

January 1981

## A Case of Forced Equity: Obtaining Spousal and Child Support From a Member of the Armed Forces

Georgetta Beck

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Family Law Commons](#)

---

### Recommended Citation

Georgetta Beck, *A Case of Forced Equity: Obtaining Spousal and Child Support From a Member of the Armed Forces*, 11 Golden Gate U. L. Rev. (1981).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol11/iss3/5>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# A CASE OF FORCED EQUITY: OBTAINING SPOUSAL AND CHILD SUPPORT FROM A MEMBER OF THE ARMED FORCES

---

Georgetta Beck\*

When called upon to represent dependents in a spousal or child support proceeding, the practitioner is confronted with a vast array of legal and emotional issues. When the obligor<sup>1</sup> is a member of the Armed Forces,<sup>2</sup> additional elements are added to the picture: Federal statutes exist to protect his<sup>3</sup> rights,<sup>4</sup> military regulations govern his accessibility,<sup>5</sup> and the court, at times, displays a protective attitude toward him.<sup>6</sup>

---

\* Third year student, Golden Gate University School of Law.

1. The term "obligor" is used throughout this Comment to refer to a service member who is legally obligated to support his or her dependents, regardless of whether pursuant to judicial decree.

2. For purposes of this Comment, the terms "Armed Forces" and "military" refer to the Army, Navy, and Air Force.

3. Masculine pronouns shall be used when referring to a member of the Armed Forces where gender-neutral terms are unduly cumbersome. This is done for both simplicity and general accuracy because in most cases dependents seek support from a male member of the military. The masculine pronoun is not used to perpetuate cultural stereotypes, but merely in recognition of statistical reality. Women constitute only about 8% of the Army, Navy, Air Force, and Marine Corps. *NEWSWEEK*, Feb. 18, 1980, at 35.

4. See The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-591 (1976) [hereinafter cited as SSCRA].

5. See, e.g., Army Regs. No. 27-40 (15 June 1973), which sets forth Army policy on personally serving a service member with process on base; see also Army Regs. No. 630-5 (18 March 1977), concerning Army policy on granting leavetime to a service member—a regulation which may circumscribe the ability to make court appearances. These regulations are discussed at notes 58-73 and 151-154 *infra* and accompanying text.

Army regulations are not readily available to the general public. The only library in San Francisco with a complete set of regulations was located at the Presidio Army Base. Furthermore, the author was initially advised by a Presidio Staff Sergeant that civilian access to the library would be permitted only if the stated purpose was not adverse to the interests of the Army. Contact the Legal Assistance Office of the appropriate base for more information on access to Army regulations.

6. See, e.g., *Kerrin v. Kerrin*, 97 Cal. App. 2d 913, 218 P.2d 1004 (1950) (trial court found defendant service member forever relieved of child and spousal support liability to the extent it is greater than his military allotment, even though the property settlement

Practitioners generally experience little difference between the common action for support and one against a service member stationed in the United States. In one respect, obtaining support from military personnel may be facilitated by military channels which can be used as an alternative to court proceedings.<sup>7</sup> Nevertheless, the recalcitrant military obligor may present particular problems to the practitioner seeking to obtain support through the courts.<sup>8</sup>

This Comment presents an overview of procedures which the practitioner may employ to obtain spousal and child support from a service member stationed in the United States, identifies problems which may arise in these efforts, and discusses strategies to overcome those obstacles. The first section explains the military procedure for obtaining support and discusses the advantages and disadvantages of that approach.<sup>9</sup> This Comment will focus on Army procedure and regulations; other branches of the Armed Forces have a similar, but not identical, approach to the pervasive problem of nonsupport.<sup>10</sup>

---

agreement required a larger amount); *Semler v. Oertwig*, 234 Iowa 233, 238, 12 N.W.2d 265, 270 (1943) (in reversing the trial court's denial of a stay under the SSCRA, the appellate court stated, "[D]oubtful cases should be resolved in favor of the service man."); *McGlynn v. McGlynn*, 178 Misc. 530, 531, 35 N.Y.S.2d 6, 7 (1942) (upon staying an order that a man pay alimony to his former wife so long as he remained in the military, the court stated, "At all hazards every inhibition must be deferred so that he is physically, mentally and spiritually free to devote himself to the greatest task ever to confront him and his country.").

7. See Army Regs. No. 608-99 (15 Nov. 1978) for Army procedures regarding complaints of nonsupport by dependents of Army personnel; for Navy procedures, see 32 C.F.R. § 715 (1980); for Air Force procedures, see 32 C.F.R. § 846 (1980).

8. For example, the service member may fail to respond to the support action, forcing the practitioner to comply with cumbersome protective statutory provisions before a default judgment may be obtained. Further, military orders may make court appearances an impracticality. See, e.g., *Bond v. Bond*, 547 S.W.2d 43 (Tex. Civ. App. 1977). These problems, and others, shall be addressed throughout this Comment.

9. See notes 23-53 *infra* and accompanying text.

10. For example, the Army designates a minimum dollar amount to be used for support of the member's dependents. The amount varies with the service member's rank, not with the number of dependents. Army Regs. No. 608-99, ¶ 2-2(c) (15 Nov. 1978), and 37 U.S.C. § 1009 (Supp. III 1979). The Navy, on the other hand, designates a percentage of the member's gross pay to be used for support where there is no court order fixing the amount and the parties are unable to otherwise agree. The percentage is based upon the relationship and number of dependents. 32 C.F.R. § 715.16 (1980). The Air Force merely requires its members to provide support "bearing a reasonable relation to the needs of the spouse and children." 32 C.F.R. § 846.4(a) (1980).

Women's Law Forum

The second section discusses problems peculiar to obtaining a support order against the service member through state court. This includes perfecting personal service on Army personnel stationed on federal territory,<sup>11</sup> and the applicability of the Soldiers' and Sailors' Civil Relief Act (SSCRA).<sup>12</sup> The SSCRA was enacted to protect service members who, because of military service, are unable to protect their rights.<sup>13</sup> Its stay and default judgment provisions can create complications for the practitioner.<sup>14</sup> The requirements of those provisions<sup>15</sup> and the factors which the courts consider relevant in denying or granting relief thereunder are discussed.<sup>16</sup>

The last section of this Comment focuses upon enforcement of the state court order<sup>17</sup>—whether by obtaining the service member's voluntary compliance, possibly with the aid of military channels,<sup>18</sup> or by garnishment.<sup>19</sup> SSCRA problems in the area of support enforcement will also be addressed.<sup>20</sup> In contrast to the difficulties which can arise in obtaining a support judgment, enforcement can usually be accomplished with relative ease.

## I. THE MILITARY PROCEDURE TO OBTAIN SUPPORT

Concerned that their members may discredit the service by

11. See notes 58-73 *infra* and accompanying text.

12. 50 U.S.C. app. §§ 501-591 (1976). See notes 74-167 *infra* and accompanying text.

13. For example, a service member engaged in combat is clearly incapable of participating in a lawsuit. See generally Skilton, *The Soldiers' and Sailors' Civil Relief Act of 1940 and the Amendments of 1942*, 91 U. PA. L. REV. 177 (1942).

14. For example, the SSCRA permits a service member to stay a court proceeding when the ability to defend is materially affected because of military service. 50 U.S.C. app. § 521 (1976). Under the SSCRA, a default judgment cannot be entered against a service member unless an attorney is appointed to represent his interests. *Id.* § 520 (1976).

15. For the discussion of the stay provision, see notes 86-97 *infra* and accompanying text. For the default provision discussion, see notes 98-123 *infra* and accompanying text.

16. See notes 124-167 *infra* and accompanying text.

17. See notes 168-186 *infra* and accompanying text.

18. See, e.g., Army Regs. No. 608-99, ¶ 2-4(c) (15 Nov. 1978), requiring service member compliance with court orders. See notes 171-175 *infra* and accompanying text.

19. The federal garnishment statute is found at 42 U.S.C. § 659 (Supp. III 1979). See notes 176-181 *infra* and accompanying text.

20. The SSCRA permits the service member to stay the enforcement of a judgment under certain circumstances. 50 U.S.C. app. § 523 (1976). See notes 182-186 *infra* and accompanying text.

neglecting family obligations,<sup>21</sup> the Armed Forces expressly require members to support their dependents.<sup>22</sup> To further this policy, each branch has established internal procedures with which to handle nonsupport problems.<sup>23</sup> Army regulations provide that the service member's superiors can attempt to persuade the member to pay support and impose certain sanctions.<sup>24</sup> Absent a court order of garnishment, however, his superiors cannot compel the service member to pay support.<sup>25</sup>

The practitioner should consider military channels before attempting to obtain a court order of support. If successful, a lengthy and expensive court process is avoided altogether and the animosity of an adversary proceeding minimized. In addition, internal procedures may be an adequate temporary measure until a support judgment can be obtained. Use of the military approach, however, with the possible imposition of sanctions, may not be appropriate in every situation.<sup>26</sup> The practitioner needs to weigh the likelihood of success as well as the cooperativeness and financial circumstances of the parties before pursuing this procedure.

The service member's commanding officer is authorized by the Army to use influence over the member to see that he abides by the Army policy on support of dependents.<sup>27</sup> The practitioner

---

21. "The Naval Service will not be a haven or refuge for personnel who disregard or evade their obligations to their families. All members of the Naval Service are expected to conduct their personal affairs satisfactorily." 32 C.F.R. § 715.11(c) (1980); "Army members must conduct their personal affairs satisfactorily." Army Regs. No. 608-99, ¶ 1-3(a) (15 Nov. 1978).

22. The Army requires its members to provide "adequate and continuous support for all primary legal dependents (spouse and children—to include stepchildren, adopted children or illegitimate children dependent on the member . . .)" as well as to comply with all separation agreements and court orders. *Id.* ¶¶ (1), (2).

23. *See* note 7 *supra*. The Army's goal in support matters is to find a solution acceptable both to the dependents and the particular service member involved. Army Regs. No. 608-99, ¶ 2-2b (15 Nov. 1978).

24. *See* notes 38-45 *infra* and accompanying text.

25. "The Army has no legal authority to deduct money from a military member's pay without his consent for the benefit of dependents unless garnishment has been ordered. . . ." Army Regs. No. 608-99, ¶ 1-3(d) (15 Nov. 1978). *See also id.* ¶ 2-2(b).

