A legal note from Marshal Willick about developments – good, bad, and ugly – in the application of family law to cases involving military personnel (part one).

The evolution of family law has quite rightly reacted to the peculiar demands and circumstances of military personnel in shaping procedural and other requirements so that members may have full and fair access to the courts in matters relating to custody, visitation, and support. And questions relating to all components of military compensation in making support determinations have been examined at length, elsewhere, the conclusions of which are useful here.

Unfortunately, in some other States, misguided legislators, egged on by radical groups of former military members, have sought to and sometimes succeeded in victimizing spouses and children in perverse initiatives cloaked in false patriotism. Where such efforts are successful, the primary considerations of the best interest of the child, and equal justice under law, have been sacrificed to what – stripped of its jingoistic trappings – is mere self-centered greed.

This note addresses matters of child custody, visitation, and support involving military personnel, with a brief aside on the unrelated topic of the Nevada Supreme Court's most recent rule changes regarding briefs. The next note will address what is happening relating to military retirement benefits militant groups, and what should be done when they come calling.

I. CUSTODY AND VISITATION CASES INVOLVING MILITARY PERSONNEL

Nevada is one of some 40 States (so far) that have enacted special legislation permitting military personnel to maintain custody and visitation rights throughout deployments for military duty, granting such personnel certain procedural and timing safeguards, and even allowing delegation of visitation rights to relatives – so long as the best interest of the child remains paramount. Details of the legislation were set out in legal note No. 42 "New Military Custody/Visitation Law, and the Purpose of These Newsletters," posted at http://www.willicklawgroup.com/newsletters.

Unfortunately, some members of the military community have such an exaggerated sense of self-importance that they have concluded that their status as military members, or veterans, give them ***superior*** rights to those of other citizens, extending to exemptions from the support and property laws governing everyone else in the United States, regardless of the harm such would cause to others, including their own children. The attempts at altering support rights are addressed below.

II. USE OF MILITARY ALLOWANCES FOR CHILD AND SPOUSAL SUPPORT

One place a misplaced sense of egocentric entitlement is frequently seen is in the area of child support. Some military members apparently think their enlisted status somehow means that they don't have to pay child support, or if they do, that most of their actual income is exempt from consideration in determining how much support should be paid.

The military pay system is too complex to be thoroughly examined here. A review of the

components of military pay was set out in my 1998 book, "Military Retirement Benefits in Divorce: A Lawyer's Guide to Valuation and Distribution" (which can be accessed at http://www.willicklawgroup.com/online_store), and a far more up to date discussion is contained in Mark Sullivan's thorough and well-written "Military Divorce Handbook," now in its second edition and available through the ABA or at Amazon.

In summary, however, all active duty members receive "basic pay" corresponding to their rank and years of seniority. In addition, there are a host of "special pays," because of the particularities or facts of that member's current service, such as "submarine pay" or "hazardous duty pay." There can also be substantial bonuses for various purposes, such as to retain trained pilots.

And then there are "allowances" – categories of extra money handed to military members on which there is no tax. Essentially every member gets nontaxable basic allowances for housing (BAH) and subsistence (BAS), and there are many kinds of situational allowances, as well. Some of these allowances – including BAH – are even ***greater*** when the member has "dependents" (a spouse or children).

The total paid in nontaxable allowances can come close to matching the amount of taxable pay received by a military member, and because allowances are received ***tax-free***, they are significantly more valuable than the regular taxable income of civilians receiving comparable perks.

In fact, there is an adjusted civilian equivalency, known as "Regular Military Compensation" (RMC), which the military itself uses for determining the actual value of the "salary" paid to members at each grade, combining basic pay, basic allowance for subsistence and the basic allowance for housing, along with the tax advantage from untaxed allowances. The chart, published annually by the Department of Defense Office of the Actuary, provides a more realistic and correct basis for an award of child support, spousal support, and attorney's fees, because it gives the Court an "apples to apples" basis on which to compare the incomes of a military member and a non-military spouse.

