) by DoD 6025.18-R, "Department of Defense Health Infor-

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mation Privacy Regulation," January 24, 2003, and DoD 8580.02-R, "Department of Defense Health Information Security Regulation," July 12, 2007. The final rule on Standards for Privacy of Individually Identifiable Health Information, published by the Department of Health and Human Services, is found at 45 CFR Parts 160 and 164.

Obtaining Educational Records

Many on-base primary and secondary schools for military dependent children are run by the Department of Defense Education Activity (DoDEA). The schools operated by DoDEA in the United States are known as the Defense Dependents Elementary and Secondary Schools (DDESS) and the schools operated overseas are known as the Department of Defense Dependents Schools (DoDDS). As in non-DoDEA schools, parents of children under age 18 have the right to access and review the school records of their children enrolled at such facilities (including academic records, disciplinary files, and other student information). These records are available to a parent or legal guardian without regard to who has custody of the child, unless the decree of divorce or dissolution or the court-approved parenting plan (including a custody order) requires that records access be denied or denies the non-custodial parent access to the child. The requesting parent must be prepared to produce documentation to establish that he or she is the child's parent. The documentation required is the same as that described below when the parent is requesting a copy of the records by mail.

If a child is presently in a non-DoDEA school (e.g., private school, charter school, or public school), the records from previous DoDEA schools will not be in the child's educational records folder unless a parent copied the records and brought them to the non-DoDEA school or unless that school, with the consent of a parent, requested the DoDEA records from a previous DoDEA school. Under the Privacy Act, a non-DoDEA school cannot request prior military school records without a parental consent form accompanying the school's request. Conversely, on-base schools may, and usually do, require previous non-DoDEA schools to copy and produce the child's records for inclusion in the child's DoDEA educational records folder.

If a parent is not located near the school where a child is enrolled, he or she may request that a DoDEA school copy and mail the child's records. A copy of the "systems notice" governing student educational records is found at Appendix B. The systems notice identifies the records that the school maintains on children, the disposition of those records, and the address to which one mails a request for copies of student records. The request for student records is made under the Privacy Act of 1974, as amended. Below is a description of the information that a parent must be prepared to provide if he or she is close to the school, or that the parent must include in a written request sent by mail:

REQUEST FOR EDUCATIONAL RECORDS — DoDEA	
Full name of student	
Name used during school attendance	
Date of birth	
Dates of attendance	
Description of the records requested	
Identity and location of school	
Name of requesting party	
Address of requesting party	
Signature of requesting party	

Note: Include a certified copy of the child's birth certificate, adoption decree, guardianship order, divorce decree, and custody order, as appropriate. Also needed, when records are requested by the non-custodial parent, is a signed statement by the custodial parent (and the child, if age 18 or over), granting the non-custodial parent access to the child's records.

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Attachment A

NORTH CAROLINA
COUNTY OF BUCKINGHAM

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 08 CV 223

ROGER K. BAIRD, JR.,
Plaintiff

v.
NANCY L. BAIRD,
Defendant

MOTION FOR NAVY RECORDS

Plaintiff hereby moves this court pursuant to NCGS. §1A and Rule 45 of the Rules of Civil Procedure for an order granting a subpoena directed to the United States Navy for the production of documents, as further explained below. The Plaintiff shows the court that:

BACKGROUND

Plaintiff is an officer in the U.S. Navy, currently stationed in Japan and the Defendant is a Navy officer, currently stationed in Florida. The parties were married to each other on April 12, 1997 and subsequently separated from each other on October 9, 2008. There are two minor children born during the parties' marriage: Ellen G. Baird, born August 2, 2001 and Lewis R. Baird, born April 19, 2003.

On November 3, 2008, Plaintiff filed his Complaint seeking, *inter alia*, child custody.

DISCOVERY REQUESTS FROM BOTH PARTIES

Both parties have asked for all documentation that the other party has related to a disciplinary hearing involving the conduct of a certain Commander John Q. Doe in December 2008. Mr. Doe is the former commander of the Navy's Far East Intelligence Group, based at Naval Air Facility Watusi in Japan. Upon information and belief, Defendant had an extramarital affair with Mr. Doe, this conduct destroyed the Baird marriage, it also destroyed Mr. Doe's career and it had an impact on the care and custody of the minor children.

Plaintiff, in discovery, has requested that Defendant admit this affair and explain the consequences that her behavior with Mr. Doe had on the family, including the effects on the minor children.

Then-Commander Doe was relieved of his duty as commander of the Group on December 23, 2008. He received nonjudicial punishment, referred to as "Admiral's Mast," as a direct result of his committing adultery with the wife of a fellow officer.

The parties both seek to obtain from each other all documentation about these proceedings in December 2008. Both parties have demanded, through their attorneys, to review this documentation.

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RELEVANCE TO THE CASE

The Plaintiff, by way of discovery, has requested that Defendant both admit the affair and explain specific details from Defendant as to the nature of her relationship with Mr. Doe, its duration, its impact on the minor children, her absence from the children while she was with Mr. Doe, and other information.

The information in Mr. Doe's case file associated with the administrative action taken in December 2008, will tend to show that Mr. John P. Doe did, in fact, have an extramarital affair with the Defendant. It will also show the nature, frequency and duration of the Defendant's conduct with Mr. Doe, which directly correlates to her absences from the family, her distraction from parental duties, and her sense of priorities as to the children's care by Plaintiff, Mr. Doe's career and her own marriage. The Plaintiff is entitled to find out from the Navy's case files the details of the Defendant's actions with Mr. Doe so as to present evidence to the court on the children being left alone while Defendant was away with Mr. Doe.

The case file will show documents, e-mails, and witness statements regarding the lapses of time in which Defendant left the minor children to be with Mr. Doe, and the times when Plaintiff had to step in to care for the minor children while Defendant was absent. The court will need to inquire into the consequences and effects on the minor children when dealing with separate families as a result of Defendant's conduct.

The case file will also assist in impeaching Defendant on her sworn statements if she denies that she had an affair, is untruthful as to its nature or duration, denies that her behavior had an impact on the children or claims that her conduct never resulted in their being left alone, with no supervision.

PROCEDURES FOR OBTAINING NAVY RECORDS

The United States Navy, pursuant to its publication, SECNAVINST 5820.8A, Enclosures (3) and (4), describes the proper procedure for obtaining Navy records. The Secretary of the Navy's sole delegate for service of process is the General Counsel of the Navy, who must be served with a subpoena by certified mail or Federal Express at the following address: General Counsel of the Navy, Navy Litigation Office, 720 Kennon Street SE, Bldg 36 Room 233, Washington Navy Yard, DC 20374-5013. The office of the General Counsel of the Navy will subsequently forward the matter to the proper determining authorities for action.

In addition to a subpoena requesting specified Navy records, a detailed written request must be submitted to the appropriate determining authority to assure an informed and timely evaluation of the request. The outline of information to be provided is included in Enclosure (4) of SECNAVINST 5820.8A. Additionally, counsel for the Plaintiff has prepared this detailed written request to accompany the court's subpoena to the General Counsel of the Navy and it is included with this motion.