26. *See* notes 49-53 *infra* and accompanying text, for a discussion of the advantages and disadvantages of the military approach.

27. "Each claim of nonsupport will be considered individually by the member's immediate commander." Army Regs. No. 608-99, ¶ 2-1(e) (15 Nov. 1978). Absent a court order, "[c]ommanders must strive to have the individuals arrive at a solution acceptable

pursuing support through military channels initiates the internal process by writing a letter to the service member's commanding officer requesting help in obtaining support.<sup>28</sup> Regulations require the commanding officer to advise the service member of Army policy on the fulfillment of support obligations.<sup>29</sup> Regulations not only require the member to provide "adequate and continuous support" for his dependents,<sup>30</sup> but also set forth a minimum amount to be used for that purpose.<sup>31</sup> He is expected to provide support "in an amount not less than the Basic Allotment for Quarters" (BAQ) at the prescribed rate for members of his rank with dependents.<sup>32</sup> If the BAQ allotment appears inadequate to meet the dependents' needs,<sup>33</sup> the practitioner should

to all concerned." Army Regs. No. 608-99, ¶ 2-2(b) (15 Nov. 1978).

28. If the practitioner does not know where the service member is located, the letter should be addressed to the unit commander of the service member's last known address. The commander is required to "[f]orward complaints received after a service member has been reassigned [and to] [r]eply to all complainants, advising of the service member's due date and the address to which correspondence should be sent. . . ." Army Regs. No. 608-99, ¶ 2-6(j) (15 Nov. 1978). Familiarity with the applicable Army regulations should be reflected in the letter. The commanding officer may be unaware of the regulation requirements in support matters.

29. Army Regs. No. 608-99, ¶ 1-4 (15 Nov. 1978).

30. *Id.* ¶ 1-3(a)(1).

31. *Id.* ¶ 2-2(c).

32. *Id.* The Basic Allotment for Quarters [BAQ] is a sum of money the Armed Forces allots the service member when rent-free government quarters are not furnished for his dependents. 37 U.S.C. § 403 (1976). See Dep't of Defense, Military Pay and Allowances Entitlement Manual (Change No. 56), ¶ 30221 (1 Jan. 1967) [hereinafter cited as Pay Manual]. For the Armed Forces' definition of what constitutes a dependent for purposes of receipt of BAQ, see 37 U.S.C. § 401 (1976). Included are the service member's spouse, unmarried minor children and, under certain circumstances, parents. Situations in which the member is not entitled to BAQ on behalf of the dependents are set forth in Pay Manual, *supra*, ¶ 30224(a). Exempted from entitlement are "dependent[s] for whom the member has been absolved of the requirement to provide support, [because of,] for example, desertion without cause, [or] marital infidelity." *Id.* ¶ 30224(a)(3). (Army regulations require, however, that "[t]he member will provide adequate support for his minor children, natural or adopted, regardless of desertion or other misconduct on the part of the spouse." Army Regs. No. 608-99, ¶ 2-1(c) (15 Nov. 1978)). Members of the Armed Forces paying alimony to a former spouse pursuant to a divorce decree are not entitled to BAQ for that former spouse, Pay Manual, *supra*, ¶ 30224(a)(5), although a member's legitimate minor children are considered his dependents at all times, so that the member will receive the BAQ on their behalf. *Id.* (Change No. 58), ¶ 30232 (1 Jan. 1967). The Army, however, will not provide BAQ to a service member for his children if the member is relieved of the support obligation by court order and does not pay any support for the children. Army Regs. No. 608-99, ¶ 2-3(f) (15 Nov. 1978).

33. Army regulations specify that child support payments should be at the "with dependent rate" and not the lower BAQ rate paid to members without dependents. Army Regs. No. 608-99, ¶ 202(c) (15 Nov. 1978). The BAQ at the "with dependents" rate ranges from \$160.80 per month for an entering private, Grade E-1 to \$479.10 per month

suggest a more reasonable amount. The commanding officer, however, generally will not determine what amount constitutes adequate support.<sup>34</sup>

The commanding officer is required to encourage the service member to initiate allotments,<sup>35</sup> but the Army cannot establish an allotment without the service member's consent.<sup>36</sup> If the member authorizes an allotment, the Army withholds a specified amount from the member's monthly salary and forwards it directly to the dependents.<sup>37</sup>

The commanding officer is also required to advise the service member of possible consequences of not complying with Army regulations.<sup>38</sup> Sanctions may include: (1) notation in his permanent record of the service member's failure to support his dependents, which hinders chances for promotion;<sup>39</sup> (2) denial of the opportunity to re-enlist;<sup>40</sup> (3) termination of the BAQ when used improperly;<sup>41</sup> (4) administrative discharge;<sup>42</sup> and (5) court martial.<sup>43</sup> Threat of these sanctions may be sufficient to prompt

for a general or admiral, Grade 0-10. The service member's pay schedule, including the BAQ rate, is a matter of public record. See 37 U.S.C. § 1009 (Supp. III 1979). See also note 10 *supra*.

34. The commanding officer's role is primarily one of mediation. Army Regs. No. 608-99, ¶ 2-2(b) (15 Nov. 1978).

35. *Id.* ¶¶ 2-1(b), 2-6(f), 2-6(h).

36. At one time, the Army had authority to force an allotment (termed a "Class Q" allotment) on any service member shown not to be supporting his dependents. In 1963 the Army abandoned the practice as applied to higher ranking enlisted personnel and since then has abandoned it altogether. Toms, *Support of Military Dependents*, 6 J. FAM. L. 15, 23 (1966). Class Q allotments were terminated because of the feeling that the military member should not be denied the dignity of handling his own affairs. However, Lieutenant Commander Toms states, "the mandatory class Q allotment system avoided a great proportion of the problem for the military organization. . . ." *Id.* at 24. Other branches of the Armed Forces may still permit mandatory allotments.

37. See Pay Manual, *supra* note 32, (Change No. 50) at ¶ 60201, for the regulations governing allotments to dependents of members of the Armed Forces. See 37 U.S.C. §§ 701, 702 (1976), for the statutes permitting allotments for the Army, Navy, Air Force, and Marines. The practitioner should urge the commanding officer to encourage the initiation of an allotment. It is more reliable than depending on the service member to send the payments.

38. Army Regs. No. 608-99, ¶ 2-6(d) (15 Nov. 1978).

39. *Id.* ¶ 1-3(b)(1) (15 Nov. 1978).

40. *Id.* ¶ 1-3(b)(2) (15 Nov. 1978).

41. Pay Manual, *supra* note 32, (Change No. 58), at ¶ 30236 (1 Jan. 1967). See note 49 *infra*, for a discussion of BAQ termination.

42. Army Regs. No. 608-99, ¶ 1-3(b) (3) (15 Nov. 1978).

43. Army regulations state that, "willful neglect of support may result in court mar-

#### Women's Law Forum

the service member to initiate payments. The frequency with which sanctions are actually imposed is unknown. Expulsion from the service for failure to pay support seems rare.<sup>44</sup> The commanding officer has great discretion in recommending to his superiors that sanctions be imposed.<sup>45</sup>

If the commanding officer is unable to convince the service member to initiate allotments, or otherwise to agree to make support payments, he may refer the service member to the Staff Judge Advocate, Legal Assistance Officer, Army Community Services, or Chaplain for counseling.<sup>46</sup> Regardless of the outcome, the commanding officer is required to respond to the non-support letter, providing information on what has transpired, and assurance that any acts promised by the member will be monitored to ensure compliance.<sup>47</sup> If it becomes apparent that no satisfactory arrangement can be made, the commanding officer will advise the parties to resolve their problems in civil court.<sup>48</sup>

The military approach offers the practitioner an alternative to seeking a support order through a civilian court. Because the service member's commanding officer is involved, however, there is the risk that the service member may face sanctions which will injure his career. Any action hindering the service member's advancement opportunities could financially penalize the depen-

---

tial under Article 92." *Id.* ¶ 2-6(d).

44. "[E]limination of recalcitrant individuals is a drastic measure which involves the waste of the substantial investment in the training and maintenance of the member." Toms, *supra* note 36, at 17.

45. Army regulations advise the commander to consider recommending sanctions when a service member has acted in a manner which may discredit the Army. Army Regs. No. 608-99, ¶ 1-3(b), (c) (15 Nov. 1978). See discussion at note 32 *supra*, regarding ¶ 30224(a)(3) of the Pay Manual, and Army Regs. No. 608-99, ¶ 2-1(c) (15 Nov. 1978). Nonsupport of a spouse shown to be disloyal to a member of the Navy will not result in disciplinary action. 32 C.F.R. § 715.12(a) (1980). For the type of evidence of infidelity the Navy requires to justify a determination the service member need not support his spouse, see 32 C.F.R. § 715.12(a)(1)(2) (1980). Infidelity may be proved by way of affidavit by the service member, relatives or others, or written admissions by the wife in letters to the service member.

46. Army Regs. No. 608-99, ¶ 2-2(b) (15 Nov. 1978).

47. *Id.* ¶ 2-6(c). The regulation states, "It is essential that the complainant be given a complete reply by the commander, one that is courteous and factual, without evasion and vague promises, and with no hint of 'brush off.'" *Id.*

48. *Id.* ¶ 2-2(b).



## 892 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 11:885]

dents as well.<sup>49</sup> If the practitioner believes nothing short of a court-ordered garnishment will succeed, the dependents' interest may be best served by avoiding contact with the commanding officer.<sup>50</sup>

Use of the military channels is best suited to the service member likely to cooperate upon intervention by his superiors. Further, if the practitioner foresees significant problems in obtaining a final support judgment while the obligor is a member of the Armed Forces, the military approach may become more compelling.<sup>51</sup> The practitioner should be aware that the commanding officer may resist the practitioner's efforts to use military channels because the Armed Forces do not attach primary importance to their role as arbitrator of the domestic affairs of their members.<sup>52</sup> Therefore, the quality of the relationship between the commanding officer and the practitioner will, to a great extent, determine the success or failure of the military avenue.<sup>53</sup>

---

49. For instance, if the Army finds the service member is not forwarding the BAQ to the dependents, it may terminate the BAQ. Pay Manual, *supra* note 32, (Change No. 58) at ¶ 30236. Additionally it can collect from the member any BAQ portion paid to the service member but not provided to the dependents. Army Regs. No. 608-99, ¶ 2-3(d)(1) (15 Nov. 1978). Army policy requires, however, that even if the BAQ is terminated, the service member must still pay an adequate amount to his dependents. *Id.* ¶ 2-3(d)(2). Without the BAQ, lower-ranking members may find it difficult to provide even a few dollars a month. *But see* Clarke v. Clarke, 25 N.Y.S.2d 64 (1941), in which the court stated: "[D]efendant's salary of \$84.00 per month is almost net to him, in that during the next year he will have no expenses for food, clothing and shelter. On the other hand, the wife will be obliged to pay rent and purchase food for herself and the children." *Id.* at 64.

