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Author's Note: This outline is a much shortened version of the Chapter "Effects of Military Service" which appears in the CLE Manuel Adoption, Paternity, and Other Florida Family Practice (6th Edition) and which has been updated by Peter Cushing the last ten years. The material herein is updated and has not yet been published in the upcoming 7th Edition of the CLE Manuel. The numbered sections track the manuel, with portions irrelevant to this seminar deleted.

EFFECTS OF MILITARY SERVICE

I. DOMICILE AND RESIDENCE

A. [§8.1] In General

"Domicile" means "legal residence." *Weiler v. Weiler*, 861 So.2d 472 (Fla. 5th DCA 2003). A person's legal residence or domicile is his or her "fixed, principal, and permanent home," and "to which that person intends to return and remain." BLACK'S LAW DICTIONARY 501 (West Group 7th ed. 1999); *Keveloh v. Carter*, 699 So.2d 285 (Fla. 5th DCA 1997). A person's residence is determined solely by his or her presence, which is a matter of objective fact, but a determination of domicile or legal residence involves an individual's intent as well. *McCarthy v. Alexander*, 786 So.2d 1284 (Fla. 2d DCA 2001). To become a Florida domiciliary, an individual must be physically present within the state and intend to make Florida a permanent home. *Coons v. Coons*, 765 So.2d 167 (Fla. 1st DCA 2000).

Residence and domicile may be different in a particular case and this is often so for servicemembers. A person may have more than one residence, but can have only one domicile at a time. *Weiler*; *Keveloh*. Once established, a domicile continues unless the party intends otherwise. *Keveloh*.

A servicemember resides where he or she is stationed, but his or her legal residence or domicile may be elsewhere. Although legal residency usually requires physical presence in the state, Florida recognizes an exception for Florida residents residing elsewhere on military orders. *Coons*. A servicemember stationed in Florida may also establish Florida as his or her domicile by showing the required intent. *McCarthy*. Establishing

bank accounts, registering an automobile, registering to vote, filing a certificate of domicile, or claiming Florida as state of residence in the member's service record book are all relevant actions in establishing residence. *Id.*

Under Florida's long-arm statute for proceedings for alimony, child support, or division of property, "residence" in Florida must precede the commencement of the action. *F.S.* 48.193(1)(e). This statute has been construed to require the respondent's residence to proximately precede commencement of the action, and that proximity is to be determined in light of the totality of the circumstances. *Garrett v. Garrett*, 652 So.2d 378 (Fla. 1st DCA 1995), *approved* 668 So.2d 991; *Shammay v. Shammay*, 491 So.2d 284 (Fla. 3d DCA 1986). Usually, if a married couple residing in Florida moves to another state, one spouse, after separation, may not return to Florida and obtain personal jurisdiction over the other spouse, based on the "prior residence" section of the long-arm statute. When the couple moves to another state, they abandon Florida as their state of residence and each spouse loses the protection of the long-arm statute. *Garrett v. Garrett*, 668 So.2d). Service of a petition for dissolution of marriage and summons on the respondent servicemember in the state generally is sufficient to confer personal jurisdiction. *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990). Care must be taken, however, to ensure that federal pension jurisdiction is acquired if there is doubt concerning the servicemember's legal residence and a general appearance has not been filed. It is entirely possible for the court to have long-arm jurisdiction but not have jurisdiction to divide a military pension. See 10 *U.S.C.* §1408(c)(4). Whether adequate jurisdiction existed may also be tested later by the servicemember with the Defense Finance and Accounting Service, which may refuse to honor an order entered without federal jurisdiction. It may not be possible to cure another jurisdictional defect in the proceeding.

The residence of an active duty member's spouse is also subject to special rules and analysis. Special circumstances pertain to members of the armed forces or other employees of the federal government "who are forced by the demands of their employment to take up temporary residence elsewhere than their primary choice of domicil." *Eckel v. Eckel*, 522 So.2d 1018, 1020 (Fla. 1st DCA 1988). In *Coons*, the active duty husband challenged on appeal his wife's Florida residence. The parties had been stationed in Florida during the husband's military career and owned real property in Florida. The wife relocated to California immediately after filing for dissolution of marriage but testified that Florida was the place she intended to return to as a permanent residence. Additional facts concerning bank accounts and automobile registrations led to a finding that the wife

was a Florida resident under the "special circumstances" rule in *Eckel*.

With respect to paternity jurisdiction, a servicemember who engages "in the act of sexual intercourse within [Florida] with respect to which a child may have been conceived" subjects himself to the long-arm jurisdiction of a Florida court. *F.S.* 48.193(1)(h). Interestingly, the statute confers greater rights on the children of unmarried nonresidents than on the children of parents who married and resided temporarily in Florida.

For further discussion of jurisdiction see Chapter 3 of FLORIDA DISSOLUTION OF MARRIAGE (Fla. Bar CLE 7th ed. 2004).

B. [§8.2] Presumption

There is a statutory presumption that service personnel and their spouses are residents of Florida for the purpose of maintaining any civil action if they are living within this state. *F.S.* 47.081. This prima facie presumption may overcome a deficiency in the testimony of a plaintiff concerning domicile in Florida. See *Mills v. Mills*, 153 Fla. 746, 15 So.2d 763 (1943). The statute, however, does not aid a servicemember who was inducted into the service after filing the complaint. *Feuer v. Feuer*, 156 Fla. 117, 22 So.2d 641 (1945).

C. [§8.3] Dissolution of Marriage

Under *F.S.* 61.021, one of the parties to the marriage must reside in Florida for six months before the filing of a petition for dissolution of marriage. The spouse of a resident, therefore, may secure a dissolution of the marriage in Florida without personally satisfying the six-month requirement. Proof of residence must be provided by affidavit, sworn corroborating testimony, or production of identification such as a driver's license or voter's registration card. *F.S.* 61.052. Some circuit courts in Florida have recently granted dissolutions of marriage with no testimony, when sworn pleadings establish that the marriage is irretrievably broken, that one party is a Florida resident, and residence is corroborated, on the authority of *Fernandez v. Fernandez*, 648 So.2d 712 (Fla. 1995). Whether this procedure is prudent and consistent with public policy has not yet been debated, with some counties in Florida allowing the practice, and other counties generally disallowing it. However, testimony by deposition of a servicemember who is a Florida resident but deployed elsewhere typically is allowed, providing adequate proof of identity is provided and there is a bona fide need to dispense with a personal appearance because of military duties.

