Volume 177 **Symposium Issue** **Fall 2003**

MILITARY LAW REVIEW

The Fourth Legal Assistance Symposium

Articles for the Legal Assistance Practitioner

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Headquarters, Department of the Army, Washington, D.C.

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MILITARY LAW REVIEW—VOLUME 177

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Word versions of their resumes, detailing relevant experience, to the Technical Editor, at charles.strong@hqda.army.mil.

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Introduction to the Fourth Legal Assistance Symposium[1]

Wherever you have judge advocates among Soldiers, you will have the practice of Legal Assistance.[2]

Captain Nicole Farmer

Legal assistance directly contributes to our personnel's legal preparedness, the well being of the Army family, and the Army's military readiness. Dedicating this issue of the *Military Law Review* solely to legal assistance issues is indeed an appropriate recognition of the significant role of legal assistance. It is also appropriate that this Fourth Legal Assistance Symposium edition coincides with the sixtieth anniversary of legal assistance.[3] As we celebrate the sixtieth anniversary of this program, it is fitting to reflect on the needs that gave rise to the Legal Assistance Program (LAP), the growth and development of the program, and the vital importance of legal assistance as an essential component to an effective and efficient Army.

The need for legal assistance became apparent in the massive mobilization of World War II—legal concerns could disrupt the Soldiers' peace of mind and increase the danger already inherent in military life. As one commentator noted:

> The outbreak of war and the subsequent disruption of normal life and process created a great new volume of legal problems for servicemen and their dependants. Many of these problems were novel in legal jurisprudence and required the development of new laws, practices, and procedures to obtain adequate and just settlement . . . This served to emphasize the need for making adequate legal advice and assistance available in this field.[4]

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1. *See also A Legal Assistance Symposium*, 102 MIL. L. REV. 1 (1983); *The Second Legal Assistance Symposium*, 112 MIL. L. REV. 1 (1986); *The Third Legal Assistance Symposium*, 132 MIL. L. REV. 1 (1991).

2. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, LAW AND MILITARY OPERATIONS IN THE BALKANS 181 (1995-1998) (quoting Captain Nicole Farmer, Chief of Legal Assistance, 1st Armored Division Forward) (13 Nov. 1998).

3. WAR DEP'T CIR. NO. 74, LEGAL ADVICE AND ASSISTANCE FOR MILITARY PERSONNEL (13 Mar. 1943) (tracing the establishment of legal assistance).

4. MILTON J. BLAKE, LEGAL ASSISTANCE FOR SERVICEMEN, A REPORT OF THE SURVEY OF THE LEGAL PROFESSION (The Lord Baltimore Press, 1951).

On 16 March 1943, *War Department Circular No. 74*, *Legal Advice and Assistance for Military Personnel*, addressed this need and created the program that has grown into today's LAP.[5]

What started during World War II as little more than a lawyer referral program has evolved into the comprehensive LAP we know today. Legal assistance attorneys use the latest automation tools to produce wills, powers of attorney, and other legal documents that comply with the laws of the state in which a Soldier or family member lives. Some offices provide in-court representation through an Expanded Legal Assistance Program. Referrals to civilian attorneys are made when legal assistance attorneys cannot provide adequate legal relief for clients. The quest for new laws, practices, and procedures to obtain adequate and just settlement noted in World War II continues today as evidenced by our partnership with the Federal Trade Commission for the "Military Sentinel."[6] Similar cooperative work with the Internal Revenue Service saves our military families millions of dollars per year through our military tax assistance program. Legislative initiatives have resulted in tax savings for military personnel and federal recognition of military powers of attorneys, advance medical directives, and testamentary instruments.

The range of topics in this Symposium reflects the expanding areas of our legal assistance practice. Just as the range of legal assistance has expanded, the quality of this practice has increased. Advances in military estate planning provide an example of this qualitative growth. The fill-in-the-blank "deployment" wills gave way to the development of will assembly software, the Minuteman and later Patriot Will programs. These tools enhanced the speed and efficiency of our legal assistance attorneys and freed time for the attorneys to address the more complex estate planning needs of our clients. These programs in turn gave way to the current advances in individual estate planning. Our current estate-planning program provides legal assistance attorneys with the tools necessary to craft the most sophisticated wills and supporting documents to meet the needs of our clients.

Another reason that the quality of LAP has increased is due to our ever-growing Preventive Law Program. Recognizing that the best solution

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5. WAR DEP'T CIR. NO. 74, *supra* note 3.

6. *See* Federal Trade Commission, *Military Sentinal*, *at* http://www.consumer.gov/military (last visited 25 Nov. 2003) ("Military Sentinel is a project of the Federal Trade Commission and the Department of Defense to identify and target consumer protection issues that affect members of the U.S. Armed Forces and their families.").

to a problem is to avoid it in the first place, many of our offices are expanding preventive law services, such as offering walk-in services to review unsigned contracts. Others are leveraging technology to obtain maximum distribution of preventive law materials to all e-mail recipients on the installation's host server. Our public *Legal Services* web site provides a wide range of preventive law information.[7] It also provides assistance for eligible clients in locating the nearest legal assistance office. Many installation legal assistance offices also maintain their own public preventive law web site.

The Army family recognizes and appreciates these benefits. In various surveys regarding military benefits, Soldiers, family members, and retirees always choose legal assistance as one of their most valued benefits.[8] This alone underscores the significance of legal assistance within our Army. Even more important, however, is our commanders' view that the availability of legal assistance, and the prompt and accurate delivery of legal assistance services, is critical to the ability to forge and maintain ready and relevant forces capable of rapid deployment and mission success anywhere in the world. Events of the last year once again bring legal assistance to the forefront as thousands of Active Duty Soldiers are joined by thousands of Reserve and National Guard Soldiers mobilized and deployed around the globe. Ultimately, that is the purpose for providing legal assistance—not because we think of it as a benefit to be handed out in the government's largesse—but because it removes and reduces Soldier and family member legal problems that interfere with Army units being better able to do what the Army must do—fight and win our nation's wars.

Legal assistance provides a unique demonstration of the "One Army" concept with a team of Active, Reserve, and National Guard legal assistance attorneys working together to support our dispersed client base. After the death of 248 soldiers in the 1985 crash of a charter transport near Gander, Newfoundland, Reserve Component judge advocates were appointed as Special Legal Assistance attorneys for families located away from active duty offices.[9] Today, the Reserve Component directory lists several hundred Reserve Component judge advocates who are available to

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7. *See* U.S. Army Judge Advocate General's Corps, *Legal Services*, *at* http://www.jagcnet.army.mil/Legal (last visited Dec. 2, 2003) ("to inform military members on personal legal affairs and preventive law").

8. U.S. Army Research Institute, Army Personnel Survey Office, Findings from the Spring 2002 Sample Survey of Military Personnel (SSMP) (copy on file with The Judge Advocate General, Legal Assistance Policy Division, Office of The Judge Advocate General, U.S. Army, Washington, DC).

advise on local law issues or provide clients with individual legal assistance. This service may be provided if the client is not near an active duty legal assistance office. It may also be appropriate because of the reservist's expertise in the particular subject matter. Lieutenant Colonel Craig Bell and Captain Thaddeus Hofffmeister reflect the expertise of our Reserve Component judge advocates in this Symposium.

The compelling need for legal assistance services that resulted in the *War Department Circular No. 74* is reaffirmed today. The global war on terrorism has highlighted yet again the crucial role of Army legal assistance offices in supporting mobilizations and deployments, caring for Army families who are left behind, and providing other essential legal services on a recurring basis. Legal readiness is a component of overall combat readiness. As the tens of thousands of reservists are brought on active duty, a crucial part of the process is a review of their "legal readiness." During this review, they are informed of their rights under the Soldiers' and Sailors' Civil Relief Act[100] and the Uniform Services Employment and Reemployment Rights Act,[111] and are assisted in preparing letters invoking the protections offered by these acts. Each of our Soldiers has the opportunity to prepare a will, power of attorney, advance medical directive, and other essential legal documents. Similar services are provided to the increasing number of Department of the Army civilian employees deploying to Afghanistan and Iraq.

Legal assistance attorneys accompany our Soldiers to the far-flung corners of the world where our Army is deployed to provide in-theater legal support for any arising legal problem. Any deployed legal professional can recount instances when fellow Soldiers have been distracted by impending legal problems that legal assistance has helped resolve, and in the process provided peace of mind to that Soldier and permitted him or her to better focus on the task at hand. It is no wonder our commanders see legal assistance as critical to the morale and well being of their Soldiers! The demand for services at home also continues as the families of our active and reserve Soldiers encounter legal problems and turn to legal assistance for support. The challenge to provide these services to families is amplified, as many are located away from our active duty military instal-

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9. Thomas J. Feeney & Captain Margaret L. Murphy, *The Army Judge Advocate General's Corps, 1982-1987*, 122 MIL. L. REV. 58 (1988).

10. 50 U.S.C. App. §§ 501-593 (2000).

11. 38 U.S.C. §§ 4301-4333 (2000).

lations. As we learned from Gander, increased reliance on our reserve judge advocate assets help us meet this need.

As it has for the past sixty years, the LAP will continue to grow and prosper. This growth will be due in part to the increased demand for legal assistance. More importantly, it will be due to the exceptional quality, dedication, and initiative of the judge advocates, civilian attorneys, paralegals, and support staff that provide legal assistance services throughout the Army and who care about the legal welfare of Soldiers and their families.

Brigadier General Daniel V. Wright

MILITARY LAW REVIEW

Volume 177 **Symposium Issue** **Fall 2003**

THE LEGAL ASSISTANCE ATTORNEY'S GUIDE TO IMMIGRATON AND NATURALIZATION

LIEUTENANT COLONEL PAMELA M. STAHL[1]

I. Introduction

On 3 July 2002, President George W. Bush signed Executive Order 13,269,[2] expediting the naturalization of aliens[3] and noncitizen nationals[4] serving in an active duty status[5] during the war on terrorism. Under this Executive Order, the President made all aliens and noncitizen nationals serving honorably on active duty during the period beginning 11 September 2001, and terminating on a date designated by future executive order, eligible for immediate naturalization.[6] The Executive Order brought naturalization issues to the forefront of the military legal assistance practice,

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2. 67 Fed. Reg. 45,287 (July 8, 2002). Note that the National Defense Authorization Act for Fiscal Year (FY) 2004 (NDAA) amended the underlying statute on which the President's executive order was based. The Act amended 8 U.S.C. section 1440(a) to include not only active duty service members, but members of the Selected Reserve of the Ready Reserve. NDAA for FY 2004, tit. XVII, § 1702 (24 Nov. 2003), 108 Pub. L. 136, 117 Stat. 1392 [hereinafter NDAA for FY 2004].

3. The term "alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2000).

as many legal assistance offices were inundated with soldiers seeking information on how to apply for naturalization under the Executive Order.

Many may be surprised to learn that a person need not be a U.S. citizen to serve in its armed forces. Under federal law, in time of peace, a person must be either a citizen or a lawful permanent resident of the United States to enlist in the Army or Air Force.[7] The regular Navy and Marine Corps apply the same requirements by policy.[8] The military generally requires a service member to become a U.S. citizen, however, before he or

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4. A "national of the United States" is defined as "a citizen of the United States, or . . . a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id.* § 1101(a)(22). *See also id.* § 1408 (providing that the following are nationals of the U.S. at birth):

> (1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;
>
> (2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;
>
> (3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and
>
> (4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years –
>
> (A) during which the national parent was not outside the U.S. or its outlying possessions for a continuous period of more than one year, and
>
> (B) at least five years of which were after attaining the age of fourteen.

See also id. § 1101(a)(29) (providing that "[t]he term 'outlying possessions of the United States' means American Samoa and Swains Island").

5. The term "serving in an active duty status" is defined as active service in the

> United States Army, United States Navy, United States Marines, United States Air Force, United States Coast Guard, or . . . [a] National Guard unit during such time as the unit is Federally recognized as a reserve component of the Armed Forces of the United States and that unit is called for active duty.

8 C.F.R. § 329.1 (2002).

she may reenlist. For example, under Army policy a soldier who is not a U.S. citizen cannot reenlist if he or she will have in excess of eight years of federal military service at the expiration of the period for which they seek to reenlist.[9]

Likewise, to be appointed as an officer in the Reserves of the armed forces, a person can be either a U.S. citizen or a lawful permanent resident.[10] A person must be a U.S. citizen, however, to receive an original appointment as a commissioned officer in the regular Army, Air Force, Navy, and Marine Corps[11] and in the National Guard.[12]

Because some service members are not U.S. citizens when they enter the armed forces, legal assistance attorneys need to know how to properly advise them on naturalization requirements. Additionally, service mem-

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6. *See* 8 U.S.C. § 1440, which provides that the President, by executive order, shall:

> designate as a period in which the Armed Forces of the U.S. are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized . . . if (1) at the time of enlistment, reenlistment, extension of enlistment or induction such person shall have been in the U.S., the Canal Zone, American Samoa, or Swains Island, or on board a public vessel owned or operated by the U.S. for noncommercial service, whether or not he has been lawfully admitted to the U.S. for Permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the U.S. for permanent residence.

Id.

7. 10 U.S.C. §§ 3253, 8253; *see also id.* § 12102(b) (providing that to be enlisted as a Reserve, a person must be a U.S. citizen or lawful permanent resident of the United States or have previously served in the armed forces or in the National Security Training Corps).

8. U.S. DEP'T OF DEFENSE, DIR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION encl. 1, para. E1.2.2.1 (21 Dec. 1993) [hereinafter DoDD 1304.26]. In addition, citizens of the federated states of Micronesia and the Republic of the Marshall Islands are eligible for enlistment in the Active and Reserve components. *Id*. at E1.2.2.4 (citing Compact of Free Association between the United States and the Government of the Federated States of Micronesia and the Government of the Marshall Islands, 99 Stat. 1770 (1986), *reprinted as amended in* 48 U.S.C. § 1681 note).

9. U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM paras. 3-9c(13), 4-8k (31 Mar. 1999). These soldiers can extend their current enlistment, however, for a period not to exceed twelve months if they have applied for naturalization to U.S. citizenship and are awaiting adjudication of the application. *Id.*

10. *See* 10 U.S.C. §§ 12201, 12241.

11. *Id.* § 532.

12. *Id.* § 313.

bers may need immigration and naturalization advice to assist their alien spouses and their spouse's children in immigrating to the United States, receiving lawful permanent resident status and, eventually, becoming naturalized U.S. citizens.

Army regulation authorizes judge advocates to provide legal assistance services on these immigration and naturalization issues.[13] Immigration law is a highly specialized field, however, and judge advocates should consider referring legal assistance clients to private attorneys specializing in immigration law if it is in the best interests of their client.[14] As with other legal assistance issues, legal assistance offices should make available a list of Reserve attorneys who specialize in this area and are willing to consider providing advice to service members and their families for Reserve points or reduced fees.

As a predicate to understanding the U.S. laws on immigration and naturalization, legal assistance attorneys should be familiar with the recent reorganization of federal immigration services. Shortly after the terrorist attacks on 11 September 2001, President Bush issued an Executive Order establishing the Office of Homeland Security "to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threat or attacks."[15] One year later, Congress passed the Homeland Security Act of 2002 (the Act), which established the Department of Homeland Security (DHS).[16] This new cabinet-level department marked the largest reorganization in the federal government in over fifty years. It absorbed twenty-two agencies and programs with a combined total of 180,000 employees.[17] One of those agencies was the Immigration and Naturalization Service (INS), which was part of the Department of Justice. The Act abolished the INS and divided its func-

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13. U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6f (21 Feb. 1996).

14. *Id.* para. 3-7h.

15. Exec. Order No. 13,228, § 2, 66 Fed. Reg. 51,812 (Oct. 8, 2001). The mission of the office was to work with executive departments and state and local governments and private entities to maintain a strategy for detecting, preparing for, preventing, protecting against, responding to, and recovering from terrorist threats or other attacks within the United States. *Id.*

16. Pub. L. No. 107-296, 25 Nov. 2002.

17. *See* U.S. DEP'T OF HOMELAND SECURITY, THE NATIONAL STRATEGY FOR HOMELAND SECURITY 47 (July 2002), *available at* http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf. "Homeland security" is defined as "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur." *Id.* at 2.

tions into three separate departments, including the Bureau of Citizenship and Immigration Services (BCIS), to manage national immigration services policies and priorities.[18] Under the new law, the Director, BCIS is charged with adjudicating immigrant and nonimmigrant visa petitions, applications for certificates of citizenship, and naturalization applications.[19] The functions of the INS and all authorities with respect to those functions transferred to the DHS on 1 March 2003 and the INS was abolished on that date.[20]

This article begins by discussing the two ways in which a person may become a U.S. citizen: by birth (acquisition or derivation) and by naturalization. It then outlines the requirements for admission into the United States and discusses two types of nonimmigrant visas that a service member's alien fiancée or spouse may use to enter the United States. The article then explains how an alien spouse, the spouse's children, and other family members may immigrate to the United States and become lawful permanent residents. Finally, it details the specific procedures for naturalization of service members and their spouses and children and proposes amending immigration regulations to allow service members to take the Oath of Citizenship overseas.

II. U.S. Citizenship, Generally

A. Citizenship by Birth

Generally, persons born in the United States become U.S. citizens at birth. In addition, certain classes of individuals born outside the United States become citizens at birth based on the U.S. citizenship status of one or both of the individual's parents. If a service member has a child born outside the United States, the child may be a U.S. citizen at birth if the ser-

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18. Pub. L. No. 107-296, §§ 451(a)(3)(D), 471. The Act also established the Bureau of Border Security to maintain the security and enforcement functions of the INS. *Id.* sec. 442; *see also* 68 Fed. Reg. 35,273 (June 13, 2003) (promulgating rules to conform Title 8 of the Code of Federal Regulations to the governmental structures established in the Homeland Security Act).

19. Pub. L. No. 107-296, § 451(b).

20. *See generally* U.S. DEP'T OF HOMELAND SECURITY, DEPARTMENT OF HOMELAND SECURITY REORGANIZATION PLAN (2002), *available at* http://www.dhs.gov/interweb/assetlibrary/reorganization_plan.pdf.

vice member complies with specific statutory requirements on residence and physical presence.

First, a child may become a U.S. citizen at birth if the child is born in the United States or certain outlying territories. According to the Fourteenth Amendment to the U.S. Constitution, all persons born in the United States and subject to the jurisdiction thereof are U.S. citizens.[21] Those persons born in, but not subject to the jurisdiction of, the United States are generally children of foreign diplomats.[22] Additionally, Congress has conferred U.S. citizenship on persons born in certain territories under U.S. control, to include persons born in Puerto Rico,[23] the Virgin Islands of the United States,[24] Guam,[25] and the Northern Mariana Islands.[26]

Even if not born in the United States, a child may be a U.S. citizen at birth because the child's parent is a U.S. citizen. First, a child is a U.S. citizen at birth if born outside the United States and its outlying possessions[27] of parents: (1) both of whom are U.S. citizens if one of the parents had a residence[28] in the United States or an outlying possession, prior to the birth;[29] (2) one of whom is a citizen who has been physically present in the United States or one of its outlying possessions for a continuous period of

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21. U.S. CONST. amend. XIV, § 1, provides:

> All persons born or naturalized in the U.S. and subject to the jurisdiction thereof, are citizens of the U.S. and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

22. 8 C.F.R. § 1101.3(a) (2002). These children, however, may be considered lawful permanent resident aliens at birth. *Id.*

23. 8 U.S.C. § 1402.

24. *Id.* § 1406.

25. *Id.* § 1407.

26. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the U.S. of America, Article III, Act of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, *as amended by* Act of December 8, 1983, Pub. L. No. 98-213, 9, 97 Stat. 1461; Act of September 30, 1996, Pub. L. No. 104-208, div. A, Title I, § 101(d), 110 Stat. 3009-181, 3009-196, *reprinted as amended in* 48 U.S.C. § 1801 note.

27. *See supra* note 4 for the definition of "outlying possessions."

28. The term "residence" means "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33).

29. *Id.* § 1401(c).

one year prior to the birth of the child, and the other who is a national, but not a U.S. citizen;[30] or (3) one of whom is an alien and the other is a citizen who, prior to the birth, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after the age of fourteen.[31] Additionally, a child is a U.S. citizen at birth if born in an outlying possession of parents one of whom is a citizen who has been physically present in the United States or one of its outlying possession for a continuous period of one year at any time prior to the child's birth.[32] If the citizen parent is a service member, any periods of honorable service are included in satisfying the physical-presence requirement.[33]

If a service member who is a U.S. citizen has a child born out of wedlock outside the United States, the child is not automatically a U.S. citizen under the above analysis. If the service member is female, her child will be a U.S. citizen at birth only if the service member previously had been physically present in the United States or one of its outlying possessions for a continuous period of one year.[34]

It is more difficult, however, for a male service member who has a child overseas born out of wedlock to establish that his child is a U.S. citizen. First, the service member father must have been physically present in the United States or an outlying possession for a period or periods totaling not less than five years, at least two of which were after the age of fourteen, prior to the birth of the child.[35] The law goes further, requiring that a blood relationship be established; that the service member father (unless deceased) agree in writing to provide financial support until the child reaches eighteen;[36] and that while the child is under eighteen, the child is legitimated under the law of the child's residence or domicile, the service member acknowledges paternity in writing under oath, or the child's pater-

30. *Id.* § 1401(d).

31. *Id.* § 1401(g).

32. *Id.* § 1401(e).

33. *Id.* In addition, periods of employment with the U.S. government, or periods during which a citizen parent is physically present abroad as the dependent unmarried son or daughter and member of household of a service member or person employed with the U.S. government are included to satisfy the physical-presence requirement. *Id.*

34. *Id.* § 1409(c).

35. *Id.* § 1409(a).

36. The requirement that the father agree in writing to provide financial support for the child until the child reaches eighteen was added in 1986. *See* Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655, *reprinted in* 8 U.S.C. § 1409 note.

nity is established by adjudication of a competent court.[37] The more difficult proof requirements for citizen fathers than for citizen mothers was recently challenged based on the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.[38] In *Nguyen v. INS*, the Supreme Court rejected the constitutional challenge to the law, finding that the different statutory requirements for a child's acquisition of citizenship depending on whether the citizen parent is a mother or father was consistent with the Equal Protection Clause.[39]

Even if a service member's child, including an adopted child,[40] does not obtain U.S. citizenship at birth, the child still may be eligible automatically to become a U.S. citizen, if the child is under the age of eighteen and residing in the legal and physical custody of the service member.[41] A child obtaining citizenship through this means is discussed later in this article.[42]

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37. 8 U.S.C. § 1409(a)(4).

38. U.S. CONST. amend. V.

39. 533 U.S. 53, 58 (2001). The Court found that, to pass equal protection scrutiny, it must be established that the classification serves an "important government object and that the discriminatory means employed" are "substantially related to the achievement of those objects." *Id.* at 60 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, (1982)). The Court found two governmental interests: (1) the importance of assuring that a biological parent-child relationship exists; and (2) the determination to ensure that the child and the parent have some demonstrated opportunity or potential to develop real, everyday ties that provide a connection between parent and child and, in turn, the United States. *Id.* at 60, 64-65. The Court found that the means Congress used to further these objectives, that is, the additional requirements if the child's citizen-parent is the father, are substantially related to these important governmental objectives. *Id.* at 68.

40. 8 U.S.C. § 1101(b)(1)(E) (Supp. 2002) defines a "child" to include:

> (i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or
> (ii) subject to the same provision as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i) [pertaining to the adoption of orphans abroad]; (II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years.

Id.

41. *Id.* § 1431(a).

42. *See infra* pt. V.D.

B. Citizenship through Naturalization

In addition to the methods discussed above, the only other way in which a person may become a U.S. citizen is to become naturalized. The power to admit aliens is an inherent right of any sovereign nation.[43] The Constitution recognizes this power by authorizing the Congress to "establish a uniform rule of naturalization."[44] Consequently, only Congress, and not the states, is authorized to regulate immigration.[45] Pursuant to its constitutional authority, Congress has passed several laws dealing with immigration and naturalization, culminating in the enactment in 1952 of the Immigration and Naturalization Act (the Act).[46] The Act sets forth the procedures for immigrating to the United States and becoming a naturalized U.S. citizen. The steps that an alien must take to legally enter the country and become a lawful permanent resident and the subsequent procedures for naturalization are discussed in the remainder of this article.

III. Aliens not Authorized Admission into the United States

The legal assistance attorney may need to provide assistance to service members whose alien spouse and spouse's children (if any) wish to enter the United States. For an alien to legally enter the United States, an immigration officer must inspect and authorize the alien's entry.[47] The Act delineates myriad reasons for which an alien may not be eligible for admission, these grounds include: health, economic, criminal, moral, security, and previous violations of the immigration laws. The legal assistance attorney must be familiar with these grounds for exclusion to properly

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43. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

44. U.S. CONST. art. I, § 8, cl. 4.

45. *See* De Canas v. Bica, 424 U.S. 351, 355 (1976) (citing *Fong Yue Ting*, 149 U.S. at 698; Henderson v. Mayor of New York, 92 U.S. 259 (1876); Chy Lung v. Freeman, 92 U.S. 275 (1876); Passenger Cases, 7 How. 283 (1849)). Nevertheless, the fact that aliens are the subject of a state statute, standing alone, does not render the state statute a regulation of immigration. *See De Canas*, 424 U.S. at 356.

46. Immigration and Naturalization Act of 1952, Pub. L. No. 414, 66 Stat. 166 (codified as amended at 8 U.S.C. (2000 & Supp. 2002)).

47. The terms "admission" and "admitted" mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

advise the service member on whether his or her spouse is eligible to enter the United States.

A. Health-Related Grounds

If an alien has a communicable disease of public health significance, he or she generally is not eligible for admission into the United States.[48] These diseases include human immunodeficiency virus (HIV) infection, active tuberculosis, gonorrhea, and infectious state syphilis.[49] Additionally, an alien who seeks admission into the United States as an immigrant,[50] or who seeks adjustment of status to that of a lawful permanent resident, must be vaccinated against vaccine-preventable diseases.[51] Finally, aliens are inadmissible if they have a physical or mental disorder that poses a threat to the property, safety or welfare of the alien or others, or is a drug abuser[52] or addict.[53] Waivers are available to some aliens for these health related requirements.[54]

B. Criminal-Related Grounds

Aliens are also inadmissible if they have been convicted of, or admit to committing, certain crimes. The first such crimes are those of moral turpitude and violations of state, federal, or foreign controlled substance laws.[55] The Act does not define the phrase "crimes of moral turpitude." Moreover, federal regulations provide only that the conduct must consti-

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48. *Id.* § 1182(a)(1)(A)(i). Waivers may be granted for alien spouses or unmarried sons or daughters, or minor unmarried lawfully adopted children and for any alien who has a child who is a U.S. citizen, a lawful permanent resident alien, or an alien who possesses an immigrant visa. *Id.* § 1182(g).

49. *See* 42 C.F.R. § 34.2(b) (2002).

50. An "immigrant" means every alien except those who enter the country as non-immigrants. *See* 8 U.S.C. § 1101(15).

51. *Id.* § 1182(a)(1)(A)(ii). These diseases include mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B, and hepatitis B. *Id.* Certain internationally adopted children are exempt from this requirement. *Id.* § 1182(a)(1)(C).

52. The term "drug abuse" is defined as "[t]he non-medical use of a substance listed in section 202 of the Controlled Substances Act, as amended (21 U.S.C. [§] 802) which has not necessarily resulted in physical or psychological dependence." 42 C.F.R. § 34.2(g).

53. 8 U.S.C. § 1182(a)(1)(A)(iii). The term "drug addiction" is defined as "[t]he non-medical use of a substance listed in section 202 of the Controlled Substances Act, as amended (21 U.S.C.[§] 802) which has resulted in physical or psychological dependence." 42 C.F.R. § 34.2(h).

54. *See* 8 U.S.C. § 1182(g) (Supp. 2002).

tute a crime under the criminal law of the jurisdiction where it occurred and that a decision on whether a crime constitutes one of moral turpitude must be based on the moral standards generally prevailing in the United States.[56] For example, in finding that involuntary manslaughter, as defined by Missouri law as recklessly causing the death of another person, constituted a crime of moral turpitude, the Board of Immigration Appeals stated that moral turpitude "refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[57] One test used to decide whether a crime is one of moral turpitude is "whether the act is accompanied by a vicious motive or a corrupt mind."[58]

An alien may be admissible, however, if he or she committed a crime before the age of eighteen and more than five years before the visa application date.[59] Additionally, an alien may be admitted if the maximum penalty possible for the crime did not exceed imprisonment for more than one year and, if convicted, the alien was not sentenced to more than six months confinement.[60]

In addition, a person is inadmissible if convicted of two or more crimes, other than purely political offenses.[61] Further, an alien who is a trafficker in any controlled substance or in any listed chemical[62] or who is the spouse or child of such a person who has, within the past five years, obtained financial or other benefits from the illicit activity of that alien, and knew or reasonably should have known that the benefit was from the person, is inadmissible.[63]

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55. *Id.* § 1182(a)(2)(A). If the offense relates to a single offense of simple possession of thirty grams or less of marijuana, it may be waived. *Id.* § 1182(h). Waivers also are available for offenses of moral turpitude under certain circumstances. *Id.*

56. 22 C.F.R. § 40.21.

57. Matter of Franklin, 20 I&N Dec. 867, 868 (BIA 1994).

58. *Id.*

59. 8 U.S.C. § 1182(a)(2)(A)(ii).

60. *Id.*

61. *Id.* § 1182(a)(2)(B). The term "purely political offenses" includes convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities. 22 C.F.R. § 40.22(d).

62. *See* 21 U.S.C. § 802(33)-(35), for the definition of a "listed chemical."

63. 8 U.S.C. 1182(a)(2)(C).

C. Economic Grounds

Aliens who are likely to become public charges are also inadmissible. Factors that the BCIS considers in deciding whether an alien is likely to become a public charge are the alien's age, health, family status, assets, resources, financial status, education level, and skills.[64] Additionally, U.S. citizens, including service members, who are seeking to sponsor an alien spouse, a child, or to adjust the status of an alien spouse who entered the country under a fiancée "K" visa, must execute an affidavit of support.[65] Legal assistance attorneys must explain the legal ramifications of the affidavit of support to service members before they execute this document. The affidavit of support is legally enforceable against the service member by the sponsored alien, the federal government, any state, or other entity that provides means-tested public benefits to the person sponsored.[66] In the affidavit, the service member agrees to provide support to the sponsored alien at an annual income of not less than 100 percent of the federal poverty line.[67] The affidavit of support is enforceable until terminated when the alien: (1) becomes a naturalized U.S. citizen; (2) ceases to hold the status of lawful permanent resident and has departed the United States; (3) is credited with working forty qualifying quarters; or (4) dies.[68] Therefore, even if the service member subsequently divorces the sponsored alien spouse, the service member is still obligated under the signed affidavit to support the alien until the obligation is terminated for one of the reasons described above.

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64. *Id.* § 1182(a)(4)(A)-(B).

65. *Id.* § 1182(a)(4)(C); *see* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-864, Affidavit of Support Under Section 213A of the Act (May 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-864.htm.

66. *Id.* § 1183a(a)(1)(B); *see also* 8 C.F.R. § 213a.1 for the definition of "means-tested public benefit."

67. *See* 8 U.S.C. § 1183a(f)(3) (providing that if the sponsor is on active duty in the U.S. military, other than active duty for training, and the person(s) sponsored is a spouse or child, the service member's income must equal at least 100 percent of the federal poverty line). Under the 2003 guidelines, 100 percent of the poverty line for a household of two is $12,120.00. For each additional member, the guidelines add $3,140.00. The 2003 monthly basic pay of a private, E-2, for example, is $1,290. *See* The 2003 Federal Poverty Guidelines *at* http://aspe.hhs.gov/poverty/03fedreg.htm; *see also id.* § 1183a(a)(1)(A) (providing that generally the sponsor (non-service member) must agree to support the sponsored alien at an annual income of 125 percent of the federal poverty line).

68. *Id.* § 1183a(3); 8 C.F.R. § 213a.2(e); *see* 42 U.S.C. § 414 (defining "quarters").

D. Security Grounds

Generally, an alien who enters the United States to engage in any activity that violates U.S. law relating to espionage or sabotage, any other unlawful activity, or any activity the purpose of which is the opposition to or control or overthrow of the government by force, violence, or other unlawful means is inadmissible.[69] Congress expanded federal law regarding the inadmissibility of aliens for security grounds by broadening the definition of terrorist activity after the terrorist attacks on 11 September 2001. Prior to Congress passing the USA Patriot Act in 2001,[70] inadmissible aliens included aliens who were members of a terrorist organization or who engaged in, or were likely to engage in, terrorist activity, those who incited terrorist activity, and those who were a representative of a foreign terrorist organization. The USA Patriot Act broadened terrorist activities to include an alien who is a representative of a political, social or other similar group who publicly endorses terrorist activity. It also includes aliens who use their position of prominence within a country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, and the spouse or child of such an alien, if the terrorist activity occurred within the last five years. [71] Moreover, the USA Patriot Act expanded the definition of "terrorist activity" to include not only using explosives and firearms with intent to endanger the safety of individuals or to cause substantial damage to property, but also the use of other weapons or dangerous devices.[72]

Others who are inadmissible for reasons of national security include an alien whose entry would have potentially serious adverse foreign policy consequences for the United States,[73] an alien who is or has been a member of or affiliated with the Communist Party or other totalitarian party,[74] an alien associated with the Nazi government of Germany who participated in

69. 8 U.S.C. § 1182(a)(3)(A).

70. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, tit. IV, § 411(a), 115 Stat. 345, 394 (codified at 8 U.S.C. § 1182(a)(3)(B)).

71. 8 U.S.C. § 1182(a)(3)(B) (2000 & Supp. 2002). As an exception, a spouse or child is not inadmissible if they did not know or should not reasonably have known of the activity or whom the consular officer or attorney general has reasonable grounds to believe has renounced the activity. *Id.*

72. *Id.* § 1182(a)(3)(B)(iii).

73. *Id.* § 1182(a)(3)(C)(i).

the persecution of any person because of race, religion, national origin, or political opinion,[75] or an alien who engaged in genocide.[76]

Finally, the President has the authority to suspend the admission of persons into the United States by proclamation.[77] Since 1997, Presidents have suspended the entry of persons who are senior officials of the National Union for Total Independence of Angola and their adult family members,[78] persons responsible for repressing the civilian population in Kosovo,[79] persons impeding the peace process in Sierra Leone,[80] and persons responsible for actions that threaten international stabilization efforts in the Balkans and those responsible for wartime atrocities in that region.[81]

E. Violation of Immigration Laws

Generally speaking, an alien who is present in the United States without being properly admitted is considered an inadmissible alien. This does not apply to certain women and children who qualify for immigrant status as immediate relatives and who are battered.[82] Further, those who fail to

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74. *Id* § 1182(a)(3)(D)(i). As an exception, an alien is not excluded if he or she can establish that the membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purpose of employment, food rations, or other living essential, or if the alien is not a threat to the security of the United States and he or she can establish that the membership or affiliation terminated at least two years before the application date or five years before the application date in the case of an alien with the party controlling the government that is a totalitarian dictatorship as of such date. *Id.* § 1182(a)(3)(D)(ii), (iii). Additionally, in the discretion of the attorney generally, to assure family unity, an alien may not be excluded if the alien is the parent, spouse, child, or sibling of an alien lawfully admitted for permanent residence for humanitarian purposes. *Id.* § 1182(a)(3)(D)(iv). If an alien continued his or her membership or affiliation in a proscribed organization after reaching the age of sixteen, only the person's activities after age sixteen are pertinent to a decision of whether continuation of membership or affiliation is or was voluntary. 22 C.F.R. § 40.34(d) (2002).

75. 8 U.S.C. § 1182(a)(3)(E)(i).

76. *Id.* § 1182(a)(3)(E)(ii).

77. *Id.* § 1182(f).

78. 62 Fed. Reg. 65,987 (Dec. 16, 1997).

79. 64 Fed. Reg. 62,561 (Nov. 17, 1999).

80. 65 Fed. Reg. 60,831 (Oct. 13, 2000).

81. 66 Fed. Reg. 34,775 (June 29, 2001).

82. 8 U.S.C. § 1182(a)(6)(A)(ii).

attend removal proceedings or who violate the terms of a student nonimmigrant visa are inadmissible for five years after the date of the violation.[83]

Similarly, aliens who have been previously removed from the United States because they misrepresented a material fact in seeking to procure a visa, falsely claimed citizenship, or were not in possession of valid entry documents are inadmissible for five years. Aliens who have been removed two or more times, or at any time if convicted of an aggravated felony, are inadmissible for twenty years.[84] Other aliens who have been removed or who depart the United States while an order of removal is outstanding are inadmissible for ten years.[85]

Aliens who were unlawfully present[86] in the United States for more than one hundred and eighty days, but less than one year, and who voluntarily depart the United States prior to commencement of removal proceedings are inadmissible for three years. If the alien was unlawfully present for one year or more, the alien is inadmissible for ten years.[87] The BCIS may waive this provision in the case of an immigrant who is the spouse or child of a U.S. citizen or lawful permanent resident if the refusal of admission would result in extreme hardship to the citizen or lawful permanent resident spouse or parent.[88] Service members may apply for such a waiver if their spouses were illegally in the United States, then left the country, and are now unable to return to join their service member spouse because of their previous illegal presence in the United States.

Once the legal assistance attorney finds that the service member's alien spouse and any children of the spouse are eligible to enter the United States, the attorney must determine the process by which they may enter. Although an alien legally may enter the United States through many programs, including the parole, refugee, or asylum programs, a service mem-

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83. *Id.* § 1182(a)(6)(B), (G).

84. *Id* § 1182(a)(9)(A).

85. *Id.*

86. The term "unlawful presence" includes periods of time in which the alien is unlawfully present in the United States after the expiration of the period of stay authorized or is present without being admitted or paroled. It does not include periods of time in which the alien is under eighteen, or has an application for asylum pending, or is a beneficiary of family unity protection. *Id.* § 1182(a)(9)(B)(ii)-(iii).

87. *Id.* § 1182(a)(9)(B)(i).

88. *Id.* § 1182(a)(9)(B)(v).

ber's spouse and the spouse's children generally enter through either the nonimmigrant or immigrant visa programs.

IV. Nonimmigrant Visas

An alien who desires to come to the United States temporarily for a specific purpose, such as to vacation or attend college, must apply for a nonimmigrant visa. There are many types of nonimmigrant visas, depending on the purpose for entering the United States. Generally, legal assistance attorneys do not see clients seeking nonimmigrant visas, with two exceptions: (1) service members seeking a K nonimmigrant visa for a fiancée or spouse living abroad awaiting an immigrant visa; and (2) service members who are lawful permanent residents seeking a V nonimmigrant visa for their spouse and/or children awaiting approval of an immigrant visa. This article only addresses these two nonimmigrant visas.

A. General Requirements

To gain admission to the United States as a nonimmigrant, an alien must have a nonimmigrant visa and a passport valid for six months.[89] If an applicant is admitted at a port of entry, he or she receives a Form I-94, Arrival-Departure Record.[90] If the alien remains in the United States beyond the period of authorized stay, the nonimmigrant visa is void. The alien then may be ineligible for readmission to the United States as a nonimmigrant, except on the basis of a visa issued in a consular office located in the country of nationality or if the Secretary of State finds extraordinary circumstances.[91]

An alien seeking a nonimmigrant visa may request a waiver of most grounds of inadmissibility under the Act.[92] An applicant for a K visa who is inadmissible may file a waiver at the consular office considering the visa

89. 8 C.F.R. § 212.1 (2002). *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-129, Petition for a Nonimmigrant Worker (Dec. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-129.htm; U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-539, Application to Change/Extend Nonimmigrant Status (Sept. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-539.htm.

90. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-94, Arrival-Departure Record (Aug. 1997).

91. 8 U.S.C. § 1202.

application.[93] The consular office then forwards the request for waiver to the BCIS for decision.[94]

B. "K" Nonimmigrant Visas

There are two types of K visas: (1) those for a U.S. citizen's fiancée who wishes to travel to the United States to be married, and the fiancée's children; and (2) those for a U.S. citizen's spouse and children who wish to travel to the United States while awaiting approval of their immigrant visas. Aliens admitted to the United States as nonimmigrant K visa holders are authorized to work for the period of the authorized stay.[95]

If a service member wants to marry his or her alien fiancée in the United States, the service member must file a visa petition[96] on behalf of the fiancée and any minor children of the fiancée.[97] Along with the visa petition, the service member must file evidence to establish that he or she has met the alien fiancée in person within two years of filing the visa petition, has a bona fide intention to marry, and that both are legally able and willing to conclude a valid marriage in the United States within ninety days of arrival.[98] If the service member does not marry the sponsored fiancée within the ninety-day period, the fiancée must leave the United States or the fiancée will be subject to removal.[99] The fiancée is not eligible to receive an extension of his or her stay.[100] Moreover, legal assistance attorneys who have clients applying for a K visa must take care to inform them

92. *Id.* § 1182(d) (2000 & Supp. 2002). Waivers may be granted to aliens who are ineligible for admission because of certain security related grounds. *See id*., *as implemented by* 22 C.F.R. § 40.301.

93. U.S. Department of Homeland Security, Immigration and Naturalization Service, Form I-601, Application for Waiver of Grounds of Excludability (Jan. 2002).

94. 8 C.F.R. § 212.7(a)(1).

95. *Id.* § 214.2(k)(9). Fiancées and their children must have an approved employment authorization. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Service, Form I-765, Application for Employment Authorization (May 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-765.htm. *Id.* § 274a.12(a)(6). Spouses and their children must apply for employment authorization. *See id*. § 274a.12(a)(9).

96. *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Service, Form I-129F, Petition for Alien Fiancée (Nov. 2001) [hereinafter Form I-129F], *available at* http://www.immigration.gov/graphics/formsfee/forms/i-129f.htm.

97. 8 U.S.C. § 1184(d) (2002 Supp.)

98. *Id.*

99. *Id.*

100. 8 C.F.R. § 1214.1(c)(3) (2002).

that once the alien spouse and children enter the United States they should immediately apply to adjust their status to that of permanent resident alien.[101]

Congress established the second type of K visa in 2000 under the Legal Immigration Family Equity (LIFE) Act.[102] This visa allows a service member's alien spouse and the spouse's children[103] to enter the United States while awaiting approval of an immigrant (permanent) visa. [104] After the alien spouse and children obtain their K visas, they may enter the United States for a period of two years.[105] They also may apply for an extension of their stay under certain circumstances.[106] Prior to the LIFE Act, a service member who married an alien overseas had to wait for approval of an immigrant visa before the alien spouse and any children could legally enter the United States. The alien spouse frequently waited for as long as one year for the Department of State to issue the immigrant visa.[107] This led to extended separations of military families when the service member transferred to the United States prior to the alien spouse receiving an immigrant visa.

The LIFE Act expanded the K visa to address these family separations. To take advantage of the new K visa, the service member must first file an immigrant visa petition with the BCIS on the alien spouse's behalf to begin the immigration process.[108] The service member must then file a visa petition[109] for a nonimmigrant K visa for his or her spouse and any children. Once the BCIS approves the visa petition for a "K visa", they inform the American consulate in the country where the marriage took

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101. *See infra* pt. V.E. for a discussion of how to apply for an adjustment of status to that of permanent resident alien.

102. Legal Immigration Family Equity Act of Dec. 21, 2000, Pub. L. No. 106-553 § 1103, 114 Stat. 2762 (codified at 8 U.S.C. §§ 1101(a)(15)(K), 1255, 1184, 1186a) [hereinafter LIFE Act]; *see also* BCIS interim rules implementing the new law at 66 Fed. Reg. 42,587 (Aug. 14, 2001) (codified at 8 C.F.R. pts. 248, 1212, 1214, 1245, 1274a).

103. Children must be under twenty-one years of age and unmarried to meet the definition of "child." 8 U.S.C. § 1101(b)(1) (2000 & Supp. 2002).

104. This nonimmigrant classification status is known as the "K visa" because it is found at subsection 101(15)(K) of the Immigration and Naturalization Act, codified at 8 U.S.C. § 1101(a)(15)(K).

105. Or, in the case of a child, until the child reaches his or her twenty-first birthday, whichever is shorter. *See* 8 C.F.R. § 1214.2(k)(8).

106. *Id.* § 1214.2(j)(10). The applicant must show that he or she has pending either an application for an immigrant visa, or an application for adjustment to that of permanent residence. *Id.*

107. 66 Fed. Reg. 42,587, para. I.A. (Aug. 14, 2001).

place.[110] The alien spouse must then apply for a nonimmigrant K visa in that country.[111] If legal assistance attorneys are involved in the visa process early, they should ensure that the service member client is aware that if he or she marries overseas, the alien spouse must apply for the nonimmigrant K visa in the country where the marriage took place.

The K visas of a spouse and any children are automatically terminated thirty days following the denial of a visa petition for an immigrant visa; the denial or revocation of an application for adjustment of status to lawful permanent residence; a divorce from the U.S. citizen sponsor becomes final; or, if the child, the marriage of the child.[112]

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108. The petition requests the BCIS to classify the alien spouse as an immediate relative for immigration purposes. *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Petition for Alien Relative, Form I-130 (June 2002) [hereinafter Form I-130], *available at* http://www.immigration.gov/graphics/formsfee/forms/i-130.htm. 22 C.F.R. § 41.81(b).

109. *See* Form I-129F, *supra* note 96.

110. The soldier must also file a Form I-129F to obtain a nonimmigrant K visa for the spouse and children. Prior to implementation of the LIFE Act rules, "K" nonimmigrants were designed as "K-1," for the fiancée of a U.S. citizen, and "K-2," for their children. For the sake of consistency, the original classification designations were not changed. Therefore, U.S. citizen spouses and children are designated as "K-3" and "K-4," respectively. *See* 66 Fed. Reg. 42,588, para. I.C. (Aug. 14, 2001). Applications for K-3/K-4 status must be sent to: The Bureau of Citizenship and Immigration Services, P.O. Box 7218, Chicago, IL 60680-7218. The Form I-129F is a temporary solution to the need for a new form. The BCIS plans to design a new form for this purpose, but because LIFE is already effective and a process was needed to implement it immediately, Form I-129F is being used until further notice. Applicants are cautioned not to fill out section (B)(18) and (B)(19) of the form. *Id.* at 42,589, para. II.B.

111. 8 U.S.C. § 1184(p)(2) (Supp. 2002). To obtain the K visa, the alien spouse must file a nonimmigrant visa application. *See* U.S. Dep't of State, Nonimmigrant Visa Application, Form DS-156 (2001), *available at* http://travel.state.gov/DS-0156.pdf; 22 C.F.R. § 41.103. The spouse must also submit a Form I-693, Medical Examination, when he or she appears at the consulate to apply for the K visa from the State Department. *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Medical Examination of Aliens Seeking Adjustment of Status, Form I-693 (Apr. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-693.htm; 22 C.F.R. § 41.108. The consular officer must determine the eligibility of an alien to receive a V nonimmigrant visa as if the alien were an applicant for an immigrant visa, except that the alien is exempt from the vaccination requirements of 8 U.S.C. § 1182(a)(1) (2000) and the labor certification requirement of 8 U.S.C. § 1182(a)(5) (2000 & Supp. 2002). 22 C.F.R. § 41.81(d).

112. 8 U.S.C. § 1184(p)(3) (Supp. 2002); *see also* 8 C.F.R. § 1214.2(j)(11).

B. "V" Nonimmigrant Visas

Similar to the K visa for a U.S. citizen's alien spouse and their children living abroad, the Life Act established the V visa for the alien spouses and children of lawful permanent residents of the United States.[113] Service members who are lawful permanent residents may use the new V visa to bring their spouses and children to the United States while awaiting approval of an immigrant visa. Additionally, service members may petition for visas for their spouses and minor children who are already in the United States.

To be eligible for a V Visa, the alien spouse must have a Petition for Alien Relative[114] filed with the BCIS on his or her behalf by the lawful permanent resident service member spouse or parent on or before 21 December 2000 and have been waiting for at least three years after filing the visa petition for immigrant status.[115] If the spouse and children are living abroad, they may apply for the visa at a consular office.[116] If the spouse and children are already living in the United States, they may apply for a V visa through the BCIS.[117] The alien is authorized to engage in employment during the period of admission.[118] The BCIS admits the spouse of a

113. The LIFE Act, 114 Stat. at 2762, § 1102.

114. Form I-130, *supra* note 108.

115. 8 U.S.C. § 1101(15)(V). The individual must be waiting at least three years either because a visa number (priority number) has not yet become available, or because BCIS has not yet adjudicated the Form I-130 or the Form I-485, Application to Register Permanent Residence or to Adjust Status. *Id.*

116. 8 C.F.R. § 1214.15(a). These individuals are admitted to the United States in V-1 (spouse), V-2 (child), or V-3 (dependent child of the spouse or child who is accompanying or following to join the principal beneficiary) status. *Id.* The consular office determines the eligiblity of the alien to receive a nonimmigrant V visa as if the alien were an applicant for an immigrant visa, except that the alien is exempt from the vaccination requirement of 8 U.S.C. § 1182(a)(1), the labor certification requirement of 8 U.S.C. § 1182(a)(5), and inadmissibility, under 8 U.S.C. § 1182(a)(9)(B), due to unlawful presence in the United States. 22 C.F.R. § 41.86.