50. Availability of sanctions may be of use in encouraging voluntary compliance from a reluctant service member. The practitioner or dependents can write the member directly, reminding him of the sanctions for nonsupport and of the potential harm to his career if his commanding officer becomes involved in the dispute.

51. *See* discussion at notes 54-123 *infra*, detailing potential problems which may arise.

52. The goal is to have the military member take care of his responsibilities with the least expense to the military organization . . . . The very small percentage [of service members] who do require supervision occupy an inordinate amount of time of those officers exercising supervision, keeping themselves and the officers from productive effort in the military mission.

Toms, *supra* note 37, at 33-34. Army regulations state: "Each member is expected to keep reasonable contact with dependents to minimize inquiries, claims, and complaints that are sent to the Army." Army Regs. No. 608-99, ¶ 2-1(d) (15 Nov. 1978).

53. The Armed Forces also provide free legal services to active and retired service members and their spouse and children for all personal legal matters. Army Regs. No.

#### Women's Law Forum

## II. ACQUIRING A STATE COURT JUDGMENT OF SUPPORT

If the practitioner is unsuccessful in obtaining support for the dependents through military channels, or decides it is in the best interest of the clients to forego that avenue,<sup>54</sup> the next step is to obtain a judgment of support. The obstacles the practitioner may encounter in the efforts to obtain the judgment against a service member will be discussed below. The first area addressed is the limitations the Army imposes upon personally serving one of its members with process on base.<sup>55</sup> The second area concerns the SSCRA.<sup>56</sup> As shall be seen, the SSCRA will only be a problem for the practitioner when the service member requests a stay of the proceedings under the SSCRA, or the practitioner seeks a default judgment. The practitioner will prevail, however, in either situation if the court finds the service member's ability to defend is not "materially affected" because of his military service.<sup>57</sup> The practitioner should proceed in obtaining the judgment of support as against any other obligor, bearing the following considerations in mind.

### A. SERVICE OF PROCESS

The court must have jurisdiction over the service member in order for a support judgment to be valid.<sup>58</sup> Jurisdiction exists when the service member (1) has reasonable notice of the support action,<sup>59</sup> and (2) has a sufficient connection with the forum

---

608-50, ¶¶ 6(a), (b), 7(a) (22 Feb. 1974). The dependents can contact the Judge Advocate General at the nearest military base to obtain the services of the Legal Services Officer. They may even consult with a legal assistance officer from another branch of the Armed Forces. *Id.* ¶ 5(a)(1). To eliminate any conflict of interest, the dependents are seen by one legal assistance officer and the service member by another. The officer is limited to advising the parties of their rights and negotiating agreements between them. *Id.* ¶ 4. It may be in the best interest of the dependents for the practitioner to refer them to the legal assistance officer when it appears the situation can be resolved without the necessity of court action. Such a referral helps minimize the expense to dependents who may already be overwhelmed financially. Where it appears the matter cannot be resolved without court intervention, the legal assistance officer will usually refer the parties to private counsel. *Id.* ¶ 4(d).

54. See notes 49-53 *supra* and accompanying text.

55. See notes 58-73 *infra* and accompanying text.

56. See notes 74-167 *infra* and accompanying text for the SSCRA discussion pertaining to obtaining a support judgment.

57. See notes 124-167 *infra* and accompanying text.

58. *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978).

59. *Id.*

so that it is fair to require him to defend there.<sup>60</sup>

Personal service is considered the most effective means to give the respondent notice.<sup>61</sup> Some jurisdictions require the practitioner to make a "reasonable effort" to serve the respondent personally before alternate means may be employed.<sup>62</sup> The simple task of personal service upon the obligor can be frustrated by the Army's policy of limiting access to on-base members for purposes of personal service.<sup>63</sup>

Army restrictions upon personal service vary according to the type of interest the federal government maintains over the particular base.<sup>64</sup> The practitioner must determine whether the

60. *Id.* The practitioner will generally experience little difficulty establishing a sufficient connection between the service member and the forum when jurisdiction is based upon residence or domicile within that forum even though he may be stationed elsewhere. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 29, 30 (1971). However, where jurisdiction is based upon his presence in the forum in which he is temporarily stationed, interesting questions regarding the sufficiency of his connection can arise, if that presence is his only contact with the forum. The issues which may arise include whether he is physically present within the state when he is stationed on federal territory within the state's boundaries, and whether his presence is voluntary. The practitioner needs also to consider the extent to which mere presence as a basis for jurisdiction has been replaced by minimum contacts and fundamental fairness analysis. *See* Glen, *An Analysis of "Mere Presence" and Other Traditional Bases for Jurisdiction*, 45 BROOKLYN L. REV. 607 (1979); Comment, *Minimum Contacts Analysis of In Personam Jurisdiction Over Individuals Based on Presence*, 33 ARK. L. REV. 159 (1979). Fundamental fairness analysis would require the practitioner to consider whether the service member has purposefully availed himself of the benefits and protections of the forum state so that it is fair to impose jurisdiction. *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958). A discussion of these issues is beyond the scope of this Comment.

61. "Personal service is still the recommended method of serving a summons and there is no question that it is a legal method of service." 4A J. GODDARD, CALIFORNIA PRACTICE, FAMILY LAW PRACTICE § 814 (3d ed. 1981). *See generally* CAL. CIV. PROC. CODE § 415.10 (West Supp. 1981).

62. *See, e.g.*, N.Y. JUD. FAM. CT. ACT § 427(b) (McKinney 1975): "If after reasonable effort, personal service is not made, the court may . . . make an order providing for substituted service . . ." *See also* *Zinger v. Zinger*, 78 Misc. 2d 197, 356 N.Y.S.2d 177 (1974) (service by mail is permissible, in the court's discretion, only where petitioner had been unable to effectuate personal service or substituted service).

63. The Army's policy is discussed at notes 64-73 *infra* and accompanying text. For Navy regulations on service of process, see 32 C.F.R. § 720.20 (1979). Occasionally service members claim immunity from service of process solely by virtue of their military status. *See, e.g.*, *Murrey v. Murrey*, 216 Cal. 707, 16 P.2d 741, *cert. denied*, 289 U.S. 740 (1932), rejecting this defense.

64. *See generally* Army Regs. No. 27-40 (15 June 1973) setting forth Army policy on service of process.

#### Women's Law Forum

base is held under exclusive federal jurisdiction, concurrently with the state, or under a mere proprietorial interest.<sup>65</sup> The practitioner should contact the Staff Judge Advocate of the particular base in question to determine the nature of the federal interest involved.<sup>66</sup>

When the federal government holds the base concurrently with the state, or has a proprietorial interest, the service member's commander will help the practitioner perfect service, because state law applies throughout the area.<sup>67</sup> He will try to persuade the member to accept service voluntarily.<sup>68</sup> If the commander is unsuccessful, Army regulations require that he assist civil authorities by making the service member available for service.<sup>69</sup>

If the base is held under exclusive federal jurisdiction, the commander is required only to talk to the member about voluntary acceptance.<sup>70</sup> If the member refuses to accept service, the practitioner will be advised that, because federal jurisdiction is exclusive, personal service within the base is precluded.<sup>71</sup> In most instances, however, a state which yields exclusive jurisdiction to the United States also reserves the right to serve process within the ceded area.<sup>72</sup> If such a reservation exists, the commander will make the service member available for service.<sup>73</sup>

65. *Id.*

66. Army Regs. No. 405-20, ¶ 6(c) (1 Aug. 1973). Large bases may consist of several parcels of land acquired at different times and subject to different conditions. See *Krull v. United States*, 240 F.2d 122, 127 (5th Cir.), *cert. denied*, 353 U.S. 915 (1957), for an example of the difficulty of attempting to prove the type of jurisdiction exerted over separate parts of a federal reservation.

67. Army Regs. No. 27-40, ¶ 1-5(b)(3)(c) (15 June 1973).

68. *Id.*

69. *Id.*

70. *Id.* ¶ 1-5(b)(3)(b).

71. *Id.*

72. "Among the rights most commonly reserved by the states, in yielding jurisdiction to the United States, is the right to serve process within the ceded area." Dep't of Army Pamphlet No. 27-21, *Military Administrative Law Handbook*, ¶ 6.10(e), at 6-82. See, e.g., CAL. GOV'T CODE § 119 (West 1980).

73. Army Regs. No. 27-40, ¶ 1-5(b)(3)(c) (15 June 1973). When a state has reserved the right to serve process, that right may not necessarily extend to service of process from other states, absent such provision in the reservation. For example, a process server in Utah was denied permission to enter a local base to serve process received by Utah from Maine because, under the Utah cession statutes, the right to serve process did not extend to process received from other states. 5 Digest of Opinions 472, § 25.9 (1955). Army regulations state that, under those circumstances, the commander will not assist in

If personal service upon the member is impossible, substituted methods of service in accordance with forum state law must be attempted. The practitioner may avoid Army restrictions completely by having the member personally served off-base.

## B. THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

Before the passage of the SSCRA in 1918,<sup>74</sup> a service member occasionally discovered that, while serving in the military, someone had obtained a default judgment against him and confiscated his possessions to satisfy the judgment.<sup>75</sup> In times of war, governments would occasionally declare a moratorium on all actions against service members, to prevent civilians from taking unfair advantage of a member of the Armed Forces.<sup>76</sup> To avoid granting temporary immunity to all members, Congress enacted the SSCRA to protect service member's rights only under certain circumstances.<sup>77</sup> Under the Act, a service member

service unless the service member voluntarily agrees to accept it. Army Regs. No. 27-40, ¶ 1-5(b)(3) (15 June 1973).

