Webinar Materials

Judges at the Crossroads, Not in the Crosshairs
Servicemembers Civil Relief Act (SCRA)

Session 1: November 17, 2015 (12-1:15pm)
Session 2: November 18, 2015 (2-3:15pm)

Contents

Agenda

Session 1 Tues., Nov. 17		Session 2 Wed., Nov. 18
12 noon	**Background**	2 pm
12:05 pm	**Resources**	2:05 pm
12:10 pm	**Panel Discussion of Scenarios** • Domestic Violence • Appearance/Failure to Appear • Appointing Counsel • Stay Requests • Eviction	2:10 pm
1 pm	**Question & Answer**	3 pm
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Course Description

In the last eight months, two cases have been handed down that emphasize the importance of knowing the ins and outs of the Servicemembers Civil Relief Act (SCRA) and applying it correctly. There isn't a one size fits all answer. The SCRA is complicated.

This course will explain what the SCRA is and how it came about. It will highlight many of the useful resources available to help practitioners navigate civil cases in accordance with the SCRA. And finally, panelists will discuss common scenarios encountered in North Carolina's courts on a daily basis along with solutions and suggestions for complying with the Act.

Online Resources

- The Servicemembers Civil Relief Act: 50 U.S.C. App. 501 *et seq*
- Judicial Code of Conduct (Jan 2006, 13 pages)
- NC State Bar's Standing Committee on Legal Assistance for Military Personnel at www.nclamp.gov contains Co-Counsel Bulletins, Take 1 Handouts, and Resources:
    - Clerk and Worker's Guide (Aug 2012, 35 pages)
    - A Trial Lawyer's Guide to the Servicemembers Civil Relief Act
    - A Judge's Guide to the Servicemembers Civil Relief Act (rev 9/25/15) by Mark E. Sullivan; including 29 questions with answers, sample language for letters requesting stay, two flowcharts, and a judge's checklist.
    - "Are We There Yet?" –A Roadmap for Appointed Counsel under the SCRA
    - Family Forum—A Roadmap for the Uniform Deployed Parents Custody and Visitation Act
- DMDC (Defense Manpower Data Center) SCRA website (https://www.dmdc.osd.mil/appj/scra/) allows users to verify the active duty status of Active Duty Reserve and National Guard members for the purpose of postponing or suspending certain civil obligations. Login is not required for a single request, but is required for multiple requests.

Panelists

Lisa Brown
Clerk of Superior Court
Onslow County
910 478-3600
Lisa.M.Brown@nccourts.org

Clerk Brown was elected to office in November of 2014. She has 31 years of experience with the Clerk's office serving as a deputy clerk for 23 years and as an assistant clerk for 7 years. Her experience has been mainly in criminal district, child support, and juvenile.

Chris Freeman
District Court Judge
District 17A
336 634-6012
Christopher.Freeman@nccourts.org

Judge Freeman is both a district court judge in Rockingham County and a captain in the U.S. Air Force, IMA JAG Reservist. Prior to being elected judge, he served as an assistant district attorney for Rockingham County.

Amy Funderburk
Assistant Legal Counsel
North Carolina Administrative Office of the Courts
919 890-1302
Amy.L.Funderburk@nccourts.org

Ms. Funderburk advises judicial officials in estates, special proceedings, and civil matters.

Prior to joining NCAOC, she represented the Department of Health and Human Services as an Assistant Attorney General.

Jameson Marks
Counsel
North Carolina Judicial Standards Commission
919 831-3630
jmm@coa.nccourts.org

Mr. Marks offers guidance to judges and justices across the state on judicial and ethical issues. As Commission Counsel, he also reviews and supervises investigations into judicial misconduct and, if necessary, prosecutes judges or justices administratively. Prior to joining the Commission, Mr. Marks served as an Assistant District Attorney in Johnston and Forsyth Counties.

Mark E. Sullivan
Attorney
Sullivan & Tanner, PA
919 832-8507
Mark.Sullivan@ncfamilylaw.com

Mr. Sullivan practices in Raleigh, North Carolina. A retired Army Reserve JAG colonel and a Board Certified Specialist in Family Law, Mr. Sullivan is a fellow of the American Academy of Matrimonial Lawyers and the author of The Military Divorce Handbook, (ABA, 2nd Ed. 2011). He helped establish the military committee of the NC State Bar in 1981, and he has been a member of the committee or its director ever since. He is a past chair of the Military Committee of the ABA Family Law Section, and he served on the ABA Working Group for the Protection of the Rights of Servicemembers in 2002-2003. He

assists fellow attorneys from across the country in drafting military pension division orders, expert witness testimony, and consulting on military divorce issues.

Lt. Col. Brendan Tukey
Military Judge
Travis Air Force Base, California
703 595-6051
Brendon.Tukey@us.af.mil

Lt Col Tukey is a Judge Advocate with the United States Air Force. He currently serves as a Military Judge in the Western Judicial Circuit, where he hears misdemeanor and felony level criminal cases. He has served on active duty with the Air Force for 15 years in a variety of fields, including civil law, operations law, criminal prosecution, criminal defense, and appellate practice.

JESSE A. WOOD, IV AND L.A.W., A MINOR CHILD, PETITIONERS v. HONORABLE RICHARD A. WOESTE, JUDGE, CAMPBELL FAMILY COURT, RESPONDENT AND ALIZA HUNTER, REAL PARTY IN INTEREST
COURT OF APPEALS OF KENTUCKY
2015 Ky. App. LEXIS 60
May 1, 2015, Rendered

PRIOR HISTORY: AN ORIGINAL ACTION ARISING FROM CAMPBELL FAMILY COURT. ACTION NO. 13-CI-00839.

COUNSEL: PETITION BY PETITIONERS: Tasha Scott Schaffner, Florence, Kentucky; Theresa M. Mohan, Fort Mitchell, Kentucky.