117. 8 C.F.R. § 1214.15(f). To apply for the V nonimmigrant visa, aliens living in the United States must submit an application to change their nonimmigrant status. U.S. Dep't of Homeland Security, Bureau of Citizenship and Naturalization Services, Form I-539, Application to Extend/Change Nonimmigrant Status (Sept. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-539.htm. They also must submit a fingerprint fee and a medical examination form without the vaccination supplement. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-693, Medical Examination of Aliens Seeking Adjustment of Status (Apr. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-693.htm. *Id.*

118. 8 U.S.C. § 1184(o)(1).

lawful permanent resident for a period not to exceed two years. The child of a lawful permanent resident is admitted for a period not to exceed two years or the day before the alien's twenty-first birthday, whichever comes first.[119]

Moreover, similar to the K visa, the period of authorized admission as a nonimmigrant pursuant to a V visa terminates thirty days following the denial of a visa petition for an immigrant visa; the denial or revocation of an application for adjustment of status to lawful permanent residence; a divorce from the lawful permanent residence sponsor becomes final; or, if a child, the marriage of the child.[120]

The bars for unlawful presence in the United States do not prevent eligible persons from obtaining a V visa, or from being readmitted to the United States with a V visa following travel abroad. Unless the person seeks and is granted a waiver, however, these grounds for inadmissibility will prevent the alien from adjusting status to lawful permanent resident for the applicable three year or ten year period.[121]

V. Immigrant Visas

An alien who desires to come to the U.S and remain permanently is referred to as an "immigrant" and must apply for an immigrant visa.[122] Generally, the classes of aliens who may be issued immigrant visas and acquire the status of a lawful permanent resident are limited to family-based immigrants, employment-based immigrants, and diversity-based immigrants.[123] The legal assistance attorney, however, generally only will see clients seeking to immigrate under the family-based immigrant pro-

119. 8 C.F.R. § 1214.15(g)(1)-(2). The BCIS may extend this two-year period for alien spouses another two-year period upon proper application and approval. In the case of children, the status may be extended for two years or the day before the alien's twenty-first birthday, whichever comes first. *Id.* § 1214.15(g)(3).

120. *Id.* § 1214.15(j)(1).

121. 8 U.S.C. § 1184(o)(3) (Supp. 2002).

122. *See* 8 U.S.C. § 1101(15) (defining "immigrant" as any alien except one who enters the country as a nonimmigrant).

123. *See generally id.* § 1151(a) (2000).

gram, or as special immigrants. Therefore, this article discusses in detail only those classes of immigrant visas.

A. Special Immigrants

An immigrant who enlisted outside the United States under a treaty or agreement in effect on 1 October 1991 allowing nationals of that state to enlist in the U.S. Armed Forces may be eligible to immigrate to the United States.[124] To be authorized special immigrant status, the individual must have served honorably on active duty in the U.S. military after 15 October 1978, for a period of either: (1) twelve years, if separated under honorable conditions; or (2) six years, if on active duty at the time of seeking special immigrant status, and reenlisted to incur a total active duty service obligation of at least twelve years.[125] The spouse and child of any such immigrant also may be accorded special immigrant status if they accompany or follow to join the immigrant.[126]

B. Family-Based Immigrant Visas

1. Immediate Relatives of U.S. Citizens

Legal assistance attorneys, especially those stationed overseas, are likely to advise service members on how to obtain immediate relative visas to bring their alien spouses to the United States. Immediate relatives include a service member's spouse, unmarried children under the age of twenty-one,[127] and, if the service member is at least twenty-one years of

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124. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 601-210, REGULAR ARMY AND ARMY RESERVE ENLISTMENT PROGRAM para. 2-4a(5) (28 Feb. 1995) (allowing citizens of the Federated States of Micronesia, Palau and the Republic of Marshall Islands to enlist in the U.S. Army).

125. 8 U.S.C. § 1101(a)(27)(K) (Supp. 2002).

126. *Id.*

127. A child is an unmarried person under twenty-one who is a child born in wedlock; born out of wedlock if legitimated before the child is eighteen years of age or if the father had a bona fide parent-child relationship with the child; a stepchild if the marriage that resulted in that status took place before the child reached eighteen years of age; a child adopted while under the age of sixteen or the natural sibling of such child who is also adopted by the same parent(s) and was adopted while under the age of eighteen. *Id.* § 1101(b)(1) (Supp. 2002). Additionally, the BCIS determines whether a child satisfies the age requirement using the age of the alien on the date on which the petition is filed to classify the alien as an immediate relative. *Id.* § 1151(f)(1).

age, the service member's parent.[128] Additionally, if the service member dies and he or she had been married to the alien for at least two years and was not legally separated at the time of the service member's death, the alien spouse and any children of the alien spouse remain eligible for immigration as an immediate relative, if the spouse applies for immigrant status within two years of the service member's death. This time limit tolls if the spouse remarries within the two-year period.[129]

In addition, the law provides certain protections for battered spouses and children. An alien may "self-petition" as an immediate relative if the alien entered the marriage or intended marriage to the U.S. citizen in good faith and during the marriage or relationship intended by the alien to be a legal marriage, the alien or the alien's child is battered or subject to extreme cruelty by the alien's spouse or intended spouse.[130] Additionally, an alien spouse may be granted immigrant status if the spouse can show that he or she was a bona fide spouse of a U.S. citizen within the past two years whose spouse lost or renounced citizenship status within the past two years related to an incident of domestic violence, or who can demonstrate a connection between the termination of the marriage within the past two years and battering or extreme cruelty by the U.S. citizen spouse.[131] The denaturalization, loss or renunciation of citizenship, death of the abuser, divorce, or changes to the abuser's citizenship status after filing a visa petition does not affect the approval of the visa petition or, for approved visa petitions, does not affect the alien's ability to adjust status to that of lawful permanent resident alien.[132]

2. Family-Sponsored Immigrants

In addition, a legal assistance attorney may advise a client on how to obtain an immigrant visa for a service member's other family members. If not classified as an immediate relative, then a family member is considered

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128. *Id.* § 1151(a)(2)(A)(i).

129. *Id.*

130. *Id.* § 1151(a)(1)(A)(iii)(I). The phrase "was battered by or was the subject of extreme cruelty" includes being the victim of any act or threatened act of violence, including forceful detention which results or threatens to result in physical or mental injury. It also includes psychocological or sexual abuse or exploitation, to include rape, incest, molestation, or forced prostitution. 8 C.F.R. § 204.2 (c)(vi) (2002).

131. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(bbb)-(ccc).

132. *Id.* § 1154a(1)(vi). *See infra* pt. IV.F. (discussing lawful permenent resident alien status).

a family-sponsored immigrant. Unlike the immediate relative immigrant, the Act sets a ceiling on the number of family-sponsored immigrants who may immigrate to the United States each year.[133] Moreover, the number of family-sponsored immigrants cannot be less than 226,000 in any given fiscal year.[134]

The Act divides the family-sponsored immigrants into four separate preference categories, each with its own quota. The first preference is for unmarried children of U.S. citizens. As a practical matter, these children will be over the age of twenty-one because unmarried children under the age of twenty-one generally may immigrate under the immediate relative category.[135] The number of visas issued each fiscal year cannot exceed 23,400, plus any visas not required for the fourth preference.[136]

The second preference is distinct from the other three because in the second preference the petitioner is a lawful permanent resident and not a U.S. citizen. In this category the petitioner may sponsor his or her spouse and children or unmarried sons or daughters over the age of twenty-one.[137] Therefore, service members who are lawful permanent residents may petition to have their spouses, children, and unmarried children over the age of twenty-one immigrate to the United States under this category. The number of visas that may be issued in this category in each fiscal year cannot exceed 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000 and any visas not required for the first

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133. *See generally* 8 U.S.C. § 1151(c). The worldwide level of family-sponsored immigrants for a fiscal year is equal to 480,000 minus the sum of immediate relatives for the previous fiscal year and the number of parolees in the second preceding fiscal year, plus the difference (if any) between the maximum number of employment-based immigrant visas during the previous fiscal year and the number of visas actually issues. The number of parolees does not include those who departed the U.S. within 365 days or who acquired that status under a provision of law that exempts such adjustment from the numerical limitations on the worldwide level of immigration. *Id.*

134. *Id.* § 1151(c)(2).

135. *See id.* § 1151(a).

136. *Id.* § 1153(a)(1).

137. *Id.* § 1153(a)(2). For purposes of deciding whether the alien qualifies as a child under the age of twenty-one, the age of the alien is calculated on the date on which the immigrant visa number becomes available for the alien, but only if the alien sought to acquire the status of a lawful permanent resident alien within one year of such availability reduced by the number of days during which the applicable petition was pending. 8 U.S.C. § 1153(h)(1) (2003).

preference category. No less than seventy-seven percent of this number must be allocated to spouses and children.[138]

If a service member who is a lawful permanent resident files a visa petition for an alien child and the service member later becomes a naturalized U.S. citizen, the service member may convert the visa petition to classify the alien child as an immediate relative. In such cases, the alien child must be under the age of twenty-one at the time of the parent's naturalization to qualify as an immediate relative.[139] In addition, if the visa petition is for an alien unmarried son or daughter (over the age of twenty-one) and the service member parent becomes a naturalized U.S. citizen, the visa petition may be converted to a visa petition to classify the unmarried son or daughter as a family-sponsored immigrant of a U.S. citizen under the first preference.[140]

The third preference is for married sons and daughters of U.S. citizens. The number of visas in this category cannot exceed 23,400, plus any visas not required for preference one and two immigrant visas.[141] If the son or daughter later divorces, the service member may convert the visa petition to one to classify the alien either as an immediate relative or as an unmarried son or daughter of a citizen under the first preference. To be classified as an immediate relative, the son or daughter must be under the age of twenty-one on the date of the termination of the marriage.[142]

Finally, the fourth preference is for brothers and sisters of a U.S. citizen, if such citizen is at least twenty-one years of age. The number of visas in this preference cannot exceed 65,000, plus the number of visas not required for the other three preferences.[143]

In addition to the quotas in each preference category, the Act limits the number of visas that may be issued to aliens from any one country. Generally, the total number of family-sponsored immigrant visas that are available to individuals of any single foreign state cannot exceed seven

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138. *Id*. § 1151(f)(2).

139. *Id.*

140. *Id.* § 1154(k)(1). The son or daughter may file a written statement with the BCIS that he or she elects not to have such conversion occur, but regardless of whether a petition is converted, the son or daughter maintains the initial priorty date for the visa application. *Id.* § 1154(k)(2)-(3).

141. 8 U.S.C. § 1153(a)(3) (2000).

142. *Id.* § 1151(f)(3).

143. *Id.* § 1153(a)(4).

percent of the total number of such visas available in the preference category for each fiscal year.[144]

C. Diversity-Based Immigrant Visas

A legal assistance attorney may recommend that a client or the client's family members apply for an immigrant visa under the Diversity-Based Immigrant Visa Program. Each fiscal year, the United States allows 55,000 aliens to immigrate worldwide under this program.[145] To be eligible, an alien must have at least a high school education or its equivalent, or at least two years of work experience in an occupation which requires at least two years of training or experience within five years of the date of application.[146] Only natives of low-admission states may apply under the diversity-based program.[147] The BCIS uses a formula to determine what states constitute low-admission states; such states are generally those that for the previous five fiscal years the BCIS has issued a low number of immigrant visas. The alien may only file one visa petition in a fiscal year. If more than one visa petition is filed, the alien is disqualified.[148]

The diversity-based immigrant visas are awarded through an annual lottery conducted by the Department of State's National Visa Center, which chooses winners randomly from qualified applicants.[149] Each year the Department of State issues a notice published in the Federal Register on how to apply for the diversity-based program lottery.[150] There is no specific form to apply for this type of immigrant visa. An alien may file a

144. *Id.* § 1152(a)(2) (Supp. 2002). If the total number of visas available in the family-spnsored and employment-sponsored categories exceeds the number of applicants, the seven percent limitation does not apply. *Id.* § 1152(a)(2). Additionally, for spouses and children of lawful permanet resident aliens under preference two, seventy five percent of the visas available (that is, seventy seven percent of the total number of visas made available under this category) are issued without regard to the seven percent limitation. *Id*. § 1152(a)(4).

145. *Id.* § 1151(e). The Nicaraguan and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160 (1997), stipulates that beginning as early as 1999, and for as long as necessary, 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. *Id.*

146. *Id.* § 1153(c).

147. *Id.* (as implemented by 22 C.F.R. § 42.33(a)(1)).

148. 22 C.F.R. § 42.33(a)(4).

149. Applications are assigned a number in a separate numerical sequence established for each regional area. All assigned numbers are separately rank-ordered at random by a computer. *Id.* § 42.33(c).

visa petition using a sheet of plain paper on which is typed the alien's name, date and place of birth, country that the alien claims to be a native, names, dates, and places of birth of spouse and children, current mailing address, and consular office nearest the applicant's place of residence. The alien must sign the application and forward it, with a photograph, to the appropriate consular center in Kentucky designated by the Department of State based on the applicant's region.[151]

D. Procedures for Obtaining an Immigrant Visa

The road to becoming a naturalized U.S. citizen begins with the service member/sponsor filing a visa petition for an immigrant visa. Once approved, the alien then must file an application for an immigrant visa. After the alien receives the immigrant visa, he or she must travel to the United States and apply for adjustment of status to that of lawful permanent resident. This process may prove long and complicated, but legal assistance attorneys can smooth the way by being involved in the process early, advising the client regarding the proper documents that must be filed, and maintaining points of contact at the BCIS and consular office.

1. Visa Petitions

For an alien to be classified as an immediate relative or family-sponsored immigrant, the U.S. citizen service member must file a Petition for Alien Relative,[152] on behalf of the sponsored individual.[153] A widow or widower of a U.S. citizen service member, a spouse or child of an abusive citizen, and an Armed Forces Special Immigrant may self-petition by filing a Form I-360, Petition for Amerasian, Widow, or Special Immigrant.[154] If the petitioning service member resides in the United States, he or she

150. For example, for the FY05 program, applicants must file their petition with the appropriate consular center between Saturday, 1 October 2003, and Tuesday, 30 December 2003. *See* the U.S. Department of State, Bureau of Consular Affairs Visa Services Instruction for the 2005 Diversity Immigrant Visa Program, *available at* http://www.travel.state.gov/dv2005.html.

151. 22 C.F.R. § 42.33(b).

152. *See* Form I-130, *supra* note 108.

153. 8 C.F.R. § 204.1(a)(1).

154. *Id*. §§ 204.1(a)(2)-(3), 204.9(a). *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-360, Petition for Amerasian, Widow, or Special Immigrant (Sept. 2000), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-360.htm.

must file the visa petition with the BCIS office having jurisdiction over the place where the service member resides.[155] If the service member resides outside the United States, he or she must file the visa petition either at the BCIS office located in the country where the service member resides or, if there is no BCIS office in that country, at the U.S. consulate office.[156]

With the visa petition, the service member must include supporting documents which establish both that the service member is a U.S. citizen and the claimed relationship of the service member to the sponsored alien. If it would cause unusual delay or hardship to obtain proof of birth in the United States, a service member stationed outside the United States may submit a statement from his or her commander stating that the personnel records of the unit show that the service member was born in the United States on a certain date.[157]

2. Visa Application

Once the visa petition is approved, the BCIS notifies the petitioning service member and forwards the approved visa petition to the Department of State's National Visa Center. The Center then forwards the visa application documents directly to the sponsored alien, to include the Form DS-230, Application for Immigrant Visa and Alien Registration.[158] Generally, the alien must submit the application and other required documents, including a valid passport, to the consular office having jurisdiction over the alien's place of residence.[159] The alien must also submit to a medical examination to ensure that he or she is not inadmissible on health related grounds,[160] submit a Form I-864, Affidavit of Support Under Section

155. *Id.* § 204.1(e)(1).

156. *Id.* § 204.1(e)(2)-(3). An overseas BCIS officer may not accept or approve a petition filed by an abused spouse or child. These petitions must be filed in the BCIS office in the U.S. having jurisdiction over the self-petitioners place of residence in the United States. *Id.* § 204.1(e)(2).

157. *Id.* § 204.1(f)(1), (2)(v). A self-petitioner filing based on physical abuse must submit evidence of abuse which may include reports and affidavits from police, judges and other court officials, clergy, social workers, and school officials. *Id.* § 204.2(c)(2)(iv).

158. 22 C.F.R. § 42.63(a) (2002). *See* U.S. Department of State, Form DS-230, Application for Immigrant Visa and Alien Registration (May 2001), *available at* http://travel.state.gov/DS-0230.pdf.

213A of the Act,[161] and appear personally before a consular officer to execute the application and for an interview.[162]

Once the application is approved, the consular office issues the immigrant visa, OF-155A, Immigrant Visa and Alien Registration.[163] The visa is generally good for six months.[164] For immediate relatives and special immigrants, the consular office issues the visa immediately after it is approved.[165] Aliens immigrating under the family–sponsored immigrant visa program, however, generally are not immediately eligible to travel to the United States because of the quota and per country numerical limitations on family-sponsored immigrant visas. Consequently, their visas contain a number allocated by the Department of State based on the date their visa petitions were properly filed.[166] The Department of State publishes a Visa Bulletin each month listing the filing dates of the visa petitions that they are working on for that month.[167]

E. Lawful Entry and Adjustment of Status

1. Generally

To enter the United States, the immigrant must have a valid unexpired immigrant visa and a valid unexpired passport or other required travel doc-

159. 8 U.S.C. § 1202 (2000); *see also* 22 C.F.R. § 42.61(a) (providing that an alien who is physically present in an area but who has no residence in that area may submit their application at the consular office having jurisdiction in that area if the alien will be in the area for the period required to process the application. If an alien is in the U.S., the alien must submit their application to the consular office in the area of their last residence prior to entering the U.S.). Applicants must also submit a copy of a police certificate(s); a certified copy of any prison record, military record, and birth certificate; and certified copies of any other records or documents that the consular officer deams necessary. 22 C.F.R. § 42.65(b).

160. *See infra* pt. III.A. (discussing medical grounds for inadmissibility).

161. *See infra* pt. III.C. (discussing affidavits of support).

162. 22 C.F.R. § 42.62(a).

163. *Id.* § 42.73(a).

164. 8 U.S.C. § 1201(d); *see also* 22 C.F.R. § 42.72.

165. 8 U.S.C. § 1202.

166. *See* 8 C.F.R. § 204.19(c); 22 C.F.R. § 42.73(a).

167. *See* U.S. Dep't of State, *Visa Bulletin* (Sept. 2003), *at* http://travel.state.gov/visa_bulletin.html. For example, the Visa Bulletin for September 2003 reflected that the Department of State was working on first preference petitions filed on 8 April 2000, generally, and 22 September 1994 for those aliens from Mexico and 15 April 1989 for those from the Philippines. *Id.*

uments.[168] To remain in the United States permanently, the immigrant must apply to adjust his or her status to that of lawful permanent resident.[169] The alien applies for adjustment of status by submitting Form I-485, Application for Permanent Residence,[170] to the BCIS director having jurisdiction over the applicant's residence.[171] An immigration officer must interview each applicant for adjustment of status, unless waived by the Service.[172] There are several categories of aliens who are either restricted or ineligible for adjustment of status, to include those employed in the United States without authorization and those aliens who are not in a lawful immigration status on the date of filing the application for adjustment of status to that of lawful permanent resident, except for immediate relatives.[173]

While the application is pending, the immigrant generally may not depart the United States or the application will be deemed abandoned, unless the BCIS first grants the applicant parole.[174] The BCIS will adjudicate the application within ninety days of the date of the interview, unless the interview is waived. If the director approves the joint visa petition, he or she provides written notice to the alien and the alien must report to the BCIS office for processing for a Permanent Resident Card.[175]

2. Special Immigrants

If the alien received an immigrant visa as an armed forces special immigrant, he or she follows the procedures outlined, above. If the service

168. 8 U.S.C. § 1181(a).

169. The term "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20).

170. 8 C.F.R. § 1245.2(a)(3). *See* U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services, I-485, Application for Permanent Residence (Feb. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-485.htm.

171. 8 C.F.R. § 1245.2(a)(1).

172. *Id.* § 1245.6.

173. 8 U.S.C. § 1255(c) (Supp. 2002), *as implemented by* 8 C.F.R. § 1245.1(b)-(c) (2002).

174. 8 C.F.R. § 1245.2(a)(4)(i). A K-3, K-4, or V visa holder is not considered to have abandoned an application if upon return the applicant is admissible as a K-3, K-4, or V visa nonimmigrant. *Id.* § 1245.2(a)(4)(i)(C)-(D). *See supra* note 110, for the definitions of K-3 and K-4 nonimmigrant visas.

175. *Id.* § 1216.4(c)-(d).

member's alien spouse or child is outside the United States, the alien may file Form I-824, Application for Action on an Approved Application or Petition,[176] with the BCIS office that approved the original application.[177] If the BCIS becomes aware that the armed forces special immigrant failed to complete his or her active duty service for reasons other than an honorable discharged, the alien may become subject to removal.[178]

3. Conditional Permanent Resident Status

An alien spouse and the spouse's children receive only conditional lawful permanent resident status if: (1) the alien spouse entered the country as an immediate relative or the spouse of a lawful permanent resident; and (2) the alien spouse and sponsoring service member were married within twenty-four months before the date the alien obtained the status of lawful permanent resident by virtue of the marriage. Moreover, a spouse and a spouse's child who entered the United States pursuant to a fiancée K visa also receive only conditional lawful permanent resident status.[179] If, before the second anniversary of the alien receiving conditional lawful permanent resident status, the BCIS determines that the marriage was entered into for the purpose of procuring the alien's admission as an immigrant or has been judicially annulled or terminated, other than through the spouse's death, or a fee or other consideration was given for filing a visa petition for immigration, the BCIS will terminate the alien's conditional permanent residence status.[180] If the visa petition is denied, the BCIS provides written notice to the alien and requires the alien to surrender any Permanent Resident Card previously issued. The denial cannot be appealed, but the alien may seek review during removal proceedings.[181]

The conditional permanent resident and the service member spouse who filed the original immigrant visa petition or fiancée petition must jointly file a Form I-751, Petition to Remove the Conditions on Residence[182] during the ninety-day period before the second anniversary of the alien's obtaining the status of conditional permanent resident.[183] Depen-

176. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-824, Application for Action on an Approved Application or Petition (Dec. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-824.htm.

177. 8 C.F.R. § 1245.8(d).

178. *Id.* § 1245.8(e).

179. 8 U.S.C. § 1186a(a)(1), (g) (2000).

180. *Id*. § 1186a(b) (Supp. 2002).

181. 8 C.F.R. § 1216.4(d)(2) (2002).

dent children of conditional permanent residents who acquired conditional status concurrently with the parent may be included in the visa petition.[184] Failure to file within the ninety-day window will terminate the spouse's permanent resident status, except if the spouse can show good cause and extenuating circumstances for failing to file within this ninety-day window.[185] The BCIS will attempt to provide notice to the spouse about the beginning of the ninety-day period, but not providing notice does not affect termination of the status for failure to apply for removal of the conditional status.[186] Upon filing the petition for removal of the conditional status, the alien and sponsoring service member generally must be interviewed by a BCIS officer at an office having jurisdiction over the residence of the joint petitioners.[187]

The BCIS may provide special provisions for service members who deploy overseas and are unable to jointly file a petition. For example, if a sponsoring service member is deployed in support of *Operation Enduring Freedom*, the service member may be unable to sign the joint petition requesting removal of the conditional status or to appear before a BCIS officer for the personal interview. The BCIS has recognized this problem and issued special instructions for such situations.[188] Under the policy memorandum, if the service member's deployment is imminent and the service member has already filed the petition to remove the conditional status, the Service Office must make "every effort" to complete adjudica-

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182. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-751, Petition to Remove the Conditions on Residence (June 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/i-751.htm.

183. 8 U.S.C. § 1186a(d)(2), as implemented by 8 C.F.R. 1216.4(a). If a joint petition cannot be filed because of the termination of the marriage through annulment, divorce, or death, or the refusal of the spouse, the petitioning spouse may apply for a waiver if the spouse can show: (1) removal from the U.S. would result in extreme hardship; (2) the marriage was entered into in good faith, but terminated other than by death, and the conditional resident was not at fault; or (3) the marriage was entered into in good faith but during the marriage the alien spouse or child was battered by or subjected to extreme cruelty committed by the citizen or permanent resident spouse or child. 8 C.F.R. § 1216.5(a)(1).

184. 8 C.F.R. § 1216.4(a)(2).

185. 8 U.S.C. § 1186a(c)(2).

186. *Id.* § 1186a(a)(2)(B)-(C).

187. 8 C.F.R. § 1216.4(b). The director of the service center may waive the interview requirement. *Id.*

188. Memorandum, Immigration and Naturalization Service Policy, subject: Removal of Conditional Resident Status If Conditional Resident Is the Spouse of an Individual Serving Abroad in the U.S. Armed Forces of Operation Enduring Freedom (Jan. 7, 2002), *available at* http://www.bcis.gov_graphics/lawsregs/handbook/Attach_ConStatPub.pdf.

tion of the petition prior to the service member's deployment.[189] If the BCIS cannot adjudge the petition before the service member deploys, the BCIS places the petition on "overseas hold" pending his or her return from abroad.[190]

If the service member has already deployed and his or her spouse's conditional status is due to expire, the BCIS will accept a petition signed by the conditional resident only, if the petition is accompanied by evidence that the service member's spouse is deployed.[191] In addition, the policy provides that the BCIS service center may approve the petition without an interview, unless the petition's supporting documentation does not warrant approval. In that case, the service center must schedule the case for an interview and place the case on "overseas hold."[192]

Under this policy, the BCIS will initially extend the alien spouse's conditional resident status for one year.[193] If the service member has not returned from abroad within one year, the service center will revalidate the extension of the conditional status in six-month increments.[194] The service member must remember to contact the BCIS service center immediately upon his or her return from the deployment, so that the BCIS may adjudicate the request to remove the spouse's conditional status.

VI. Naturalization

Once an alien immigrates to the United States, he or she has completed the first step toward becoming a naturalized U.S. citizen. Before applying for naturalization, the alien generally must have been a lawful permanent resident for five years. There are several categories of lawful permanent residents, however, who do not have to wait five years. Several of these categories apply specifically to service members and their spouses and children. This section discusses the general requirements for natural-

189. *Id*. at 1.

190. *Id.*

191. *Id.* at 2. Such evidence may include "a photocopy of the service member's travel orders, a letter from the commanding officer, or other appropriate documentation signed by responsible military personnel." *Id.*

192. *Id.*

193. *Id.* That is, the conditional resident's Form I-551, is extended. *See* U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form I-551, Permanent Resident Card (June 1999).

194. *Id.*

ization and then details the specific categories that apply to service members and their families.

A. General Naturalization Requirements

Generally, a person must be a lawful permanent resident who is at least eighteen years of age,[195] has resided continuously within the United States for at least five years and been physically present in the United States for periods totaling two and one-half years, and has resided[196] within the State or BCIS district in which the person files the application for at least three months before the person may apply for naturalization.[197] Additionally, after the person applies for naturalization, the person must reside continuously within the United States until he or she becomes a citizen.[198] Moreover, during this entire period, the person must be of good moral character,[199] attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States.[200]

An applicant for naturalization also must show that he or she has an understanding of the English language, including the ability to read, write, and speak English,[201] and a knowledge and understanding of the fundamentals of the history and principles and form of government of the United

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195. 8 U.S.C. § 1445(b) (2000).

196. For applicants serving in the Armed Forces and who are not eligible for naturalization under other special categories, the applicant's residence is the state or BCIS Service District where the applicant is physically located for at least three months preceding filing an application for naturalization, or the location of the residence of the applicant's spouse or minor children, or the applicant's home of record. 8 C.F.R. § 316.5(b) (2002).

197. 8 U.S.C. § 1427(a).

198. *Id.* If the applicant is absent from the United States for more than six months but less than one year for any of the continuous residence requirements, the continuity of the residence is broken, unless the applicant can establish that he or she did not abandon his or her residence in the United States during the period of the absence. *Id.* § 1427(b). Also, if the applicant is absent for a continuous period of one year or more, the continuity of the applicant's residence in broken, except if the applicant is employed abroad by the U.S. Government; certain American firms; public international organizations; or performing religious duties. *Id.* §§ 1427(b), 1428.

199. *See* 8 C.F.R. § 316.10 (discussing what constitutes a lack of good moral character, including convictions for murder, aggravated felony, and crimes of moral turpitude; a failure to support dependents; and an extramarital affair that tended to destroy an existing marriage).

200. 8 U.S.C. § 1427(a). *Also see* 8 C.F.R. § 316.11 (providing that attachment and favorable disposition contemplate the exclusion of those who are hostile to the basic form of U.S. government, or who do not believe in the principles of the Constitution).

States.[202] A BCIS officer may examine the applicant during the naturalization interview regarding these skills. The officer determines the applicant's ability to speak English from answers to questions normally asked during the examination.[203] The officer tests the applicant's ability to read and write English and his or her knowledge of U.S. history and government using the BCIS authorized Federal Textbooks on Citizenship.[204] Alternatively, the applicant may take a standardized citizenship test within one year of his or her application, but a BCIS officer still must examine the applicant on his or her ability to speak English during the naturalization interview.[205]

B. Special Categories for Service Members

1. Honorable Service in the Armed Forces During Hostilities

The first special category allows service members to apply to become naturalized U.S. citizens if serving during certain periods of hostilities designated by the President through executive order.[206] Most recently, as explained in the beginning of this article, President Bush declared, by executive order, such a period of hostility beginning 11 September 2001 and ending on a date designated by future executive order.[207] A service member applying under this executive order must comply with the general requirements for naturalization. The service member must show that he or she has been for at least one year prior to filing for naturalization, and continues to be, of good moral character, attached to the principles of the Con-

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201. The requirement to understand the English language does not apply to a person who, on the date of filing an application for naturalization, is over fifty years of age and has been living in the United States for periods totaling twenty years or more after being lawfully admitted for permanent residence, or to an applicant who is over fifty-five years of age and has been living in the United States for periods totaling fifteen years after lawful admission for permanent residence. 8 U.S.C. § 1423(b)(2).

202. *Id.* § 1423(a). The literacy, history and government requirements do not apply if the applicant is unable to show knowledge and understanding of these subjects because of a physical or mental impairment that already has or is expected to last at least twelve months. A person must file a Medical Certification for Disability Exceptions, to apply for the exception. U.S. Dep't of Homeland Security, Bureau of Citizenship and Naturalization Services, Form N-648, Medical Certification for Disability Exceptions (Apr. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/n-648.htm. 8 C.F.R. §§ 312.1(b)(3), 312.2.

203. 8 C.F.R. § 312.1(c)(1).

204. *Id.*

205. *Id.* § 312.3(a).

stitution, and favoring the good order and happiness of the United States.[208] The service member may be naturalized regardless of age, however, and no residence or physical presence in the United States is required.[209]

Legal assistance attorneys must note that regardless of whether the service member has been admitted for permanent residence, to be eligible for citizenship under this category, the service member must have been in the United States, the Canal Zone, American Samoa, or Swains Islands, or on board a public vessel owned or operated by the United States for noncommercial service at the time of the enlistment, reenlistment, extension of enlistment or induction. If the service member was not in any of these locations at the time described, the service member is not eligible for naturalization under this provision unless he or she became a lawful permanent resident after their enlistment or induction.[210] Therefore, if the

206. *See* 8 U.S.C. § 1440 (allowing for naturalization through honorable service during WWI, WWII, and the Korean and Vietnam Conflicts); *see also* Reyes v. INS, 910 F.2d 611 (9th Cir. 1990) (striking down a presidential executive order permitting service members serving in Grenada to benefit from this provision on the grounds that the President does not have the authority to make area restrictions under the statute, only time restrictions); Exec. Order No. 12,582, 3 C.F.R. § 201 (1987); 8 U.S.C. § 1440-1 (permitting the grant of posthumous citizenship to service members who serve honorably in an active duty status during such a designated period of hostility and die as a result of injury or disease incurred in or aggravated by that service). Note, that the NDAA for FY 2004, tit. XVII, § 1703 amended the Immigration and Naturalization Act by extending posthumous benefits to surviving spouses, children and parents. NDAA for FY 2004, *supra* note 2, at tit. XVII, § 1703.

207. *See infra* pt. I. To be eligible for naturalization under this category, the service member must show that his or her service was honorable, as determined by the military department, and that he or she was not separated from service because of alienage; was not a conscientious objector who performed no military, air or naval duty; and did not refuse to wear the military uniform. 8 C.F.R. § 329.1.

208. 8 C.F.R. § 329.2(d). Additionally, citizenship granted pursuant to this executive order may be revoked if the service member is subsequently separated under other than honorable conditions. 8 U.S.C. § 1440(c).

209. 8 U.S.C. § 1440(b). Additionally, the servicemember is not required to pay naturalization fees, except fees required by the state. *Id.* § 1440e.

210. *Id.* § 1440(a). Note, however, that by statute, a person must be either a citizen or a lawful permanent resident of the United States to enlist in the Army or Air force. *See* 10 U.S.C. §§ 3253, 8253. The Navy and Marine Corps apply the same requirement by policy. *See* DoDD 1304.26, encl. 1, para. E1.2.2.1. Additionally, citizens of the federated states of Micronesia or the Republic of the Marshall Islands are eligible for enlistment. Therefore, although under 8 U.S.C. § 1440 a service member may be eligible for naturalization because of honorable service during a designated period of hostilities without being a lawful permanent resident, there may be an issue that a service member who is not a lawful permanent resident fraudulently enlisted in the U.S. military.

service member enlisted in the Philippines, for example, he or she would not be eligible to be naturalized under this provision unless the service member had subsequently obtained lawful permanent residence status.

2. Persons with One Year of Service in the U.S. Armed Forces

Another special category is for persons who have served for one year in the U.S. Armed Forces. To be eligible to apply for naturalization under this category, a person must show that he or she has served honorably in the U.S. Armed Forces for a period or periods aggregating one year and, if separated from the armed forces, was never separated except under honorable conditions.[211] Under Department of Defense (DOD) policy, a service member who desires to become naturalized through military service cannot be separated prior to completion of this period, unless the service member's performance or conduct does not justify retention or the service member is transferred to inactive duty in a reserve component to complete a reserve obligation or attend a recognized institution of learning under an early release program.[212]

If the person is in the military when he or she files the application, or is within six months of leaving the service, the person does not have to show that he or she has been physically present in the United States for any specified period of time, or has resided in the State or BCIS district in which the application is filed for at least three months.[213] The service member applying for naturalization under this category may prove good moral character, attachment to the principles of the U.S. Constitution, and favorable disposition toward the good order and happiness of the United

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211. 8 U.S.C. § 1439(a) (as amended by the NDAA for FY 2004, tit. XVII, § 1701(a) which reduced the time in service from three years to one year). The person must have served in either an active or reserve status in the Army, Navy, Marines, Air Force or Coast Guard, or in a unit of the National Guard during a time when the unit is federally recognized as a reserve component of the U.S. Armed Forces. 8 C.F.R. § 328.1. "Honorable service" means that military service must be designated as honorable service by the military department. Any service that is designated to be other than honorable does not qualify. *Id.*

212. *See* U.S. DEP'T OF DEFENSE, DIR. 5500.14, NATURALIZATION OF ALIENS SERVING IN THE ARMED FORCES OF THE U.S. AND OF ALIEN SPOUSES AND/OR ALIEN ADOPTED CHILDREN OF MILITARY AND CIVILIAN PERSONNEL ORDERED OVERSEAS para. 4.1.3. (30 Oct. 1970) (C1, 7 May 1997).

213. 8 U.S.C. § 1439(a).

States during such service by an authenticated copy of the person's service record.[214]

C. Special Categories for Spouses of U.S. Citizens

In addition to the special categories for service members, there are several categories for spouses of U.S. citizens that reduce or eliminate the residence and physical presence requirements for eligibility to become naturalized U.S. citizens. Legal assistance attorneys need to be familiar with these categories to properly advise their clients.

1. Spouses of U.S. Citizens, Generally

Lawful permanent residents who are married to U.S. citizens must comply with the general requirements for naturalization, except for the residency requirements. A spouse of a U.S. citizen only need show that, after being admitted as a lawful permanent resident, the spouse has resided continuously within the United States for at least three years, and during the three years immediately preceding the date of filing the application, has been living in marital union with the citizen spouse, who has been a U.S. citizen during that three years.[215] The spouse also must show that he or she has been physically present in the United States for periods totaling at least one and one-half years and has resided within the state or BCIS district in which he or she filed the naturalization application for at least three months.[216]

The burden is on the applicant to prove that he or she has lived in marital union for the requisite time period. To prove marital union, applicants must show that they actually reside with their U.S. citizen spouse.[217] A legal separation breaks the continuity requirement; the BCIS will evaluate on a case-by-case basis an informal separation that suggests the possibility of marital disunity. There are two exceptions to the marital union requirements. First, if the applicant and spouse live apart because of circum-

214. *Id.* § 1439(e). If the service was not continuous, however, the person must allege and prove in the application for naturalization that he or she is of good moral character, attached to the principles of the constitution, and favorably disposed toward the good order and happiness of the United States. *Id.*

215. *Id.* § 1430(a) (Supp. 2002).

216. *Id.*

217. 8 C.F.R. § 319.1(b)(1) (2002).

stances beyond their control, such as military service, the separation will not preclude naturalization under this category.[218] Second, if the applicant and spouse live apart because the applicant has been battered or subjected to extreme cruelty by their U.S. citizen spouse, the applicant need not show that he or she actually resided with the spouse in marital union.[219]

2. Spouses Employed Abroad

Another category that a spouse of a service member may use to speed the naturalization process applies to spouses of certain U.S. citizens employed abroad, including service members assigned overseas.[220] The spouse may be naturalized if he or she complies with the general naturalization requirements, except that no prior residence or specified period of physical presence within the United States or within a State or BCIS district is required.[221]

To qualify for naturalization under this category, the service member's spouse must be in the United States at the time of the naturalization and must declare before a BCIS officer an intent to reside in the United States immediately upon termination of the military spouse's overseas assignment.[222] Moreover, the applicant must establish that he or she will depart to join the military spouse within thirty to forty-five days after the date of naturalization.[223] If the military is paying for the spouse to travel overseas, the applicant must submit a DD Form 1278, Certificate of Overseas Assignment to Support Application to File Petition for Naturalization[224] that has been completed within ninety days of the departure date

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218. *Id.* § 319.1(b)(2)(ii).

219. 8 U.S.C. § 1430(a).

220. *Id.* § 1430(b). The U.S. citizen spouse must be "regularly stationed abroad" meaning that the citizen spouse must be outside the United States for a period of not less than one year pursuant to orders. 8 C.F.R. § 319.2(a)(1). This category also applies to spouses of U.S. citizens who are employed by the U.S. government, an American institution of research, or American firm or corporation engaged in the development of foreign trade and commerce of the United States, or of a public international organization in which the United States participates by treaty or statute, or is authorized to perform the ministerial or priestly functions of a religious denomination having an organization within the United States, or is engaged solely as a missionary. *Id.*

221. 8 U.S.C. § 1430(b) (2000).

222. *Id.*

223. 8 C.F.R. § 319.2(b)(1) (2002).

224. U.S. Dep't of Defense, Form 1278, Certificate of Overseas Assignment to Support Application to File Petition for Naturalization (May 2000).

showing authorization for concurrent travel.[225] If the spouse is not authorized concurrent travel, the spouse must submit a copy of the service member's travel orders, a letter from the service member's commander stating that he or she does not object to the applicant residing with the service member at his or her duty location, and evidence of transportation arrangements to the duty location.[226]

Applications filed under this category are eligible for expeditious action. Ordinarily, the BCIS will adjudicate naturalization applications in chronological order by date of receipt. A spouse applying for naturalization as a spouse of a U.S. citizen residing abroad, however, may request that the application be expedited to enable the spouse to acquire U.S. citizenship before traveling overseas to join a citizen spouse. The alien must request that the application be expedited by submitting an Expedite Authorization Worksheet with the naturalization application.[227]

3. Surviving Spouses of U.S. Citizen Service Members

A third special category for spouses of U.S. citizens that may apply to legal assistance clients is for surviving spouses of U.S. citizens who died during a period of honorable service on active duty in the U.S. Armed Forces. The surviving spouse must comply with all general requirements for naturalization, except that no prior residence or specific physical presence in the United States, or in a State or BCIS district is required.[228] As in the above general category for spouses of U.S. citizens, the surviving spouse must have been living in marital union with the service member at the time of his or her death.[229] Additionally, the surviving spouse remains eligible for naturalization even if he or she remarries.[230]

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225. 8 C.F.R. § 319.7(b)(1).

226. *Id.* 319.7(b)(2).

227. *See* Memorandum, Immigration and Naturalization Policy No. 70, subject: Processing Expedited Naturalization Applications (August 23, 2000), *available at* http://sja.hqmc.usmc.mil/jal/Practice%20Areas/Immigration/Expedited%20Nat%20Apps.pdf.

228. 8 U.S.C. § 1430(d) (2002).

229. *See infra* pt. V.C.1. (discussing the definition of living in "marital union").

230. 8 C.F.R. § 319.3(b).

D. Special Categories for Children of U.S. Citizens

Congress also has made eligible for U.S. citizenship special classes of children of U.S. citizens who are born outside the United States and who do not attain U.S. citizenship at birth.[231] These children are eligible to automatically become citizens upon approval of their applications for certificates of citizenship.[232] These classes of children are discussed, below.

1. Children Born Outside of and Residing in the United States

If a service member has a child born outside the United States who is not eligible for U.S. citizenship at birth, the child still may automatically become a citizen of the United States when at least one parent is a U.S. citizen, either by birth or naturalization, if the child is under the age of eighteen, and the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.[233] This class applies to an adopted child of a U.S. citizen parent, as well.[234]

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231. *See infra* pt. II.A. (discussing children born outside the United States who automatically become U.S. citizens at their birth).

232. A U.S. citizen parent or legal guardian must submit the application for a citizenship certificate for their biological children. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form N-600, Application for Certificate of Citizenship (Dec. 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/n-600.htm. A U.S. citizen adoptive parent or legal guardian must submit the application for citizenship certificate for their adoptive children. U.S. Dep't of Justice, Immigration and Naturalization Service, Form N-643, Application for Certificate of Citizenship in Behalf of An Adopted Child (Dec. 2001). 8 C.F.R. §§ 320.3(a), 322.3(a); *see also id.* §§ 320.3(b), 322.3(b) (discussing additional documents that must be submitted with the application).

233. 8 U.S.C. § 1431 (Supp. 2002). In the case of a child of divorced or legally separated parents, the BCIS will find a U.S. citizen parent to have legal custody where there has been an award of primary care, control, and maintenance of a child to a parent by a court or other appropriate government entity. The BCIS considers a U.S. citizen parent who has been awarded "joint custody," to have legal custody of the child. 8 C.F.R. § 320.1(2).

234. An adopted child is one who has been adopted pursuant to a full, final and complete adoption. In the case of an orphan adoption, the adoptive parents must have seen and observed the child in person prior to or during the foreign adoption proceedings. *Id.* § 322.1.

2. Children Born in and Residing Outside the United States

If a U.S. citizen service member is stationed overseas and adopts a child, the child is eligible for U.S. citizenship, even if he or she resides abroad with the service member. The child must be under eighteen years of age, reside outside the United States in the legal and physical custody of the citizen parent, and be temporarily present in the United States pursuant to a lawful admission. Furthermore, the service member parent must show that he or she was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years, or that the service member parent has a parent who has been physically present in the United States or outlying possessions for periods totaling not less than five years, at least two of which were after reaching the age of fourteen.[235]

E. Naturalization Procedures

1. General Procedures

To begin the naturalization process, a lawful permanent resident must file a Form N-400, Application for Naturalization,[236] with the BCIS office having jurisdiction over the applicant's residence at the time of filing the application.[237] Applicants who are in the military but do not qualify for naturalization because of service during specified periods of hostility or because of three years of military service may file in the State or BCIS District where the service member is physically present for at least three months immediately preceding filing the application; the location of the residence of the service member's spouse and/or minor child(ren); or the service member's home of record.[238] The applicant must also provide evi-

235. 8 U.S.C. § 1433(a) (Supp. 2002); *see supra* note 233 (discussing the term "legal custody" in the case of separated or divorced parents).

236. U.S. Department of Justice, Immigration and Naturalization, Form N-400, Application for Naturalization (May 2001), *available at* http://www.immigration.gov/graphics/formsfee/forms/n-400.htm.

237. 8 C.F.R. § 316.3.

238. *Id.* § 316.5(b)(1).

dence of lawful permanent residence in the United States and submit three photographs with the application, as well as be fingerprinted.[239]

After the application is filed, the BCIS will conduct an investigation of the applicant. At a minimum, the BCIS reviews pertinent records and conducts both a police department check and a neighborhood investigation where the applicant resided and was employed for at least five years preceding the application.[240] An examiner also must personally interview the applicant. [241] During the interview, the examiner questions the applicant under oath on the application for naturalization and keeps notes of the examination for the record.[242] The examiner has the authority to subpoena witnesses and documentary evidence to assist the examiner in deciding whether to approve the application.[243] The BCIS examiner must make the decision to grant or deny the application within one hundred and twenty days after the examination.[244]

If the application is approved, the BCIS will notify the applicant of the time and place that he or she is required to take the oath of allegiance in a public ceremony.[245] Generally, the applicant takes the oath before a designated BCIS official or immigration judge, but may elect to have the oath administered by a court.[246] Federal regulation requires that the applicant take the oath in the United States.[247] Because of the perceived inequities in requiring a service member deployed overseas to travel to the United States simply to take the oath of allegiance before becoming a naturalized citizen, Congress passed legislation in late 2003 to provide relief. The NDAA for FY 2004, section 1701(d) requires the Secretaries

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239. *Id.* § 316.4.

240. 8 U.S.C. § 1446 (2000), *as implemented by* 8 C.F.R. § 335.1.

241. 8 U.S.C. § 1446(b), *as implemented by* 8 C.F.R. § 335.2(a). The BCIS officer schedules the interview after receiving a response from the Federal Bureau of Investigation that a full background check of the applicant has been completed. *Id.* § 335.2(b). The BCIS will consider the application to be abandoned and will administratively close the application without making a decision if the applicant fails to appear for the examination and does not request that it be rescheduled within thirty days. The applicant may request to reopen an administratively closed application within one year from the date the application was closed. If the applicant does not request that the application be reopened within one year, the BCIS will consider the application abandoned and will dismiss the application without further notice. 8 C.F.R. § 335.6.

242. *Id*. § 335.2(b). At a minimum, the notes must include a record of the test given to the applicant on English literacy and basic knowledge of history and government of the United States. *Id.*

243. *Id.* § 3352.(d).

244. *Id.* § 336.2(a).

of Homeland Security, Department of State, and the Department of Defense to ensure that all "applications, interviews, filings, oaths, ceremonies . . . relating to naturalization of [service members] are available at United States embassies, consulates, and as practicable, United States military installations overseas."[248] Legal assistance attorneys overseas, however, need to ensure that their nonmilitary clients understand that they will

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245. 8 U.S.C. § 1448(a) (Supp. 2002). The BCIS may waive the taking of the oath by a person that they determine is uanable to understand its meaning, including children and those with a physical or develomental disability or mental impairment. *Id*. The oath is as follows:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereinty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constituion and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

8 C.F.R. § 337.1(a). When the applicant, by reason of religious training or belief or for other reasons of good conscience, cannot take the oath prescribed with the words "on oath" and "so help me God" included, the words "and solemnly affirm" are substituted for the words "on oath," the words "so help me God" are deleted, and the oath is taken in modified form. *Id.* § 337.1(b). Additionally, an applicant who has an hereditary title or any of the orders of nobility in any foreign state must publicly renounce the title or order of nobility. *Id.* § 337.1(d). Moreover, any person who can show by clear and convincing evidence that he or she is opposed to the bearing of arms or any type of service in the U.S. Armed Forces by reason of religious training and belief may take a modified oath. 8 U.S.C. § 1448(a).

246. 8 U.S.C. § 1421. Courts eligible to adminster oaths include a district court of the United States or any court of record in a state having a seal, a clerk, and jurisdiction in which the amount in controversy is unlimited. *Id.* § 1421(b)(5). In some jurisdictions, a court may have exercised its statutory right to have exclusive authority to administer oaths of allegiance during the forty-five day period beginning on the date the BCIS certifies to the court that an applicant is eligible for naturalization. *Id.* § 1421(b)(1)(B), (b)(3)(A).

247. 8 C.F.R. § 337.1(a).

248. NDAA for FY 2004, *supra* note 2. Note that the law also requires the Secretary of Defense to prescribe a policy that facilitates service members naturalization procedures, to include giving service members a high priority for granting emergency leave and transportation on aircraft of or chartered by, the Armed Forces. *Id.* § 1701(e).

have to return to the United States to take the oath of allegience and, thus, complete their naturalization process.

Once the oath is taken, the applicant is deemed a U.S. citizen and the BCIS issues a Form N-550, Certificate of Naturalization.[249] If the applicant fails to appear without good cause for more than one oath administration ceremony, they will be presumed to have abandoned the intent to be naturalized.[250]

If the application is denied, the applicant has thirty days to request a rehearing.[251] The BCIS must schedule the rehearing before another immigration officer within 180 days from the date the applicant filed the appeal. The hearing officer reviews the application for naturalization and any administrative record created as part of the original examination, examines the applicant, and may receive new evidence or take additional testimony. The officer must then either affirm the findings and determination of the original examination officer or redetermine the original decision in whole or in part.[252] If the application is again denied, the applicant may request a *de novo* review in the U.S. District Court having jurisdiction over the applicant's place of residence within 120 days of the final determination.[253]

2. Special Naturalization Procedures for Service Members

In 1999, the DOD and the INS entered into an agreement to expedite the administrative handling of service members' citizenship applications. The agreement requires DOD, through the military services, to provide assistance to applicants in preparing and submitting their applications.[254] To be eligible for the expedited processing, service members must apply

249. *Id*. § 338.1(a).