74. The Soldiers' and Sailors' Civil Relief Act of 1940 virtually restated the SSCRA of 1918. Compare 40 Stat. 440 (1918) with 50 U.S.C. app. §§ 501-591 (1976).

75. See generally Skilton, note 13 *supra*.

76. *Id.* at 178-80. Moratoriums were used as a device "to preserve an existing social pattern during a period which is believed to be unusual and temporary in character." *Id.* at 179. Persons who wanted to bring suit against a member of the Armed Forces had to wait until the moratorium ended. Even absent moratoriums, some courts held service members exempt from suit as a matter of public policy. See, e.g., *Land Title & Trust Co. v. Rambo*, 174 Pa. 566, 34 A. 207 (1896).

77. The purpose, as expressed in the SSCRA, is as follows:

In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense provision is made to suspend enforcement of civil liabilities' in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act . . . remains in force.

50 U.S.C. app. § 510 (1976).

The Supreme Court has stated that the SSCRA is to "be read with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948). The Act is not intended to function as a shield behind which the service member can avoid legal obligations. See, e.g., *Boone v. Lightner*, 319 U.S. 561

## Women's Law Forum

can obtain a stay of the proceedings if a judge determines his ability to defend is materially affected by his military service.<sup>78</sup> A default judgment cannot be entered against a service member at least until an attorney is appointed to safeguard his interests.<sup>79</sup>

In attempting to obtain a support judgment against a member of the Armed Forces, practitioners are occasionally confronted with the SSCRA's stay and default provisions.<sup>80</sup> The following is a discussion of (1) the SSCRA's stay provision,<sup>81</sup> (2) its default provision,<sup>82</sup> and (3) factors the courts consider in granting a stay request or granting entry of a default judgment.<sup>83</sup> Included throughout are suggestions for ways to minimize the possibility the SSCRA will be successfully used to the detriment of the dependents.<sup>84</sup> It will become apparent that the SSCRA should rarely bar the practitioner from obtaining a judgment of support.<sup>85</sup>

### *The Stay Provision*

The stay provision provides that a service member's application for a stay shall be granted unless the court feels his ability to conduct his defense is not materially affected by reason of his military service.<sup>86</sup> It is silent both as to who has the burden

---

(1943), in which the Court, affirming the lower court's denial of a stay, quoted the lower court which had found that the service member had "only sought to use the provisions of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrongdoing." *Id.* The lower court had concluded, that "this Court, who once wore a U.S. uniform with pride, does not intend for this to be done." *Id.* at 571.

78. The stay provision is found at 50 U.S.C. app. § 521 (1976). See notes 86-97 *infra* and accompanying text.

79. The default provision is found at 50 U.S.C. app. § 520 (1976). See notes 98-123 *infra* and accompanying text.

80. See, e.g., *Smith v. Smith*, 222 Ga. 246, 149 S.E.2d 468 (1966); *Kerrin v. Kerrin*, 97 Cal. App. 2d 913, 218 P.2d 1004 (1950); *McGlynn v. McGlynn*, 178 Misc. 530, 35 N.Y.S.2d 6 (1942).

81. See notes 86-97 *infra* and accompanying text.

82. See notes 98-123 *infra* and accompanying text.

83. See notes 124-167 *infra* and accompanying text.

84. See, e.g., notes 139-150 *infra* and accompanying text.

85. See notes 124-167 *infra* and accompanying text.

86. 50 U.S.C. app. § 521 (1976). The statute provides:

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be

of proving the member will or will not be prejudiced,<sup>87</sup> and as to the quantum of proof required.

The United States Supreme Court has held within the trial court's discretion the decision whether the service member must make a showing of impaired ability to defend, or whether his adversary must come forward with evidence that he is not prejudiced.<sup>88</sup> A service member, however, usually will not be granted a stay upon the mere showing that he is in the military,<sup>89</sup> unless the motion goes unopposed or the service member is stationed overseas.<sup>90</sup>

Generally, California requires the service member to make a

---

stayed as provided in this Act . . . unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military services.

*Id.*

87. See *Boone v. Lightner*, 319 U.S. 561, 569 (1942) ("The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee.").

88. See *id.* at 569-70. After referring to the statute's failure to address the burden of proof question, the Court stated: "We too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come." *Id.* at 569. See also *Bond v. Bond*, 547 S.W.2d 43 (Tex. Civ. App. 1976), which held that the trial court has wide discretion in deciding which party should carry the burden of proof on the issue of prejudice.

89. The Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service. Canons of statutory construction admonish us that we should not needlessly render as meaningless the language which, after authorizing stays says, "unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

319 U.S. at 565. See also *Johnson v. Johnson*, 59 Cal. App. 2d 375, 382, 139 P.2d 33, 37 (1943) ("The Soldiers' and Sailors' Civil Relief Act of 1940 does not grant an absolute right to stay whenever it is made to appear that one of the parties is in the military service.").

90. See, e.g., *Mays v. Tharpe & Brooks, Inc.*, 148 Ga. App. 815, 240 S.E.2d 159 (1977) (stay proper where the record indicated only that the service member was in military service in the Philippines and no evidence was presented by his adversary showing his rights would not be materially affected); *Parker v. Parker*, 207 Ga. 588, 63 S.E.2d 366 (1951) (stay proper where husband stationed overseas and wife offered no evidence that his rights would not be materially impaired); and *Lankford v. Milholin*, 197 Ga. 227, 28 S.E.2d 752 (1944) (a stay should be granted upon bare application unless it appears no material impairment exists).

Women's Law Forum

prima facie showing for relief.<sup>91</sup> The amount of proof is much less than is required from a litigant requesting a limited continuance independent of the Act.<sup>92</sup> The burden then shifts to the party resisting postponement to show the member is not materially affected by his military service.<sup>93</sup>

When the member requests a stay, the practitioner must be prepared to argue that ability to defend is not prejudiced.<sup>94</sup> Even if the court grants a stay of the support proceeding, the practitioner should request temporary support for the duration of the stay. The SSCRA permits the court to grant stays subject to whatever terms justice requires.<sup>95</sup> Many courts have been willing to award dependents temporary support while the stay is in effect.<sup>96</sup> Some courts have gone so far as to grant the service member a stay on condition that he provide temporary support pending the outcome of the action.<sup>97</sup>

---

91. *See Chaffey v. Chaffey*, 59 Cal.2d 792, 797, 382 P.2d 365, 368, 31 Cal. Rptr. 325, 328 (1963) (“[W]hen a prima facie showing for relief is made, the statute in effect, places the burden of persuasion, if not of proof, upon the party resisting a postponement . . . .”) (relying on *Pacific Greyhound Lines v. Superior Court*, 28 Cal. 2d 61, 67, 168 P.2d 665, 668 (1946)). The court held the trial court abused its discretion in denying the service member’s stay request in a child custody matter.

92. *Miller v. Miller*, 26 Cal. 2d 119, 125, 156 P.2d 931, 934 (1945); *Johnson v. Johnson*, 59 Cal. App. 2d 375, 392, 139 P.2d 33, 42 (1943).

93. *Chaffey v. Chaffey*, 59 Cal. 2d 792, 797, 382 P.2d 365, 368, 31 Cal. Rptr. 325, 328 (1963).

94. See notes 124-167 *infra* and accompanying text for the factors courts consider in determining prejudice.

95. The SSCRA provides that a stay may remain in effect “subject to such terms as may be just . . . .” 50 U.S.C. app. § 524 (1976).

96. *See Hagen v. Hagen*, 207 Ark. 1007, 1011, 183 S.W.2d 785, 787 (1944); *Gilmore v. Gilmore*, 185 Misc. 535, 58 N.Y.S.2d 556 (1945) (the court allowed a stay of the divorce proceedings until termination of the defendant’s military service, but provided for spousal support and an allowance for the wife’s counsel); and *Jelks v. Jelks*, 207 Ark. 475, 476, 181 S.W.2d 235, 236 (1944). *But see Smith v. Smith*, 222 Ga. 246, 149 S.E.2d 468 (1966), in which the court reversed the trial court’s award of temporary alimony and child support.

97. *See, e.g., Shelton v. Shelton*, 248 Ala. 48, 26 So.2d 553 (1946), in which the trial court granted the service member a stay of the divorce action conditioned upon payment of \$40 per month spousal support pendente lite. The Alabama Court did not reach the legality of the stay order. It dismissed the appeal as moot because the service member was discharged from the military before the submission of his appeal. *See also Brown v. Brown*, 89 Ga. App. 428, 80 S.E.2d 2 (1953), in which the trial court, after granting a stay of the support proceedings, granted a further stay at the second hearing on condition that the service member pay the wife \$125 in alimony per month. Upon the service member’s failure to fulfill the condition, the stay was terminated. As no appeal was had from the second order, the court of appeal did not reach the legality of that order. *See also Ahrens v. Ahrens*, 229 Ky. 497, 185 S.W.2d 694 (1945) (court affirmed the trial court’s



### *The Default Provision*

If a service member fails to make any appearance in the civil suit, the practitioner may seek a default judgment against him only after the requirements set forth in the SSCRA default provision are fulfilled.<sup>98</sup> Under the Act, the practitioner must initially file an affidavit with the court, stating the respondent is in the military.<sup>99</sup> The court must then appoint an attorney to protect the service member's interests.<sup>100</sup> The court will permit entry of default judgment where no apparent prejudice to defendant exists. If the court allows entry of default, and it later appears the member was prejudiced because of military service, he may have the judgment reopened for consideration of further evidence.<sup>101</sup> The following questions frequently arise concerning the default provision: (1) What constitutes "any appearance" by the service member so as to deny him the benefits of the SSCRA's default provision? (2) Who obtains and pays for the

---

granting of a stay on condition that the service member pay temporary alimony, but modified the amount).

98. The default provision, found at 50 U.S.C. app. § 520 (1976), provides in part:

(1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act.

(Citations omitted.)

99. *Id.*

100. *Id.*

101. *Id.* 520(4).

Women's Law Forum

service member's appointed attorney? (3) What are the appointed attorney's duties? (4) Under what circumstances may the service member reopen a default judgment?