RESPONSE BY REAL PARTY IN INTEREST: J. David Bender, Fort Thomas, Kentucky.

JUDGES: BEFORE: JONES, MAZE AND THOMPSON, JUDGES. JONES, JUDGE, CONCURS. MAZE, JUDGE, DISSENTS WITH SEPARATE OPINION.

THOMPSON, JUDGE: Petitioner, Jesse A. Wood, IV (father), and L.A.W. (son), through son's guardian ad litem (GAL), filed a petition for a writ to prohibit the family court from conducting a hearing on a motion to temporarily modify primary residential custodian of son to Aliza Hunter (mother), while father was deployed with the Air Force National Guard. Father and son also filed two emergency motions to stay the family court from proceeding with a decision. We grant the writ of prohibition because the family court acted erroneously, there is no adequate remedy by appeal, and great injustice and irreparable injury have resulted. We deny the emergency motions as moot.

When father and mother divorced in 2005, they were living in Cincinnati, Ohio. Pursuant to an agreed parenting plan, the parties shared joint custody with an alternating schedule. In 2009, after mother moved to Montana, the parties agreed to a modified order making father the primary residential custodian of son for school purposes, with mother exercising timesharing during son's summer vacation and other school breaks.

In 2012, father and son moved to Kentucky and began residing with father's paramour, Jill Markum, and Ms. Markum's children. In 2013, mother violated the parameters of her timesharing by failing to return son at the conclusion of her summer visitation period. Father filed a motion requesting the Campbell Family Court to enforce the Ohio custody orders. Father was granted an ex parte court order to secure son's return.

After son returned, father and mother moved the court to alter their custody and timesharing arrangements arguing the current arrangement was not in son's best interest. Father requested sole decision-making power and mother requested she be made the primary residential parent for school purposes. In an April 28, 2014 order, the family court upheld the existing timesharing arrangement as being in son's best interest.

Father is a reserve member of the Air Force National Guard. In September 2014, father was given notice that he was being returned to active service in October and informed mother of his impending deployment. On October 6, 2014, father was deployed to Afghanistan for 180 days. Son, who was ten-years old at this time, remained in Kentucky in the care of Ms. Markum and his paternal grandparents.

On December 1, 2014, mother filed a motion for temporary primary residential custody in the Campbell Family Court arguing that father's deployment constituted a substantial change in circumstances and the care arrangement made for son in father's absence seriously endangered son's physical, mental, moral or emotional health. Mother requested she be given immediate primary residential custody for the remainder of the school year.

On December 9, 2014, father filed a motion to stay the proceedings for ninety days pursuant to the federal Servicemembers Civil Relief Act (SCRA), and indicated he anticipated being available for court proceedings in mid-April 2015. Father's attached exhibits included: (1) proof that he was serving in active duty as of December 4, 2014; and (2) a letter from his commanding officer that he was involuntarily mobilized on October 6, 2014, and would be unavailable for any court proceedings for a period of 180 days not to include travel or reconstitution.

The GAL filed a memorandum of law pointing out that KRS 403.320(4)(a) mandates that any court-ordered modification of timesharing due in part or in whole to a parent's deployment outside the United States shall be temporary and shall revert back to the previous schedule at the end of deployment. The GAL urged the family court to consider whether it would be in the best interest of son to disrupt his current schedule and require him to adjust to a new school mid-year in another state, when at the conclusion of father's deployment he would be returned to father's residential custody and then need to leave his Montana school to resume the school year at his current school in Kentucky.

After a hearing on this motion on December 19, 2014, the family court denied the motion. It determined father would not be prejudiced by proceeding and indicated that modification should be granted unless it was proven that granting mother temporary residential custody would seriously endanger son.

On January 5, 2015, the family court heard mother's motion. That same day, father and son filed a joint petition for writ of prohibition and/or mandamus with this Court, along with an emergency motion to stay the family court from proceeding. Father argued he and son would be irreparably harmed through failure to grant the stay because he could not effectively assist his counsel in defending against mother's motion or provide relevant information to help the GAL represent son's interest without having the opportunity to provide detailed information about son's prior maladjustment upon traveling to Montana for visitation, high anxiety level, prior poor adjustment to changing schools, educational accommodations, adjustment to his current home, father's own wishes, mother's involvement in son's life, and the arrangements that had been made for son's care while deployed, as well as other relevant matters.

While the family court acknowledged receipt of the petition for writ, it stated in the absence of an order from this Court, it was obligated to continue with the scheduled hearing on mother's motion. The family court proceeded to hear testimony on January 6, 2015, and announced it would likely have a decision before the end of the day. Therefore, also on January 6, 2015, father and son filed a renewed emergency motion to stay the family court from proceeding arguing that father and son would suffer irreparable harm and grave injustice if the stay was not granted.

On January 6, 2015, the family court ordered that son reside with mother in Montana and designated her as temporary residential custodian until father's return from deployment. The family court reasoned mother's custodial rights needed to be enforced in father's absence unless son would be harmed by living with mother in Montana.[1] In making this decision, the family court determined father could not be the physical custodian of son while deployed, father could not unilaterally designate the paternal grandfather as custodian of the child knowing mother had joint custody rights, father's substantive rights would not be altered from a temporary order, father's attorney adequately represented father's interests, the SCRA could not be applied to deny mother's custodial rights and the SCRA did not apply where father had appeared through counsel. Father filed an appeal.[2]

1 We note that the family court erred in failing to apply the best interest standard pursuant to KRS 403.320(3) as made applicable to modifications of timesharing between joint custodians by *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008). While KRS 403.320(4) does contemplate that the active duty deployment may be part of the basis for temporarily modifying timesharing, this provision does not alter the applicable best interest standard contained in KRS 403.320(3). The single event of a service member, who is the primary residential custodian, being deployed does not determine that modification is appropriate and the child should be placed with the other custodial parent. *Koskela v. Koskela*, No. 2011-CA-000543-ME, 2012 Ky. App. Unpub. LEXIS 168, 2012 WL 601218, 9-10 (Ky.App. 2012) (unpublished). Instead, the family court must consider other factors to determine whether modification is in the best interest of the child, such as: "How long will [father's] deployment last and how far away will he be sent? If the deployment is for a relatively short period of time, is it in the best interest of the [child] to uproot [him] from [his] school[] and community?" 2012 Ky. App. Unpub. LEXIS 168, [WL] at 9.