The subpoena in this case should request the following:

- The Navy's internal investigation of the alleged inappropriate relationship between John P. Doe and
- Nancy L. Baird, in Japan, Okinawa, and elsewhere during and before December 2008 including witness statements, e-mails; and

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- Navy's record of administrative, punitive, nonjudicial or other action against Commander Doe.

WHEREFORE the Plaintiff prays that this Court:

Sign a subpoena (copy attached hereto) for production of the United States Navy's disciplinary and investigative files for Commander John P. Doe.

Grant such other relief for Plaintiff as is just and proper.

_____ Date:_____/09

Jack M. Wilson, Attorney for Plaintiff
9926 Greenwood Drive
Warren, NC 27604

NORTH CAROLINA
COUNTY OF BUCKINGHAM

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 08 CV 223

ROGER K. BAIRD, JR.,
Plaintiff

v.
NANCY L. BAIRD,
Defendant

SUBPOENA FOR NAVY RECORDS

Pursuant to N.C.G.S. §1A and Rule 45 of the North Carolina Rules of Civil Procedure, the court issues this subpoena:

To: General Counsel of the Navy, Navy Litigation Office, 720 Kennon Street SE, Bldg 36 Room 233, Washington Navy Yard, DC 20374-5013	Date: April 17, 2009
Documents: 1) The Navy's internal investigation of the alleged inappropriate relationship between Commander John P. Doe, SSN 432-22-5567, and Nancy L. Baird, in Japan, Okinawa, and elsewhere during and before December 2008 including witness statements, documents and e-mails; and 2) The Navy's record of administrative, punitive, nonjudicial or other action against Commander Doe.	Time: 9:00 a.m.
Place for Production: Buckingham County Courthouse, Room 141, Warren, NC 27604 (P.O. Box 355)	

_____ Date:_____/09

Ellen G. Lindhoffer, Judge Presiding

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March 1, 2009
General Counsel of the Navy
Navy Litigation Office
720 Kennon Street SE
Bldg 36 Room 233
Washington Navy Yard, DC 20374-5013

Re: SECNAVINST 5820.8A, Enclosure (4) – Subpoena for Navy Records

To Whom It May Concern:

Pursuant to SECNAVINST 5820.8A, Enclosure (4): Contents of a Proper Request or Demand, the undersigned attorney for the Plaintiff herein provides the requisite written request for documents to be produced pursuant to a *subpoena duces tecum* (attached hereto). In making said request, we disclose the following:

Identification of parties, their counsel, and the nature of the litigation:

- Case Caption: Roger K. Baird, Jr. vs. Nancy L. Baird
- Docket Number: 08 CVD 19038
- Court: District Court, Buckingham County, North Carolina
- Plaintiff: Roger K. Baird, Jr.
- Defendant: Nancy L. Baird
- Attorney for Plaintiff: Jack M. Wilson, 9926 Greenwood Drive, Warren, NC 27604; phone number - 919-999-7766; fax number - 919-233-4455
- Attorney for Defendant: Janet Kelly, 208 Green Valley Ave., Warren, NC 27604; phone number - 919-334-8211; fax number – 919-243-9967
- Date and Time that documents must be produced: April 17, 2009, at 9:00 a.m.
- Location for Production: Clerk of Court, ATTN: District Court Judge Ellen G. Lindhoffer, PO Box 355, Warren, NC 27604 Buckingham County Courthouse, Room 141, Warren, NC 27604

Identification of information or documents requested

- Documents requested are the case files associated with the administrative action taken against Commander John P. Doe, former commander of the Far East Intelligence Group based at Naval Air Facility Watusi in Japan, in December 2008.
- The location of the requested case files associated with the administrative action taken against Commander John P. Doe in December 2008 is at Naval Air Facility Watusi Japan.

Description of why the information is needed

- Summary and Posture of Case: Commander Roger K. Baird, Jr., the Plaintiff, filed a lawsuit in North Carolina against the Defendant, Nancy L. Baird, for claims related to child custody, child support, and equitable distribution. The assigned judge on the case is District Court Judge Ellen G. Lindhoffer. The minor children currently reside with Plaintiff in Japan. Defendant current resides in Norman, Oklahoma. On May 13, 2009, the Warren County District Court will conduct a temporary child custody hearing.
- Statement of Relevance: The information in the case files associated with the administrative action taken in May 2008 against former Commander John P. Doe, former commander of

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the Japan-based Carrier Air Wing 5 based at Naval Air Facility Watusi in Japan, is relevant for the foregoing reasons:

1. It will show that the Defendant carried on an extramarital affair with Commander Doe;
2. It will also show that she was absent from the children during the periods of time when she was with Commander Doe;
3. When she was absent, depending on the dates and times, the children were either left alone or in the care and custody of Commander Baird, who is petitioning for custody of the children.

Testimony Sought: Plaintiff seeks no factual, expert or opinion testimony from the U.S. government.

Additional Considerations

- Plaintiff is willing to pay in advance all reasonable expenses and costs of searching for and producing documents associated with the administrative action taken against Commander John P. Doe in May 2008.
- We will provide Defendant's attorney with a copy of all correspondence and documents originated by the determining authority so they may have the opportunity to submit any related litigation requests and participate in any discovery.

If the General Counsel of the Navy requires any additional information in evaluating this request, please let our office know and we shall provide same.

Sincerely,
Jack M. Wilson
Attorney at Law

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Article Submissions

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 May, 2012, with a submission deadline of April 15, 2012.

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

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Appendix B

DoDEA 26

System name:

Department of Defense Education Activity Dependent Children's School Program Files (May 3, 2007, 72 FR 24572)

System location:

DoDEA Headquarters Office DoDEA Area (DoDDS-Europe, DoDDS-Pacific, and DDESS) offices and school districts. Specific addresses for each Area office and school districts may be obtained from the DoDEA website at http://www.dodea.edu. or from the DoDEA, Headquarters office, 4040 North Fairfax Drive, Arlington, VA 22203-1634, telephone 703 588-3200.

Categories of individuals covered by the system:

Current and former students in schools operated by DoDEA, world-wide.