To retain the benefits of the default provision, the service member cannot make either a general or special appearance, personally or through retained counsel.<sup>102</sup> Therefore, if the service member unsuccessfully makes a special appearance to challenge jurisdiction, the court can enter a default judgment without appointing an attorney for him. Should a default judgment be entered, it will not later be permitted to be reopened.<sup>103</sup> On the other hand, there is no "appearance" where the service member, or someone acting on his behalf, contacts the court requesting relief for the member under the SSCRA.<sup>104</sup> It is viewed as a communication to the judge as an individual and not to the

---

102. *See* Cloyd v. Cloyd, 564 S.W.2d 337 (Mo. Ct. App. 1978), in which the court rejected the service member's argument that his divorce judgment, which included a provision for spousal and child support, was a default judgment and thereby void because no attorney was appointed to represent and protect his interest. After holding the judgment entered was not a default, the court held there was no "default of any appearance" within the meaning of the SSCRA, where the member's former attorney had filed a general denial and withdrawn from the case before trial. "For there to be such a default the defendant must not have made a general appearance at any time while the suit was pending." 564 S.W.2d at 344. *See also* Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251 (1943), in which defense counsel filed a motion to dismiss for lack of jurisdiction. The court held the motion constituted an appearance. The court stated:

There is no "default of any appearance" in such a case even though the defendant chooses to make only a special appearance to contest the jurisdiction of the court and therefore limits the authority of his attorneys to that issue. If that course proves ineffective he can hardly contend that he was not represented by counsel. There is nothing in the Soldiers' and Sailors' Civil Relief Act requiring the court to disregard the appointment of attorneys by the defendant and the course of action he decides upon and to appoint another attorney to embark upon another course of action on defendant's behalf.

*Id.* at 586, 134 P.2d at 255. *See also* Blankenship v. Blankenship, 263 Ala. 297, 82 So.2d 335 (1955).

103. *See* Reynolds v. Reynolds, 21 Cal. 2d 580, 586, 134 P.2d 251, 255 (1943).

104. *See, e.g.,* Allen v. Allen, 30 Cal. 2d 433, 182 P.2d 551 (1947) in which respondent service member was not notified of the hearing to increase the support amount. Notice was served on his former divorce attorney who appeared at the hearing only to inform the court that he could not locate the service member and was not authorized to represent him. The court held the service member made no appearance within the meaning of the default provision. *See also* Rutherford v. Bentz, 345 Ill. App. 532, 104 N.E.2d 343 (1952) which held that a telegram to the judge requesting rights under the SSCRA does not constitute an appearance.

court.<sup>105</sup>

The presence of counsel appointed in accordance with the default provision does not, of course, constitute an appearance to later deprive the service member of having the judgment reopened.<sup>106</sup> It may be considered an appearance, however, if the service member begins to actively participate in his defense through the appointed attorney, treating the attorney as if retained by the member.<sup>107</sup> Protection afforded the service member applies only when the appointed attorney acts under authority of the court rather than that of the service member.<sup>108</sup>

Once the court is satisfied the service member has made no appearance in the action, the court will appoint an attorney to represent his interests.<sup>109</sup> The default provision, however, does not specify who obtains the appointed attorney. Local court rules may provide the practitioner with guidance. Otherwise, it has been suggested that the dependents select an attorney willing to act on the service member's behalf and to attach written consent to an *ex parte* application for appointment of counsel.<sup>110</sup>

The default provision is silent about compensation of the appointed attorney. One court has held the services of the appointed attorney "are to be regarded as a patriotic duty for which no compensation would be expected by members of a pro-

105. *Rutherford v. Bentz*, 345 Ill. App. 432, 104 N.E.2d 343 (1952).

106. Kerig, *The Absent Defendant and the Federal Soldiers' and Sailors' Civil Relief Act*, 33 N.Y.U.L. REV. 975, 981 (1958).

107. *See, e.g., Sanders v. Sanders*, 63 Wash. 2d 709, 388 P.2d 942 (1964).

108. *Id.* at 713, 388 P.2d at 945.

109. 50 U.S.C. app. § 520 (1976).

110. 4A. J. GODDARD, *supra* note 61, at §§ 925-929. Further, Goddard suggests the *ex parte* application be accompanied by an affidavit by petitioners which should include the following:

Respondent is in a designated branch of the military service; respondent's mailing address in such service; proof of service is on file showing that the respondent was duly served with summons and copy of the petition on a given date; respondent has not filed a response, and that the time for him to plead has elapsed; and a named attorney at law of a specified address has consented to accept appointment as attorney for such respondent, and that such consent is attached.

*Id.* at 357-58 (footnote omitted). "The order should make no provision as to payment of fees of the [appointed] attorney." *Id.* For a discussion regarding compensation of the appointed attorney, see notes 111-113 *infra* and accompanying text.

Women's Law Forum

fession deeply imbued by a sense of public responsibility."<sup>111</sup> Another court has held the attorney may be paid, but only for the time expended in obtaining a stay;<sup>112</sup> the service member could not be required to pay for the appointed attorney's services.<sup>113</sup> As a practical matter, unless the government agrees to bear the cost, dependents must retain and probably compensate the appointed attorney in order to obtain a default judgment.<sup>114</sup>

The SSCRA requires the appointed attorney to "represent [the] defendant and protect his interest."<sup>115</sup> While it is not clear from the Act what this duty entails, it is generally believed the appointed attorney's obligation is to inform the service member of the proceedings and determine how he wishes to proceed.<sup>116</sup> If the service member authorizes the entry of default, the appointed counsel will so inform the court. The appointed attorney must request a stay of the proceedings if he or she determines the member is prejudiced in conducting his defense because of military service.<sup>117</sup> The court will probably not permit entry of

111. *In re Cool's Estate*, 19 N.J. Misc. 236, 239, 18 A.2d 714, 717 (1941).

112. *In re Ehlke's Estate*, 250 Wis. 583, 27 N.W.2d 754 (1947), *modified*, 251 Wis. 57, 28 N.W.2d 884 (1947). The appointed attorney had worked 31 days as the service member's guardian ad litem and the court would only permit compensation for the time expended to obtain a stay, payable at a rate equal to that permitted by a Wisconsin statute for an attorney appointed to represent an indigent. *Id.* at 587-91, 27 N.W.2d at 756-59.

113. *Id.* The court stated that the service member "is not liable to compensate [the appointed attorney] for he neither employed him nor consented to nor had knowledge of [his] appointment or rendition of service." *Id.* at 591, 27 N.W.2d at 758. *See also In re Cool's Estate*, 19 N.J. Misc. 236, 239, 18 A.2d 714, 717 (1941), in which the court stated that compensation is "[c]ertainly not [chargeable] as against a party in military service."

114. The likelihood the county will be required to bear the cost of providing attorneys for both the dependents and service member has discouraged the District Attorney's Office in at least one county from initiating support actions against delinquent service members. Interview with Pierre Vaughn, Attorney, San Francisco District Attorney's Office, Family Support Bureau (Sept. 27, 1979).

115. 50 U.S.C. app. § 520 (1976).

116. *Bowery Savings Bank v. Pellegrino*, 185 Misc. 912, 58 N.Y.S.2d 771 (1945). *See also Borden, A Practical Approach to the Soldiers' and Sailors' Civil Relief Act*, 8 PRAC. LAW 65, 68 (Feb. 1962).

117. *See In re Ehlke's Estate*, 250 Wis. 583, 27 N.W.2d 754, *modified*, 251 Wis. 57, 28 N.W.2d 884 (1947), in which the court stated: "[t]he utmost service of a person appointed to appear for a soldier in the military service, either required or suggested, is toward procuring such temporary stay of proceedings as is necessary to protect the soldier's interests." *Id.* at 588, 27 N.W.2d at 757. *See also* Dep't of Army Pamphlet No. 27-166, *Soldiers' and Sailors' Civil Relief Act*, ¶ 3.4, at 3-4 (July, 1971) ("It seems that unless the defendant is able to be present for trial, to testify and fully cooperate in the defense, the primary purpose of the appointed attorney should be to obtain a stay until the defendant can be present.").

default judgment if there is evidence of prejudice to the service member.<sup>118</sup>

Under the SSCRA, the service member may have a default judgment reopened to permit him to defend when it appears that, because of his engagement in the Armed Forces, he was prejudiced in making his defense.<sup>119</sup> The service member must request the reopening no later than ninety days after military service terminates.<sup>120</sup> The request will be granted if the member has an apparently meritorious defense.<sup>121</sup> The court will not permit reopening if the service member acted in bad faith.<sup>122</sup> In urging that a default judgment be entered, the dependents' attorney should remind the court that if, in hindsight, entry of the

---

118. For the factors courts consider in granting entry of a default judgment, see notes 124-167 *infra* and accompanying text.

119. 50 U.S.C. app. § 520 (1976). That section provides, in part,

(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof.

*Id. See, e.g., Becknell v. D'Angelo*, 506 S.W.2d 688 (Tex Civ. App. 1974), in which the appellate court affirmed the trial court's order vacating of a divorce decree where service member's inability to defend was "strongly supported by the evidence". *Id.* at 693.

120. 50 U.S.C. app. § 520 (1976). Courts have firmly held to the 90-day limit, even where the service member was unaware of the judgment until after that time. *Morris Plan Bank v. Nadsall*, 202 Ga. 52, 41 S.E.2d 881 (1947).

121. 50 U.S.C. app. § 520 (1976). *See, e.g., Allen v. Allen*, 30 Cal. 2d 433, 182 P.2d 551 (1947). The service member was not represented by an attorney at a hearing in which he was ordered to pay a higher amount of support. He did not learn of the order until 27 months after it was made. The court held the member was "unquestionably prejudiced" and vacated the order, after noting the service member had a meritorious defense. *Id.* at 436, 182 P.2d at 553.

122. *See, e.g., Lamar v. Lamar*, 19 Ariz. App. 128, 505 P.2d 566 (1973) (no prejudice where service member was informed of the divorce action, took no steps to protect his rights, and motion to vacate showed no meritorious defense); *Wilterdink v. Wilterdink*, 81 Cal. App. 2d 526, 532, 184 P.2d 527, 532 (1947) (no prejudice where the service member demonstrated by his conduct before entry of default that he would not assert a defense); *Burgess v. Burgess*, 234 N.Y.S.2d 87 (1962) (the court refused to set aside a default separation decree because the service member was fully advised of the pending action, was always accessible to the court, and refused to accept notice by certified mail of the hearing date).