250. *Id.* § 337.10.

251. 8 U.S.C. § 1447(a), *as implemented by* 8 C.F.R. §§ 316.14(b), 336.2(a). The examiner must forward a written notice of denial explaining the facts and applicable law upon which the denial was based. *Id.* § 336.1(b).

252. *Id.* § 336.2(b).

253. *Id.* §§ 336.9(b), 336.9(c).

254. *See* Memorandum of Understanding Between the DOD, The Dep't of Transportation and the INS on the Processing of United States Citizenship Applications for DOD Military Service Members and U.S. Coast Guard Member, § I (on file with author) [hereinafter Agreement].

for naturalization based on one year of military service or have served during a designated period of military hostility.[255]

Each of the Services has implemented their own procedures for processing these naturalization applications.[256] In the Army, the Directorate of Military Personnel Management (DMPM), G1, manages the citizenship application process and the Personnel Service Support Division (PSSD), U.S. Total Army Human Resources Command (HRC), monitors the application process and resolves problems. At the installation level, the Personnel Services Battalions (PSB) and Military Personnel Divisions (MPD) are supposed to assist soldiers with their applications and coordinate with HRC when necessary.[257] In practice, however, many service members visit legal assistance offices for help in filing their applications. In the Air Force, the Military Personnel Flight (MPF) Customer Service Element assists airmen with their citizenship applications.[258] The Navy's Legal Assistance Division, Office of the Judge Advocate General (OJAG-Code 16), has oversight of the program. Under the Navy policy, commanding officers must appoint a command representative with responsibility for providing assistance to sailors.[259] Finally, the Marine Corps has designated the Legal Assistance Branch, Judge Advocate Division, Headquarters, U.S. Marine Corps (Code JAL) as the representative on Marine Corps naturalization issues; the local Marine Corps Legal Assistance Office is the primary source of assistance for Marines who want to submit citizenship applications.[260]

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255. *Id.* § IV.

256. *See* U.S. HRC, THE SOLDIER'S GUIDE TO CITIZENSHIP APPLICATION (2001), *available at* http://www.perscom.army.mil/tagd/pssd/ins.htm [hereinafter ARMY GUIDE]; U.S. Dep't of Air Force, The Air Force Guide to Citizenship Application (2002), *available at* http://www.afpc.randolph.af.mil/mpf/mpfworkcenters/customerservice/bcis/AF%20BCIS%20GUIDE-APRIL%202003.doc [hereinafter Air Force Guide]; U.S. Navy Guide to Naturalization Applications Based Upon Qualifying Military Service, *available at* http://www.jag.navy.mil/documents/code16Navy%20Immigration%20Guide3.doc [hereinafter Navy Guide]; U.S. DEP'T OF NAVY, U.S. MARINE CORPS LEGAL ASSISTANCE GUIDE TO NATURALIZATION APPLICATIONS BASED UPON QUALIFYING MILITARY SERVICE (n.d.), *available at* http://sja.hqmc.usmc.mil/PUBS/P5800/14%20Legal_Assistance.doc (fig. 14.1) [hereinafter MARINE CORPS GUIDE].

257. *See* ARMY GUIDE, *supra* note 256, introduction.

258. *See* Air Force Guide, *supra* note 256, introduction.

259. *See* Navy Guide, s*upra* note 256, introduction.

260. *See* MARINE CORPS GUIDE, *supra* note 256, para. 1.

Along with the application for naturalization, the service member must complete a Form G-325B, Biographical Information.[261] The applicable Service uses this form to complete a background check.[262] The service member must also complete a Form N-426, Request for Certification of Military or Naval Service[263] and submit it to the appropriate personnel center to authenticate the applicant's service data.[264] Additionally, the service member must be fingerprinted for purposes of the Federal Bureau of Investigation (FBI) background check. Through an agreement with the BCIS, the Services have the authority to schedule fingerprinting appointments at the servicing BCIS facilities through the Services' points of contact.[265] The service member must also forward other documents with the application for naturalization, as explained in each of the Service's guides.[266]

Once the documents are complete, the Service point of contact forwards the application packet to the Nebraska Service Center in Lincoln Nebraska, regardless of the service member's residency. The forwarding office must attach a letter stating where the service member wants to have the BCIS interview and where he or she wants to take the Oath of Allegiance.[267] Similar to other applicants for naturalization, a BCIS examiner

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261. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form G-325-B, Biographical Information (Sept. 2002), *available at* http://www.immigration.gov/graphics/formsfee/forms/g-325.htm.

262. In the Army, the PSB/MPD faxes the form to the Central Clearance Facility (CCF) at Fort Meade for processing. ARMY GUIDE, *supra* note 256, step 8. In the Air Force, the MPF faxes the form to HQ AFPC/DPSM for processing. Air Force Guide, *supra* note 256, Responsibilities. The Navy's Command Representative or service member mails the original form to the Office of the Judge Advocate General, Code 16, for processing. Navy Guide, *supra* note 256, para. 4.c. A Marine must submit the form to his or her Legal Assistance Attorney, who contacts the local Naval Criminal Investigative Service office to obtain the background report. MARINE CORPS GUIDE, *supra* note 256, para. 4.c.

263. U.S. Dep't of Homeland Security, Bureau of Citizenship and Immigration Services, Form N-426, Request for Certification of Military or Naval Service (Aug. 2000), *available at* http://www.immigration.gov/graphics/formsfee/forms/n-426.htm.

264. In the Army, the PSB/MPD verifies and authenticates the soldier's service data. ARMY GUIDE, *supra* note 256, at step 7. The Air Force's MPF completes the form. Air Force Guide, *supra* note 256, para. 3. The Navy's PSD/personnel office completes the form for sailors. Navy Guide, *supra* note 256, at 4.b. Marines submit their forms to their CONAD/ADMIN offices for completion. MARINE CORPS GUIDE, *supra* note 256, para. 4.b.

265. *See* Agreement, *supra* note 254, § V.B.4. For example, in the Army, the PSB makes the fingerprint appointment. ARMY GUIDE, *supra* note 256, para. step 4; *see supra* note 255 (listing specific service guides for fingerprint appointment authority).

266. *See supra* note 256.

267. *See* Agreement, *supra* note 254, § V.B.4.

will interview the service member and decide whether to approve the application for naturalization.

VII. Conclusion

There are many gates for a service member and his or her family to pass through on their way to becoming naturalized U.S. citizens. Legal assistance attorneys can assist service members who desire to become naturalized U.S. citizens by helping them understand the complicated rules and myriad forms involved in a naturalization application. Fortunately, for most service members, the process is simplified through an agreement between the BCIS and DOD that centralizes and expedites the process. Moreover, Congress has greatly assisted the naturalization process for service members by allowing many naturalization procedures to be accomplished overseas, to include taking the oath of allegiance.

Assisting a service member's alien spouse and children in becoming naturalized U.S. citizens may be even more challenging to legal assistance attorneys than helping the service member. While most service member clients have already immigrated to the United States and have become lawful permanent residents by the time they enter the U.S. military, alien spouses and their children are generally starting from the beginning—applying for a visa to immigrate to the United States. Consequently, the legal assistance attorney must understand not only the requirements for naturalization, but also how aliens immigrate to the United States and adjust their status to that of a lawful permanent resident.

Therefore, to properly advise their clients, legal assistance attorneys must be familiar with their specific Service guides for processing service member applications for naturalization, and Department of State and BCIS rules regarding immigration and naturalization, generally. In addition, they should maintain points of contact within their local BCIS office or U.S. consulate office, if stationed overseas, to obtain assistance when necessary in providing advice to clients who are traveling the long and complex road towards U.S. citizenship.

HOME SWEET HOME: A PRACTICAL APPROACH TO DOMICILE

MAJOR WENDY P. DAKNIS[1]

There's no place like home.[2]

I. Introduction

"So, where are you from?" For those who have traveled or moved before, this is a common question. It comes from the curious new neighbor, the friendly waitress, or even the new Staff Judge Advocate. It seems relatively innocuous. But to many military service members, this is the question that makes them break out in a cold sweat, looking around for somebody, *anybody*, to help them give the right answer. For these unfortunate individuals, there may be no right answer. They might stammer out, "Well, right now I'm living in Virginia." Perhaps they will name the connection to the last place they lived before they joined the military: "I'm originally from North Carolina, but I haven't actually lived there since 1986." For those whose parents were also in the military, the answer becomes even more of a dilemma: "Well, um, my dad was in the Army, and I went to high school in Alexandria, Virginia, so I guess I call Virginia home."

This question turns even more confusing when clients visit the Legal Assistance office. Both Legal Assistance attorneys and paralegals fre-

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2. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

quently ask the question, "Where are you a legal resident?"[3] Often, either because they do not want to have to think about it or because they truly do not know, soldiers will randomly choose a state to claim as their legal residence. What they do not realize, however, is that there are many legal ramifications stemming from a person's state of legal residence, or domicile. Consequently, it is crucial for soldiers to know where they are domiciliaries.

Unlike many of their civilian counterparts, military service members are in the unique position of having ties to many states. These multiple connections may make it difficult to determine which is the state of domicile. Additionally, they create various forums in which service members can potentially establish a new domicile. As a result, service members should have a basic understanding of domicile, how one acquires a domicile, and the consequences of that choice.

This article is intended to help service members understand the fundamentals of domicile by defining domicile, explaining the acquisition of domicile, and differentiating it from the other terms often connected with domicile. Furthermore, the article will help service members recognize the multiple consequences that stem from domicile by discussing the impact on judicial jurisdiction, choice of law, and governmental benefits and burdens. Finally, the article will provide service members with the necessary tools to determine their current state of domicile, make an informed decision about selecting and acquiring a new domicile,[4] and take the appropriate steps required to change their domicile. With this background, service members should be less panicked when deciding which state to call "home."

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3. Common situations in which legal residence is important to a Legal Assistance office include preparing powers of attorney, preparing tax returns, drafting wills, and counseling on family law issues.

4. Although this article discusses numerous consequences of domicile that service members should consider, it focuses primarily on financial consequences, to include state individual income tax, in-state tuition consequences, and the Alaska Permanent Fund Dividend.

II. The Basics

There are numerous terms associated with domicile—many of which are frequently misunderstood or misinterpreted. Terms such as domicile, residence, legal residence, and home of record all have different meanings and connotations. Sorting through these terms, their definitions, and requirements is the first step on the path to choosing a state of domicile.

A. Domicile

Domicile refers to "a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere."[5] A person's domicile establishes a legal connection to that particular place and ties that person to the legal system of that territory.[6] Domicile arises in three different ways: (1) by birth (domicile of origin); (2) by the extent of a person's connections to a certain place (domicile of choice); or (3) by law (domicile by operation of law).[7]

1. Domicile of Origin

Every person acquires a domicile at birth, known as the domicile of origin, or natural domicile.[8] The domicile of origin is based not on the place of birth, but on the domicile of a child's parents at the time of his birth.[9] This domicile continues to be applicable until the parents select a new domicile (if the child is a minor) or until the adult child acquires a domicile of choice.[10]

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5. BLACK'S LAW DICTIONARY 501 (7th ed. 1999); *accord* Gilbert v. David, 235 U.S. 561, 569 (1915) (citing Price v. Price, 27 A. 291, 292 (Pa. 1893)).

6. Williamson v. Osenton, 232 U.S. 619, 625 (1914) (citing Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 157 (1898)).

7. Adams v. Smith (*In re* Estate of Jones), 182 N.W. 227, 228 (Iowa 1921) (providing a framework for understanding and determining domicile).

8. BLACK'S LAW DICTIONARY 501 (7th ed. 1999).

9. Prentiss v. Barton, 19 F. Cas. 1276, 1277 (C.C.D. Va. 1819) (No. 11,384). If the parents have different domiciles and the child is legitimate, it will have the domicile of its father. If the child is born after the death of its father or is illegitimate, it will have the domicile of its mother. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 14 (1971) [hereinafter RESTATEMENT].

2. Domicile of Choice

Domicile of choice is the place that a person chooses for himself to replace a previous domicile.[11] Because acquiring a domicile of choice requires the mental capacity to make a legal decision, only adults may make this choice.[12] Consequently, minors are presumed to have the same domicile as their parents.[13]

To acquire a domicile of choice, a person must be physically present at a place and must have the intention to make a permanent home there.[14] A person cannot acquire a domicile without meeting both of these requirements.[15] Furthermore, physical presence and intention to remain must exist at the same time.[16]

Traditionally, physical presence has been interpreted to mean actual residence in that place.[17] Even so, the length of time that a person must spend at that place is not settled—it may be a considerable length of time or only a moment.[18] In fact, there is no requirement to actually establish a home there, as long as the intent is to make one's permanent abode in that place.[19] Nevertheless, a person rarely forms enough connections to a place

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10. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989); *Prentiss*, 19 F. Cas. at 1277 ("[B]y the general laws of the civilized world, the domicil of the parents at the time of birth, or what is termed the 'domicil of origin,' constitutes the domicil of an infant, and continues, until abandoned, or until the acquisition of a new domicil, in a different place.").

11. *Adams*, 182 N.W. at 228.

12. RESTATEMENT, *supra* note 9, § 15.

13. *Mississippi Band of Choctaw Indians*, 490 U.S. at 48; RESTATEMENT, *supra* note 9, § 22.

14. *Mississippi Band of Choctaw Indians*, 490 U.S. at 48; Gilbert v. David, 235 U.S. 561, 569 (1915); *Prentiss*, 19 F. Cas. at 1277; Price v. Price, 27 A. 291, 293 (Pa. 1893); RESTATEMENT, *supra* note 9, § 15.

15. RESTATEMENT, *supra* note 9, § 15.

16. *Id.*

17. *See* Texas v. Florida, 306 U.S. 398, 424 (1939) (citing BEALE, Conflict of Laws § 15.2); White v. Tennant, 8 S.E. 596, 597 (W. Va. 1888) (citing WHARTON, Conflict of Laws § 21).

18. *White*, 8 S.E. at 597; RESTATEMENT, *supra* note 9, § 16 cmt. b.

19. *White*, 8 S.E. at 597; RESTATEMENT, *supra* note 9, § 16.

to acquire a domicile without actually residing there or spending some amount of time there.[20]

The more scrutinized factor in acquiring domicile is a person's intent to make a place his permanent home.[21] Courts and scholars agree that a person's domicile is not lost until he establishes a new one.[22] Accordingly, a person bears the burden of proof to show that he has acquired a new domicile.[23] In determining where domicile exists, courts will look to "all the circumstances of [a person's] life" for "indicat[ions] that his real attitude and intention with respect to his residence [in a place] were to make it his principal home or abiding place to the exclusion of others."[24]

Specific evidence considered by the courts to show intent includes formal declarations, informal declarations, and acts by a person.[25] Formal declarations, such as affidavits, stating one's intent to establish domicile in a place often are not enough, by themselves, to show the requisite intent.[26] Informal declarations made to friends and acquaintances expressing a love for a place or a desire to make a home there carry more weight, as they are usually made without consideration of legal ramifications.[27] A person's actions—how he lives his life and where he establishes the most connections—are the most convincing evidence of his intent to establish domicile in a particular place.[28]

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20. RESTATEMENT, *supra* note 9, § 16 cmt. b.

21. *Id.* at Special Note on Evidence for Establishment of a Domicil of Choice.

22. Von Dunser v. Aronoff, 915 F.2d 1071, 1072 (6th Cir. 1990); Adams v. Smith (*In re* Estate of Jones), 182 N.W. 227, 230 (Iowa 1921); RESTATEMENT, *supra* note 9, § 19.

23. RESTATEMENT, *supra* note 9, § 19 cmt. c.

24. Texas v. Florida, 306 U.S. 398, 425 (1939).

25. RESTATEMENT, *supra* note 9, at Special Note on Evidence for Establishment of a Domicil of Choice.

26. *Id.*; *see, e.g.*, *Texas*, 306 U.S. at 425 ("[W]hile one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there and they are of slight weight when they conflict with the fact.").

27. RESTATEMENT, *supra* note 9, at Special Note on Evidence for Establishment of a Domicil of Choice; *see, e.g.*, *Texas*, 306 U.S. at 425 (placing greater weight on a deceased's prior statements to friends than on his statements to tax assessors).

28. RESTATEMENT, *supra* note 9, at Special Note on Evidence for Establishment of a Domicil of Choice.

The types of activities that show intent are frequently those that are associated with everyday living. For example, the Supreme Court in *Texas v. Florida* paid particular attention to the large size of a decedent's home in a particular state, as well as his furnishing that home with family heirlooms, centering his activities associated with his interests in that state, and spending the majority of his time in that state.[29] Other activities considered by common law courts include where a person works, where he votes, where he belongs to a church, where he banks, and where he pays taxes.[30] Based on this common law background for examining intent, many states have codified the definition of domicile and the activities that are considered to show intent to make a place one's permanent home.[31] Common elements of these statutory definitions include where a person owns a house, keeps his personal property, houses his family, works, conducts business, votes, pays taxes, and registers his motor vehicle.[32] Some states have taken these elements to the extreme, creating a formulaic approach to demonstrating intent that requires individuals to complete at least a portion of the following tasks: purchasing a residence in the state, registering to vote, registering an automobile, maintaining a driver's license, maintaining a checking, savings, or safety deposit box, having a will or other legal documents on file in the state that indicate residence in the state, having membership in professional organizations in the state, and establishing a business in the state.[33] Although courts, statutes, and other state agencies typically consider similar activities to demonstrate intent, each case should be considered individually based on all the relevant circumstances.[34]

For service members, the statutory definitions of domicile may be disconcerting. After all, service members frequently change homes pursuant to assignment orders. At each new location, they may purchase or rent a home, maintain their personal property, house their family, work, and attend a church. They are physically located in a new state and have accomplished many of the activities that demonstrate intent to remain permanently. Nonetheless, service members do not automatically gain a new domicile each time they move, nor are they subject to the legal consequences of association with that state.

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29. *Texas*, 306 U.S. at 426.

30. RESTATEMENT, *supra* note 9, at Special Note on Evidence for Establishment of a Domicile of Choice; *see, e.g.*, District of Columbia v. Murphy, 314 U.S. 441, 447-8 (1941) (applying these elements to determine domicile for tax purposes).

31. *See, e.g.*, ALASKA ADMIN. CODE tit. 15, § 23.173 (2003); MICH. ADMIN. CODE R. 206.5 (2001); VA. CODE ANN. § 24.2-101 (Michie 2003).

32. *See* ALASKA ADMIN. CODE tit. 15, § 23.173 (2003); MICH. ADMIN. CODE R. 206.5 (2001); VA. CODE ANN. § 24.2-101 (2003).

As with any other person, a service member maintains his domicile until he acquires a new one by showing his intent to make a place his new permanent home.[35] The Soldiers' and Sailors' Civil Relief Act of 1940[36] (SSCRA) ensures that service members are protected from acquiring a new domicile against their will for at least some purposes.[37] The SSCRA specifically provides that for the purposes of taxation, service members do not lose their domicile or acquire a new one if they are in a state solely because

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33. *See, e.g.*, TEXAS HIGHER EDUCATION COORDINATING BOARD, RULES AND REGULATIONS: DETERMINING RESIDENCE STATUS (2001), *available at* http://www.collegefortexans.com/additional/ (last visited Dec. 2, 2003). One of the many formulas used by Texas schools to determine domicile applies specifically to service members. The pertinent text provides:

> A member of the U.S. Armed Forces whose state of record is not Texas may change his/her residency to Texas if he/she does the following things at least 12 months prior to the member's enrollment:
>
> (I) is assigned to duty in Texas at least 12 consecutive months, during which the member files proper documentation with the military to change his/her permanent residence to Texas, and
> (II) meets four of the 8 conditions listed below for the 12 months prior to enrollment:
>
> (III) purchase a residence in Texas and claim it as a homestead;
> (IV) register to vote in Texas;
> (V) register an automobile in Texas;
> (VI) maintain a Texas driver's license;
> (VII) maintain checking, savings or safety deposit box in Texas;
> (VIII) have a will or other legal documents on file in Texas that indicate residence in Texas;
> (IX) have a membership in professional organizations or other state organizations; and/or establish a business in Texas;
> (X) establish a business in Texas.

Id.

34. *Murphy,* 314 U.S. at 458. The court rejects a set approach, stating:

> Our mention of these considerations as being relevant must not be taken as an indication of the relative weights to be attached to them, as an implied negation of the relevance of others, or as an effort to suggest a formula to handle all cases that may arise, or the possibility of devising one.

Id.

35. Von Dunser v. Aronoff, 915 F.2d 1071, 1072 (6th Cir. 1990); Adams v. Smith (*In re* Estate of Jones), 182 N.W. 227, 230 (Iowa 1921); RESTATEMENT, *supra* note 9, § 19.

36. 50 U.S.C. App. § 574 (2003).

37. *Id.*

of compliance with military orders.[38] Although the SSCRA applies to domicile for all types of taxation, to include income tax and personal property tax, it does not apply to domicile for other purposes.[39] For other purposes, service members must look to the applicable state statutes and general common law concerning domicile. In most cases, however, states recognize the unique status of military members and respect their choice of domicile.[40]

After experiencing life in a variety of states, many service members choose to acquire a domicile of choice in a state in which they are stationed. Because a person may only have one domicile,[41] this choice will force them to abandon their original domicile, whether acquired by origin or choice. Once a new domicile is acquired, it will then continue as the service member's domicile until he acquires a new one.

3. Domicile by Operation of Law

Finally, domicile by operation of law refers to those circumstances in which the law declares an individual's domicile, ignoring his intent and any actions he may have taken to select a domicile.[42] One example of a

38. *Id.* The pertinent portion of the statute states:

> For the purposes of taxation of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become a resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent.

Id.

39. *Id.*

40. *See, e.g.*, ALASKA STAT. § 15.05.020(1) (Michie 2003) ("A person may not be considered to have gained a residence solely by reason of presence . . . while in the . . . military service of . . . the United States . . . ."); CAL. ELEC. CODE § 2025 (2003) ("A person does not gain or lose a domicile solely by reason of his or her presence or absence from a place while employed in the service of the United States. . . .").

41. RESTATEMENT, *supra* note 9, § 11(2) ("Every person has a domicil at all times and, at least for the same purpose, no person has more than one domicil at a time.").

person acquiring domicile by operation of law is when a minor child, who is unqualified to choose a domicile of his own, acquires the domicile of his parent.[43] Another example of this type of domicile arises from the common law rule that a wife automatically assumes her husband's domicile.[44] Although several states still apply this rule,[45] the majority of jurisdictions have abandoned the concept.[46] Consequently, there are very few cases in which domicile is acquired by operation of law, instead of by choice.

B. Residence

People frequently associate and confuse the term "residence" with "domicile." Residence ordinarily means the place where a person physically lives.[47] It differs from domicile in that although it requires physical presence in a place, it does not require the intent to make a permanent home at that place.[48] Consequently, a person may have multiple residences at one time, while only having one domicile.[49]

Legally, "the words 'domicile' and 'residence' are not always synonymous at law, nor are they convertible terms."[50] Nevertheless, many state statutes confusingly use the terms "residence" and "domicile" interchangeably, such that "residence" takes on the meaning of "domicile."[51]

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42. Adams v. Smith (*In re* Estate of Jones), 182 N.W. 227, 228-9 (Iowa 1921).

43. *Id.* at 229.

44. *Id.*

45. Major Mary Hostetter, *TJAGSA Practice Note: Legal Assistance Items*, ARMY LAW., Jan. 1993, at 41 (citing 23 ILL. COMP. STAT. ch. 23, para. 2-10 (West 1992), *amended by* 305 ILL. COMP. STAT. ANN. 5/2-10 (West 2003)).

46. *Id.* at 42; RESTATEMENT, *supra* note 9, § 21 cmt. a.

47. BLACK'S LAW DICTIONARY 1310 (7th ed. 1999).

48. *Id.*

49. *Adams*, 182 N.W. at 228; BLACK'S LAW DICTIONARY 1310 (7th ed. 1999). For example, a retired married couple that has a permanent home in New York, but spends the winters in a temporary home in Florida, may have a residence in both New York and Florida, but a domicile in only New York.

50. *Adams*, 182 N.W. at 228.

51. *See, e.g.*, N.C. GEN. STAT. § 116-143.1 (2003) ("A . . . 'resident' is a person who qualifies as a domiciliary of North Carolina"); TEX. EDUC. CODE § 54.052 (2003) ("In this subchapter, 'residence' means 'domicile.'"); TEX. ELEC. CODE § 1.015 (2003) ("In this code, 'residence' means domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence."); VA. CODE ANN. § 24.2-101 (Michie 2003) ("'Residence' . . . means and requires both domicile and a place of abode.").

While some of these statutes provide definitions that make their intent clear, explaining, for example, that "residence" means "domicile,"[52] others offer no guidance concerning their use of the term "residence." In the latter case, state courts have been forced to decide what the statute actually means when it refers to a "resident" or "residence."

When determining the meaning of "residence" for a particular statute, nearly all state courts base their interpretation on the intent of the statute.[53] For example, in motor vehicle statutes that have special service of process provisions for nonresidents who are involved in automobile accidents, both state and federal courts base their analysis on the statute's purpose of creating a means for serving summons on "transient motorists or nonresidents who are only temporarily within the state."[54] Despite their reliance on the same analysis of nearly identical statutes, courts reach different conclusions as to the intended meaning of "residence." The District Court of Maryland found in *Suit v. Shailer* that residence did not equate to domicile,[55] while the Court of Appeal of California decided in *Briggs v. Superior Court of Alameda County* that residence meant more than just temporary presence in the state.[56] Although these two findings are not diametrically opposed, they do not help to create a uniform definition for residence, even as used in this particular type of statute. Courts recognize this weakness, calling the term "residence" a "slippery eel" whose definition

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52. *See, e.g.*, TEX. EDUC. CODE § 54.052 (2003) ("In this subchapter, 'residence' means 'domicile.'").

53. *See, e.g.*, Briggs v. Superior Court of Alameda County, 183 P.2d 758, 762 (Cal. Dist. Ct. App. 1947) ("To determine [residence's] meaning, it is necessary to consider the purpose of the act."); State v. Tustin, 322 S.W.2d 179, 181 (Mo. Ct. App. 1959) ("The meaning of the word 'resident' depends upon the purpose in the law where the word is employed."); Cincinnati, H. & D. R.R. Co. v. Ives, 3 N.Y.S. 895, 896 (N.Y. 1889) ("'Residence' is the favorite term employed in statutes to express the connection between person and place; its exact significance being left to construction, to be determined from the context, and the apparent object sought to be attained.") (citing Bell v. Pierce, 51 N.Y. 12 (N.Y. 1872)).

54. Suit v. Shailer, 18 F. Supp. 568, 571 (D. Md. 1937); *accord Briggs*, 183 P.2d at 762.

55. *Suit*, 18 F. Supp. at 571 ("Looking at the [statute's] evident purpose . . . and the mischief to be remedied, it seems apparent that [equating residence to domicile] puts an artificial and strained construction upon the term 'nonresident' which, for all practical purposes in relation to the subject matter, is far removed from actualities.").

56. *Briggs*, 183 P.2d. at 758 (holding that a couple who moved all of their belongings to California and lived in the state for six weeks were nonresidents for purposes of the statute). "No one would contend that under the Vehicle Code the mere presence of a defendant in the state constitutes him a resident." *Id.* at 762.

will "wriggle out of our hands when used in another context or in a different sense."[57]

Despite the apparent confusion created by different interpretations of "residence," a few courts choose not to rely on the purpose of a statute when defining the term. For example, the Court of Appeals of Washington in *State v. Pray* based its interpretation of "residence" as it related to a sex offender registration statute on nothing more than the definition in the dictionary.[58] Similarly, the Supreme Court of Michigan in *Bingham v. American Screw Products Company* relied on its previous definition of "residence" in an unrelated case to interpret the meaning of "residence" in an employment security act.[59] The court stated that since the statute did not define "residence," it was required to apply the definition from an 1898 case.[60] Although the court ultimately also considered the intent of the statute, this consideration was secondary to the court's application of what it deemed to be an established, unchanging definition.[61]

No matter what types of analysis courts use to interpret "residence," the term has clearly developed different meanings for different purposes.[62] In an effort to provide some consistency, the Restatement (Second) of the Conflict of Laws offers the following rules for interpreting "residence" within a statute for specific purposes: (1) for judicial jurisdiction, voting, eligibility to hold office, exemptions from the claims of creditors, liability for inheritance and poll taxes, and certain personal property taxes, residence has the same meaning as domicile; (2) for divorce and homestead exemption laws, residence refers to a domicile where a person actually lives; and (3) for income taxation, attachment, school privileges and constructive service on nonresident motorists, residence actually means residence (where a person lives).[63] States generally adhere to these

57. *Tustin*, 322 S.W.2d at 180.

58. State v. Pray, 980 P.2d 240, 242 (Wash. Ct. App. 1999). In analyzing the meaning of "residence," the court stated that "[i]n the absence of a specific statutory definition, words in a statute are given their ordinary meaning. A non-technical word may be given its dictionary meaning." *Id.*

59. Bingham v. American Screw Prods. Co., 248 N.W.2d 537 (Mich. 1976).

60. *Id.* at 546.

61. *Id.*

62. Suit v. Shailer, 18 F. Supp. 568, 571 (D. Md. 1937) ("The meaning of the word 'resident' varies with the context and subject matter. When used in connection with the exercise of political rights it may have a different connotation from that given where it is used to determine property rights.").

63. RESTATEMENT, *supra* note 9, § 11 cmt. k.

interpretational rules.[64] Nonetheless, because the meaning of "residence" has become so ambiguous, it must be evaluated in each case.[65]

Adding to the confusion between residence and domicile is the term "legal residence." For all purposes, legal residence is synonymous with domicile.[66] Consequently, legal residence requires both physical presence and the intent to remain permanently.[67]

C. Home of Record

Unlike domicile and residence, "home of record" is a military-specific term that does not carry with it any legal ramifications.[68] Home of record is used solely to determine the distance for which the Army will pay to move service members and their belongings when they separate from military service.[69] Home of record is based on the place where the service member entered the Army; it is unrelated to the service member's domicile or residence.[70] Essentially, then, home of record is a misnomer, since it has absolutely nothing to do with the service member's home. Although a service member's home of record has no independent legal significance,

64. *See, e.g.*, ALASKA STAT. § 15.05.020 (Michie 2003) (a state voting statute that equates residence to domicile); HAW. REV. STAT. § 235-1 (2002) (a state income tax statute that defines resident as anyone who is in the state for more than two hundred days of the taxable year); TEX. FAM. CODE § 6.301 (2002) (a state divorce statute that requires both domicile and present residence in the state).

65. RESTATEMENT, *supra* note 9, § 11.

66. BLACK'S LAW DICTIONARY 907 (7th ed. 1999).

67. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989); Gilbert v. David, 235 U.S. 561, 569 (1915); Prentiss v. Barton, 19 F. Cas. 1276, 1277 (C.C.D. Va. 1819) (No. 11,384); Price v. Price, 27 A. 291, 293 (Pa. 1893); RESTATEMENT, *supra* note 9, § 15.

68. Legal Assistance Policy Division, U.S. Army's Judge Advocate General's Corps, *Domicile—Questions & Answers* (last visited Dec. 2, 2003), *at* http://www.jagcnet.army.mil/Legal.

69. *Id.*; I JOINT FED. TRAVEL REGS. PU5125A (1 Aug. 2001); U.S. DEP'T OF ARMY, REG. 55-71, TRANSPORTATION OF PERSONAL PROPERTY AND RELATED SERVICES glossary (15 Sept. 1984).

70. *Id.*

many states rely on military home of record when determining residence for individual income tax purposes.[71] This erroneous reliance on military home of record to create potential tax liabilities is yet another reason why it is important for service members to clearly establish domicile in the state of their choice.

III. Consequences of Domicile

Understanding the difference between domicile, residence, and home of record is the first step in determining, selecting, and acquiring domicile. The second step is recognizing the many consequences of domicile. Aside from determining where he calls home, a person's domicile impacts his life in three significant ways: (1) judicial jurisdiction; (2) choice of law; and (3) governmental benefits and burdens.[72]

A. Judicial Jurisdiction

By establishing domicile in a state, a person subjects himself to the judicial jurisdiction of that state.[73] A domiciliary is subject to this jurisdiction at all times, whether present in the state or not, such that the courts may issue personal judgments against him.[74] Additionally, the state of domicile determines where the courts have jurisdiction for a person to ini-

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71. *See, e.g.*, IDAHO DEP'T OF ADMIN., ADMIN. RULES § 35.01.01, R.032 (2002) ("The domicile of a qualified service member is presumed to be that member's military home of record . . ."); Iowa Dep't of Revenue and Finance, *Iowa Withholding and Income Taxes for Military personnel*, *at* http://www.state.ia.us/tax/educate/78583.html ("[a] military person is an Iowa resident if . . . Iowa is declared as his or her Military Home of Record.") (last visited Dec. 2, 2003); Connecticut Dep't of Revenue Services, *Overview of Connecticut Income Tax*, *at* http://www.drs.state.ct.us/taxassistance/Indvtxpg/overview.html#FILREQ5 (last visited Sept. 21, 2003) (stating incorrectly that "[p]ersons in the armed forces can only be taxed on their military income in the state of their domicile or *home of record*, regardless of where they are stationed") (emphasis added).

72. RESTATEMENT, *supra* note 9, § 11 cmt. c.

73. *Id.*

74. *Id.*

tiate a legal action.[75] The legal bonds that are created by acquiring domicile remain until a new domicile is acquired.[76]

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75. *Id.* For service members, issues of judicial jurisdiction most often arise when filing an action for divorce. (In 2001, Army Legal Assistance Offices assisted over 29,000 clients with divorce issues. Legal Assistance Policy Division, Office of the Judge Advocate General, 2001 Client Information Services Report (generated 1/19/2002). This amounts to seventeen percent of all legal assistance clients. *Id.*) The state where at least one of the spouses is domiciled at the time of suit may terminate a marriage, issue a decree of judicial separation, and grant an annulment. RESTATEMENT, *supra* note 9, § 11 cmt. c. Most states will require a period of residence before a petition for divorce may be filed. *See, e.g.*, N.C. GEN. STAT. § 50-6 (2003) (requiring either plaintiff or defendant to reside in the state for a period of six months prior to dissolution of the marriage); TEX. FAM. CODE § 6.301 (2003) (requiring either the petitioner or the respondent to have been a domiciliary for at least six months prior to the suit being filed); VA. CODE ANN. § 20-97 (Michie 2003) (requiring at least one of the parties to have been an "actual bona fide resident" for at least six months prior to suit). Many states, including Georgia, Texas, and Virginia, have special provisions for service members, requiring only that a service member be stationed at a military installation in the state for a period of time before filing suit for dissolution of a marriage. GA. CODE ANN. § 19-5-2 (2002) (permitting a service member to bring suit after one year residence is on a military installation in the state); TEX. FAM. CODE § 6.304 (2003) (permitting a service member to file suit after being stationed at a military installation in the state for six months); VA. CODE ANN. § 20-97 (Michie 2003) (permitting a service member to file for divorce after being stationed at a military installation in the state for six months). As a result, service members wishing to file for divorce should usually do so not in the state of their domicile, but instead in the state in which they currently reside.

76. *See* Von Dunser v. Aronoff, 915 F.2d 1071, 1072 (6th Cir. 1990); Adams v. Smith (*In re* Estate of Jones), 182 N.W. 227, 230 (Iowa 1921); RESTATEMENT, *supra* note 9, § 19.

B. Choice of Law

A person's domicile also determines which state's law will be applied to legal matters concerning personal status, such as validity of a marriage,[77] legitimacy of a child, and distribution of property at death.[78] In these types of cases, where the local law of a person's domicile governs an issue, the state that is deciding which law to apply will make the determination of domicile based on its own rules.[79]

C. Governmental Benefits and Burdens

Service members who have limited contact with the judiciary will be most concerned about the domiciliary consequence of the benefits and burdens imposed by the state of domicile, since they impact each and every citizen. For example, a state permits its domiciliaries to vote[80] and hold public office.[81] It also provides education and support to its domiciliaries.[82] On the other hand, a state may also subject its residents to forms

77. For example, in cases where relatives marry, states in which the spouses were domiciled prior to their marriage and to which they return after the marriage may apply their own laws to determine the validity of the marriage even if the persons were married outside the state. RESTATEMENT, *supra* note 9, § 283 cmt. c.

78. RESTATEMENT, *supra* note 9, § 11 cmt. c. For example, where a person is domiciled may determine the choice of law that affects service members particularly in the area of decedents' estates. (In 2001, Army Legal Assistance Offices assisted over 36,500 clients with wills. Legal Assistance Policy Division, Office of the Judge Advocate General, 2001 Client Information Services Report (generated 1/19/2002). This amounts to twenty-two percent of all legal assistance clients. *Id.*) Domicile can impact the validity of a service member's will, succession of personal property, and appointment of a personal representative and guardian. RESTATEMENT, *supra* note 9, § 11 cmt. c. The law of the state of domicile at the time of death governs intestate distribution of personal property. *Id.* Likewise, the elective share to which a spouse is entitled is tied to the state of domicile. ALASKA STAT. § 13.12.202 (Michie 2003) ("The surviving spouse of a decedent who dies domiciled in this state has a right of election . . ."). Because the amount of the elective share varies from state to state, service members who wish to disinherit their spouses will be greatly affected by their state of domicile. *See id.* (providing an elective share equal to one-third the estate); N.C. GEN. STAT. § 30-3.1 (2003) (providing an elective share of up to one-half of the estate). Additionally, some states have provisions permitting only residents of the state to serve as a personal representative or guardian. *See, e.g.*, N.C. GEN. STAT. § 35A-1213 (2003) ("An individual appointed as general guardian or guardian of the estate must be a resident of the State of North Carolina."); TENN. CODE ANN. § 30-1-116 (2003) ("No nonresident person, bank or trust company may be appointed as the personal representative of an estate of a decedent . . ."). This type of potential restriction is one more way in which the consequences of domicile can have a serious impact on service members.

79. RESTATEMENT, *supra* note 9, § 11 cmt. c.

of personal taxation.[83] Because many of these benefits and burdens have a financial impact, service members will experience this effect of their domicile both in the short and long terms. The following financial consequences are likely to have the greatest significance for service members.

1. Tax

A state may impose a variety of personal taxes on its domiciliaries, to include both individual income tax and personal property tax.[84] Furthermore, states may impose taxes on its residents who are not domiciliaries for other purposes.[85] Nevertheless, under the provisions of the SSCRA, service members may only be taxed in their state of domicile and not in the state in which they are working and living pursuant to military orders.[86] Spouses and dependents, on the other hand, are not covered by the SSCRA

80. *See* Gilbert Veldhuyzen & Samuel F. Wright, *Domicile of Military Personnel for Voting and Taxation*, ARMY LAW., Sept. 1992, at 15-20 (containing an in-depth discussion of the interrelationship between voting, domicile, and taxation). Domicile (commonly referred to as "residence" in most election codes) for voting purposes is determined by following common law rules. *Id.;* TEX. ELEC. CODE § 1.015 (2003) ("Residence shall be determined in accordance with the common-law rules, as enunciated by the courts of this state, except as otherwise provided by this code."); VA. CODE ANN. § 24.2-101 (Michie 2003) (listing common law factors as considerations for determining domicile). For service members, many election codes indicate that domicile is neither gained nor lost based on assignment under military orders. *See, e.g.*, ALASKA STAT. § 15.05.020 (Michie 2003) ("A person may not be considered to have gained a residence solely by reason of presence nor may a person lose it solely by reason of absence while in the . . . military service of . . . the United States . . ."); CAL. ELEC. CODE § 2025 (2003) ("A person does not gain or lose a domicile solely by reason of his or her presence or absence from a place while employed in the service of the United States.").

81. RESTATEMENT, *supra* note 9, § 11 cmt. c.

82. *Id.*

83. *Id.*

84. *Id.* Property tax is established by municipal governments to generate revenue and is not a state-imposed burden. Legal Information Institute, *Property Tax: An Overview, at* http://www.law.cornell.edu/topics/property-tax.html (last visited Sept. 21, 2003). Taxable personal property usually consists of motor vehicles, to include motorcycles and trucks, trailers, campers, mobile homes, boats, airplanes and business personal property. Cumberland County, North Carolina, *General Tax Information*, *at* http://mainfr.co.cumberland.nc.us/oasgrinf.htm (last visited Sept. 21, 2003); Loudon County, Virginia, *Personal Property Tax Questions and Answers*, *at* http://www.loudoun.gov/cor/ppt.htm (last visited Sept. 21, 2003) [hereinafter Loudon County].

85. *See, e.g.*, DEL. CODE ANN. tit. 30, § 1103 (2003) ("A resident individual of this State means an individual . . . [w]ho maintains a place of abode in this State and spends in the aggregate more than 183 days of the taxable year in this State.")

86. 50 U.S.C. app. § 574 (2003).

for this purpose,[87] and would be required to pay state income tax if they earn wages or other income in the state.

The SSCRA-imposed exemption from taxation applies to both income and personal property taxes; consequently, military members who do not maintain a domicile in the location to which they are assigned are not responsible for personal property tax.[88] As with income tax, spouses and dependents would be required to pay local personal property tax .[89] In many locations, if the property is titled jointly, the military member will be liable for local personal property tax.[90] A service member's ultimate liability to a state for both income and personal property tax must be evaluated on an individual basis.

2. In-State Tuition Rates

As opposed to the burden of income tax, a benefit of domicile is that states with public colleges and universities charge lower tuition rates for students who are domiciliaries or residents of that state.[91] Whether using the term domicile or residence, most state statutes base eligibility for in-state tuition on the common law requirements for domicile of physical presence and intent to make the state a permanent home.[92] Additionally, the statutes recognize that many prospective students are minors who share the domicile of their parents and provide that students in this situation (generally referred to as "dependent")[93] share the residence of the parent with whom they live.[94] Some states also permit a dependent child whose

87. *See* Virginia Dep't of Taxation, *Residency Status*, *at* http://www.tax.state.va.us/site.cfm?alias=ResidencyStatus#MILITARY (last modified Feb. 13, 2003) ("The tax exemption provided for members of the armed forces does not apply to spouses and other family members.").

88. *Id.*

89. *See* Loudon County, *supra* note 84.

90. *See, e.g.*, *id.* ("If the vehicle is titled jointly with a nonmilitary person, you will be liable for both the regular vehicle decal fee and personal property tax in Loudon County if the same tax is not paid to the registered owner's legal domicile.")

91. *See infra* App. A.

parents are divorced, separated, or otherwise living apart to claim residence in the state if either parent is a domiciliary of the state.[95]

As with all other benefits of domicile, the burden of establishing domicile in a state for in-state tuition purposes rests on the student.[96] When evaluating eligibility for in-state tuition, states consider the usual common law factors of domiciliary intent, to include:

> continuous residence for at least one year prior to the date of alleged entitlement, state to which income taxes are filed or paid, driver's license, motor vehicle registration, voter registration, employment, property ownership, sources of financial support, military records, a written offer and acceptance of employment

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92. *See, e.g.*, FLA. STAT. § 1009.21 (2002) (requiring a resident to "[e]stablish that his or her presence in the State currently is, and during the requisite 12-month qualifying period was, for purposes of maintaining a bona fide domicile rather than of maintaining a mere temporary residence . . ."); TEXAS EDUC. CODE § 54.052 (2003) ("'Residence' means 'domicile.'"); UTAH CODE ANN. § 53B-8-102 (2003) ("The meaning of 'resident student' is determined by reference to the general law on the subject of domicile . . ."); VA. CODE ANN. § 23-7.4 (Michie 2003) ("'Domicile' means the present, fixed home of an individual to which he returns following temporary absences and at which he intends to stay indefinitely."); N.C. GEN. STAT. § 116-143.1 (2003) (using the same language as the Florida code regarding bona fide domicile).

93. *See, e.g.*, FLA. STAT. § 1009.21 (2002) (using the term 'dependent child'); TEX. EDUC. CODE § 54.052 (2003) (using the term 'dependent'); VA. CODE ANN. § 23-7.4 (Michie 2003) (using the term 'dependent student').

94. *See, e.g.*, CAL. EDUC. CODE § 68062 (2003) ("The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of the unmarried minor child.").

95. *See, e.g.*, FLA. STAT. § 1009.21 (2002). The Florida statute provides the following:

> The legal residence of a dependent child whose parents are divorced, separated, or otherwise living apart will be deemed to be this state if either parent is a legal resident of this state, regardless of which parent is entitled to claim, and does in fact claim, the minor as a dependent pursuant to federal individual income tax provisions.

Id.

96. *See* FLA. STAT. § 1009.21 (2002); N.C. GEN. STAT. § 116-143.1 (2003); Office of Academic Records and University Registrar, The University of Alabama, *Residency*, *at* http://registrar.ua.edu/residency.html (last visited Dec. 2, 2003) [hereinafter Office of Academic Records and University Registrar, The University of Alabama].

> following graduation, and any other social or economic relationships with the Commonwealth and other jurisdictions.[97]

States also place great weight on other factors specific to residence status for tuition purposes, such as where the student graduated high school and earned his high school diploma or its equivalent.[98] Ultimately, states may require prospective students to overcome the presumption of nonresident status by submitting evidence of connection to the state in the form of a notarized personal statement and supporting documentation.[99]

Many state statutes include provisions to frustrate attempts to bypass domicile requirements. For example, the Texas Education Code addresses otherwise nonresident students who become wards of residents of Texas or are adopted by residents of Texas "under circumstances indicating that the guardianship or adoption was for the purpose of obtaining status as a resident student."[100] Likewise, the Florida and North Carolina Education

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97. VA. CODE ANN. § 23-7.4 (Michie 2003).

98. *See, e.g.*, TEX. EDUC. CODE § 54.052 (2003). The relevant portion of the code states:

> Notwithstanding any other provision of this subchapter, an individual shall be classified as a Texas resident until the individual establishes a residence outside this state if the individual resided with the individual's parent, guardian, or conservator while attending a public or private high school in this state and:
>
> (1) graduated from a public or private high school or received the equivalent of a high school diploma in this state;
>
> (2) resided in this state for at least three years as of the date the person graduated from high school or received the equivalent of a high school diploma;
>
> (3) registers as an entering student in an institution of higher education not earlier than the 2001 fall semester; and
>
> (4) provides to the institution an affidavit stating that the individual will file an application to become a permanent resident at the earliest opportunity the individual is eligible to do so.

Id.

99. *See, e.g.*, Office of Academic Records and University Registrar, The University of Alabama, *supra* note 96 (advising students to "[b]e sure to sign the application before a notary public and attach your personal statement along with photocopies of all supporting documentation.").

Codes require students to establish that their (or their parents') residence in the state is "for the purpose of maintaining a bona fide domicile, rather than for the purpose of maintaining a mere temporary residence or abode incident to enrollment in an institution of higher education."[101] These provisions ensure that this benefit is available only to those students truly domiciled in the state.[102] Important for service members, most states do not penalize a student for his or his parents' service in the Armed Forces; if the student (or his parents in the case of a dependent child) is a domiciliary of a state, he does not lose his resident status for tuition because he is serving in the Armed Forces outside the state.[103]

3. Alaska Permanent Fund Dividend

In addition to the benefit of in-state tuition rates, Alaska also helps support its domiciliaries through its Permanent Fund Dividend. In 1977, the Alaska state government established a savings trust and state development fund known as the Alaska Permanent Fund with the proceeds from mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments, and bonuses received by the state.[104] In 1980, the Alaska State Legislature went one step further and created the Permanent Fund Dividend Program, which pays state residents an annual dividend,[105] ensuring that all eligible Alaskans share the wealth from publicly owned resources.[106] For purposes of the payment, the term resident is equivalent

100. TEX. EDUC. CODE § 54.052 (2003) (classifying these students as nonresident students despite their legal relationship to residents of Texas).

101. FLA. STAT. § 1009.21 (2002); N.C. GEN. STAT. § 116-143.3 (2003).

102. Although in-state tuition is usually reserved for domiciliaries, many states grant resident status for tuition purposes to personnel of the U.S. Armed Forces assigned to active duty within the state, as well as to their immediate family members. *See, e.g.*, FLA. STAT. § 1009.21 (2002); N.C. GEN. STAT. § 116-143.3 (2003); TEX. EDUC. CODE § 54.058 (2003); UTAH CODE ANN. § 53B-8-102 (2003). Although some states continue this benefit for family members even after the active duty service member has been reassigned to another state, *see, e.g.*, TEX. EDUC. CODE § 54.058 (2003), most states discontinue this special consideration once the service member is transferred to another state. *See, e.g.*, N.C. GEN. STAT. § 116-143.3 (2003) (continuing the in-State tuition rate only for the remainder of the academic year); UTAH CODE ANN. § 53B-8-102 (2003).

103. *See, e.g.*, FLA. STAT. § 1009.21 (2002) ("A person shall not lose his or her resident status for tuition purposes solely by reason of serving, or, if such person is a dependent child, by reason of his or her parent's or parents' serving, in the Armed Forces outside this state."); N.C. GEN STAT. § 116-143.3 (2003) ("No person shall lose his or her resident status for tuition purposes solely by reason of serving in the armed forces outside this State.").