If the residence and domicile requirements are met at the time of the filing of the petition, a later change of domicile by the petitioner while the proceedings are pending will not divest the court of jurisdiction. *Coons v. Coons*, 765 So.2d 167 (Fla. 1st DCA 2000).

In general, the residence requirement means actual, not constructive, residence, in addition to domicile. *McCarthy v. McCarthy*, 786 So.2d 1284 (Fla. 2d DCA 2001). *F.S.* 61.021 allows the nonresident spouse of a Florida domiciliary not actually in the state because of military duty to file an action for dissolution. A servicemember who is a Florida domiciliary, however, need not actually reside within the state to initiate a dissolution proceeding if he or she was born in Florida and never resided outside of the state except for the time spent in military service. *Jeffries v. Jeffries*, 133 So.2d 751 (Fla. 3d DCA 1961).

The nonresident spouse also has access to the courts under *F.S.* 61.09 to secure alimony and child support unconnected with dissolution. A spouse may sue for alimony and support even if neither spouse satisfies the six-month residency requirement. See *Howell v. Howell*, 545 So.2d 933 (Fla. 2d DCA 1989); *Martin v. Martin*, 128 So.2d 386 (Fla. 1961). *F.S.* 61.09 does not require either of the parties to be a resident of the state for purposes of filing an action for alimony or child support. *Graham v. Graham*, 648 So.2d 814 (Fla. 4th DCA 1995); *Weinschel v. Weinschel*, 368 So.2d 386 (Fla. 3d DCA 1979). Florida courts have subject matter jurisdiction to award alimony and child support even though neither party is a resident of Florida at the time the petition is filed if there is a basis for personal jurisdiction over the respondent. *Martin*.

Florida courts have jurisdiction to equitably distribute a military pension as property or as a source from which to pay alimony or child support. *Pastore v. Pastore*, 497 So.2d 635 (Fla. 1986); *Diffenderfer v. Diffenderfer*, 491 So.2d 265 (Fla. 1986); see *F.S.* 61.076. Once pension assets are distributed, the court may consider those assets equitably distributed to a party in determining ability to pay alimony. *Acker v. Acker*, 30 FLW S235 (Fla. 2005).

If equitable distribution of a military pension is sought, personal jurisdiction over the servicemember based on residence other than by military assignment, based on domicile, or obtained by consent or participation in the litigation is required. 10 *U.S.C.* §1408(c)(4). Express consent to pension jurisdiction is not required; participating in the case on the merits or requesting affirmative relief is sufficient for purposes of federal law. *Allen v. Allen*, 484 So.2d 269 (La. Ct.App. 1986). The Florida Supreme Court has held that a respondent in a civil case waives a challenge

to personal jurisdiction by seeking affirmative relief. *Babcock v. Whatmore*, 707 So.2d 702 (Fla. 1998). In that case, however, the court held that a motion to have previous judgments declared void under *Fla.R.Civ.P.* 1.540(b) did not constitute seeking affirmative relief.

II. [§8.7] PAY AND ALLOWANCES

Personnel of the uniformed services of all ranks and grades are paid according to pay grade and length of service. See 37 *U.S.C.* §203. They may also receive special or incentive pay of various types, including aviation pay, sea pay, hazardous duty pay, duty under hostile fire pay, and professional pay for doctors and dentists. 37 *U.S.C.* §§301–323.

In the past, when quarters were not furnished, servicemembers received an additional monthly allowance for quarters (BAQ). This allowance varied according to pay grade and whether the servicemember had dependents. Effective January 1, 1998, this allowance was replaced by the basic allowance for housing (BAH). See 37 *U.S.C.* §403. This new allowance was developed to improve housing allowances for servicemembers, taking into account complaints with the old BAQ/VHA (variable housing allowance) system. See DOD, FMR, Vol. 7A, Ch. 26, Interim Change 14-99.

A servicemember assigned within the United States who is not furnished government housing is eligible for BAH, based on the member's number of dependents and geographic location. See 37 *U.S.C.* §§403(a)–(b). BAH-DIFF is the allowance for a servicemember who is assigned to single quarters and is eligible for BAH only because he or she pays child support. A servicemember is not entitled to this allowance if the monthly amount of child support is less than the BAH-DIFF. 37 *U.S.C.* §403(m)(2). BAH-DIFF is the amount to be concerned with when calculating child support in a dissolution of marriage. Child support should be calculated using the lesser allowances the servicemember will receive after dissolution of the marriage. However, if the servicemember will be moving into government quarters, this "in-kind" compensation should be considered under *F.S.* 61.30(2)(a)13.

A servicemember serving overseas, including in United States protectorates, who is not furnished government housing is eligible for Overseas Housing Allowance (OHA), based on the number of dependents. 37 *U.S.C.* §403(c). If the member is serving an unaccompanied tour, the member is eligible for BAH at the with-dependents rate based on the dependents' ZIP code in the United States, plus OHA at the without-

dependents rate if not furnished government housing overseas. 37 *U.S.C.* §403(d).

For BAH rates, see the Defense Finance And Accounting Service website at www.dfas.mil.

When an enlisted servicemember is allowed to reside off base, the commander may authorize the payment of "separate rations," an amount intended to cover the cost of meals. 37 *U.S.C.* §402. All officers receive an amount as basic allowance for subsistence (BAS). *Id.* Although BAQ and BAS/separate rations are not taxable, they are subject to inclusion in the computation of a servicemember's ability to pay alimony and child support. See *F.S.* 61.30(2)(a)13.

Some members who are subject to sea duty or remote assignment, such as members of the Coast Guard and Navy, may be entitled to a Family Separation Allowance (FSA) while they are separated from their families. 37 *U.S.C.* §427. Provision is made for continuation of payments and allotments for missing service personnel in 37 *U.S.C.* §§551–559.