Categories of records in the system:

- School Student Record Files. Information includes records of student name, Social Security Number (SSN), date of birth, citizenship, etc. and sponsor identifiers and sponsor's permanent address, student performance, achievements and recognition (academic, citizenship, and athletic), standardized achievement tests scores and grades; reading records, letters of recommendation, parental correspondence, and similar records.
- Health Record Files. Includes student health records, immunization records, parental permission forms, screening results, sports physicals, physician referrals, medication instructions, consent forms, copies of accident reports, and similar records.
- School Special Education Files. Information pertaining to special education programs to include referrals and referral forms and, when appropriate, samples of student's work; Individual Education Plans; Case Study Committee reports and minutes; test results and protocols; disciplinary records, behavior plans and related information; assessment and evaluation reports; correspondence between teachers, service providers and/or parents; file access records and cross-reference location information; results of special education administrative hearings and other informal and formal conflict resolution procedures, such as mediated agreements or settlement documents; related service-provider reports, and teacher notes relevant to the child's special education program or needs.
- School Ancillary Service Files. Information on non-special education supplemental student services, such as: Gifted Program, English as a Second Language (ESL), Compensatory Education, Reading Improvement to include consultation and referrals, test protocols, assessments and evaluation plans and results, progress and evaluation reports and summaries, teachers' notes, general correspondence, and samples of student's work, and related information.
- School Registration Card Files. Sponsor and/or pupil registration cards reflecting student and sponsor Social Security Numbers, grade/rank enrollment verification, sponsoring agency, emergency locator information, 'sponsors' orders, birth certificates, housing documents, court documents that document a student's relationship to the sponsor, agency certification of sponsors, housing documents, and similar files.
- Teacher Class Register Files. Grade books reflecting scholastic marks and averages, teacher comments and/or notes, student attendance and withdrawal information, and similar files.
- Transcript Files. Information consists solely of the student's permanent records (transcripts) reflecting student name and Social Security Number, grades, course titles, credits, and similar related information.
- Transcript Request Files and other Disclosure Files. Request forms and correspondence authorizing release of transcript and other school student record files.
- Report Card Files. Report cards that reflect scholastic grades, promotion, retention.
- Attendance and Discipline Files. Information reflecting attendance and disciplinary actions, to include teacher referrals, tardy and/or admission slips, correspondence to and from parents, student and/or witness statements, and

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school investigative files, and similar related information.

- System Wide Assessment Files. System Wide Assessment results for individual students and aggregated results for classrooms, schools, districts and areas.
- School Mediation Agreement and Hearing Results Files. Material on mediations and hearings other than that contained in the individual student record.

Authority for maintenance of the system:

10 USC 2164, DoD Domestic Dependent Elementary and Secondary Schools; 10 U.S.C. 113, Secretary of Defense; 20 U.S.C. 921-932, Overseas Defense Dependent's education; and E.O. 9397 (SSN).

Purpose(s):

The purpose of this system is to determine enrollment eligibility and tuition status in DoDEA and DoDEA funded non-DoD schools; schedule children for classes and transportation; record attendance, absence and withdrawal; record and monitor student progress, grades, course and grade credits, services, school activities, student awards, special interests, hobbies and accomplishments; develop an appropriate educational program, services and placement; provide information for enrollment and student financial aid for post-DoDEA education and employment; obtain and preserve school academic and athletic accreditation; to provide directory information to military recruiters; and to perform other related authorized educational duties required.

Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

In addition to those disclosures generally permitted under 5 U.S.C.552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

- To a non-DoD school, upon request, when the child is enrolled in the school at DoD expense.
- To Federal and State educational agencies and public and private entities as needed to complete a student's application for or receipt of financial aid.
- To Federal, State, and local governmental officials to protect health and safety in the event of emergencies.
- To public and private organizations conducting studies on or on behalf of DoDEA.
- To State and local social service offices relative to law enforcement inquiries and investigations and child placement/support proceedings.
- To private individuals, who have been appointed to DoDEA school Boards, advisory committees, student disciplinary committees, school improvement teams, and similar committees established by DoDEA, to perform authorized DoDEA activities or functions.
- To a non-DoD school receiving a student who is transferring from a DoD school, upon request from the school. Only academic and attendance records will be released.
- The DoD 'Blanket Routine Uses' set forth at the beginning of the OSD compilation of systems of records notices also apply to this system.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

Storage:

Paper records in file folders and electronic storage media.

Retrievability:

By student surname, Social Security Number (SSN), date of birth, and student number.

Safeguards:

Access is provided on a 'need-to-know' basis and to authorized authenticated personnel only. Records are maintained in controlled access rooms or areas. Computer terminal access is controlled by terminal identification and the password or similar system. Physical access to terminals is restricted to specifically authorized individuals. Password authorization, assignment and monitoring are the responsibility of the functional managers.

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Retention and disposal:

School Student Record Files. Destroy/delete files other than secondary transcripts of all information except report cards or other records of academic promotion or retention data after 1 year. Destroy or delete all non-secondary transcript files 3-5 years after graduation, transfer, withdrawal, or death of student. Secondary School Transcripts will be cut off upon transfer, withdrawal, or death of student. Secondary Transcript files are destroyed when 50 years old. DoDDS student records are retained at the school for four years following the graduation, transfer, withdrawal, or death of student or until school closure whichever occurs first, and are then transferred to the area for one year, and then are transferred to the DoDEA Records Center at Fort Benning, Georgia, until destroyed. DDESS student records are stored at the school until destroyed. Panama student records are stored at the DoDEA Records Center at Fort Benning, Georgia, until destroyed. All other records included in this database follow the disposition schedules of the following files:

Secondary School transcripts will be cut off upon transfer, withdrawal, or death of student. Secondary Transcript files are destroyed when 50 years old. DoDDS transcripts are retained at the school for four years following the graduation, transfer, withdrawal, or death of student or until school closure whichever occurs first, and are then transferred to the Area for one year, and then are transferred to the Thompson Learning Center, Lawrenceville, NJ, until destroyed. DDESS transcripts are stored at the school until destroyed. Panama transcripts are stored at the DoDEA Records Center at Fort Benning, Georgia, until destroyed. All other records included in this database follow the disposition schedules of the following files:

- Health Record Files. Place in student record file upon transfer, withdrawal, or death of student.
- School Special Education Files. Destroy/Delete when 5 years old. Cut off on graduation, transfer, withdrawal or death of student.

- Ancillary Service Files. Transfer to student record file upon transfer, withdrawal, or death of student.
- Registration Card Files. Transfer current card to student record file upon graduation, transfer, withdrawal, or death of student. Supporting documents used to determine eligibility, such as sponsor's orders, birth certificates, custody documents, housing documents (CONUS), and similar documents may be destroyed). A copy of current card is maintained in the student record file to authorize release of records. Destroy when superseded.
- Teacher Class Register Files. Destroy/Delete when 1 year old. Cut off at end of school year.
- Master Student List Files. Destroy/Delete when 25 years old. Cut off at end of school year and retain in the CFA.
- Transcript Files. Maintain transcripts IAW School Student Record Files.
- Transcript Request Files. Destroy/Delete when 2 years old. Cut off at end of school year.
- Secondary Report Card Files. Transfer to student record file upon TWD of student.
- Attendance and Discipline Files. Destroy/Delete when one year old. Cut off at end of school year.
- System Wide Assessment Files. Destroy after 6 years. Individual reports maintained with the student records shall be retained in accordance with the disposition instructions in FN 1005-06 (School Student Record Files).

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- School Mediation Agreement and Hearing Results Files. Destroy/Delete when 20 years old. Cut off after final decision. Retire OSD-related records to the FRC when 5 years old.
- Panama Student Records File. Destroy when 50 years old. Records stored at the schools; DoDEA Records Center, 7441 Custer Road, Building 2670, Fort Benning, GA 31905; and Thompson Learning, Inc. (contractor) 2000 Lenox Drive, Lawrenceville, NJ 08648. Destroy when 50 years old.