Some military members look at the special protections put in place by the federal government to prevent garnishments and executions against military personnel, and figure that the same rules should insulate them from paying child or spousal support based on the money they are actually receiving. One active-duty military member wrote in, outraged that the allowances he received for reimbursement of expenses, etc., could be used as a basis for awarding child support.

As is typical, the member attempted to portray the matter as one of national security, claiming that such funds were "to provide a recipient working away from their home in another state or country with reimbursements for expenses necessary and required to perform their duties efficiently." From which he considered that the bulk of his actual income was to be ignored in setting child and spousal support, despite the fact that the existence of those dependents was part of the reason he was ***receiving*** the allowances in the first place. He was incensed that a court ordered that he pay "40% to 50% of my allowances for child support and alimony" (for support of two-thirds of his family), citing a host of federal regulations that he considered to be violated by such an order.

A California intermediate appellate court recently did an excellent job of setting out such an

argument – and explaining why it does not hold water. *In re Marriage of Stanton*, 190 Cal. App. 4th 547, 118 Cal. Rptr. 3d 249 (Ct. App. 2010), considered the case of a litigant, like the member who wrote to me, who argued that setting child support based on allowances violated the federal preemption doctrine since federal law exempts military allowances from the definition of income for federal tax purposes, and such allowances are not subject to wage garnishment for support arrears.

The trial court's analysis was the pretty straightforward one that if money "looks like income, it is income no matter how it's paid."

On appeal, the court affirmed, finding the law of federal pre-emption "inapplicable to California support law," given that "[e]ach parent should pay for the support of the children according to his or her ability," that gross income "means income from whatever source derived," and that "employment benefits" include "taking into consideration the benefit to the employee, [and] any corresponding reduction in living expenses. . . ."

The court explained well the place – and limits – of federal pre-emption in a family law analysis:

> In [*Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987)], the United States Supreme Court explained: "We have consistently recognized that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' [Citations.] 'On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "*positively required by direct enactment*" that state law be pre-empted.' [Citations.] Before a state law governing domestic relations will be overridden, it 'must do "major damage" to "clear and substantial" federal interests.'" (Italics added.) Express preemption arises when Congress has explicitly stated its intent in statutory language.

Exhaustively reviewing cases from around the country, the court found that the nontaxable status of military allowances did not suggest that Congress had any preemptive intent with regard to either child or spousal support. Nor was the court impressed by the fact that such allowances could not be garnished, noting that in *Rose*, the United States Supreme Court found that the State of Tennessee could hold a military veteran in contempt for nonpayment of child support when the support was based on disability payments not subject to garnishment, and such payments were his only means for satisfying his support obligation.

Explaining that conclusion, the Supreme Court rejected the idea that disability benefits not be subject to ***any*** legal process aimed at diverting funds for child support, including a State-court contempt proceeding, and held that the statutes merely applied to State proceedings against agencies of the United States government. As the California court noted, the purpose of those laws is "to avoid sovereign immunity problems, not to shield income from valid support orders," citing *In re Marriage of McGowan*, 638 N.E.2d 695, 698 (Ill. App. 1994).

The California court therefore joined courts across the nation in holding that federal preemption is inapplicable to military allowances such as BAH and BAS, and that such allowances are included

in a party's gross income for purposes of support when State law encompasses them. The court held that not only did including such allowances in gross income "not do major damage to a clear and substantial federal interest," but "to the contrary, the Department of Defense by regulation and otherwise encourages members of the armed forces to fulfill their family commitments," again citing *In re Marriage of McGowan*, *supra*.

Given the essentially-identical definition of gross income in Nevada, the same result should be expected to result here in support cases involving military personnel. As the Nevada Supreme Court has pointed out, our courts are to use any source of income to calculate child support payments that is otherwise not explicitly prohibited by law; it is for this reason that SSI, but not SSD, is includable in income considered for support purposes. *See Metz v. Metz*, 120 Nev. 786, 101 P.3d 779 (2004).

There is no justification for treating tax-advantaged military allowances as anything other than income to the member, just as a court would include both salary and bonus, or wages plus commissions, for a salesman, or the value of the company car and expense account for an executive; they are just part of the compensation package. All military pay and allowances "count" as income for child support purposes – pretty much the same way that all ***non***-military allowances and perks count. That is pretty much definitionally "fair."