Reserve personnel may be entitled to pay and allowances. 37 *U.S.C.* §206. Whether they receive pay as reservists depends on their reserve billet or slot. Some reservists serve in nonpaying slots and others are paid for each four-hour drill period. Those reservists serving in nonpaying slots serve for the purpose of acquiring points toward their retirement. It should be noted that reserve retirement pay, although not received until age 60, is subject to equitable distribution under the Former Spouse's Protection Act just as is active duty retirement pay. Points accumulated during the marriage should be determined in this regard. Points are acquired throughout the year. Generally, a reservist acquires 50 points per year — four per month plus "gratuitous" points, not to exceed 50, if the reservist drilled only one weekend per month. The gratuitous points allow for a missed drill or two. See 10 *U.S.C.* §1408 regarding retirement pay generally and §§8.26–8.27 below for discussion of division of retirement pay. See also www.va.gov regarding calculation of retirement.

Servicemembers are paid on the first and fifteenth days of the month unless they wish to be paid once a month. Every member also receives monthly leave and earnings statements. These statements reflect all of the member's entitlements, allotments, and deductions. Because of restrictions imposed by the Privacy Act, 5 *U.S.C.* §552(b), a court order must be secured to obtain release of these records without the member's

consent. But see *Fla.Fam.L.R.P.* 12.285, requiring production of pay stubs as part of mandatory disclosure in a dissolution of marriage proceeding.

D. [§8.16] Procedure To Obtain Support

Any dependent not receiving adequate support may contact either the servicemember's immediate commanding officer or the personnel department of that particular service. A letter to the commander of a determined recalcitrant may prove to be ineffectual, but in most cases it will produce results, because military regulations require the commanding officer to take all necessary and reasonable measures to find an equitable solution to problems concerning support. See, *e.g.*, 32 C.F.R. §584.2. If satisfaction is not obtained, the base or installation commanding officer may be contacted. That officer will usually refer the matter to the staff judge advocate to investigate, make recommendations, and counsel with the servicemember and the immediate commander.

In the absence of an agreement between the parties concerning what constitutes reasonable support, the matter may be referred to the personnel department of the particular service. If the servicemember, after counseling and without good cause, fails to resolve the issue or if his or her actions tend to bring discredit on the service, the immediate commander will determine if a sufficient basis exists to warrant administrative or disciplinary action. This normally will not be done if the servicemember is complying with all financial obligations to the best of his or her ability.

In a case of continued irresponsibility or acts of evasion, fraud, or deceit, the following administrative or disciplinary action may be taken:

- Administrative admonition or reprimand.
- Proceedings to determine the fitness of the offender to be retained in the service.
- Nonjudicial punishment under Article 15 of the Uniform Code of Military Justice.
- Trial by court-martial on the basis of financial irresponsibility.

A compulsory allotment may be established administratively to provide adequate support for the dependents of any servicemember under certain emergency conditions.

See 32 C.F.R. §§584.1 and 733.4 for specific policies.

E. [§8.17] Mandatory Allotment For Support Of Dependent Children

Mandatory allotments for support of dependent children are authorized by 42 *U.S.C.* §665, 32 C.F.R. §§584.9 and 733.3, and 33 C.F.R. §54.01. The relationship is not dependent on a continued marriage of the parents. The statute and regulations specifically require a court order stating that there is an arrearage in child support of two or more months, the amount of the arrearage, and the way in which it is to be discharged, including the amounts of monthly payments and when they are to terminate. The servicemember's full name and social security number, a certified copy of the order awarding support, and a notice and statement that the support payments are at least two months in arrears must be provided. The regulations should be reviewed carefully and complied with. Any defect in the submission will result in a denial. See 32 C.F.R. §584.9.

Although children born out of wedlock do not qualify for an allotment, the services recognize an obligation of the father to support his child if paternity is established or acknowledged. Regulations relating to paternity claims appear in 32 C.F.R. §§584.3 and 733.5.

F. [§8.18] Medical Benefits

Because dependents are eligible to receive comprehensive medical treatment from both civilian and military medical facilities, determining the amount of actual financial support a servicemember should provide for dependents after separation or dissolution of marriage involves more than a mere calculation based on available monthly take-home pay. A servicemember's spouse, until a final judgment of dissolution of marriage has been entered, and children, until they fail to qualify as dependents, are entitled to complete hospitalization and out-patient care. The servicemember thus is relieved almost entirely of the duty to pay medical expenses. The attorney should note, however, that dependents of reserve personnel do not have the same benefits unless the servicemember is on active duty.

If civilian facilities are to be used, the TRICARE military benefit program will pay for many costs and is the government's health insurance program for all seven of the uniformed services. All active duty servicemembers and their families, retirees and their families, and survivors who are not eligible for Medicare may participate in at least one of three TRICARE programs. TRICARE replaced CHAMPUS (Civilian Health and

Medical Program of the Uniformed Services) as the government's version of health care reform. Eligibility for TRICARE is determined by the individual services and the member must be enrolled in DEERS (the Defense Enrollment Eligibility Reporting System). For information about TRICARE, see www.tricare.osd.mil.

After entry of a final judgment of dissolution of marriage, a non-military spouse who was married for at least 20 years during the service-member's career of at least 20 years is entitled to continued military medical benefits as long as that person remains unmarried and does not have coverage under an employer-sponsored plan. See 10 *U.S.C.* §1072(2)(F); 32 C.F.R. §199.3(b). In counting creditable service, both active duty and reserve time are included, as long as the time is creditable in determining the member's or former member's entitlement for retirement or retainer pay. A spouse who was married to a servicemember for at least 20 years but whose marriage overlapped a 20-year service career by only 15 years is entitled to continued military medical benefits for a period of two years following entry of the final judgment of dissolution of marriage. This benefit also terminates on remarriage. 10 *U.S.C.* §1072(2)(G); 32 C.F.R. §199.3(b).

Divorced spouses of servicemembers are also eligible for three years of TRICARE-type coverage if they have not remarried and do not fall within either the 20/20/20 or 20/20/15 rules. 10 *U.S.C.* §1078a(b)(3). A person receiving continued health care coverage is required to pay into a military health care account the necessary premiums for the 36 months of available coverage. 10 *U.S.C.* §§1078a(f)–(g). See 10 *U.S.C.* §1078a(g)(4)(B) regarding extended coverage for spouses receiving a portion of the member's retirement pay.