2 We do not address whether father can properly appeal from a temporary modification of timesharing.

An extraordinary writ may be granted upon a showing that "the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004). Father has made such a showing to merit granting the petition for a writ of prohibition.

The SCRA, which also applies to Kentucky National Guard members through KRS 38.510, has the following purposes:

> (1) to provide for, strengthen, and expedite the national defense through protection extended by this Act [said sections] to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and
>
> (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

50 App. U.S.C. § 502.

The SCRA directly applies to child custody proceedings to stay an action for a period of not less than ninety days if the service member properly provides a letter explaining why service requirements prevent the service member from appearing and when he will be able to appear, and a letter from his commanding officer stating that his military duty prevents his appearance and that leave is not authorized. 50 App. U.S.C. § 522(a), (b). The SCRA uses mandatory language to require a stay under such circumstances: "the court . . . shall, upon application by the service member, stay the action[.]" 50 App. U.S.C. § 522(b)(1). In interpreting Section 522, our sister courts have held the SCRA "leaves no room for judicial discretion." *Hernandez v. Hernandez*, 169 Md.App 679, 690, 906 A.2d 429, 435 (2006) (footnote omitted). If a service member complies with the requirements for a stay, it is mandatory that the trial court grant a stay. *In re Amber M.*, 184 Cal.App.4th 1223, 1230, 110 Cal.Rptr.3d 25, 30 (2010); *In re A.R.*, 170 Cal. App. 4th 733, 743, 88 Cal. Rptr. 3d 448, 456 (2009); *Hernandez*, 169 Md.App. at 690, 906 A.2d at 435-36.

The Soldiers' and Sailors' Civil Relief Act, the SCRA's predecessor act, similarly contained mandatory language requiring an action "shall . . . be stayed" if properly applied for by a person in military service, but added additional discretionary language: "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." 50 App. U.S.C. § 521 (1990). However, even with this discretion, the Supreme Court opined that the Act was "to be liberally construed to protect those who have been obligated to drop their own affairs to take up the burdens of the nation" and stays were "not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial." *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231, 87 L.Ed.1587 (1943).

The limited discretion trial courts had under the Soldiers' and Sailors' Civil Relief Act to deny a stay was eliminated by the SCRA, which omitted the language granting such discretion. *Hernandez*, 169 Md.App. at 690 n.3, 906 A.2d at 435 n.3. Therefore, the dissent errs in its conclusion that the trial court had discretion to deny father's properly supported motion for an automatic stay by relying exclusively on cases interpreting the Soldiers' and Sailors' Civil Relief Act. Accordingly, because father fully complied with the Section 522 requirements for a stay, the family court erred in failing to grant it.

The injury in this case is real and irreparable. First, son is being relocated during a school year without consideration of whether a move to a distant state is in son's best interest. A future appeal cannot possibly rectify any damage caused to son by the court's order.

Likewise, father's injuries are irreparable. While serving his country, father was unable to appear and oppose mother's motion. The purpose of the SCRA is to permit service members to "devote their entire energy to the defense needs of the Nation" by temporarily suspending judicial proceedings, including custody proceedings. 50 App. U.S.C. § 502 Holding a custody hearing in father's absence after he properly filed a motion for an automatic stay directly contravenes the stated purpose of the SCRA. Even if father will ultimately resume his role as residential custodian, the violation of the SCRA has already caused the harm sought to be prevented by its enactment which cannot be remedied on appeal.

There may be emergency situations in which family courts must act quickly to protect children through temporary orders and an automatic stay would not be appropriate, such as if the caretakers an absent residential custodian military parent has selected are abusive or otherwise unfit. When such allegations are made, a family court may need to hold a hearing to decide if temporary alterations to timesharing are necessary to protect children before imposing the automatic stay. When applicable, such temporary orders should carefully be drafted to address the immediate safety of children, be of limited duration and designed to protect service members from prejudice. However, such a situation was not present here; the family court found that Ms. Markum and the

grandparents were acceptable custodians and son was well taken care of in Kentucky.

Therefore, we grant the writ of prohibition and order the family court to return son as soon as practical from Montana to his home in Kentucky as to avoid further disruption to the child's life and thereupon begin the ninety day mandatory stay under the SCRA. Upon expiration of the stay, if father remains deployed and the family court determines that a further stay would not be appropriate under the SCRA, the family court should consider the best interest of son in determining whether mother should become his temporary residential custodian.

The petitioners having filed a petition for writ of prohibition; IT IS HEREBY ORDERED the petition for writ of prohibition is hereby GRANTED. The motions for emergency relief are hereby denied as moot.

JONES, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS WITH SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: I respectfully dissent from my colleagues' conclusion that it is necessary and proper to grant the Writ of Prohibition filed by the Father. Kentucky law has consistently held that before an extraordinary writ of prohibition may be issued, it must be shown either that:

> (1) The lower court is proceeding or is about to proceed outside its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

Certainly there cannot be any dispute that the Campbell Family Court was acting within its jurisdiction. The focus, therefore, has to be on whether the lower court was acting erroneously, whether there exists no adequate remedy by appeal, and whether irreparable injury will result if the petition is not granted. The facts of this case do not support any of these findings.