System manager(s) and address:
Area school district system manager addresses may be obtained from the Office of the Director, DoDEA, 4040 North Fairfax Drive, Arlington, VA 22203-1634 or by visiting the web site http://www.dodea.edu.

Notification procedure:
Individuals seeking to determine whether this system contains information about themselves should address written inquiries to Area or District Systems Managers or the Privacy Act Officer, Department of Defense Education Activity, 4040 North Fairfax Drive, Arlington, VA 22203-1635.

Record access procedures:
Individuals seeking access to information about themselves contained in this system should address written inquiries to Area or District Systems Managers or the Privacy Act Officer, Department of Defense Education Activity, 4040 North Fairfax Drive, Arlington, VA 22203-1635.

Written requests for access should contain the full name, name used at time of school attendance, date of birth, identity and location of school attended, dates of attendance, and signature.

Parents or legal guardians of a student may be given access to the Children's School Program Files records without regard to who has custody of the child, unless the child is age 18 or over, or a court has directed otherwise.

Contesting records procedures:
The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are contained in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

Record source categories:
Individuals, school teachers, principals and administrators; counselors, medical personnel, parents/guardians, occupational and physical therapists, testing materials and activities, other educational facilities, medical facilities, (examinations and assessments), military commanders, and installation activities.

Exemptions claimed for the system:
None.

Footnotes

[1]The text herein is solely the commentary provided by Mr. Wadsworth and does not represent the views of the U.S. Army or the Department of Defense.
[2] Department of Defense Form 2870, "Authorization for Disclosure of Medical or Dental Information," is the most commonly used release authorization in military facilities. MTFs may still honor other formats.
[3] For an example of a way a patient can seek to restrict access to his or her health information, see Department of Defense Form 2871, "Request to Restrict Medical or Dental Information."
[4] Further information pertaining to data needed from the U.S. government is covered at Section 1.08 of Chapter 1.
[5]*See* United States *ex rel*. Touhy v. Ragen, 340 U.S. 462, 71 S. Ct. 416, 95 L. Ed. 417 (1951).
[6] 5 U.S.C. § 552a(b)(11).

Mr. Sullivan, a retired Army Reserve JAG colonel, practices family law in Raleigh, NC and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2nd Ed. 2011), from which portions of this article are adapted. He is a fellow of the American Academy of Matrimonial Lawyers and has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 or mark.sullivan@ncfamilylaw.com.

Fact Sheet – VA Payments and Family Support

by Mark E. Sullivan, Esq.

Q. Are VA benefits subject to levy, seizure or attachment?

A. In general, the answer is no. Under 38 USC §5301(a)(1), benefits paid by the Department of Veterans Affairs (VA) are not subject to levy, seizure or attachment. "However," adds Steve Shewmaker, a Georgia lawyer who is also an Army Reserve JAG lieutenant colonel, "...the general rule is that they are available for consideration by the court in deciding matters of family support. *Levy, seizure or attachment* refers to collection of debts; the courts interpreting this have consistently stated that this does not mean the duty of support for a family."

Q. Do the cases on "family support" include alimony as an exception to 38 USC §5301(a)(1)?

A. Yes – alimony (also known as spousal support or maintenance) is one of the exceptions. A useful example would be a 1994 Iowa case involving an appeal from an alimony decision. The husband's main source of income was a VA disability check of $1,548 per month. It was based on a disability rating of 100 percent. In that case, *In re Marriage of Anderson*, 522 N.W.2d 99, 101–102 (Iowa App. 1994), the state Court of Appeals recognized this "family support exception" to 38 USC. §5301(a)(1):

The issue raised by the appellant has been answered by the United States Supreme Court in the case of *Rose v. Rose,* 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987). The *Rose* case involved nonpayment of child support as opposed to nonpayment of alimony. However, both are viewed as familial support by the United States Supreme Court in *Rose.* 481 U.S. at 631–32, 107 S. Ct. at 2037, 95 L. Ed. 2d at 611. The *Rose* case involved a disabled veteran whose sole means of support was his VA checks. The state court held him in contempt for failure to pay child support. The U.S. Supreme Court held a state court has jurisdiction to hold a disabled veteran in contempt for failing to pay child support, even if the veteran's only means of satisfying his obligation is to use veteran's benefits received as compensation for a service connected disability. 481 U.S. at 619, 107 S. Ct. at 2030, 95 L. Ed. 2d at 604. The court held:

> Neither the Veteran's Benefits provisions of Title 38 nor the

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> garnishment provisions of the Child Support Enforcement Act of Title 42 indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support. We hold, therefore, that as enacted, these federal statues were not in conflict with and thus did not preempt § 36–820 (the Tennessee child support statute). Nor did the circuit court's efforts to enforce its order of child support by holding appellant in contempt transgress the congressional intent behind the federal statutes. 481 U.S. at 636, 107 S. Ct. at 2039, 95 L. Ed. 2d at 614.

Q. Are there cases in other states which also say this?

A. Yes. In a 1984 Louisiana Court of Appeals case, the trial court found that the husband, Mr. Collins, had virtually no source of income other than his VA benefits. The husband argued that VA benefits are exempt from awards of temporary alimony ("alimony pendente lite") under the anti-attachment wording in Title 38. The court of Appeals stated:

> Mr. Collins was obliged to, and did support Mrs. Collins out of his Veterans' benefits during the time they lived together. His obligation to support her out of whatever income and assets are available to him continues until their marriage is dissolved by divorce.
>
> An award of alimony pendente lite is not an "attachment, levy, or seizure" as contemplated in 38 USCA § 3101(a) [the previous number for this section of Title 38]...
>
> The provisions of 38 USCA § 3101(a) do not apply to awards of alimony pendente lite. The duty to pay alimony pendente lite does not arise as the result of the judicial process. An award of alimony pendente lite is the legal enforcement of a marital duty rather than a process for the collection of a debt. If no other income is available for the purpose, Mr. Collins must use his Veterans' benefits for the support of Mrs. Collins when she "has not a sufficient income for maintenance pending suit." La.C.C. Art. 148. The trial judge erred in discontinuing the previous award of alimony pendente lite.

Collins v. Collins, 458 So.2d 1008 (La. App. 1984)

In a 1990 Maryland case, the Court of Special Appeals said:

> Neither [the *McCarty* nor the *Mansell* case] purported even to suggest that... disability benefits actually received by a veteran cannot be counted as income to the veteran for purposes of determining his or her ability to pay alimony.
>
> The law generally is that such benefits *may* be considered as a resource for purposes of setting the amount of alimony and that doing so does not constitute an affront to the Federal anti-attachment and anti-alienation provisions, such as 38 USC § 3101 and 42 USC § 662(f)(2) protecting those benefits from the claims of creditors.... We find those cases persuasive and therefore hold that the VA disability benefits received by Dr. Riley may be considered as a resource for purposes of determining his ability to pay alimony. Accordingly, we reject his legal challenge to the order denying his motion to terminate or reduce alimony. *Riley v. Riley*, 82 Md. App. 400, 409-10, 571 A.2d 1261 (1990).

