BOTH SIDES OF THE GATE: MEETING THE NEEDS OF MILITARY CHILDREN AND THEIR FAMILIES IN CIVILIAN COURTS

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A NOTE CONCERNING THE PROGRAM MATERIALS

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JUDGE JASON SHEA FLEMING serves as circuit judge, Family Court, Division 3 of the 3rd Judicial Circuit, which consists of Christian County. Before his election to the circuit bench in November 2006, Judge Fleming was assistant Christian County attorney from 1998 to 2006. He also served as the director of Christian County Juvenile Services and as a volunteer for the Christian County Juvenile Drug Court from 2000 to 2006. Judge Fleming was in private practice with Thomas, Arvin & Fleming in Hopkinsville from 1997 to 2000 and had a solo practice from 2000 to 2003. He received his bachelor’s degree from the University of Kentucky and his J.D. from the University of Kentucky College of Law, where he graduated cum laude and member of the Order of the Coif. In addition, he was articles editor for the Kentucky Law Journal and chair of the hearing committee on the UK College of Law Honor Council from 1996 to 1997. Judge Fleming is a recipient of the Kentucky Bar Association’s CLE Award and Pro Bono Award, and the Department of Public Advocacy’s Kentucky Public Advocate Award (2006). He also received the 2007 Meritorious Service Award from the Christian County Juvenile Drug Court and the Advocate for Children Award from the Christian County Child Abuse Council in 2010. Judge Fleming has authored numerous journal articles and is a frequent presenter at CLE seminars. He is a past president of the Hopkinsville-Christian County Jaycees and Big Brothers-Big Sisters of the Southern Pennyrile and a past vice president of the Kentucky State Jaycees, for which he also served as legal counsel. Judge Fleming was a part-time instructor for Brown-Mackie College and served as chair of the board of the Housing Authority of Hopkinsville for six years, and chair of the board of Westwood Senior Homes for two years.
Dr. Kathleen M. West  
Center for Innovation and Research on  
Veterans and Military Families  
University of Southern California  
1101 Pearl Street  
Santa Monica, California  90405  
kathleenmwest3@gmail.com

KATHLEEN WEST is a lecturer and researcher for the University of Southern California School of Preventive Medicine in Los Angeles, California. She received her B.A. from Kalamazoo College and Doctorate in Public Health from the University of California, Los Angeles. Ms. West is a member of the American Public Health Association and the National Council of Juvenile and Family Court Judges.
NOTE ABOUT MATERIALS: Due to the dynamic, rapidly changing nature of the law, information contained in this publication may become outdated with new decisions or statutes. Accordingly, lawyers using this material must research original sources of authority. In addition, the military tends to use A LOT of acronyms. Whenever possible, the authors have provided those acronyms in parentheses so when a service member uses them, the practitioner will understand the underlying issue that he or she is discussing. This outline is an update of a presentation given in 2009 and 2010. The authors note that the case law is up-to-date as of 8/2/2012. The authors thank Hon. Edmund V. Smith for his contribution to the materials.

The Objectives of the Session are to:

1. Describe military culture and relevance to family dynamics, and case management.

2. Explain special features and injuries of the recent decade+ of wars in Iraq and Afghanistan.

3. Describe the implications of the unique features of the war on the family and service members upon return to the "home front" and reintegration efforts in the community and workplace.

4. Identify key regulations and laws that govern military families on installations and how they interact with civilian courts.

5. List recommendations and actions that the judiciary and court personnel can take to improve outcomes for military and veteran families, service members, and veterans.

6. Note resources available to assist.

Background context is provided with a brief (four to five minute) video clip from COVER ME, the motivation, training, and warrior ethos of the Armed Forces. Debrief quickly with audience regarding words that come to mind when they think of military and then separately, when they think of veterans. These words are often both laudatory and uncomplimentary; it’s a complex group and almost everyone has an underlying bias about expectations and feelings about the military and war that can affect their approach to working with this population. Practitioners' attitudes towards this group must be examined and self-awareness is important in these interactions.

The nature of OEF/OIF/OND (elaborate on "alphabet soup" of military and explain; engage audience) is unique in multiple ways. Although "war is war," the conflicts that the U.S. has been involved in somewhere since 1941 on a nonstop basis has changed the military's capacity and way of fighting. Since the U.S. military shifted to being an All-
Volunteer Force in 1973, recruitment has been critical to maintaining a ready force. During non-war time, less than 1 percent of the U.S. population has served as an Active Duty service member at any given point since the wars began in 2002. Since that time more than 3 million deployments of thirty days or more have occurred and more than 2 million persons have deployed. Due to the prolonged nature of these wars, which taken together are the longest wars the U.S. has ever engaged in, multiple deployments have been the norm and Reservists and National Guard have been deployed at unprecedented rates. This has had huge implications for families of service members.

Some of the unique characteristics of these wars include:

Recruiting needs that required up to 60 percent more waivers to be given to qualify individuals to serve in the military. This has implications for prior experiences of recruits and challenged capacities to tolerate the unique demands and both operational and combat stressors of insurgent warfare.

Multiple deployments with little "dwell time." This unique feature of both OEF/OIF has far-reaching effects both on the service members and their family members during the deployments, brief returns, and final reintegration back into their families, communities, and civilian workplace.

High incidence of injuries and low fatality rates. The signature injury of these wars is traumatic brain injury (TBI), ranging from severe to mild, and in itself is not uncommon for military throughout time, however the multiple and extreme experiences of TBI is unprecedented. Blast injuries from improvised explosive devices (IEDs) accounts for about 85 percent of injuries with TBI invariably being one of those injuries in addition to limb, vision and hearing loss. Due to the dramatic improvement of battlefield medicine, service members are surviving injuries that would have been fatal in past wars; however the psychological and physical injuries coupled create new challenges for their reintegration into civilian settings. Multiple surgeries, need for prosthetics, and management of "invisible wounds" (TBI, PTSD) persist as challenges long after the service member has returned from combat.

Post-traumatic stress is ubiquitous with an incidence of post-traumatic stress disorder (PTSD) that ranges from a low estimate of 15 percent to 35 percent. Early identification and treatment of PTSD is inhibited due to stigma of mental health problems in the military and lack of understanding of the military experience and warrior culture in civilian community-based providers and systems of care. This complicates treatment services and care-seeking as the lack of self-identification requires an additional level of sensitivity to military/veterans among care providers, law enforcement, and other systems, including the judiciary, which is typically absent.

The incidence of divorce, child custody challenges, domestic violence, intimate partner violence, child abuse and neglect, substance disorders, assault, driving violations, and suicide are all on the increase in veteran and military populations. Although military families have historically been a highly resilient population, the duration of the recent wars, the nature of the insurgencies, cultural settings of the wars, as well as characteristics of our current Armed Forces has contributed to the multiple epidemics now being experienced in society at large.
This session will focus on both the protective and risk factors that either mitigate or exacerbate and promote behaviors and situations that bring veterans, service members, and their family members to the attention of the Courts systems and local community service providers.

I. BASIC ALLOWANCE FOR HOUSING, "BAH"

A. Basic Allowance for Housing is an amount that a service member receives each month to help pay for their housing. If the service member is married, then there is an additional amount that the service member receives because of having dependents (also known as BAH-WITH).

B. If the service member lives on post, the BAH is a pass-through. It appears on the Leave and Earnings Statement (LES) but there will also be a corresponding deduction that goes to the contractor handling the on base housing.

C. BAH is gross income for child support purposes.

D. Generally, until there is an order of the court or an agreement of the parties the service member's chain of command will require the service member to provide their separated spouse with an amount each month at least equivalent to the amount of BAH the service member receives. The Army Regulation on Family Support and BAH can be found in Army Regulation 608-99. It has several hypothetical scenarios to help the chain of command in application of the regulation. http://www.apd.army.mil/pdffiles/r608_99.pdf.

E. Rarely will the chain of command require more support than that required under the BAH unless there is an order or agreement in place. Therefore, you must assess whether your client will benefit more by going to Court or letting the default provisions apply. The military will force the service member to abide by a valid court order because it is a violation of the Uniform Code of Military Justice (UCMJ) to violate a valid court order which can result in punishment including potential court-martial.

II. SERVICEMEMBERS’ CIVIL RELIEF ACT

A. The Servicemembers’ Civil Relief Act (SCRA) has been updated in recent years. Veteran attorneys are probably familiar with the SCRA's predecessor, "The Soldiers' and Sailors' Relief Act" (SSCRA).

B. The SCRA provides a ninety day stay of proceedings when the service members' military status inhibits them from appearing and defending an action and when other conditions are met. (See Moore v. Moore, 2009 WL 723022 (Ky. App. Mar. 20, 2009) clarifying that the SCRA is applicable if the service member is away on active duty).

C. The SCRA requires the service member to file a statement with the court explaining how their current military duties materially affect his or her
ability to appear and a date when they will be able to appear. In addition, the service member's commanding officer must file a statement confirming that the service member's military duty prevents his or her appearance and stating that military leave is not authorized for the service member at the time of the statement.

D. The setting of child support is not generally stayed by the SCRA because it is considered a ministerial duty of the Court since it is based upon a solid formula. However, there are some exceptions, see Smith v. Davis, 364 S.E.2d 156 (N.C. App. 1988). See also, Spurgeon v. Spurgeon, 2011 WL 3759495 (Ky. App. Aug. 26, 2011) (Court needs to make a finding that the military service of the service member will not have a "material adverse effect" upon his rights and should give the service member the reasonable opportunity to participate given the circumstances (i.e. telephonic hearing if possible)).

E. Some discovery is not precluded under the stay. The stay should be narrowly tailored to protect all parties’ interests. Examples of allowable discovery are items which can be obtained by the present spouse with authorization from the Court such as bank records, or giving the service member additional time to retrieve documents and items that can be obtained from his or her physical location.

F. The request for a stay must be made in good faith and the service member must exercise due diligence in trying to arrange to appear in court.

G. Every final decree, whether the person is military or not, should have a finding that the provisions of the SCRA have been complied with fully.

H. SCRA does not apply to criminal actions, only civil and administrative actions.

III. DIVORCE JURISDICTION

A. KRS 403.140(1) specifically states that a service member can get divorced in Kentucky if the person was "stationed in this state while a member of the armed services, and that the residence or military presence has been maintained for 180 days next preceding the filing of the petition.

B. Please note that when a service member is deployed to places such as Afghanistan or Iraq, they are still stationed at their home base during this time. Therefore, they have a "military presence" during their deployment.

IV. CHILD CUSTODY AND VISITATION

A. The Uniform Child Custody and Jurisdiction Enforcement Act (the UCCJEA) does apply to military child custody actions. See KRS 403.800.
B. The UCCJEA is subject matter jurisdiction, and therefore, cannot be waived by the parties.

C. Generally, if a person is stationed in a state with the child for a period of at least six (6) months, then that state will become the "home state" of the child. The UCCJEA speaks of the place where the child "lived" not where the child is domiciled. This is a factual determination. It is sometimes argued and on a case-by-case situation may be able to be proven that the location in the state is temporary under KRS 403.800(7).

