

The New Servicemembers Civil Relief Act

By Mark E. Sullivan

With the conflict in Iraq continuing to place heavy demands on the nations armed forces, more and more National Guard and Reserve servicemembers (SMs) are being called to duty. Just like those on active duty, these "Reserve Component" personnel have families, may have been divorced, and need guidance on visitation, child support and other subjects. Thus, family law attorneys today are more likely than at any time in recent memory to see military issues in their offices.

For over 60 years, SMs were protected by the Soldiers' and Sailors' Civil Relief Act. This Act stayed and limited actions against SMs off fighting a war or otherwise occupied with military duties that made it hard to respond to a lawsuit. In 2003 the Soldiers' and Sailors' Civil Relief Act was replaced by the "Servicemembers Civil Relief Act" (SCRA), which is a complete revision of the old Act and extends many of its protections. The provisions of the new Act most important to family law attorneys are discussed below.

EXTENSION OF PROTECTION TO NATIONAL GUARD: The new Act extends protections to National Guard members called to active duty for 30 days or more pursuant to a contingency mission specified by the President or the Secretary of Defense. 50 U.S.C. App. §511(2)(A)(ii).

STAYS AND DELAYS EXPANDED TO ADMINISTRATIVE ACTIONS: The new Act expands the SM's right to ask for a stay of proceedings to include administrative hearings. 50 U.S.C. App. § 511-512. Thus the stay rules discussed below apply to both tribunals.

PROCEDURE FOR OBTAINING STAYS: When a SM lacks notice of the proceedings, the new Act requires a stay (or continuance) of at least 90 days when 1) the court decides that there may be a defense to the action and such defense cannot be presented in the defendant's absence, or 2) with the exercise of due diligence, counsel has been unable to contact the defendant (or otherwise deter-

mine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

When the SM defendant has notice of the proceeding, a 90-day stay (minimum) applies upon the SM's request, if the stay request includes two things. The first is a letter or other communication that 1) states the manner in which current military duties materially affect the SM's ability to appear, and 2) gives a date when the SM will be available to appear. The second is a letter or other communication from the SM's commanding officer stating that 1) the SM's current military duty prevents appearance, and 2) that military leave is not now authorized for the SM. 50 U.S.C. App. § 522. Of course, these two communications may be consolidated into one if it is from the SM's commander.

IMPACT ON FAMILY LAW CASES: Consider the potential impact of this stay provision in family law cases. Assume custodial mom gets mobilization orders and takes off for Afghanistan, leaving the parties' child with her mother in Florida. How is dad to get custody when mom's lawyer interposes a stay request to stop the litigation dead in its tracks? If mom has executed a Family Care Plan (PCP), which is required by military regulations, leaving custody with the maternal grandmother, will that document – executed by mom, approved by her commanding officer and accompanied by a custodial power of attorney - displace or overcome a court order transferring custody to dad? Can the court even enter such a custody order given the stay and default provisions of the SCRA? To see how this plays out in custody cases, compare *Lenser v. Lenser*, 2004 Ark. LEXIS 490 (upholding the judge's grant of custody to the mother when the mobilized father requested a stay to keep physical custody with his own mother) with *In re Marriage of Grantham*, 2004 Iowa App. LEXIS 1257 (upholding judge's stay of mother's custody petition when father was

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mobilized and gave custody via his FCP to his mother).

On another front, think about support. If the custodial dad has no support order, how can he get one if the mother is deployed overseas? Think about a divorce. Many divorces go by default, but the SCRA forbids entry of a default judgment against a SM unless certain conditions are met. Clearly, the stay provisions will impact many family law cases.

ADDITIONAL STAYS OR APPOINTMENT OF COUNSEL: An application for an additional stay may be made at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the court refuses to grant an additional stay, then the court must appoint counsel to represent the SM in the action. 50 U.S.C. App. § 522(d)(2).

Once again, give this some thought. What is the appointed attorney supposed to do - tackle the entire representation of the SM, whom he has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm's way?

And, by the way, who pays for this? There is no provision for compensation in the SCRA. How would *you* respond if her honor beckons you to the bench next Monday and says, "Counselor, I am appointing you as the attorney for Sergeant Sandra Blake, the defendant in this case. I understand that she's in the Army, or maybe the Army Reserve or National Guard. Whatever. Please report back to the court in two weeks and be ready to try this case."?

DEFENSES: The SCRA states that an application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. § 522).