The Vermont Supreme Court stated in a 1987 case:

> 38 USC. § 3101(a) protects recipients of disability benefits from the claims of creditors and provides security to the recipient's family and dependents.... Section 3101(a) does not apply in the present case, however, since a wife seeking spousal maintenance is not a "creditor" under the statute. *Id.* Veterans' disability benefits may be considered for alimony or spousal maintenance payments.... Further, the instant proceeding is not litigation in which the wife seeks to attach, levy or seize plaintiff's veteran benefits.... While 38 USC § 3101(a) would preclude an assignment or apportionment of plaintiff's veteran disability benefits, it does not preclude consideration of disability benefits by a trial court as a source of income upon which an award of alimony may be based.

Repash v. Repash, 148 Vt. 70, 528 A.2d 744 (1987)

Q. Are there any other cases which support this?

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A. Yes. Many other cases confirm this rule of law in the context of spousal support. Some of these are:

- Alabama – *Mims v. Mims*, 442 So.2d 102 (Ala. Civ. App. 1983) Arkansas – *Womack v. Womack*, 307 Ark. 269, 818 S.W.2d 958 (1991); *Murphy v. Murphy*, 302 Ark. 157, 787 S.W.2d 684 (1990) Colorado – *In re Marriage of Nevil*, 809 P.2d 1122 (Colo. App. 1991) Mississippi – *Hollis v. Bryan*, 166 Miss. 874, 143 So. 687 (1932) Montana – *In re Marriage of Strong*, 300 Mont. 331, 8 P.3d 763 (Mont. 2000)

- Nebraska – *Ray v. Ray*, 222 Neb. 324, 383 N.W.2d 752 (1986); *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982)
- Oregon – *Matter of Marriage of Tribbles*, 63 Or. App. 774, 665 P.2d 1267 (1983); *Gerold v. Gerold*, 6 Or. App. 353, 488 P.2d 294 (1971) Pennsylvania – *Parker v. Parker*, 335 Pa. Super 348, 484 A.2d 168 Virginia – *Lambert v. Lambert*, 10 Va. App. 623, 627, 395 S.E.2d 207 (1990)

- Wisconsin; *In re Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992) *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Wis. App. 1990); *In re Gardner*, 220 Wis. 493, 264 N.W. 643 (1936)

Q. Does that mean that veterans' benefits can also be divided at divorce in "property division"?

A. No. The law is clear on that, and congress has spoken. The Uniformed Services Former Spouses' Protection Act clearly says that VA disability compensation payments under Title 38 of the U.S. Code are not subject to property division upon divorce. The same is true to a large extent with military disability retirement payments under Title 10, Chapter 61 of the U.S. Code.

Q. Has the U.S. Supreme Court also spoken?

A. Yes. The case is *Mansell v. Mansell*, 490 U.S. 581 (1989). The *Mansell* case involved a California court decree which divided a military retiree's disability benefits as part of the property settlement, not as alimony or spousal support. In the *Mansell* decision, the court held that federal law does not permit state courts to divide or partition disability benefits as community or marital property upon divorce. It also prohibits the treatment of a waiver of military retired pay (to obtain VA payments) as marital or community property.

Q. How are the courts handling support cases with VA disability elections before and after the divorce?

A. Alexander R. Rhoads, an Iowa family law practitioner, states the rules this way:

> Congress has never passed a law stating that veterans' benefits may not be considered with respect to spousal support. Nor has the U.S. Supreme Court ever held that VA benefits cannot be considered in this manner.

Where the disability benefits are elected before the divorce, disability benefits are income for purposes of support. See *Womack v. Womack*, 307 Ark. 269, 818

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S.W.2d 958 (1991); In re Marriage of Bahr, 29 Kan. App. 2d 846, 32 P.3d 1212 (2001); Riley v. Riley, 82 Md. App. 400, 571 A.2d 1261 (1990); *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990).

Where disability has not been elected at divorce, but an election is pending or otherwise seems likely, the court may make a nominal award or otherwise reserve jurisdiction to make an award of support after the election is final. See *Collins v. Collins*, 144 Md. App. 395, 798 A.2d 1155 (2002) and *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003) ($1 per year permanent alimony award).

Where disability is elected after the divorce, the election of disability is a sufficient change of circumstance to permit an increase in alimony. See *Ashley v. Ashley*, 337 Ark. 362, 990 S.W.2d 507 (1999); *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *In re Marriage of Murphy*, 151 Or. App. 649,950 P.2d 377 (1997); *In re Marriage of Jennings*, 138 Wash. 2d 612, 980 P.2d 1248 (1999).

Where the trial court originally awarded non-modifiable alimony, and the husband thereafter elected disability benefits, an Ohio court held that it was error not to reopen the judgment to make the alimony modifiable on the ground that the original judgment was no longer equitable. *Schaefferkoetter v. Schaefferkoetter*, 2003 WL 22359725 (Ohio Ct. App. 2003).

Q. So far the cases have only dealt with alimony. What about child support?

A. Child support may also be awarded based on disability payments to either parent being considered as income. Laura Wish Morgan notes the following cases to support this rule in her treatise, Child Support Guidelines:

Interpretation and Application –

Loving v. Sterling, 680 A.2d 1030 (D.C. 1996) (federal law does not prohibit treating child support obligor's veterans administration disability benefits as income under support guidelines); *In re Paternity of C.L.H.*, 689 N.E.2d 456 (Ind. Ct. App. 1997) (full amount of veteran's disability benefit was income under guidelines); *In re Marriage of Lee*, 486 N.W.2d 302 (Iowa 1991) (veterans' disability benefits, Social Security benefits, retirement benefits, and workers' compensation benefits are includable in income); *In re Marriage of Benson*, 495 N.W.2d 777 (Iowa Ct. App. 1992) (veterans' disability, Social Security disability, workers' compensation, retirement income, are all to be considered income for support); *Riley v. Riley*, 82 Md. App. 400, 571 A.2d 1261 (1990) (military disability is income); *In re Marriage of Strong*, 8 P.3d 763 (Mont. 2000); Fox v. Fox, 592 N.W.2d 541 (N.D. 1999); Dye v. White, 976 P.2d 1086 (Okla. Ct. App. 1999); *Wingard v. Wingard*, 11 D. & C. 4th 343 (Pa. Ct. Com. Pl.), aff'd, (1987); *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990) (military disability pension is income).

Laura Wish Morgan, Child Support Guidelines: Interpretation and Application (1996, Supp. 2009)

Q. How do the courts explain the rule which allows VA benefits to be used in setting family support?

A.The Montana Supreme Court explained the law as follows in *In re Marriage of Strong*, 300 Mont. 33, 342, 8 P.3d 763, 769-770 (Mont. 2000):

> Should the court's new property distribution appear inadequate to provide for Brandy's "reasonable needs" post-dissolution, then the District Court may consider awarding Brandy spousal maintenance under § 40-4-203, MCA, in lieu of or in addition to what marital property the court may legally apportion to her. Even though Justin's VA disability benefits are his sole current source of income and, thus, would necessarily be used to satisfy his maintenance obligations, such action is permitted under the logic of the U.S. Supreme Court's decision in *Rose v. Rose* (1987), 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599.