As protection against the possibility that the servicemember will leave the service other than through retirement, the support order or agreement can include a provision of responsibility for all medical expenses incurred that would have been paid had the servicemember remained in the service until normal retirement. This would provide a basis for compelling the purchase of medical insurance should the servicemember leave the service. Medical expense orders for children should be labeled "child support" to allow collection by methods such as reducing arrears to judgment and issuance of an income deduction order through the Defense Finance and Accounting Service.

G. [§8.19] Exchange And Commissary Benefits

When determining the amount of support to be awarded dependents, consideration also should be given to whether exchange and commissary facilities will continue to be available to the family, because some savings can be realized by taking advantage of those facilities. Servicemembers should arrange for identification cards for dependents to allow them access to military facilities without the servicemember being present. In addition to dependent children, some former spouses who have not remarried retain their entitlement to commissary and exchange privileges. See 10 *U.S.C.* §1062.

H. [§8.20] Extra-Judicial Relief For Nonsupport

All branches of the service have regulations requiring their members to support dependents unless they have a valid legal reason for not doing so. See §§8.9–8.14. A servicemember may be disciplined if that obligation is not met. The legal reasons for not supporting dependents may include abandonment or desertion of the servicemember by the petitioning unsupported spouse or, perhaps, adoption of the servicemember's children by the former spouse's new spouse. Inability to pay or insufficient funds is not a valid legal reason for nonsupport under the various service regulations. Although Class Q allotments are a thing of the past, see §8.15, a commander often can persuade a nonsupporting servicemember to take out a voluntary allotment to cover the support of dependents.

Because nonsupport potentially involves discipline under the Uniform Code of Military Justice (see §8.16), counsel should phrase requests for support carefully to avoid even the appearance of using criminal laws to benefit a party in a civil matter, because this could subject counsel to a charge of extortion or abuse of process in many states.

The services are without authority to specifically enforce judicial orders of support, although they have authority to force the servicemember to support dependents to some degree. All servicemembers stationed in the United States, however, are subject to the jurisdiction of the various state courts under the Uniform Interstate Family Support Act, *F.S.* Chapter 88, notwithstanding the Servicemembers Civil Relief Act. See, *e.g.*, 32 C.F.R. §§584.1, 733.4.

I. Garnishment To Enforce Support Orders

1. [§8.21] Office For Service

Garnishment of a servicemember's pay is governed by 32 C.F.R.

§§584.8 and 734.1. All correspondence should include the servicemember's full name, status (active duty or retired), and social security number. Consolidation of the various finance offices maintained by the individual branches of service has been completed. The following office now processes all court-ordered garnishment and division of retirement pay:

Defense Finance and Accounting Service
Cleveland DFAS-DGG/CL
P.O. Box 998002
Cleveland, OH 44199-8002
866/859-1845

See www.dfas.mil. For further information see 32 C.F.R. §§584.8, 743.3, 33 C.F.R. §54.07.

2. Amounts Subject To Garnishment

a. [§8.22] In General

Amounts subject to garnishment under federal law are restricted by 15 *U.S.C.* §1673. See §8.23. "Disposable earnings" available for garnishment means those earnings "remaining after the deduction from those earnings of any amounts required by law to be withheld." 15 *U.S.C.* §1672(b). Withholding generally includes federal income taxes, federal social security taxes, and state and local withholding taxes. Discretionary amounts that are deducted for union dues, allotments, credit union accounts, insurance allotments, savings bond allotments, and the like are not required by law to be withheld and are included within the term "disposable income." Previously, disability benefits received for service-connected disabilities were exempt from garnishment. Amounts received could be used to compute income for alimony or support and factored into the "ability to pay" analysis used in contempt proceedings. Effective February 1997, disability benefits received by a retired servicemember who has waived regular military retirement are subject to garnishment. 42 *U.S.C.* §659(h)(1)(A)(v).

"Earnings" are defined as compensation paid "for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." 15 *U.S.C.* §1672(a). Consequently, certain military pay and allowances are not included, such as quarters, subsistence, and clothing allowances and readjustment pay, if applicable.

b. [§8.23] Restrictions

Restrictions on garnishment are established in 15 *U.S.C.* §1673. When an individual is supporting a spouse or dependent child other than the child referenced in the writ of garnishment, 50% of the individual's disposable income is subject to garnishment. 15 *U.S.C.* §1673(b)(2)(A). When the individual is not supporting a spouse or dependent child, 60% of the individual's disposable earnings are subject to a writ of garnishment. 15 *U.S.C.* §1673(b)(2)(B). When support is in arrears by 12 or more weeks, the amounts subject to a writ of garnishment are increased by 5% to 55% and 65%, respectively. 15 *U.S.C.* §1673(b)(2).

3. [§8.24] Form For Proposed Order

IN THE CIRCUIT COURT FOR
..... COUNTY, FLORIDA

Case No. .....

.....,
Petitioner
vs.

.....,
Respondent.

ORDER DETERMINING ARREARS AND DIRECTING ISSUANCE OF A CONTINUING WRIT OF GARNISHMENT

THIS ACTION was heard on the petition of the .....wife/husband..... for issuance of a continuing writ of garnishment. The court having found that the .....husband/wife....., ...(name)....., ...(social security number)....., is in arrears in support payments as of .....(date)....., in the amount of $....., and that the .....husband/wife..... is presently a .....member/retired member..... of the .....(branch of service)..... and .....has/has not..... remarried, and the court having been otherwise fully advised in the premises, it is

ADJUDGED that:

1. The .....husband/wife..... is in arrears in .....child support/ alimony/child support and alimony..... payments as of .....(date)....., in the amount of $.....

2. The petition for issuance of a continuing writ of garnishment is granted.

3. Until all the arrears in this action have been paid, the garnishee, ...(name)....., shall deduct monthly from the .....salary/pension..... of the .....husband/wife..... so much of the .....husband's/wife's..... .....salary/pension..... as is not exempt from garnishment under the provisions of 15 U.S.C. §1673.

4. On payment of arrearages owed by the .....husband/wife..... for unpaid support, the garnishee shall deduct from the .....salary/pension..... of the .....husband/wife..... the sum of $..... per month ($..... for child support for the minor children of the parties; $..... for alimony), provided that this deduction shall not be for an amount in excess of that allowed under 15 U.S.C. §1673.

COMMENT: Insert the following, if applicable.