D. Jurisdiction for child custody and child support are two (2) different requirements. Therefore, a court may have jurisdiction to determine custody and visitation, but not child support (or vice versa). See Section V below.

E. In 2006, Kentucky was a front runner in the country in protecting the custody rights of our military. KRS 403.340 was amended to add a Section 5(a) and 5(b) which limits any court-ordered modification of custody based in whole or in part on the active duty of a parent or de facto custodian being deployed to be limited to the length of the deployment (or active duty if active duty National Guard or Federal Reserves), unless the service member consents that the modification continues past the end of the deployment period. However, it should be noted that the statute was written prior to Pennington v. Marcum, 266 S.W.3d 759 (Ky. 2008). There is an argument that the legislative intent was to include modification of timesharing as well, since Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003), was the controlling case when KRS 403.340(5) was written. Some Courts have ruled such or incorporated it in by analogy. There is an unpublished case post-Pennington, which limits it to custody and not just timesharing, Koskela v. Koskela, 2012 WL 601218 (Ky. App. Feb. 24, 2012). However, it does not appear that legislative intent of the statute was argued in that case and being unpublished, it is just persuasive authority.

F. Remember that there is a very good chance that a service member is going to be transient. Therefore, it is strongly suggested that you either ask the Court to go ahead a set a local visitation schedule and a long distance visitation schedule, or get the parties to agree on both if possible. The Court can take the transient lifestyle of the military into consideration when reaching its decision. Koskela 2012 WL 601218 at *6. The 18th Circuit out of Florida has done an excellent job of putting together things to think about in long distance cases and suggested language for settlement agreements for different scenarios. See http://www.flcourts18.org/PDF/SHARED%20PARENTING%20RESPONSIBILITY%20TIMESHARING%20GUIDELINES-LONG%20DISTANCE%20DRAFT%20REV%20SPRING%202012%20WEBSITE%20VERSION.pdf.

G. Occasionally, the service member will attempt in a joint custody situation to name their new spouse as the temporary custodian of the child(ren)
while they are deployed (especially on short deployments). The Court may be able to do this in situations where the other parent is unfit; however, if the other parent is fit, then the other parent should have the opportunity to take care of the child since the new spouse will not have standing, in all likelihood, to assert a claim for child. See Collins v. Duffus, 2011 WL 2163374 (Ky. App. Jun. 3, 2011). However, the Court can set up telephonic calls with the step-parent, even over the objection of the biological parent(s). The Court of Appeals of Kentucky has stated as follows: "Simply put, we do not believe that telephone contact is tantamount to visitation with the children. And, we think the family court was well within its discretion in allowing the children reasonable telephonic contact with [the grandparents in that case]." See Martin v. Martin, 2010 WL 2867945 (Ky. App. Jul. 23, 2010), at *2.

V. CHILD SUPPORT

A. Child support jurisdiction is governed by the "Uniform Interstate Family Support Act" (UIFSA). KRS 407.5101.

B. There are eight (8) methods to achieve child support personal jurisdiction in Kentucky over a nonresident of Kentucky. KRS 403.5201 provides for jurisdiction if any of the following are met:

1. The individual is personally served with summons, or notice within this state;

2. The individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive pleading having the effect of waiving any contest to personal jurisdiction;

3. The individual resided with the child in this state;

4. The individual resided in this state and provided prenatal expenses or support for the child;

5. The child resides in this state as a result of the acts or directives of the individual;

6. The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;

7. The individual asserted parentage in the putative father registry maintained in this state by the Cabinet for Health and Family Services; or

8. There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.
C. When dealing with military child support, remember that gross income is based on income from whatever source derived. See KRS 403.211 and KRS 403.212. Therefore, a service member's income will include things such as base pay, BAH, BAS (Basic Allowance for Sustenance), flight pay, deployment pay, COLA bumps for place of station, hazardous duty pay, etc. Generally, a good rule of thumb is to look at the box on a service member's LES under "Entitlements" that says "TOTAL." This will be close to the actual gross income of the service member. Note however, the Court can choose not to include some of the allowances if the Court finds that the allowances are not significant and do not reduce the parent's personal living expenses. See Roberts v. Roberts, 2012 WL 669978 (Ky. App. Mar. 2, 2012) An example of this may be the yearly uniform allowance or a COLA adjustment.

D. A service member can have a child added to their health insurance for free. This insurance is called "Tricare." It may be important to put in a settlement agreement that the parties use a Tricare provider whenever possible because Tricare is very picky on what it will cover and not cover for services obtained off a military reservation. It should also be noted that the service member can obtain dental and optical insurance for the children at a VERY low cost through the military.

E. Child support can be easily paid through DFAS (Department of Finance and Accounting Services) through the filing of a military wage assignment. Temporary support can be quickly set up if the service member will set up a "voluntary allotment" to the other parent.

F. For your convenience, the pay scale for the military for 2012 and BAH chart for Kentucky is attached to this outline.

VI. SURVIVOR BENEFIT PLAN (SBP)

A. A divorce entitlement that is often overlooked is the "Survivor Benefit Plan" (SBP). SBP is a plan that allows the non-military ex-spouse to basically insure his or her portion of the retirement in the event that the service member dies before the non-military ex-spouse. It is especially important in long term marriages with many years of credible service during the marriage.

B. SBP is very expensive. Under DFAS' default rules, the premium is paid proportionately by the parties based on their entitlement under the Poe formula.

C. The parties can reallocate the SBP to require one party to bear the cost of the entire premium. Be careful though, shifting the burden from DFAS' default rulings will affect each parties' marital share of the pension under the Poe formula. Therefore, if the Court or the parties alter DFAS default rules, then there must be a corresponding correction to the Poe formula. For your convenience, there is a chart from Mark Sullivan's Military

D. SBP must be elected within one year of the divorce or it is lost. This requirement occasionally changes, so you need to look at the DFAS forms whenever you have an SBP election.

E. It may be cheaper on the parties to require the service member to maintain a life insurance policy in an amount equivalent to the pension entitlement instead of an SBP election due to the cost of the SBP.

F. SBP is not good for the former spouse if she remarries before age fifty-five. Remarriage before age fifty-five terminates the SBP coverage.

G. SBP is not good for the service member's future spouse. If the service member remarries, the SBP cannot be divided between the former spouse and the new spouse so if the former spouse elects SBP then the new spouse is denied benefits if the service member dies while they are married.

H. Attorneys need to be careful that they understand military entitlements when drafting settlement agreements. In Creech v. Creech, 2010 WL 743748 (Ky. App. Mar. 5, 2010), the parties agreed on the record that the non-military spouse would receive one-half of the military spouse's retirement benefits accrued during the marriage. The agreement never mentioned anything about her being entitled to SBP or what would happen if the service member took disability (discussed below). The Court of Appeals affirmed the trial court in that the agreement was not unconscionable since the non-military spouse has the ability to waive her rights. The non-military spouse "is not entitled to a new decree simply because she failed to bargain for benefits to which she may have been entitled. Furthermore, it is not the duty of the trial court to advise the parties of their legal entitlements, but only determine whether the agreement they reach is unconscionable. Creech, 2010 WL 743748 at *3.

VII. DOMESTIC VIOLENCE AND MILITARY SERVICE

A. It should be noted that the SCRA does apply to a domestic violence petition; therefore, the judge may have to reissue the Emergency Protective Order (EPO) every two (2) weeks until the service member is available for a hearing.

B. A common misconception is that a Domestic Violence Order will automatically chapter the service member out of the military. This is simply not true. While sometimes the gravity of the event or the soldier's performance on other matters may culminate in their termination when they get a domestic violence order against them, it is not automatic. Generally, the argument is "if I can't have a weapon then I am no use to the military." Don't fall for this line. Although it is true that 18 USC §922(g)(8) does bar a military member from possessing or attempting to
possess a firearm or firearm ammunition during the pendency of the DVO, there is an exception for military members in the course of military service and law enforcement officers in the course of law enforcement duties to possess firearms and ammunition as long as they are government issued and controlled. However, the Court will have to explicitly allow this exception in its order. The Court has the power not to grant this exception. See Cissell v. Cissell, 2009 WL 3672835 (Ky. App. Nov. 6, 2009)

C. Don’t get confused with 18 USC §922(g)(9), the "Laughtenburg Amendment" which does bar possessing or attempting to possess a firearm or firearm ammunition for life when there is a misdemeanor conviction of domestic violence. There is not a similar military and law enforcement exception for this provision. Therefore, this will normally result in either the service member being chaptered out of the military or at least barred to reenlistment. There is a recent U.S. Supreme Court case of United States v. Hayes, 129 S.Ct. 1079 (2009), decided 2/24/09, that ruled that amendment from fourth degree assault, domestic violence to plain fourth degree assault still kicks in the gun restriction. The Supreme Court's decision holds that the gun ban applies whenever the battered victim is in fact the spouse or other family relative of the offender. In the majority opinion, Supreme Court Justice Ruth Bader Ginsburg wrote, "It suffices for the government to charge and prove a prior conviction that was, in fact, an offense committed... against a spouse or other domestic victim." Hayes, at *421.

VIII. 20-20-20 MEDICAL COVERAGE

A. If there is military service of at least twenty years, a marriage that lasted at least twenty years and an overlap of marriage and military service of at least twenty years, then the non-military former spouse is entitled to Tricare medical benefits and military medical treatment.

B. If the deadlines are met, then it does not cost the military spouse or former spouse anything for this coverage. If you have a nineteen year marriage with the other requirements also being met at twenty years, it may be in everyone's best interest to prolong the divorce until the 20-20-20 requirement is met. The military spouse enjoys a savings especially if maintenance is going to be awarded.

IX. THRIFT SAVINGS PLAN

A. The Thrift Savings Plan (TSP) is a Federal Government-sponsored retirement savings and investment plan. Congress established the TSP in the Federal Employees' Retirement System Act of 1986. The purpose of the TSP is to provide retirement income.

B. The TSP is a defined contribution plan. The retirement income that you receive from your TSP account will depend on how much you have contributed to your account during your working years and the earnings
on those contributions. The TSP offers the same type of savings and tax benefits that many private corporations offer their employees under so-called "401(k)" plans.

C. Since there can be quite a bit of money built up in a TSP it is important to get the value of the account and take it into consideration upon division of property.

X. SURVIVORS’ GROUP LIFE INSURANCE (SGLI)

A. Survivors’ Group Life Insurance (SGLI) is group term life insurance for members of the armed forces. Active duty members are automatically insured for $200,000, unless they opt out in writing. SGLI is a better choice than many other insurance plans because it pays out in situations, such as death by war or suicide, where other plans do not. Additionally, SGLI protects the service member while on active duty and for the first 120 days after they separate.

B. The military member has the absolute right to choose the beneficiary to receive the SGLI funds in the event of the member’s death.

C. It is very important that your service member client keep their beneficiary designation current, especially if they have gotten divorced and/or remarried. In Ridgway v. Ridgway, which went all the way to the United States Supreme Court, the military member designated his spouse on the SGLI election form. However, when he was subsequently divorced and remarried, he never changed the beneficiary designation. Thus, when the military member died, the SGLI proceeds went to his ex-wife instead of his current wife. Ridgway v. Ridgway, 454 U.S. 46 (1981).