It is important to remember how this matter arrived before this Court and what legal hearing the Petitioner (Father) was trying to prevent. The Father is a member of the military who was deployed in October of 2014. He and the Real Party in Interest, (the Mother), enjoyed joint custody of their son with the Father having custodial responsibility during the school year. Prior to father's deployment he unilaterally designated his father, the child's paternal grandfather, as the child's caretaker during his deployment. Two months after his deployment, Mother filed a motion for custody. In response, father, through counsel, filed a motion to stay the custody proceedings citing the Servicemembers Civil Relief Act contained in 50 App. U.S.C.A. § 501, *et seq*.

The Family Court denied the motion to stay the proceedings and set a hearing for January 5, 2015. On the date of the custodial hearing, Father filed this present petition for Writ of Prohibition in this Court. The trial court was aware of the filing, but conducted the hearing in the absence of any contrary order from this Court. It should be noted that, at the custodial hearing, the Father's attorney and the paternal Grandfather were also present and were given an opportunity to defend.

On January 6, 2015, Father filed an emergency motion in this Court to prohibit the Family Court from entering an order following the hearing. But again, with no forthcoming order, the Family Court entered its order on January 6, 2015, granting temporary primary custody to Mother. Father filed a notice of appeal on February 3, 2015, from the order granting temporary custody to the Mother.

As an initial matter, the Father has not clearly shown that the Family Court was acting erroneously by denying a stay of proceedings under the Servicemembers Civil Relief Act. The applicable stay provisions of the Act are set out in 50 App. U.S.C.A. § 522(b) as follows:

> (b) Stay of proceedings
>
> (1) Authority for stay
>
> At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.
>
> (2) Conditions for stay

> An application for a stay under paragraph (1) shall include the following:
>
> (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
>
> (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

The majority takes the position that the stay is mandatory once the servicemember properly invokes the Act. But in interpreting the predecessor version of the Act, the United States Supreme Court reached a contrary conclusion, holding that the Act cannot be construed to require a continuance on a mere showing that the applicant was in military service at the time of the proceeding. *Boone v. Lightner*, 319 U.S. 561, 568, 63 S. Ct. 1223, 1226, 87 L. Ed. 1587 (1943). Rather, a trial court has the discretion to require the applicant to prove prejudice if the stay is not granted.

> 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. 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. One case may turn on an issue of fact as to which the party is an important witness, where it only appears that he is in service at a remote place or at a place unknown. The next may involve an accident caused by one of his family using his car with his permission, which he did not witness, and as to which he is fully covered by insurance. Such a nominal defendant's absence in military service in Washington might be urged by the insurance company, the real defendant, as ground for deferring trial until after the war. To say that the mere fact of a party's military service has the same significance on burden of persuasion in the two contexts would be to put into the Act through a burden of proof theory the rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary. We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment.

Id. at 569-70, 63 S.Ct. at 1228-29.

Since *Boone v. Lightner*, the overwhelming weight of authority has consistently recognized the broad discretion vested in trial courts to determine whether to grant a stay under the Act. *See, e.g., In re Burrell, Bkrtcy.*, 230 B.R. 309 (E.D. Tex. 1999); *Shelor v. Shelor*, 259 Ga. 462, 383 S.E.2d 895 (1989); *Bond v. Bond*, 547 S.W.2d 43 (Tex. Civ. App. 1976); *Tabor v. Miller*, 389 F.2d 645 (3d Cir. 1968); *Slove v. Strohm*, 94 Ill. App. 2d 129, 236 N.E.2d 326 (Ill. App. 1968); *Runge v. Fleming*, 181 F. Supp. 224 (N.D. Iowa 1960); *Cadieux v. Cadieux*, 75 So. 2d 700 (Fla. 1954); *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952); *State ex rel. Stenstrom v. Wilson*, 234 Minn. 570, 48 N.W.2d 513 (1951); *Huckaby v. Oklahoma Office Bldg. Co.*, 1949 OK 19, 201 Okla. 141, 202 P.2d 996 (1949); *Rauer's Law & Collection Co. v. Higgins*, 76 Cal. App. 2d 854, 174 P.2d 450 (1946); *State v. Goldberg*, 161 Kan. 174, 166 P.2d 664 (1946); *People ex rel. Flanders v. Neary*, 113 Colo. 12, 154 P.2d 48 (1944); ?*Van Doeren v. Pelt*, 184 S.W.2d 744 (Mo. 1945); *Gross v. Williams*, 149 F.2d 84 (8th Cir. 1945); and *Konstantino v. Curtiss-Wright Corporation*, 52 F. Supp. 684 (W.D.N.Y. 1943). ?Even prior to *Boone v. Lightner*, Kentucky's highest court also recognized the extent of the trial court's discretion in granting a stay. *Fennell v. Frisch's Adm'r*, 192 Ky. 535, 234 S.W. 198 (1921).

In the present case, the trial court held a hearing and denied the motion for a stay. The trial court found that the Father's interests were adequately protected by counsel and by his power of attorney (Grandfather). Both were present at the January 5, 2015 hearing, presented evidence for Father and cross-examined witnesses. There is no suggestion in the motion that Father was prevented from defending the proceeding. Under the circumstances, the trial court had the

discretion to deny the Father's motion for a stay. And given the limited record before us, I do not believe it is appropriate to disturb that finding when ruling on a writ.

But even if we were to find an abuse of discretion at this point, I disagree with the majority that the Father lacks an adequate remedy by appeal. The trial court conducted a temporary custody hearing and entered an order granting temporary primary residential custody to the Real Party in Interest. It is my understanding that post-decree orders that modify child custody are final and appealable. *Gates v. Gates*, 412 S.W.2d 223 (Ky. 1967).