Women's Law Forum

default judgment was error, the service member has a remedy under the reopening provision.<sup>123</sup>

### *Factors Demonstrating Prejudice to the Service Member*

In deciding whether to grant a stay or permit entry of a default judgment, the court must determine whether the service member's ability to defend is materially affected<sup>124</sup> because of military duties.<sup>125</sup> To determine the degree of prejudice to the member, courts ask two questions: (1) Is the service member available to appear at the proceedings?,<sup>126</sup> and (2) Is his appearance necessary?<sup>127</sup> The proximity of the forum to the base,<sup>128</sup> the

123. The court may require the dependents to file a bond before the default judgment is entered, "to protect the rights of such [service members]." 50 U.S.C. app. § 520(3) (1976).

124. "Material effect" is an equitable principle expressed throughout the SSCRA. That expression or its equivalent is mentioned specifically in the following sections of the Act: 50 U.S.C. app. §§ 520(4)-523, 526, 530-532, 535-536, 560, 573, and 590 (1976).

125. "Material effect" is specifically mentioned in the general stay provision. 50 U.S.C. app. § 521 (1976). Its equivalent is only mentioned in the default provision when referring to reopening of the default judgment. 50 U.S.C. app. § 520(4) (1976). The default provision, however, has been interpreted to mean that a default judgment should be granted only when it appears that the service member's ability to defend is not materially affected by his military service. *See, e.g.,* *Lawther v. Lawther*, 53 Pa. D. & C. 280 (1945) (default divorce decree should be granted only if the absent service member knew of the proceedings, was within the United States, and was not prevented by his military service from defending the action or applying for a stay); and *King v. King*, 193 Misc. 750, 753, 85 N.Y.S.2d 563, 566 (1948) ("this [default] provision was not intended . . . to prevent a judgment by default against a person in the military service if he was fully informed of the pendency of the action and had adequate time and opportunity to appear and defend . . ."). Indeed, the appointed attorney in a default proceeding should request a stay if it appears the service member will be unfairly prejudiced. *See* note 117 *supra* and accompanying text.

126. The United States Supreme Court has said, "[A]bsence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial" under the SSCRA. *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

127. *Id.* at 569; *Whealton v. Whealton*, 67 Cal. 2d 656, 665, 432 P.2d 979, 985, 63 Cal. Rptr. 291, 297 (1967); *Johnson v. Johnson*, 59 Cal. App. 2d 375, 390, 139 P.2d 33, 41 (1943) ("[W]hile it is true that normally a litigant in the military service is entitled to be present at the trial in order to defend or prosecute his action adequately, that right is not absolute."). *But see* *Mays v. Tharpe & Brooks, Inc.*, 143 Ga. App. 815, 817, 240 S.E.2d 159, 160-61 (1977), stating, "A substantial right of a party to litigation is to be present at the trial and render assistance to his counsel as the developments unfold. Consequently, unless it is a situation in which no harm could accrue by reason of his absence . . . a member of the military service is entitled as of right to the stay."

128. In *Boone v. Lightner*, 319 U.S. 561 (1943), the Court upheld a stay denial because, among other reasons, the service member was summoned into North Carolina state court while stationed in nearby Washington, D.C. *See also* *Brown v. Brown*, 89 Ga. App. 428, 80 S.E.2d 2 (1953) (denial of a stay affirmed where the forum was located in a county adjoining the county in which the service member was stationed). *But see* *Mays*

service member's ability to obtain leave,<sup>129</sup> and current Armed Forces activity<sup>130</sup> are factors used in determining availability. As to the necessity of his appearance, courts consider the nature of the action<sup>131</sup> and the service member's relation to it.<sup>132</sup> A discussion of these considerations follows. Techniques to minimize the likelihood of a finding of prejudice to the service member are indicated, including use by the practitioner of the Uniform Reciprocal Enforcement of Support Act (URESA).<sup>133</sup>

### 1. Proximity of the Forum

The location of the forum is an important consideration in determining whether the service member will be available to attend the proceedings.<sup>134</sup> When he is stationed overseas, the

v. Tharpe & Brooks, Inc.; 143 Ga. App. 815, 240 S.E.2d 159 (1977) (stay granted where service member stationed in Philippines); and Starling v. Harris, 114 Ga. App. 282, 151 S.E.2d 163 (1966) (stay granted where service member stationed in Korea).

129. The Supreme Court considered the service member's failure to apply for leave in affirming the lower court's refusal to grant a stay in *Boone v. Lightner*, 319 U.S. 561, 572-73 (1943). The Court asked, "Did he apply for a leave at all? The affidavit pretty clearly implied that he had not. We think the court had ample grounds for [its] opinion." *Id.* at 572. See also *Derby v. Kim*, 238 Ga. 429, 233 S.E.2d 156 (1977) (trial court erred in denying stay in custody dispute where father asserted he could not be available for the December hearing because he had used up all of his leave time for that year, but indicated he could be available for a hearing in January).

130. See, e.g., *Johnson v. Johnson*, 59 Cal. App. 2d 375, 383, 139 P.2d 33, 37 (1943) in which the court stated:

It is a harsh thing to tell a litigant that he must wait to enforce his cause of action until after the war. Witnesses or parties may die, and witnesses may disappear or forget the fact. However, in the national interest, wherever the rights of one in the military service will be adversely affected unless a stay is given, the court must grant a stay. That is one price civilians must pay in aiding the war effort.

See also *Bowsman v. Peterson*, 45 F. Supp. 741, 743 (D. Neb. 1942) ("The soldier or sailor in seasons of war has neither time nor mental aptitude for litigation.").

131. See, e.g., *Mathis v. Mathis*, 236 So.2d 755, 756-57 (Miss. S. Ct. 1970) ("Without holding that such a finding is required in every case, we are of the opinion that a paternity suit is of such a personal and intimate nature that it is implicit that appellant's absence materially affects his defense unless a specific finding is made to the contrary.").

132. See *Boone v. Lightner*, 319 U.S. 561, 569 (1943) (in determining prejudice to the service member, "[o]ne case may turn on an issue of fact as to which the party is an important witness"); and *Semler v. Oertwig*, 234 Iowa 233, 239, 12 N.W.2d 265, 270 (1943) (finding "[t]he nature of the action, or his relation to it, or his lack of knowledge of the matters involved, may render [the service member's] presence at the trial unnecessary to an adequate protection of his rights.").

133. See notes 139-150 *infra* and accompanying text.

134. *Boone v. Lightner*, 319 U.S. 561 (1943); *Brown v. Brown*, 89 Ga. App. 428, 429, 80 S.E.2d 2, 3 (1953).

### Women's Law Forum

courts are more inclined to find prejudice.<sup>135</sup> If the support action is filed in the forum in which he is stationed, a finding of unavailability is doubtful,<sup>136</sup> absent evidence of inability to obtain leave,<sup>137</sup> or the existence of war.<sup>138</sup>

To minimize a finding of prejudice due to unavailability, the practitioner might consider litigating the support action in the forum in which the service member is stationed. To prevent any hardship to the dependents in the event that they do not reside nearby, URESA can be used to obtain a judgment of support.<sup>139</sup> URESA allows the dependents a local support hearing and, at the same time, permits the service member to present a defense in the forum in which he is stationed. Most states have adopted a form of URESA, although provisions vary from state to state.<sup>140</sup> All duties of support—past, present, and future—are enforceable under the Act if enforceable in the reciprocal state.<sup>141</sup>

URESAs generally operate as follows. The dependents demonstrate their need for support in a verified complaint filed in the county in which they reside.<sup>142</sup> Once the initiating court determines the complaint alleges facts sufficient to show a duty

135. See, e.g., *Mays v. Tharpe & Brooks, Inc.*, 143 Ga. App. 815, 240 S.E.2d 159 (1977); *Starling v. Harris*, 114 Ga. App. 282, 151 S.E.2d 163 (1966).

136. See note 135 *supra*.

137. See notes 151-154 *infra* and accompanying text.

138. See notes 154-157 *infra* and accompanying text.

139. The text of the Uniform Reciprocal Enforcement of Support Act [URESAs] is found at 9A UNIFORM LAWS ANNOTATED 643-801 (West Master ed. 1979). For California's version of the Act, see CAL. CIV. PROC. CODE §§ 1650-1699 (West Supp. 1981). See generally Note, *Uniform Reciprocal Legislation to Enforce Familial Duties of Support*, 25 DRAKE L. REV. 206 (1975), for a historical review of URESAs.

140. See 9A UNIFORM LAWS ANNOTATED, *supra* note 139, for the version of URESAs adopted in each state.

141. California provides that the duty of support under URESAs includes:  
a duty of support whether imposed or imposable by law or by order, decree, or judgment of any court whether interlocutory or final or whether incidental to a proceeding for a dissolution of marriage, judgment of nullity, or for legal separation, or to an action for divorce, separation, separate maintenance, or otherwise and includes the duty to pay arrearages of support past due and unpaid.

CAL. CIV. PROC. CODE § 1653(b) (West Supp. 1981). URESAs can thus be used to obtain as well as enforce judgments of support, provided they are permitted in the reciprocal state.

142. See, e.g., CAL. CIV. PROC. CODE §§ 1673, 1676 (West Supp. 1981).



of support is owed, it forwards its certification and the complaint to the court in the jurisdiction in which the respondent resides.<sup>143</sup> After determining the respondent is located in its jurisdiction, the responding court will docket the case and notify the local prosecuting attorney.<sup>144</sup> The prosecuting attorney becomes the dependents' attorney in the responding state and is required to take all action necessary to enable the court to obtain jurisdiction over the service member.<sup>145</sup> At the hearing in the responding court, the service member may present evidence on his own behalf.<sup>146</sup> If it becomes necessary to conduct further examination of witnesses, the responding court may continue the proceedings until the witnesses are examined personally, through depositions<sup>147</sup> or by interrogatories.<sup>148</sup> The responding state, applying its own laws, has the power to enter the order of support.<sup>149</sup>

Obtaining a support judgment through URESA seems ideally suited for situations in which the parties are in different parts of the country. A possible drawback, however, is that by the time the complaint reaches the responding court, the service member may have been transferred elsewhere. URESA, how-

---

143. *Id.* § 1676.