5. Because the .....husband/wife..... has remarried, the .....husband/ wife..... is entitled to an exemption of 45% under 15 U.S.C. §1673.

6. The garnishee shall disburse all payments required to be deducted by this writ to .....(address)....., and shall identify each check with the following support number: ..... The clerk shall disburse all payments received from the garnishee to the .....wife/husband.....

7. This writ shall be served on the garnishee by .....regular mail/certified mail/the appropriate authorities..... and the garnishee shall serve an answer to this writ on .....(name)....., the attorney for the petitioner, at .....(address)....., within 20 days after service on the garnishee, exclusive of the day of service, and shall file the original with the clerk of this court either before service on petitioner's attorney or immediately thereafter, stating whether the .....husband/wife..... is receiving a .....salary/pension..... from the garnishee, the amount of the .....salary/pension....., and whether the garnishee intends to abide by the provisions of this writ of garnishment.

Circuit Judge

Copies furnished to: .....

J. [§8.25] Involuntary Allotments

Because the components of military pay subject to garnishment and the standard income deduction order may provide limited relief, seeking an involuntary allotment may secure additional monthly support amounts. The basic requirements for that allotment are a state court support order for child support or child support and alimony, and an arrearage equal to or exceeding the support required for a two-month period. 42 *U.S.C.* §665. See, *e.g.*, 32 C.F.R. §§112.1 *et seq.* Because an allotment may be made from "pay and allowances," basic allowance for housing, basic allowance for subsistence, sea pay, hazardous duty pay, professional pay, and other components of military pay may be reached using the involuntary allotment procedure. 42 *U.S.C.* §665.

The state order is sent to the Defense Finance and Accounting Service, stating that the requisite arrearage exists and requesting that a mandatory allotment be started. The finance center notifies the member's commander and the member concerning the request. Unless the member presents an adequate defense, an involuntary allotment is started. This remedy-at-law often is preferable to the use of contempt to collect arrearages.

An involuntary allotment application may be obtained from the Defense Finance and Accounting Service, Cleveland Center. See §8.29.

III. Division of Military Retired Pay

1. [§8.26] In General

A military pension is an asset subject to equitable distribution. 61.075(5)(a)(4), FS. Often, the military pension is the largest asset of a military family in a long term marriage. A portion of a servicemember's retired pay may be allotted directly to the former spouse under court order. 10 *U.S.C.* §1408(d)(1); see *DeLoach v. DeLoach*, 590 So.2d 956 (Fla. 1st DCA 1991), *disapproved on other grounds* 703 So.2d 451. The Deloach fraction is the method normally used in Florida to equitably distribute a military pension, awarding the non-military spouse a portion of the military pension, based upon a fraction the numerator of which is the total years and months of marital military service, and the denominatior of which is the total years, marital and non-marital, of military service. In this fashion, the non-military spouse receives a portion of the military pension, "if, as, and

when" the military member receives the pension. This is known as the "deferred distribution" method. See *DeLoach*, *supra*. Under federal law, to take advantage of the direct allotment provisions, the spouse must have been married to the member for at least 10 years during the member's active service. 10 *U.S.C.* §1408(d)(2). The court order must specify either the dollar amount or the percentage that the spouse is to receive. 10 *U.S.C.* §1408(a)(2)(C). If a percentage is used, the recipient spouse will also receive his or her share of annual cost of living increases. If the parties were married less than 10 years, the pension is still subject to equitable distribution under Florida law. See *F.S.* 61.076. The remedy of a continuing writ of garnishment should be considered to enforce payment. Contempt proceedings, however, are not available to enforce property distribution awards.

The Defense Finance and Accounting Service, Cleveland Center, published a Former Spouse's Protection Act Bulletin on October 23, 1995, that affects retirement splits and provides additional flexibility. Orders dividing military retired or retainer pay served on or after April 1, 1995, may provide for the payment of an amount expressed in terms of a formula (if the only element missing is the member's years of service) or may provide for the payment of an amount expressed in terms of a hypothetical retired pay amount. For formula and hypothetical awards, the parties must have been divorced while the member was on active duty. When the court order is expressed in terms of a formula and the element missing from that formula is the member's years of service, Defense Finance will supply the member's years of service in terms of whole months. Court orders expressing a division of retired pay in terms of a hypothetical amount will be computed on the basis of the member's pay at the time of retirement. This policy should reduce the need for postjudgment clarification orders and simplify negotiations concerning equitable distribution of the military pension.

Because Florida is an equitable distribution state, military pension distribution is not properly an exercise in mere mathematics, regardless of how convenient this may appear to the parties or the court. The military pension may be treated as solely the property of the member or as a stream of income from which alimony and child support is paid, depending on the necessities and equities of the case. The court should weigh the statutory factors in *F.S.* 61.075, and an unequal distribution of pension benefits may be made. Lengthy separation of the parties, assumption of marital debt, childrearing and homemaking responsibilities, distribution of offsetting assets, and other equitable considerations should be weighed and findings of fact made by the court. *F.S.* 61.075(1)(a); see *Karimi v. Karimi*, 867

So.2d 471 (Fla. 5th DCA 2004).

The amount of the retirement plan available for distribution may not include any contributions made after the date of the original judgment of dissolution of marriage. *Boyett v. Boyett*, 703 So.2d 451 (Fla. 1998), Oglesby v. Oglesby, 921 So. 2d 849, (Fla. 2 DCA, 2006). Therefore, enhancements in the value of a military pension based on longevity or promotion accruing after the final judgment of dissolution should be excluded from equitable distribution. Lawrence v. Lawrence, 904 So.2d 445 (Fla. 3 DCA, 2005). The final judgment must delineate marital and nonmarital assets and make specific factual findings to support the distribution of marital assets, whether equal or unequal. See *F.S.* 61.075(3); *Coons v. Coons*, 765 So.2d 167 (Fla. 1st DCA 2000). If the active duty member has not yet retired, it may be appropriate to reserve jurisdiction to enter a "clarifying order" after the member retires and when the total years of service are known. This is so because it is impossible to know how to value the military pension precisely without knowing the total years of military service, some of which will be non-marital and must be excluded from an assessment of the marital value of a military pension. Occasionally, there are sufficient marital assets to reduce the pension to a present value and make distribution of other assets to the spouse while awarding the pension to the servicemember. This is known as the "immediate offset" method of equitable distribution. See *DeLoach, supra.* In this case, competent evidence regarding the value of the retirement benefits will be needed, normally through the use of expert testimony and reducing the pension to present value. Smith v. Smith, 31 FLW D2019 (Fla. 2 DCA, 2006).