XI. ADOPTION

A. The SCRA applies to adoption proceedings.

B. KRS 199.475 alters the one (1) year residency requirement for an adoption if the petitioner is in the military. KRS 199.475 provides that “[a]ny person who has been a resident of any United States Army post, military reservation or fort within the State of Kentucky for sixty (60) days, or is a resident of this state who has resided on such United States Army post, military reservation or fort together aggregating sixty (60) days before filing the petition, may bring an action for adoption of a child in any county adjacent to said army post or military reservation.”

XII. DIVISION OF MILITARY RETIRED PAY IN DIVORCE

A. Method of calculation of retired pay depends on DIEMS (Date of Initial Entry to Military Service), which is provided on service member’s LES (Leave and Earnings Statement)
1. DIEMS prior to September 8, 1980: (terminal "basic pay") X multiplier:

The "multiplier" is 2.5% X years of service (limited to 75 percent). For example, at twenty years of service, the multiplier will be 50 percent, i.e. .025 x 20 = 0.5, or 50%. At thirty years of service, the multiplier will be 75 percent, i.e. .025 x 30 = 0.75, or 75 percent. [10 USC §§1406, 1409(b)(1)]

2. DIEMS on or after September 8, 1980: (average of highest three years of "basic pay") X multiplier:

   a. Add average monthly pay (basic pay) of the three highest years of pay (each year individually) and divide by three.

   b. Defined as "the 36 months out of all the months of active duty served by the member....for which the monthly basic pay to which the member was entitled was the highest" [10 USC §1407(b),(c)]

   c. The "multiplier" is the same as with the formula applied to service members with a DIEMS prior to September 8, 1980. For example, a service member retiring after 20 years would have retired pay calculated as follows: .025 x 20 = 0.5, or 50 percent x (average of highest three years of "basic pay").

3. DIEMS on or after August 1, 1986: In addition to "High Three Formula", service members have option of utilizing the REDUX formula. [10 USC §1409(b)(2), 37 USC §322]

   a. The REDUX formula is utilized when the service member accepts the option of agreeing to accept a mid-career bonus ($30,000.00) at the fifteenth year of service and to remain on active duty for at least twenty years of service. [10 USC §1409(b)(2)]

   b. Under REDUX, retirement payments are based on 40 percent (rather than 50 percent) of average of highest three earning years ("basic pay") after twenty years of service. The reduction resulting in a 40 percent multiplier is computed by subtracting 1 percent for each full year the service member's total creditable service is less than thirty years. For example, at twenty years, the calculation would be as follows: .025 x 20 = 0.5, or 50 percent, less 10 percent, based on 1 percent x years of service less than thirty years, 50% - (1% x 10) or 40%.

   c. In the event that the service member serves beyond twenty years, the calculation will include a 3.5 percent increase for each additional year served up to twenty years. At thirty
years of service, retired pay will be capped at 75 percent. For those retiring after 2006, the percentage utilized may be the sum of 75 percent and the product of 2.5 percent times the credible years of service beyond thirty. [10 USC §1409(b)(3)]

d. For example, Lieutenant Colonel Jones, having retired with twenty-two years of service, will receive monthly retirement payments calculated as follows: Average "basic" pay for highest three years [$6200 (or $6100 + $6200 + $6300 divided by 3)] times the "multiplier", which is 40% + TIM (time in service) over twenty years times 3.5%: $6200 x 47% [40% + (2 x 3.5%) = 47%] = $2914.

e. Other adjustments: The COLA is computed differently under this system, or as 1 percent less than inflation measured by the CPI. [10 USC §1401a (b)(3)] Retired pay is re-computed at age sixty-two to raise payments to amount that would have been received under the "High Three Formula," with the multiplier being applied to the original highest three years of "basic pay". Also, a re-computation at age sixty-two allows member to recoup CPI shortfall up to age sixty-two, after which the COLA reverts to 1 percent less than CPI for life. [10 USC §1401(1)]

f. Note that there is a difference between a fixed amount award and a percentage award as to COLA. If the parties use a fixed amount award, then the non-military spouse will not share in the COLA unless specifically stated. If the parties use a percentage calculation, then the non-military spouse will share in the COLA. See Applewhite v. Applewhite, 2009 WL 1884615 (Ky. App. Jul. 2, 2009).

g. Also, the Court cannot just order a lump sum payment for the buyout of the military retirement without a showing of how and why it came up with that amount. This will probably require an expert actuarial. In Rearden v. Rearden, 296 S.W.3d 438 (Ky. App. 2009), the trial court calculated that the wife and husband were only married for two (2) months of the husband’s military service. The wife’s marital share of the husband's military retirement was $8.08 per month. The trial court, in an attempt to quantify the amount and prevent the husband from having to pay the wife this paltry amount each month, ordered that the husband pay the wife $3000.00 for her share of his retirement (roughly thirty years of payments). The Court of Appeals found that even in a marriage where the military service only overlapped the marriage by two months, the wife was entitled to her share of his retirement. However, without testimony "about his life expectancy, [an] assessment of the current value of the retirement benefits
and [a] consideration of actuarial tables" the court cannot
determine what buyout amount would be appropriate.
Rearden, 296 S.W.3d 438 at 444.

B. A QUADRO is not required to divide military retired pay, however, the
court order is subject to very specific requirements and provisions which
are found in several authorities, including the Uniformed Services Former
Spouse's Protection Act (USFSPA) and implementing regulations found
at the DoD Financial Management Regulation (DoD 7000.14-R, Vol. 7B,
Chap. 29), 32 CFR Part 63; 10 U.S.C. §1408; Former Spouse Payments
From Retired Pay, 60 FR 17507-01.

1. Requirements and provisions found in the USFSPA. 10 U.S.C.
§1408.

a. The court order must express the former spouse's share in
dollars or as a percentage of "disposable retired pay." 10
U.S.C. §1408

b. The court order must be effectively served on the military
service by personal service, facsimile, electronic
transmission, or by mail, to Defense Finance and
Accounting Service (DFAS), Cleveland Center, P.O. Box
998002, Cleveland, OH 44199-8002. 10 U.S.C. §1408(b).

c. The court order must be regular on its face, which it is if
rendered by a court of competent jurisdiction, in legal form,
with nothing on its face providing reasonable notice of
being issued without authority of law. 10 U.S.C.
§1408(b)(1)(B), 10 U.S.C. §1408(b)(2)

d. The court order or documents served with the order must
identify the service member concerned and include the
SSN of the service member. 10 U.S.C. § 1408(b)(1)(C)

e. The court order or documents served with the order must
certify that the rights of the service member provided by
the Service members Civil Relief Act (SCRA) were

f. The court order must reflect that the court has the authority
to treat the service member's retired pay as property of the
service member and his/her spouse in accordance with the
law of the jurisdiction of the court. 10 U.S.C. §1408(c)

g. The court order must reflect that the court has exercised
jurisdiction over the service member either by reason of
his/her residence in the state for reasons other than simply
because of military assignment, or by reason of the service
member being a domiciliary of the state, or by reason of
the service member having consented to the jurisdiction of the court. 10 U.S.C. §1408(c)(4)

h. If the court order is subsequently modified by a sister state, that order will not be accepted by DFAS unless the court of the sister state possesses jurisdiction over the service member as provided in 10 U.S.C. §1408(c)(4). 10 U.S.C. §1408(c)(4); U.S.C. §1408(d)(7)

2. Requirements and provisions found in DoD 7000.14-R, Vol. 7B, Chap. 29

a. For service members divorced while on active duty, the award may be expressed in terms of a marital or coverture fraction (numerator is number of months parties were married while service member was performing creditable military service and denominator is the number of months of total creditable military service. [DoD 7000.14-R, Vol. 7B, Chap. 29, Para. 290211]

b. An example of a formula award is as follows: The former spouse is awarded a percentage of the service members disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____, representing the months of marriage during which the service member performed creditable military service, divided by the member’s total number of months of creditable military service. If, at the date of divorce, the marriage had lasted twelve years during which the service member performed creditable service, after which the service member continued to serve for a total of twenty-five years: The formula would be applied as follows: .50 (or 50%) x 144/300 = 24 percent (share of former spouse). The denominator would not be provided for in the court order (as it is not known at that time how many years the service member will actually serve before s/he retires) and DFAS will insert the appropriate number subsequent to the actual retirement. [DoD 7000.14-R, Vol. 7B, Chap. 29, Para. 290607] [NOTE: DoD 7000.14-R, Vol 7B, Chap. 29, contains a sample "Military Retired Pay Division Order," which provides all required language as well as sample provisions for both formula and hypothetical awards for active duty and retired service members. Another useful document (along with other materials, FAQ’s, etc.) is found at the DFAS website, www.dfas.mil (click on "Military Pay," then "Garnishment Military" and then look under the heading "Uniformed Services Former Spouses’ Act") and is titled "Uniformed Services Former Spouses’ Protection Act, Dividing Military Retired Pay").]
c. A hypothetical award may also be utilized if the service member is divorced while on active duty. This award is based on a percentage of a retired pay amount calculated using variables different from the service member's actual retirement variables. It is usually calculated as if the service member retired at the time the court divided the service member's retired pay (or, in other words, the date of the divorce). In this situation, the former spouse doesn't benefit from pay increases, promotions and increased length of service between divorce and actual retirement. [DoD 7000.14-R, Vol. 7B, Chap. 29, Para. 290213]

d. An example of a hypothetical award is as follows: The former spouse is awarded _____% (may compute utilizing marital/coverture fraction with the denominator being the total months of military service at the divorce/or hypothetical retirement date) of the service members disposable military retired pay that the service member would have received had the service member retired on ____________, 2009, with a retired base pay of $_____.__ and with ___ years of creditable service.

e. DFAS will convert the hypothetical award into a percentage of the service member's actual disposable retired pay as reflected in the following example [DoD 7000.14-R, Vol. 7B, Chap. 29, Para. 290608F]: Court order awards former spouse 25% of retired pay of E-6 with a retired base pay of $2040.00 (average of high thirty-six months of base pay prior to date of hypothetical retirement), with eighteen years of creditable service and a hypothetical retirement date of June 1, 1997. The hypothetical retired pay is $918.00 or $2040.00 x (.025 x 18). The service member actually retires on June 1, 2002, as an E-7 with an actual retired base pay of $3200.40 and twenty-three years of creditable service. The actual gross retired pay amount is $1840.00 or $3200.40 x (.025 x 23). DFAS will convert the hypothetical award to a percentage of the actual retired pay: .25 (or 25%) x 918/1840 = 0.124728 (12.4728%). In other words, .25 x $918.00 = $229.50 and .124728 x $1840.00 = $229.50. As this is a percentage award, the former spouse will receive a proportionate share of COLA's.