144. *Id.* § 1680(a).

145. *Id.* § 1680(b) states, "The prosecuting attorney shall prosecute the case diligently." It appears, however, that some district attorneys' offices do not act on URESA petitions against service members stationed in their forum, apparently because they believe they cannot obtain jurisdiction over them. Vaughn interview, *supra* note 114. For a discussion of potential jurisdiction problems, see note 60 *supra*. Inaction due to fear of losing the jurisdiction argument, particularly where there is no evidence the service member would contest jurisdiction, is not considered prosecuting the case "diligently." Section 1680(c) states that if the prosecuting attorney does not pursue the support action, the Attorney General's office in that state may order the attorney to do so, or may undertake the representation itself. CAL. CIV. PROC. CODE § 1680(c) (West Supp. 1980).

146. CAL. CIV. PROC. CODE § 1683 (West Supp. 1981).

147. *Id.*

148. "For those cases in which the husband raises a defense, the act provides a means for the wife to litigate the issue. In such a case the court must, on request of either party, continue the case for submission of her evidence." *Hight v. Hight*, 67 Cal. App. 3d 498, 503-04, 136 Cal. Rptr. 685, 690 (1977) (citations omitted). URESA contemplates that the prosecuting attorney "shall use the machinery of deposition and interrogatories. . . ." *Id.* URESA protects the due process rights of the defendant by affording him an opportunity to be heard and to examine and cross-examine by deposition the plaintiff and any other witnesses who have testified in the initiating states. *Smith v. Smith*, 125 Cal. App. 2d 154, 270 P.2d 613 (1954). Each litigant "pleads in the court of his or her own jurisdiction." *Uniform Reciprocal Legislation*, *supra* note 139, at 212.

149. CAL. CIV. PROC. CODE § 1682 (West Supp. 1981).

#### Women's Law Forum

ever, does authorize the responding court to send the complaint on to the appropriate court.<sup>150</sup> Another potential drawback is that, because the District Attorney's office is a public agency, their attorneys may have less time to devote to the dependents' support action than one would expect from private counsel. The practitioner needs to weigh the advantages and disadvantages of URESA before using this approach.

## 2. Ability to Obtain Leave

When a court considers prejudice to the service member, it inquires into the likelihood of the service member obtaining leave.<sup>151</sup> The Armed Forces try to accommodate the courts by making service members available to appear. Although the commanding officer must approve time off, leave is freely granted to members of the Army to respond to court orders, absent special circumstances.<sup>152</sup> Even if the service member has depleted his accrued leave, the commanding officer can advance leavetime.<sup>153</sup> The member is not deprived of pay for that period of authorized leave.<sup>154</sup>

## 3. Military Involvement

The military involvement of the United States at the time of the support proceeding is a factor courts consider in determining the member's ability to attend. Clearly, courts are likely to find the service member's ability to defend materially affected when the Armed Forces are engaged in war.<sup>155</sup> The SSCRA was

150. The service member's previous commanding officer is required to advise of the service member's new address. Army Regs. No. 608-99, ¶ 2-6(j) (15 Nov. 1978).

151. See, e.g., *Boone v. Lightner*, 319 U.S. 561, 572 (1943). The service member "might be expected to make some move to get leave to be present. If it were denied, he might be expected to expose every circumstance of his effort to the court in his plea for continuance." See also *Derby v. Kim*, 238 Ga. 429, 233 S.E.2d 156 (1977); *Johnson v. Johnson*, 59 Cal. App. 2d 375, 381, 389-90, 139 P.2d 33, 36, 41 (1943); and *Semler v. Oertwig*, 234 Iowa 233, 238, 12 N.W.2d 265, 270 (1943), in which the service member's "lack of diligence in protecting his rights when he could have, or his failure to obtain leave to be present when it might have been obtained, may be considered."

152. Interview with Captain William D. Raymond, Legal Assistance Officer, United States Army, at the Presidio (Oct. 2, 1979). The Navy has a similar policy. See 32 C.F.R. § 720.20(e) (1980), which states: "[t]he commanding officer normally should grant leave or liberty to the person served in order to permit him to comply with the process; provided, such absence will not prejudice the best interests of the naval service."

153. Army Regs. No. 630-5, ¶ 1-8(c) (18 Mar. 1977).

154. Pay Manual, *supra* note 32 (Change No. 56), at ¶ 10301 (1 Jan. 1967).

155. *Graves v. Bednar*, 167 Neb. 847, 852, 95 N.W.2d 123, 128 (1959) (court denied

## 910 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 11:885]

enacted to provide relief under such emergency conditions.<sup>156</sup> The suspension of civil remedies against service members is seen as a necessary sacrifice on the part of civilians to further national defense.<sup>157</sup> Similarly, the practitioner should be aware of national sentiment in anticipating the difficulty in obtaining a judgment against the service member. A court's patriotism may color a decision of whether the service member is prejudiced because of military service.<sup>158</sup>

#### 4. Necessity to Appear

The unavailability of the service member will not necessarily preclude the court from finding the member is not prejudiced.<sup>159</sup> Courts consider the adequacy of discovery techniques to compensate for any detriment he may suffer due to his absence.<sup>160</sup> The Army policy on use of discovery makes a finding of necessity of the service member's presence less likely. Regulations expressly encourage civilian attorneys to use discovery, particularly when a service member's physical appearance in court may interfere with his military duties.<sup>161</sup> Further, upon re-

---

stay and distinguished *Davis v. Wyche*, 224 N.C. 746, 32 S.E.2d 358 (1944), which permitted a stay, because, in *Davis*, a "hot war was then in progress"; *Parker v. Parker*, 207 Ga. 588, 63 S.E.2d 366 (1951) (court overturned an order for temporary support and granted a stay when the service member was overseas engaged in the Korean conflict).

156. 50 U.S.C. app. § 510 (1976). See note 77 *supra*.

157. See *Johnson v. Johnson*, 59 Cal. App. 2d 375, 139 P.2d 33 (1943) and case discussion at note 130 *supra*.

158. See, e.g., *Smith v. Smith*, 222 Ga. 246, 149 S.E.2d 468 (1966). An action for divorce was begun in Georgia while the service member was undergoing training in North Carolina in preparation for active duty in Vietnam. The trial court awarded temporary alimony and child support but the appellate court reversed, permitting the service member to remain free of obligation until discharged. This harsh result occurred at a time when the general population supported American intervention in Vietnam. For an example of judicial patriotism, see *McGlynn v. McGlynn*, 178 Misc. 530, 531, 35 N.Y.S.2d 6, 7 (1942) and case discussion at note 6 *supra*.

159. See note 127 *supra* and accompanying text.

160. "Assuming, arguendo, that defendant did not have ample opportunity to appear personally in his defense . . . we nevertheless remain unimpressed with this contention. Had such a situation prevailed, the defendant might nevertheless have availed himself of the usual remedies available in Chancery proceedings, by taking of depositions or interrogatories . . ." *Fluhr v. Fluhr*, 140 N.J. Eq. 131, 133, 52 A.2d 847, 849 (1947). "At no time prior to entry of the decree in the cause did the defendant make . . . any showing that his testimony could not be taken by desposition." *Cadieux v. Cadieux*, 75 So. 2d 700, 703 (Fla. S. Ct. 1954).

161. Army Regs. No. 27-40, ¶ 7-17(a) (15 June 1973); 32 C.F.R. § 516.5(g) (1980). See *Johnson v. Johnson*, 59 Cal. App. 2d 375, 381, 139 P.2d 33, 36 (1943) (denial of stay affirmed where civilian plaintiff introduced evidence from the service member's com-

#### Women's Law Forum

quest, a military legal assistance officer will help the member comply with discovery requests.<sup>162</sup>

The practitioner can make convincing arguments that, in the "usual" support proceeding, the service member's presence is not indispensable.<sup>163</sup> The issues in the support action are narrow. They focus only upon the needs of the dependents and the respondent's financial ability to meet those needs.<sup>164</sup> These issues can generally be adequately set forth by way of income and expense declarations.<sup>165</sup> Indeed, California courts frequently determine the support obligation solely on the basis of information contained in the financial declarations filed by both parties.<sup>166</sup> Depositions and interrogatories can be employed when a dispute over the information contained in the declarations arises.<sup>167</sup>

### III. ENFORCEMENT OF THE SUPPORT JUDGMENT

Once a support judgment is obtained, the practitioner will have relatively little difficulty enforcing it against the service member.<sup>168</sup> This was not always the case. Until recently, the doctrine of sovereign immunity precluded garnishing salaries of

---

mander that the commander did not refuse to permit the service member to be produced as a witness, and had suggested that he would allow time off for the service member to have his deposition taken).

162. See generally Army Regs. No. 608-50 (22 Feb. 1974), and discussion at note 53 *supra*.

163. Indeed, the degree of standardization in assessing support obligations can to some extent be demonstrated by the use of temporary support schedules by many courts. See, e.g., SAN FRANCISCO SUPER. CT. DOM. REL. R. 8. Interestingly, under the San Francisco support schedule, an unemployed dependent spouse would be entitled to receive \$250 per month assuming the obligor was a private in the Army, level E-1. A private, at level E-1 currently earns a total of \$609.60 monthly, if he has dependents—\$448.80, net salary and \$160.80 BAQ. See 37 U.S.C. § 1009 (1976). The Army would require that only \$160.80 be used for support—the BAQ allowance. See note 32 *supra* and accompanying text.

164. *Mattos v. Correia*, 274 Cal. App. 2d 413, 79 Cal. Rptr. 229 (1969); *Bierl v. McMahon*, 270 Cal. App. 2d 97, 75 Cal. Rptr. 473 (1969); *Van Diest v. Van Diest*, 266 Cal. App. 2d 541, 72 Cal. Rptr. 304 (1968).

165. See, e.g., CAL. R. CT. 1243, 1285.50 (West 1981).

166. C. MARKEY, CALIFORNIA FAMILY LAW, PRACTICE AND PROCEDURE § 26.106[3] (1980).

167. If the service member is represented by an attorney, the practitioner can make an even stronger argument that the defendant's interests are adequately protected. The California Supreme Court has held that a plaintiff service member's ability to prosecute was not materially affected by physical absence, where his attorney was already familiar with the facts, which were not in dispute. *Whealton v. Whealton*, 67 Cal. 2d 656, 432 P.2d 979, 63 Cal. Rptr. 291 (1967).