In Florida, a party may not petition for modification to obtain a share of the former spouse's military pension. The doctrine of res judicata bars the action. *Love v. Love*, 770 So.2d 256 (Fla. 1st DCA 2000). Accord, *Foster v. Foster,* Vol.32, No. 44, FLR, (Ark. Ct. App, 2006).

2. Conversion To Disability Benefits

a. [§8.27] In General

An ongoing problem for the nonmilitary spouse is the waiver by the member of retirement benefits for a disability pension. In this context, the term "disability pension" refers to a member who has earned the right to longevity retirement pay, but has waived the right to receive all or a portion of his longevity retirement pay in exchange for a tax-free disability pension. Under *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675

(1989), this type of disability pension is not "disposable retirement pay" under 10 *U.S.C.* §1408 and is thus not subject to equitable distribution. (See In re Landis, Vol. 31, No. 30, FLR (Or. Ct. App, 2005 for discussion of lump sum disability benefits subject to equitable distribution).

If the agreement or final order requires that the nonmilitary spouse receive a portion of "disposable retirement pay", and after the entry of the final judgment of dissolution of marriage the member waives his or her regular retirement pay in whole or in part for a disability pension, an inequity may result. The Florida Supreme Court has held that the parties may agree to an indemnification provision requiring the military spouse to pay an amount equivalent to what would have been received as a portion of retirement benefits without violating *Mansell*. *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997).

Relief available if an indemnification provision was not included in the final judgment or agreement has been addressed by a Florida court. In *Longanecker v. Longanecker*, 782 So.2d 406 (Fla. 2d DCA 2001), there was an agreement for the husband to pay the wife $157.76 per month from his net disposable retirement pay as lump sum alimony to make equitable distribution. The court agreed that the conversion of the regular pension into a disability pension meant that the pension could not be reached under *Mansell,* but that the requirement to make the payment was enforceable. Accord, *Janovic v. Janovic*, 814 So.2d 1096 (Fla. 1 DCA, 2002), *Padot v. Padot,* 891 So.2d 1079 (Fla. 2 DCA, 2004; *U.S. Rev. Sought).* See also *Robinson v. Robinson*, 647 So.2d 160 (Fla. 1st DCA 1994) (payment of retirement benefits was alimony rather than property settlement).

There is a split of authority in other jurisdictions. Some cases have held the nonmilitary spouse to be without remedy. See, *e.g.*, *Ashley v. Ashley*, 990 S.W.2d 507 (Ark. 1999); *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct.App. 1999). But see *Surratt v. Surratt*, 148 S.W.3d 761 (Ark. Ct.App. 2004). Other cases allow a remedy by directing reconsideration of the property distribution based on equitable considerations and the intent of the parties. See, *e.g.*, *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct.Spec.App. 1995); *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996). In *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001), the court held that the former spouse's interest in the military retirement benefits vested at the time of the dissolution judgment and could not be altered after the final judgment by the husband converting the asset to a disability pension. See also *In re Marriage of Gaddis*, 957 P.2d 1010 (Ariz. Ct.App. 1997) (offset in retirement pay for civil service employment).

In *In re Marriage of Gahagen*, 690 N.W.2d 695 (Iowa Ct.App. 2004), the court protected the nonmilitary spouse from losing her share of pension benefits, after the husband waived a portion of his regular military retirement to receive a disability pension, by ordering that the husband pay to the wife 50% of his disposable retirement pay. The court in the decree stated that, if the husband receives disability pay or civil service income and either of these events causes a reduction of the husband's net disposable retirement pay, thus reducing the wife's share, the husband will pay to the wife directly each month any amount that is withheld by Defense Finance for that reason. The husband then waived a portion of his regular retirement pay and filed a motion to modify the final judgment alleging that enforcement of the judgment would violate *Mansell*, by in effect requiring him to divide his disability pension with his former wife. The court, citing to the Florida case of *Abernethy v. Fishkin*, found that the trial court's order did not violate *Mansell,* as long as the order did not require the former husband to directly pay over his disability benefits to the former wife and any make up amounts were to be paid from a source of funds other than the disability. See also *In re Marriage of Nielsen & Magrini*, 792 N.E.2d 844 (Ill. App.Ct. 2003); *Rhoades v. Rhoades*, 85 P.3d 246 (N.M. Ct.App. 2003), *Resare v. Resare*, Vol. 33, No. 2, FLR (RI, 2006).

It can now be fairly stated that most if not all military jurisdictions will not permit the postjudgment conversion of a regular military retirement benefit into a disability benefit to deprive the nonmilitary spouse of an agreed or court-ordered division of retirement benefits, with or without an indemnity provision.

However, some disabled veterans work and earn supplemental income; others do not. Retaining jurisdiction over an alimony award may provide another solution. The need and ability to pay analysis involved in alimony determinations is appropriate when the military spouse elects disability retirement after the final judgment. When a case comes back to the court after conversion of the retirement benefits to a disability pension, the court must take care to perform an appropriate analysis of the financial equities. Merely awarding "dollar for dollar" in spousal maintenance to compensate the nonmilitary spouse was held to be disingenuous in *Perkins v. Perkins*, 26 P.3d 989 (Wash. Ct.App. 2001).

Although enforcement of the non-military spouse's rights to receive an equitable distribution of pension benefits has advanced in the reported cases, enforcement problems remain because normally the remedy of contempt is not available to enforce equitable distribution orders, nor is income deduction available because military pension benefits are not

alimony or child support. *Padot at 1083, supra.* The informed attorney will therefore craft agreements allowing enforcement of pension benefits as alimony as well as equitable distribution payments, when the pension benefits are needed for the support of the non-military spouse.