f. The court order, in providing for a hypothetical award, must make clear what percentage is awarded to the former spouse, the years of creditable service prior to the hypothetical retirement date, the hypothetical retire pay base (or the member's hypothetical rank), and the hypothetical retirement date. [DoD 7000.14-R, Vol. 7B, Chap. 29, Para. 290608C] For example, in the case of a service member with a DIEMS subsequent to September
8, 1980, it will be necessary to provide (in the court order) the average of the highest three years of basic pay prior to the hypothetical retirement date (which also must be specified) as well as the number of creditable years of service immediately prior to the hypothetical retirement date. This is necessary due to the fact that the computation of the hypothetical retirement pay requires that the "multiplier" (which is .025 x the credible years of service) must in turn be multiplied by the average of the high 3 years of basic pay.

g. Like the USFSPA, DoD 7000.14-R, Vol. 7B, Chap. 29, provides that the court order must be regular on its face [Para. 290601A.]; that the former spouse's share must be expressed in such a way that DFAS may determine the percentage of fixed dollar amount (percentage awards result in a share of future COLA increases) [Para. 290601C]; that the service member's rights under the SCRA were observed [Para. 290602B]; that jurisdiction over the service member was obtained by consent, domicile or residence for reasons other than military service [Para. 290604A, 290605]. If the service member signs a separation agreement, there is a presumption that there is consent to the jurisdiction of the court with which this document is filed. [Para. 290606]

h. The 10/10 requirement rule: In order for the former spouse to receive his or her share of the military retired pay through direct payment from DFAS (as opposed to relying on the service member, for example, to send a check on a monthly basis to the former spouse), the marriage must have overlapped with creditable military service for a period of at least ten years. Consequently, the court order must provide clearly that the parties "were married for at least ten years during which the service member performed ten years or more of creditable military service". This is an extremely important issue for the former spouse and a clear benefit that arises out of a more lengthy marriage. Many service members are under the impression, mistakenly, that the former spouse has no right to share in the military retired pay unless the marriage lasted at least ten years. This is not correct.

i. Reservists: For members of the reserve, the numerator of any formula award will be expressed in terms of retirement points earned during the marriage (must be provided in court order). The denominator (which will be inserted by DFAS) will be total number of retirement points at retirement. [DoD 7000.14-R, Vol. 7B, Chap. 29, Para. 290607] In regard to hypothetical awards, the hypothetical creditable years of service is calculated by dividing the
retirement points earned as of the hypothetical retirement date by 360. [Para. 290608B] [NOTE: DoD 7000.14-R, Vol 7B, Chap. 29, which includes a sample "Military Retired Pay Division Order", provides sample provisions for both formula and hypothetical awards for reservists.]

The application process, as well as the notice that is provided to the service member and the procedure for disputing the enforcement of the court order, is described at DoD 7000.14-R, Vol. 7B, Chap. 29, Para. 290401 through Para. 290504.

C. Poe v. Poe, 711 S.W. 2d 849 (Ky. 1986), provides for a formula with both a non-hypothetical and a hypothetical element. It is helpful to keep this in mind as DFAS must be provided with adequate information to carry out the necessary calculations. The following is a case scenario from an actual case which demonstrates the complexity that can result from utilizing the Poe v. Poe formula:

1. The formula provided in Poe v. Poe is as follows:

   \[
   \frac{150 \text{ months (duration of marriage)}}{\text{total months of military service}} \times \frac{\text{1/2 of Robert's disposable retired or retainer pay (as defined in 10 U.S.C. section 140 8(c)(1)), OR } \frac{1/2 \text{ of the disposable retired or retainer pay which would be payable to Robert if he retired at the same rank and basic pay rate which he had attained as of January 5, 1985. WHICHEVER IS LESS.}}{\text{any post-retirement cost-of-living increases (10 U.S.C. section 140(a)) which are proportional to Joanne's interest in the disposable retired or retainer pay computed as of the date of retirement.}} \times \frac{\text{that portion of retirement payments which were earned during the marriage.}}{\text{1/2 of Robert's disposable retired or retainer pay which would be payable to Robert if he retired at the same rank and basic pay rate which he had attained as of January 5, 1985. WHICHEVER IS LESS.}} \times \frac{\text{any post-retirement cost-of-living increases (10 U.S.C. section 140(a)) which are proportional to Joanne's interest in the disposable retired or retainer pay computed as of the date of retirement.}}{\text{1/2 of Robert's disposable retired or retainer pay which would be payable to Robert if he retired at the same rank and basic pay rate which he had attained as of January 5, 1985. WHICHEVER IS LESS.}}
   \]

2. The portion of the Poe formula which provides that "1/2 of the disposable retired or retainer pay which would be payable to Robert if he retired at the same rank and basic pay rate which he had attained as of January 5, 1985. WHICHEVER IS LESS"
expresses a hypothetical formula. This can cause a problem if the relevant data is not provided to DFAS in the court order.

3. In the "Retirement/Early Out' Pay" provisions of the marital dissolution agreement there is language that corresponds to this hypothetical language in Poe v. Poe. Namely, the agreement provides that "(t)he marital portion shall then be multiplied by fifty percent (50%) of the Husband's disposable retired pay or retainer pay which would be payable to Husband if he retired at the same rank and basic pay rate he has attained as of November 15, 2000."

4. The former spouse of the service member submitted an application (DD Form 2293) to receive her portion of her former husband's retired pay and she subsequently received a letter from DFAS explaining that the court order did not provide sufficient information to allow DFAS to calculate the amount of the hypothetical retired pay.

5. The Paralegal Specialist at DFAS noted that, as the service member's DIEM was after September 7, 1980, his hypothetical retirement pay would have to be calculated utilizing the "high 36 months" prior to the hypothetical retirement date. As DFAS does not have access to the service member's active duty pay records, the "high 36 months" data must be provided in the court order. The court order must also provide the years of creditable service prior to the hypothetical retirement date.

6. DFAS ultimately approved the former spouse's application after a clarifying order was obtained by agreement. The issue was resolved by agreeing to the marital or coverture fraction (.50 x 204/276) based on the marriage (at the time of the divorce) having overlapped with seventeen years of creditable military service (204 months) and the service member having retired after a total of 23 years of creditable service (276 months), which corresponds to the language in Poe v Poe, providing for the "% of future monthly retirement payments earned during the marriage". The percentage obtained utilizing this marital or coverture fraction is 37% (.3695...). This percentage was then multiplied by one-half of the average of the service member's "high 36 months" of basic pay prior to the hypothetical retirement date, or half of $2173.90 ($2065.89 + $2172.60 + $2283.30/3), which is $1086.95. This was done despite the fact that the marital dissolution agreement actually provided that the "marital portion" (i.e. outcome of the marital or coverture fraction) was to be multiplied by one-half of the service member's hypothetical "retired pay or retainer pay" (not simply by the average of the "high 36 months" amount) which would actually have been obtained by utilizing the following formula (.025 x 17 = .425, or 43%) x $2173.90 = $934.77. One-half of this amount would be $467.39, so that the language of the marital dissolution agreement actually provided that the former
spouse was to receive 37 percent of $467.39, or $172.93. The former spouse actually received 37 percent of one-half of the "high 36 months" prior to the hypothetical retirement date, which is $467.39, or $172.93. Over a period of thirty years, this is a difference to the former spouse of $106,005.60 ($168,260.40 - $62,254.80). As in many other areas of the law, the "devil is in the details." (Also note that the agreed clarifying order includes other information required by the USFSPA and DoD 7000.14-R, Vol. 7B, Chap. 29, and which was not included in the marital dissolution agreement or the final decree.)

7. Another good example of the inequities that can occur in a case if the percentages are not clearly defined is Snodgrass v. Snodgrass, 297 S.W.3d 878 (Ky. App. 2009). It should be noted that Snodgrass also included facts regarding the use of CR 60.02 due to lack of due process. However, the crux of the Snodgrass case is the fact that the wife got an order that gave her "46% of [service member's] retirement benefit from the United States Military." The order did not take into account that the husband could work beyond twenty years. In that case, she would be receiving 46 percent of his non-marital portion of the retirement instead of 100 percent of his non-marital portion. The trial court did correctly find that wife was only entitled to the amount as if he had retired at the same rank and pay at the time of the divorce, but did not correct the percentages. The Court of Appeals reversed the latter, finding that the husband was entitled to his non-marital share of the retirement. Specifically, the Court found the ruling contrary to Kentucky law. In fact they showed that the actual amount that the wife was receiving was equivalent to 82 percent of the marital portion of the retirement. Snodgrass is a very interesting read on the effect of non-clarity or lack of understanding of DFAS terminology in orders. It is highly recommended that any practitioner who has a military case to read the Snodgrass opinion.

D. The "disposable retired pay" that may be divided by a court order does not include amounts received by the service member as a result of a service-connected disability. "Disposable retired or retainer pay" is defined in 10 U.S.C. §1408(a)(4)(A)-(D), is simply the amount of retired pay that DFAS sends the retiree after the government deducts (A) what was previously overpaid by the government to the retiree while a service member, (B) forfeitures resulting from military discipline, (C) portions of the retired pay attributable to disability payments to the service member who retires for reasons of physical disability, and (D) annuities set up by the service member for the benefit of his spouse or children. In Mansell v. Mansell, 490 U.S. 581 (1989), the U.S. Supreme Court held that disability payments are not divisible pursuant to the USFSPA.) This creates a significant issue for the non-military former spouse. For
example, acceptance by the service member of disability pay through the Veterans' Administration (VA) (which is non-taxable) necessitates a corresponding reduction in the service member's retired pay which, in turn, allows the service member to unilaterally decrease the amount that had previously been received by the former spouse as a result of a property division which awarded the former spouse a percentage of the service member's retired pay. (The former spouse has received some relief as a result of recent "concurrent receipt" legislation which will be discussed below.) There are primarily two types of disability pay that are of concern here, military disability retired pay and VA disability pay.

1. In the event that a service member, while on active duty, becomes disabled to the point of being unable to perform his or her assigned military duties, the service member may be placed on the "disability retired list" (if the service member has sufficient creditable service time). The USFSPA provides that "disposable retired pay" does not include an amount which is equal to the amount of disability retired pay received by the service member utilizing the percentage of disability on the date he or she was retired. 10 USC §1408(a)(4)(C) This provision, in effect, makes only the difference (between the gross retired pay and the disability pay) divisible by the state court. For example, a divorce decree may have provided that the former spouse is to receive 50 percent of a service member's military retired pay [(.025 x twenty years of service) x $3500.00 (average of high thirty-six months) or $1750.00. In the event that the service member's monthly basic pay at the time of the disability rating was $3800.00 and his or her percentage of disability was 37 percent, the disability pay would be $1406.00 (.37 x $3800.00). Instead of the former spouse receiving $875.00 (.50 x $1750.00), he or she would only receive $172.00 (.50 x ($1750.00 - $1406.00), or .50 x $344.00.