104. Alaska Permanent Fund Dividend Division, *History*, *at* http://www.pfd.state.ak.us/OVERVIEW.HTM (last updated Jan. 2, 2003).

to domiciliary in that it requires both physical presence in the state and intent to remain permanently in Alaska.[107]

Military service members may benefit from the Alaska Permanent Fund Dividend in two ways. First, service members who are Alaska domiciliaries, but are absent from the state because of their active duty military service, are still entitled to receive the dividend.[108] Second, service mem-

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105. ALASKA STAT. § 43.23.005 (Michie 2003). For 2002, this payment was $1540.76 per resident. News Release, Alaska Department of Revenue, Permanent Fund Dividend Program, *Dividend Amount By Year* (Sept. 25, 2002), *at* http://www.pfd.state.ak.us/YEARAMOU.HTM.

106. Alaska Permanent Fund Dividend Division, *supra* note 104.

107. *See* ALASKA ADMIN. CODE tit. 15 § 23.173 (2003). Factors considered by the Department of Revenue as proof of intent to remain permanently in the state include:

> (1) a contract to move household goods to Alaska, except when there is a contract to move household goods from Alaska at the end of the individual's employment;
>
> (2) proof of home ownership, a home purchase contract, rent receipts, or other proof that the individual maintains a principal place of abode in Alaska, except when housing is provided as a part of an employment contract;
>
> (3) employment and unemployment records, including a copy of the leave and earnings statement of a military member for
>
> (A) December of the year before the qualifying year; and
>
> (B) the most recent month;
>
> (4) tax records;
>
> (5) school records;
>
> (6) voter registration and voting records;
>
> (7) motor vehicle registration records;
>
> (8) licensing records such as those for hunting and fishing licenses;
>
> (9) court or other government agency records; or
>
> (10) birth or other vital statistics records.

Id.

108. ALASKA STAT. § 43.23.008 (Michie 2003).

bers who are stationed in Alaska pursuant to military orders are eligible to receive the dividend upon a showing of intent to make the state their permanent home.[109] Acts that serve as proof of this intent include, but are not limited to, registering to vote, registering a vehicle, purchasing a home, signing a lease for a home, and obtaining an Alaska driver's license.[110] Service members who file for the dividend must be honest in their intent, since civil penalties for misrepresenting a material fact relating to eligibility for the payment include a fine of up to $5000 and loss of eligibility to receive the next five dividends.[111] Because military service members may find themselves assigned to Alaska and contemplating establishing domicile in the state, the Alaska Permanent Fund Dividend is a significant financial consequence of domicile that warrants consideration.

IV. Determining, Selecting, and Acquiring Domicile

With an understanding of the basics of domicile and its consequences, this section provides guidance for those service members who are confused about where to call home or who want to choose a new home. It takes into account the transient nature of the military and the associated challenges with determining domicile. It assists service members with selecting a new domicile based primarily on the financial consequences of domicile—weighing the relative burden of income tax in each state with the benefits of in-state tuition and Alaska Permanent Fund Dividend payments. Finally, it outlines some of the steps service members should take to acquire a new domicile.

A. Determining Domicile

Determining domicile requires an examination of all aspects of the service member's life, to include governmental, social, familial, and financial contacts.[112] In many cases, the service member will still be domiciled in the state of his domicile at the time of his entry onto active duty. If the service member has maintained significant contacts with this state and has

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109. ALASKA ADMIN. CODE tit. 15, § 23.173 (2003).

110. Alaska Dep't of Revenue, *Military Guide for the Alaska Permanent Fund Dividend*, *at* http://www.pfd.state.ak.us (last visited Jan. 29, 2003).

111. ALASKA STAT. § 43.23.035 (Michie 2003).

112. *See* Texas v. Florida, 306 U.S. 398, 425 (1939) (looking to "all the circumstances" of the decedent's life to determine domicile).

not made any overtures toward another state showing intent to make a permanent home, he will not have acquired a new domicile.[113]

Other service members, however, may have taken actions in one or more other states that indicate an intention to establish domicile. For example, a service member may have entered military service in State A, where his parents were domiciled, and as an operation of law, he acquired domicile. He registers his car in State A and pays taxes to State A. As he is reassigned during the course of his military career, he purchases real property in State B and registers to vote in State B. Both purchasing real property and voting in State B demonstrate intent to acquire domicile in State B. This service member has established ties to both State A and State B.

A service member who has close connections to more than one state will still only have one domicile.[114] If he has significantly more connections to one state than another, then the state to which he has closer ties will be his domicile.[115] If he has substantially equal connections to both states, then the state in which he first made his home will be his domicile until he takes the necessary steps to acquire a new domicile.[116]

B. Selecting a Domicile

Once he has determined his state of domicile, a service member who wishes to abandon that domicile and acquire a new one should select his new home based on his honest long-term intent. If he plans to return to a particular state after completion of his military service, he should make that state his domicile. Attempting to make another state his domicile to avoid taxes or secure a lower tuition rate is the type of subterfuge that states, through their statutes and courts, seek to defeat.[117] On the other hand, if a service member is unsure of where he would like to settle, he

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113. *See* District of Columbia v. Murphy, 314 U.S. 441, 456 (1941) (placing emphasis on the remaining ties to a former place of abode to determine domicile).

114. RESTATEMENT, *supra* note 9, § 11.

115. *Id.* § 20 cmt. b.

116. *Id.*

117. *See, e.g.*, Texas v. Florida, 306 U.S. 398 (1939) (finding that the decedent made declarations of domicile in Texas solely to evade taxes in Massachusetts and that Massachusetts was his true domicile); FLA. STAT. § 1009.21 (2002) (requiring proof that residence is for the purpose of establishing bona fide domicile); N.C. GEN. STAT. § 116-143.3 (2003) (using the same language as the Florida statute).

may want to weigh the consequences of domicile in each state to select the state that provides the most advantages.[118] Service members should consider how domicile will affect many aspects of their lives—submission to the jurisdiction of courts within a particular location, distribution of their estate and the appointment of a personal representative and guardian of their choice at death, and their ability to vote and perhaps someday hold office in the district of their choice. For many service members, however, these consequences will not carry as much weight as those with the greatest financial impact—individual income tax, in-state tuition, and payment of the Alaska Permanent Fund Dividend.

1. Income Tax Rates

Perhaps the most significant consequence of domicile for service members is the imposition of individual income tax. Because state income tax is a long-term liability that can have a considerable financial impact,[119] most service members would likely prefer to be domiciliaries of a state with no or very little income tax liability. Investigating state tax laws can prove to be extremely beneficial, since over half the states provide some type of tax advantage to military members.[120]

The seven states that do not have a system of personal income tax are the following: Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming.[121] Additionally, New Hampshire and Tennessee only impose income tax liability on dividends and interest income earned in the

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118. The Supreme Court has recognized that a person has the right to select a domicile "for any reason that seem[s] good to her." Williamson v. Osenton, 232 U.S. 619, 625 (1914).

119. For example, a soldier domiciled in North Carolina is liable for state individual income tax ranging from a low of 6% of adjusted gross income to a high of 8.25% of adjusted gross income. *See infra* Appendix B. Consequently, an unmarried private first class with under two years of service whose basic pay equals $1356.90 per month could pay up to $800 in state income tax. U.S. Dep't of Defense, Defense Finance and Accounting Service, *2003 Military Pay Rates*, *at* http://www.dfas.mil/money/milpay/pay (last modified June 12, 2003); *see infra* Appendix B. A married major with children and over twelve years of service whose basic pay equals $5201.40 per month, Defense Finance and Accounting Service, *infra*, could pay up to $3700 of state income tax. *See infra* Appendix B.

120. Some advantages include excluding all or a portion of military pay, separation pay, and military retirement pay. *See* Retirement Living Information Center, Inc., *Taxes by State, at* http://www.retirementliving.com/index.html (last visited Oct. 4, 2003) (containing a comprehensive review of each state's taxes); *see also Military taxes: A state-by-state guide*, ARMY TIMES, Feb. 17, 2003, at 37.

121. *See infra* Appendix B.

state.[122] Without delving further, these states would appear to offer the best tax advantage for military members. However, several other states exclude either all or some of active duty military pay, thus imposing either no or reduced tax liability.[123] Both Illinois and Michigan exclude all active duty military pay, regardless of where the service member is stationed.[124] Eleven more states (California, Connecticut, Idaho, Minnesota, Missouri, New Jersey, New York, Oregon, Pennsylvania, Vermont, and West Virginia) do not tax active duty military pay when the service member is stationed outside the state.[125] Finally, five more states (Arkansas, Louisiana, North Dakota, Oklahoma, and Virginia) provide partial exemptions for active duty military pay.[126]

The remaining twenty-three states impose full state personal income tax liability on service members.[127] Although all these states have similar ranges of high and low tax rates, the income brackets for these rates vary greatly.[128] For example, Vermont does not begin to impose income tax liability until a taxpayer's income reaches $27,950.[129] Given this high minimum income level, many single junior enlisted soldiers could potentially not have to pay any state income tax at all.[130] On the other hand, seven of these states (Alabama, Georgia, Kentucky, Maryland, Mississippi, South Carolina, and Utah) impose their maximum tax rate at an income level so low that the majority of service members would be subjected to the maximum rate.[131] Complicating the matter even more, some states' maximum rate is lower than others' minimum rate.[132] Accordingly, for those states

122. *See id.*

123. *See infra* Appendix C.

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *See infra* Appendix B.

129. *See id.*

130. Based on a basic pay of $1356.90 for a private first class with less than two years of service. Defense Finance and Accounting Service, *supra* note 119.

131. *See infra* Appendix B (showing that the minimum gross income required for the maximum tax rate in these states ranges from $3000 to $12,000); Defense Finance and Accounting Service, *supra* note 119 (establishing the minimum annual pay for a Private with less than four months service as $12,776.40).

132. For example, all service members would be subjected to Maryland's maximum tax rate of 4.75% because the income bracket for this rate starts at $3000. Even so, this maximum rate is still lower than North Carolina's minimum tax rate of 6%. *See infra* Appendix B.

that tax military pay, the service member will have to look closely at the tax laws and rates to determine which state is more advantageous for him.

Another aspect of income tax consequences that service members may want to consider is the income tax liability imposed by states on military retirement pay. As with military pay, there will be absolutely no tax liability in those states that do not have a system of personal tax (Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming). In addition to these states, twelve others (Alabama, Hawaii, Illinois, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, New Jersey, New York, Oregon, and Pennsylvania) exclude military retirement pay from adjusted gross income.[133] The majority of the remaining states provide some type of tax break for retirees.[134] Only Arizona, California, Connecticut, Minnesota, Nebraska, New Mexico, Rhode Island, Vermont, Virginia, and Wisconsin fail to assist retired taxpayers.[135]

Based on income tax rates, the states that provide the maximum advantage for most service members are those that do not have a personal income tax and those that exclude both military pay and military retirement pay from adjusted gross income (Illinois, Michigan, New Jersey, New York, Oregon, and Pennsylvania). For service members who are nearing retirement, the states that exclude military retirement pay (and not necessarily active duty military pay) may be just as beneficial. The tables at Appendices B and C provide a starting point for evaluating tax consequences.

2. Tuition Rates

The other consequence of domicile that has the most significant impact on service members is the availability of in-state tuition rates at state colleges and universities. The in-state tuition rates vary greatly from

133. *See infra* Appendix C.

134. *See* Retirement Living Information Center, Inc., *Taxes by State, at* http://www.retirementliving.com/index.html (last visited Oct. 4, 2003).

135. *See infra* Appendix C.

state to state, as well as within each state, depending on the school that the student wishes to attend.[136]

For the public national universities,[137] the states that charge the lowest in-state tuition rates are Wyoming ($2586/year), Florida ($2700-$3050/year), Nevada ($2830/year), Utah ($3072-$3646/year), and New Mexico ($3313-3372/year).[138] When compared to the in-state tuition rates charged by Vermont ($9636/year), New Hampshire ($8664/year), Pennsylvania ($8594-9274/year), New Jersey ($7927/year), and Connecticut ($6808/year), domiciliaries of the five least expensive states can save up to $7050 per year in college tuition costs.[139]

Another consideration for parents of college students is the amount saved by paying in-state versus out-of-state tuition. Parents may have a particular school that they would like their child to attend—perhaps an alma mater—and may be concerned with being able to send their child to that particular school at the lowest cost available to the family. Since the lowest tuition rates are available only for domiciliaries of the state, parents can significantly lower the amount of tuition they will have to pay by obtaining the in-state tuition rate. For example, the minimum savings a parent would encounter would be in Illinois at Northern Illinois University, where the difference between in-state and out-of-state tuition is $4078 per year.[140] The greatest savings for in-state students can be found in California ($19,194/year at the University of California at Davis and $14,210/year at six of the remaining seven universities in the University of California system), Michigan ($16,800/year at the University of Michigan at Ann Arbor), Colorado ($16,326/year at the University of Colorado at Boulder), Virginia ($16,020/year at the University of Virginia), and Wisconsin ($14,010/year at the University of Wisconsin at Madison).[141] Assuming that parents are interested in having their child attend a school in one of these states, they can save a significant amount by acquiring domicile there.

A final consideration is overall ability to pay for a college education. In 2000, the National Center for Public Policy and Higher Education evaluated all fifty states in terms of affordability and awarded each state a

136. *See infra* Appendix A.
137. This considers only four-year and above schools with doctoral programs.
138. *See infra* Appendix A.
139. *See id.*
140. *See id.*
141. *See id.*

grade on a scale of A to F.[142] Of the fifty states, only five received an A: California, Illinois, Minnesota, North Carolina, and Utah.[143] Likewise, only three states received an F: Maine, New Hampshire, and Rhode Island.[144] Service members who are concerned about their ability to finance their child's college education may want to consider domicile in one of the "A" states and avoid domicile in one of the "F" states.

For many students, finances are not the sole consideration in choosing a school. If a school is not the best suited for a student, then the least expensive school does not often provide the best savings. When comparing the costs of schools, then, service members may also want to note the quality of the schools. While certainly not a definitive guide to the quality of a school or the fit of a school to a particular student, the *U.S. News & World Report* annual ranking of schools is a starting point in assessing the quality of a school.[145] According to the most recent *U.S. News & World Report* ranking, the top five public national universities with doctoral programs are the University of California at Berkeley, the University of Virginia, the University of Michigan at Ann Arbor, the University of California at Los Angeles, and the University of North Carolina at Chapel Hill.[146] Notably, these are also the schools that provide the greatest tuition

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142. *Grading the States*, THE CHRONICLE OF HIGHER EDUCATION, Dec. 8, 2000, at A25, *available at* http://chronicle.com/free/v47/i15/15a02501.htm. The survey evaluated each state's affordability, as follows:

> Measure by the percentage of a family's income needed to pay for college expenses minus financial aid at both two-an four-year colleges; percentage of state grants awarded to low-income families compared with federal Pell grants given to low-income families in the state; share of income that poorest families need to pay for tuition at lowest-priced colleges in the state; and average loan amount that students borrow each year.

Id.

143. *Id.*

144. *Id.*

145. *U.S. News & World Report* assesses national colleges and universities based on the following factors: peer assessment, retention, faculty resources, student selectivity, financial resources, graduation rate performance, and alumni giving rate. USNews.com, *America's Best Colleges 2004*, *at* http://www.usnews.com/usnews/edu/rankguide/rghome.htm (last visited Oct. 16, 2003).

146. *Id.*

savings for residents,[147] and three of the five schools are located in states with the top affordability grades.[148]

Whether in-state tuition is a benefit for a service member depends on many factors, to include the quality of the school and whether the service member's child wishes to attend that particular school. Additionally, some service members may be more concerned with the cost of the school than the in-state savings. The chart at Appendix A provides a starting point for evaluating this domiciliary benefit.

3. Alaska Permanent Fund Dividend

Although limited to Alaska domiciliaries, the Alaska Permanent Fund Dividend can have a significant impact for service members. At a minimum, a service member would receive an annual payment for himself, which in 2002 was valued at $1540.76.[149] Married service members with children would receive an even larger payment, since all domiciliaries, including children, are eligible for the dividend payment.[150] For example, a service member who is married with four children, would receive a household total of $9244.56 per year.[151] Additionally, because Alaska does not have personal income tax[152] and many Alaskan municipalities do not have personal property tax,[153] service members do not need to balance the burden of tax with the benefit of the dividend payment. The Alaska

147. *See infra* Appendix A.

148. California and North Carolina both received affordability grades of "A." *Grading the States,* THE CHRONICLE OF HIGHER EDUCATION, Dec. 8, 2000, at A25, *available at* http://chronicle.com/free/v47/i15/15a02501.htm.

149. ALASKA STAT. § 43.23.005 (2003). For 2002, this payment was $1540.76 per resident. News Release, Alaska Department of Revenue Program, *Permanent Fund Dividend Will Be $1540.76* (Sept. 25, 2002), *at* http://www.pfd.state.ak.us/YEARAMOU.HTM.

150. Alaska Permanent Fund Dividend Division, *Kids' Page*, *at* http://www.pfd.state.ak.us/KIDSPAGE.HTM (last updated Jan. 2, 2003).

151. This total is based on the 2002 payment rate and assumes that the service member and his wife combine their income and assets.

152. *See infra* Appendix B.

153. Telephone Interview with Steve Van Sant, State Assessor, Alaska Department of Community and Economic Development (Mar. 18, 2003). For example, the city of Juneau exempts individual motor vehicles from tax and levies a tax only against commercial vehicles. City and Borough of Juneau Finance Department, *Local Tax Information*, *at* http://www.juneau.org/financeftp/taxinfo.php (last visited Oct. 4, 2003).

Permanent Fund Dividend is an unqualified advantage for service members considering Alaska as their domicile of choice.

C. Acquiring a New Domicile

Once a service member has selected the state that he would like to eventually call home, he must begin to take the appropriate steps to establish domicile. The first of these steps is to meet the requirement of physical presence.[154] A person cannot simply choose to make a state his new domicile without spending at least some amount of time there.[155]

The next step to establish domicile is to take some of the actions that will prove intent to make a permanent home in the state.[156] A service member may consider making a formal declaration, either oral or written, of his intent.[157] Sharing his decision to ultimately settle in a certain state with his family and friends would serve as an informal declaration of his intent.[158] Other affirmative acts to demonstrate intent to remain in a state permanently include the following:

1. Moving his family to the state;
2. Having his children attend school in the state;
3. Declaring his residence in the state on documents such as wills, deeds, mortgages, leases, contracts, insurance policies, and hospital records;
4. Declaring his residence in the state in affidavits or litigation;
5. Paying income and personal property taxed to the state and county;
6. Purchasing land or a home in the state;
7. Leasing a home in the state;
8. Moving his personal property to the state;
9. Registering to vote in the state;
10. Registering his vehicle in the state;
11. Obtaining a driver's license in the state;
12. Opening and maintaining bank and investment accounts in the state;

154. *See* RESTATEMENT, *supra* note 9, § 15.
155. *See id.*
156. *See id.*
157. *See id.* at Special Note on Evidence for Establishment of a Domicil of Choice.
158. *See id.*

13. Joining church, civil, professional, service, or fraternal organizations at that location;
14. Marrying in the state;
15. Purchasing a burial plot at that location;
16. Burying immediate family members at that location;
17. Donating to charitable contributions at that location;
18. Investing in business interest in the state;
19. Filing DD Form 2058, State of Legal Residence Certificate, with his local personnel office;
20. Providing that address on his federal income tax return;
21. Explaining temporary changes in residence; and
22. Paying nonresident tuition to an institution of higher learning in another state.[159]

While this list is not exhaustive, it provides a starting point for those who are unsure about how to acquire a domicile of choice. Additionally, the more consistent a service member is in his actions, the easier it will be for him to establish domicile in a new state.[160] Service members should keep in mind that a state that had been receiving tax payments from a service member may question the service member's motive for acquiring a new domicile; therefore, service members should be prepared to prove that they have legitimately changed their domicile.[161]

D. Examples

The following hypothetical situations apply the principles of determining, selecting, and acquiring domicile. Although these situations are similar to those in which service members might actually find themselves, they are meant to be only an example of how all the pieces fit together. No two-service members' circumstances are exactly the same; consequently, each specific case should be evaluated based on its own unique set of facts.

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159. Major L. Sue Hayn, *Soldiers' and Sailors' Civil Relief Act Update,* ARMY LAW., Feb. 1989, at 40; Legal Assistance Policy Division, *supra* note 68.

160. Legal Assistance Policy Division, *supra* note 68.

161. District of Columbia v. Murphy, 314 U.S. 441, 456 (1941) (citing Anderson v. Watt, 138 U.S. 694, 706 (1891) when stating "If one has at any time become domiciled here, it is his burden to establish any change of status upon which he relies to escape the tax.").

1. Private First Class (PFC) A

Private First Class *A* is unmarried with no children. He has less than two years of active duty service. He joined the Army from Texas, where his parents lived at the time he entered the Army. Private First Class *A*'s parents are originally from New Mexico, but since PFC *A* turned eighteen, have made Texas their permanent home. Private First Class *A*'s extended family (grandparents, aunts, uncles, and cousins) still live in New Mexico. Because his father was in the military, PFC *A* moved frequently during his childhood—both within the United States and overseas. His father's last duty station before retiring to Texas was Fort Bragg, North Carolina. Private First Class *A* graduated from high school at Fort Bragg, has a North Carolina driver's license, registered his car in North Carolina, and registered to vote in North Carolina. His girlfriend still lives there. After graduating high school, he moved to Texas with his parents, where he enrolled in a local college for two years, had a part-time job, and lived with his parents. His DD Form 2058, State of Legal Residence Certificate, lists New Mexico as his state of legal residence. Private First Class *A*, stationed in Hawaii, is unsure about his domicile.

The starting point for determining PFC *A*'s current state of domicile is his initial domicile, or domicile of origin. When he was born, PFC *A* acquired the same domicile as his father, which in this case was New Mexico.[162] While still a minor, PFC *A*'s domicile remained the same as his parents' domicile.[163] Because his parents were domiciled in New Mexico until after he turned eighteen, PFC *A* continues to be domiciled in New Mexico unless he has acquired a new domicile of choice since he reached the age of majority.[164] Whether PFC *A* has acquired that new domicile is dependent on his intent. If he plans to return to New Mexico when he separates from the service, then New Mexico is still his domicile. PFC *A* needs to know that as a New Mexico domiciliary, he will be required to continue to pay state individual income tax to New Mexico, since the state does not exclude military pay.[165] Based on New Mexico's tax rate range of 1.7% to 8.2%,[166] he could potentially pay significant amounts to the state over the course of his military career. If, after consideration of the financial impact of New Mexico domicile, PFC *A* still desires to make his

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162. *See* RESTATEMENT, *supra* note 9, § 14.

163. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989); RESTATEMENT, *supra* note 9, § 22.

164. *See Mississippi Band of Choctaw Indians*, 490 U.S. at 48.

165. *See infra* Appendix C.

166. *See infra* Appendix B.

home in New Mexico, then he does not need to take any further action, since the state is his current domicile. To solidify his relationship with the state, however, he should consider severing his ties with North Carolina and getting a New Mexico driver's license, registering his car in New Mexico, and registering to vote in New Mexico. Taking these steps will show his desire to remain a New Mexico domiciliary.

On the other hand, if PFC *A* plans to settle permanently in a state other than New Mexico, and has taken some steps to show this intent, he may have already begun the process to acquire a new domicile of choice in another state. Based on PFC *A*'s most recent past, the two states in which he has the most significant connections appear to be North Carolina and Texas. Based on his intent, he may consider taking additional steps to complete the transition to a new domicile in either one of these states.

First, PFC *A* established significant ties to North Carolina when he was there. Not only did he graduate high school there, but he also acquired a North Carolina driver's license, registered his car in the state, and votes there. If, at the time that he was there, he intended to make North Carolina his permanent home, and if he still has that desire, he may claim North Carolina as his domicile. To make this an effective claim, he should change his DD Form 2058 to reflect North Carolina and begin paying North Carolina taxes. Additionally, he should maintain his contacts in North Carolina by renewing his driver's license, re-registering his car in North Carolina, and voting by absentee ballot. He should consider making some charitable contributions to the community in North Carolina, such as donating to his old high school. Additionally, PFC *A* should claim North Carolina as his domicile in all official documents, such as wills, powers of attorney, and affidavits. If he wants to change his domicile to North Carolina, PFC *A* needs to consistently claim North Carolina as his legal residence.

More recently, PFC *A* also established significant ties to Texas. He completed two years of college there and earned income in the state for two years by working there. Additionally, it is his military home of record.[167] If, at the time that he was there, he intended to make Texas his permanent home, and if he still has that desire, he may potentially claim Texas as his domicile. As with the previous North Carolina example, he should change his DD Form 2058 to reflect Texas. Furthermore, he should sever all ties to North Carolina by obtaining a Texas driver's license, registering his car in Texas, and registering to vote in Texas. He should also obtain a will naming Texas as his state of legal residence and maintain a checking or

savings account in the state. He should maintain all contacts in Texas, to include visiting his parents at regular intervals. As with North Carolina, if PFC *A* wants to make Texas his domicile, he should be consistent with his actions and declarations.

If PFC *A* knows that he would like to settle down in a state other than New Mexico, North Carolina, or Texas, he should take the steps necessary to acquire domicile there, to include visiting the state and beginning to establish a home. If, however, PFC *A* has no idea where he wants to be when he settles down, he should weigh the consequences of establishing domicile in one of the states to which he has ties. Because acquiring a new domicile requires physical presence, the states in which he has lived are the best candidates. Given his background, PFC *A* should probably choose between New Mexico, North Carolina, Texas, and Hawaii, where he currently lives. When he makes this decision, it should be with an honest intent to make that state his home until some as yet unknown factor changes his circumstances and desires.

Examining the income tax factor, Texas appears to be a better choice than North Carolina or Hawaii. Not only does North Carolina not exclude military pay,[168] but the state also has a high individual income tax rate, with the minimum set at 6%.[169] Because PFC *A* already earns more than $12,750 per year,[170] he could potentially be required to pay at least the full six percent to North Carolina.[171] Although his girlfriend is currently located in North Carolina, if he is not confident about his long-term plans with her and his desire to live permanently in the state, he should not change his domicile to North Carolina because of the high tax rate. Likewise, Hawaii does not exclude military pay for income tax purposes,[172] and has a tax rate ranging from 1.4% to 8.25%.[173] Since it offers him no

167. While military home of record is unrelated to domicile, many states consider it to be a relevant factor in determining domicile. *See, e.g.*, IDAHO DEP'T OF ADMIN., ADMIN. RULES 35.01.01 (2000), R.032 (2002) *at* http://www2.state.id.us/adm/adminrules/rules/idapa35/35index.htm ("[t]he domicile of a qualified service member is presumed to be that member's military home of record . . ."); Iowa Dep't of Revenue and Finance, *Iowa Withholding and Income Taxes for Military Personnel*, *at* http://www.state.ia.us/tax/educate/78583.html ("A military person is an Iowa resident if . . . Iowa is declared as his or her Military Home of Record.").

168. *See infra* Appendix C.

169. *See infra* Appendix B.

170. *See* Defense Finance and Accounting Service, *supra* note 119 (establishing the minimum annual pay for a Private with less than four months service as $12,776.40).

171. *See infra* Appendix B.

172. *See infra* Appendix C.

tax advantages and he has no real ties to the state, Hawaii is not the best choice for PFC *A*. Finally, Texas does not levy a personal income tax,[174] which is a huge financial advantage. Because of the lack of tax and because his immediate family is in Texas and he has a history there, a decision to make Texas his permanent home would be a wise one for now. To make Texas his domicile of choice, he should return home for at least a brief visit, and while there, begin transferring his ties from North Carolina to Texas and tell his parents of his plans to eventually settle down in Texas. All other steps to acquire a domicile in Texas would remain as previously discussed.

Despite the tax advantage of making Texas his domicile, PFC *A* might also consider education and in-state tuition. If he were considering separating from the service after his first term of enlistment and finishing his college education, he should look at what school he would like to attend. Since he already has ties to North Carolina and Texas, he might want to attend school in one of these states. Comparing the main four-year universities in the states, PFC *A* would find that although both the University of North Carolina at Chapel Hill and the University of Texas at Austin are ranked as top tier schools by *U.S. News*, the University of North Carolina is ranked higher than the University of Texas .[175] Additionally, he would discover that tuition at the University of North Carolina would be approximately $2500 less per year than at the University of Texas.[176] Although the University of North Carolina appears to be more appealing, PFC *A* should still investigate both schools, considering factors such as academic programs and campus life. If after evaluating their programs, he decides that he likes and wants to attend the University of North Carolina at Chapel Hill, he should go ahead and take the steps to become a domiciliary of North Carolina. As a North Carolina resident, he would save nearly $16,000 in tuition per year,[177] which would still offset the amount of personal income tax he would pay while enlisted in the Army.[178] To acquire

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173. *See infra* Appendix B.

174. *See id.*

175. USNews.com, *supra* note 145. The University of North Carolina is ranked 29th, while the University of Texas is ranked 53rd. *Id.*

176. The University of North Carolina's tuition and fees for the 2003-2004 academic year equal $4072; the University of Texas' tuition and fees for residents equal $6608. *See infra* Appendix A.

177. *See id.*

178. An unmarried PFC with under two years of service whose basic pay equals $1356.90 per month, Defense Finance and Accounting Service, *supra* note 119, could pay up to $800 of state income tax. *See infra* Appendix C.

a North Carolina domicile, he should visit his girlfriend and her family, and while there, tell them of his intent to settle in North Carolina. Additionally, he should change his DD Form 2058 and take the additional steps previously discussed. If, on the other hand, PFC *A* decides that the University of Texas is more to his liking, he should take similar steps to make Texas his domicile. He would save over $5600 in tuition per year[179] without being burdened with state income tax. Financially, PFC *A* would only benefit by becoming a Texas domiciliary.

The case of PFC *A* illustrates the need for service members to determine their state of domicile and assess the consequences of that domicile. It shows some of the confusion that arises with service members' connections to multiple states and evaluates some of the ties that show intent to make a state a permanent home. Additionally, this example demonstrates the application of financial consequences, such as state income tax and in-state tuition, to select a new state of domicile. Finally, this case highlights some of the steps a service member would take to establish domicile in the selected state.

2. Lieutenant Colonel (LTC) B

Lieutenant Colonel *B* is married with two children, ages seventeen and fifteen. He is currently preparing for his retirement after twenty-two years in the service. He was born and raised in New York, which is his military home of record. Although his parents have always been New York domiciliaries, they recently retired to Florida. Additionally, his sister took her family there to help take care of their parents. Lieutenant Colonel *B* has been stationed throughout the country and Europe; however, he visits his family in Florida when he can.

Lieutenant Colonel *B*, now stationed in Germany, is trying to decide where to settle down once he retires. He is still registered to vote in New York and sends periodic donations to his hometown church. Lieutenant Colonel *B* still claims New York as his residence for state income tax purposes. Although he still feels tied to New York, he rarely visits, since his family is no longer in the state. Over the years, he has purchased real estate in several locations, to include Florida and Virginia. He was stationed in Virginia and has a Virginia driver's license and most recently registered his

179. *See infra* Appendix A.

car there. Lieutenant Colonel *B* believes that he could be happy in any one of the three states to which he has ties.

Before deciding where to settle, LTC *B* should first determine which state is his current domicile. Looking to his domicile of origin, it appears that LTC *B* acquired domicile in New York at birth, since his parents were both New York domiciliaries.[180] Lieutenant Colonel *B* is still a domiciliary of New York because his strongest connections are to New York, and he has made no apparent move to acquire a new domicile.[181] Settling in New York would be easy for him, in that it would not change either his voting or tax status. Even so, if he is not confident that this is where he wants to live, he may want to consider making one of the other states his new home. Lieutenant Colonel *B* should examine some of the consequences associated with each of his other potential domiciles.

Lieutenant Colonel *B* should first consider the income tax ramifications in each state. Florida does not have a system of personal income taxation[182] and is the most beneficial state for LTC *B*. New York, which provides some benefits for military service members and retirees, such as excluding active duty military pay while a service member is stationed outside the state and excluding military retirement pay,[183] is second best for tax purposes. Although he currently does not have to pay New York state income taxes, since his active duty military pay is exempt,[184] once he moves to the state and gains employment there, he will be subject to state tax at a rate of 6.85%.[185] On the other hand, because New York does not tax military retirement pay,[186] approximately $41,000 of his income will be excluded.[187] If he does not get another job after retirement, he would not have to pay New York taxes at all. Finally, for tax purposes, Virginia should be LTC *B*'s last choice. Virginia does not exempt either his active

180. *See* RESTATEMENT, *supra* note 9, § 14.

181. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989). Additionally, the SSCRA has protected him from acquiring a new domicile based solely on his military assignments. *See* 50 U.S.C. app. § 574 (2003).

182. *See infra* Appendix B.

183. *See infra* Appendix C.

184. *See id.*

185. This rate is based on an assumption that he will earn more than $20,000 per year. *See infra* Appendix B.

186. *See infra* Appendix C.

187. This annual retirement pay is based on the assumption that he retires in 2003 after twenty-two years of service under the High-3 retirement plan. *See* Office of the Undersecretary of Defense for Personnel and Readiness, *Military Pay and Benefits* (May 2003), *at* http://www.dod.mil/militarypay/.

duty pay[188] or his retirement pay,[189] and if he were to return to work, he would be subject to a state income tax of 5.75%.[190]

Although Florida is the best choice for tax purposes, LTC *B* should also consider in-state tuition for his children to attend college in each of the states. Lieutenant Colonel *B* has always dreamed of sending his kids to a "big name" school and would like for them to attend the best school possible. He knows that short of their winning scholarships, he will only be able to send them to state schools. Of the state schools in the three states he is considering, only the University of Virginia is ranked in the top 50 schools in the nation.[191] He can save over $16,000 annually per child by sending his children to the University of Virginia as residents.[192] Furthermore, this annual savings would likely exceed any income tax obligations he would have to the state.[193] Even so, LTC *B* would not receive the full benefit of his income and retirement pay. If, however, he is more flexible with where he will send his kids to school, LTC *B* will find that the Florida schools have the lowest resident tuition and would save him between $2600 and $2800 annually per child in tuition fees and costs.[194] When it comes to tuition, the New York schools should be the last choice for LTC *B*. Not only is their in-state tuition rate higher than the schools in Florida or Virginia (with the exception of the University of Virginia), but the savings for attending the schools as a resident versus a nonresident is also the lowest of the states.[195]

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188. As a LTC with twenty-two years in service, he makes $35,000 over the annual limit of $30,000 to receive Virginia's exclusion of military pay. *See* Defense Finance and Accounting Service, *supra* note 119; *infra* Appendix C.

189. *See infra* Appendix C.

190. This rate is based on the assumption that he will earn more than $17,000 per year, which will put him into the highest tax bracket. *See infra* Appendix B.

191. Based on the *U.S. News & World Report* ranking system. *See* USNews.com, *supra* note 145.

192. *See infra* Appendix A.

193. Based on a tax rate of 5.75%, LTC *B* would have to make over $243,000 annually to incur a $14,000 income tax liability.

194. *See infra* Appendix A.

195. *See id.*

If LTC *B* truly does not have a solid preference about where to settle down, it appears as though Florida offers the most financial benefits for his family. With no state income tax, he can receive his military retirement pay and pursue a second career without having to lose a portion of his income. Additionally, the state universities in Florida are less expensive than in any other state. Since his family also lives in Florida, this appears to be an excellent choice for LTC *B*. On his next visit to Florida, he should begin to take the appropriate steps to change his domicile to that state.

The case of LTC *B* balances the financial consequences of state income tax and in-state tuition to select a state of domicile. It also illustrates how individual circumstances, such as the desire to attend a specific university, can change the analysis. This example highlights the need for individual examination of each case.

3. Staff Sergeant (SSG) C

Staff Sergeant *C* was born and raised in Michigan, which he still calls home. He is registered to vote in Michigan and pays Michigan state income tax. In fact, his current state of domicile is Michigan. Staff Sergeant *C* is divorced and his two young children, ages four and two, live with his ex-wife in his hometown in Michigan.

Staff Sergeant *C* has been in the Army for twelve years and is currently stationed in Alaska. He loves everything about Alaska and would like to make his home there after he leaves the military. He has become an integral part of the community, participating in numerous church and civic groups. He also purchased land in an undeveloped area of town and registered his car in the state. Since joining the Army, this is the first time that SSG *C* has taken any steps toward becoming a member of a community other than his hometown in Michigan. Staff Sergeant *C* wonders if he should change his domicile from Michigan to Alaska.

To decide whether to change his domicile, SSG *C* must consider all the consequences associated with the change. Financially, Alaska would offer substantial benefits for SSG *C*. It has no system of personal income taxation,[196] compared to the 4% flat rate charged by Michigan.[197] While the income tax consequences would not impact SSG *C* while he is in the

196. *See infra* Appendix B.
197. *See id.*

military because Michigan excludes active duty military pay,[198] it would have an effect once SSG *C* separates from the service and finds a civilian job. Additionally, if he switches his domicile to Alaska, SSG *C* will be entitled to receive the annual payment from the Alaska Permanent Fund Dividend, which is currently over $1500.[199] Of the financial factors, income tax and the Alaska Permanent Fund Dividend are the two most important for SSG *C*'s purposes. Evaluating in-state tuition right now would not be particularly helpful for SSG *C*, since it will be at least fourteen years until his oldest child attends college and predicting the costs of tuition that far in the future would be impracticable.

In addition to financial consequences, SSG *C* should look at other ramifications of changing his domicile to Alaska. If he makes his home in Alaska, SSG *C* will be separated from his children by over 2,800 miles.[200] He will not be able to participate in their daily lives and will be forced to see them relatively infrequently. Depending on the type of relationship he wishes to have with his children, this one drawback may far outweigh the financial benefit of changing his domicile to Alaska. Because SSG *C* can only change his domicile based on his honest intent to make Alaska his permanent home,[201] he cannot merely claim domicile in Alaska to receive the financial benefits while residing elsewhere to be close to his family. Staff Sergeant *C* should only change his domicile to Alaska if he is willing to accept the separation from his family.

The case of SSG *C* illustrates that financial considerations are only one factor in selecting domicile. Personal circumstances such as proximity to family and other non-financial consequences of domicile also play a significant role. There is no set formula for choosing a state of domicile.

V. Conclusion

Although tackling the question of where to call home may appear daunting to some service members, it can be simplified with an application of the basic rules of domicile. For most legal purposes, to include judicial

198. *See id.*

199. *See* Alaska Department of Revenue, Permanent Fund Dividend Program, *Dividend Amount By Year* (Jan. 2, 2003), *at* http://www.pfd.state.ak.us/YEARAMOU.HTM.

200. This mileage is calculated based on the assumption that SSG *C* settles in Fairbanks and his family lives in Lansing. *See* Mileage Calculator (Nov. 1, 2002), *at* http://www.symsys.com/~ingram/mileage.html.

201. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989).

jurisdiction, voting, and income taxation, a service member's legal residence is the place where he plans to one day establish a permanent home. Practically, a service member's domicile is in the state to which he has the closest social, financial, and governmental connections. Where a service member lives, votes, owns property, pays taxes, visits while on leave, and claims on his DD Form 2058 are some of the considerations used to determine domicile. Importantly, where one is domiciled can potentially have significant consequences for service members.

Service members who are unsure of where they want to settle after separating from the military should consider all the consequences of domicile when making a decision about where to call home. Although some service members will be concerned about consequences such as judicial jurisdiction, application of estate law, and eligibility to hold political office, the consequences that have the greatest daily impact on service members are those that affect finances, such as income tax, in-state tuition rates, and the Alaska Permanent Fund dividend. An evaluation of these factors can assist service members in making an informed decision.

The greatest financial benefit for service members comes from being domiciled in a state that does not levy a personal income tax. Service members can also benefit greatly, however, from being domiciled in one of the many other states that do not tax active duty military pay or military retirement pay. Another benefit provided by states is the lower in-state tuition rates at public colleges and universities. Because the amount of savings varies from state to state, service members must balance the potential tuition savings with the amount paid in state income tax to determine if maintaining a residence in a state for future tuition savings is financially sound. Finally, receiving an annual stipend, such as payment from the Alaska Permanent Fund Dividend, is an added bonus for service members.

Even though some states provide significant financial advantages, service members should avoid establishing domicile for the sole purpose of avoiding tax liability in another state. Not only may this type of subterfuge fail in avoiding taxes, but it may also undermine a service member's ability to claim the benefits of domicile in a state to which he has allegiance and in which he would like to establish a home. Ultimately, financial considerations are only one factor that can assist service members who are unsure about where they would like to settle.

With the basics of domicile and how it is acquired that are contained in this article, service members should be able to determine which state is

their domicile. Furthermore, they should be able to recognize the consequences of domicile and weigh these factors to make an informed decision about changing that domicile. The next time a service member is asked that daunting question—"So, where are you from?"—he can relax, smile, and talk about his home.

Appendix A

College and University Tuition Rates[202]

	INSTITUTION NAME	IN-STATE	OUT-OF-STATE	IN-STATE SAVINGS
Alabama	Auburn U[203]	$4426	$12,886	$8460
	U of Alabama at Birmingham[204]	$4274	$9494	$5220
	U of Alabama at Tuscaloosa[205]	$4134	$11,294	$7160
Alaska	U of Alaska at Fairbanks[206]	$3550	$9280	$5730
Arizona	Arizona State U[207]	$3595	$12,115	$8520
	U of Arizona[208]	$3604	$12,374	$8770
Arkansas	U of Arkansas at Fayetteville[209]	$4526	$11,276	$6750
California	U of California at Berkeley[210]	$5858	$20,068	$14,210
	U of California at Davis[211]	$5853	$25,047	$19,194
	U of California at Irvine[212]	$5804	$19,784	$13,480
	U of California at Los Angeles[213]	$5820	$20,510	$14,210

[202] This table includes only four-year or above public institutions with doctoral programs. The figures represent estimated charges to first-time, full-time undergraduates based on a nine-month academic year of twenty-four to thirty semester hours for the 2003-2004 school year. Required fees, along with tuition, are included in the figures.

[203] Office of the Bursar and Special Funds Accounting, Auburn University, *Auburn University Tuition Structure Effective Fall 2003 Through Summer 2004* (2003), *at* http://www.auburn.edu/administration/iss/business_office/bursar/.

[204] University of Alabama at Birmingham Student Affairs, *UAB Tuition and Fees*, *at* http://students.uab.edu/academics/ (last visited Oct. 9, 2003).

[205] Office of Student Receivables, The University of Alabama, *Undergraduate Tuition Fall 2003 and Spring 2004*, *at* http://cost.ua.edu/ (last visited Oct. 9, 2003).

[206] Registrar's Office, University of Alaska at Fairbanks, *Spring 2003 Fee Schedule*, *at* http://www.uaf.edu/reg/schedule/expenses.html#fees (last modified Mar. 13, 2003).

[207] Arizona State University, *General Semester Tuition/Fee Rates by Credit Hour: Academic Year 2003/2004 Per Semester Rates*, *at* http://www.asu.edu/visitors/ (last visited Oct. 9, 2003).

[208] Office of Student Financial Aid, The University of Arizona, *Estimated Cost of Attendance*, *at* http://www.arizona.edu/admissions/paying.shtml (last visited Oct. 9, 2003).

[209] Office of Admission, University of Arkansas, *Tuition*, *at* http://www.uark.edu/admission.html (last visited Oct. 9, 2003).

[210] Office of the Registrar, University of California, Berkeley, *2003-2004 Registration Fees*, *at* http://www.berkeley.edu/applying/index.html#undergrad (last updated Aug. 1, 2003).

[211] University of California, Davis, *Fees, Fees, Fees*, *at* http://why.ucdavis.edu/finances.cfm (last updated Sept. 4, 2003).

[212] University of California, Irvine, *2003-04 General Catalogue*, *at* http://www.uci.edu/prospective.html (last visited Oct. 9, 2003).

[213] Registrar's Office, University of California, Los Angeles, *Graduate, Undergraduate 2002-03 Annual Fees* (2003), *at* http://www.registrar.ucla.edu/Fees/.

	INSTITUTION NAME	IN-STATE	OUT-OF-STATE	IN-STATE SAVINGS
California	U of California at Riverside[214]	$5951	$20,161	$14,210
	U of California at San Diego[215]	$5508	$19,718	$14,210
	U of California at Santa Barbara[216]	$5639	$19,849	$14,210
	U of California at Santa Cruz[217]	$6191	$20,401	$14,210
Colorado	Colorado State U[218]	$3920	$14,392	$10,472
	U of Colorado at Boulder[219]	$4022	$20,346	$16,326
Connecticut	U of Connecticut[220]	$6806	$17,590	$10,784
Delaware	U of Delaware[221]	$6498	$16,028	$9530
Florida	Florida International U[222]	$3050	$13,100	$10,050
	Florida State U[223]	$2860	$13,888	$11,028
	U of Florida[224]	$2770	$13,800	$11,030
	U of South Florida[225]	$2700	$12,244	$9544

[214] Division of Student Affairs, University of California, Riverside, *Estimated Expenses*, *at* http://www.admissions.ucr.edu/money.html (last visited Oct. 9, 2003).

[215] Financial Aid Office, University of California, San Diego, *2003-2004 Estimated UCSD Undergraduate Basic Budgets*, *at* http://orpheus.ucsd.edu/finaid/ (last visited Oct. 9, 2003).

[216] Financial Aid Office, University of California, Santa Barbara, *Budget*, *at* http://www.finaid.ucsb.edu/Budget.asp (last visited Oct. 9, 2003).

[217] University of California, Santa Cruz, *Tuition & Fees*, *at* http://www.admissions.ucsc.edu/ (last visited Oct. 9, 2003).

[218] Student Financial Services, Colorado State University, *Costs*, *at* http://sfs.colostate.edu/ (last updated Sept. 30, 2003).

[219] University of Colorado at Boulder, *Estimated Expenses*, *at* http://www.colorado.edu/prospective/freshman/index.html (last visited Oct. 10, 2003).

[220] Student Financial Aid Services, University of Connecticut, *Cost of Attendance*, *at* http://vm.uconn.edu/~wwwfaid/ (last visited Oct. 10, 2003).

[221] Office of Undergraduate Admissions, University of Delaware, *Finance Your Delaware Education*, *at* http://www.udel.edu/main/pros-students/ (last visited Oct. 10, 2003).

[222] Financial Aid Office, Florida International University, *Estimating Your Cost of Attendance*, *at* http://www.fiu.edu/orgs/finaid/general.html (last visited Oct. 10, 2003).

[223] Florida State University, *Estimated Undergraduate Basic Costs 2003-2004*, *at* http://www.fsu.edu/prospective/undergraduate/finances.shtml (last visited Oct. 10, 2003).

[224] Office of the University Registrar, University of Florida, *2003-2004 Average Annual Costs of Attendance* (2003), *at* http://www.ufl.edu/pstudnts.html.

[225] UNIVERSITY OF SOUTH FLORIDA, 2003-2004 UNDERGRADUATE CATALOG (2003), *at* http://www.ugs.usf.edu/catalogs.htm.

	INSTITUTION NAME	IN-STATE	OUT-OF-STATE	IN-STATE SAVINGS
Georgia	Georgia Institute of Technology[226]	$4076	$16,002	$11,926
	Georgia State U[227]	$3920	$13,544	$9624
	U of Georgia[228]	$4078	$14,854	$10,776
Hawaii	U of Hawaii-Manoa[229]	$3464	$9944	$6480
Idaho	U of Idaho[230]	$3348	$10,740	$7392
Illinois	Northern Illinois U[231]	$5547	$9625	$4078
	Southern Illinois U at Carbondale[232]	$5522	$9766	$4244
	U of Illinois at Chicago[233]	$6798	$16,494	$9696
	U of Illinois at Urbana-Champaign[234]	$7010	$18,046	$11,036
Indiana	Indiana U at Bloomington[235]	$6518	$17,552	$11,034
	Purdue U[236]	$5860	$17,640	$11,780
Iowa	Iowa State U[237]	$5028	$14,370	$9342
	U of Iowa[238]	$4993	$15,285	$8428

[226] Georgia Institute of Technology, *Costs*, *at* http://www.finaid.gatech.edu/costs/# (last visited Oct. 10, 2003).

[227] GEORGIA STATE UNIVERSITY, UNDERGRADUATE CATALOG 2003-2004, *at* http://www.gsu.edu/gsuhome-v1/students/catalogs.html (last visited Oct. 10, 2003).

[228] Bursar's Office, The University of Georgia, *Tution and Fee Schedule Fall/Spring Semester 2003-04: Undergraduates*, *at* http://www.uga.edu/admit/ (last updated June 2003).

[229] UNIVERSITY OF HAWAII AT MANOA, *2003-2004 CATALOG (2003)*, *at* http://www.catalog.hawaii.edu/.

[230] Financial Aid and Scholarships, University of Idaho, *Cost of Attendance*, *at* http://www.nss.uidaho.edu/ (last visited Oct. 12, 2003).

[231] Office of the Bursar, Northern Illinois University, *Undergraduate Tuition and Fees*, *at* http://www.admissions.niu.edu/finaidmain.html (last visited Oct. 12, 2003).

[232] Southern Illinois University, Carbondale Campus, *Tuition and Fees Schedules*, *at* http://www.siu.edu/departments/oar/tuition.htm (last visited Oct. 12, 2003).

[233] Registration and Records, University of Illinois at Chicago, *Tuition and Fee Rates*, *at* http://www.uic.edu/depts/oar/rr/tuition.shtml (last visited Oct. 12, 2003).