The Family Court made two significant findings in its January 6, 2014 order: (1) The Father's unilateral designation of the paternal grandfather as caretaker of the child cannot defeat the Mother's joint custodial status and (2) the Father simply cannot be the physical custodian of the child while he is deployed. I also note that the trial court's order provided that the change of joint custody would only be temporary and residential custody would revert back to the Father on his return. These findings are on appeal before this very Court. Under Kentucky law, a writ cannot be used as a substitute for an appeal. *National Gypsum Co. v. Corns*, 736 S.W.2d 325, 326 (Ky. 1987). Therefore, I am of the opinion that the Father has failed to demonstrate the lack of an adequate remedy by appeal.

And most importantly, I disagree with the majority that a disputed child custody determination amounts to irreparable injury. In *Lee v. George*, 369 S.W.3d 29 (Ky. 2012), our Supreme Court stated:

> This injury is no different from the result in every custody case in which a parent does not get what he or she requested. While the Court recognizes Appellant's desire to spend more time with his children and to have more control over important decisions about their lives, his claimed injuries are simply not the kind of injuries that justify issuing an extraordinary writ. Indeed, if they were, the appellate courts would be awash with writ petitions in domestic cases. Yet, as we have noted time and again, the extraordinary writs are no substitute for the ordinary appellate process, and the interference with the lower courts required by such a remedy is to be avoided whenever possible.

Id. at 34.

I fully agree with the trial court that the Servicemembers Civil Relief Act does not alter the custodial rights of parents. In this case, Father and Mother each have joint custody of the child. There is no dispute that the Mother is a fit and proper person to have custody. And in the Father's absence, the Mother's rights as a joint custodian must take precedence over any non-parent. *Pennington v. Marcum*, 266 S.W.3d 759, 763 (Ky. 2008).

The majority suggests that that the trial court's order causes irreparable injury due to the disruptive effect on this child's life. I have no doubt that even a temporary move to Montana may cause significant distress to this child, who has difficulty adapting to new situations. However, the trial court noted that the Mother has access to support services in Montana to assist in the child's adjustment during the period while Father is deployed overseas.

And more to the point, any disruption to the child has already occurred. By granting this writ, this Court is directing that the child be returned immediately to Kentucky and placed in the physical custody of a non-parent. We are not correcting a wrong - we are simply making a difficult situation even harder for the young man who is the subject of this dispute. I am unwilling to be a part of such a result.

Accordingly, I dissent.

229 WEST 113th STREET, UHAB HDFC, Petitioner, -against- MARK LAMB, Respondent. Index No. 59150/2015

59150/2015

CIVIL COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY

2015 N.Y. Misc. LEXIS 2904; 2015 NY Slip Op 31488(U)

August 10, 2015, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: Present: Hon. Michael Weisberg, Judge, Housing Court.

OPINION BY: Michael Weisberg

OPINION

DECISION/ORDER

In this summary nonpayment eviction proceeding where Respondent has failed to answer or appear, Petitioner moves for an order 1) relieving it of the obligation to file an affidavit stating that Respondent is not in military service (otherwise known as a "nonmilitary affidavit") before entry of a default judgment and 2) for entry of a default judgment against Respondent. In support of its motion Petitioner annexes an affidavit from its agent in which she alleges that she was unable to determine whether or not Respondent is engaged in military service. The affidavit also sets forth the steps she took in her attempts to ascertain Respondent's military status specifically two unsuccessful attempts to speak with Respondent at his apartment. It also refers to unspecified conversations with other tenants in the building and the existence of unspecified "records" concerning Respondent. The question before the court is whether this investigation was sufficiently thorough and the facts of the investigation were sufficiently detailed to entitle Petitioner to the relief sought.

Petitioner is required to address the military status of Respondent because of the Servicemembers Civil Relief Act (50 App. USCA § 501 *et seq.*), which was enacted with the express purposes of 1) strengthening the national defense by extending certain protections to military servicemembers with respect to judicial proceedings, thereby enabling such servicemembers to devote their entire energy to the defense needs of the country (*id.* § 502[1]) and 2) temporarily suspending judicial and administrative proceedings that may adversely affect the civil rights of servicemembers during their military service (*id.* § 502[2]).

To those ends, section 521 of the Act provides for the protection of military servicemembers against default judgments in any civil action or proceeding in which the servicemember does not make an appearance. Specifically, the Act requires that before a default judgment may be entered against a respondent the petitioner must file with the court an affidavit "stating whether or not the [respondent] is in military service and showing necessary facts to support the affidavit" (*id.* § 521[b][1][A]). However, if the petitioner is unable to determine whether the respondent is in military service, the court may enter a default judgment against the respondent after the filing by the petitioner of an affidavit attesting thereto (*id.* § 521[b][1][B]). If the petitioner asserts that it is unable to ascertain whether the respondent is in military service the court is empowered by the Act to require the petitioner to file a bond so as to indemnify the respondent in the event that the respondent is later found to be in military service (*id.* § 521[b][3]).

The statute does not detail how thorough an investigation, if any a petitioner must undertake before informing the court that it is unable to determine a respondent's military status. Nor does it specify what showing a petitioner must make to the court before the court may award a default judgment under such circumstances. In the absence of any appellate law, lower courts have interpreted the statute to require that the petitioner undertake some form of investigation and to provide the court with sufficient details of its investigation prior to entry of a default judgment (*L&F Realty Co v. Kazama*, NYLJ, Nov. 26, 1997 at 31 col 1 [Civ Ct, NY County 1997]; *Tivoli Assoc. v. Foskey*, 144 Misc 2d 723, 545 N.Y.S.2d 259 [Civ Ct, Kings County 1989]). These interpretations are consistent with the express purposes of the Act:

if a petitioner need not conduct any investigation or if it need only conduct a *pro forma* or cursory investigation before relying on the "unable to determine" provision of the Act to obtain a default judgment, then the protection of service-members for whom the Act exists could hardly be achieved.