Another common problem is the merger of military retirement with the Federal Employees' Retirement System (FERS) or Civil Service Retirement System (CSRS) pension. This situation has been addressed by a "prevention of circumvention" statute. Effective January 1, 1997, when a servicemember waives retired pay to enhance a CSRS annuity or FERS retirement, the member must authorize the director to pay an annuity in an appropriate amount to the former spouse. 5 *U.S.C.* §8332(c)(4).

b. [§8.28] Concurrent Receipt

In the past, the requirement of a dollar-for-dollar waiver of regular military retirement pay to receive disability benefits meant that "concurrent receipt" was not permitted. In 2002, Congress approved a limited concurrent receipt law benefiting a small group of disabled retirees. The FY 2003 defense bill authorized Combat Related Special Compensation (CRSC) for certain disabled retirees who had at least 20 years of active duty and had a Purple Heart and at least a 10% disability connected to a war injury suffered in active duty or disability ratings of 60 to 100% related to combat operations. The 2004 Defense Authorization Act, Pub.L.No. 108-136, 117 Stat. 1392 (Nov. 24, 2003), however, also expanded CRSC to cover any combat operations disability of any percentage and extended eligibility to National Guard and reserve retirees. Reserve and guard members had not been previously covered in the legislation. CRSC payments did not have a "phase in" period for qualified applicants. See 10 *U.S.C.* §1413a. CRSC has little effect on family law matters, except as to alimony, because these payments are a new category of compensation and do not affect regular retirement pay. The legislation was significant, however, because it provided for "concurrent receipt" of both regular retirement and CRSC pay.

The FY 2004 Defense Authorization Act, however, also created "Concurrent Disability Pay" (CDP). See 10 *U.S.C.* §1414. Qualified individuals include all retirees with 20 or more years of service and a VA disability rating of 50% or higher. Chapter 61 medical retirees and National Guard and reserve retirees with more than 20 years' service and a service-related disability rating of 50% or more are also qualified. These individuals will have their retired pay offsets or "VA waivers" phased out over a 10-year period. Therefore, they will begin to receive both their regular

longevity retired pay and their VA disability compensation. Because of this legislation, former spouses who received a portion of the servicemember's retirement pay by court order and then "lost" their benefits because of a disability waiver will need to contact the Defense Finance and Accounting Service to request resumption of their payments.

The National Defense Authorization Act of 2005, Pub.L.No. 108-375, 118 Stat.1811 (Oct. 28, 2004), amended 10 *U.S.C.* §1414 to eliminate the phase-in plan for individuals with a 100% disability rating as of January 1, 2005.

Concurrent receipt raises several unresolved issues:

- Is concurrent receipt a basis to increase alimony?
- Is concurrent receipt an exceptional circumstance that would justify modifying a property distribution in a case in which concurrent receipt is, in effect, an "omitted asset?"
- Is there any other legitimate basis on which to open a final judgment to divide a marital benefit that did not exist at the time of the dissolution?

3. [§8.29] Direct Allotment To Former Spouse

To take advantage of the direct allotment provision of the Former Spouses' Protection Act, 10 *U.S.C.* §1408(d), the recipient spouse must serve a certified copy of the final judgment of dissolution of marriage or court order distributing retired pay, by certified mail, return receipt requested, on

Defense Finance and Accounting Service
Cleveland Center, Code L C Room 1417
Garnishment Operations Directorate
Post Office Box 998002
Cleveland, OH 44199-8002

Ordinarily, provisions for direct payment of a portion of retirement benefits are included in the final judgment of dissolution of marriage. Care must be taken to include identifying data for both of the parties, including their social security numbers and dates of birth, as well as certification that the member's rights under the Servicemembers Civil Relief Act were observed. *F.S.* 61.076(2). Under provisions of the Former Spouses' Protection Act, the allotment cannot exceed 50% of a retired member's disposable

retired pay. 10 *U.S.C.* §1408(e)(1).

V. [§8.30] Insuring Military Retired Pay

If military retired pay is equitably distributed and the amount is of substantial value, it should be adequately insured, because the pension distribution stops on the death of the retired servicemember. Although all active duty servicemembers have Servicemen's Group Life Insurance, normally in the amount of $400,000.00, court orders cannot regulate this benefit. The proceeds pass to the designated beneficiary regardless of fraud, constructive trust, or breach of contract on the part of the deceased member. Therefore, even though a state court order based upon a marital settlement agreement may provide SGLI insurance benefits for a spouse or minor child of a marriage, the order can be defeated by the member not complying threwith or altering a designation made after the dissolution of marriage. If this occurs, and the servicemember dies, there are few remedies available to the injured party as the member's estate, if there is one, is not liable. This is based on the doctrine of federal preemption discussed in *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981). The *Ridgeway* decision has been followed by the federal circuit courts, even though the results are often unjust. See *Dohnalik v. Somner,* Vol. 32 No. 48 FLR, (5th Cir. 2006). The one exception to *Ridgway* is if the insured is unable to make a beneficiary change because of incapacity. In that case, the insurance company and the beneficiary must be named parties and the proceeds impleaded. Expert psychiatric testimony will be needed to void the "irrational" designation.

If a private policy is used to secure the military pension benefits, the problem created by *Ridgway* is avoided. However, because private life insurance policies may lapse unless assigned, the attorney should consider a Survivor Benefit Plan (SBP) under 10 *U.S.C.* §1448.

An SBP is available to active duty members, and open enrollment for retired members is made available periodically. Divorcing parties may agree to an SBP election or a court may order an SBP election to provide an annuity to the deceased servicemember's surviving former spouse or surviving dependent children. Within one year of the dissolution of marriage, the servicemember must file a former spouse election form. 10 *U.S.C.* §1448(b)(5). Failure by counsel to serve the deemed election form may be a serious liability problem should the servicemember die, leaving a former spouse without the lifetime annuity contemplated by an SBP.

This issue was recently explored in *Wise v. Wise*,) 768 So.2d 1076

(Fla. 1st DCA 2000). The husband and wife, at the time of the husband's retirement from the military, had elected an SBP naming the parties' minor daughter as beneficiary. When the parties divorced several years later, a stipulated final judgment required the husband to elect his former wife as the SBP beneficiary. The husband failed to do so and the wife moved for enforcement and contempt. The trial court ordered the former husband to complete the necessary paperwork and he appealed. The appellate court noted that the former wife had failed to file a "deemed election" within one year of the final judgment, which would have been effective to lock in the former husband's SBP benefit. Because of this failure, the wife was without a direct remedy. However, the court remanded the case to the trial court to reconsider equitable distribution in light of this situation.