[234] Office of Student Financial Aid, University of Illinois at Urbana-Champaign, *University of Illinois at Urbana-Champaign Estimated Education Expenses for 2003-2004*, *at* http://www.osfa.uiuc.edu/# (last visited Oct. 12, 2003).

[235] Office of the Bursar, Indiana University, *Bursar Rates and Policies*, *at* http://www.indiana.edu/~iuadmit/costs/ (last updated Oct. 10, 2003).

[236] Undergraduate Office of Admissions, Purdue University, *All About Purdue*, *at* http://www.purdue.edu/Admissions/Undergrad/pages/about/ab_cost_fin_aid.html (last visited Oct. 12, 2003).

[237] Office of the Registrar, Iowa State University, *Tuition and Fees*, *at* http://www.iastate.edu/~registrar/fees/ (last updated Aug. 27, 2003).

[238] The University of Iowa, *Estimated First-Year Costs at Iowa*, *at* http://www.uiowa.edu/admissions/first_year/costs.html (last updated Sept. 17, 2003).

	INSTITUTION NAME	IN-STATE	OUT-OF-STATE	IN-STATE SAVINGS
Kansas	Kansas State U[239]	$3826	$11,190	$7364
	U of Kansas[240]	$4101	$11,577	$7476
Kentucky	U of Kentucky[241]	$4547	$11,227	$6680
	U of Louisville[242]	$4450	$12,166	$7716
Louisiana	Louisiana State U at Baton Rouge[243]	$3964	$9264	$5300
Maine	U of Maine[244]	$5914	$14,614	$8700
Maryland	U of Maryland at College Park[245]	$6759	$17,433	$10,674
	U of Maryland - Baltimore County[246]	$7388	$14,240	$6852
Massachusetts	U of Massachusetts at Amherst[247]	$6482	$15,335	$9068
Michigan	Michigan State U[248]	$6747	$16,707	$9960
	U of Michigan at Ann Arbor[249]	$7708	$24,508	$16,800
	Wayne State U[250]	$5274	$11,475	$6201
	Western Michigan U[251]	$5221	$12,735	$7514

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[239] Office of Student Financial Assistance, Kansas State University, *Financial Aid*, *at* http://www.ksu.edu/Prospective/ (last visited Oct. 12, 2003).

[240] Office of the University Registrar, The University of Kansas, *Comprehensive Fee Schedule* (2003), *at* http://www.ku.edu/admissions/.

[241] Office of the Registrar, University of Kentucky, *Tuition 2003-2004*, *at* http://www.uky.edu/Registrar/feesgen.html (last updated Aug. 13, 2003).

[242] Office of Admissions, University of Louisville, *Aid & Scholarships: Funding Your U of L Educational Experience*, *at* http://admissions.louisville.edu/aid/ (last visited Oct. 12, 2003).

[243] Office of Budget and Planning, Louisiana State University, *Louisiana State University Tuition and Fees* (2003), *at* http://www.bgtplan.lsu.edu/fees.htm.

[244] Office of Student Financial Aid, The University of Maine, *Cost of Attendance*, *at* http://www.umaine.edu/prospective.htm (last updated June 12, 2003).

[245] Office of the Bursar, University of Maryland, *Tuition, Fees, and Other Expenses*, *at* http://www.umd.edu/prospective/ (last visited Oct. 12, 2003).

[246] Office of Undergraduate Admissions, University of Maryland, Baltimore County, *Costs*, *at* http://www.umbc.edu/ (last visited Oct. 12, 2003).

[247] Office of Enrollment Services, University of Massachusetts, Amherst, *UMass Quick Facts*, *at* http://www.umass.edu/admissions/financing/index.html (last visited Oct. 12, 2003). Figures represent tuition and fees for the 2002-2003 academic year.

[248] Controller's Office, Michigan State University, *Tuition, Fees and Housing Calculator*, *at* http://www.ctlr.msu.edu/studrec/bud1.asp (last reviewed June 6, 2003).

[249] Office of the Registrar, University of Michigan, *University of Michigan Ann Arbor Campus Tuition and Laboratory Fees*, *at* http://www.umich.edu/~regoff/tuitmenu.html (last visited Oct. 12, 2003).

[250] Office of the Registrar, Wayne State University, *Tuition and Fees: 2003-2004 Academic Year*, *at* http://www.wayne.edu/future_students/index.html (last visited Oct. 12, 2003).

[251] Office of the Registrar, Western Michigan University, *Tuition and Fees*, *at* http://www.wmich.edu/registrar/schedule/term-information.html (updated Oct. 13, 2003).

	INSTITUTION NAME	IN-STATE	OUT-OF STATE	IN-STATE SAVINGS
Minnesota	U of Minnesota - Twin Cities[252]	$7316	$18,946	$11,630
Mississippi	Mississippi State U[253]	$3874	$8780	$4906
	U of Mississippi[254]	$3916	$8826	$4910
	U of Southern Mississippi[255]	$3874	$8752	$4878
Missouri	U of Missouri at Columbia[256]	$6150	$14,968	$8818
Nebraska	U of Nebraska at Lincoln[257]	$4840	$12,422	$7582
Nevada	U of Nevada at Reno[258]	$2830	$11,317	$8487
New Hampshire	U of New Hampshire[259]	$8664	$19,024	$10,360
New Jersey	Rutgers U - New Brunswick[260]	$7927	$14,441	$6514
New Mexico	New Mexico State U[261]	$3372	$11,250	$7878
	U of New Mexico[262]	$3313	$11,954	$8641

[252] Office of Admissions, University of Minnesota, *Approximate Annual Costs—2003-2004 Academic Year*, *at* http://admissions.tc.umn.edu/CostsAid/ (last modified Sept. 26, 2003).

[253] Mississippi State University, *Account Services*, *at* http://www.controller.msstate.edu/sas/account.htm (last modified June 10, 2003).

[254] Office of Financial Aid, University of Mississippi, *Financial Aid Policies: Estimated Cost of Attendance*, *at* http://www.olemiss.edu/depts/financial_aid/policies/cost.html (last updated Sept. 24, 2003).

[255] Office of Admissions, The University of Southern Mississippi, *Cost*, *at* http://www.admissions.usm.edu/ (last updated July 25, 2003).

[256] University of Missouri-Columbia, *Costs & Financial Aid*, *at* http://www.missouri.edu/admissions.htm (last visited Oct. 8, 2003).

[257] Office of Scholarships & Financial Aid, University of Nebraska, Lincoln, *Costs*, *at* http://www.unl.edu/scholfa/costs.html (last visited Oct. 14, 2003).

[258] Cashier's and Loan Office, University of Nevada, Reno, *Registration Fees: Fall 2003*, *at* http://www.howler.unr.edu/controller/cashiers.htm (last updated Sept. 25, 2003).

[259] Undergraduate Admissions, University of New Hampshire, *Fees and Expenses (2003-2004)*, *at* http://www.unh.edu/admissions/financialaid/index.html (last updated July 14, 2003).

[260] Rutgers University, *Tuition and Fees*, *at* http://admissions.rutgers.edu/html/00.asp (last visited Oct. 14, 2003).

[261] University Accounts Receivable, New Mexico State University, *Schedule of Costs*, *at* http://www.nmsu.edu/%7Euar/schecosts/schcosts.htm (last modified Oct. 1, 2003).

[262] Bursar's Office, The University of New Mexico, *Tuition Rates*, *at* http://www.unm.edu/~bursar/studentnew.html (last modified June 2, 2003).

	INSTITUTION NAME	IN-STATE	OUT-OF-STATE	IN-STATE SAVINGS
New York	State U of New York at Albany[263]	$5770	$11,720	$5950
	State U of New York at Binghamton[264]	$5690	$11,640	$5950
	State U of New York at Buffalo[265]	$5850	$11,800	$5950
	State U of New York at Stony Brook[266]	$5306	$11,256	$5950
North Carolina	North Carolina State U[267]	$3970	$15,818	$11,848
	U of North Carolina at Chapel Hill[268]	$4072	$15,920	$11,848
Ohio	Kent State U[269]	$6882	$13,314	$6432
	Ohio State U at Columbus[270]	$6624	$16,488	$9864
	Ohio U[271]	$7128	$15,351	$8223
	U of Cincinnati[272]	$7623	$19,230	$11,607
	U of Toledo[273]	$6415	$15,054	$8639

[263] University at Albany - State University of New York, *Cost/Financial Aid*, *at* http://www.albany.edu/admissions/undergraduate/finances/cost.htm (last visited Oct. 14, 2003).

[264] The Office of Student Financial Aid and Employment, Binghamton University - State University of New York, *Costs*, *at* http://bingfa.binghamton.edu/ (last visited Oct. 14, 2003).

[265] Office of Admissions, University at Buffalo - State University of New York, *2003-04 Annual Costs*, *at* http://www.buffalo.edu/home/prospective.shtml (last visited Oct. 14, 2003).

[266] Offices of the Bursar/Student Accounts, Stony Brook University - State University of New York, *Undergraduate Tuition and Fee Information*, *at* http://www.stonybrook.edu/bursar/ (last visited Oct. 14, 2003).

[267] University Cashier's Office, North Carolina State University, *Undergraduate Tuition and Fees: Fall 2003-Spring 2004*, *at* http://www7.acs.ncsu.edu/cashier/ (last updated Sept. 3, 2003).

[268] Office of Student Accounts & University Receivables, The University of North Carolina at Chapel Hill, *Tuition and Fees, Academic Year 2003-2004* (Sept. 15, 2003), *at* http://www.unc.edu/finance/cashiers/03_04YRFINAL.pdf.

[269] Admissions Office, Kent State University, *Fees*, *at* http://www.admissions.kent.edu/Financing.asp (last visited Oct. 14, 2003).

[270] The Ohio State University, *Tuition and Fees*, *at* http://www-afa.adm.ohio-state.edu/undergraduate/index.php (last visited Oct. 14, 2003).

[271] Office of Admissions, Ohio University, *Fees and Expenses*, *at* http://www.ohiou.edu/admissions/fees.htm (last visited Oct. 14, 2003).

[272] University of Cincinnati, *Tuition & Fees, 2003-2004*, *at* http://www.uc.edu/ucinfo/cost.html (last modified Sept. 18, 2003).

[273] Bursar's Office, The University of Toledo, *Tuition Fall 2003 & Spring 2004*, *at* http://finadmin.utoledo.edu/bursars_office/tuition.htm (last visited Oct. 14, 2003).

	INSTITUTION NAME	IN-STATE	OUT-OF-STATE	IN-STATE SAVINGS
Oklahoma	Oklahoma State U[274]	$3493	$9440	$5947
	U of Oklahoma at Norman[275]	$4133	$10,262	$6129
Oregon	Oregon State U[276]	$4620	$17,376	$12,756
	U of Oregon[277]	$3306	$11,132	$7826
Pennsylvania	Pennsylvania State U at U Park[278]	$8796	$18,418	$9622
	Temple U[279]	$8594	$15,354	$6760
	U of Pittsburgh[280]	$9274	$18,586	$9312
Rhode Island	U of Rhode Island[281]	$5169	$15,301	$10,132
South Carolina	Clemson U[282]	$7134	$14,732	$7598
	U of South Carolina at Columbia[283]	$6778	$16,116	$9338
Tennessee	U of Memphis[284]	$3,704	$10,858	$7,154
	U of Tennessee at Knoxville[285]	$4450	$13,532	$9082

[274] Office of the Bursar, Oklahoma State University, *Calculation of Tuition and Fees Fall 2003/Spring 2004*, *at* http://bursar.okstate.edu/tuition.html (last visited Oct. 14, 2003).

[275] Office of the Bursar, The University of Oklahoma, *Tuition Estimator*, *at* http://www.ou.edu/bursar/ (last modified May 1, 2003).

[276] Financial Aid & Scholarships, Oregon State University, *Estimating Your Cost of Attendance*, *at* http://oregonstate.edu/admissions/firstYear/FYoutline.html (last visited Oct. 14, 2003).

[277] Registrar's Office, University of Oregon, *Tuition Rates*, *at* http://registrar.uoregon.edu/ (last visited Oct. 14, 2003).

[278] The Pennsylvania State University, *Penn State Tuition*, *at* http://www.psu.edu/ur/prospective.html (last visited Oct. 14, 2003).

[279] Temple University, *Temple University 2003-04 Tuition Schedule*, *at* http://www.temple.edu/bursar/ (last visited Oct. 14, 2003).

[280] Office of Institutional Research, University of Pittsburgh, *University of Pittsburgh Tuition Rates and Required Fees*, *at* http://www.ir.pitt.edu/ (last updated July 14, 2003).

[281] Enrollment Services, University of Rhode Island, *Tuition and Fee Information (2003-2004)*, *at* http://www.uri.edu/es/acadinfo/acadyear/tuition.html (last visited Oct. 14, 2003).

[282] Undergraduate Admissions Office, Clemson University, *Clemson Facts at a Glance*, *at* http://www.clemson.edu/attend/undrgrd/academic/ataglance/ (last visited Oct. 14, 2003).

[283] Office of the Bursar, University of South Carolina at Columbia, *University of South Carolina Fee Schedule 2003-2004*, *at* http://web.csd.sc.edu/bursar/ (last updated July 8, 2003).

[284] Student Financial Aid Office, The University of Memphis, *2003-2004 Cost of Attendance*, *at* http://www.enrollment.memphis.edu/FinancialAid/geninfo.html#coa (last visited Oct. 14, 2003).

[285] Undergraduate Admissions, The University of Tennessee, *Costs and Financial Aid*, *at* http://admissions.utk.edu/undergraduate/ (last visited Oct. 14, 2003).

	INSTITUTION NAME	IN-STATE	OUT-OF-STATE	IN-STATE SAVINGS
Texas	Texas A&M U at C Station[286]	$4134	$11,214	$7080
	Texas Tech U[287]	$5045	$12,125	$7080
	U of Houston[288]	$3798	$10,878	$7080
	U of North Texas[289]	$3606	$9270	$5664
	U of Texas at Arlington[290]	$3704	$9368	$5664
	U of Texas at Austin[291]	$5016	$11,624	$6608
Utah	U of Utah[292]	$3646	$11,292	$7646
	Utah State U[293]	$3072	$8946	$5874
Vermont	U of Vermont[294]	$9636	$22,688	$13,052
Virginia	Old Dominion U[295]	$4770	$13,920	$9150
	U of Virginia[296]	$5968	$21,988	$16,020
	Virginia Commonwealth U[297]	$4869	$17,213	$12,344
	Virginia Tech[298]	$5095	$15,029	$9934

[286] Division of Finance, Texas A&M University, *Tuition, Fees and Refund Schedule for the 2003-2004 Academic Year*, *at* http://finance.tamu.edu/sfs/resources/tuition_and_fees/fees-99-00.asp (last visited Oct. 14, 2003).

[287] Office of Admissions, Texas Tech University, *Estimated Cost of Attendance 2003-2004 Academic Year*, *at* http://www.admissions.ttu.edu/nso/ (updated July 3, 2003).

[288] Student Financial Services, University of Houston, *Tuition and Fee Schedule*, *at* http://www.uh.edu/sfs/ (last visited Oct. 14, 2003).

[289] Student Accounting & University Cashiering Services, University of North Texas, *Tuition and Fees*, *at* http://essc.unt.edu/saucs/ (last visited Oct. 14, 2003).

[290] Office of Accounting & Business Services, University of Texas at Arlington, *Registration Cost Summary Charts*, *at* http://www.uta.edu/uta/about (last visited Oct. 15, 2003).

[291] Office of Accounting, The University of Texas at Austin, *Flat Rate Tuition Pilot Project*, *at* http://www.utexas.edu/business/accounting/sar/t_f_rates.html (revised Apr. 10, 2003).

[292] Income Accounting and Student Loan Services, University of Utah, *Tuition Information*, *at* http://www.utah.edu/newstudents/finances.html (updated Sept. 25, 2003).

[293] Controller's Office, Cashier's Office, Utah State University, *Utah State University 2003-2004 Tuition & Fees* (Mar. 18, 2003), *at* http://controller.usu.edu/cashier/notifications/2003-04%20tuition.pdf.

[294] The University of Vermont, *Cost and Financial Aid*, *at* http://www.uvm.edu/financialaid/ (last modified Oct. 8, 2003).

[295] Old Dominion University, *Old Dominion University Campus Facts*, *at* http://www.odu.edu/webroot/orgs/IA/campusfacts.nsf/pages/campusfacts (last visited Oct. 14, 2003).

[296] Student Accounts, University of Virginia, *Tuition & Fee Schedule*, *at* http://www.virginia.edu/studentaccounts/ (last modified July 11, 2003).

[297] Undergraduate Admissions, Virginia Commonwealth University, *Financing College*, *at* http://www.vcu.edu/ugrad/admissions101/financingcollege.html (last modified Oct. 10, 2003).

[298] Office of the University Bursar, Virginia Polytechnic Institute and State University, *Tuition & Fees for School Year 2003-2004*, *at* http://www.bursar.vt.edu/sp/tuition.shtml (last visited Oct. 14, 2003).

	INSTITUTION NAME	IN-STATE	OUT-OF-STATE	IN-STATE SAVINGS
Washington	U of Washington at Seattle[299]	$3312	$10,748	$7436
	Washington State U[300]	$5280	$13,382	$8102
West Virginia	West Virginia U[301]	$3548	$10,768	$7220
Wisconsin	U of Wisconsin at Madison[302]	$5140	$19,150	$14,010
	U of Wisconsin at Milwaukee[303]	$5107	$17,858	$12,751
Wyoming	U of Wyoming[304]	$2586	$7266	$4680

[299] Student Fiscal Services, University of Washington, *Tuition Rates*, *at* http://www.washington.edu/students/sfs/ (modified July 25, 2003).

[300] Office of Student Financial Aid, Washington State University, *Estimated Costs of Attending Washington State University 2003-2004 Academic Year*, *at* http://www.finaid.wsu.edu/ (last visited Oct. 14, 2003).

[301] Financial Aid Office, West Virginia University, *Cost of Attendance*, *at* http://www.wvu.edu/~finaid/coa.htm (last modified Sept. 8, 2003).

[302] Undergraduate Admissions, The University of Wisconsin, Madison, *Costs and Financial Aid*, *at* http://www.admissions.wisc.edu/ (last updated Sept. 2003).

[303] Business & Financial Services, University of Wisconsin, Milwaukee, *Tuition and Fees*, *at* http://www.bfs.uwm.edu/fees/ (last visited Oct. 14, 2003).

[304] University of Wyoming, *Semester Tuition and Fee Schedule 2003-2004*, *at* http://www.uwyo.edu/ (last visited Oct. 14, 2003).

Appendix B

State Individual Income Taxes[305]

	Tax Rates		Income Brackets	
	Low	High	Low	High
Alabama	2.00%	5.00%	$500	$3,000
Alaska	No State Income Tax			
Arizona	2.87%	5.04%	$10,000	$150,000
Arkansas	1.00%	6.50%	$2,999	$25,000
California	1.00%	9.30%	$5,834	$38,291
Colorado	4.63%		flat rate	
Connecticut	3.00%	4.50%	$10,000	$10,000
Delaware	2.20%	5.95%	$5,000	$60,000
Florida	No State Income Tax			
Georgia	1.00%	6.00%	$750	$7,000
Hawaii	1.40%	8.25%	$2,000	$40,000
Idaho	1.60%	7.80%	$1,087	$21,730
Illinois	3.00%		flat rate	
Indiana	3.40%		flat rate	
Iowa	0.36%	8.98%	$1,211	$54,495
Kansas	3.50%	6.45%	$15,000	$30,000
Kentucky	2.00%	6.00%	$3,000	$8,000
Louisiana	2.00%	6.00%	$10,000	$50,000
Maine	2.00%	8.50%	$4,200	$16,700
Maryland	2.00%	4.75%	$1,000	$3,000
Massachusetts	5.00%		flat rate	
Michigan	4.00%		flat rate	
Minnesota	5.35%	7.85%	$18,710	$61,461
Mississippi	3.00%	5.00%	$5,000	$10,000
Missouri	1.50%	6.00%	$1,000	$9,000
Montana	2.00%	11.00%	$2,200	$75,400
Nebraska	2.56%	6.84%	$2,400	$26,500
Nevada	No State Income Tax			
New Hampshire	Limited to Dividends and Interest Income Only			
New Jersey	1.40%	6.37%	$20,000	$75,000
New Mexico	1.70%	8.20%	$5,500	$65,000
New York	4.00%	6.85%	$8,000	$20,000
North Carolina	6.00%	8.25%	$12,750	$120,000
North Dakota	2.10%	5.54%	$27,050	$297,350
Ohio	0.74%	7.50%	$5,000	$200,000

[305] The Federation of Tax Administrators, *State Individual Income Taxes* (last modified Jan. 1, 2003), *at* http://www.taxadmin.org/fta/rate/ind_inc.html. Tax rates listed are for tax year 2003.

	Tax Rates		Income Brackets	
	Low	High	Low	High
Oklahoma	0.50%	7.00%	$1,000	$10,000
Oregon	5.00%	9.00%	$2,500	$6,250
Pennsylvania	2.80%		flat rate	
Rhode Island	25.0% Federal tax liability			
South Carolina	2.50%	7.00%	$2,400	$12,000
South Dakota	No State Income Tax			
Tennessee	Limited to Dividends and Interest Income Only			
Texas	No State Income Tax			
Utah	2.30%	7.00%	$863	$4,313
Vermont	3.60%	9.50%	$27,950	$307,050
Virginia	2.00%	5.75%	$3,000	$17,000
Washington	No State Income Tax			
West Virginia	3.00%	6.50%	$10,000	$60,000
Wisconsin	4.60%	6.75%	$8,280	$124,200
Wyoming	No State Income Tax			

Appendix C

State Income Tax Benefits Provided to Military Service Members

	Military pay excluded?	Military retirement pay excluded?
Alabama	No[306]	Yes[307]
Alaska	NO STATE INCOME TAX[308]	NO STATE INCOME TAX
Arizona	No[309]	No[310]
Arkansas	Partial[311]	Partial[312]
California	Yes[313]	No[314]
Colorado	No[315]	Partial[316]

[306] Alabama Department of Revenue, *Frequently Asked Questions – Alabama Individual Income Tax*, *at* http://www.ador.state.al.us/incometax//faq80401.html (last visited Oct. 4, 2003).

[307] *Id.*

[308] *See supra* app. B.

[309] ARIZONA DEPARTMENT OF REVENUE, PUB. 704, TAXPAYERS IN THE MILITARY 2-3, *available at* http://www.revenue.state.az.us/brochure.htm (last visited Feb. 8, 2003).

[310] Arizona Department of Revenue, *Frequently Asked Questions Regarding Individual Income Tax*, *at* http://www.revenue.state.az.us/faqs.htm (last visited Oct. 4, 2003).

[311] Arkansas Department of Finance & Administration, *Moving to Arkansas: General Taxpayer Information* (last modified July 8, 2002), *at* http://www.state.ar.us/dfa/taxes/movingto.html. Only the first $6,000 of active duty pay is exempt. *Id.*

[312] Arkansas Department of Finance & Administration, *Individual Income Tax FAQ & TeleTax Information* (last modified Dec. 11, 2002), *at* http://www.state.ar.us/dfa/taxes/ind_tax/IIT_index.html. Up to $6000 of pension is excluded. *Id.*

[313] CALIFORNIA FRANCHISE TAX BOARD, PUB. 1032, TAX INFORMATION FOR MILITARY PERSONNEL (2001), *available at* http://www.taxes.ca.gov/resident.html. The exclusion applies only to military pay earned outside the state pursuant to PCS orders. *Id.*

[314] *Id.*

[315] Colorado Department of Revenue, *Customer Support Site for Colorado Taxes*(last modified Feb. 4, 2003), *at* http://revenuestateco.custhelp.com/cgi-bin/revenuestateco.cfg/php/enduser/std_adp.php?p_sid=fS2u8ZUg&p_lva=&p_faqid=327&p_created=1010089028&p_sp=cF9zcmNoPTEmcF9ncmlkc29ydD0mcF9yb3dfY250PTI0NyZwX3NlYXJjaF90ZXh0PW1pbGl0YXJ5IGluY29tZSZwX3NlYXJjaF90eXBlPTMmcF9jYXRfbHZsMT0zJnBfY2F0X2x2bDI9fmFueX4mcF9zb3J0X2J5PWRmbHQmcF9wYWdlPTE*&p_li=. If the service member is stationed and spends at least 305 days during the year outside of the United States, he may file as a nonresident. A nonresident cannot be taxed on military pay earned outside the state. *Id.*

[316] *Id.* at http://revenuestateco.custhelp.com/cgi-bin/revenuestateco.cfg/php/enduser/std_adp.php?p_sid=fS2u8ZUg&p_lva=327&p_faqid=330&p_created=1010089836&p_sp=cF9zcmNoPTEmcF9ncmlkc29ydD0mcF9yb3dfY250PTI0NyZwX3NlYXJjaF90ZXh0PW1pbGl0YXJ5IHJldGlyZW1lbnQgaW5jb21lJnBfc2VhcmNoX3R5cGU9MyZwX2NhdF9sdmwxPTMmcF9jYXRfbHZsMj1_YW55fiZwX3NvcnRfYnk9ZGZsdCZwX3BhZ2U9MQ**&p_li=. Service members aged fifty-five to sixty-four may exclude up to $20,000 of their military retirement benefits; those aged sixty-five and up may exclude up to $24,000. *Id.*

	Military pay excluded?	Military retirement pay excluded?
Connecticut	Yes[317]	No[318]
Delaware	No[319]	Partial[320]
Florida	NO STATE INCOME TAX[321]	NO STATE INCOME TAX
Georgia	No[322]	Partial[323]
Hawaii	No[324]	Yes[325]
Idaho	Yes[326]	Partial[327]

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[317] Connecticut Department of Revenue Services, *Income Tax Information for Members of the Armed Forces*, *at* http://www.drs.state.ct.us/taxassistance/Indvtxpg/military.html (last visited Oct. 4, 2003). A service member may qualify as a nonresident for income tax purposes if all of the following are true for the entire taxable year: (1) he did not have a permanent place to live in Connecticut; (2) he had a permanent place to live elsewhere; and (3) he did not spend more than thirty days in Connecticut during the tax year. A nonresident cannot be taxed on military pay earned outside the state. *Id.*

[318] *Id.*

[319] DIVISION OF REVENUE, DELAWARE DEPARTMENT OF FINANCE, TAX NEWSGRAM 72-37, PERSONAL INCOME TAX (1972), *available at* http://www.state.de.us/revenue/tims/taxnewsgrams/taxnews7237.pdf.

[320] Office of Personal Taxes, Delaware Department of Finance, *Hot Topics and Most Frequently Asked Questions* (last modified Mar. 25, 2003), *at* http://www.state.de.us/revenue/per_quest/ptquestions.htm. Service members under age sixty may exclude up to $2000 of pension; those age sixty or over may exclude up to $12,500.

[321] *See supra* app. B.

[322] Income Tax Division, Georgia. Department of Revenue, *Individual Frequently Asked Questions* (last modified Oct. 4, 2001), *at* http://www2.state.ga.us/departments/dor/inctax/webfaq/faq-ind.shtml.

[323] *Id.* Although military retirement pay is not specifically excluded, Georgia allows a retirement exclusion of up to $14,500 for individuals age sixty-two or over that includes pay from pensions. *Id.*

[324] HAW. REV. STAT. § 235-2.3 (2003).

[325] *Id.* § 235-7.

[326] IDAHO CODE § 63-3013(2) (2003); IDAHO DEP'T OF ADMIN., ADMIN. RULES § 35.01.01. R.032 (2000). Service members who are absent from the state for at least 445 days in a 15-month period are not considered residents and do not have to file an Idaho income tax return. Classification as a nonresident under this rule does not apply to service members who meet the following criteria: (1) have a permanent home in Idaho where their spouses or minor children live for more than sixty days during the calendar year; or (2) claim Idaho as their tax home for federal income tax purposes. Service members regain their resident status when they spend more than sixty days in Idaho in any calendar year. *Id.*

[327] IDAHO CODE § 63-3022A (2003). Once the service member reaches age sixty-five (sixty-two if disabled), he (or his unremarried widow) may deduct a portion of his military retirement pay. *Id.*

	Military pay excluded?	Military retirement pay excluded?
Illinois	Yes[328]	Yes[329]
Indiana	No[330]	Partial[331]
Iowa	No[332]	Partial[333]
Kansas	No[334]	Yes[335]
Kentucky	No[336]	Partial[337]
Louisiana	Partial[338]	Yes[339]

[328] ILLINOIS DEPARTMENT OF REVENUE, PUB. 102, ILLINOIS FILING REQUIREMENTS FOR MILITARY PERSONNEL (last modified Mar. 2003), *available at* http://www.revenue.state.il.us/publications/pubs/pub-102.pdf.

[329] Illinois Department of Revenue, *Individuals: Frequently Asked Questions*, *at* http://www.revenue.state.il.us/Individuals/Faq/#anchor3 (last visited Oct. 4, 2003).

[330] Indiana Department of Revenue, *Military Personnel: Tax Form Questions*, *at* http://www.in.gov/dor/assistance/ (last visited Oct. 4, 2003).

[331] INDIANA DEPARTMENT OF REVENUE, INFORMATION BULLETIN #6 INCOME TAX (Jan. 2003), *available at* http://www.in.gov/dor/publications/bulletin/income/pdf/ib06.pdf. Once the service member (or his widow) reaches age sixty, he (or his widow) qualifies for a maximum adjustment of $2,000. *Id.*

[332] Iowa Department of Revenue and Finance, *Iowa Withholding and Income Taxes for Military Personnel*, *at* http://www.state.ia.us/tax/educate/78583.html (last visited Oct. 4, 2003).

[333] Iowa Department of Revenue and Finance, *Iowa Income Tax FAQ's*, *at* http://www.state.ia.us/tax/educate/faqinc.html (last visited Oct. 4, 2003). Service members who have reached age fifty-five or are disabled and who file their tax returns using a married status may exclude the lesser of $12,000 or the taxable amount of the retirement pay. Service members who have reached age fifty-five or are disabled and who file using a single or head of household status may exclude the lesser of $6000 or the taxable amount of the retirement pay. *Id.*

[334] Kansas Department of Revenue, *Frequently Asked Questions: Taxation—Individual Income* (last modified Apr. 21, 2003), *at* http://www.ksrevenue.org/faqs-taxii.htm.

[335] *Id.*

[336] KENTUCKY REVENUE CABINET, WHO . . . WHAT . . . WHEN . . . WHERE?: INFORMATION ABOUT KENTUCKY INDIVIDUAL INCOME TAX FORMS (2000), *available at* http://www.revenue.state.ky.us/pdf/15f002.pdf.

[337] COMMONWEALTH OF KENTUCKY REVENUE CABINET, TAX FACTS: A DIGEST OF KENTUCKY TAX LAWS (2002) 57, *available at* http://www.revenue.state.ky.us/pdf/taxfacts_2002.pdf. Military retirement pay is fully excludable with an upper limitation of $39,400 for 2003. *Id.*

[338] LOUISIANA DEPARTMENT OF REVENUE, 2003 LOUISIANA INCOME TAX RETURN: RESIDENT FORM, *available at* http://www.rev.state.la.us/forms/vndrforms/540ResidentInstructions(2003).pdf. A service member who is stationed outside the state for 120 or more consecutive days may be entitled to an exemption of up to $29,999 of military income. *Id.*

[339] *Id.* at 63.

	Military pay excluded?	Military retirement pay excluded?
Maine	No[340]	Partial[341]
Maryland	No[342]	Partial[343]
Massachusetts	No[344]	Yes[345]
Michigan	Yes[346]	Yes[347]
Minnesota	Yes[348]	No[349]
Mississippi	No[350]	Yes[351]
Missouri	Yes[352]	Partial[353]

[340] Maine Revenue Service, *Frequently Asked Questions: Individual Income Tax* (last updated Oct. 14, 2003), *at* http://www.state.me.us/revenue/incomeestate/faq1040.html.

[341] *Id.* Service members may deduct up to $6000 of their military pensions. *Id.*

[342] COMPTROLLER OF MARYLAND, INFORMATION FOR MILITARY PERSONNEL WHO ARE RESIDENTS OF MARYLAND (2003), *available at* http://individuals.marylandtaxes.com/incometax/military/resident.asp.

[343] COMPTROLLER OF MARYLAND, MILITARY RETIREMENT INCOME (2003), *available at* http://individuals.marylandtaxes.com/incometax/military/retirement.asp. If the service member has reached the age of fifty-five and was an enlisted member of the military at the time of retirement, he is eligible for a $2500 exclusion of military retirement pay. Service members who retired as officers are not eligible for the exclusion. *Id.*

[344] MASSACHUSETTS DEPARTMENT OF REVENUE, GUIDE TO FILING YOUR 2002 MASSACHUSETTS INCOME TAXES 25 (2002), *available at* http://www.dor.state.ma.us/publ/pdfs/tx_gd02.pdf.

[345] Massachusetts Department of Revenue, *Personal Income Tax—Pensions and Retirement Plans*, *at* http://www.dor.state.ma.us/help/guides/abate_amend/personal/issues/military.htm (last visited Oct. 5, 2003).

[346] MICH. ADMIN. CODE R. 206.10 (2001).

[347] *Id.* R. 206.12 (2001).

[348] Minnesota Department of Revenue, *Residency of Active Duty Personnel*, *at* http://www.taxes.state.mn.us/individ/residency_and_filing_status/military/Residency%20of%20active%20duty%20military%20personnel.shtml (last visited Oct. 5, 2003). A service member is considered a nonresident for income tax purposes when he is stationed outside the state. *Id.*

[349] *Id.*

[350] MISSISSIPPI STATE TAX COMMISSION, REG. 704, MILITARY (2003), *available at* http://www.mstc.state.ms.us/taxareas/individ/rules/IREG704.PDF.

[351] MISSISSIPPI STATE TAX COMMISSION, REG. 207, INCOME FROM ANNUITIES, PENSIONS, RETIREMENT PLANS (2003), *available at* http://www.mstc.state.ms.us/taxareas/individ/rules/IREG207.PDF.

[352] Missouri Department of Revenue, *Frequently Asked Questions: Individual Income Tax*, *at* http://www.dor.state.mo.us/tax/faq/faqindiv.htm#10 (last visited Oct. 5, 2003). Military pay is not subject to Missouri tax if the service member and his spouse did not spend more than thirty days in Missouri and did not maintain permanent living quarters in Missouri. *Id.*

[353] *Id.* Up to $6000 of military retirement pay is exempt within certain income limitations. *Id.*

	Military pay excluded?	Military retirement pay excluded?
Montana	No[354]	Partial[355]
Nebraska	No[356]	No[357]
Nevada	NO STATE INCOME TAX[358]	NO STATE INCOME TAX
New Hampshire	NO STATE INCOME TAX[359]	NO STATE INCOME TAX
New Jersey	Yes[360]	Yes[361]
New Mexico	No[362]	No[363]

[354] MONT. CODE ANN. § 15-30-111 (2002).

[355] *Id.* The first $3600 of military retirement pay is exempt from Montana tax. This amount must be lowered by $1 for every $1 of income over $30,000. *Id.*

[356] NEBRASKA DEP'T OF REVENUE, NEBRASKA INCOME TAX FOR MILITARY SERVICE MEMBERS 2 (2003), *available at* http://www.revenue.state.ne.us/info/8-364.pdf.

[357] *See* NEB. REV. STAT. §§ 77-2714-27,123 (2002) (incorporating the Internal Revenue Code of 1986 and remaining silent on military retirement, civilian retirement, or pensions).

[358] *See supra* app. B.

[359] *See id.*

[360] NEW JERSEY DIVISION OF TAXATION, GIT-7, MILITARY PERSONNEL 2 (2002), *available at* http://www.state.nj.us/treasury/taxation/pdf/pubs/tgi-ee/git7.pdf. Service members are considered nonresidents for income tax purposes only when they meet all three of the following conditions: (1) they did not maintain permanent homes in New Jersey; (2) they maintained permanent homes outside of New Jersey; and (3) they did not spend more than thirty days in New Jersey during the tax year. *Id.*

[361] *Id.* at 8.

[362] New Mexico Taxation & Revenue Department, *Frequently Asked Questions*, *at* http://www.state.nm.us/tax/trd_ques.htm (last visited Oct. 5, 2003).

[363] N.M. ADMIN. CODE tit. 3, § 3.11.13 (2003).

	Military pay excluded?	Military retirement pay excluded?
New York	Yes[364]	Yes[365]
North Carolina	No[366]	Partial[367]
North Dakota	Partial[368]	Partial[369]
Ohio	No[370]	Partial[371]
Oklahoma	Partial[372]	Partial[373]

[364] NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PUB. 361, NEW YORK STATE INCOME TAX INFORMATION FOR MILITARY PERSONNEL AND VETERANS 5-6 (2002), *available at* http://www.tax.state.ny.us/pdf/publications/Income/pub361_1102.pdf. Service members are considered nonresidents for income tax purposes when they meet all three of the following conditions: (1) they did not maintain a permanent home in New York; (2) they maintained a permanent home outside of New York; and (3) they did not spend more than thirty days in New York during the tax year. Additionally, service members are considered nonresidents for tax purposes if they: (1) were in a foreign country for at least 450 days during any period of 548 consecutive days; (2) spent ninety days or less in New York in a permanent home during this period (and whose spouse and children spent less than ninety days in the state in a permanent home); and (3) spent less than the maximum allowable days in the state according to the following formula: number of days in the nonresident portion of the tax year/548 x 90 = maximum number of days allowed in New York State. *Id.*

[365] *Id.* at 9.

[366] North Carolina Department of Revenue, *Active Military* (last modified Oct. 1, 2003), *at* http://www.dor.state.nc.us/taxes/individual/military.html.

[367] North Carolina Department of Revenue, *Retirement Benefits Deduction* (last modified Feb. 2, 2002), *at* http://www.dor.state.nc.us/taxes/individual/retirement.html. Retirees may deduct up to $4000 depending on their circumstances. *Id.*

[368] STATE OF NORTH DAKOTA OFFICE OF STATE TAX COMMISSIONER, INCOME TAX GUIDELINE: MILITARY PERSONNEL (2002) 2, *available at* http://www.state.nd.us/taxdpt/indincome/pubs/guide/gl_28243.pdf. If resident service members file using the Form ND-2, they may exclude $1000 of their military pay. Additionally, they may exclude $300 per month (or fraction of a month) for each moth they served overseas if they were overseas for at least thirty days. *Id.*

[369] *Id.* Retirees who are at least fifty years old may exclude up to $5000 of retirement pay. *Id.*

[370] Ohio Department of Taxation, *Individual Links: Military*, *at* http://www.state.oh.us/tax/individual_taxes_personal_military.html (last visited Oct. 5, 2003).

[371] Ohio Department of Taxation, *Individual Links: Credits*, *at* http://www.state.oh.us/tax/individual_taxes_personal_income_credits.html (last visited Oct. 5, 2003). Retirees are entitled to a retirement income credit of up to $200. *Id.*

[372] OKLA. STAT. tit. 68 § 2358 (2002). The first $1500 of military pay shall be deducted from taxable income. *Id.*

[373] *Id.* Retirement pay not to exceed $5500 shall be excluded from taxable income. *Id.*

	Military pay excluded?	Military retirement pay excluded?
Oregon	Yes[374]	Yes[375]
Pennsylvania	Yes[376]	Yes[377]
Rhode Island	No[378]	No[379]
South Carolina	No[380]	Partial[381]
South Dakota	NO STATE INCOME TAX[382]	NO STATE INCOME TAX
Tennessee	NO STATE INCOME TAX[383]	NO STATE INCOME TAX
Texas	NO STATE INCOME TAX[384]	NO STATE INCOME TAX

[374] Oregon Department of Revenue, *Military Personnel Filing Information* (last modified Apr. 2, 2003), *at* http://www.dor.state.or.us/InforC/101-657.html. Military pay is only excluded when the service member meets all of the following requirements: (1) he does not have a permanent residence in Oregon for himself or his family during any part of the tax year; (2) his permanent residence is outside Oregon during the entire tax year; and (3) he spends less than thirty-one days in Oregon during the tax year. *Id.*

[375] Oregon Department of Revenue, *Pensions—Federal and State* (last modified June 4, 2001), *at* http://www.dor.state.or.us/NewsR/Pension.html.

[376] PENNSYLVANIA DEPARTMENT OF REVENUE, PENNSYLVANIA PERSONAL INCOME TAX GUIDE: ONLINE VERSION 4-6 (2003), *available at* http://www.revenue.state.pa.us/revenue/lib/revenue/pitguide.pdf. Military pay earned outside the state is non-taxable. *Id.*

[377] *Id.* at 7-37.

[378] STATE OF RHODE ISLAND—DIVISION OF TAXATION, SYNOPSIS: PERSONAL INCOME TAX—RESIDENT AND NONRESIDENT INDIVIDUALS tit. 44, ch. 30 (2000), *available at* http://www.tax.state.ri.us/info/synopsis/15.htm.

[379] R.I. GEN. LAWS § 44-30-2 (2002).

[380] *See* SOUTH CAROLINA DEPARTMENT OF REVENUE, MOVING TO SOUTH CAROLINA: TAX GUIDE FOR NEW RESIDENTS, *available at* http://www.sctax.org/DOR/Publications/mov2sc.html (last visited Oct. 5, 2003) (remaining silent on any exclusions or exemptions for military taxpayers).

[381] *Id.* ("Beginning with the first year you receive retirement income and until you turn 65, you may take an annual deduction of up to $3000 from retirement income. The retirement deduction increases to $10,000 at age 65.").

[382] *See supra* Appendix B.

[383] *See id.*

[384] *See id.*

	Military pay excluded?	Military retirement pay excluded?
Utah	No[385]	Partial[386]
Vermont	Yes[387]	No[388]
Virginia	Partial[389]	No[390]
Washington	NO STATE INCOME TAX[391]	NO STATE INCOME TAX
West Virginia	Yes[392]	Partial[393]
Wisconsin	No[394]	No[395]
Wyoming	NO STATE INCOME TAX[396]	NO STATE INCOME TAX

[385] Utah State Tax Commission, *Residency Issues: Military Personnel* (last modified Dec. 30, 2002), *at* http://incometax.utah.gov/residencymilitary.html.

[386] Utah State Tax Commission, *Income Tax Deductions: Retirement Income Exemption/Deduction* (last modified Dec. 30, 2002), *at* http://incometax.utah.gov/deductionsretire.html. Service members under age sixty-five may deduct up to $4800 of retirement pay depending on total income level; those age sixty-five are entitled to a retirement exemption of $7500. *Id.*

[387] VT. STAT. ANN. tit. 32, § 5823 (2002). Military pay earned outside the state is not included in adjusted gross income. *Id.*

[388] *See id.* §§ 5823-4 (adopting federal income tax laws and remaining silent on military retirement, civilian retirement, or pensions).

[389] Virginia Department of Taxation, *FAQs for Individuals* (last modified June 6, 2003), *at* http://www.tax.state.va.us/site.cfm?alias=IndividualFAQ. Service members can subtract up to $15,000 of military pay from their adjusted gross income. For every $1 of military pay over $15,000, the maximum subtraction is reduced by $1. The subtraction does not apply to service members whose military pay exceeds $30,000. *Id.*

[390] *See* Virginia Department of Taxation, *Individuals: Residency Status* (last modified Feb. 13, 2003), *at* http://www.tax.state.va.us/site.cfm?alias=ResidencyStatus (addressing Social Security and Railroad Retirement Benefits, an $800 personal exemption for senior citizens, and an age deduction for taxpayers age sixty-two and over, but remaining silent on military retirement, civilian retirement, or pensions).

[391] *See supra* app. B.

[392] WEST VIRGINIA TAX COMMISSIONER, FORTY-FIFTH BIENNIAL REPORT: WEST VIRGINIA TAX LAWS 58, *available at* http://www.state.wv.us/taxrev/44thtaxlaws.pdf (last visited Oct. 5, 2003). Service members may qualify as nonresidents for income tax purposes if they meet both of the following conditions: (1) they had no permanent home in West Virginia during the tax year; and (2) they did not spend more than thirty days in West Virginia during the tax year. *Id.*

[393] *Id.* at 52. The first $2000 of military pay is excluded from adjusted gross income. *Id.*

[394] Wisconsin Department of Revenue, *Frequently Asked Questions: Individual Income Tax—Military* (last modified May 23, 2003), *at* http://www.dor.state.wi.us/faqs/military.html. Although military pay is not excluded and service members who are Wisconsin domiciliaries are not eligible for nonresident status for income tax purposes, service members stationed outside the United States are eligible for a tax credit of up to $200. *Id.*

[395] Wisconsin Department of Revenue, *Frequently Asked Questions: Individual Income Tax—Retired Persons* (last modified Jan. 17, 2003), *at* http://www.dor.state.wi.us/faqs/retired.html.

[396] *See supra* app. B.

THE GROWING IMPORTANCE OF ADVANCE MEDICAL DIRECTIVES

CAPTAIN THADDEUS A. HOFFMEISTER, USAR[1]

All of this turmoil—political, judicial and emotional—could have been avoided or at least minimized if Terry Schiavo had left a living will or advanced directive stating her wishes about being kept alive, or not, on life support.[2]

I. Introduction

While the litigation in the Terri Schiavo case is an extreme example of what can go wrong in the health care decision-making process, it high-

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1. Presently serving as a legislative aide to Congresswoman Eleanor Holmes Norton. Previously served as a law clerk to the Honorable Anne E. Thompson, U.S. District Court, District of New Jersey, 2002-2003. Currently assigned to U.S. Army Japan, 9th TSC. LL.M. 2002, Georgetown University Law Center; J.D. 1998, Northeastern University School of Law; B.A. 1995, Morgan State University. For a list of the author's previous publications, *see A Practitioner's Note on Physical Evaluation Boards*, ARMY LAW., Feb. 2001, at 49; *Book review* (author Judge Dickinson R. Debevoise), *Gilbert Molleson Elliott: A Life Forged in the Crucible of the American Experience*, FED. LAW., Feb. 2003, at 64; and *On the DMZ: Move the Yanks from the Front*, INT'L HERALD TRIB., June 20, 2003, at A18. The author would like to thank the attorneys assigned to Walter Reed Army Medical Center from 2000-2002 for reviewing this article.

2. Bee Editorial Staff, *Editorial: The Schiavo Intrusion*, SACRAMENTO BEE, Oct. 25, 2003, *available at* http://www.sacbee.com/content/opinion/story/7664430p-8604453c.html. Terri Schiavo, who is thirty-nine years old, has been in a persistent vegetative state since 1990 after she "suffered severe brain damage after a heart stoppage." *Id.* Presently, she relies on a feeding tube and "can open her eyes and shows some facial expressions but doctors say those movements are involuntary." *Id.* For the past five years, her husband, "Michael Schiavo, has sought to have her feeding tube removed so she can die a natural death. Her parents fought him in court, but through a five-year legal battle, Florida courts consistently sided with her husband." *Id.*; *see, e.g.*, *In re* Schiavo, 800 So. 2d 640 (Fla. Dist. Ct. App. 2d Dist., 2001), *review denied*, *In re* Schindler, 816 So. 2d 127 (Fla. 2002), *remanded by*, *In re* Schiavo, 851 So. 2d 182 (Fla. Dist. Ct. App. 2d Dist., 2003) (holding that "the order of the guardianship court was affirmed. On remand, the guardianship court was to schedule another hearing solely for the purpose of entering a new order scheduling the removal of the nutrition and hydration tube"); *rehearing denied*, Schindler v. Schiavo, 2003 Fla. App. LEXIS 14167 (Fla. Dist. Ct. App. 2d Dist. July 9, 2003), *review denied*, Schindler v. Schiavo, 855 So. 2d 621, 2003 Fla. LEXIS 1493 (Fla. 2003). Terri's feeding tube was eventually removed in October 2003 for six days before the Florida legislature and Governor Jeb Bush enacted a new law to have it reinserted. *Id.*; *see* FLA. STAT. tit. XXX, ch. 415, § 105 (2003); HB 35-E, 2003 Leg., Spec. Sess. (Fla. 2003) (granting the governor "the authority to issue a one-time stay to prevent the withholding of nutrition and hydration" providing certain criteria are met).

lights the importance of advance medical directives (AMD) in helping to ensure patient autonomy during end-of-life medical treatment. Unfortunately, large segments of society, to include the military, are still unclear about the role of AMDs in patient care.[3] Thus, this article provides a broad overview of AMDs and their legal applications with a particular emphasis on expanding their use in the military community.[4]

II. Overview

This article begins with a discussion of living wills and durable powers of attorney (DPOAs), demonstrating how each one individually and or combined with the other form the component parts of an AMD. The second section of this article briefly explores the legal bases supporting AMDs. The third section provides a history of AMDs in the military followed by recommendations on how to better implement and craft AMDs; including proposed changes to the two Department of Defense (DOD)

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3. *See* Gina Kolata, *Documents Like Living Wills Are Rarely of Aid, Study Says,* N.Y. TIMES, Apr. 8, 1997, at A12. The reasons most frequently cited for the low percentage of patients having AMDs are:

> (1) Most physicians and health care providers believe that the patient is responsible for addressing the issue yet most patients perceive it as the doctor's responsibility;
> (2) Many physicians are uncomfortable discussing withholding or withdrawal of life-sustaining treatment;
> (3) Many young patients and their physicians believe that AMDs are only necessary for the elderly or chronically ill patients. This attitude is repeatedly reinforced by numerous publications that only address AMDs in the context of terminal illnesses; and
> (4) Education efforts about AMDs have been ineffective, inadequate and/or misdirected.