In *Rose*, the Tennessee trial court held the veteran spouse in contempt for failing to pay ordered child support. The veteran challenged that action on appeal, arguing that it was impermissible since his income was composed almost entirely of disability benefits received from the VA. *See Rose*, 481 U.S. at 622, 107 S.Ct. at 2032, 95 L.Ed.2d at 605 (noting that the veteran also received nominal monthly

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disability income from the Social Security Administration). After reviewing the legislative history applicable to what is now 38 USC § 5301(a) (formerly 38 USC § 3101(a)), the court held that VA disability benefits were never intended to be exclusively for the subsistence of the beneficiary. Rather, congress intended such benefits to support not only the veteran, but the veteran's family as well. Recognizing an exception to the application of [§ 5301(a)'s] prohibition against attachment, levy, or seizure in this context would further, not undermine, the federal purpose in providing these benefits.

Rose, 481 U.S. at 634, 107 S.Ct. at 2038, 95 L.Ed.2d at 613. The court thus held that the "[n]either the Veterans' Benefits provisions of Title 38 nor the garnishment provisions of the Child Enforcement Act of Title 42" preempt the authority of state courts to enforce a child support order against a veteran, even where the veteran's income is composed of VA disability benefits that would necessarily be used to pay child support. See *Rose*, 481 U.S. at 636, 107 S.Ct. at 2039, 95 L.Ed.2d at 614.

Under the logic of *Rose*, since "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents," *Rose*, 481 U.S. at 631, 107 S.Ct. at 2036, 95 L.Ed.2d at 610-11, "a state court is clearly free to consider post-[dissolution] disability income and order a disabled veteran to pay spousal support even where disability benefits will be used to make such payments." *Clauson*, 831 P.2d at 1263 n.9. In addition to Alaska, several other jurisdictions have concluded that federal law does not prohibit considering veterans' disability pay as a source of income in awarding spousal maintenance. See *In re Marriage of Kraft* (Wash. 1992), 832 P.2d 871; *Womack v. Womack* (Ark. 1991), 818 S.W.2d 958; *In re Marriage of Nevil* (Colo. Ct. App. 1991), 809 P.2d 1122; *Riley v. Riley* (Md. Ct. Spec. App. 1990), 571 A.2d 1261; *Lambert v. Lambert* (Va. Ct. App. 1990), 395 S.E.2d 207; *Weberg v. Weberg* (Wis. Ct. App. 1990), 463 N.W.2d 382.

Q. What about apportionment?

In addition to Alaska, several other jurisdictions have concluded that federal law does not prohibit considering veterans' disability pay as a source of income in awarding spousal maintenance.

Isn't that the method that must be used to decide the amount of family support which a veteran must pay and the means to transfer that to the child or children?

A. No. This issue was covered in the *Rose* decision. The Supreme Court found no evidence that congress intended this to be the exclusive means of setting family support or enforcing it, and stated that the VA regulations bear this out:

> Nowhere do the regulations specify that only the Administrator may define the child support obligation of a disabled veteran in the first instance. To the contrary, appellant, joined by the United States as *amicus curiae,* concedes that a state court may *consider* disability benefits as part of the veteran's income in setting the amount of child support to be paid.

The court stated that:

The statute simply provides that disability benefits "may . . . be apportioned as may be prescribed by the Administrator." 38 USC § 3107(a)(2). The regulations broadly authorize apportionment if "the veteran is not reasonably discharging his or her responsibility for the . . . children's support." 38 CFR § 3.450 (a)(1)(ii) (1986).

The Supreme Court went on to say:

> In none of these provisions is there an express indication that the Administrator possesses exclusive authority to order payment of disability benefits as child support. Nor is it clear that Congress envisioned the Administrator making independent child support determinations in conflict with existing state-court orders. The statute gives no hint that exercise of the Administrator's discretion may have this effect.

Q. Can a court garnish the benefits of a veteran for child support or alimony?

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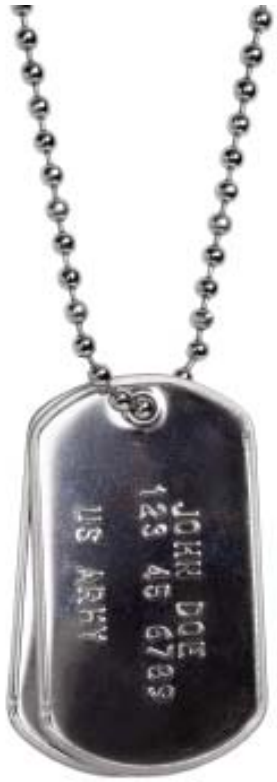
A. Generally speaking, the answer is no. However, Congress enacted an exception in the case of a military retiree who has waived pension payments (in whole or part) to receive VA benefits. It is found at 42 USC § 662(f)(2). In *U.S. v. Murray*, the Georgia Court of Appeals reviewed a case brought by the ex-wife of a veteran who sought to garnish the veteran's VA disability compensation for alimony. The court held that VA disability payments are subject to garnishment for alimony to the extent that they replace "waived retired pay." *U.S. v. Murray*, 158 Ga. App. 781, 282 S.E.2d 372 (1981).



Q. Does the tax-free status of VA disability compensation mean that it cannot be considered in determining support?

A. "No," says Jim Higdon, a retired Navy Reserve captain who practices in Texas. "There is no exemption for payments which are tax-free. They are counted as all other sources of money (except for means-tested benefits) in computing the income of the individual who is to pay support, even though they are not subject to income tax. Other military payments which are tax–free but are generally counted in determining support are the basic allowance for housing (BAH) and the basic allowance for subsistence (BAS). Pay and allowances in general are exempt from taxation when the service member is in a combat zone, yet they are also subject to consideration in calculating alimony and child support. Since such payments are tax-free, the entire amount should be considered."

Q. Are VA benefits exempted from consideration as "income" in setting child support because they are "means-tested payments"?

A. "Since they are not *means-tested payments* in the first place," responds John Camp of Warner Robins, Georgia, a family lawyer and a retired Air Force Staff Judge Advocate, "the answer is no." Camp continues, "*Means-tested* refers to payments which depend on a person's having little or no money. The individual is "tested" as to his means of support; if it falls below a certain level, then benefits are paid. While that is true for VA pensions, it does not apply to VA disability compensation. For the latter, the wealth or poverty of the recipient doesn't matter, nor does one's previous rank. If John Smith has a service-connected disability and applies for VA disability compensation, the payments will be made by the Department of Veterans Affairs without regard to whether he is rich and was formerly an admiral, or whether he is poor and used to be a corporal. The monthly amount doesn't vary due to these factors."

* * *

* Note: Portions of this Fact Sheet are adapted from Mark E. Sullivan, *The Military Divorce Handbook* (Am. Bar Assn., 2nd Ed. 2011).

Mr. Sullivan, a retired Army Reserve JAG colonel, practices family law in Raleigh, NC and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2nd Ed. 2011), from which portions of this article are adapted. He is a fellow of the American Academy of Matrimonial Lawyers and has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 or mark.sullivan@ncfamilylaw.com.