Other courts have held that an investigation similar to the one conducted by the Petitioner is insufficient to entitle a landlord to a default judgment. In *L&F Realty Co.* (NYLJ, Nov. 26, 1997), the court denied the petitioner's motion for an order dispensing with the requirement to submit an affidavit setting forth the military status of the respondent where the petitioner submitted an affidavit from its managing agent in which the managing agent averred that it had visited the respondent's apartment on five separate occasions in its unsuccessful attempt to personally inquire as to his military status. The affidavit further stated that neither the managing agent nor the building superintendent had ever seen the respondent in a military uniform and that they "[had] no reason to believe" that respondent was in military service. In *Tivoli* (144 Misc 2d at 726), the court denied petitioner's motion where the only "investigation" undertaken was two unsuccessful attempts to visit the respondent at his home. In *Benabi Realty Mgmt. Co. v. Van Doorne* (190 Misc 2d 37, 738 N.Y.S.2d 166 [Civ Ct, NY County 2001]) the court held that an investigation comprising "several" alleged unsuccessful attempts to interview the respondent at his apartment was insufficient to serve as basis on which to dispense with nonmilitary affidavit requirement.

In determining the extent to which a petitioner must investigate the military status of the respondent, the court must balance the purposes and requirements of the Act against the right of the petitioner to take advantage of the remedies afforded it under the law. On the one hand, the Act's allowance for entry of a default judgment upon an affidavit that the respondent's military status could not be ascertained requires that a court not refuse entry of an otherwise lawful default judgment indefinitely if certain conditions are met. On the other hand, the protections and procedures set forth in the Act must not be regarded as mere speed bumps requiring a petitioner to ease up on the accelerator as it races to its desired destination. As one court has noted, "To some litigants, and their attorneys and investigators, the requirements as to military status affidavits may seem to obstruct or slow down unduly their having a judgment entered. However, these are legal requirements with which petitioners and plaintiffs must comply, and these who are serving our country should receive the full protection of the law" (*One Sickles St. Co. LP v. Vasquez*, NYLJ, Mar. 19, 1997 at 26, col 3 [Civ Ct, Y County 1997]).

In this court's opinion and in the absence of any guidance from the appellate courts on the matter, a petitioner has met the requirements of section 521(b)(1)(B) where it has demonstrated that it has undertaken a thorough, good faith investigation to ascertain the military status of the respondent and that the investigation is designed and implemented such that it will result in the petitioner having ascertained the respondent's military status with certainty whenever possible.

Petitioner's "investigation" into Respondent's military status hardly merits that designation and does not meet the standard set forth above. The sum total of its alleged inquiry comprised only two attempts by its agent to contact Respondent by going to his apartment on two consecutive days in June, at 6:15 PM and 10:15 AM, respectively. Petitioner's agent attests that on both occasions no one answered the door. Petitioner's agent further attests that "based on the records contained in [her] office [she] does not believe that respondent is actively engaged in the military or dependent upon anyone in the military." Missing from the agent's affidavit is any indication of what records she reviewed prior to making her conclusion and what information those records contained.

The agent also states that "no one" she has spoken to, "including members of the Board of Directors who live in the subject building," believe that Respondent is a military servicemember. The affidavit doesn't provide any other information as to the identities of the individuals with whom she spoke, when these alleged conversations took place, the questions asked of the board members, or the basis for those individuals' beliefs. While hearsay allegations are not *per se* not probative in an affidavit regarding a respondent's military status (*Central Park Gardens, Inc. v. Ramos*, NYLJ, Apr. 9, 1984 at 12, col 6 [App. Term 1st Dept 1984]), the bald, conclusory, and detail-less allegations in the affidavit have no probative value. Finally, the agent alleges that she visits the building regularly and has never seen anyone enter or leave Respondent's apartment "dressed in military fashion." Missing from the affidavit is how many times the agent has ever seen someone enter or leave the apartment at all whether it's one time or one thousand times. Not only is the agent's allegation meaningless without context, courts have declined to assign significance to a respondent's dress since as far back as 1942 (*see Nat'l Bank of Far Rockaway v. Van Tassell*, 178 Misc 776, 778, 36 N.Y.S.2d 478 [Sup Ct, Qns County 1942] ["[T]he reference to 'civilian clothes' is of no import, for it is now common practice for selectees and other to be sworn in to the military service and then given short furloughs during which they are permitted to wear civilian clothes"]; *New York City Hous. Auth. v. Smithson*, 119 Misc 2d 721, 723, 464 N.Y.S.2d 672 [Civ Ct, NY County 1983] [rejecting as basis for nonmilitary affidavit the claim that respondent was not wearing military uniform]).

The investigation undertaken by Petitioner was not thorough and does not seem to have been designed or implemented such that Petitioner could actually ascertain the military status of Respondent. Accordingly, Petitioner's motion to dispense with the filing of a nonmilitary affidavit and for a default judgment is denied in its entirety, without prejudice to renew with proof of a sufficient investigation.[1]

1 The court notes that useful information for litigants and practitioners regarding the requirements of nonmilitary investigations including the use of the Department of Defense Manpower Data Center military verification service, can be found in Legal/Statutory Memorandum 1528 (LSM 1528) promulgated by the Deputy Chief Administrative Judge and in Chief Clerk's Memorandum 158A (CCM 158A) (http://www.courts.state.ny.us/courts/nyc/civil/directives.shtml). *See also Tracey Towers Assoc. v. Cobblah*, 26 Misc 3d 132[A], 907 N.Y.S.2d 104, 2010 NY Slip Op 50061[U] (Civ Ct, NY County 2010).

This constitutes the decision and order of this court.

Dated: August 10, 2015

/s/ Michael Weisberg

Hon. Michael Weisberg

J.H.C.