GENERAL ACCOUNTING OFFICE, HEALTH, EDUCATION, AND HUMAN SERVICES DIVISION, U.S. GENERAL ACCOUNTING OFFICE REPORT, PATIENT SELF DETERMINATION ACT: PROVIDERS OFFER INFORMATION ON ADVANCE DIRECTIVES BUT EFFECTIVENESS UNCERTAIN, REPORT NO. GAO-95-135 (Aug. 1995); Anita K. Gordon, *Advance Directives Revisited: A Proposal to Amend Advance Directive Laws,* 28 J. HEALTH & HOSP. L. 73, 86 (1995).

4. For additional information regarding AMDs, *see* NANCY M. P. KING, MAKING SENSE OF ADVANCE DIRECTIVES (rev. ed. 1996); Alan Lieberson, *Advance Medical Directives—1998: A Medical View*, 12 QUINNIPIAC PROB. L.J. 305, (1998); U.S. ARMY MEDICAL COMMAND, OFFICE OF THE JUDGE ADVOCATE GENERAL, 1999 MEDICAL-LEGAL DESKBOOK 1-1 (Aug. 1999) [hereinafter MEDICAL LEGAL DESKBOOK, AMD].

Directives that address AMDs.[5] The article concludes with a model AMD.[6]

III. Component Parts

Generally speaking, an AMD is a written statement recognized under state law[7] intended to govern the health care[8] decisions of the patient, should he or she[9] lose decision-making capacity in the future. Although AMDs offer patients a measure of autonomy, they are by no means a panacea for those contemplating medical treatment decisions.[10] Advance medical directives can take the following three forms: a living will, DPOA, or combination thereof.[11]

Any adult[12] who has decision-making capacity[13] can make an AMD. All states and the District of Columbia have some type of documentary mechanism known collectively as an AMD.[14] Historically, most viewed AMDs as a way to refuse treatment in cases of terminal illness.[15] Now,

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5. *See* U.S. DEP'T OF DEFENSE, DIR. 1350.4, LEGAL ASSISTANCE MATTERS (28 Apr. 2001) [hereinafter DOD DIR. 1350.4]; U.S. DEP'T OF DEFENSE, DIR. 6000.14, PATIENT BILL OF RIGHTS AND RESPONSIBILITIES IN THE MILITARY HEALTH CARE SYSTEM (1998) (addressing the duty of the health care provider to discuss AMDs with the patient).

6. This AMD is based on the one currently in use at Walter Reed Army Medical Center. On 1 October 2000, Drafting Libraries (DL) Wills became the Army Standard Software for drafting estate-planning documents. Lieutenant Colonel Curtis A. Parker, Deputy Chief, Legal Assistance Policy Division, OTJAG (14 Sept. 2000). The DL Wills users may prepare state-specific living wills and advance medical directives. Presently, "DL Wills Software is available without charge to all Army Legal Assistance (LA) providers (active and reserve components) including those outside of LA who have a LA-related mission to prepare important estate planning documents (e.g., wills, advance medical directives)." Information Paper, Miles Smutz, Development Project Services, subject: Downloading & Registering Drafting Libraries (DL) Wills Software via JAGCNET (24 Jan. 2002).

7. T.P. Gallanis, *Write and Wrong: Rethinking the Way We Communicate Health Care Decisions*, 31 CONN. L. REV. 1015, 1025-1026 (1999).

8. This includes mental health care. Currently, five states have statutes recognizing mental health AMDs. Lieberson, *supra* note 4, at 312; *see also* Roberto Cuca, *Ulysses in Minnesota: First Steps Toward a Self-Binding Psychiatric Advance Medical Directive Statute*, 78 CORNELL L. REV. 1152 n.146 (1993); Elizabeth M. Gallagher, *Advance Instruments for Mental Health Treatment: Advance Directives for Psychiatric Care: A Theoretical and Practical Overview for Legal Professionals*, 4 PSYCHOL. PUB. POL'Y. & L. 746 (1998).

however, many view an AMD as a tool to allow incapacitated patients the possibility of dignity and control at the end of life.[16]

A. Living Will

The first component of an AMD is the living will or instructive directive.[17] The living will is a written document informing health care providers about particular types of medical care the patient wants provided or withheld. First introduced in 1969 by attorney Luis Kutner, the living will was an early attempt to grant the patient increased treatment autonomy.[18] Mr. Kutner argued that, although the common law prohibited euthanasia, patients could withhold their consent to necessary future medical treatment.[19] Mr. Kutner proposed that the law permits competent patients to

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9. Thirty-four states include pregnancy exemptions in their AMD statutes. Of the thirty-four states, seventeen automatically disregard the AMD throughout the entire pregnancy, while many of the remaining seventeen offers lesser forms of restrictions. It is the author's opinion that pursuant to the Supremacy Clause, an AMD created under 10 U.S.C. § 1044 (2000) would override any state statute, which prohibited the enforcement of a military AMD because the declarant was pregnant. *See* Supremacy Clause, ("Laws of the United States which shall be made in Pursuance thereof . . . under the Authority of the United States, shall be the supreme Law of the Land . . ."). For a more complete discussion on AMD pregnancy statutes, *see* Timothy J. Burch, *Incubator or Individual?: The Legal Policy Deficiencies of Pregnancy Clauses in Living Will and Advance Health Care Directive Statutes,* 54 MD. L. REV. 528 (1995); Amy Lynn Jerdee, *Breaking Through the Silence: Minnesota's Pregnancy Presumption and the Right to Refuse Medical Treatment*, 84 MINN. L. REV. 971 (2000); Anne D. Lederman, *A Womb of My Own: A Moral Evaluation of Ohio's Treatment of Pregnant Patients with Living Wills*, 45 CASE W. RES. L. REV. 351 (1994); Janice MacAvoy-Snitzer, *Pregnancy Clauses in Living Will Statutes*, 87 COLUM. L. REV. 1280 (1987).

10. *See* Vicki Joiner Bowers, *Elder Law Symposium: Comment: Advance Directives: Peace of Mind or False Security*, 26 STETSON L. REV. 677 (1996); Rebecca Dresser, *Relitigating Life and Death*, 51 OHIO ST. L.J. 425, 431 (1990) (discussing some of the limits of AMDs); Gordon, *supra* note 3, at 85; Lieberson*, supra* note 4; Jon L. Spargur, Jr., *Are Living Wills Dead in North Carolina?*, 32 WAKE FOREST L. REV. 591 (1997); Joan M. Tenno et al., *Do Advance Directives Provide Instructions That Direct Care?*, 45 J. AM. GERIATRICS SOC'Y 508 (1997).

11. Thaddeus Mason Pope, *The Maladaptation of Miranda to Advance Directives: A Critique of the Implementation of the Patient Self Determination Act*, 9 HEALTH MATRIX 139, 149 (1999).

12. *See* Jennifer Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right to Make Decisions Regarding Life Sustaining Treatment*, 49 RUTGERS L. REV. 1 (1996) (discussing the rights of minors and AMDs).

13. AR 40-3, *infra* note 77, sec. II, Terms ("A patient with decision-making capacity is an adult who has the ability to communicate and understand information and the ability to reason and deliberate sufficiently well about the choices involved.").

execute documents explaining their future health care wishes.[20] Over the past thirty years, Kutner's idea has evolved into a document widely

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14. *See* T.P. Gallanis, *Write and Wrong: Rethinking the Way We Communicate Health Care Decisions*, 31 CONN. L. REV. 1015, 1028 (1999) (citing ALA. CODE § 22-8A-5(a)(2) (1997); ALASKA STAT. § 18.12.020 (Michie 1997); ARIZ. REV. STAT. § 36-3202 (1997); ARK. CODE ANN. § 20-17-204(a) (Michie 1997); CAL. HEALTH & SAFETY CODE § 7188 (Deering 1998); COLO. REV. STAT. § 15-18-109 (1997); CONN. GEN. STAT. § 19a-579a (1997); DEL. CODE ANN. tit. 16, § 2504(a)(1) (1997); D.C. CODE ANN. § 6-2424(2) (1997); FLA. STAT. ch. 765.104(1)(a) (1997); GA. CODE ANN. § 31-32-5(a)(2) (1997); HAW. REV. STAT. § 327D-12(2) (1997); IDAHO CODE § 39-4506(1)(b) (1997); 755 ILL. COMP. STAT. 35/5(a)(2) (West 1997); IND. CODE § 16-36-4-12(a)(1) (1998); IOWA CODE § 144A.4(1) (1997); KAN. STAT. ANN. § 65-28,105(a)(2) (1997); KY. REV. STAT. ANN. § 311.627(1)(a) (Michie 1996); LA. REV. STAT. ANN. § 40:1299.58.4(A)(2)(a) (West 1998); MASS. ANN. LAWS ch. 201D, §5 (1997); ME. REV. STAT. ANN. tit. 18-A, § 5-803(b) (West 1997); MD. CODE ANN., HEALTH-GEN. I § 5-604 (1997); MICH. COMP. LAWS § 700.496(11)(d) (1997); MINN. STAT. § 145B.09(1) (1997); MISS. CODE ANN. § 41-41-109(1) (1997); MO. REV. STAT. § 459.020(1) (1997); MONT. CODE ANN. § 50-9-104(1) (1997); NEB. REV. STAT. § 20-406(1) (1997); NEV. REV. STAT. § 449.620(1) (1997); N.H. REV. STAT. ANN. § 137-H:7(1)(c) (1997); N.J. STAT. ANN. § 26:2H-57(b) (West 1997); N.M. STAT. ANN. § 24-7A-3(B) (Michie 1997); N.Y. PUB. HEALTH LAW §§ 2969(1), 2985(1)(a) (McKinney 1998); N.C. GEN. STAT. § 90-321(e) (1997); N.D. CENT. CODE § 23-06.4-05(1)(a) (1997); OHIO REV. CODE ANN. § 2133.04 (Anderson 1998); OKLA. STAT. tit. 63, § 3101.6(A) (1997); OR. REV. STAT. § 127.545(1)(b) (1997); 20 PA. CONS. STAT. § 5406 (1997); R.I. GEN. LAWS § 23.4.11-4(a)(1) (1997); S.C. CODE ANN. § 44-77-80(2) (Law. Co-op. 1997); S.D. CODIFIED LAWS § 34-12D-8 (Michie 1998); TENN. CODE ANN. § 32-11-106(1) (1997); TEX. HEALTH & SAFETY CODE ANN. § 672.012(2) (West 1998); UTAH CODE ANN. § 75-2-1111(1)(b) (1997); VA. CODE ANN. § 54.1-2985(i) (Michie 1997); VT. STAT. ANN. tit. 18, § 5257 (1997); WASH. REV. CODE § 70.122.040(1)(b) (1997); W. VA. CODE § 16-30-4(a)(2) (1997); WIS. STAT. § 154.05(1)(b) (1997); WYO. STAT. ANN. § 35-22-103(a)(ii) (Michie 1997)). For an overview of select statutes, *see* Bretton J. Horttor, *A Survey of Living Will and Advance Health Care Directives*, 74 N.D. L. REV. 233 (1998) (discussing selected state statutes).

15. DAVID JOHN DOUKAS & WILLIAM REICHEL, PLANNING FOR UNCERTAINTY: A GUIDE TO LIVING WILLS AND OTHER ADVANCE DIRECTIVES FOR HEALTH CARE 53 (1993). The use of the "right-to-die" label and its association with death may explain why the general public has not used AMDs more widely. Perhaps more people would have signed AMDs if they were associated with the right to choose medical treatment, rather than the right to die.

16. KING, *supra* note 4, at 2. Even though AMDs embody a broad range of possible medical treatment areas, most are written for the refusal of life-sustaining treatment. *Id.*

17. *See* Ardath A. Hamann, *Family Surrogate Laws: A Necessary Supplement to Living Wills and Durable Powers of Attorney*, 38 VILL. L. REV. 103 (1993). "Living will" is the term generally used by the public although only a few statutes use the term. *See, e.g.*, TENN. CODE ANN. § 32-11-103(4) (Supp. 1992) (defining "living will" as a "written declaration" of a person's preferences for medical treatment). Most statutes use the terms "declaration" or "directive" to describe a living will. *See, e.g.*, ALA. CODE § 22-8A-4 (1990) (defining declaration as a written document directing "withdrawal of life-sustaining procedures in a terminal condition"); OR. REV. STAT. § 127.610 (1990) (defining directive as written document expressing individual's wish to withhold or withdraw life-sustaining procedures).

accepted and recognized in all fifty states to include the District of Columbia—the living will.[21] This is not to say, however, that living wills are as well known by the average individual, as they should be.[22] Even today, many people are still unfamiliar with living wills and even mistakenly refer to them as testamentary wills.[23]

Procedurally speaking, living wills become effective when (1) the declarant (patient)[24] is no longer capable of making medical care decisions; (2) the declarant is in a condition covered by the living will; and (3) a decision covered by the living will is called for.[25] The principal advantage of the living will is the unparalleled capacity to memorialize the subjective intent of the declarant.[26] Also, the living will avoids potential conflicts[27] of interest that may arise in the case of substitute decision-makers and removes a huge burden from those same decision-makers who are normally a relative or close family friend.[28] The obvious inherent weakness of the living will is its inability to cover every potential contingency. Yet, even if one could draft a living will in such a way as to cover every unforeseen event, such broad coverage would render it impotent, as the

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18. Luis Kutner, *Due Process of Euthanasia: The Living Will, A Proposal,* 44 IND. L.J. 539 (1968-1969); Luis Kutner, *The Living Will: Coping with the Historical Event of Death,* 27 BAYLOR L. REV. 39 (1975). Mr. Kutner had formulated this concept years earlier during the 1950s while working with the Euthanasia Society. Horttor, *supra* note 14, at 233.

19. *Id.*

20. *Id.*

21. Gallanis, s*upra* note 14 at 1028.

22. Kolata, *supra* note 3, at A12.

23. While these two legal documents share a similar purpose, that is, both attempts to speak after their maker is unable to do so, they are entirely different instruments. Testamentary wills dispose of property at death. Living wills direct medical treatment. The living will, unlike the testamentary will, is not governed by the law of the maker's domicile but by the law of the state where the AMD is exercised. *See* Leslie Francis, *The Evanescence of Living Wills*, 24 REAL PROP., PROB. & TR. J. 141 (1989) (comparing AMDs and testamentary wills); Therese A. Bruno, *The Deployment Will*, 47 A.F. L. REV. 211 (1999) (discussing testamentary wills in the military).

24. For the purposes of this article "declarant" and "patient" are used interchangeably as are "agent" and "proxy."

25. KING, *supra* note 4, at 126-127.

26. Gallagher, *supra* note 8, at 750.

27. *See generally* Wendland v. Wendland, 28 P.3d 151 (Cal. 2001); Lynda M. Tarantino, *Withdrawal of Life Support: Conflict Among Patient Wishes, Family, Physicians, Courts and Statutes, and the Law*, 42 BUFF. L. REV. 623 (1994) (discussing such conflicts); Katy Hillenmeyer, *End-of-Life Care A Dilemma; Families*, *Patients Wrestle With Medical Advances, Hard Choices*, ASHEVILLE CITIZEN-TIMES, Sept. 5, 2000, at A1, n.2.

28. Lieberson, *supra* note 4, at 328.

numerous contingencies would drown out the specific intent of the declarant.[29]

B. Durable Power of Attorney[30]

The second component part of the AMD is the DPOA[31] or "health care power of attorney." Durable powers of attorney trace their roots back to agency law, which allows "a person [principal] to do through an agent whatever he is empowered to do for his own person."[32] Unlike regular powers of attorney, however, incapacity of the principal does not extinguish a DPOA.[33] To the contrary, the principal creates a DPOA with the intent that he will soon become incapacitated and unable to make decisions.[34] Because DPOAs survive incapacity, revocation becomes of prime importance. Fortunately, the common-law rule of agency—that a principal may revoke the authority of the agent at will[35]—applies to the DPOA.[36]

Procedurally speaking, the DPOA comes in two different forms, "springing" and "current."[37] A "springing" DPOA is effective only when a specific event occurs, such as incapacity of the principal.[38] A "current" DPOA is effective upon execution of the document. Of the two, the "springing" DPOA is more burdensome to use when creating an AMD, as the third party, the health care provider, may not be convinced that the

29. Gallagher, *supra* note 8, at 750.

30. The following phrases are examples of language used in DPOAs: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal" or "This power of attorney shall become effective upon the disability or incapacity of the principal." UNIFORM PROB. CODE § 5-501, 8 U.L.A 513 (1989); UNIF. DURABLE POWER OF ATT'Y ACT § 1, 8A U.L.A. 278 (1987).

31. *See generally* Mark Fowler, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 1008-20 (1984).

32. First Nat'l Bank of Alex. v. Southland Prod. Co., 112 P.2d 1087, 1092 (Okla. 1941).

33. Major Michael N. Schmitt & Captain Steven A. Hatfield, *Durable Power of Attorney: Applications and Limitations*, 132 MIL. L. REV. 203, 205 (1991).

34. Jill Hollander, *Health Care Proxies: New York's Attempt to Resolve the Right to Die Dilemma,* 57 BROOK. L. REV. 145, 148-149 (1991).

35. This may not be true for mental health AMDs. *See* Roberto Cuca, *Ulysses in Minnesota: First Steps Toward a Self-Binding Psychiatric Advance Medical Directive Statute*, 78 CORNELL L. REV. 1152, 1153 (1993).

36. Schmitt & Hatfield, *supra* note 33, at 203.

37. Faculty, The Judge Advocate General's School, TJAGSA Practice Note: *Estate Planning Note*, ARMY LAW., Nov. 2000, at 38.

38. *Id.*

"springing" condition triggering the DPOA has actually occurred.[39] Also, as with regular powers of attorney, a third party generally is not obligated to honor the DPOA.[40]

For most, the advantages of the DPOA over the living will are obvious.[41] Living wills always need interpretation and, regardless of skillful craftsmanship, cannot cover all healthcare contingencies. The agent or proxy in a DPOA, however, knows the patient's values intimately and can respond to unexpected events.[42] In addition, the agent can ask questions, assess risks and costs, speak to relatives and friends of the patient, consider a variety of therapeutic options, seek the opinions of other physicians, and evaluate the patient's condition and prospects of recovery; in short, engage in the same complex decision-making process that the patient would undertake if able to do so.[43] The DPOA, however, is not without its faults. For example, many patients do not want to burden their relatives or close friends with the job of proxy thereby requiring them to make the "tough choices."[44] In addition, there is no guarantee that the proxy will be able to carry out the patient's desired intent or that the proxy will be in a rational state when forced to make a decision.[45]

C. The Hybrid

The hybrid, which has become the standard format[46] for most AMDs to include those used in the military, employs a living will and a DPOA. Several reasons exist as to why one should have both a living will and a DPOA.[47] First, proxy decision makers do not want the full responsibility of making life-altering decisions without some form of guidance.[48] A living will provides a framework within which the proxy can make his or her

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39. Captain Kent R. Meyer, *Continuing Powers of Attorney,* 112 MIL. L. REV. 257 (1986). The model military AMD offered at the end of this article offers both a current and springing POA.

40. Schmitt & Hatfield, *supra* note 33, at 211. However, see *infra* note 55.

41. David A. Peters, *Advance Medical Directives: The Case for the Durable Power of Attorney for Health Care,* 8 J. LEGAL MED. 437 (1987).

42. *See* Lieutenant Colonel William A. Woodruff, *Letting Life Run Its Course: Do Not-Resuscitate Orders and the Withdrawal of Life-Sustaining Treatment*, ARMY LAW., Apr. 1989, at 13 (providing information on selecting an agent or proxy).

43. Fowler, *supra* note 31, at 1001.

44. *Id.*

45. Lieberson, *supra* note 4, at 327.

46. *See, e.g.*, IDAHO CODE § 39-4505 (1998).

47. Pope, *supra* note 11, at 183-184.

decisions.[49] Second, a health care provider is more likely to follow a hybrid as it increases the chances that the patient and his proxy have discussed in-depth the patient's healthcare wishes.[50] The hybrid, however, like any legal instrument, is not without its complications. For example, if a patient has both a living will[51] and a DPOA,[52] some states have created a pecking order[53] between the two, while other states have mandated that the last instrument executed is controlling.[54]

D. AMDs and Liability[55]

All state living will and DPOA statutes confer some type of immunity from civil and or criminal liability on health care providers who in good faith comply with a properly executed AMD in accordance with the patient's wishes or in the patient's best interest.[56] Conversely, only a small number of states provide enforcement provisions against health care providers who fail to follow an AMD.[57] Those states recognizing enforcement provisions place them in three broad categories: professional sanctions, civil liability, and criminal charges.[58] While the potential exists for a patient or his estate to pursue one or all of these actions, they rarely

48. Steven R. Stieber, *Right to Die: Public Balks at Deciding for Others*, HOSPS. 72 (Mar. 5, 1982) (stating that only forty-six percent of Americans would be willing to disconnect life-support).

49. Pope, *supra* note 47, at 183.

50. Lieberson, *supra* note 4, at 329.

51. *Id.* The living will is controlling in Connecticut, Hawaii, Ohio and Arizona.

52. *Id.* The DPOA is controlling in Georgia, New Hampshire and Utah.

53. The model AMD offered at the end of this article demonstrates how to avoid a potential conflict between the DPOA and living will.

54. *Id.* (including Texas, Rhode Island, North Dakota, and South Dakota).

55. *See generally* M. Rose Gasner, *Financial Penalties for Failing to Honor Patient Wishes to Refuse Treatment*, 11 ST. LOUIS U. PUB. L. REV. 499 (1992); Adam A. Milani, *Better off Dead than Disabled?: Should Courts Recognize a "Wrongful Living" Cause of Action When Doctors Fail to Honor Patient's Advance Directives*, 54 WASH & LEE L. REV. 149 (1997); Philip G. Peters, *The Illusion of Autonomy at the End of Life: Unconsented Life Support and the Wrongful Life Analogy*, 45 U.C.L.A. L. REV. 673 (1998); Maggie J. Randall Robb, *Living Wills: The Right to Refuse Life Sustaining Medical Treatment A Right Without a Remedy,* 23 DAYTON L. REV. 169 (1997); Mark Strasser, *A Jurisprudence in Disarray: On Battery, Wrongful Living, and the Right to Bodily Integrity*, 36 SAN DIEGO L. REV. 997 (1999); S. Elizabeth Wilborn, *The Right to Refuse Medical Treatment Where There Is a Right, There Ought To Be A Remedy*, 25 N. KY. L. REV. 649 (1998).

56. Wilborn, *supra* note 55, at 658 n.47.

57. Robb, *supra* note 55, at 173.

58. *Id.*

do.[59] This potential is even more remote in the military as many patients are prevented from bringing legal action against the federal government pursuant to the *Feres*[60] doctrine, and those who are not must follow the restrictive requirements of the Federal Tort Claims Act.[61] Both military and non-military patients, however, should be aware that, while states have attempted to limit the liability of both hospitals and health care providers, the potential for provider liability still exists.[62]

IV. Legal Bases for Recognizing AMDs

While AMDs are relatively new, the legal framework supporting them has been around for over a hundred years.[63] The legal basis for recognizing AMDs rests with the patient's right of autonomy and self-determination regarding medical treatment.[64] This right can be found in both the common law[65] and the U.S. Constitution.[66] At common law,[67] the touching of one person by another—regardless of whether committed by a health care provider—without consent or legal justification constitutes an assault.[68] The natural corollary of the common law consent doctrine is the right not to consent; that is, the right to refuse medical treatment.[69]

In *Cruzan v. Director, Missouri Department of Health*, the Supreme Court, in a 5-4 decision,[70] found the right to refuse medical treatment constitutionally protected.[71] The Court, while acknowledging that some states

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59. *Id.*

60. Feres v. United States, 340 U.S. 135 (1950).

61. 28 U.S.C. 1346 (2000).

62. Gragg v. Calandra, 297 Ill. App. 3d 639 (Ill. 1998); *see also* Osgood v. Genesys Reg. Med. Ctr., No. 94-26731-NH (Genesee County Mich. Cir. Ct. Feb. 16, 1996) (awarding $16.6 million to a plaintiff after her husband was provided life support against his will).

63. *See* Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

64. Cruzan v. Dir., Missouri Dep't of Health Dir., 497 U.S. 261, 269 (1990).

65. *Id.*

66. U.S. CONST. amend. XIV.

67. Schloendorff v. Soc'y of New York Hosp., 211 N.Y. 125, 129 (1914). Justice Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault; for which he is liable in damages." *Id.*

68. *See* W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON LAW OF TORTS § 9, at 39-42 (5th ed. 1984). Obtaining consent is not always required when treating service members. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-4 (15 July 1999) [hereinafter AR 600-20].

69. *Cruzan*, 497 U.S. at 269.

70. *Id.*

reviewed this right pursuant to the Fourteenth Amendment's "right to privacy,"[72] held that "this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest."[73] Also, the Supreme Court made it patently clear that AMDs are "a valuable additional safeguard of the patient's interest in directing his medical care."[74]

Patient Self-Determination Act (PSDA)[75]

In addition to the *Cruzan* decision, passage of the PSDA in 1991 further enhanced the legal recognition and use of AMDs. This act required hospitals receiving Medicare and Medicaid monies to inform their patients about relevant state laws regarding AMDs.[76] While the PSDA is not applicable to military medical treatment facilities, both military and Joint Commission on Health Care Organization (JCAHO) regulations mandate that military treatment facilities follow similar standards.[77] The PSDA signified the first major federal legislation concerning the use of AMDs and was ushered through Congress to help reduce the number of difficult ethical and legal issues presented during medical treatment decisions.[78] The ulti-

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71. *Id. at* 279.

72. Prior to *Cruzan*, several state courts viewed the right to refuse medical treatment as a Fourteenth Amendment fundamental Right to Privacy issue. *See, e.g.*, *In re Quinlan*, 355 A.2d 647, 663 (1976).

73. *Cruzan*, 497 U.S. at 278. Applying a "liberty interest" results in somewhat less protection for the individual. By analyzing this issue pursuant to a "liberty interest," the Court must balance the individual's "liberty interest" against the relevant state interest to determine if a constitutional infringement has occurred. If the Court, however, had analyzed this issue within a "Right to Privacy" framework, the state would have had to demonstrate a compelling state interest prior to infringing upon the individual's rights. *Id.*

74. *Id.*

75. Edward J. Larson & Thomas A. Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, 32 WAKE FOREST L. REV. 249 (1997).

76. 42 U.S.C. § 1395cc(f)(1) (A)(ii) (2000).

77. U.S. DEP'T OF ARMY, REG. 40-3, MEDICAL, DENTAL AND VETERINARY CARE para. 2-1 (11 Dec. 2002); U.S. DEP'T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS para. 1.3.1 (1 May 1996) [hereinafter AFI 51-504]; U.S DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. (JAGINST) 5801-2 (11 Apr. 97) [hereinafter JAGINST 5801-2]; U.S. DEP'T OF TRANSP., U.S. COAST GUARD, COMMANDANT INSTR. 5801.4C, LEGAL ASSISTANCE PROGRAM (30 July 99) [hereinafter COAST GUARD, COMMANDANT INSTR. 5801.4C].

78. *The Patient Self-Determination Act: Health Care's Own Miranda*, 8 J. CONTEMP. HEALTH L. & POL'Y 455 (1992) (Commentary by Senator William V. Roth Jr.) (citing 136 CONG. REC. E2, 190 (June 28, 1990)) (statement of Representative, now Senator, Levin).

mate goal of the PSDA was to heighten public awareness of AMDs and empower the patient in making health care decisions.[79]

V. Part III: Evolution of AMDs in the Military

In the military, AMDs followed a similar pattern of acceptance and use as in the civilian community. Initially, in 1978, Army policy did not allow either DNRs[80] or withdrawal-of-life-support orders.[81] This policy remained in effect until 1985, when subsequent to the publication of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical Research,[82] the Army formally started to recognize DNR Orders.[83] Prior to 1985, many military medical treatment facilities like civilian hospitals found themselves creating "slow codes" or "notify MOD [medical officer of the day] before coding" instructions.[84] Medical staff, patients and patient's families at military medical treatment facilities used these informal agreements to get around the prohibition against withdrawal of life support and DNR orders.[85] By 1990, after much staffing, the

79. *Id.*

80. Do not resuscitate (DNR) orders are technically, but not legally, a type of AMD. Do not resuscitate orders are medical orders left on the patient's chart by an attending physician instructing other health care providers not to order therapy collectively referred to as cardio-pulmonary resuscitation. COMMITTEE ON CARE AT THE END OF LIFE, APPROACHING DEATH: IMPROVING CARE AT THE END OF LIFE, INST. OF MED. 98-99 (1997).

81. Woodruff, *supra* note 42, at 7-8.

82. *Id.* at 8 (citing President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment: Ethical, Medical, and Legal Issues in Treatment Decisions 248-55 (1983)).

83. The Army, however, did not rescind its prohibition against the withdrawal of life support until the decision in *Tune v. Walter Reed Army Hosp.*, 602 F. Supp. 1452, 1453, (D.D.C 1985). An earlier case regarding the withdrawal of care at a military treatment facility, *Newman v. United States*, No. EP-86-CA-276 LEXIS (W.D. Tex. 1986), was dismissed as the patient died before adjudication.

84. Woodruff, *supra* note 42, at 8.

85. *Id*. These informal arrangements were necessary because the Judge Advocate General at the time determined that "it was at least possible that a physician withdrawing life support or failing to order resuscitation could face criminal prosecution in some circumstances." *Id.*

Army finally permitted living wills in the inpatient and outpatient records of its patients.[86]

A. Growing Pains

As AMDs continued to gain acceptance and popularity after the Cruzan decision and the passage of the PSDA,[87] the Army began to include AMD implementation guidelines in its regulations.[88] Judge advocates tasked with advising personnel about AMDs quickly realized that, due to the transient lifestyle of military personnel, a strong possibility existed that some states would not recognize AMDs created for service members in other states.[89] Soldiers could not be sure if an AMD created pursuant to the local state requirements would be valid in another state that had different standards.[90] Fortunately, 10 U.S.C. § 1044c removed this uncertainty.[91]

B. 10 U.S.C. § 1044c

This statute exempts "an advance medical directive executed by a person eligible for legal assistance . . . from any requirement of form, substance, formality, or recording."[92] The statute permits federal recognition of AMDs created for individuals eligible for military legal assistance. Therefore, if an AMD is created at Fort Bragg, it is valid in every state recognizing AMDs regardless of that state's particular procedural requirements.[93] This legislation is significant for several reasons. First, the need for judge advocates to be familiar with AMD laws of other states is greatly

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86. Major Stephen M. Parke, *Death and Dying in Army Hospitals: The Past and Future Roles of Advance Medical Directives*, ARMY LAW., Aug. 1994, at 6. Memorandum, to Commanders, U.S. Army Health Services Command, subject: Placement of Living Wills in Outpatient Treatment Records, and In Patient Records 3 (9 Nov. 1990).

87. Michael A. Salatka, *Commentaries: The Patient Self-Determination Act of 1990*, 1 J. PHARMACY & L. 155, 156 (1992).

88. Currently, all four services plus the Coast Guard offer military AMDs. AR 40-3, *supra* note 77, para. 2-1; AFI 51-504, *supra* note 77, para. 1.3.1; JAGINST 5801-2, *supra* note 77; U.S. COAST GUARD, COMMANDANT INSTR. 5801.4C, *supra* note 77. In addition, some local military medical treatment facilities have their own implementation regulations, U.S. DEP'T OF ARMY, WALTER REED ARMY MED. CENTER REG. 40-8, IMPLEMENTATION OF ADVANCE DIRECTIVES (2 Apr. 99) [WALTER REED ARMY MED. CENTER REG. 40-8].

89. Colonel Alfred R. Arquilla et al., *Army Legal Assistance: Update, Initiatives, and Future Challenges,* ARMY LAW., Dec. 1995, at 14-15.

90. Parke, *supra* note 86, at 9.

diminished.[94] Second, Congress did not mandate a required AMD format, thus giving drafters wide-latitude in deciding what language to include in the AMD.[95] Third, the statute did not require an attorney (military or civil-

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91. *Arquilla*, *supra* note 89, at 14-15. Lieutenant Colonel George L., Hancock, Jr. then the Chief, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, first proposed the concept and initial draft for this legislation. The law is as follows:

> (a) Instruments To Be Given Legal Effect Without Regard to State Law. An advance medical directive executed by a person eligible for legal assistance—
> (1) is exempt from any requirement of form, substance formality, or recording that is provided for advance medical directives under the laws of a State; and
> (2) shall be given the same legal effect as an advance medical directive prepared and executed in accordance with the laws of the State concerned.
> (b) Advance Medical Directives. For purposes of this section, an advance medical directive is any written declaration that-
> (1) sets forth directions regarding the provision, withdrawal, or withholding of life-prolonging procedures, including hydration and sustenance, for the declarant whenever the declarant has a terminal physical condition or is in a vegetative state; or
> (2) authorizes another person to make health care decisions for the declarant, under circumstances stated in the declaration, whenever the declarant is incapable of making informed health care decisions.
> (c) Statement To Be Included.
> (1) Under regulations prescribed by the Secretary concerned, an advance medical directive prepared by an attorney authorized to provide legal assistance shall contain a statement that sets forth the provisions of subsection (a).
> (2) Paragraph (1) shall not construed to make inapplicable the provisions of subsection (a) to an advance medical directive in a State that does not otherwise recognize and enforce advance medical directives under the laws of the State.
> (d) Definitions. In this section:
> (1) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.
> (2) The term "person eligible for legal assistance: means a person who is eligible for legal assistance under section 1044 of this title.
> (3) The term "legal assistance" means legal services authorized under section 1044 of this title.

10 U.S.C. § 1044c (2000).

92. *Id.*

93. Currently, all fifty states and Washington, D.C. recognize some form of an AMD. *See supra* note 14.

94. MEDICAL LEGAL DESKBOOK, AMD, *supra* note 4, at 1-7.

ian) to draft the AMD, thereby making the AMD more easily accessible to those who need it.[96]

VI. Part IV: Current Status and Recommendations

A. *DOD Directive 1350.4*

Unfortunately, some individuals, to include attorneys, may mistakenly believe that an AMD created pursuant to 10 U.S.C. § 1044c is only effective in the state in which it was created or that an attorney must draft it for it to be valid. While the former issue is solved by increased publication and discussion of 10 U.S.C. § 1044c, the latter requires an alteration to DOD Directive 1350.4. The Directive states in para. 4.2.2, "A military testamentary instrument shall: Be executed in the presence of a military legal assistance counsel acting as presiding attorney," and goes on in para. 4.4. to state, "If prepared, such documents will include a statement or preamble in form and content substantially as outlined at enclosure 4," which reads as follows:

> This is a military advance medical directive prepared pursuant to section 1044c of title 10, United States Code. *It was prepared by an attorney authorized to provide legal assistance for an individual eligible to receive legal assistance under section 1044 of title 10, United States Code.* Federal law exempts this advance medical directive from any requirement of form, substance, formality or recording that is provided for advance medical directive under the laws of a State. Federal law specifies that this advance medical directive shall be given the same legal effect as an advance medical directive prepared and executed in accordance with the laws of the State concerned.[97]

The directive as currently written improperly interprets 10 U.S.C. § 1044c.[98] The DOD should modify the Directive[99] by removing both para

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95. *Arquilla*, *supra* note 89, at 14-15.

96. *Id.*

97. *See* DOD DIR. 1350.4, *supra* note 5, at 9 (emphasis added).

98. Arquilla et al., *supra* note 89, at 14-15.

99. This modification would allow the Directive to reflect the recommendations originally offered by *Parke, supra note 86, app. B.*

4.2.2 ("Be executed in the presence of at military legal assistance counsel as presiding attorney") and the italicized language listed above.[100]

To receive the protections of 10 U.S.C. §1044c, an attorney need not draft the declarant's AMD. Instead, the declarant need only be eligible for military legal assistance.[101] The significant point is not "by whom" the AMD is prepared but "for whom" it is prepared.[102] In the opinion of this author, such additional formalities imposed by *DOD Directive 1350.4* are contrary to the purpose of both the PSDA and 10 U.S.C. § 1044c. Mandating that only attorneys draft AMDs both overstates the importance of attorneys[103] in the AMD process and creates unnecessary impediments not generally found in the civilian community.[104] Notwithstanding the fact that AMDs can be drafted without assistance from counsel, judge advocates need to stay current with AMD developments and be available to those who need or want additional information or assistance in completing them. Also, judge advocates should be proactive in educating the military community about the benefits of AMDs by offering timely information papers, presentations and other educational materials.

B. Soldier Readiness Processing (SRP)[105]

Besides modifying *DOD Directive 1350.4*, the military should take steps to offer AMDs to its personnel prior to hospitalization, ideally during initial in-processing or mobilization briefings. Currently, military regulations require hospital personnel to brief service members on AMDs upon

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100. *See* DOD DIR. 1350.4, *supra* note 5, para. 3.4, 4.2.2.

101. 10 U.S.C. § 1044c (2000).

102. Arquilla et al., *supra* note 89, at 14-15.

103. John F. Fader, *Trends in Health Care Decisionmaking: The Precarious Role of the Courts: Surrogate Health Care Decisionmaking*, 53 MD. L. REV. 1193 (1994). Judge Fader argues that permitting non-attorneys to draft AMDs "will help keep life and death medical decisions out of the courtrooms and will allow more of these decisions to remain with the individual patient and his family and friends, where they belong." *Id.* at 1219.

104. Many non-profit organizations have created a universal AMD valid in most states. "Each state has an approved living will document that has an approved living will document that is downloadable and free on the website of the not-for profit partnership-forcaring.org." Jean Chatzky, *A Will For the Living,* TIME MAG., Nov. 3, 2003, at 18.

105. U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-AND OUT AND MOBILIZATION PROCESSING) (1 Mar. 1997). The SRPs serve to prepare soldiers for deployment by updating their medical and dental records, life insurance policies, identification cards, family care plans, testamentary wills and power of attorneys. Generally speaking, units conduct bi-annual SRPs.

admission to a medical treatment facility.[106] Studies demonstrate that this is normally not the best time for patients to start thinking about AMDs.[107] Providing AMDs prior to hospitalization[108] allows service members more time to contemplate the AMD without the immediacy of pain, discomfort, fears or the press of time.[109] In addition, prior to hospitalization, the service member has more time to seek further counsel from friends, family, counsel, clergy or other health care providers.

The SRP is just one example of an opportunity the Army has to expose a captive audience to the benefits of an AMD. While commanders cannot require personnel to complete an AMD, they can at least ensure that the service member is educated about its opportunities. Through the SRP, the Army can encourage service members to plan for future medical treatment or at least to start thinking about it. In fact, the DOD policy mandates, "Although not every person needs a will or military testamentary instrument, all military personnel shall consider the advisability of making either."[110]

VII. Conclusion

While no amount of prior planning or documentation exists to ensure patient treatment autonomy when a person is incapacitated, AMDs help ensure that the patient's desires are followed. The recommendations provided in this article will, if implemented, ensure that service members are offered greater opportunities to complete or at least become aware of AMDs, and thus become more active participants in their own medical care treatment.

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106. Parke, *supra* note 86 at 7; *see also* Captain Michael J. Roy & Itzhak Jacoby, *The Patient Self-Determination Act: Is It All It Can Be?*, 158 MIL. MED. 1128-1129 (1993). In addition, some local military medical treatment facilities have their own implementation regulations, WALTER REED ARMY MED. CENTER REG. 40-8, *supra* note 77, at Sec. 5a.

107. Pope, *supra* note 11, at 141.

108. Parke, *supra* note 86 at 10.

109. The American Medical Association does not believe that the hospital is the most appropriate place, nor admission to a facility the most appropriate time, for a patient to consider the issues of an AMD. *Hearings Before the Subcomm. on Medicare and Long-Term Care Senate Committee on Finance*, 101st Cong. 1-3 (1990) (statement of Nancy W. Dickey, M.D. Board of Trustees, American Medical Association); Parke, *supra* note 86, at 10.

110. DOD DIR. 1350.4, *supra* note 5, para. 4.1.1.

Appendix A

Proposed Model Advance Medical Directive

This is a military advance medical directive prepared pursuant to section 1044c of title 10, United States Code. Federal law exempts this advance medical directive from any requirement of form, substance, formality or recording that is provided for an advance medical directive under the laws of a State. Federal law specifies that this advance medical directive shall be given the same legal effect as an advance medical directive prepared and executed in accordance with the laws of the State concerned. This military advance medical directive consists of five sections: (I) Durable Power of Attorney; (II) Living Will; (III) Other Wishes; (IV) Signatures; and (V) Revocation.

Part I. Durable Power of Attorney

A Durable Power of Attorney authorizes your agent broad discretion regarding your medical treatment. You should speak with an attorney if you wish to limit this authorization. Choose someone who knows you very well, cares about you, and who can make difficult decisions.

____I designate the following individual to act as my agent to make health care decisions for me when I cannot make those decisions myself___ or starting at the present time___:

Name:_____

Telephone (home)_____(work)_____

Address:_____

e-mail address:_____

____If the person above cannot or will not make decisions for me, I appoint the following person.

Name:_____

Telephone (home) _____(work)_____

Address:_____

e-mail address:_____

___I have not appointed anyone to make health care decisions for me in this or any other document.

Part II. Living Will

A Living Will is used to determine what medical treatment you would or would not want in the event that you are unable to make decisions for yourself.

____I do not want life-sustaining treatments started. If life-sustaining treatments are started I want them stopped.

____I want life-sustaining treatments that my health care providers think are best for me.

___Additional information _____

1. Comfort Care

___I want to be as comfortable and free of pain as possible, even if such care prolongs or shortens my life.

___Additional Information:_____

2. Artificial Nutrition and Hydration

___I do not want artificial nutrition and hydration started if it would be the main treatment keeping me alive. If artificial nutrition and hydration are started, I want them stopped.

___I want artificial nutrition and hydration even if it is the main treatment keeping me alive.

___Additional information:_____

3. These are my desires if I am ever in a persistent vegetative state:

___I do not want life-sustaining treatments started. If life-sustaining treatments are started, I want them stopped.

___I want life-sustaining treatments that my health care providers think are best for me.

___Additional information:_____

Part III. Other Wishes

4. Expiration Date

___If you want to limit the duration of this AMD provide an expiration date_____

5. Military Benefits

__If I am a member of the armed services, the medical choices made by my agent or any health care provider shall take into consideration the completion of all procedures necessary to obtain potential medical and/or retirement benefits.

6. Pregnancy

__If I am pregnant my AMD is null and void___unchanged___or modified___, if modified list those changes _____

7. Conflict

___If a conflict arises between my Durable Power of Attorney and my Living Will, I want the health care providers to rely on my Living Will ___Durable Power of Attorney___

8. Organ Donation

___I do not wish to donate any of my organs or tissues.

___I want to donate all of my organs and tissues.

___I want to donate only these organs and tissues.
_____

9. Autopsy

___I do not want an autopsy.

___I agree to an autopsy if my doctors or family wish it.

___Additional information.
_____

10. Witness Statement

I, declare under penalty of perjury; (1) that the individual who signed or acknowledged this military advance medical directive is personally known to me, or that the individual's identity was proven to me by convincing evidence; (2) that the individual signed or acknowledged this military advance medical directive in my presence; (3) that the individual appears to be of sound mind and under no duress, fraud or undue influence; (4) that I am not a person appointed as agent by this military advance medical directive; and (5) I am not the individual's health care provider.

First Witness

Name:_____Date_____

Telephone (h)_____(w)_____

Address:_____e-mail address:_____

Signature of witness_____Date_____

Second Witness

Name:_____Date_____

Telephone(h)_____(w)_____

Address:_____e-mail address:_____

Signature of witness_____Date_____

Part V. Revocation

___I understand that I may revoke this military advance medical directive at any time.

A SURVEY OF MILITARY RETIREMENT BENEFITS

MAJOR SAMUEL W. MORRIS[1]

I. Introduction

This survey is intended to give legal assistance officers an overview of the primary benefits associated with military retirement, and to serve as a starting point when researching basic retirement benefit questions. It explains the primary Department of Defense (DOD) and Department of Veterans Affairs (VA) retirement benefits and answers the most fundamental questions that pre-retirement and post-retirement clients and their family members often raise. In addition to explaining the three DOD retirement formulas, the VA non-disability medical benefit programs, and the authority for each, this survey also outlines VA burial benefits, educational benefits, home loans, and life insurance benefits.

This survey does not cover topics such as the divisibility of military retirement pay pursuant to divorce proceedings,[2] compensation for veterans with service-connected or non-service-connected disabilities,[3] VA benefits available to dependents and surviving family members of deceased veterans,[4] or the VA claims adjudication process.[5]

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2. This topic and the applicability of the Uniformed Services Former Spouse's Protection Act, 10 U.S.C.S. § 1408(c)(1) (LEXIS 2003), to military retirement pay is extensively covered in law review articles and journals. *See, e.g.*, Landever Bond, *The Uniformed Services Former Spouses' Protection Act: A Practitioner's Guide*, 10 AM. J. FAM. L. 145 (1996); Major Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 MIL. L. REV. 40 (2001); Captain Kristine D. Kuenzli, *Uniformed Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?*, 47 A.F. L. REV. 1 (1999).

II. Department of Defense Retirement Pay Benefits

Generally, regular and Reserve commissioned officers, warrant officers, and enlisted members may retire after completing twenty or more years of active federal service.[6] Upon completion of twenty years of active federal service, service members are entitled to retirement pay.[7]

A. The DOD Military Retirement Pension Formulas

The DOD uses three formulas for computing non-disability retirement pay. The date that an individual first entered military service determines which formula is used to compute his retirement pay. This date is called the Date of Initial Entry to Military Service (DIEMS) or the DIEMS date.[8] The following discussion highlights the three DOD military retirement formulas.

1. Fifty Percent of Final Basic Pay (Fifty Percent Formula)

Service members eligible for retirement pay under the "fifty percent of final basic pay" formula (Fifty Percent Formula) include those with a DIEMS date before 8 September 1980.[9] The DOD computes monthly

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3. *See* VETERANS BENEFITS MANUAL (Barton F. Stichman, Ronald B. Abrams, David F. Addlestone eds., 2001) [hereinafter VETERANS BENEFITS MANUAL]. The *Veterans Benefits Manual* contains information about VA benefits for disabled veterans. The *Veterans Benefits Manual* covers other topics such as the requirements for obtaining disability compensation, the evidentiary standard required to prove the existence of a service-connected disability, eligibility requirements for non-service-connected disability pension benefits, and the procedural steps necessary to apply for each of these benefits. *See id*.

4. *See generally* Gerald A. Williams, *A Primer on Veterans' Benefits for Legal Assistance Attorneys*, 47 A.F. L. REV. 163 (1999).

5. The VETERANS BENEFITS MANUAL, *supra* note 3, is an excellent resource to use when advocating on behalf of a VA client. This manual includes advice and practice information on topics such as: advising and assisting clients with the VA claims adjudication and appeals process; disability benefits for veterans; VA benefits for non-veterans and family members of living or deceased veterans; rules affecting the amounts of benefits paid; and procedures for the correction of military records.

6. 10 U.S.C.S. §§ 3911, 3914.

7. *Id*. § 3929.

8. The DIEMS date should not be confused with the Basic Active Service Date (BASD). A soldier's BASD and DIEMS dates are often different. The DIEMS date for each Army service member is now listed on the monthly leave and earnings statement.

9. 10 U.S.C.S. § 1406.

retirement payments under this formula at fifty percent of final basic pay after twenty years of service with an increase of two and one-half percent for each additional year served up to thirty years.[10] For example, under the Fifty Percent Formula, a lieutenant colonel retiring with twenty-two years of military service will receive monthly retirement pay computed as follows:

Final Monthly Basic Pay	$6300
Multiplier (time in service (TIS) X 2.5% per year)	x .55
Pre-tax Monthly Retirement Pay Amount	$3465[11]

The DOD annually adjusts the monthly payments under the Fifty Percent Formula to protect the purchasing power of retirement pay.[12] Service members retiring under the Fifty Percent Formula receive full inflation protection through annual cost of living adjustments (COLA) based on changes in the consumer price index (CPI).[13]

2. Average of Highest Three Earning Years (High Three Formula)

Service members eligible for retirement pay under the "high-three" pay formula (High Three Formula) include those with a DIEMS date between 8 September 1980 and 31 July 1986.[14] The DOD computes monthly retirement payments under this formula similarly to the method used under the Fifty Percent Formula.[15] The main difference between the

10. *Id.* § 1409(b)(1). Under this formula, a retiree with thirty years of service receives seventy-five percent of final basic pay. *Id.* § 1409(b)(3).

11. The final monthly basic pay figure used in this example is a hypothetical figure used for illustration only. The pre-tax monthly retirement pay amount does not factor in the applicable cost of living adjustment (COLA) increase or reflect any premium deduction for participation in the Survivor Benefit Plan.

12. 10 U.S.C.S. § 1401a(b).

13. *Id.* The Secretary of Defense makes COLA adjustments effective on 1 December of each year. *Id.*

14. *Id.* §§ 1407(a), 1409(b)(2).

15. Under the High Three Formula, the service member receives a two and one-half percentage base increase for each year of service over twenty years. For example, the retirement pay of a service member retiring under the High Three Formula with twenty-six years of service is computed at 65% (TIS x 2.5%) of his highest three earning years. Under this formula, a retiree with thirty years of service receives 75% of the average of the highest three earning years.