Nevada Strikes Out on Alimony

By Bruce I. Shapiro, Esq

1. INTRODUCTION

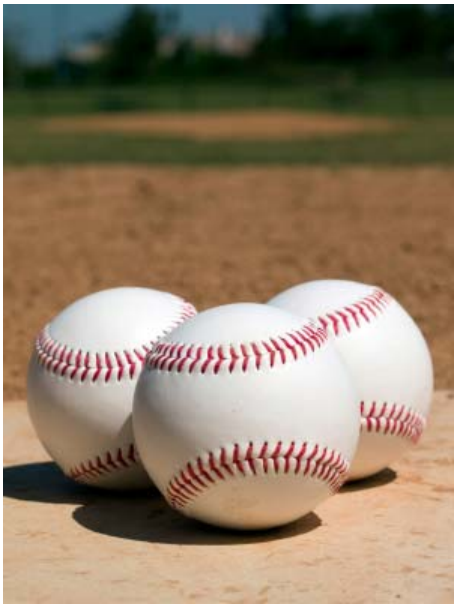
What does the determination of alimony have to do with salaries in Major League Baseball? Nothing, but perhaps it should. The determination of alimony in divorces is arbitrary, inconsistent and fails most litigants. Other than child custody, the award of alimony in many cases has the most dramatic consequences to people's lives.

Child support involves minimal conflict because of NRS 125B that imposes a presumptive amount of child support based on the gross income of the payor parent. Under NRS 125.150, community property must be divided equally absent a compelling reason. Then, there is alimony. There is no generally accepted formula for an alimony award. The Nevada Supreme Court has implicitly discouraged the use of formula for alimony through child support cases.[1] Every judge views alimony differently and each judge's award can be drastically different. The same judge, with similar facts, on a different day, could award a different alimony award. How does this serve anyone's best interests? With 20 different family court judges, it is difficult for even the seasoned divorce lawyer to advise his or her client as to what alimony will be. When negotiating alimony, counsel have no clear guidelines. When you take an alimony issue to trial, you are playing Russian roulette.

2. WHAT IS ALIMONY?

Although there is no specific legal standard for temporary support, it is sometimes more predictable and consistent than post-divorce orders because the standard is different. In Nevada, all income acquired during marriage is community. "The wages of either spouse during marriage are considered to be community funds regardless of which spouse earns the greater income or which spouse supports the community." *Norwest Financial v. Lawver*, 109 Nev. 242, 246, 849 P.2d 324 (1993). NRS 125.150(1)(b) mandates that the court "[s]hall, to the extent practicable, make an equal disposition of the property of the parties . .. ." In other words, earnings during marriage are community. The court should therefore have some obligation to equally divide the community income pending a divorce.

The Nevada Supreme Court has recognized two general forms of alimony. The first "...is a form of alimony a court may award in order to satisfy the demands of justice and equity. A second type of alimony (rehabilitative alimony) is that provided by the legislature under NRS 125.150(8) which is designed to provide necessary training or education 'relating to a job, career or profession.'" *Gardner v. Gardner*, 110 Nev. 1053, 1057, 881 P.2d 645 (1994). A case by case analysis will determine the appropriate amount and length of any alimony award. *Gardner*, 100 Nev. at 1056-58, 881 P.2d 647-48; *Rutar v. Rutar*, 108 Nev. 203, 206-08, 827 P.2d 829, 831-33 (1992). Alimony is an equitable award serving to meet the post-divorce needs and rights of the former spouse. *Cf. Gardner v. Gardner*, 100 Nev. 1053, 881 P.2d 645, 647 (1994). It follows from the Nevada Supreme Court decisions in this area that two of the primary pur-



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poses of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties, and to allow the recipient spouse to live "as nearly as fairly possible to the station in life they enjoyed before the divorce." *Sprenger* at 860.

The court must award alimony as appears "'just and equitable,' having regard to the conditions in which the parties will be left in by the divorce." *Sprenger v. Sprenger*, 110 Nev. 855, 859, 878 P.2d 284 (1994), *citing* NRS 125.150(1)(a). In *Sprenger*, the court cited seven factors that should be used in determining an alimony award in a divorce case:

> (1) the wife's career prior to marriage;
> (2) the length of the marriage;
> (3) the husband's education during the marriage;
> (4) the wife's marketability;
> (5) the wife's ability to support herself;
> (6) whether the wife stayed home with the children; and
> (7) the wife's award, besides child support and alimony.[3]

So what does this laundry list of factors actually mean? In *Sprenger*, the district court awarded the wife $1,500 per month alimony for two years. *Sprenger* at 858. The Supreme Court reversed the lower court's award, finding that based on the relevant factors, the district court's alimony award was an abuse of discretion. The Supreme Court then remanded the case to the district court to "both increase and extend [the] alimony award such that [wife] is able to live 'as nearly as fairly possible to the station in life she enjoyed before the divorce,' for the rest of her life or her financial circumstances substantially improve." *Sprenger* at 860, *citing Heim v. Heim*, 104 Nev. 605, 612-13, 763 P.2d 678, 683 (1988).

In *Gardner*, the parties had been married for 27 years and had no children. The husband earned $75,000 per year and the wife earned $43,000 per year. *Gardner* at 1055. The district court awarded the wife $1,300 per month alimony for the first year and $1,000 per month for the second year. *Gardner* at 1055. Considering all of the relevant factors, the Supreme Court attempted to achieve "income parity" between the parties by increasing "the length of [the] alimony award by an additional 10 years, at the rate of $1,000 per month." *Gardner* at 1058-1059.

As it did in the above cases, the Nevada Supreme Court, in *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995), equalized the parties' income for a reasonable period. *Alba* involved a marriage of only seven years. *Alba* at 426. Husband earned $35,000 per year, less $6,000 paid in child support, and wife earned $20,400 per year, and $6,000 per year received in child support. Therefore, husband had an adjusted income of approximately $29,000 per year and wife had an adjusted income of $26,400 per year. The Nevada Supreme Court affirmed the lower court's award of $1,000 per month alimony to the wife for three years. *Alba* at 428. The alimony was affirmed because the earning potential of the husband was "higher" than that of the wife. *Alba* at 428.

In *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998), the husband's income was $62,124 per year, and the wife's income was $19,200 per year. The Nevada Supreme Court reversed the lower court's award of $500 per month for five years and remanded the case for an award that was "fair and equitable," having regard to the conditions in which the parties will be left by the divorce, noting that "it appears very unlikely that in five years, [the wife] will be able to earn an income that will enable her to either maintain the lifestyle she enjoyed during the marriage or a lifestyle commensurate with, although not necessarily equal to, that of [the husband]." The amount and length of alimony are to be determined by "the individual circumstances of each case," although the district court was not ***required*** to award alimony "so as to effectively equalize salaries." *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998). It is apparent from *Wright* and *Shydler* that that while "equalization of incomes" is not the goal of an alimony award, the district court should make an attempt to "close the gap" of the parties' standard of living for some period after the divorce.