NORTH CAROLINA ADMINISTRATIVE OFFICE of the COURTS

Judges at the Crossroads, Not in the Crosshairs

Servicemembers Civil Relief Act (SCRA)

November 2015

Webinar

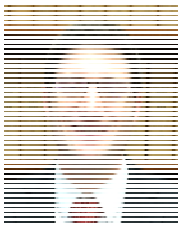
- Background
- Resources
- Scenarios
- Questions

Panelists


Amy Funderburk


Lisa Brown


Chris Freeman


Jameson Marks


Mark Sullivan


Brendon Tukey

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Background

SSCRA

- Soldiers' and Sailors' Civil Relief Act
- Enacted 1940 at start of WWII
- Updated 1991 after Gulf War

SCRA

- Servicemembers Civil Relief Act
- Enacted 12/19/03
- Protects those on active duty as well as reservists and members of National Guard

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Resources

- Servicemembers Civil Relief Act: **50 U.S.C. App. 501 *et seq***
- Judicial Code of Conduct
- NC State Bar's Committee on Legal Assistance for Military Personnel ("NC LAMP") **www.nclamp.gov**
  - A **Judge**'s Guide to the Servicemembers Civil Relief Act
  - A **Trial Lawyer**'s Guide to the Servicemembers Civil Relief Act
  - "Are We There Yet?" – A Roadmap for **Appointed Counsel** under the SCRA
  - **Clerk** and Worker's Guide
  - Family Forum—A Roadmap for the Uniform Deployed Parents Custody and Visitation Act

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Resources, continued—Legal Assistance for Military Personnel (LAMP)

www.nclamp.gov > Resources > A Judge's Guide to the SCRA

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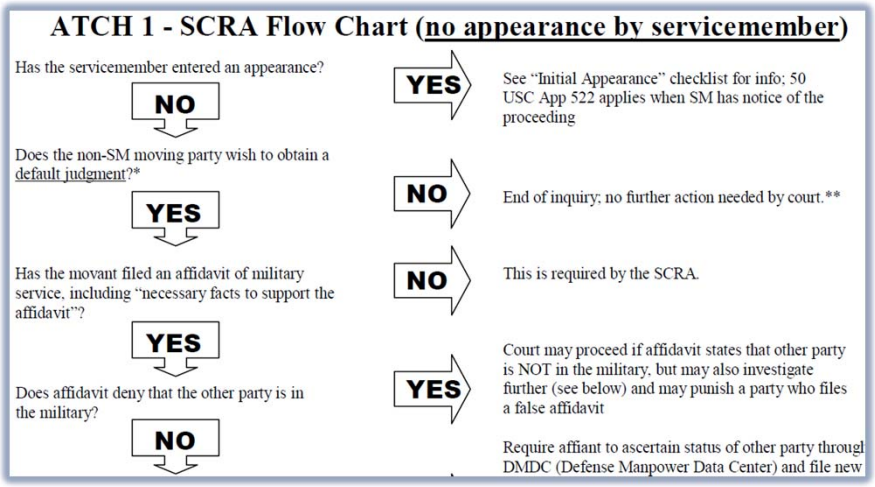
Resources, continued—flowchart from Judge's Guide



ATCH 1 - SCRA Flow Chart (no appearance by servicemember)

Has the servicemember entered an appearance?

NO

Does the non-SM moving party wish to obtain a default judgment?*

YES

Has the movant filed an affidavit of military service, including "necessary facts to support the affidavit"?

YES

Does affidavit deny that the other party is in the military?

NO

YES — See "Initial Appearance" checklist for info; 50 USC App 522 applies when SM has notice of the proceeding

NO — End of inquiry; no further action needed by court.**

NO — This is required by the SCRA.

YES — Court may proceed if affidavit states that other party is NOT in the military, but may also investigate further (see below) and may punish a party who files a false affidavit

Require affiant to ascertain status of other party through DMDC (Defense Manpower Data Center) and file new

Scenario 1: Domestic Violence

Avery and Martin are married and have one child. Avery just returned from a six-month deployment.

Avery arrives in the clerk's office and states that Martin has assaulted her. She asks for a 50B and for criminal process to issue.

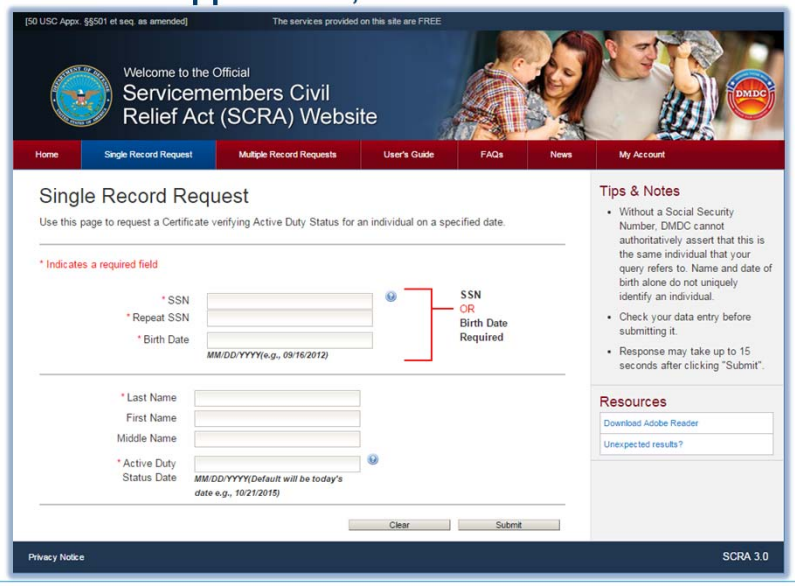
Scenario 1: Key Points

- SCRA is never involved in criminal proceedings.
- Just because you may have heard from a JAG officer does not mean that a party is represented.