Fifty Percent Formula and the High Three Formula is that the DOD applies the two and one-half percent increase (for each additional year after twenty years) to the average basic pay for the highest three earning years rather than the final basic pay at retirement.[16] For example, under the High Three Formula, a lieutenant colonel retiring with twenty-two years of military service will receive monthly retirement pay computed as follows:[17]

Average Basic Pay For Highest Three Earning Years	
($6100 + $6200 + $6300 divided by 3)	$6200
Multiplier = (TIS x 2.5%)	x .55
Pre-tax Monthly Retirement Pay Amount	$3410

Similar to the Fifty Percent Formula, monthly payments under the High Three Formula receive full inflation protection through annual COLA increases based on changes in the CPI.[18]

3. Military Retirement Reform Act (REDUX Formula)

Service members eligible for retirement pay under the reduction in pay formula (REDUX Formula) include those with a DIEMS date after 1 August 1986.[19] Acceptance of the REDUX Formula is contingent upon the service member's agreement to accept a mid-career bonus at the fifteenth year of service and remain on active duty for at least twenty years.[20]

Under the REDUX Formula, service members have a choice between two retirement options. They may retire under the High Three Formula or under provisions of the Military Retirement Reform Act by electing to take a $30,000 career retention bonus during their fifteenth year of military service.[21] To receive this bonus, the service member must agree to complete a twenty-year active duty career.[22] The member may continue service

16. 10 U.S.C.S. §§ 1407(b), (c). The statute defines the "highest three earning years" 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." *Id.*

17. The average basic pay for the highest three earning years in this example are hypothetical figures used for illustration only. The pre-tax monthly retirement pay amount does not factor in the applicable COLA increase or reflect any premium deduction for participation in the Survivor Benefit Plan.

18. 10 U.S.C.S. § 1401a(b).

19. 37 U.S.C.S. § 322(a) (LEXIS 2003).

20. *Id.*

21. *Id.* § 322(b), (d)(1).

22. *Id.* § 322(a)(2).

beyond twenty years, but the service obligation only extends to twenty years.[23]

The DOD computes monthly retirement payments under the REDUX Formula at forty percent of the average of the highest three earning years of basic pay after twenty years of service.[24] The service member then receives a three and one-half percent increase per year for each additional year served up to thirty years.[25] For example, a lieutenant colonel retiring with twenty-two years of military service will receive monthly retirement pay computed as follows:[26]

Average Basic Pay For Highest Three Earning Years ($6100 + $6200 + $6300 divided by 3)	$6200
Multiplier = [40% + (TIS over 20 years x 3.5%)]	x .47
Pre-tax Monthly Retirement Pay Amount	$2914

A twenty-four year retiree will receive a 54% multiplier, a twenty-six year retiree will receive a 61% multiplier, a twenty-eight year retiree will receive a 68% multiplier, and a thirty-year retiree will receive a 75% percent multiplier.

The REDUX retirement formula and the $30,000 career retention bonus are considered components of a package deal. The service member receives the entire $30,000 bonus shortly after he commits to the twenty-year service obligation at the fifteenth year of service.[27] If the member does not complete the twenty-year obligation, however, he or she must

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23. *Id.*

24. 10 U.S.C.S. §§ 1409(b)(2), 1407(b) (LEXIS 2003). The "reduction" resulting in a 40% multiplier is computed by subtracting 1% for each full year the service member's total creditable service is less than thirty years. For example, a service member retiring at twenty years will receive a 40% REDUX multiplier computed as follows: 50% multiplier (20 years TIS x 2.5%) minus 10% (1% x 10 years of service (30 years of potential service minus 20 years of actual service)) is equal to the 40% REDUX multiplier. *Id.*

25. *Id.* § 1409(b)(2). The 3.5% increase for each year over twenty years is the sum of a 2.5% increase in the multiplier plus 1% recaptured from the "reduction" for each year less than thirty years of service. *Id.*

26. The average basic pay for the highest three earning years in this example are hypothetical figures used for illustration only. The pre-tax monthly retirement pay amount does not factor in the applicable COLA increase or reflect any premium deduction for participation in the Survivor Benefit Plan.

27. 10 U.S.C.S. § 322(d). Under the statute, the DOD pays the bonus to the service member within sixty days after service secretary receipt of the member's REDUX election and written agreement to serve twenty years. *Id.*

repay a pro-rated share of the bonus.[28] The combination of the bonus and monthly retirement pay may be advantageous to some individuals. The REDUX portion provides retirement pay based on length of service and the retention bonus provides funds for savings, investing, or starting a business upon retirement.[29]

The DOD also computes the annual COLA adjustments under the REDUX Formula differently than under the two preceding retirement formulas. Under the REDUX Formula, the DOD computes COLA at one percent less than inflation, as measured by the CPI.[30]

The recomputation of benefits when the retiree reaches age sixty-two is another unique component to the REDUX Formula. Retirees experience two adjustments to REDUX retirement pay at age sixty-two. First, the retiree's pay is raised to the amount he would have received had he retired under the High Three Formula.[31] Thus, a twenty-year retiree will receive a 50% multiplier, a twenty-two year retiree will receive a 55% multiplier, a twenty-four year retiree will receive a 60% multiplier, a twenty-six year retiree will receive a 65% multiplier, and a twenty-eight year retiree will receive a 70% multiplier.[32] The DOD applies this multiplier to the retiree's original average of his highest three years of basic pay.[33] For example, a lieutenant colonel retiring with twenty-two years of military service will

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28. *Id.* § 322(f).

29. *See* Office of the Sec'y of Defense, *Military Compensation–CSB/REDUX Retirement System* (n.d.), *at* http://militarypay.dtic.mil/actives/retirement/ad/04_redux.html/.

30. 10 U.S.C.S. § 1401a(b)(3).

31. *Id.* § 1410(2).

32. *Id.* § 1410. Note that service members who retire after thirty years of service under REDUX, receive no recomputation of benefits because their benefits are already computed at seventy-five percent as if they retired under the "high-three" formula. *Id.*

33. *See* Major Vivian Shafer, *Choosing Between the High-Three and the REDUX Military Retirement Programs: Thrift Savings Plan Participation a Valuable Option*, ARMY LAW., Sept. 2000, at 18 (comparing the "High-Three" and "REDUX" military retirement pay formulas).

receive an increased amount of monthly retirement pay at age sixty-two, computed as follows:[34]

Average Basic Pay For Highest Three Earning Years ($6100 + $6200 + $6300 divided by 3)	$6200
Age 62 Multiplier = (50% + (TIS over 20 years x 2.5%))	x .55
Age 62 Pre-tax Monthly Retirement Pay Amount	$3410

Secondly, in order to restore the purchasing power lost since retirement, the retiree's monthly retirement payment is recalculated to the amount payable had full CPI protection been in effect.[35] In essence, the retiree receives a one-time catch up of full CPI for each previous retirement year to reach a recalculated monthly retirement amount.[36] This recalculated amount will be the same amount as if the retiree had retired under the High Three Formula.[37] Thus, at age sixty-two, the REDUX and High Three monthly retirement payments are the same.[38] After age sixty-two, however, annual COLA adjustments for REDUX recipients returns to the original formula of CPI minus one percent, for life, making the High Three Formula a more attractive retirement alternative over time.[39]

III. Veterans Administration Benefits

A. Eligibility Requirements for VA Benefits—"Veteran" Defined and the Impact of Characterization of Discharge

To become eligible for most VA benefits, "the claimant must be a veteran or the dependent or survivor of a veteran."[40] The VA defines a "veteran" as a person who "served in the active military . . . and who was discharged or released therefrom under conditions other than dishonorable."[41] The term "under conditions other than dishonorable" poses a

34. The average basic pay for the highest three earning years in this example are hypothetical figures used for illustration only. The pre-tax monthly retirement pay amount does not include any premium reductions for participation in the Survivor Benefit Plan.

35. 10 U.S.C.S. § 1410(1).

36. *Id.* § 1410.

37. *Id.*

38. *See generally* Office of the Sec'y of Defense, *Military Pay and Benefits*, *at* http://pay2000.dtic.mil/ (last visited Sept. 2, 2003) (including a retirement calculator and a discussion comparing the High Three and REDUX retirement formulas).

39. *Id.*

40. VETERANS BENEFITS MANUAL, *supra* note 3, at 25.

problem for judge advocates because this statutory definition is different from the language the military uses to characterize its discharges.[42]

The VA considers most honorable and general discharges as "other than dishonorable," qualifying former service members as "veterans" under the statute.[43] Discharge under other than honorable conditions and bad conduct discharges, however, do not automatically disqualify a former service member and his or her dependents from receiving VA benefits.[44] The regional VA office reviews such cases and makes a character of service determination to determine whether the military separated the service member under dishonorable conditions or other than dishonorable condi-

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41. 38 C.F.R. § 3.1(d) (2001). Note that the veteran's characterization of service (as wartime or peacetime) and his length of service may also impact upon the eligibility for some VA benefits. VETERANS BENEFITS MANUAL, *supra* note 3, at 35-38; *see* 38 U.S.C.S § 5303A (LEXIS 2003) (governing length-of-service requirements); *see also infra* note 168 (defining periods of wartime service the VA uses to make benefit eligibility determinations).

42. VETERANS BENEFITS MANUAL, *supra* note 3, at 28. Generally, there are five types of military discharges: (1) honorable; (2) under honorable conditions, or general; (3) under other than honorable conditions, or undesirable discharge; (4) bad-conduct discharge, issued by either special or general courts-martial; and (5) dishonorable or (in the case of an officer) dismissal, issued only by a general courts-martial. *Id.*

> If the statutory language used by the VA . . . corresponded directly to terminology used by the military services, then all discharges other than the final "dishonorable" discharge would qualify the individual as a veteran. This, however, is not the case. The rules followed by the VA are somewhat different.

Id. Despite discord between the statute and military discharge terminology, when making benefit eligibility determinations, the VA will focus upon the reason for discharge rather than the type of discharge. *Id*. at 1636. When reviewing discharges, the VA uses a "character of service determination" process to determine benefit eligibility. *See infra* note 42; 38 U.S.C.S §§ 5303, 5303A; 38 C.F.R. § 3.12 (governing VA benefit program general eligibility requirements); *see also* VETERANS BENEFITS MANUAL, *supra* note 3, at 1635-39.

43. VETERANS BENEFITS MANUAL, *supra* note 3, at 28.

44. *Id*. at 29. The Code of Federal Regulation bars receipt of all VA benefits if the service member was: (1) released from service as a conscientious objector; (2) released by reason of a sentence of a general court-martial; (3) an officer who resigned for the good of the service; (4) a deserter; or (5) discharged under other than honorable conditions as the result of being absent without leave (AWOL) for at least 180 days without a compelling reason. 38 C.F.R. § 3.12(c) (2003).

tions.[45] Veterans may appeal adverse decisions by a regional VA office to the U.S. Court of Appeals for Veterans Claims.[46]

Dishonorable discharges are an automatic bar to receipt of VA benefits, unless the service member's Board for Correction of Military Records or Discharge Review Board upgrades the discharge to at least a general discharge.[47] Note that if the VA determines that the veteran's injury or disease was caused by his own "willful misconduct," the veteran will be barred, by regulation, from receiving any benefits related to the treatment of that injury or disease.[48]

B. Medical and Health Care Benefits

The VA provides an extensive network of health care for veterans at either no cost or for a fee.[49] Despite past promises made to many service members, however, not every veteran is automatically entitled to VA health care or "free lifetime medical care."[50] Free VA health care is primarily reserved for treatment of veterans with service-connected disabilities, low-income veterans,[51] and some combat veterans.[52] Other veterans

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45. VETERANS BENEFITS MANUAL, *supra* note 3, at 29. "This character of service determination is a review by the VA of the entire period of enlistment to evaluate the quality of service and judge if it was good enough to merit receipt of veterans benefits." *Id.*; *see* U.S. VETERANS' ADMINISTRATION, VA ADJUDICATION PROCEDURE MANUAL M21-1, pt. IV, ¶ 11.01-11.06 (n.d.) [hereinafter VA ADJUDICATION PROCEDURE MANUAL] (discussing the VA's procedures for determining character of service).

46. VETERANS BENEFITS MANUAL, *supra* note 3, at 29.

47. 38 C.F.R. § 3.12(e)-(h). All discharges upgraded to at least a general discharge are "final and conclusive" for the VA and render the veteran eligible for benefits. *Id.*

48. *Id.* § 3.1(n)(1). The Code defines "willful misconduct" as:

> [A]n act involving conscious wrongdoing or known prohibited action. . . .
> (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.
> (2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.
> (3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death.

Id.

49. VETERANS BENEFITS MANUAL, *supra* note 3, at 747.

receive a lower priority for care and may be required to pay for any treatment they receive.[53]

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50. In *Schism v. United States*, 316 F.3d 1259 (Fed. Cir. 2002), 2002 U.S. App. LEXIS 23769 (Nov. 18, 2002), *cert denied*, 123 S. Ct. 2246 (2003), the U.S. Court of Appeals for the Federal Circuit upheld the determination of the district court, which concluded that the U.S. Air Force Secretary lacked authority when the plaintiff's joined the Air Force to promise free and full medical care because the statute upon which they relied, 5 U.S.C.S. § 301, authorized only space-available treatment at the time they joined, not free health insurance for life. Moreover, the veterans were unable to assert a breach of an implied-in-fact contract because military retiree compensation, including free medical care and government-provided insurance, was controlled exclusively by statute. *Schism*, 316 F.3d at 1264.

51. 38 U.S.C.S § 1722 (LEXIS 2003) establishes three categories of veterans eligible for free VA health care based on income alone. Veterans who fall within these three groups qualify for mandatory access to VA health care so long as they meet the threshold income requirements under § 1722(b). *Id.*

52. VETERANS BENEFITS MANUAL, *supra* note 3, at 747. Under 38 U.S.C.S § 1710, free VA hospital care is only available to the following combat veterans (note that this list is not exhaustive):

> (1) for treatment of a service-connected disability;
> (2) with a compensable service-connected disability, for the treatment of any disability;
> (3) whose discharge or release from active service was for a compensable disability incurred or aggravated in the line of duty, for the treatment of any disability;
> (4) former prisoners of war, or who have been awarded the Purple Heart, for the treatment of any disability;
> (5) who are veterans of the Mexican border period or World War I, for the treatment of any disability;
> (6) of the Vietnam era, who was herbicide-exposed, for the treatment of any disability;
> (7) who was exposed to radiation during service, for treatment of any disability;
> (8) who may have been exposed to a toxic substance or an environmental hazard in the Persian Gulf War;
> (9) having low income and meeting VA's definition of "unable to defray the expenses of necessary care," for the treatment of any disability.

VETERANS BENEFITS MANUAL, *supra* note 3, at 760-61.

53. *Id.* at 747; *see generally* U.S. Dep't of Veterans' Affairs, *Health Benefits & Services* (July 31, 2003), *at* http://www.va.gov/vbs/health.

1. Eligibility for Care Under the Uniform Benefits Package

Presuming a veteran meets the eligibility requirements discussed above, veterans seeking VA medical services must first be enrolled into the VA system[54] or become exempt from enrollment.[55] Veterans who fail to enroll in the VA health care system cannot receive VA hospital and outpatient care.[56] Veterans may enroll at any VA facility providing medical services, by mail, or the Internet.[57] Once the veteran files a completed enrollment application, the VA assigns the veteran a priority category and then informs the veteran of his or her enrollment status.[58] The VA determines which of the seven priority categories will be selected for enrollment annually.[59] The level of congressional funding dictates VA's ability to provide benefits to veterans within all seven priority categories.[60] The VA then publishes these priority categories in the Federal Register.[61] If the VA selects the veteran's assigned category for enrollment, the veteran should qualify for a bundle of services, which the VA designates a "Medi-

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54. 38 C.F.R. § 17.36(a). Veterans may apply for enrollment at any time. Once enrolled, the VA recognizes the veteran's enrollment status at any VA medical facility throughout the United States. *Id.*

55. *Id.* § 17.37. Even if not enrolled in the VA healthcare system, the following veterans will receive VA hospital and outpatient care provided for in the Medical Benefits Package (note that this list is not exhaustive):

> (1) Veterans rated for service-connected disabilities at 50% or greater;
> (2) Veterans seeking care for a service-connected disability;
> (3) Veterans discharged or released from active military service for a disability incurred or aggravated in the line of duty;
> (4) When there is a compelling medical need to complete a course of VA treatment started when the veteran was enrolled in the VA healthcare system;
> (5) Veterans participating in VA's vocational rehabilitation program;
> (6) Veterans receiving VA hospital or outpatient care based on factors other than veteran status (such as care received by VA employees or DOD retirees).

Id.

56. *Id.* § 17.36(a)(1).

57. VETERANS BENEFITS MANUAL, *supra* note 3, at 750. Veterans applying for enrollment should complete VA Form 10-10EZ. *See* https://www.1010ez.med.va.gov/sec/vha/1010ez/.

58. VETERANS BENEFITS MANUAL, *supra* note 3, at 750.

cal Benefits Package."[62] The VA's Medical Benefits Package consists of both "basic care"[63] and "preventive care"[64] services.

2. Priority of Care—Admission to VA Facilities and Determination of Medical Need

Although a veteran may qualify for free health care, the VA chooses which veterans have priority for admission to its hospitals and nursing homes.[65] Absent a medical emergency, this policy can result in the VA denying admission to one veteran while selecting another for treatment.[66] Veterans who do not receive care under these circumstances may receive

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59. 38 C.F.R. § 17.36(b). The VA assigns veterans to a priority group. Veterans in Category 1 are given the highest priority of VA enrollment while Category 7 veterans are given the lowest. Veterans will be eligible for benefits enrollment based on the following order of priority:

> (Category 1) Veterans with a disability rating of 50 percent or greater;
> (Category 2) Veterans with a service-connected disability rating of 30 or 40 percent;
> (Category 3) Former POWs; recipients of the Purple Heart; veterans with a service-connected disability rating of 10 or 20 percent; veterans discharged from active military service for a disability incurred or aggravated in the line of duty; veterans receiving disability compensation under 38 U.S.C.S. § 1151; veterans whose entitlement to disability compensation is suspended because of the receipt of military retired pay; and veterans receiving compensation at the 10 percent rating level based on multiple noncompensable service-connected disabilities that clearly interfere with normal employability;
> (Category 4) Veterans who receive increased pension based on their need for aid and attendance or by reason of being permanently housebound; veterans who are determined, by the Chief of Staff of the VA facility where they were examined, to be catastrophically disabled;
> (Category 5) Veterans not in priority groups 1 through 4 who are determined by the VA to have insufficient income to defray the expenses of necessary care under 38 U.S.C.S. § 1722(a);
> (Category 6) All other eligible veterans not required to make co-payments for their care; and
> (Category 7) All veterans not in categories 1 through 6, who agree to pay specified co-payments.

Id.; *see also* VETERANS BENEFITS MANUAL, *supra* note 3, at 752.

60. VETERANS BENEFITS MANUAL, *supra* note 3, at 750. In 2000, the VA enrolled all seven priority categories of veterans who applied for benefits. *Id.*

61. 38 C.F.R. §17.36(c).

62. *Id.* § 17.38.

either fee-based care or VA funded care at a non-VA facility, such as a

63. The following hospital and outpatient care constitutes the "basic care" portion of the Medical Benefits Package, as defined in 38 C.F.R. § 17.38(a)(1):

> (1) Outpatient, medical, surgical, mental healthcare, and care for substance abuse;
> (2) Inpatient hospital, medical, surgical, mental healthcare, and care for substance abuse;
> (3) Prescription drugs, over-the-counter drugs, and surgical supplies;
> (4) Emergency care in VA facilities and those non-VA facilities under contract or otherwise authorized;
> (5) Bereavement counseling as authorized;
> (6) Comprehensive rehabilitative services;
> (7) Professional counseling, consultation, training, and mental health services for immediate family members or legal guardian of the veteran or the individual in whose household the veteran certifies an intention to live, if needed to treat a qualifying condition;
> (8) Authorized durable medical equipment and prosthetic and orthotic devices, including eyeglasses and hearing aids;
> (9) Home health services;
> (10) Reconstructive plastic surgery required due to disease or trauma, excluding medically unnecessary cosmetic surgery;
> (11) Respite, hospice, and palliative care;
> (12) Payment of travel and travel expenses for eligible veterans; and
> (13) Pregnancy and delivery services as authorized.

Id.

64. The following hospital and outpatient care constitutes the "preventive care" Medical Benefits Package, as defined in 38 C.F.R. § 17.38(a)(2):

> (1) Periodic medical exams;
> (2) Health and nutrition education;
> (3) Maintenance of drug-use profiles, drug monitoring, and drug use education;
> (4) Mental health and substance abuse preventive services;
> (5) Immunizations against infectious disease;
> (6) Prevention of musculoskeletal deformity or other gradually developing disabilities of a metabolic or degenerative nature;
> (7) Genetic counseling concerning inheritance of genetically determined diseases;
> (8) Routine vision testing and eye-care services; and
> (9) Periodic reexamination and treatment of members of high-risk groups for selected diseases and functional decline of sensory organs.

Id.

65. VETERANS BENEFITS MANUAL, *supra* note 3, at 762 (citing 38 C.F.R. § 17.49).

66. *Id.* at 762.

DOD hospital, a public hospital, or a private hospital.[67] Before receiving such care, the veteran must receive prior authorization from the VA to avoid paying for non-VA care.[68]

The VA considers two factors when determining which veteran should first receive medical care.[69] The VA first determines the veteran's "medical need" and then considers the veteran's priority category.[70] The VA places the veteran into one of three categories of medical need: emergency, urgent, or general.[71] The VA's hospitals immediately admit veterans with "emergency" conditions regardless of their priority category, giving them priority over veterans with less serious conditions.[72]

Once the VA establishes a medical need, it can choose from a number of options when determining the method and means of a veteran's medical treatment.[73] The VA may immediately admit the veteran as an inpatient, place the veteran in an outpatient care status, pre-admit the veteran for preliminary diagnostic testing with a view toward future inpatient care, schedule the veteran for later admission, place the veteran on a waiting list for admission, or determine that no care is necessary.[74]

3. Payment for Care—Co-payments

Veterans ineligible to receive free VA health care services (Category 7 veterans) must agree to pay a co-payment to receive that service, contingent on the availability of resources and space.[75] The co-payment amount is based on the type of services received—hospital, outpatient, nursing home, or pharmacy care.[76] Generally, the co-payment cost for VA care is much less than the cost for private care. "This means in many cases a vet-

67. *Id.* at 762-63 (citing 38 C.F.R. § 17.46(a)(1)).
68. *Id.* at 763.
69. *Id.* at 762.
70. *Id.*
71. *Id.* at 763 (citing VA ADJUDICATION PROCEDURE MANUAL, *supra* note 45, M-1, pt. I, ¶ 1.114-1.116).
72. *Id.* at 762 (citing VA ADJUDICATION PROCEDURE MANUAL, *supra* note 45, M-1, pt. I, ¶ 4.26a).
73. *Id.* at 764.
74. *Id.*
75. 38 U.S.C.S. § 1710(f) (LEXIS 2003).
76. *Id.* § 1710(f)(2)(A)(i).

eran, who has a choice between obtaining VA care for a cost or private care not covered by insurance, will save money by choosing VA care."[77]

4. Outpatient Pharmacy Services

"In general, if a veteran is eligible for VA treatment of a condition, he or she can receive from the VA drugs, medications, or medical supplies if they were *prescribed by the VA* for treatment of the condition."[78] A veteran who receives a prescription for a non-service-connected condition during VA outpatient treatment must pay a two-dollar co-payment to fill the prescription at a VA pharmacy.[79] Under the Veterans Millennium Health Care and Benefits Act of 1999,[80] the VA is authorized to raise the co-payment and to establish a monthly and annual cap on the amount of veterans' co-payments.[81] Under some circumstances, the VA will not

77. VETERANS BENEFITS MANUAL, *supra* note 3, at 796 (citing Pub. L. No. 106-117, § 201(a), 113 Stat. 1560 (1999). This law gives the Secretary of Veterans' Affairs authority to establish the outpatient co-payment rate. The VA recently reduced its co-payment requirements for its services as follows: (1) medication—the prescription co-payment charge is $2 for each supply of medications provided on an outpatient basis for nonservice-connected conditions for thirty days or less; (2) outpatient medical treatment—the outpatient co-payment amount is based on three different tiers of services ranging from no co-payment, $15 for a primary care visit, or $50 for a specialty care visit; (3) inpatient medical treatment—Congress determined that the appropriate inpatient co-payment should be the current inpatient Medicare Deductible Rate ($840 in 2003) for the first ninety days that the patient remains in the hospital, plus a $10 per diem charge; and (4) long term medical care—these charges vary by type of service provided and the individual veteran's ability to pay. *Id.*; *see also* U.S. Dep't of Veterans' Affairs, *Enrolling in VA's Health Care System: Financial Information* (July 25, 2003), *at* http://www.va.gov/elig/Co-payments.htm (annotating the latest co-payment amounts).

78. *Id.* at 783 (citing VA ADJUDICATION PROCEDURE MANUAL, *supra* note 45, M-1, pt. I, ¶ 16.64a).

79. *Id.* at 783 (citing 38 U.S.C.S. § 1722A).

80. Pub. L. No. 106-117, § 201, 113 Stat. 1545 (1999).

81. VETERANS BENEFITS MANUAL, *supra* note 3, at 783.

charge veterans pharmacy co-payments.[82] Some veterans may even qualify to have their non-VA prescriptions filled at VA pharmacies.[83]

5. VA Dental Benefits

The VA provides dental services to eligible veterans, including dental examinations and emergency and non-emergency outpatient dental treatment.[84] Relatively few veterans receive unlimited, unrestricted free VA dental treatment because of the strict eligibility requirements.[85] In contrast to other types of VA health care, the VA does not offer free dental care to low-income veterans.[86]

B. Burial Benefits

1. General

"The VA burial benefits program is generally intended to assist the survivors of deceased veterans in meeting the funeral and burial costs associated with the veteran's death."[87] A portion of these benefits may also be available to certain family members. The VA sponsors the following six different types of burial benefits for eligible veterans: a burial payment for non-service-connected deaths or deaths in service;[88] a plot or interment

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82. The following veterans are not required to pay the co-payment for medication:

> (1) Veterans with a service-connected disability rated 50% or more; or
> (2) Veterans meeting certain income requirements under 38 U.S.C.S § 1521.

38 U.S.C.S. § 1722A (LEXIS 2003).

83. *See id*. § 1712(d). Typically, this benefit is limited to veterans living in private nursing homes who are also eligible for VA pensions with aid and attendance, disability compensation benefits, or military retirement pay (these veterans are also exempt from the two-dollar pharmacy co-payment). *Id*.

84. *See* 38 C.F.R. § 17.160-.166 (2002).

85. *See id*. § 17.161(a) (listing nine groups of veterans who may be eligible for dental care; three eligible groups receive unrestricted, unlimited dental care and the other six groups receive limited services as described). *Id*.

86. VETERANS BENEFITS MANUAL, *supra* note 3, at 791.

87. *Id.* at 887 (citing VA ADJUDICATION PROCEDURE MANUAL, *supra* note 45, M21-1, pt. III, ¶ 13.01); *see* U.S. Dep't of Veterans' Affairs, *Burial & Memorial Benefits* (June 26, 2003), *at* http://www.cem.va.gov.

allowance;[89] burial in a national cemetery;[90] free headstone or grave marker; or reimbursement for a private headstone or marker;[91] and payment for transporting remains.[92] The VA also provides the veteran's next-of-kin a U.S flag and Presidential Memorial Certificate.[93] Each burial benefit has its own eligibility requirements.

2. Burial Allowances

a. Non-Service-Connected Deaths

For deaths not connected to military service, the VA may pay up to $300 per veteran for funeral and burial expenses.[94] To apply for this benefit, veterans must file VA Form 21-530, Application for Burial Benefits, within two years following the burial of the veteran.[95] Eligible claimants include: any person who paid out-of-pocket for funeral, burial, and transportation expenses; the funeral director, if any part of the funeral bill remains unpaid; and the legal representative of the veteran's estate.[96] Veterans eligible for this benefit include those veterans receiving military retirement pay or a VA pension or compensation at the time of death.[97]

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88. 38 C.F.R. § 3.1600(b) (non-service-connected deaths); 38 C.F.R. § 3.1600(a) (service-connected deaths).

89. *Id.* § 3.1600(f).

90. 38 U.S.C.S. § 2402 (LEXIS 2003); 38 C.F.R. § 1.620 (2002); *see also* U.S. Dep't of Defense, *Military Funeral Honors*, *at* http://www.militaryfuneralhonors.osd.mil (last visited Sept. 4, 2003).

91. 38 C.F.R. §§ 1.630, 1.632, 3.1612 (2002).

92. *Id.* § 3.1606.

93. 38 U.S.C.S. § 2301; *see* U.S. Dep't of Veterans' Affairs, VA Form 2008, Application for United States Flag for Burial Purposes (Sept. 1999). Veterans may apply for the Presidential Memorial Certificate at the nearest regional VA office. Requests for a certificate should include a copy of the deceased veteran's discharge document. *See* U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge From Active Duty (Nov. 1988).

94. 38 U.S.C.S. § 2302.

95. *Id.* § 2304; 38 C.F.R. § 3.1601(a); *see* U.S. Dep't of Veterans' Affairs, VA Form 21-530, Application for Burial Benefits (Sept. 1995).

96. 38 C.F.R. § 3.1601(a).

97. *Id.* § 3.1600(b)(1).

b. Service-Connected Deaths

If the VA determines that a veteran's death is related to military service, the VA pays up to $1500 toward the cost of the veteran's funeral and burial.[98] The VA pays this benefit when a service-connected debilitating event either directly results in or contributes to the veteran's death.[99] There is no time limit attached to the application for this benefit.[100] If the veteran's immediate survivors are entitled to Dependency and Indemnity Compensation (DIC) as a result of a service-connected death, then the VA will not pay a service-connected burial allowance.[101] "Payment of the service-connected burial allowance also precludes payment of the plot or interment allowance and the non-service-connected burial allowance."[102]

3. Plot or Interment Allowance

The VA pays up to $150 to the person or entity incurring the expenses for a plot or interment for deaths not connected to military service.[103] If the veteran is buried in a national cemetery or the veteran's employer paid the veteran's plot or interment expenses in full, then the veteran is ineligible for the plot or interment allowance.[104] The plot or interment allowance, however, is payable in cases where the veteran has prepaid his or her funeral expenses.[105] Veterans eligible for this benefit include those veter-

98. 38 U.S.C.S. § 2307; 38 C.F.R. § 3.1600(a).

99. 38 C.F.R. § 3.312(a), (c).

100. *Id*. § 3.1601(a).

101. VETERANS BENEFITS MANUAL, *supra* note 3, at 889 (citing VA ADJUDICATION PROCEDURE MANUAL, *supra* note 45, M21-1, pt. III, ¶ 13.28a(1)). "Only non-service-connected burial allowance, plot-interment allowance and transportation expenses may be paid in these cases." *Id*.

102. *Id*. at 889 (citing 38 C.F.R. § 3.1600(a)).

103. 38 U.S.C.S. § 2303(b); 38 C.F.R. § 3.1600(f).

104. 38 C.F.R. §§ 3.1600(f), 3.1604(c)-(d).

105. VETERANS BENEFITS MANUAL, *supra* note 3, at 890 (citing VA ADJUDICATION PROCEDURE MANUAL, *supra* note 45, M21-1, pt. III, ¶ 13.35).

ans receiving military retirement pay or a VA pension or compensation at the time of death.[106]

4. Burial in a National Cemetery and Headstone or Grave Marker

"Burial benefits in the national cemetery system include the gravesite, a headstone or marker, opening and closing of the grave, and perpetual care."[107] Those persons eligible for burial in a national cemetery include: veterans who completed the statutory period of service and were discharged under honorable conditions;[108] servicemembers who died on active duty;[109] veterans authorized to receive retirement pay resulting from twenty years of creditable service with a Reserve Component;[110] and the surviving spouse, minor child, or unmarried adult child of any eligible veteran.[111] Those convicted of offense under 38 U.S.C.S. § 6105(a) are not eligible for this benefit even if they are otherwise qualified for it.[112]

5. Payment for Transport of Remains

The VA pays for certain costs associated with the transportation of persons eligible for VA burial benefits from the place of death to the

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106. *See* 38 C.F.R. § 3.1600(b)(1)-(2)n (2002).

107. VETERANS BENEFITS MANUAL, *supra* note 3, at 891. Cremated remains may also be stored in a national cemetery under this provision. *Id.*

108. 38 U.S.C.S. § 2402(1).

109. *Id.*

110. *Id.* § 2402(7).

111. This listing of eligible persons is not exhaustive. *See id.* § 2402(5).

112. *Id.* § 2402. The offenses include:

> (1) Sections 894, 904, and 906 of Title 10 (articles 94, 104, and 106 of the Uniform Code of Military Justice);
> (2) Sections 792, 793, 794, 798, 2381, 2382, 2383, 2384, 2385, 2387, 2388, 2389, 2390, and Chapter 105 of Title 18;
> (3) Sections 222, 223, 224, 225, and 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2272, 2273, 2274, 2275, and 2276); and
> (4) Section 4 of the Internal Security Act of 1950 (50 U.S.C. 783).

Id.

funeral and gravesite.[113] Covered transportation expenses can include either shipment by common carrier or transportation by hearse.[114]

6. Burial Flags

The VA furnishes a flag to drape the casket of each of the following deceased: veterans of any war; veterans with a period of service after 31 January 1955; veterans who have served at least one enlistment; veterans discharged or released from active duty for a disability incurred or aggravated in the line of duty; individuals who at the time of death were entitled to military retirement pay; and each deceased person who is buried in a national cemetery.[115] After the veteran's burial, the VA presents the flag to the veteran's next of kin. If the veteran's next-of-kin makes no claim for the flag, the VA may give it to a close friend or associate of the deceased veteran upon request.[116]

7. Military Funeral Honors

The DOD is responsible for providing military funeral honors for the burial of eligible veterans.[117] A basic military funeral honors ceremony includes a funeral honors detail, presentation of the American flag and the playing of Taps by a bugler, if available, or by electronic recording.[118] Only funeral directors may request funeral honors.[119] Family members desiring military funeral honors should request them through their funeral directors.[120] The VA can also help arrange for honors and veterans service organizations or volunteer groups may help provide honors.[121]

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113. 38 C.F.R. § 3.1606 (2002).

114. *Id.*

115. 38 U.S.C.S. § 2301(a), (e).

116. *Id.* § 2301(b).

117. U.S. DEP'T OF VETERANS' AFFAIRS, FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS 46 (2001) [hereinafter FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS].

118. *Id.* at 45.

119. *Id.* at 46. The DOD maintains a toll-free telephone number for use by funeral directors to request military funeral honors—1 (877) MIL-HONR. *Id.*

120. FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS, *supra* note 117, at 46.

121. *Id.*

C. Education Benefits

1. General

The VA offers several education assistance programs to eligible veterans.[122] A veteran, however, may not simultaneously receive educational benefits under more than one VA program.[123] There are currently two major veterans' education benefit programs, the Post-Vietnam Era Veterans' Educational Assistance Program (VEAP)[124] and the All Volunteer Force Educational Assistance Program, more commonly known as the Montgomery G.I. Bill.[125] A third program, not covered in this survey, provides education benefits to spouses and dependent children of veterans under the Survivors' and Dependents' Educational Assistance Program (DEA).[126]

2. Veterans' Education Assistance Program (VEAP)

The VEAP is available to men and women who entered the armed forces between 31 December 1976 and 1 July 1985, to assist them obtain an education they "might not otherwise be able to afford."[127] Further, eligibility is contingent upon the veteran serving at least 181 continuous days

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122. *See generally* U.S. Dep't of Veterans' Affairs, *Education Benefits*, *at* http://www.gibill.va.gov (last visited Sept. 4, 2003).

123. 38 U.S.C.S. § 3033(a) (1) (LEXIS 2001).

124. *Id.* §§ 3201-3243.

125. *Id.* §§ 3001-3036.

126. 38 C.F.R. § 21.3001-3344 (2001). Entitlement to benefits under the DEA is authorized for spouses and children of veterans who:

> (1) died of a service-connected disability; or
> (2) died while suffering from a total and permanent service-connected disability; or
> (3) have a total and permanent disability arising from a service-connected disability; or
> (4) [are] listed as missing in action or a prisoner of war.

Id.

127. 38 U.S.C.S. § 3201.

of military service[128] and receiving a discharge under honorable conditions.[129]

The veteran must use his or her VEAP benefits for enrollment in an approved "program of education"[130] at an "educational institution" [131] as defined under the statute.[132] Presuming the veteran made the maximum required lump sum or monthly contributions under the VEAP,[133] he or she will qualify to receive a maximum of thirty-six monthly benefit payments (or their equivalent in part-time benefits).[134] The amount of the VEAP monthly benefit payment is equal to the sum of the veteran's total entitlement (veteran's total VEAP contributions plus DOD matching funds plus DOD additional contributions) divided by thirty-six (months).[135]

The veteran must generally complete the selected program of education within ten years after the veteran's last discharge or release from active duty.[136] Otherwise, the VA disenrolls the veteran from the program and triggers a forfeiture of benefits.[137] There are limited exceptions to the ten-year disenrollment rule.[138] After disenrollment, the VA may refund forfeited VEAP contributions to the veteran.[139] If the veteran's poor health causes the disenrollment, the veteran may apply to the VA for a refund of

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128. 38 C.F.R. § 21.5040(b)(iv)(A).

129. *Id.* § 21.5040(b)(iii).

130. 38 U.S.C.S. § 3452(b). "The term 'program of education' means any curriculum or any combination of unit courses or subjects pursued at an educational institution generally accepted as necessary to fulfill requirements for the attainment of a predetermined and identified educational, professional, or vocational objective." *Id.*

131. *Id.* § 3452(c). "The term 'educational institution' means any public or private elementary school, secondary school, vocational school, correspondence school, business school, junior college, teachers' college, college, normal school, professional school, university, or scientific or technical institution, or other institution furnishing education for adults." *Id.*

132. *Id.* § 3452.

133. *Id.* § 3222. The maximum participant contribution is $2,700, made in monthly payments or a lump sum contribution. When the veteran elects to use VEAP benefits, the DOD will match the contributions at a rate of $2 for every dollar the veteran contributed into the fund. The DOD may also make additional contributions to the fund called "kickers," "to encourage persons to enter or remain in the Armed Forces." *Id.*

134. *Id.* § 3231(a)(1).

135. 38 C.F.R. § 21.5138 (2001); *see also* U.S. Dep't of Veterans' Affairs, *Education Benefits*, *at* http://www.gibill.va.gov (last visited Sept. 4, 2003).

136. 38 U.S.C.S. § 3232.

137. *Id.* § 3232(a)(1). This ten-year period is called the "delimiting period." *Id.* If the veteran does not completely exhaust his entitlements under the VEAP within the delimiting period, the VA disenrolls the veteran from the program, but the veteran may qualify for a refund of contributions, as discussed below. *Id.*

his contributions to his immediate surviving family, if any, or to his estate.[140]

Veterans who are otherwise eligible to receive VEAP benefits may also receive supplemental monetary assistance to receive tutorial services.[141] To qualify, the veteran must pursue a college education program on at least a half-time basis at an educational institution, and have a "deficiency in a subject which is indispensable to the satisfactory pursuit of an approved program of education."[142] The VA must determine that the selected tutor is qualified to provide such services, that the tutor charges no more than the customary charge for such assistance, that the tutor provides only individual assistance to the veteran, and that the tutor is not a family member of the veteran.[143] Upon application to the VA, a veteran meeting these qualifications may receive up to $100 per month not to exceed a total entitlement of $1200.[144] The VA will not subtract any funds from the veteran's VEAP account for any amount of tutorial assistance received.[145]

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138. *Id.* § 3232. The ten-year period can be extended due to an intervening disability preventing the veteran from attending school. *Id.* Other exceptions also exist. *See* FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS, *supra* note 117, at 31.

139. *Id.* § 3223. As a general rule, the VA only refunds a veteran's contributions to the program after disenrollment. If disenrollment occurs after discharge or release from active duty, the VA refunds the veteran's contributions within sixty days of receipt of an application. The VA will refund DOD matching contributions to the veteran's VEAP account to the DOD. *Id.*

140. *Id.* § 3224. In the event of a veteran's death, the VA pays the unused VEAP contributions to the following surviving persons, in the following order:

> (1) The veteran's surviving spouse;
> (2) The veteran's surviving child or children, equally;
> (3) The veteran's surviving parent or parents, equally;
> (4) The veteran's estate.

Id.

141. 38 C.F.R. § 21.5141 (2001).

142. *Id.* § 21.4236(a). The "deficiency indispensable to the satisfactory pursuit of an approved program of education" must be certified to the VA by the educational institution. *Id.*

143. *Id.* § 21.4236(b).

144. *Id.* § 21.4236(c).

145. *Id.* § 21.4236(d).

3. Montgomery GI Bill (MGIB)

The MGIB is available to men and women who entered the Armed Forces after 30 June 1985 and honorably served a minimum of two or three years of active duty service.[146] In order to receive benefits under the MGIB, the veteran must have either a high school diploma (or equivalent certificate) or academic credit equivalent to twelve semester hours in a college education program before completing his or her service obligation.[147]

Upon completion of twelve mandatory monthly $100 contributions under the MGIB,[148] the service member qualifies to receive a maximum of thirty-six monthly benefit payments (or their equivalent in part-time benefits).[149] For veterans honorably serving a three-year service obligation, the amount of educational payments under the MGIB for fiscal year 2003 is $900 per month if the veteran attends school on a full time basis.[150] For a veteran honorably serving a two-year service obligation, the amount of educational payments for fiscal year 2003 is $732 per month for full time attendance.[151] The VA provides veterans inflation protection for MGIB education benefits through annual COLA increases based on the CPI.[152] Additionally, the VA can authorize increased educational payments of up to $950 per month for those veterans who enlist in a critical shortage specialty or skill recognized by the DOD.[153]

The veteran must generally complete the selected program of education within ten years after the veteran's last discharge or release from active duty.[154] Veterans who had not exhausted their educational benefits under the VEAP program on 31 December 1989, however, may also be

146. 38 U.S.C.S. § 3011(a)(1)(A) (LEXIS 2003). Higher benefits are payable to veterans serving a three year commitment. *Id*.

147. *Id.* § 3011(a)(2).

148. *Id.* § 3011(b)-(c). The maximum contribution under the MGIB is a $1200 non-refundable contribution by the service member and an additional contribution of up to $600, for a total of $1800. *Id.*

149. *Id.* § 3013(a)(1).

150. *Id.* § 3015(a)(1). For fiscal year 2004, the benefit is $985 per month for full-time attendance. *Id*.

151. *Id.* § 3015(b)(1). For fiscal year 2004, the benefit is $800 per month for full-time attendance. *Id*.

152. *Id.* § 3015(h). The COLA supplement is equal to the annual percentage increase of the CPI for the twelve-month period ending on 30 June each year. *Id.*

153. *Id.* § 3015(d)(1). These additional funds are commonly known as "kickers." This Code provision does not authorize COLA supplements for kicker payments. *Id*.

154. *Id.* § 3031(a).

entitled to MGIB benefits.[155] Such a veteran may establish eligibility for MGIB benefits if he meets certain criteria. First, he must have served three continuous years of active duty in the Armed Forces after 30 June 1985, or else have been discharged under honorable conditions for a medical disability, hardship, or for convenience of the government (provided the individual completed at least thirty months of active duty).[156] Second, the veteran must have either a high school diploma (or equivalent certificate) or academic credit for twelve semester hours in a college education program before 1 January 1990.[157] Finally, the veteran must receive an honorable discharge from active duty.[158]

Veterans on active duty on 9 October 1996 who have funds remaining in their VEAP accounts may also be eligible for conversion to the MGIB program.[159] To be eligible, the veteran must have elected the MGIB and deposited $1200 by 9 October 1997.[160]

D. Home Loan Guarantee

The VA Home Loan Guarantee program is a well-known and commonly used VA benefit. VA loan guarantees are made to eligible service members and veterans to assist them with the purchase of a home under terms favorable to both the borrower and lender.[161] In every VA home loan, the VA guarantees part of the loan, enabling the veteran to obtain a competitive mortgage with a comparably low interest rate and no down payment.[162] The VA loan guarantee protects the lender from default for up

155. 38 C.F.R. § 21.7044 (2001).
156. *Id.* § 21.7044(a)(4).
157. *Id.* § 21.7044(a)(3), (b)(3).
158. *Id.* § 21.7044(a)(5), (b)(6).
159. *See* 38 U.S.C.S. § 3018 (LEXIS 2003).
160. *Id.* § 3018C.
161. *See generally* U.S. Dep't of Veterans' Affairs, *Home Loan Guarantee Services* (Sept. 4, 2003), *at* http://www.homeloans.va.gov.
162. FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS, *supra* note 117, at 34.

to the amount of the guarantee.[163] As a result, veterans are more likely to qualify for home mortgages with the VA's backing against default.[164]

To determine eligibility for a guaranteed VA home loan, the VA reviews when the veteran served on active duty, how long the veteran served, and the type of discharge the veteran received.[165] A veteran must receive an honorable discharge in order to qualify for benefits under this program.[166] Under the eligibility statute, evidence of an honorable discharge is sufficient to apply for a home loan.[167]

Veterans with honorable service during World War II, the Korean Conflict, or the Vietnam Era, or with ninety days or more of total service and service under honorable conditions, are eligible for the VA home loan program.[168] Generally, veterans who served honorably between September 1980 and July 1990 may be subject to a twenty-four month service requirement for eligibility.[169] Persian Gulf War veterans who honorably

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163. *Id.* at 34.

164. The policy of the VA home loan guarantee is to "enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure, to both the veteran and the Veterans' Administration as guarantor of the veteran's indebtedness." United States v. Shimer, 367 U.S. 374, 383 (1961).

165. *See* 38 U.S.C.S. § 3702(a).

166. *Id.* § 3702(c).

167. *Id.* Any veteran who does not have a discharge certificate, or who received a discharge other than honorable, may apply to the VA for a certificate of eligibility. *Id.*

168. *Id.* § 3702(a)(2)(A). Congress established the periods of wartime for purposes of establishing entitlement to VA benefits. To become eligible for wartime service, the VA does not require actual service in a combat zone. The VA only requires that the veteran served during the designated wartime period. For VA home loan guarantee eligibility, periods of wartime service include the following conflicts:

> (1) World War II—December 7, 1941, through December 31, 1946, extended to July 25, 1947, where continuous with active duty on or before December 31, 1946;
> (2) Korean Conflict—June 27, 1950, through January 31, 1955;
> (3) Vietnam Era—August 5, 1964, through May 7, 1975, and February 28, 1961, through May 7, 1975, for veterans who served in the Republic of Vietnam during that period;
> (4) Persian Gulf War—August 2, 1990, through a date to be prescribed by Presidential proclamation of war.

38 C.F.R. § 3.2 (2001). VETERANS BENEFITS MANUAL, *supra* note 3, at 35-36.

169. 38 U.S.C.S. § 5303A(b)(1). Veterans who fall within this category must have served at least "24 months of continuous active duty, or the full period for which such person was called or ordered to active duty." *Id.*

served on active duty for ninety days or more at any time during the war are also eligible.[170] Peacetime veterans who served honorably for a period of more than 180 days after 25 July 1947 also qualify.[171] Current active duty members are eligible after serving on continuous active duty for ninety days.[172]

The VA guarantees veterans an entitlement of up to $60,000 for purchasing homes with mortgage loans over $144,000.[173] Smaller entitlements are also available and vary with the total loan amount.[174] There are no restrictions on the loan amounts, as long as the loans do not exceed the reasonable value of the property.[175] A veteran who has previously received a VA loan may have a remaining entitlement for a second home purchase.[176] A new purchaser may assume a VA loan, but the VA will not restore the selling veteran's entitlement unless the purchasing veteran agrees to use his entitlement for the purchase.[177]

E. Life Insurance

The DOD oversees two insurance programs on behalf of service members and veterans—Servicemembers' Group Life Insurance (SGLI)[178] and Veterans' Group Life Insurance (VGLI).[179] The SGLI is

170. *Id.* § 3702(a)(2)(D).

171. *Id.* § 3702(a)(2)(c).

172. FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS, *supra* note 117, at 36. "Until the Gulf War era is ended by law or Presidential Proclamation, persons on active duty are eligible after serving on continuous active duty for 90 days." *Id.*

173. 38 U.S.C.S. § 3703(a)(1)(A)(i)(IV).

174. *Id.* § 3703(a)(1)(A)(i).

175. FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS, *supra* note 117, at 37. The veteran must also certify that he intends to live in the home secured by the VA-guaranteed loan. *Id.* The maximum allowable term on any VA guaranteed home loan is thirty years and thirty-two days. *Id.*

see U.S. Dep't of Veterans' Affairs, *Home Loan Guaranty Services—Fact Sheet on VA Guaranteed Loans* (June 18, 2001), *at* http://www.homeloans.va.gov/factsheet.htm. "There is no maximum VA loan but lenders will generally limit VA loans to $240,000." *Id*.

176. *Id*. at 37. The available amount is the difference between the veteran's total entitlement and the amount of entitlement previously used. *Id.*

177. *Id*.

178. 38 U.S.C.S. §§ 1965-1980.