3. DO WE NEED GUIDELINES?

The simple answer is yes, we need something. The district court awards of alimony are often inadequate. It should be noted that there has never been a published Nevada Supreme Court decision that re-

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Alimony Strike Out

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versed a trial court for awarding too much alimony. All reversals have been due to the district court failing to award sufficient alimony.

It is not being argued that the court should necessarily equalize incomes. The superior earning capacity of one spouse may have nothing to do with the community contributions of the other spouse. In most cases there is a need for alimony, but the ability to pay is limited. The standard of living usually cannot be maintained after divorce because the same income will be supporting two homes instead of one. Further, it is not argued that marriage itself, without any other factors, entitles a spouse to any post-divorce alimony. There must, however, be more guidance.

The child support enforcement amendments of 1984 required all states to develop advisory mathematical guidelines to calculate child support awards.[4] As a result, in 1987 the Nevada legislature enacted NRS 125B.070 and NRS 125B.080, which created a rebuttable presumption that the guidelines represent the proper child support award and that a deviation from the guidelines will be allowed only upon a written finding that the application of the guidelines would result in an unjust or inappropriate mathematical award. These child support guidelines were developed because the child support awards being made prior to enactment of the formulas were found to be
severely deficient when compared to the actual economic costs of rearing children. Orders resulted in inconsistent awards and caused inequitable treatment of parties in similarly situated cases and inefficient adjudication of child support awards in the absence of uniform standards.[5] Judicial discretion, unassisted by the presumptive guidelines, often resulted in severely deficient child support awards.[6] The same is true of alimony and has been acknowledged by the Nevada Supreme Court when it stated that "the legislature has failed to set forth an objective standard for determining the appropriate amount. Absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support." [7]

The child support formula scheme enacted by the Nevada legislature in 1987, and the case law that has followed, has alleviated many of the problems in inconsistent and inadequate child support awards. The same is needed for alimony. There does not seem to be much support for specific guidelines similar to the child support guidelines. Perhaps this is because some lawyers believe they benefit from the chaos and lack of predictability. Some type of general guidelines, however, are needed to alleviate some of the vast inconsistencies amongst judicial departments.

4. NO INCENTIVE TO BE REASONABLE

In many cases, the financially disadvantaged spouse does not have any incentive to negotiate a reasonable alimony award early in the case. Since temporary support cannot be credited toward post-divorce alimony, the financially disadvantaged spouse has an incentive to receive this "free," temporary support for as long as possible before negotiating a resolution. Conversely, once the matter nears trial, the financially advantaged spouse is ready to take his or her chances at trial. Even when nearing trial, the uncertainly of "Russian Roulette" often does not provide adequate incentive for either party to negotiate a reasonable alimony award.

NRS 125.141 offer of judgment statute for family court specifically excludes alimony. This is one of the problems. Why is there a reluctance to punish a spouse who is either being unreasonable in asking for too much or offering too little in alimony? If one party is clearly being unreasonable with respect to alimony and causes the matter to go to trial, there should be a consequence. Now, alimony is negotiated like the sale of a used car. The "buyer" asks for an unreasonable amount of alimony so he or she has "room" to negotiate. Same with the "seller," or payor. Neither party wants to give up too much in their negotiating power so the negotiations often have no relation to the facts of the case. These unreasonable positions carry over to trial and the court often finds both parties' positions to be unreasonable and orders alimony somewhere in the middle. "Splitting the baby" in turn encourages both parties to be unreasonable so that the "middle" is closer to their request.

This brings us to salary arbitration in Major League Baseball. In the Major League Baseball salary arbitration process, each party sub-

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mits a salary request to the arbitrator, along with their position as to why their request is appropriate. Rather than "splitting the baby" by finding a salary in the middle, which again provides incentive for both parties to exaggerate their requests, the arbitrator *must* pick one or the other. The arbitrator is forced to pick the most reasonable of the two submissions, thereby forcing both parties to be more reasonable. Instead of going for the "home run," there is incentive to simply get a base hit, rather than risk striking out.

A similar concept could work with alimony. By requiring the court to choose one proposal or the other, it forces both parties to be more reasonable in their requests. There could be an "out" for the judge if both proposals are so unreasonable that in good conscience the court could pick neither, but in that case, I would propose that there is a requirement that the "more" reasonable party must be awarded his or her attorney's fees. Unless it is mandatory, the family court judges in Clark County simply will not award attorney's fees for alimony claims.

5. CONCLUSION

Absent guidelines or the ability of the judges to be more consistent in their alimony awards, alternatives must be explored. Absent a formula or guidelines, using baseball style arbitration is certainly a possibility. Too many litigants are striking out when it comes to alimony and too many judges simply miss the call. It's time to "Play ball" with alimony.

Footnotes

[1] *See Hoover v. Hoover*, 106 Nev. 388, 793 P.2d 1329 (1990); *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992).

[2] NRS 123.220.

[3] *Sprenger* at 859, *citing Fondi v. Fondi*, 106 Nev. 856, 862-64, 802 P.2d 1264, 1267-69 (1990).

[4] Pub. L. No. 98-38, §18, 98 Stat. 1305.

[5] See Williams, *Guidelines For Setting Levels Of Child Support Orders*, 21 FAM. LAW QUART. 281, 282, 326 (1987). *See also* Advisory Panel On Child Support Guidelines, Development Of Guidelines For Child Support Enforcement, National Center For State Courts I-3, 4 (1987) Advisory Panel On Child Support Guidelines, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ENFORCEMENT, National Center For State Courts I-3, 4 (1987) (hereinafter "ADVISORY PANEL").

[6] *See* Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 FAM. LAW QUART. 281, 283 (1987); *Child Support Guidelines: Formula To Protect Our Children From Poverty and the Economic Hardships of Divorce*, 23 CREIGHTON LAW REVIEW 835 (1990); Goldfarb, *Child Support Guidelines: A Model For Fair Allocation of Child Care, Medical, And Educational Expenses*, 21 Fam. Law Quart. 335 (1987); U.S. Department Of Health And Human Services, Administration For Children and Families, Office Of Child Support Enforcement, THE TREATMENT OF MULTIPLE FAMILY CASES UNDER STATE CHILD SUPPORT GUIDELINES, July, 1991 pages 1-4 (hereinafter "TREATMENT") citing U.S. Bureau of the Census, U.S. Dept. of Commerce, DIVORCE, CUSTODY AND CHILD SUPPORT, CURRENT POPULATION REPORTS, Series P -23, No. 84 (1979), Bureau of the Census, U.S. Dept. of Commerce, CHILD SUPPORT AND ALIMONY - 1983, CURRENT POPULATION REPORTS, Series P-23 No. 141 (1985); Bureau of the Census, U.S. Dept. of Commerce, CHILD SUPPORT AND ALIMONY: 1985 (SUPPLEMENTAL REPORT), CURRENT POPULATION REPORT, Series P-23, No. 154 (1989).

[7] *Wright v. Osburn*, 114 Nev. 1367, 1369; 970 P.2d 1071, 1072 (1998).

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