2. An additional system providing disability pay is found at Title 38 of the USC, and is administered by the VA. The most frequently encountered situation is where the service member is, following retirement, determined to have a disability by the VA and he or she will ordinarily elect to receive disability pay through the VA by waiving a corresponding amount of retired pay. 10 USC §1408(a)(4)(B) This waiver is the attractive option for the service member because the disability pay, unlike the retired pay, is not subject to being taxed. As pointed out above, however, this unilateral election by the service member will result in a decrease in the payments being made to a former spouse under the terms of a property division.

a. Concurrent Retirement & Disability Pay (CRDP): Some degree of relief is available for the former spouse due to legislation passed by Congress in 2003 (taking effect on January 1, 2004) and known as CRDP. 10 USC §1414 In the event that the service member is entitled to retired pay (20 years of creditable service) and is has a VA disability
rating of at least 50 percent, he or she entitled to receive both military retired pay and disability pay through the VA despite the restrictions otherwise imposed by 38 USC §§5304, 5305. Until 2014, however, there is a phase-in period for full concurrent receipt. The process began in 2004 and continues until 2014 when full restoration of the waived amount will be obtained. The phase-in requirement was eliminated in 2005 for those service members with 100% disability. In the event that the former spouse has not been receiving any portion of the service member's retired pay due to a 100 percent disability rating by the VA, a new application (DD Form 2293) should be submitted to DFAS. The disability does not need to be combat related in order to qualify for CRDP.

b. The method to be employed in implementing the phase-in was set out in the statute, 10 USC §1414(c). For example, if the service-member retired in 2003, had been receiving $1800.00 in retired pay and then had subsequently waived $800.00 in retired pay in order to receive $800.00 in disability pay (based on a 70 percent rating) through the VA, the adjustment would be as follows for 2004: The monthly retired pay of $1000.00 would be increased by $250.00 (a 50 percent disability would result in a $100.00 increase, a 60 percent disability would result in a $125.00 increase, a 80 percent disability would result in a $350.00 increase, etc.). The increase in the retired pay would, in effect, result in the waived amount decreasing from $800.00 to $550.00 ($800.00 - $250.00). For 2005, the adjustment would be as follows: The amount of retired pay would be the sum of $1250.00 and 10 percent of the difference between $550.00 (the remaining amount of the waived retired pay) and $250.00 (the 2004 adjustment amount), or $1250.00 + .10 ($550.00 - $250.00), or $1250.00 + .10($300.00), or $1250.00 + $30.00 = $1280.00. This process of incremental increases in retired pay continues until 2014, at which point the service member will receive $1800.00 (along with COLA increases) in retired pay as well as $800.00 in disability pay. The important aspect of this process for the former spouse is that the incremental increases in retired pay (CRDP) are subject to the terms of the property division. (Those service members retiring after 2004 receive a larger monthly increment in CRDP, after which the statutory provisions are applied for subsequent years.)

c. In addition to the former spouse's share of the CRDP amounts (remember that CRDP is not a "benefit" enjoyed by the former spouse of a service member with a disability of less than 50 percent) it is also helpful to keep in mind the possibility of drafting provisions in marital dissolution
agreements and making creative arguments in an effort to protect the former spouse from the impact of the unilateral decision on the part of the service member to receive VA disability pay and to waive a corresponding amount of retired pay. Possibilities include the retention of jurisdiction to amend the property division in the event that a waiver occurs, or a requirement that direct payments be made by the service member to the former spouse to make up for the decrease in retired pay, etc. The following language from *Yonts v. Yonts*, 2008 WL 344194 (Ky. App. Feb. 8, 2008) is also instructive:

The United States Supreme Court in *Mansell* considered whether state courts could divide military retirement pay waived by the retiree in order to receive veteran’s disability benefits pursuant to the federal Uniformed Services Former Spouses’ Protection; 10 U.S.C. §1408. The Supreme Court held that a state court may not divide military retirement benefits waived in order to receive veteran’s disability benefits. *Id.*

Similarly, in *Davis v. Davis*, 777 S.W.2d 230 (Ky. 1989), the Kentucky Supreme Court addressed whether veteran’s disability benefits received by a veteran via his election to waive retirement benefits in a like amount could be regarded as divisible marital property in a divorce proceeding. The Court held that pursuant to 10 U.S.C. §1408 (a)(4) “[a]mounts waived in order to receive compensation under title 38, or, VA benefits received in lieu of military retirement pay, are specifically excluded from division as marital property.” *Davis* at 232. *See also West v. West*, 229 S.W.2d 451 (Ky. App. 1987).

However, the Court in *Davis* recognized the potential for inequity that *Mansell* puts on the former spouse upon dissolution of a marriage. In recognizing that, the Court concluded, "if an inequity arises in an individual case, the trial court can resolve the problem according to our statutes by making an appropriate award of spousal support and/or marital property." *Davis* at 232. *See also* KRS 403.190; KRS 403.200. In this case, the trial court did not order division of the VA benefits, or even that Herbert pay a portion of his VA benefits to Brenda. Rather, the trial court only awarded maintenance pursuant to state law. There is no authority which prohibits the trial court from

See also, Perron v. Perron, 2009 WL 1256502 (Ky.). In Perron, the Family Court attempted to make a contingency award of maintenance in the amount of one-half (½) of the disability should the military retiree take disability at a later time. The Court of Appeals stated that this is improper because it is attempting to veil an award of disability under a maintenance award without taking into consideration the factors of KRS 403.200. It stated, instead, that the Family Court retained jurisdiction to consider a maintenance award should the contingency of a disability award occur. Perron v. Perron, 2009 WL 1256502 (Ky. App. May 8, 2009).

The wording of the parties settlement agreement may allow the parties to agree to divide disability even when the Court could not do it on its own. Timberlake v. French, 2009 WL 4405558 (Ky. App. Dec. 4, 2009). In Timberlake, the Court was relying on the language in the Settlement Agreement to award the wife the full amount of her ex-husband's retirement instead of an amount in disability. In Timberlake, the parties divorced in 2000 with a Settlement Agreement awarding the wife one-half of the "disposable retired pay available" to the husband. At this point, the award was not vested. In November 2003, the husband retired from the military and the wife began receiving her share of the benefits (i.e., the retirement vested). Subsequently, husband elected to take disability benefits and waive an equal share of military retirement in return. The trial court, and later the Court of Appeals, decided that at the time of the vesting of the retirement was when the Court evaluated what was "available" to the husband and what the wife's share of the retirement was. The Court held that husband's "subsequent election to receive military disability benefits is of no consequence and cannot be used to reduce [Wife's] share of military retirement benefits per the agreement." Id. at *3. The Court concluded that the wife is entitled to one-half of the husband's total share of what his retirement would be including cost of living increases and ordered the husband to pay the wife the difference between such amount and the reduced amount she was receiving due to the husband's unilateral decision.
In Copas v. Copas, 359 S.W.3d 471 (Ky. App. 2012), the Court of Appeals of Kentucky had before it a case where DFAS was paying the wife 50 percent of the husband's total retirement instead of just 50 percent of the marital portion of the retirement. Once he retired, the error in the form sent in to DFAS by the wife was discovered. In the meantime, husband had taken disability benefits of $567.00 reducing his disposable military retired pay by the same. After a hearing (and a motion to alter, amend or vacate), the trial court corrected the percentage to be that incurred during the marriage, but ruled that wife "is awarded 50 percent of the disposable military retired pay the [husband] would have received had the [husband] become eligible to receive retired pay on June 18, 1997, with the rank of SFC/E7 and with 21 years 9 months of service for basic pay purposes." This wording in essence would allow wife to have her share regardless of the election of disability by the husband. The Court of Appeals reversed saying that "We are cognizant of the potential inequities which may result when the retiree elects to receive disability payments, thereby reducing the net amount of retired pay the retiree's former spouse receives. Nonetheless, the current state of the law, both federal and in this Commonwealth prohibits a court from treating a retiree's disability payments as marital property." Id. at 478-79. The Court did state that the best practice is for the Court or Settlement Agreement to have a provision reserving the right to reopen the case in the event that a disability election is made, or in lieu of benefits an award of spousal support. Id.

There may also be a difference in the result if a pension has vested or not. In In Re: Marriage of Susan Nielsen, 792 N.E.2d 844 (2003), the husband was in the military at the time of the parties' divorce in 1986, and the parties entered into an Agreed Order which granted the former spouse twenty-five percent (25%) of the husband's gross retired or retainer pay. The ex-husband subsequently retired from the military, and his retired pay was in the amount of $2,185.00 per month. However, the Veteran's Administration subsequently determined that the ex-husband was disabled and awarded him disability benefits which substantially reduced the amount of his retired pay. The Nielsen Court examined the case law from a number of jurisdictions and concluded that a party's vested interest in a military pension cannot be unilaterally diminished by an act of a military spouse and applied that principle to the present case. The Court concluded that it was clear that the parties intended that the former wife would receive a percentage of his total retirement pay and not just his disposable retired or retainer pay. The Court affirmed the
trial court's decision that the former wife was entitled to an amount equal to twenty-five percent (25%) of the ex-husband's military pension as it existed on the date he retired. However, the Court clarified that the trial court could not order the ex-husband to withhold and pay over to the former spouse a portion of his monthly disability benefits. The case was remanded to the trial court to determine if the ex-husband could satisfy his obligation with assets other than the disability benefits. 792 N.E. 2d at 871-72.

A similar result was reached by the Arizona Appellate Court in In Re: Marriage of Gaddis, 957 P.2d, 1110, 1113 (Ariz. Ct. App., 1997), and in Johnson v. Johnson, 37 S.W.3d 892, 897-98 (Tenn., 2001). In the Gaddis case, the judgment for dissolution awarded the wife one-half of the husband's military retirement benefits as of a certain date. The judgment did not contain any provision concerning indemnification, modification or direct responsibility on the part of the husband. Thereafter, the husband obtained a waiver of a portion of his retirement pay which was required as a condition of his civil service employment. The Court compared that waiver to the required waiver to obtain disability benefits and reduced the wife's entitlement. The trial court ordered the husband to continue paying the wife the same monthly sum he owed her before the waiver because the divorce decree already had established the wife's fixed interest in the military retirement benefits. The trial court properly ordered the husband to continue to pay the sum to which the wife was entitled at the time of the divorce decree and clarified the court order needed only to avoid specifying an improper source of funds for the payment to be in conformity with Mansell. 957 P.2d, at 1013.

In the Johnson case, the parties' divorce decree provided that the wife would receive one-half of all retirement benefits due the husband. One year after the dissolution had been entered, the husband elected to waive a portion of his military retirement pay for disability benefits. The Court held that when a judgment for dissolution divides military retirement benefits, a nonmilitary spouse has a vested interest in her portion of those benefits as of the date of the Court's decree. The Court would not permit that vested interest to be unilaterally diminished by an act of the military spouse. Id., at 897.

d. Combat-Related Stress Compensation (CRSC): Another type of compensation available to the service member, which can impact the amount of retired pay ultimately available to the former spouse, is CRSC. 10 USC §1413a
The disability must be combat-related, which is defined at 10 USC §1413(e), and the compensation provided is determined according to tables published by the VA and the rates increase in accordance with the number of individuals dependent upon the service member for support. The important point for the former spouse is that CRSC is not divisible as marital property and the service member cannot receive both. The following is an example of an outcome that can be catastrophic for the former spouse: Sergeant Jones is rated as 100 percent disabled by the VA and receives $1500.00 in disability pay and, because of CRDP, he still receives $1200.00 a month in retired pay (and his former spouse receives 50 percent of this amount, or $600.00). Sergeant Jones then applies for and receives $1200.00 in CRSC and, consequently, loses the entitlement to CRDP, which means that Sergeant Jones receives $2700.00 ($1500.00 in disability pay + $1200.00 in CRSC) tax free and the former spouse receives nothing despite the award in the property division.