DEFAULTS: Before entry of a default the movant must file an affidavit stating "whether or not the defendant is in military service and showing necessary facts in support of the affidavit." Criminal penalties are provided for filing a knowingly false affidavit. 50 U.S.C. App. § 521(c). If the movant cannot swear that the other side is not a SM, a default judgment may not be entered unless the court follows appoints an attorney for the absent SM. 50 U.S.C. App. § 521(b)(2). If the court fails to appoint an attorney then the judgment or decree is voidable.

ATTORNEY FOR "THE ABSENT": The role of the appointed attorney is to represent the SM. The statute does not say, however,

what tasks are to be undertaken by the appointed attorney. Obviously, counsel for the SM should probably request a stay of the proceedings as long as possible unless asked not to by the SM. However, how can an appointed counsel act given that her actions may not waive any defense of the SM or bind the SM? Can she, for example, stipulate to the income of her client or of the other party or agree to "guideline child support"? Arguable, the Act means that appointed counsel must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions. Such conduct is, of course, at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.

DEFAULT PROTECTIONS: If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections. The SCRA allows a member who has not received notice of the proceeding to move to reopen a default judgment. To do so, he must apply to the trial court that rendered the original judgment of order. In addition, the default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter, and the SM must apply for reopening the judgment while on active duty or within 90 days thereafter. 50 U.S.C. App. § 521(g). Reopening or vacating the judgment does not impair any right or title acquired by a bona fide purchaser for value under the default judgment. 50 U.S.C. App. 521(h).

To prevail in his motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service. In addition, he must show that there is a meritorious or legal defense to the initial claim. Thus, a motion or petition to reopen a default judgment or order should clearly state the SM's defense.

INTEREST RATES: The new Act says that interest in excess of 6% per year must be forgiven. 50 U.S.C. App. § 527(a)(2). The SM must request this reduction in writing and include a copy of his/her military orders. 50 U.S.C. App. § 527(b)(1). Once the creditor receives notice, the creditor must grant the relief effective as of the date the SM is called to active duty. The creditor must forgive any interest in excess of the six percent with a resulting decrease in the amount of periodic payment that the SM is required to make. 50 U.S.C. App. § 527(b)(2). The creditor may challenge the rate reduction if it can show that the SM's military service has not materially affected

his or her ability to pay. 50 U.S.C. App. § 527(c). Obviously, this provision can be a huge boon to a SM who has substantial credit card debt before being called to active duty. It can also be a big help to SMs paying high mortgage interest.

EVICTION PROTECTION: The new act bars evictions from premises occupied by SMs for which the monthly rent does not exceed \$2,400 for the year 2003. It also provides a formula to slightly increase the rent ceiling each year; the 2005 rent ceiling is \$2,534.32. 50 U.S.C. APP. § 531(A).

SERVICEMEMBER RELOCATIONS: The old Act allowed a SM to terminate a pre-service "dwelling, professional, business, agricultural, or similar" lease executed by or for the SM and occupied for those purposes by the SM or his dependents. The new Act extends this provision by also extending coverage to leases entered into by active duty SMs who later receive orders for a "permanent change of station" or a deployment for a period of 90 days or more.

AUTOMOBILE LEASES: The new Act allows termination of automobile leases (for business or personal use) by SMs and their dependents. Pre-service automobile leases may be canceled if the SM receives orders to active duty for a period of 180 days or more. Automobile leases entered into while the SM is on active duty may be terminated if he or she receives "permanent change of station" orders to a location outside the continental United States or deployment orders for a period of 180 days or more. 50 U.S.C. App. § 535.

OTHER RESOURCES: The best source of quick information on the SCRA is "A Judge's Guide to the Servicemembers Civil Relief Act," found at www.abanet.org/family/military. An extended treatment of the SCRA and family law issues may be found in Sullivan, "Family Law and the Servicemembers Civil Relief Act," and "Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical," *Divorce Litigation*, Vol. 16/ Number 3, March 2004. Also see Sullivan, "The Servicemembers Civil Relief Act: A Guide for Family Law Attorneys," in Brown and Morgan, *2005 Family Law Update*, pp. 23-54 (Aspen Publishers 2005). The Army JAG School's guide to the new Act will be on-line shortly, taking the place of the current guide which deals with the old Act but is still available (and still quite useful in understanding and interpreting the statute) at www.jagcnet.army.mil/tjaglcs. Click on [TJAGLCS Publications](#), go to [Legal Assistance](#), and then look for publication JA 260. ■