For further discussion, see Cushing, *The Ten Commandments of Military Divorce: Representing the Non-Military Spouse*, 69 Fla. Bar J. 66 (July/Aug. 1995); 69 Fla. Bar J. 84 (Oct. 1995).

M. [§8.32] Voluntary Separation Incentive And Special Separation Bonus

The Voluntary Separation Incentive (VSI) and Special Separation Bonus (SSB) programs provide benefits to servicemembers leaving the service before becoming eligible for retirement. See 10 *U.S.C.* §§1174a, 1175. The Florida Supreme Court has held that these programs are sufficiently similar to retirement benefits that an agreement or court order distributing military retirement may be enforced against these benefits. *Kelson v. Kelson*, 675 So.2d 1370 (Fla. 1996).

In *Abernethy v. Fishkin*, 638 So.2d 160 (Fla. 5th DCA 1994), however, the trial court ordered the husband to pay a percentage of his VSI benefits directly to the wife. The husband later waived a portion of his VSI benefits and elected to receive a disability pension. The Florida Supreme Court held that the disability pension could not be used as a source of payment of the husband's obligation to split the pension with the wife, but did not preclude the use of other assets to make the required payments. *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997). Regulations effective in March 1998 make VSI and SSB benefits subject to garnishment for child support and alimony. 5 C.F.R. §§581.103(b)(16)–(b)(17). Reserving jurisdiction over alimony would also make payments readily enforceable despite *Abernethy*.

H. [§8.40] The Florida Bar

In meeting its responsibility to servicemembers stationed in Florida, The Florida Bar has created the Military Affairs Committee. This committee engages in a wide variety of public services on behalf of the bar. Principal among them is the charge to ensure that military attorneys temporarily stationed in Florida are adequately prepared to deliver legal services to members of the military.

Through Operation Stand-By, the committee publishes a directory of Florida civilian lawyers who have volunteered to respond to military legal assistance offices regarding problems of local law. The directory is available from The Florida Bar or by calling 800/342-8011. The Take-One program ensures that each military legal assistance office has access to public service pamphlets published by The Florida Bar Public Information and Bar Services Department (see www.FloridaBar.org).

Through its Liaison Program, the committee seeks to assign a member of The Florida Bar to every military legal assistance office throughout Florida. This program increases communications with military attorneys and improves services to military personnel. The committee also provides annual symposiums; reviews proposed and enacted legislation affecting servicemembers, dependents, and retirees; and publishes periodic newsletters containing both committee information and professional notes.

I. [§8.41] American Bar Association

The American Bar Association, Family Law Section, Military Committee, publishes a semi-monthly newsletter, *Roll Call*, and provides legal assistance to military and family law attorneys worldwide by lecturing, training, and mentoring young attorneys representing military personnel and their dependents. A website at www.abanet.org/family/military provides a broad range of materials and advice for attorneys practicing in this area.

Operation Enduring LAMP is an ongoing project of the ABA Standing Committee on Legal Assistance for Military Personnel. A consortium of state and local bar associations recruits volunteer attorneys to assist military attorneys with civil law matters affecting servicemembers. For more information see www.abanet.org/legalservices/helpreservists/home.html.

VI. [§8.44] SERVICE OF PROCESS AND APPEARANCE IN LITIGATION

Florida has concurrent jurisdiction for the service of civil and

criminal process over state lands ceded to the United States. *F.S.* 6.04. A servicemember who resides on a military reservation in Florida, therefore, is not immune from process in any civil or criminal action. *Valverde v. Valverde*, 121 Fla. 576, 164 So. 287 (1935); Att'y Gen. Op. 46-77. For service of process in Florida, the sheriff of the county in which the military installation is located can serve the member, who will be called to the security office to accept service. For Florida process to be served outside of Florida, the active duty servicemember will be given a choice to accept or reject service. Service overseas must be made in accordance with international law.

All of the uniformed services have a policy of cooperation with civil authorities, and there are few restrictions on service of process. The staff judge advocate at the military installation can advise on restrictions and will also advise the servicemember of all rights and obligations. If it will not interfere unreasonably with duty, a servicemember will be permitted to attend trials as a witness or, if that is not practicable, a deposition can be taken. Before serving a member with process or seeking to obtain his or her appearance at trial or deposition, the practitioner should consult the appropriate regulations for the military installation and seek assistance from the local staff judge advocate. Examples of these regulations can be found in 32 C.F.R. §516.10 (Army) and §§720.20–720.21 (Navy).

VII.

QUALIFIED MILITARY ORDER

THIS CAUSE came before me upon the trial of this matter and the court finds that the respondent, Captain John Q. Public, United States Navy retired, is a resident and domiciliary of the State of Florida. The court finds that the wife contrtibuted to the marriage as homemaker, mother, and helpmate, as well as maintaining employment. The parties were married in excess of ten years during wihich time the husband was on active duty in the United States Navy.

The court hereby awards, as equitable distribution of property, to the wife, Janis Q. Public, 50% (Fifty Percent) of the disposable retired pay of the husband. The wife shall also receive 50% of all cost of living allowances authorized by congress. Each party shall be responsible for their own income taxes on their respective pension interests. The court retains jurisdiction over the parties, the subject matter, and over alimony to enforce the intent of this order.

OR

The court awards to the wife $3000.00 per month as equitable distribution of her share of husband's military pension. Husband shall pay annually, by separate check to wife, one half of the cost of living allowance authorized by congress on the military pension.

OR

The court finds that the husband is on active duty in the United States Navy with a rank of Lieutenant Commander. The parties were married for 20 years and husband has twenty years of military service and his retirement is vested. Wife is entitled to receive the sum of $1500.00 per month as this sum represents one half of the retirement pay of a Lieutenant Commander with twenty years of active military service plus cost of living allowance as authorized by congress on her share of the pension benefit. The wife shall receive her share of the pension when husband retires and he will be responsible to send her by separate check her cost of living allowance. Enhancements in value of the pension due to longevity or promotions shall be the separate property of husband. The provisions of the Servicemember's Civil Relief Act have been fully complied with during this proceeding. END OF PRESENTATION.