XIII. INTERNATIONAL CHILD CUSTODY CASES (HAGUE CONVENTION)

Service members often marry and have children with individuals from foreign countries and, when the marriages begin to fail, the non-military foreign national spouse will often return to their native country with the child or children. In these instances, it is necessary to become familiar with the Hague Convention on the Civil Aspects of International Child Abduction ("Convention"). The key consideration in the application of the Convention is whether the child(ren) who was removed from the country was "habitually resident" here in the United States and whether the removal from the United States was "wrongful."

A. Article 1 of the Convention provides that the object of the Convention is to "secure the prompt return of children wrongfully removed" and to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." A typical scenario which is amenable to resolution by application of the Convention is where the issue of custody and visitation is subject to the jurisdiction of a Kentucky court pursuant to our version of the UCCJEA (KRS 403.822), and where the service member is maintaining contact with the child despite deployments, etc., but the foreign national non-military spouse removes the child(ren) to another country in order to file in a court of that country and obtain an advantageous ruling on custody. (It should also be kept in mind that the Convention only applies if the child has been removed from the United States for a period of less than one year (Article 12 of the Convention) and until the child reaches the age of sixteen years (Article 4 of the Convention).

B. The removal of the child from the United States may be characterized as "wrongful" in two ways.
1. First, if there is already a custody order, for example a temporary custody order in place granting custody with the service member pending the outcome of the divorce action, the removal would be "wrongful" under Article 3 of the Convention. Specifically, Article 3a provides that a removal is "wrongful" if it is in "breach of rights of custody attributed to a person….under the law of the State in which the child was habitually resident immediately before the removal or retention".

2. Second, even if there is no standing custody order in place, the removal may still be characterized as "wrongful" under the Convention as the "rights of custody" referred to above may be said to arise "by operation of law": Specifically, Article 3 provides that "(t)he rights of custody mentioned by sub-paragraph a) above, may arise in particular by operation of law....". The application to the U.S. Department of State for assistance pursuant to the Convention must, in this type of case, include what is referred to as an "Affidavit of Law" in which you must, as the attorney representing the service member in the state where the child was habitually resident immediately prior to the removal, certify that the "rights of custody" of the service member arise by "operation of law". Language such as the following will suffice: "I verify that, under Kentucky law, that the courts determine custody issues in accordance with the best interests of the children and it is absolutely clear that 'equal consideration shall be given to each parent'." KRS 403.270(2).

C. Assuming the country to which the child has been taken is a signatory to the Convention, that country will have had to designate a "Central Authority" to discharge the duties imposed by the Convention. (The U.S. Department of State, Bureau of Consular Affairs, Office of Children's Issues, performs that function for the United States and will be your point-of-contact for proceeding under the Convention to obtain the return of the child for your client so that custody, visitation, etc., may be litigated here.) Article 7 of the Convention outlines the duties of the Central Authority and provides that assistance must be provided in discovering the whereabouts of the child, in attempting to negotiate the voluntary return of the child, in providing general information concerning the law of that country, and in initiating judicial proceedings to obtain the return of the child.

D. As a practical matter, it is suggested that the following be kept in mind in proceeding under the Convention. Despite the language in Article 7 of the Convention regarding the initiation of judicial proceedings by the Central Authority, it is likely that the actions taken by the Central Authority (of the country to which the child has been taken) will be limited to providing notice to a court of that country (under Article 16 of the Convention) that the court should refrain from taking any further action regarding custody of the child pending the outcome of the decision as to whether the child should be returned to the United States pursuant to the Convention. This is helpful, admittedly, in a situation where the foreign
national has obtained an ex parte order of custody insofar as it serves to stay any further actions. It will, however, in all probability be necessary to retain local counsel to appear in that foreign court and address the issue of whether the removal was "wrongful" and whether the return of the child should be ordered by the foreign court. In addition, the service member will probably not be entitled to assistance of any free "legal aid" services in the foreign country unless he or she is entitled to such aid here and the service member is unlikely to be eligible for that aid. This means that the service member will have to pay his or her attorney fees to handle the portion of the case occurring in Kentucky and also the attorney fees of an attorney in the foreign country.

XIV. MISCELLANEOUS

A. If you are going to practice any military divorces, then we would strongly suggest that you purchase *Military Divorce Handbook* by Mark E. Sullivan. It is available from the ABA website. It is the "Bible of Military Divorce Law." In addition, we would suggest that you join the Family Law Section of the ABA and its Military Committee and their respective listservs. This area of the law is ever changing and due to its unique problems, these sections and their listservs are a valuable resource. In addition, the Military Committee has a website for its members that has all sorts of useful information including the "Silent Partner" and "Legal Eagle" handouts which some are attached to this outline for your information. The authors wish to thank Mr. Sullivan and the ABA for their willingness to allow their materials to be used in this CLE.

B. Provided below are additional resources which will be helpful in addressing the issues arising in military divorces:


7. Office on Violence Against Women Resources for Military Divorces, (Note: Some links on this site are outdated, but still very useful source), http://www.ncdsv.org/images/websitesofinterest LAPTOPcall.pdf


ETHICAL SCENARIO 1

Judge Barry Sincere is a Family Court Judge in Hypothetical, Kentucky. Judge Sincere entered an Emergency Protective Order upon a proper petition by a spouse of a military member on behalf of her child. During a domestic violence hearing, the mother of a child testifies that she witnessed the child's military father on multiple occasions attack their eleven year old son leaving bruises and one time knocking the child out. When asked if she reported this matter to the Cabinet for Families and Children, Department of Community Based Services ("DCBS"), the mother replies, "No." Judge issues the Domestic Violence Order.

After the hearing, Judge Sincere calls DCBS and reports the incident to the intake worker. The intake worker provides the information to an investigator. Upon investigation, DCBS substantiates the abuse and also finds that mother failed to protect the child. The investigator goes to Judge Sincere and files an ex parte petition for the child to be removed. Judge Sincere grants the Emergency Custody Order and places the child into foster care. Within the statutory timeframes, Judge Sincere has a Temporary Removal Hearing. At this hearing, the Court finds just cause for the Petition and keeps the child in foster care pending an adjudication of the underlying case. Pursuant to Kentucky law, Judge Sincere appoints a Guardian Ad Litem for each of the parents and the child.

Prior to the adjudication, the Guardian Ad Litem for the mother files a motion for Judge Sincere to recuse based on ex parte communication with the Cabinet and that he was the referral source to the Cabinet. In addition, the motion alleges bias because the Judge also heard the DVO action. Should Judge Sincere recuse?

MODEL ANSWER TO ETHICAL SCENARIO 1

Assuming that Judge Sincere believes he can make a decision based on the law and the facts presented to him in the adjudication hearing, then he is not required to recuse. Under the Kentucky Code of Judicial Conduct Canon 3(E)(1), a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to, instances where: (a) the judge has a personal bias or prejudice concerning a party or a parties lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." In this case, the judge does not have any personal knowledge of the disputed facts. The judge has acquired all his information through his duties required for him to fulfill under the law.

Under Canon 3(B)(7)(e), "a judge may initiate or consider any ex parte communications when expressly authorized by law to do so." As to the ex parte communication regarding the emergency protective order, the Court is required under KRS 403.740(1) to "issue, upon proper motion, ex parte, an emergency protective order. As to Judge Sincere hearing the evidence in the domestic violence proceeding, KRS 23A.100 requires the Family Court to be the primary jurisdiction in domestic matters, including emergency protective order, domestic violence orders and dependency, abuse and neglect proceedings. Therefore, it is presupposed that the same Court would hear the domestic
violence and DNA proceedings. In fact, this is part of the "One Family, One Court, One Judge" philosophy for which Kentucky Family Courts were created.

Regarding the Judge reporting the information he received in the DVO hearing to the Cabinet. KRS 620.030 requires "any person" (which would include a judge) who has "reasonable cause" to believe a child is dependent, abused or neglected to report that information to the Cabinet, law enforcement, or the Commonwealth's or County's Attorney. Therefore, the judge, while he did not have personal knowledge of the events, had to refer this matter to the Cabinet for investigation. Finally, KRS 620.060 specifically authorizes that there be an "ex parte emergency custody order" when there are reasonable grounds to believe that there are specific instances of dependency, abuse or neglect.

Therefore, the judge was completely within the statutory requirements of his job when he received all of his information and, thus, he is within the Canons to ethically hear the case.

ETHICAL SCENARIO 2

Judge Cordial is handling a very high profile dependency, abuse and neglect case. The grandmother who raised the child has recently died, but before she died she placed the child with a fairly prominent family friend. The mother of the child has been in and out of rehab and prison. The military father of the child has been fairly absent in the child's life. At the time of the DNA action, mother is not in rehab or prison and father is employed and has a home. The family friend, who has been in this child's life basically since birth, gets very nervous that she is going to lose this child.

The family friend goes to several churches and talks to prayer groups about the situation. She urges them to contact Judge Cordial and express their concern to the judge about the effects of moving this child from the only person he knows and placing the child with parents who have never been involved. The churches jump on this endeavor. Judge Cordial's office receives about ten (10) phone calls and receives ninety-nine (99) letters urging Judge Cordial to grant custody to the family friend. The judge personally never reads any of the letters or takes any of the phone calls, but he knows that he received them.

Judge Cordial considers making a statement publically and also considers recusing upon his own motion. What should Judge Cordial do?

MODEL ANSWER TO ETHICAL SCENARIO 2

Based on the fact pattern, this is probably not a mandatory recusal situation. However, probably Judge Cordial should recuse. One thing that Family Court judges must remember is that the judge is the ultimate trier of fact in a case. Unlike a jury trial where someone else is making the decision, judges in bench trials wear many hats. Most people's only involvement with the court system is either family court or traffic court. Therefore, their perception of the justice system is framed by what happens to them in these courts.

First, the judge was proper in not reading the letters or receiving the phone calls. The Court cannot receive extrajudicial ex-parté contact which is not authorized under the
Code or by law. This is best illustrated through Ethical Scenario 1. As stated by a judge in *Ex Parte C.V. v. J.M.J.* and *T.F.J.*, 810 So.2d 700, 704 n.1 (Ala. 2001), "I understand that scores of letters by concerned citizens have been sent to me and other members of the Court. However, as a Justice of this Court, I am prohibited from reading and considering such ex parte communications."