168. See discussion at notes 171-186 *infra* and accompanying text.

federal employees.<sup>169</sup> In 1975 Congress enacted a law which permits garnishment of federal wages for the limited purpose of enforcing child and spousal support proceedings.<sup>170</sup> The practitioner, therefore, can either proceed to garnish the service member's wages, or attempt to obtain his voluntary compliance, with or without the aid of military channels. The following section discusses these approaches as well as SSCRA problems which may arise in the area of enforcement.

The practitioner should consider attempting to secure the service member's voluntary compliance before pursuing enforcement through other avenues.<sup>171</sup> The dependents may receive their financial support more quickly because less time and effort is involved than required to obtain a court-ordered garnishment. Many service members are complying with support orders voluntarily since the enactment of the federal garnishment statute.<sup>172</sup> The risk of military sanctions for violating the Army regulation that members abide by court orders may provide additional incentive to remit.<sup>173</sup> If the service member remains

---

169. Garnishment was considered to place an intolerable burden on the processes of public administration and to apply public funds to uses other than those for which they were allocated. Romero, *Garnishment of Military Wages*, 17 A.F.L. REV. 1, 3 (Fall, 1975).

170. 42 U.S.C. § 659 (Supp. 1979). The statute provides that:

(a) Notwithstanding any other provision of law, effective 1 January 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States . . . to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States . . . were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

The Federal government also permits the Secretary of Treasury to assess and collect unpaid support for dependents in the same manner as a delinquent federal tax. 42 U.S.C. § 652(b) (Supp. III 1979).

171. Lawyers frequently overlook this alternative. [1978] 4 FAM. L. REP. (BNA) 2474.

172. "Based on thousands of phone calls and letters from interested parties, conservative estimates indicate that, for every actual garnishment, voluntary compliance resulting solely from threatened garnishment avoids at least one other potential garnishment." Phillips & Dowark, *The Federal Garnishment Statute: Its Impact in the Air Force*, 18 A.F.L. REV. 70, 78 (Winter, 1976).

173. "The service member will provide support in accordance with the terms of court orders until relieved of this obligation by modification of the orders by a court of competent jurisdiction." Army Regs. No. 608-99, ¶ 2-4(c) (15 Nov. 1978). See 32 C.F.R. § 40.14 (1980). On possible sanctions, see notes 38-45 *supra* and accompanying text.

uncooperative, the practitioner may seek the aid of the commanding officer to encourage the satisfaction of the support judgment.<sup>174</sup> The commanding officer, however, cannot compel payment absent a court-ordered garnishment.<sup>175</sup>

To garnish the service member's wages, the practitioner proceeds as if the government were a private employer.<sup>176</sup> The law of the jurisdiction issuing the writ of garnishment governs the procedures to be employed, as well as the amount of the service member's pay that can be subject to garnishment.<sup>177</sup> The writ will be honored by the military unless it contravenes federal law<sup>178</sup> or the laws of the issuing state.<sup>179</sup> Once the Army determines the garnishment request is valid, it notifies the member and forwards the amount ordered to the dependents.<sup>180</sup> The Army will inform the member that he should resolve any garnishment difficulties through the appropriate civil court.<sup>181</sup>

174. See notes 27-48 *supra* and accompanying text. One practitioner suggests, however, that "if one does not want to wreck the ex-husband's career, it is often better to resort to garnishment first, without taking this preliminary step." [1978] 4 FAM. L. REP. (BNA) 2474.

175. See note 25 *supra*.

176. 42 U.S.C. § 659 (Supp. III 1979). The addresses for service of process on each branch of the Armed Forces are (1) U.S. Army Commander, U.S. Army Finance & Accounting Center, Attn: FINCL-G, Indianapolis, Ind. 46249; (2) U.S. Air Force, Air Force Financing & Accounting Center (AFAFC/AJQ), Denver, Colo. 80279; (3) U.S. Navy, Director, Navy Family Allowance Activity, Federal Building, Cleveland Ohio 44199; and (4) U.S. Marine Corps, Commanding Officer, Marine Corps Finance Center, Kansas City, Mo. 64197. [1978] 4 FAM. L. REP. (BNA) 3051. See 42 U.S.C. § 659(b) (Supp. III 1979), regarding method of service.

177. 42 U.S.C. § 659(b) (Supp. III 1979). *Evans v. Evans*, 429 F. Supp. 580 (W.D. Okla. 1976).

178. "Unless the order is contrary to Federal law, USAFAC [United States Army Finance & Accounting Center] will garnish the member's pay in accordance with the court order unless it is modified or rescinded." Army Reg. No. 608-99, ¶ 2-5(c) (15 Nov. 1978). For example, the federal government has set a limit on the percentage of pay that can be garnished. 15 U.S.C. § 1673 (Supp. III 1979). The state law on exemptions governs if it is more restrictive. See *Evans v. Evans*, 429 F. Supp. 580 (W.D. Okla. 1976).

179. Army Regs. No. 608-99 (15 Nov. 1978); *Overman v. United States*, 563 F.2d 1287 (8th Cir. 1977).

180. Pay Manual, *supra* note 32 (Change No. 50), at ¶ 70710(g)(2)(7); see also [1978] 4 FAM. L. REP. (BNA) 2475, in which Howard M. Bushman, Army Judge Advocate at the time garnishment statutes were passed, stated that the Army's interagency board for the implementation of garnishment procedures "decided that they could assume that in 99 percent of the cases the man at sometime had his day in court. Therefore, it was decided that every demand should be honored."

181. "Jurisdictional or procedural challenges to garnishment actions remain the private legal responsibility of the individual service members." Army Regs. No. 608-99, P 2-5(a) (15 Nov. 1978). One commentator notes that legal assistance officers have been ad-

The practitioner may be confronted with the SSCRA in seeking to enforce the support order against the service member. The Act permits the member to stay the execution of a judgment, through garnishment or otherwise, unless his ability to comply with the judgment is not significantly hindered because of military duties.<sup>182</sup> Service members have on occasion argued for a stay of support order enforcement because military service has substantially affected their ability to comply.<sup>183</sup> Courts generally reject this argument as contrary to public policy.<sup>184</sup> The

---

vised not to help the service member resist implementation of the garnishment. [1978] 4 FAM. L. REP. (BNA) 2475.

182. 50 U.S.C. app. § 523 (1976) provides in part:

In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, and its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service—

(a) Stay the execution of any judgment or order entered against such person, as provided in this Act; and

(b) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment as provided in this act.

(Citations omitted.)

183. See, e.g., *McKinney v. McKinney*, 182 Misc. 903, 50 N.Y.S.2d 8 (1944) (stay granted on portion of arrearages); *Elkind v. Elkind*, 180 Misc. 329, 41 N.Y.S.2d 820 (1943) (stay denied of the enforcement or support obligations under a separation agreement); *Kelley v. Kelley*, 38 N.Y.S.2d 344 (1942) (stay requested in an action to enforce support provision; continued to obtain proof of the financial status of the parties); *Willson v. Willson*, 40 Ohio L. Abs. 281 (Dom. Rel. 1944) (denial of stay of judgment subjecting service member's property to satisfaction of alimony and support payments); *Commonwealth v. Watts*, 47 Pa. D. & C. 87, 4 Mon. Leg. R. 134, 11 Som. Leg. J. 141, 56 York Leg. Rec. (1941) (stay of enforcement of support order denied).

184. See *Kelley v. Kelley*, 38 N.Y.S. 344, 349 (1942):

Clearly, it would be unjust to suspend provision for food and clothing for children six and eight years of age for the duration of the war if the father, receiving his own subsistence from the government, has the means so to provide. Moved, as we all are with a duty and desire to contribute to the well-being and morale of those in the armed forces, there is a point beyond which moral obligations at home cannot be entirely overlooked.

See also *Clarke v. Clarke*, 25 N.Y.S. 2d 64 (1941) ("Notwithstanding his military service, some provision for defendant's wife and children must be made."); *Willson v. Willson*, 40 Ohio L. Abs. 281 (Dom. Rel. 1944) ("The intention of Congress to protect men in service did not preclude the enforcement of their necessary civil obligations, and that a defendant who had left for the Army without making provision for the care of his wife and child, although he had property in the jurisdiction, was not entitled to the protection of

#### Women's Law Forum

service member may be entitled to a modification of the support order if his income has changed substantially since the entry of the order,<sup>185</sup> but a blanket stay is generally unnecessary and rarely granted.

#### IV. CONCLUSION

The financial abandonment of spouse and child is pervasive in this country. Too many offenders have evaded the duty of support. The likelihood of recovering support from the delinquent obligor appears to be aggravated when he is in the military. Statutory protections exist to shield the service member from civil suit.<sup>186</sup> Nevertheless, the military has made a good faith effort to prevent itself from becoming a refuge for those seeking to avoid family obligations. As this Comment has indicated, however, only the rarest of circumstances should preclude dependents from acquiring support from a member of the Armed Forces.

---

the statute since he did not question the reasonableness of the support order nor make any offer or provision for his family, but apparently intended that the proceedings be stayed and his family be left to get along as best they could."); *Commonwealth v. Watts*, 47 Pa. D. & C. 87, 88, 4 Mon. Leg. R. 134, 135, 11 Som. Leg. J. 141, 56 York Leg. Rec. 61 (1942) (the SSCRA does not "relieve deserting fathers of the obligation to support their children.").

185. *See, e.g., Clarke v. Clarke*, 25 N.Y.S.2d 64 (1941) (service member requested a modification and the court continued the matter to obtain sufficient data on the financial situation of the parties before ruling on the motion). On this issue, Army regulations state,

Many outstanding and uncontested support judgments against service members cause severe hardship. Such judgments can only be modified by court orders. If the member's outstanding income appears inadequate to satisfy an outstanding judgment and still maintain the service member, the commander should urge the individual to consult a legal assistance officer or other counsel.

Army Reg. No. 608-99, ¶ 2-4 (15 Nov. 1978).

186. *See note 183 supra.*