Scenario 2: Appearance

At the 10 day hearing, Martin doesn't show up and has made no appearance.

Scenario 2: Appearance, continued—DMDC search



Scenario 2: Appearance, continued—role of counsel

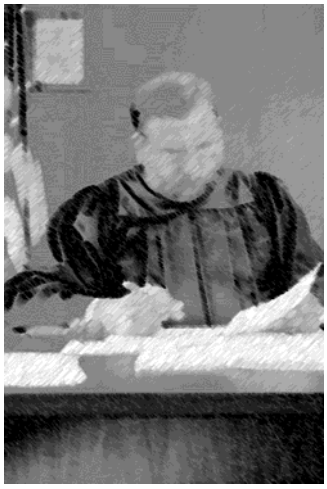
How do I get paid?

The real question is **do you** get paid?

- Duties: locate, inform, represent, special instructions
- SCRA has no allowances for payment

Scenario 2: Key Points

- A 50B petition begins as an ex parte emergency request for protection, which is only temporary.
  - In NC, SCRA comes into play at the return hearing when both parties are present.
  - This is where judges may find themselves in "default judgment" territory and should be mindful of the opposing party's servicemember status.
- Considerations for appointing an attorney:
  - Military status of the non-moving party?
  - Have they made an appearance?



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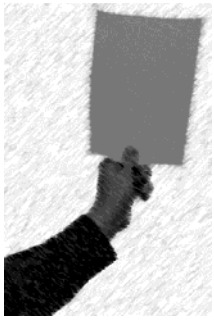
Scenario 3: Stay Request

After the judge appointed an attorney and granted an initial stay to allow the attorney an opportunity to attempt to reach his or her client, the case has come back before the judge.



Martin is not present, but his attorney provides the court with a **request for a stay** accompanied with a printed email from Martin explaining how his current assignment materially affects his ability to appear until three months later, and a letter from Martin's Commanding Officer (CO) stating Martin's military duties materially affect his ability to be present and leave is not authorized at this time.

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Scenario 3: Stay Request
What about inequitable conduct?

John Doe, a soldier, is refusing to pay child support.

- The mother of Doe's child has been evicted and is living on street.
- Doe asks to stay proceedings for 120 days

Roberta Roe, a marine, absconded with her child.

- Roe refuses to tell her ex-husband where child is located.
- Roe wants a stay of proceedings for 90 days.

Jack Green, a sailor, has been given multiple extensions of time.

- Green failed to comply with filing an answer or responding to discovery.
- Green now asks court to stay proceedings for 6 months

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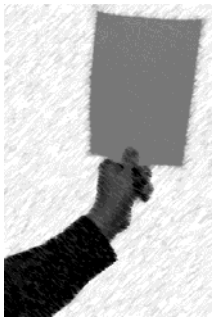
Scenario 3: Stay Request
Sword or Shield?



Judkins v. Judkins, 113 N.C. App. 734, 441 S.E.2d 139 (1994) – power of court to deny stay request due to conduct of soldier

Minor v. Minor, 62 N.C. App. 750, 303 S.E.2d 397 (1983) – power of court to enter involuntary dismissal under Rule 41 due to party's violation of court's orders or rules

Purpose of SCRA is to protect servicemembers, not to oppress the rights of others.

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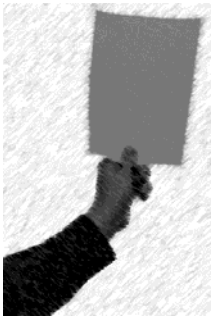
Scenario 3: Stay Request
Elements of a Valid 90-day Stay Request



1. A statement from the servicemember as to how the servicemembers' current military duties materially affect his ability to appear AND
   a. stating a date when the servicemember will be available to appear.
2. A statement from the servicemembers' commanding officer stating that the servicemembers' current military duty prevents appearance AND
   a. stating that military leave is not authorized for the servicemember at the time of the current court event.

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Scenario 3: Key Points

- There are times when you don't need an affidavit.
- Statements can be vague but must comply with the statute. Stay requests may be submitted in written or verbal form.
- A request for stay under SCRA does NOT constitute an appearance for jurisdictional purposes or a waiver of any defense, substantive or procedural.

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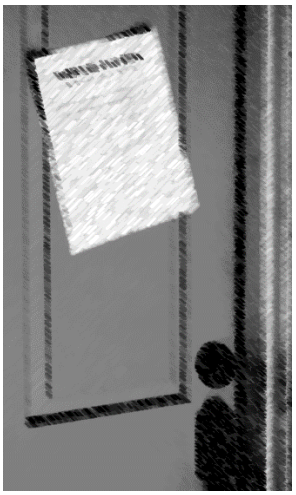
Scenario 4: Eviction

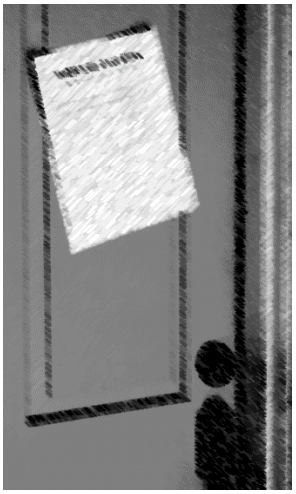
Avery moved out of the family's apartment but she is still listed on the lease. Martin is now behind on the rent.

The landlord files to evict Avery and Martin from their apartment.



Scenario 4: Key Points

- Get the SCRA affidavit to ascertain military status of non-moving party prior to judgment.
- Different case gets a different court file number which means that SCRA requirements apply anew.
- Appoint counsel if appropriate.



Questions

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Prepared by:
Lori Cole

Organizational Development Division

T 919 890-1276

Lori.C.Cole@nccourts.org
www.nccourts.org