In the present case, if only a few letters were received, then the judge should stay on the case. However, with the extreme number of letters, the judge should probably recuse. Under Canon 1 of the Kentucky Code of Judicial Conduct, the judge must "uphold the integrity and independence of the judiciary." In addition, the "Preamble" to the Code states that judge "must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system." In addition, Canon 3(B)(3) specifically states that "a judge shall not be swayed by partisan interests, public clamor or fear of criticism." In this case, the judge is in a catch-22. If the judge rules in favor of the family friend, then it appears that the court can be swayed by public opinion and public clamor. If the judge rules in favor of the parents, then the public perception will be that the court does nothing to protect the rights of children. The Alabama Supreme Court summarized this best: "Paramount to any system of justice is the total impartiality of the court which sits in judgment of any controversy. The appearance of fairness is virtually as important as is fairness itself. One of the essential ingredients of an effective judiciary is the high level of respect accorded it by the citizenry. Except for the impartiality of those who occupy the role of judge, both in act and appearance, the level of respect necessary to a strong and effective judiciary will fail." *Morgan County Commission v. Powell*, 293 So.2d. 830, 849 (Ala. 1974) (Jones, J.,concurring).

As to the judge making public comment about the situation, the answer depends on what the judge was going to say. If the judge was just going to make a general comment reminding people that judges cannot receive and read letters from the public regarding any case before it, then the judge is probably okay. Canon 4(B) states that a judge "may speak, write, lecture, teach or participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects." Therefore, this limited comment would probably fall within this section of the Code.

However, if the judge was going to make a public comment about the particular case before him, then this would definitely be an ethical violation. Under Canon 3(B)(9), a judge "shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." This obligation prevents the judge from making any comment about the merits of the case. In addition, it would potentially be a violation of the law. Since juvenile proceedings are confidential, release of information would violate KRS 610.340 and be a class B misdemeanor under KRS 610.990.

**ETHICAL SCENARIO 3**

The social worker for the Cabinet for Health and Family Services has been working on a case where the child was neglected by her military service member mother. Like many cases, the mother was angry with the Cabinet at the beginning for removing her child. Therefore, she did not actively participate in her treatment plan for the first seven (7) months after removal except for making her weekly visitation session with her child.
After seven (7) months, the mother finally began working on her plan. Part of her treatment plan was for her to remain drug and alcohol free. At the nine (9) month mark after removal, the Court ordered a random drug test and the mother tested positive for use of marijuana. At that point, the Cabinet changed its treatment plan for the mother to go to a long term treatment center. The mother reluctantly went to the treatment center recommended by the Cabinet which was a six (6) month program. The mother successively completed the program.

As the mother was being released from the program, the Cabinet's attorney obtained a goal change order from the Court because the child had been in foster care for fifteen of the last twenty-two months. Under the Adoption and Safe Families Act (ASFA), the Cabinet felt it needed to find permanency for this child. Therefore, the goal was formally changed from reunification to termination of parental rights and adoption. However, since there was no waiver of reasonable efforts entered by the Court, the Cabinet continued to work a reunification plan with the mother concurrent with proceeding on its termination case.

Since that time, the mother has made significant progress. She has completed parenting classes. She has obtained her GED and is gainfully employed. She has stayed drug and alcohol free and has obtained a small, but adequate house. In addition, she is regularly attending AA/NA meetings and has obtained a sponsor.

The social worker is very pleased with the mother's progress and asks the independent review committee at the Cabinet for permission to begin actively reunifying the mother and the child. The Committee during the review notes that the child has now been in foster care for over twenty-two months, and denies the request.

The attorney for the Cabinet does not believe that the child should be reunited with the mother. Not only does he believe reunification would not be in the child's best interest, but he goes to church with the foster family and knows that they are willing to adopt this child. When the Cabinet's attorney reviews the report that the social worker wants to submit to the Court and the GALs, the Cabinet's attorney edits the report to remove much of the information showing the mother's progress since the goal was changed and removing the statement by the social worker that she believes that termination of parental rights at this point is not in the child's best interest. The edited report was ultimately approved by the social worker's supervisor and submitted to the Court and the GALs.

Prior to the termination hearing, the Cabinet's attorney meets with the social worker in regard to her testimony. The Cabinet's attorney informs the social worker that the social worker is required to present the opinion of the Committee as the position of the Cabinet. In addition, the Cabinet's attorney tells the social worker that if she testifies that she believes the mother's rights should not be terminated that the Cabinet's attorney will make sure that she is fired from her position.

At the hearing the social worker testifies that termination is in the child's best interest upon being asked this question by the Cabinet's attorney.

What are the applicable ethical rules to this situation?
MODEL ANSWER TO ETHICAL SCENARIO 3

This scenario raises many ethical issues which need to be addressed. First, under Rule 1.13, it should be noted that the lawyer represents the organization as a client and not the individuals in the organization. In this case the lawyer has a duty under Rule 1.13 to make sure that no employee "intends to act or refuses to act in a manner related to the representation that is a violation of the legal obligation of the organization, or is a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization." See Rule 1.13(b). Under KRS 600.010, the Commonwealth is charged with the duty in dependency, abuse and neglect action to "strengthen and maintain the biological family unit, and to offer all available resources to any family in need of them." It could be argued that the lawyer for the Cabinet has violated this provision by not allowing the Cabinet Worker to do her job and not allowing the Cabinet Worker to report her view to the Court.

The second issue is that the Cabinet attorney owes a duty of candor to the Court under Rule 3.3. Under Rule 3.3, the lawyer cannot offer evidence that the lawyer knows to be false. In addition, the lawyer has a special obligation to protect the Court against fraudulent conduct "which undermines the integrity of the adjudicative process." See Commentary to Rule 3.3 at (12). In the present case, the Cabinet attorney is running afoul of this rule by not presenting truthful and full evidence to the Court for it to make its decision. The Cabinet attorney has undermined the integrity of the entire process.

The next issue is that the attorney owes a duty of fairness to the other parties to the action. The attorney cannot "knowingly falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. See Rule 3.4(b). In addition, the attorney cannot "present, participate in presenting or threaten . . . disciplinary charges solely to obtain an advantage in any civil or criminal matter." See Rule 3.4(b)(f). It appears that counsel for the Cabinet is potentially violating both of these provisions.

Another issue which may be present is that depending on the relationship the attorney has with the foster parents, the attorney may have its judgment clouded to the point that it creates a conflict of interest to the attorney. The attorney must be able to separate his personal feelings from their professional feelings. If the attorney is unable to do so, then the attorney may want to withdraw from the action and get another Cabinet attorney who can be objective to take over the matter.

This scenario also presents criminal implications. The social worker may be committing perjury depending on how material the social worker's statements are to the overall outcome of the action. See KRS 523.020 and KRS 523.030. The attorney may be guilty of complicity to commit perjury if the requisite testimony is material to the overall outcome of the action.

Finally, all Cabinet Attorneys should read and adhere to the "Standards of Practice for Lawyers Representing Child Welfare Agencies" promulgated by the American Bar Association. A copy can be obtained at http://www.abanet.org/child/agency-standards.pdf.
**ETHICAL SCENARIO 4**

A seven year old was taken into foster care after a neighbor witnessed the child being spanked excessively by his military father with a belt. The child had extreme bruising on his legs and buttocks area. The child's mother does not believe there is anything wrong with the punishment and refuses to cooperate with the Cabinet for Health and Family Services to protect the child.

The child is taken into foster care through an Emergency Court Order upon Petition by the Cabinet. The Court appoints Hon. Ima B. Leavher as the GAL for the child. Ms. Leavher shows up at the adjudication hearing and represents the child at the hearing. Ms. Leavher has not interviewed the child or any person in this case other than the social worker. Ms. Leavher makes the recommendation to the Court that the child should remain in foster care. The Court adjudicates the child as abused and sets the case for disposition.

Prior to disposition, the social worker contacts Ms. Leavher to set up an appointment for the child to meet with her. Ms. Leavher states that she does not have time on her schedule to meet with the child in person prior to disposition, but gets the foster home's phone number to call the child. Ms. Leavher calls the child on the phone and talks to him for a short time. During the conversation, the child states that he wants to go back home to his mother. He also states that he misses his father and that his birthday is next week and he wants to go to his grandmother's house on his birthday because she always cooks him his favorite meal on his birthday.

The child's birthday comes and goes without any contact from Ms. Leavher. At the disposition hearing, the Cabinet makes the recommendation that the child be committed to the Cabinet and remain in foster care with the parents to work a reunification plan. When asked by the Court if there was any dispositional alternative, Ms. Leavher simply says "No."

Has Ms. Leavher potentially violated any ethical standards?

**MODEL ANSWER TO ETHICAL SCENARIO 4**

A child is a client with diminished capacity under Rule 1.14. This rule requires the attorney to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." As such, the attorney should make every effort to work with the child within that child's capacity. For younger children, there may not be much the attorney can do to garner the child's help in representation. However, the older the child, the more involved the attorney should be with the child; and the more the child should be able to provide input.

However, regardless of the capacity of the child, the attorney still owes the duty of diligence to the child client. See Rule 1.3. In fact, the younger the child, theoretically, the more important this duty becomes. The more that the child does not have the capacity due to age or maturity to help the attorney, the more that the attorney will have to do independent investigation to protect the child's rights. This means that the attorney will have to interview more people than just the social worker to protect the child's interest. The Guardian Ad Litem for the child should not be a rubber stamp for either the
Cabinet's wishes or the parent's wishes. The Guardian Ad Litem is really helpful to the Court in that it provides another set of eyes on what is in the child's best interest.

The older the child becomes, then the more important the duty of communication under Rule 1.4 becomes. In the above case, Ms. Leavher should have contacted the child, at minimum, to let him know that he would not be going to his grandmother's house on his birthday. In addition, Ms. Leavher should have been more diligent in this matter. Under Rule 1.4(3), the lawyer had a duty to keep the child reasonably informed about the status of the case, and under Rule 1.4(4) promptly respond to him on his requests for information.

While not readily apparent from the scenario, there may be an issue of competence in this matter. Ms. Leavher did not have any dispositional alternative to the commitment. This could be because Ms. Leavher agreed with the recommendation. However, this could also be because Ms. Leavher does not know the full range of dispositional alternatives under KRS 620.140 or does not know the services provided in her community. An attorney should not undertake GAL work unless they know the range of possibilities under Rule 1.1.

Finally, there is an underlying issue in every Guardian Ad Litem case when an attorney is appointed to represent a child: "Do I represent the child's wishes or the child's best interest?" Kentucky, unlike many states, has not provided much guidance. The best answer may be that the attorney represents both. It is well established in the Commonwealth, that a Guardian Ad Litem is endowed with an awesome responsibility. "His obligation is to stand in the infant's place and determine what his rights are and what his interests and defense demand. Although not having the powers of a regular guardian, he fully represents the infant and is endowed with similar powers for purposes of the litigation in hand. [Citation omitted]. He is, therefore, both a fiduciary and lawyer of the infant, and in a special sense the representative of the court to protect the minor. . . So, he occupies a position of trust and confidence towards his ward as well as toward the court." Black v. Wiedeman, 254 S.W.2d. 344 (Ky. 1953). The best suggestion is to let the Court know the child's wishes, but also, use judgment and make an ultimate recommendation of what the attorney believes is in the child's best interest. Therefore, the Court knows both the child's desires and the Guardian Ad Litem's position.