III. NEW RULES ON APPEAL, AND OTHERWISE

The Nevada Supreme Court has been on something of a tear over the past six months, substantially re-writing a host of rules governing procedure in that Court, and others, and holding hearings on yet other rule changes that have not yet been set down. Some are pretty modest, some dramatic, and most – but not all – make sense in light of a reasoned evaluation of competing policy objectives. Good or ill, it is important for practitioners affected to know of them; these notes occasionally discuss some that seem interesting.

For today, changes to the appellate procedure rules set out in ADKT 467 (September 21, 2011). Our Court has elected to bring State rules into closer conformity with those governing procedure in federal court, in a number of ways.

By itself, that is unobjectionable, but there are public policy ramifications, if subtle, to what could be seen as an over-reaction. Specifically, the preamble to the rule set out as an objective to "facilitate review . . . of briefs that . . . use fonts, footnotes and spacing to compress more text into the allotted pages."

The new rules require all text – body, footnotes, and quotes – to be in 14-point font, and adopts the federal courts' tripartite test of length by words, lines, and pages, which it terms a "type-volume" limit.

In the Advanced Family Law Seminar of December, 2010, my submission was "Enforcement of Judgments: Appeals Stays & Liens" (posted at http://www.willicklawgroup.com/published_works). That CLE article recapped a variety of rule-changes, including this recap of the 2010 appellate rule

changes, with this discussion of the amendments to the brief formatting rules:

> **D. Font Changes**
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> It seems like such a small thing. NRAP 32(a)(5)(A) dictates the size of fonts for appellate briefs as now being 13-point – including block indent quotes, and footnotes. The result is a lot less space in which to present an appellate argument, since the 30-page limit of NRAP 32(a)(7)(A) has remained the same.
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> We ran a couple of tests comparing the effect on briefs, which previously conformed to the typographical standard of 12-point type, 11-point block indent quotes, and 10-point footnotes. What ***used*** to take 10 pages takes 12.5 pages under the revised rules. Put another way, the 30 pages of material counsel used to have to lay out an appellate argument now must fit in what would have previously been 24 pages.
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> The Nevada Supreme Court has for years railed that briefs should be concise, precise, and carefully-drafted. The font rule change will indeed force the elimination of material – we will all just have to hope that the necessary deletion of information does not lead to an increase in error.

In other words, the Court's rules prohibit what was done just above here – reducing the font of a block-indent quote by a point to increase set-off readability without increasing length. But the Court has decided now to go further – to ***14***-point type, reducing what used to be an acceptable brief by about a third – from 30 pages of 12-point type to about 20 pages.

Will this make briefs shorter? No doubt. More "readable" (presumably without glasses)? Sure. But there will be a third less there to read. Shakespeare tells us that "Brevity is the soul of wit." Apparently, the Nevada Supreme Court agrees.

Let's just hope this trend does not go too much further, until we are reduced to appeals saying in huge print: "He's wrong!" and responses of "You lie!" I'd like to believe that points meriting appellate consideration deserve – and require – a bit more substance.

IV. CONCLUSIONS

Amending the family law system to ensure an opportunity for meaningful participation in family law cases by military personnel is reasonable. Abandoning equity because a participant is or once was in uniform is not.

When it comes to supporting spouses and children, military allowances are just like every other kind of allowances, because the best interest of the child and equality under law trump all made-up "national security" pretenses for refusing to adequately support spouses and children. Seeking to do so under cover of false patriotism is a betrayal of the concept of equal justice under law that is a cornerstone of our democratic republic that the armed services exist to protect.

V. QUOTES OF THE ISSUE

"Ignorant people think it is the noise which fighting cats make that is so aggravating, but it ain't so; it is the sickening grammar that they use."
– Mark Twain

"Everything should be made as simple as possible, but not simpler."
– Albert Einstein (attrib.)

"I would have written a shorter letter, but I did not have the time."
– Blaise Pascal, *Provincial Letters: Letter XVI* (c. 1650)

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