ETHICAL SCENARIO 5

A seven year old was taken into foster care after a neighbor witnessed the child be spanked excessively by his military father with belt. The child had extreme bruising on his legs and buttocks area. The child's mother does not believe there is anything wrong with the punishment and refuses to cooperate with the Cabinet for Health and Family Services to protect the child.

The child is taken into foster care through an Emergency Court Order upon Petition by the Cabinet. While mother was offered a Guardian Ad Litem, she believes that any court appointed attorney is on the Cabinet's side and decides to hire her own attorney. She meets with Hon. S. O. Gullibal, a fairly prominent family attorney. Ms. Gullibal is sympathetic to the mother since the mother is not the abuser in this case. Ms. Gullibal believes that the Cabinet's decision to remove the child from the mother's care is extreme. Therefore, she decides to take the case.
Ms. Gullibal convinces the mother that prior to the adjudication hearing, the mother needs to complete the parenting classes recommended by the Cabinet, and she successfully finishes them. After beginning her representation, Ms. Gullibal starts interviewing witnesses and the social worker. During the representation, Ms. Gullibal learns that the mother has a significant history of mental illness and a long history with the Cabinet. In fact, Ms. Gullibal learns that the mother was responsible for the accidental death of another child several years ago. In addition, mother confides in Ms. Gullibal that she also uses corporal punishment on the child, including just before the child was removed, which leaves more bruises than what father's did and will continue to do so because "children need to be spanked." Moreover, Ms. Gullibal begins to get concerned about her ability to engage in a reasoned dialog with her client because the mother frequently misses appointments and sometimes cannot keep on topic during their conversations. Frankly, Ms. Gullibal develops serious concerns about the mother's ability to care for her child and has the personal belief that the child is better off in his foster home.

How should Ms. Gullibal resolve the moral, ethical and personal dilemma of advocating — at the potential expense of an innocent child — for a client whose actions caused the death of a child and may do so again?


MODEL ANSWER TO ETHICAL SCENARIO 5

The first issue in this scenario is similar to a previous scenario: How to handle a client with diminished capacity. Under Rule 1.14, age is not the only type of diminished capacity. Mental impairment also falls within this category. Therefore, the attorney must "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Id. In addition, "when a lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Rule 1.14(b). However, please be aware that under subsection (4) of the commentary, "if the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct." In the present case, the attorney, may at minimum, wish to get a professional opinion as to whether the diminished capacity of her client makes her a risk of harm to herself or others.

The attorney may also wonder how she is to use the information she has received that her client has potentially abused the child recently. Under KRS 620.030, every person has a duty to report to a local law enforcement agency, Kentucky State Police, the Cabinet or its designated representative, the Commonwealth's attorney or the county attorney whenever the person "knows or has reasonable cause to believe that a child is dependent, neglected or abused." Id. Rule 1.6(b)(4) states that a lawyer may reveal information relating to the representation of a client to comply with the applicable law. At
first blush, this would appear to mean that Ms. Gullibal would be required to report the abuse that she was told about. However, hidden in KRS 403.050(3) is an exception for attorneys where the attorney-client privilege has been established. "Neither the husband-wife nor any professional-client/patient privilege, except the attorney-client and clergy-penitent privilege, shall be a ground for refusing to report under this section or for excluding evidence regarding a dependent, neglected or abused child or the cause thereof, in any judicial proceedings resulting from a report pursuant to this section." *Id.* [Emphasis added]. Therefore, Ms. Gullibal should not report the prior abuse which her client revealed to her.

However, if the hypothetical would have included that the mother told Ms. Gullibal that she is so mad at the neighbor for reporting the abuse that she is going to kill the neighbor, then Ms. Gullibal "may" disclose the information "to prevent reasonably certain death or substantial bodily harm." *See* Rule 1.6(b)(1) and subsection (6) of the commentary to the rule.

Ms. Gullibal may also feel compelled to counsel her client on the problems her choice to spank children because "they need to be spanked" given the history of the mother. Rule 2.1 permits an attorney to do just that. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." *Id.* The commentary to this rule at subsection (4) permits the attorney to recommend that Ms. Gullibal seek help from other professionals. The commentary recognizes that "family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work . . . Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation." *Id.*

Finally, this situation raises the difference between declining representation of a client and withdrawing once representation is undertaken. As every attorney knows, an attorney acting in private capacity can decline representation of nearly any client, so long as they take steps to protect the potential client's interests such as advising them of deadlines or referrals, etc. However, once an attorney accepts representation, then the attorney cannot terminate that representation unless the attorney complies with Rule 1.16(b). In the present case, based on the above, the attorney may not have grounds to terminate. Potentially, the attorney could use Rule 1.16(b)(4) that the "client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement" as grounds for the termination. This may be a little bit of a stretch, but based on how adamant the client is, the attorney may be able to justify this ground. The attorney needs to remember that she cannot withdraw if withdrawal would have "a material adverse effect on the client's interests." *See* Commentary (7) to Rule 1.16. In addition, the attorney would have to get permission of the Court to withdraw. *See* Rule 1.16(c).

This would be a very tough situation for any lawyer. If the above scenario were not a privately hired attorney but a Court appointed GAL, then the attorney would need to look at subsection 3 to the commentary to Rule 1.16 for guidance on when and how the attorney may be able to withdraw.
ETHICAL SCENARIO 6

Assistant County Attorney Lynn C. Adams has been talking to a social worker at the local Cabinet for Health and Family Services office about an ongoing investigation. The social worker has met with Ms. Adams on three (3) different occasions. During the first meeting, the social worker told Ms. Adams that the military mother and father of the child was locking the child in the bedroom with no bed, no food, no toys and no opportunity to use the bathroom except on himself. During the next meeting with Ms. Adams the social worker states that the child did have food and toys in the room and that the parents had a video camera in the room to watch the child. In addition, while the child had accidents, the parents did take the child to use the restroom on a regular basis. During the final meeting with Ms. Adams, the social worker reverted back to the original situation that the child was locked in the bedroom with no bed, no food, no toys and no opportunity to use the bathroom. During this meeting, the social worker asked Ms. Adams to file a removal petition with the local family court. Question 1: What are Ms. Adams' ethical duties in this situation?

At the removal hearing, the parents, without counsel, wanted to testify. They had not been advised any rights by the Judge. The parents began admitting to acts which could be deemed criminal. Question 2: What should Ms. Adams ethically do in this situation?

Prior to the adjudication hearing, the parents stop cooperating with the social worker which is very upsetting to the social worker. The social worker comes to Ms. Adams and begins telling her that she did not tell her everything that her investigation initially found. The social worker begins to tell Ms. Adams that there were feces all over the walls and floor in the room, that the room smelled of feces and ammonia to the point that it was a health hazard and that the children were drawing pictures with the feces on the wall of the room. Ms. Adams has severe doubts about this because there were no pictures of any of this. Ms. Adams states to the social worker that they have enough with what they have already presented, and therefore, they will just present the allegations already in the petition. The social worker tells Ms. Adams that if she is called to testify that she is going to tell the judge about these new revelations because "these parents never need these children in their care again." Question 3: What should Ms. Adams ethically do?

Finally, the Guardian Ad Litem for the mother reveals that this child is of Indian descent and registered with a tribe, that the child is bi-polar and that the child should be placed with a grandmother in another state. Ms. Adams, who is a new Assistant County Attorney, does not understand what difference any of these statements to her makes. Question 4: Should she ethically be handling this case?

MODEL ANSWER TO ETHICAL SCENARIO 6

Question 1: This situation highlights a typical scenario where the investigation is fluid. While Kentucky law has no cases on point, there have been some arguments raised across the country that a dependency, abuse and neglect case is quasi-criminal, and therefore, implicates the duty of the prosecutor to provide GALs with exculpatory information under Brady v. Maryland, 371 U.S. 812 (1962). See, In re M.M., 202 P.3d, 409 (Wyo., 2009), and In re C.J., 652 N.E.2d 315 (Ill., 1995). There is no real definite law on this matter. However, it is an issue that the prosecutor needs to be aware of in order to effectively perform their duties. Even though this is not a criminal matter, per se, the
prosecutor needs to be aware of the duty of a prosecutor to disclose matters which mitigates an offense under Rule 3.8(c) and look at that rule in detail.

This situation also raises the issue of candor to the tribunal under Rule 3.3 to reveal this information to the Court since emergency custody petitions are ex parte. Under Rule 3.3(d) "in an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Id. As stated in subsection 14 of the commentary to Rule 3.3, "ordinary, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding . . . there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration." Id. In the present case, the Assistant County Attorney should disclose the adverse material to the Court so the Court can decide whether to grant the ex parte Emergency Custody Order.

Question 2: This question requires Ms. Adams to make a judgment under Rule 3.8 dealing with the special responsibilities of a prosecutor. Under Rule 3.8(b), the prosecutor shall "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." Id. This is because the "prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . ...." Id., at commentary to Rule 3.8, subsection (1). Therefore, Ms. Adams should request the Court to advise the parents of their rights out of an abundance of caution.

Question 3: While there are significant differences in the fact scenario here and Ethical Scenario 3, above, the basic concept is the same. In Ethical Scenario 3, the Cabinet Attorney was attempting to get the social worker to omit information. In this scenario, the Assistant County Attorney is trying to prevent the social worker from potentially lying on the stand. Under Rule 3.3, the lawyer cannot offer evidence that the lawyer knows to be false. In addition, the lawyer has a special obligation to protect the Court against fraudulent conduct "which undermines the integrity of the adjudicative process." See Commentary to Rule 3.3 at subsection (12). In the present case, the Ms. Adams may be running afoul of this rule by not presenting truthful and full evidence to the Court for it to make its decision. However, in subsection (8) of the commentary to Rule 3.3, the "prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. Thus, although the lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood." Id. Therefore, Ms. Adams has to make a judgment call regarding the totality of the circumstances as to whether to call the social worker to the stand.

Question 4: There are issues here regarding at least three different federal laws. Under Rule 1.1, an attorney shall "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Id. At minimum, any attorney who participates in dependency, abuse and neglect court, whether as a prosecutor or in
another role, should have a basic understanding of the following: (a) the Adoption and Safe Families Act (ASFA), (b) the Child Abuse Prevention Treatment Act (CAPTA), (c) the Indian Child Welfare Act (ICWA), (d) the Interstate Compact on Placement of Children (ICPC), (e) the Individuals with Disabilities Education Act (IDEA), and (f) state laws concerning policies, procedures and confidentiality of child abuse and neglect actions. Cabinet attorneys have additional laws they should be familiar with and should consult the "Standards of Practice for Lawyers Representing Child Welfare Agencies" promulgated by the American Bar Association for additional information.

The county attorney may also have an ethical duty here. Under Rule 5.1, a supervising attorney has the duties to make reasonable efforts to ensure that the lawyers in the office conform to the Rules of Professional Conduct which would include the rules regarding competence. The county attorney can be held liable for his/her own ethical violation if the county attorney did not take appropriate measures to prevent the subordinate attorney from violating the Rules of Professional Conduct if he or she knew of the specific conduct and did not take measures to avoid the consequences.