179. *Id.* § 1977.

open to active duty members and reservists of the Armed Forces.[180] The VGLI is available to veterans released from active duty.[181]

1. SGLI

Active duty members of the armed forces are presumed insurable at the time of entry upon active duty. Therefore, service members are automatically insured for $250,000 group term coverage under the SGLI.[182] Service members may elect the SGLI coverage in a lesser amount or decline coverage completely.[183] Should a service member elect a lesser amount of the SGLI coverage, however, the service member may be required to prove his insurability before receiving the requested increase in the amount of coverage.[184] The Defense Finance and Accounting Service (DFAS) automatically deducts SGLI premiums from service members' pay.[185] The SGLI provides insurance coverage during active duty and for a 120-day period following separation from service.[186]

2. VGLI

The SGLI may be converted to the VGLI, which is renewable five-year group term coverage of up to $250,000.[187] The VGLI is available to those veterans with SGLI coverage upon release from active duty, and who apply for VGLI within 120 days of separating from active duty.[188] After 120 days, veterans may receive VGLI coverage within one year after termination of the veteran's SGLI policy only upon submission of evidence of insurability and the required premium.[189] Note, however, that totally

180. *Id.* § 1967(a).

181. *Id.* § 1977; *see* U.S. Dep't of Veterans' Affairs, VA Form 29-8283, Claim for Death Benefits (July 1994). Beneficiaries making claims should mail them to SGLI, 212 Washington Street, Newark, N.J. 07102-2999, or call 1-800-419-1473.

182. 38 U.S.C.S. § 1967.

183. *Id.* § 1967(a).

184. *See* Dep't of Veterans' Affairs, *Life Insurance Program—SGLI Frequently Asked Questions* (Mar. 4, 2002), *at* http://www.insurance.va.gov/sglivgli/sglivgli.htm.

185. FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS, *supra* note 117, at 41.

186. 38 U.S.C.S. § 1968(a)(1)(A).

187. *Id.* § 1977(b).

188. 38 C.F.R. § 9.2(b)(1) (2001).

189. FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS, *supra* note 117, at 41.

disabled veterans with SGLI coverage at retirement have up to one year to purchase the VGLI while remaining totally disabled.[190]

The primary argument for converting an SGLI policy to VGLI within 120 days of retirement is that the VGLI will guarantee the insurability of the veteran.[191] This benefit is particularly significant in cases in which the retiring veteran is otherwise uninsurable because of pre-existing illness, disease, or injury suffered while serving on active duty.[192]

IV. Conclusion

Judge advocates should possess a working understanding of the variety of the DOD and VA benefits associated with military retirement. The ability to advise clients in this area of the law equips legal assistance attorneys to provide a value-added service to military members nearing retirement, retired veterans, and family members. This survey of retirement benefits is a tool for judge advocates to successfully answer simple questions about retirement benefits, as well as a good starting point for more in-depth research.

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190. *Id.* There is no "evidence of insurability" requirement for totally disabled veterans who apply for VGLI within one year of retirement. *Id.*

191. *See* U.S. Dep't of Veterans' Affairs, *Life Insurance Program—VGLI Frequently Asked Questions* (Jan. 9, 2002), *at* http://www.insurance.va.gov/sglivgli/vgli%20faq.htm#1.

192. *Id.*

AN EDUCATION IN HOME SCHOOLING

MAJOR MICHAEL D. CARSTEN[1]

I. Introduction

As of 2002, research estimated that between 1.725 million and 2.185 million school-aged children are being home schooled in the United States.[2] Although this number represents a small portion of the school-aged population, it is a one hundred-percent increase from the number of children taught at home a mere fifteen years earlier.[3] Many with no personal involvement with home schooling think it is a fringe educational movement practiced mostly by religious fundamentalists. Although a large number of parents who home school their children are guided in part by religious convictions, others are driven by secular educational philosophies rather than religion.[4]

To the uninitiated, what defines home schooling can be uncertain or even unknown. Although it can take on many different variations, home schooling in its most basic form describes a situation in which parents who

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2. Home School Legal Defense Association, *Homeschooling Research*, *at* http://www.hslda.org/research/faq.asp (last visited Oct. 29, 2003) (explaining that "[h]ome education has constantly grown over the last two decades. The growth rate is 7% to 15% per year").

3. RAY E. BALLMAN, THE HOW AND WHY OF HOMESCHOOLING 15 (1987).

4. Robert J. Grossman, *Home Is Where the School Is*, 46 H.R. MAG. (Nov. 2001), *at* http://www.shrm.org/hrmagazine/articles/1101/default.asp?page=1101grossman.asp.

lack state teaching licenses or certifications choose to instruct their children themselves.[5] This instruction is not conducted in addition to public or private schooling, but rather, as an alternative to these mainstream forms of education. The home schooling parent usually purchases a number of curricula or correspondence courses that are readily available from educational suppliers and retailers. These materials are available for all grades and for any and all subjects that would be taught at the typical public or private school.[6]

Although many believe that home schooling is a relatively new concept in the United States, it is in actuality, the original form of education practiced in this country.[7] From the arrival of the initial settlers during the 1600's and for the next 250 years, home education was the primary form of schooling for the majority of the population.[8] State-sponsored public education, similar to the system that exists today, originated in Massachusetts in the 1840's. It took another sixty years before state-sponsored public education became widespread.[9] "When public schools were formed and compulsory attendance laws were passed throughout the country in the early 1900's, home schooling almost died out. Not until the 1970's was the modern home school movement born."[10]

As the number of home schooled children continues to increase in the United States, "more and more military and Department of Defense (DOD) civilian families are turning to this educational alternative."[11] Numerous reassignments make home schooling "a logical choice in the

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5. CHRISTOPHER J. KLICKA, THE RIGHT CHOICE: THE INCREDIBLE FAILURE OF PUBLIC EDUCATION AND THE RISING HOPE OF HOME SCHOOLING 122 (1992).

6. *Id*. at 202-06.

7. *Id.* at 112. A logical response to such a statement might be that home schooling was the form of education of necessity, not choice. Although that may have been true in the frontier, there was much discussion and many strongly held beliefs about preferred methods of instruction in colonial America. Highly regarded individuals, such as Thomas Jefferson, added fuel to the discussion. Although historians give Thomas Jefferson much credit for developing public education in the Commonwealth of Virginia, he stopped short of making attendance mandatory. On the subject of compulsory state-sponsored public education, he said: "It is better to tolerate the rare instances of a parent refusing to let his child be educated, than to shock the common feelings and ideas by the forcible asportation and education of the infant against the will of the father." SAUL K. PADOVER, JEFFERSON: A GREAT AMERICAN'S LIFE AND IDEAS 169 (1942).

8. *Id.*

9. *Id.* at 115.

10. *Id.* at 112.

11. National Center for Home Education, *Military Home Schooling Overseas Home*, *at* http://www.hslda.org/docs/nche/000000/00000032.asp (last visited Oct. 29, 2003).

military, providing a stable environment for children in the midst of frequent change."[12] These military dependents are receiving home school instruction both within the United States and overseas. As the issues and reporting requirements home schoolers face are unique, the chain of command must be aware of its responsibilities and limitations regarding these military dependents.

First, this article discusses the home school requirements of four states with significant military populations, California, Georgia, North Carolina, and Virginia. It also summarizes common themes in state requirements. Next, it outlines the development of home schooling overseas. This includes the obligations and requirements that exist between the command and service members who choose to home school their children. The article then analyzes what constitutes educational neglect in a home school environment. Finally, the article summarizes key points regarding home schooled children.

II. Home Schooling Within the United States

In one form or another, all fifty states authorize parents to educate their children at home. When a child is a military dependent, the command to which the parent belongs has an interest in ensuring that the military member abides by the rules within the jurisdiction where the child resides.[13] Regardless of whether the child resides on a military installation or in the civilian community, parents must adhere to the applicable state rules regarding home schooling.[14] Because the DOD defers to the state in which the child resides in order to ascertain home school requirements, it is a simple matter to determine the home school guidelines in any particular case. Although researching the statutes for any particular state is a simple matter, encapsulating the requirements across all jurisdictions is another matter. The reason for this difficulty is that there are as many variations to home school requirements as there are states.

Although home schooling is allowed in all jurisdictions, some states place such extreme limitations, controls, or reporting requirements upon it

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12. National Center for Home Education, *Home Schoolers Gain Equal Access to Department of Defense Schools at* http://www.hslda.org/docs/nche/000002/00000258.asp (last visited Sept. 12, 2002).

13. Memorandum, DOD Education Activity, subject: Home Schooling (6 Nov. 2002) [hereinafter Home Schooling Memo, 6 Nov. 2002].

14. *Id.*

that home schooling becomes exceedingly cumbersome, and only the most dedicated parents can comply with the state requirements. In contrast, other jurisdictions, under certain circumstances, impose no constraints or reporting requirements on the practice of home schooling. The home school requirements of four states that contain large military populations, California, Georgia, North Carolina, and Virginia, provide good examples to demonstrate the variance in controls and limitations on home schooling families. The discussion begins with the most restrictive of the four regulatory regimens in California. It then discusses the moderately restrictive systems in Georgia and North Carolina, and ends with a discussion of the least restrictive system, in Virginia, which in some instances places almost no state control over home schooled children.

A. California

Under the California Education Code, "[e]ach person between the ages of [six] and [eighteen] years not exempted under the provisions of this chapter . . . is subject to compulsory full-time education."[15] Three alternatives exist for parents who wish to place their children in an alternative other than a public school environment: private tutors; enrollment in a private full-time day school; or an arrangement for an independent study program through the local public school district.[16]

If parents elect to hire a private tutor, the tutor must possess California teaching credentials for the grades taught.[17] A parent with state teaching credentials can act as the tutor under this option. The tutor's instruction must be for at least three hours per day, for 175 days each calendar year, and must occur between the hours of eight o'clock a.m. and four o'clock p.m.[18] The instruction must be in English and must consist of the subjects required in the public schools.[19]

Private full-time day schools are another alternative to enrollment in the public education system. This instruction must also be in English and must consist of the subjects the public schools teach.[20] Although the instructors at a private full-time day school need not possess California

15. CAL. EDUC. CODE § 48200 (2003).
16. *Id.* §§ 48200, 48220, 48224, 51745.
17. *Id.* § 48224.
18. *Id.*
19. *Id.*
20. *Id.* § 48222.

teaching credentials, they must be "persons capable of teaching."[21] To qualify as a private school, the school administration must file an annual Private School Affidavit[22] with the California Department of Education.[23]

The final alternative for parents who wish to educate their children in a setting other than the traditional public education classroom is an independent study program.[24] Unlike the other educational options, which qualify as exemptions to mandatory public school enrollment, independent study does not. Instead, independent study is merely an alternative form of public education that is conducted and administered by the local school district outside the normal classroom environment.[25]

B. Georgia

Georgia's rules for home education are typical of the majority of states. Unlike California, the majority of jurisdictions permit parents with high school diplomas or general equivalency diplomas (GED) to give home school instruction.[26] Jurisdictions like Georgia, while expanding upon whom may home school, require parents to do three things: (1) provide instruction in specified subjects; (2) report the child's educational progress to appropriate state officials; and (3) have the child take standardized achievement tests.[27]

Under Georgia law, children "between their sixth and sixteenth birthdays shall [be] enroll[ed and sent] . . . to a public school, private school, or a home study program."[28] Regardless of whether a child is enrolled in

21. *Id.*

22. *Id.* Most California home schooling families operate under this option. The current position of the California Department of Education (CDE), however, is that non-credentialed parents who exclusively home school their children are operating outside the law, even when the parents file the Private School Affidavit with CDE. California Dept. of Educ., *Home Schooling*, *at* http://www.cde.ca.gov/privateschools/homeschool.html (last visited Jan. 19, 2003). A plain reading of the applicable code section does not appear to conform to the meaning the CDE assigns to it. CAL. EDUC. CODE § 48222. Time will tell whether a home schooling family is prosecuted, let alone successfully, for truancy under CDE's interpretation of the Code.

23. CAL. EDUC. CODE § 48222.

24. *Id.* § 51745.

25. *Id.*

26. *Id.* § 48224; GA. CODE ANN. § 20-2-690(c)(3) (2002).

27. GA. CODE ANN. §§ 20-2-281(a), 20-2-690(b)(4), 20-2-690(c)(5), (6), (7) (2002).

28. *Id.* § 20-2-690.1 (2002).

public school, private school, or a home study program, an academic year consists of at least 180 days of instruction.[29] The public or private school or home study program must provide, at the very minimum, instruction in reading, language arts, mathematics, social studies, and science.[30]

To be eligible to provide a home study program, the "teaching parent" must have obtained at least a high school diploma or a GED equivalent.[31] "Parents or guardians may teach only their own children in the home study program . . . but the parents or guardians may employ a tutor who holds at least a baccalaureate college degree to teach such children."[32] Parents electing to provide a home study program must submit a declaration of intent to give home school instruction to the local public school superintendent thirty days after the establishment of a home study program, and by 1 September every year thereafter.[33] A home study program day must consist of at least four and one-half hours.[34] Parents must maintain attendance records and submit them to the local public school superintendent each month.[35] Parents must prepare an annual progress report for each child enrolled in a home study program,[36] and retain the annual progress report for three years.[37] Children enrolled in a home study program must take a national standardized achievement test every three years, commencing with the end of third grade.[38] Although standardized achievement tests are required, there is no requirement that the parents submit the test scores to the public school superintendent.[39]

C. North Carolina

North Carolina imposes fewer restrictions on home education than California and Georgia. Under North Carolina law, children between the ages of seven and sixteen must be enrolled in a state-authorized education program.[40] State law defines a home school as a nonpublic school in which

29. *Id.* §§ 20-2-168(c)(1), 20-2-690(b)(3), 20-2-690(c)(5).
30. *Id.* §§ 20-2-281(a), 20-2-690(b)(4), 20-2-690(c)(4).
31. *Id.* § 20-2-690(c)(3).
32. *Id.*
33. *Id.* § 20-2-690(c)(2).
34. *Id.* § 20-2-690(c)(5).
35. *Id.* § 20-2-690(c)(6).
36. *Id.* § 20-2-690(c)(8).
37. *Id.*
38. *Id.* § 20-2-690(c)(7).
39. *Id.*
40. N.C. GEN. STAT. § 115C-563 (2003).

one or more children of not more than two families receive instruction from parents, legal guardians, or members of either household.[41] The persons providing academic instruction in a home school shall possess at least a high school diploma or its equivalent.[42] Parents electing to home school their children must make an election to operate as either a private church school or as qualified nonpublic school.[43] Regardless of which option the home school elects, a nationally standardized test must be administered to all third, sixth, and ninth graders.[44] The selected standardized test must measure achievement in English grammar, reading, spelling, and mathematics.[45] All eleventh graders, regardless of the educational system the parents elect, must take a nationally standardized high school competency test.[46] The selected test must measure competency in verbal and quantitative areas.[47]

What makes North Carolina one of the least restrictive jurisdictions for home-based education is that it: (1) permits different families to home school together; (2) provides for minimal interaction with state officials; and (3) does not require parents to provide instruction in specified subjects.[48] Additionally, North Carolina establishes a separate category for those who desire to establish a Private Church School.[49]

D. Virginia

The home-based educational requirements in Virginia are a study of contrasts. In many ways, as discussed below, the commonwealth is restrictive. Virginia, however, also allows families to opt out of the public education system for religious reasons.[50] If a family qualifies for this exemption,

41. *Id.*
42. *Id.* § 115C-564.
43. *Id.*
44. *Id.* §§ 115C-548, 115C-557.
45. *Id.*
46. *Id.* §§ 115C-550, 115C-558.
47. *Id.*
48. *Id.* § 115C-563.
49. *Id.* § 115C-564.
50. VA. CODE ANN. § 22.1-254 (2002).

the commonwealth places no guidelines or controls upon the education of the child.[51]

Under the Virginia Code, children between the ages of five and eighteen must enroll in and attend a public school, private school, or other state-authorized educational program.[52] If the parent of a child under the age of six believes the child is not prepared to attend school, however, the parent can delay the child's attendance for one year.[53] Parents may elect to provide home school education in lieu of school attendance provided the teaching parent: (1) possesses a baccalaureate degree from an accredited institution of higher learning; (2) is qualified as a teacher by the Board of Education; (3) uses a curriculum that has been pre-approved by the Superintendent of Public Instruction; or (4) uses a curriculum or program of study that includes the state's Standards of Learning for mathematics and language arts, and shows evidence that the parent is capable of providing an adequate education for the child.[54] Home schooling parents must notify the Superintendent annually by 15 August if they intend to home school their children; the notice must include evidence satisfying one of the four criteria.[55] By 1 August of the year after the first year of home school instruction, the parent must also provide either of the following:

> (i) evidence that the child has attained a composite score in or above the fourth stanine [23rd percentile] on a battery of achievement tests . . . or
> (ii) an evaluation or assessment which . . . indicates that the child is achieving an adequate level of educational growth and progress.[56]

In addition to the home schooling options and requirements previously stated, "[a]ny pupil who, together with his parents, by reason of bona fide religious training or belief is conscientiously opposed to attendance at

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51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* § 22.1-254.1.
55. *Id.*
56. *Id.*

school" is exempt from the requirements placed upon the four other home school options, above.[57]

E. Common Themes in State Requirements

A comparison of the four states reveals that requirements for home-based education are diverse. Despite this diversity, there are several common requirements the commander should understand, regardless of jurisdiction. States generally specify compulsory education for a specified age group and generally permit education outside of the traditional public or private school environment. Although all states allow for some form of home-based education in lieu of enrollment in a public or private school, the requirements vary from state-to-state. State law, however, generally imposes the following limitations: (1) a requirement to inform the appropriate state or local officials of the intent to home school;[58] (2) a requirements to declare which state-authorized exemption the parents cite as a legal basis for home-based education;[59] (3) a requirement that the teaching parents achieve specific educational levels or obtain state teaching credentials;[60] (4) a minimum number of days that the home-based education must be in session;[61] (5) a requirement that the parents include certain core subjects in the home based curriculum;[62] and (6) a requirement that the home schooled children participate in standardized achievement testing, or some other form of periodical review to assess academic progress or proficiency.[63] Finally, states that permit home schooling under religious exemptions generally do not extend their usual regulatory requirements to such cases.[64]

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57. *Id.* § 22.1-254.

58. GA. CODE ANN. § 20-2-690(c)(2) (2002); N.C. GEN. STAT. § 115C-564 (2003); VA. CODE ANN. § 22.1-254.1 (2002).

59. GA. CODE ANN. § 20-2-690(c)(2); N.C. GEN. STAT. § 115C-564; VA. CODE ANN. § 22.1-254.1.

60. CAL. EDUC. CODE § 48224 (2003); GA. CODE ANN. § 20-2-690(c)(3); N.C. GEN. STAT. § 115C-564; VA. CODE ANN. § 22.1-254.1.

61. CAL. EDUC. CODE § 48224; GA. CODE ANN. § 20-2-690(c)(5).

62. CAL. EDUC. CODE § 48224; GA. CODE ANN. § 20-2-690(c)(4); VA. CODE ANN. § 22.1-254.1.

63. GA. CODE ANN. § 20-2-690(c)(7); N.C. GEN. STAT. §§ 115C-548, 115C-550, 115C-557, 115C-558; VA. CODE ANN. § 22.1-254.1.

64. VA. CODE ANN. § 22.1-254.

III. Home Schooling Overseas

The decision to home school military dependents overseas presents issues not encountered with home schooling within the United States. The main concern of home schooling stateside is compliance with applicable state laws, but overseas home schooling must address the interplay between U.S. statutes, the DOD Education Activity (DODEA), DOD directives, and the applicable status of forces agreement[65] the United States has with the host nation.

A. History

Although the DOD has operated schools for dependents overseas for over fifty years,[66] the Overseas Defense Dependents' Education Act of 1978 directed the Secretary of Defense to create a unified education system for military dependents located overseas.[67] Specifically, the Act required "[t]he Secretary of Defense [to] establish and operate a program (hereinafter in this chapter referred to as the 'defense dependents' education system') to provide a free public education through secondary school

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65. The Status of Forces Agreements (SOFAs) the United States has with Germany, Japan, and South Korea do not exempt military dependents from the application of host nation civil law. Status of Forces in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531, 481 U.N.T.S. 262; Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652; Mutual Defense Treaty Between the United States of America and the Republic of Korea, July 9, 1966, U.S.-Rep. of Korea, 17 U.S.T. 1677. By implication, military dependents should be bound by the education requirements of host nations. For example, Article XVI of the Japanese Constitution states, "All people shall have the right to receive an equal education correspondent to their ability, as provided by law. All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free." JAPAN CONST. art. xxvi. Education officials related, however, that foreign nationals are not included within the meaning of "people" under Article XXVI. Interview with Captain James Weirick with Chief, Education Section, Ishikawa City Office, Okinawa, Japan (Aug. 19, 2003). Thus, foreign nations are exempt from the Japanese compulsory education requirements.

66. U.S. Dep't of Defense Education Activity, *DODEA Facts*, *at* http://odedodea.edu/communications/dodeafacts2002.htm (last visited Aug. 17, 2003) [hereinafter *DODEA Facts*]. "Shortly after the end of World War II, the United States military established schools for the children of its service men and women stationed in Europe and the Pacific. Schools for the children of military members stationed at various bases in the United States were already well established." *Id.*

67. Overseas Defense Dependents' Education Act of 1978, 20 U.S.C.S. § 921(a) (LEXIS 2003).

for dependents in overseas areas."[68] The Act also stated that "[t]he Secretary shall ensure that individuals eligible to receive a free public education under [this Act] receive an education of high quality."[69] The Director of the DODEA was given the responsibility for the day-to-to day operations of the defense dependents' education system.[70] "The defense dependents' education system is operated through the field activity of the DOD known as the DODEA.[71]

The Act resulted in the creation of the DOD Dependents' Schools (DODDS).[72] The mission assigned DODDS was to:

> provide, pursuant to [The Defense Dependents' Education Act of 1978] and DOD Directive 1342.13, a free public education of high quality from pre-kindergarten through grade twelve for eligible minor dependents of U.S. military and civilian personnel of the [DOD] stationed overseas; and . . . to provide a free appropriate education for children with disabilities, ages 3 through 21; and . . . to provide a community college program for eligible students in Panama.[73]

In its original form, the Act was silent about the issue of compulsory enrollment in the defense dependents' education system.[74] Additional guidance was needed to establish the extent of the DODEA's role in the education of overseas dependents. It was not initially clear whether attendance was mandatory in the defense dependents' education system; a DOD directive clarified this question: "DOD dependent students may be provided education in approved non-DOD dependent schools or may receive correspondence courses at U.S. Government expense only at locations

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68. *Id.*

69. *Id.* § 921(b)(1).

70. *Id.* § 922(a).

71. Until 1994, there were two separate but parallel systems to educate dependent children, "the Department of Defense Dependents Schools (DODDS) overseas, and the Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS) in the United States. In 1994, the two systems were brought together under an umbrella agency, the Department of Defense Education Activity (DODEA)." *DODEA Facts*, *supra* note 66.

72. U.S. DEP'T OF DEFENSE, DIR. 1342.6, DEPARTMENT OF DEFENSE DEPENDENTS SCHOOLS (DODDS) (17 Oct. 1978), *cancelled by* U.S. DEP'T OF DEFENSE, DIR. 1342.6, DEPARTMENT OF DEFENSE DEPENDENTS SCHOOLS (DODDS) (13 Oct. 1992) [hereinafter DOD DIR. 1342.6].

73. *Id.* para. 3.

74. 20 U.S.C.S. §§ 921-932.

where DOD dependents schools are not available or are operating at maximum capacity."[75] The directive also gives overseas commanders the responsibility to inform inbound personnel of all aspects of DODDS, to include the use of non-DODDS schools.[76] These provisions establish that the defense dependents' education system was not intended to be the exclusive vehicle for the education of overseas dependents.[77]

In 1987, President Reagan issued Executive Order 12,606, addressing the formulation of family policies by the Executive Department and its agencies.[78]

> In formulating and implementing policies and regulations that may have significant impact on family formation, maintenance, and general well-being, Executive departments and agencies shall, to the extent permitted by law assess such measures in light of the following questions:
> (a) Does this action by government strengthn [sic] or erode the stability of the family and, particularly, the marital commitment?
> (b) *Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?*
> (c) *Does this action help the family perform its functions, or does it substitute governmental activity for the function?*
> (d) Does this action by government increase or decrease family earnings? Do the proposed benefits of this action justify the impact on the family budget?
> (e) *Can this activity be carried out by a lower level of government or by the family itself?*
> (f) What message, intended or otherwise, does this program send to the public concerning the status of the family?

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75. U.S. DEP'T OF DEFENSE, DIR. 1342.13, ELIGIBILITY REQUIREMENTS FOR EDUCATION OF MINOR DEPENDENTS IN OVERSEAS AREAS para. 5.1.3 (8 July 1982) [hereinafter DOD DIR. 1342.13].

76. *Id.* para. 6.4-6.4.4. The DODDS Manual also discusses the same responsibility, stating that installation commanders shall "[e]ncourage all eligible dependents who have not completed high school to enroll in a DoDDS approved education program. If a DoDDS program is unsuitable to the parents, the installation commander shall encourage the parents to enroll their dependents in an alternate program." U.S. DEP'T OF DEFENSE, MANUAL 1342.6-M, ADMINISTRATIVE AND LOGISTIC RESPONSIBILITIES FOR DOD DEPENDENTS SCHOOLS para. C1.4.3.6. (11 Aug. 1995).

77. DOD DIR. 1342.13, *supra* note 75, paras. 5.1.3, 6.4-6.4.4.

78. Exec. Order No. 12,606, 52 Fed. Reg. 34,188 (Sept. 9, 1987).

> (g) What message does it send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society?[79]

The impact of Executive Order 12,606 on home schooling is that it "imposes an obligation on the military departments and commanders to carefully consider any policy or regulatory action that would tend to erode the rights and authority of parents in the education of their children."[80] A subsequent directive repeated the spirit and intent of Executive Order (EO) 12,606. The directive stated that "[f]amily policy-making criteria, as prescribed in [EO] 12606 be followed, to the extent permitted by law, in formulating and implementing policies that have significant impact on DOD personnel and their families."[81] Consistent with its restatement of Executive Order 12,606, the directive states, "DoD personnel, both married and single, bear primary responsibility for the welfare of their families."[82]

B. Recent Developments

Congress has taken action to ensure that the DODDS supports those who choose home education. The Armed Forces Committee report that accompanied the National Defense Authorization Act for Fiscal Year 2000 addressed the issue of home schooling overseas.

> The committee believes that military families who decide to home school their children should be supported by Department of Defense Overseas Schools (DODDS) to the extent possible . . . . The committee is aware that the Department of Defense Education Activity (DODEA) claims that it fully supports home schooling. DODEA's published material[83] and the actual experience of some parents[84] belie that claim, however. The committee believes that DODEA should take a more proactive approach in establishing a clear policy and providing parents information about available DODEA support for home schooling overseas, rather than merely directing parents to the over-

79. *Id.* (emphasis added).

80. Memorandum, Office of the Judge Advocate General, U.S. Army, to General Counsel, U.S. Dep't of Defense, subject: The Overseas Commanders' Responsibility Regarding Home Schooling (12 July 2002) [hereinafter The Overseas Commanders' Responsibility Regarding Home Schooling Memo].

81. U.S. DEP'T OF DEFENSE, DIR. 1342.17, FAMILY POLICY para. 4.1 (30 Dec. 1988).

82. *Id.* para. 4.3.

> seas commander. To that end, the committee directs the Secretary of Defense to develop clear policy on support for home schooling overseas. That policy, which would officially implement what DODEA representatives state is actual practice, should specify that home schooled students may be supported with library services, music, sports, single classes, and other programs without having to actually enroll in DODDS.[85]

Responding to the report issued by the House Armed Services Committee, the Interim Director, DODEA, implemented new policy for home schooling.

> It is the policy of the Department of Defense Education Activity (DODEA) to neither encourage nor discourage sponsors from home schooling their minor dependents. DODEA recognizes that home schooling is a sponsor's right and can be a legitimate form of education for their dependents. . . .

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83. The Committee is most likely referring to the following provision:

> DODDS does not have a policy favoring or disfavoring home schooling. The Defense Dependents Education System Act imposes on DODDS the duty to provide a "free appropriate public education to DOD dependents overseas who are 'command sponsored.'" However, except as required by foreign law, DOD dependents are required by law to enroll in our schools. . . . When a family declines to enroll a dependent in our schools, the installation commander may call the family to account for this decision. The commander controls access to the military installation, and whether the overseas dependents are "command sponsored" or not, the commander may predicate continued logistical support (e.g., exchange privileges) for the sponsor's school age dependents on enrollment in some school program that serves the interest of the child. Hence, the installation commander may require attendance at our school, some alternative school approved by DODDS, or some alternative program acceptable to the commander as a condition of continued "command sponsorship."

OFFICE OF DEPENDENTS SCHOOLS, MANUAL. 2948.1, FAMILY POLICY para. 24 (7 Mar. 1990).

84. On occasion, overseas installation commanders have attempted to prohibit home schooling, mandating that all dependent children not attending a DODDS school or a DODDS-approved alternative school be immediately enrolled in a DODDS school. National Center for Home Education, *Military Home Schooling Overseas*, *at* http://www.hslda.org.docs/nche/000000/00000032.asp (last visited Dec. 9, 2002).

85. H.R. REP. NO. 106-162 (1999).

> Upon request, DODEA shall provide dependents who are home schooled with library services and, consistent with existing regulations and policy, single classes, special education services, and participation in extra-curricular and interscholastic activities such as music and sports programs. Home schoolers who choose to use DODEA services must complete a registration form. When classes carry prerequisites for admission, verification of competence must also be included.
>
> DODEA does not provide home schooling materials, such as textbooks, workbooks, software, etc., to DOD sponsors wishing to home school their dependents. Obtaining these materials is the responsibility of the DOD sponsor. However, DODEA schools will loan material to sponsors if those materials would be helpful to the home school program.[86]

Not satisfied with DODEA's 27 March 2000 policy memorandum concerning home schooling, Congress used the National Defense Authorization Act for Fiscal Year 2002 to attach an amendment to the Overseas Defense Dependents' Education Act of 1978.[87]

> (d) Auxiliary services available to home school students
>
> (1) A dependent who is educated in a home school setting, but who is eligible to enroll in a school of the defense dependents' education system, shall be permitted to use or receive auxiliary services of that school without being required to either enroll in that school or register for a minimum number of courses offered by that school. The dependent may be required to satisfy other eligibility requirements and comply with standards of conduct applicable to students actually enrolled in that school who use or receive the same auxiliary services.
>
> (2) For purposes of paragraph (1), the term "auxiliary services" includes use of academic resources, access to the library of the school, after hours use of school facilities, and participation in music, sports, and other extracurricular and interscholastic activities.[88]

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86. Memorandum, DOD Education Activity, subject: Home Schooling (27 Mar. 2000) [hereinafter Home Schooling Memo, 27 Mar. 2000].

87. 20 U.S.C.A. § 926(d) (West 2002).

Upon the President's signing of the Fiscal Year 2002 Authorization Act, the White House issued the following statement:

> The Act provides important improvements in the quality of life for the members of our Armed Forces, who have dedicated their lives to the defense of their fellow citizens . . . . The legislation . . . addresses important needs of military families, such as improved job training and education opportunities for military spouses and access for home schooled children of military families to facilities and programs of Department of Defense dependent schools.[89]

Recently, DODEA issued a new policy memorandum concerning home schooling that "supercedes all previous policies issued by the Department of Defense Education Activity (DODEA)."[90] Like its predecessor,[91] the policy neither encourages nor discourages DOD sponsors from home schooling their dependents.[92] Unlike its predecessor, however, the new policy memo provides detailed discussion concerning the degree of support DODEA will provide to home schooled dependents, to include an attachment that addresses "Frequently Asked Questions" concerning: (1) what constitutes an "auxiliary service;" and (2) what are the eligibility and enrollment requirements before a home schooler can partake in an "auxiliary service."[93] Specifically, the policy memo does not require home schooled dependents to enroll with the DODDS to obtain auxiliary services, but merely to prove "eligibility."[94] A sponsor can establish eligibility by providing a copy of his orders and with some proof of the dependent's identity, such as a birth certificate, passport, or DOD identification card.[95] The process of requiring home schoolers to prove eligibility before using auxiliary services, but not requiring home schoolers to complete an enrollment form, represents the balancing of two competing interests. The 2002 Amendment to the Overseas Defense Dependents' Education Act of 1978 placed new requirements upon DODDS schools and overseas commanders. Regardless of whether Congress intended to

88. *Id.*

89. Press Release, The White House, Statement by the President (28 Dec. 2001), *available at* http://www.whitehouse.gov/news/releases/2001/12/print/20011228-4.html.

90. Home Schooling Memo, 6 Nov. 2002, *supra* note 13.

91. Home Schooling Memo, 27 Mar. 2000, *supra* note 86.

92. Home Schooling Memo, 6 Nov. 2002, *supra* note 13.

93. *Id.*

94. *Id.*

95. *Id.*

do so, opening DODDS auxiliary services to home schooled dependents has changed resource requirements. Not only do DODDS schools have to make resources available to DODDS enrollees, but also to home schoolers who may elect to use DODDS auxiliary services. By requiring proof of eligibility, the DODEA obtains data concerning the services and funds it must commit to support home schoolers using auxiliary services; this system also allows the DODDS to avoid offending some home schooling sponsors who view the completion of a more detailed enrollment form to be objectionable.[96]

IV. Child Neglect

A discussion of home schooling would not be complete without addressing the issues of child neglect and educational neglect. According to the U.S. Department of Health and Human Services (HHS), there is no generally accepted definition of child neglect.[97]

> Differences in definitions of child neglect in State laws and in community standards reflect significant variations in the judgments of professionals and nonprofessionals concerning what constitutes child neglect. Some State statutes emphasize the condition of the child without any mention of parental fault; others stress the condition of the child resulting from parental actions or fault. Some communities have determined that no child under age 10 should be left at home alone, while other communities "permit" working parents to leave their children unsupervised after school.[98]

Education neglect is an identified form of child neglect. Individuals and state agencies have sometimes alleged educational neglect for the following reasons: (1) sincere concern for the child; (2) opposition to the right to

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96. *In the Trenches: Access for Military Students Clarified*, HOME SCH. CT. REP., Nov./Dec. 2002, at 27 (Home School Legal Defense Association, Purcellville, VA).

97. U.S. Dep't of Health and Human Serv., *Child Neglect: A Guide for Intervention*, *at* http://www.calib.com/nccanch/pubs/usermanuals/neglect/define.cfm (last visited Nov. 17, 2002) [hereinafter HHS Web Site].

98. *Id.*

home school; or (3) hostility toward the family, even when the state knew the family was actively engaged in home schooling.[99]

A. What is Educational Neglect?

The HHS identifies three forms of educational neglect: (1) failure to enroll; (2) permitted chronic truancy; and (3) inattention to special education needs.[100] Failure to enroll is defined as "[f]ailure to register or enroll a child of mandatory school age, causing the school-aged child to remain at home for nonlegitimate reasons (e.g., to work, to care for siblings, etc.) an average of at least 3 days a month."[101] Permitted chronic truancy is categorized as "[h]abitual truancy averaging at least 5 days a month classifiable under this form of maltreatment if the parent/guardian ha[s] been informed of the problem and ha[s] not attempted to intervene."[102] Inattention to special education needs is identified as the "[r]efusal to allow or failure to obtain recommended remedial educational services, or neglect in obtaining or following through with treatment for a child's diagnosed learning disorder or other special education need without reasonable cause."[103]

Home-based education is most susceptible to claims of education neglect under the first form identified by the HHS—failure to enroll. The other two forms of educational neglect have minimal applicability to a family that is actively engaged in home schooling. Accordingly, families can avoid allegations of educational neglect by understanding the home school enrollment requirements for their jurisdiction. In addition to knowing the state requirements, the best way for home schooling families to avoid allegations of educational neglect is to meet all state reporting deadlines. These deadlines typically include the date by which the family must: (1) inform state officials of their intent to home school; (2) report their children's academic progress to state officials; (3) have their children take

99. Home School Legal Defense Association News, *Colorado Home School Family Charged with Educational Neglect*, *at* http://www.hslda.org/hs/state/CO/200207090.asp?PrinterFriendly=True (last visited Nov. 17, 2002).

100. HHS Web Site, *supra* note 97.

101. *Id.*

102. *Id.*

103. *Id.*

standardized achievement tests; and (4) submit the results of the standardized test to state officials.

B. Department of Defense and Service Definitions

The DOD defines educational neglect[104] as "[a]llowing for extended or frequent absence from school, neglecting to enroll the child in school, or preventing the child from attending school for other than justified reasons (e.g., illness, inclement weather)."[105] The Army and Marine Corps Family Advocacy Programs are unclear as to whether educational neglect rises to the level of child abuse or neglect. Both, however, describe educational neglect merely as a potential indicator of child abuse or neglect.[106] The Navy defines neglect as "[a]ctions or omissions by a parent, guardian, or caretaker, which includes [sic], but is not limited to, deliberate or negligent withholding or deprivation of necessities (nourishment, shelter, clothing, and health care), lack of adequate supervision, emotional or educational neglect, and abandonment."[107] The Navy specifically refers to *DOD Directive 6400.2* for a definition of educational neglect.[108] Unlike the other services, the Air Force does not does not attempt to define or categorize abuse or neglect. Instead, the Air Force Family Advocacy Pro-

104. This same instruction defines child abuse or neglect as "[t]he physical injury, sexual maltreatment, emotional maltreatment, deprivation of necessities, or other maltreatment of a child [by someone] responsible for the child's welfare, under circumstances that indicate that the child's welfare is harmed or threatened. The term encompasses both acts and omissions on the part of a responsible person." U.S. DEP'T OF DEFENSE, INSTR. 6400.2, CHILD AND SPOUSE ABUSE REPORT para. E2.A2.8.a (10 July 1987) [hereinafter DOD INSTR. 6400.2].

105. *Id.* para. E2.A2.13.d(7).

106. In establishing indicators of possible child abuse, the Army and Marine Corps adopt identical language. "Neglect [that] tends to be chronic in nature and involves inattention to the child's minimal needs for nurturing, food, clothing, shelter, medical care, dental care, safety or education." U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM para. 3-5e (1 Sept. 1995); U.S. DEP'T OF NAVY, MARINE CORPS ORDER P1752.3B, MARINE CORPS FAMILY ADVOCACY PROGRAM STANDARD OPERATING PROCEDURES app. B, para. 2 (1 July 1994).

107. OFFICE OF THE CHIEF OF NAVAL OPERATIONS, INSTR. 1752.2A, FAMILY ADVOCACY PROGRAM encl. 1, para. d (17 July 1996).

108. *Id.*

gram uses the word "maltreatment" as "[a] general term [to] encompass[] child abuse or neglect and spouse abuse or neglect."[109]

The common thread running through the service specific regulations on abuse and neglect is that no additional guidance exists. Therefore, the definition of educational neglect in *DOD Directive 6400.2* is the definition that applies to questions of educational neglect.[110] The DOD's definition of educational neglect requires non-enrollment in school or extended, frequent or unjustified absences from school.[111] As the U.S. Code[112] and DODEA[113] have accepted home schooling as "a legitimate alternative form of education,"[114] the fact that a family is engaged in a home schooling program cannot be the basis of an investigation for educational neglect within the DOD.[115]

V. Recommendations

Over the past thirty years, the phrase "military readiness" has changed from focusing on issues such as whether a soldier has the proper tools, equipment, training, and skills to perform assigned duties, to encompassing a broader inquiry. In addition to factors that were identified with mil-

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109. U.S. DEP'T OF AIR FORCE, INSTR. 40-301, FAMILY ADVOCACY attachment 1 (1 May 2002).

110. DOD INSTR. 6400.2 para. E2.A2.13.d(7), *supra* note 104.

111. *Id.*

112. 20 U.S.C.S. § 926(d) (LEXIS 2002).

113. Home Schooling Memo, 6 Nov. 2002, *supra* note 13.

114. *Id.*

115. A related issue, but beyond the scope of this article, is whether authorities can or should take any action if some evidence suggests that a family claiming that it is home schooling is not actively engaged in home based education.

> Generally, the overseas, installation commander has the discretion to revoke . . . privileges for appropriate cause. In cases of . . . educational neglect or failure to supervise it may be appropriate for the overseas, installation commander to revoke some or all of these privileges to remedy the situation. The commander . . . may [also] order the advance return of the civilian family members of soldiers and civilian employees to the United States if the commander determines that the dependent's continued presence would be prejudicial to the order, morale, and discipline of the command.

The Overseas Commanders' Responsibility Regarding Home Schooling Memo, s*upra* note 80.

itary readiness in the past, the term now includes matters such as providing adequate recreational activities, improving housing, and providing a quality environment for military dependents.[116] A portion of this focus on military dependents encompasses the educational opportunities afforded the children of service members. After the enactment of the Overseas Defense Dependents' Education Act of 1978, the DODEA's focus, for the first twenty years, was on providing a high quality education for military dependents through the DODDS and DDESS systems. With DODEA's congressionally mandated policy changes and the 2002 Amendment of the Overseas Defense Dependents' Education Act, the breadth of DODEA's mission has expanded to the point that DODEA now recognizes home schooling as a legitimate educational choice and has an affirmative duty to support those who home school.

State regulations of home schooling differ widely but contain common elements. Commanders must understand the fundamentals of these state regulations, as well as the impact of recent legislation, and how both have changed the responsibilities they share with the DODEA to support home schooled dependents. The key point regarding state regulations is that home schooling programs must comply with the regulations of the state in which the child resides, regardless of whether the home is located on or off the military installation.[117] Most state regulations specify an age range for compulsory education, a minimum number of hours of instruction, specific required subjects, standardized testing requirements, authorized alternatives to public education, and notification requirements. Under these notification requirements, parents must notify state officials before initiating a home schooling program, which exemption to the state's compulsory public education requirement they intend to invoke, what specific educational level or other qualifications they themselves possess. Neither the DODEA nor host nations regulate or restrict U.S. service members who choose to home school their dependents overseas. Recent legislation also gives the DODEA and installation commanders an affirmative obligation to support to home schooled dependents with auxiliary services. New DOD standards also clarify that home schooling does not constitute educational neglect.

Finally, DODEA current policy of proving eligibility as a prerequisite to partaking in auxiliary services is not so unduly burdensome so as to

116. Naval Research Advisory Committee, *Quality of Life*, *at* http://nrac.onr.navy.mil/webspace/exec_sum/01qol.html (last visited Mar. 25, 2003).

117. Home Schooling Memo, Nov. 2002, *supra* note 13.

erode upon the authority and rights of parents in the education of their children.[118] Such data enables the command and DODEA to keep records of the number of home schooled dependents within the command, or area, enabling accurate resource projections.[119]

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118. Exec. Order No. 12,606, 52 Fed. Reg. 34,188 (Sept. 9, 1987).
119. 20 U.S.C.S. § 926(d) (LEXIS 2003).

THE OFFICER PROMOTION RE-LOOK PROCESS:

A PRACTITIONER'S GUIDE TO SPECIAL SELECTION BOARDS

MAJOR EDWARD K. (TAD) LAWSON IV[1]

As a legal assistance attorney at a small Army installation, you are scheduled to meet with three officers recently nonselected for promotion: Captain Latoer, Major Correction, and Lieutenant Colonel Leftout. Each officer is seeking advice on his or her promotion re-look options. Since you are unfamiliar with this issue, you scan your Basic Course materials frantically looking for any relevant information to help you assist them. You find nothing. Do not panic; this article can help.

I. Introduction

The mission of officer promotion selection boards is to recommend qualified officers for promotion. Conversely, selection boards also identify those who are not qualified for advancement. Occasionally, due to an administrative or process error, a board will not recommend an officer for promotion who is otherwise qualified. Accordingly, a second special

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selection system exists to reconsider officers for promotion who can demonstrate that some mistake caused the original board to nonselect them.[2] As in the above legal assistance scenario, nonselected officers may seek legal advice from a judge advocate concerning this "re-look"[3] process. The purpose of this article is to provide the practitioner with a guide to the Army's officer promotion re-look system.

The engine of this re-look process is the Special Selection Board (SSB).[4] Congress created the SSB in 1981 as a part of the Defense Officer

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2. Generally, the next regularly convened promotion board for the same competitive category and rank will reconsider any officer previously nonselected for promotion. If, however, an officer is twice nonselected for promotion (to captain, major, or lieutenant colonel), discharge or release from the service or retirement, if eligible, may be the result. U.S. DEP'T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS para. 1-13(a) (30 Nov. 1994) [hereinafter AR 600-8-29] (stating that discharge or release will be in accordance with "AR 635-120" and "635-100" which have been superceded by U.S. DEP'T OF THE ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (29 June 2002) [hereinafter AR 600-8-24]). The provisions for mandatory discharge or retirement, however, will not apply to captains or majors approved for selective continuation or within two years of voluntary retirement. AR 600-8-29, *infra*, para. 1-14. Also, officers who refuse to continue serving after being chosen for selective continuation may forfeit any right to separation pay. U.S. DEP'T OF DEFENSE, REG. 7000.14 - R, DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATION para. 350202.M (Nov. 18, 2002) (stating that a Regular Army officer who declines continuation for a period of time that would make him or her qualified for retirement is ineligible for separation pay).

3. The term "re-look" appears frequently throughout this article. Although not found in any statute, directive, or regulation, the term exists in military parlance and means "promotion reconsideration." While this article specifically discusses only commissioned officers, its information applies equally to warrant officers.

4. A SSB is defined by U.S. DEP'T OF DEFENSE, DIR. 1320.11, SPECIAL SELECTION BOARDS encl. 1, para. 1.4 (May 6, 1996) [hereinafter DOD DIR. 1320.11].

> A panel of officers convened under Section 628 or 14502 of [Title 10 of the U.S. Code] to evaluate and recommend commissioned officers on the Active Duty List or the Reserve Active Status List and warrant officers on the warrant officer Active Duty List for promotion consideration because the officer was not considered due to administrative error, or following a determination that the action of a board that considered and did not select the officer was contrary to law or involved a material error of fact or material administrative error, or if the board did not have before it for its consideration material information. Special Selection Boards make select and nonselect recommendations, as distinguished from providing advisory opinions as to whether an officer would have been selected had an officer been properly considered by the original board.

Id.

Personnel Management Act (DOPMA).[5] The SSB provisions of that legislation[6] changed the previous promotion re-look board process that involved the non-statutorily created Standby Advisory Board (STAB).[7] Unfortunately for the practitioner, the legislative history of the DOPMA provides little information relative to the creation of the SSB;[8] and since then, the courts have developed very little case law interpreting the stat-

5. The Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980) [hereinafter DOPMA] (codified as amended at 10 U.S.C. § 611 (2000)). Congress enacted similar legislation for the Reserve Component (RC) through the Reserve Officer Personnel Management Act, Pub. L. No. 103-337, 108 Stat. 2921 (1994) [hereinafter ROPMA].

6. DOPMA, Pub. L. No. 96-513, tit. I, § 105, 94 Stat. 2859 (1980) (codified as amended at 10 U.S.C. § 628)). Congress instituted the SSB for the RC by ROPMA, Pub. L. No. 103-337, div. A, tit. XVI, subsect. A, pt. I, 1611, 108 Stat. 2947 (1994) (codified as amended at 10 U.S.C. § 14502 and became effective on 1 October 1996).

7. *See* Major David Bent, *DOPMA: An Initial Review*, ARMY LAW., Apr. 1981, at 3 (noting that DOPMA was the first major revision of military officer personnel law since the Officer Personnel Act of 1974). Specifically for the Army, the SSB replaced the non-statutory Standby Advisory Board (STAB) as the standing promotion re-look mechanism. The key change for the SSB from the STAB is the authority to actually select officers for promotion rather than merely recommend promotion.

Before DOPMA, no statutory board existed to make promotion decisions following an officer's nonselection by an original selection board under circumstances warranting a re-look. The STAB existed merely by virtue of military regulation. *See* Porter v. United States, 163 F.3d 1304, at 1313 (Fed. Cir. 1998), *cert. denied*, 120 S. Ct. 41 (1999). A STAB could act in lieu of the original promotion board or render an advisory opinion to a civilian correction board. *See* Evensen v. United States, 654 F.2d 68 (Ct. Cl. 1981) (noting that STAB was convened to replicate, or act in lieu of, the original selection board); Braddock v. United States, 9 Ct. Cl. 463 (1986) (noting STAB was convened to tender an advisory opinion to the civilian correction board on the officer's likelihood of promotion based on his corrected record). The purpose of an advisory opinion would be to assist the correction board in making a determination of whether an error in an officer's record was prejudicial or harmless in relation to a promotion nonselection. *See Braddock*, 9 Ct. Cl. at 463. If a STAB recommended an officer for promotion, the corrections board would then consider any error it had removed from the officer's file as "prejudicial." Consequently, the board would expunge any evidence of the nonselection from the officer's records and recommend that the Service Secretary promote the officer.

8. H.R. REP. NO. 96-1462, at 74 (1980), contains the only commentary on 10 U.S.C. § 628. The HOUSE REPORT merely states that "[t]he purpose of this subsection is to provide a means to make a reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error." 10 U.S.C. § 628 (2000).

ute.[9] Consequently, the practitioner assisting an officer with a promotion re-look must also become familiar with the applicable directive[10] and regulation[11] that implement the statute and the various Army policies[12] that govern the reconsideration process and the SSB procedure.

This article provides a broad overview of the promotion reconsideration process, beginning with a discussion of the basic requirements and prerequisites for a re-look. To initiate the re-look process, an aggrieved officer must demonstrate that some material error in the original selection

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9. The major case to address the SSB is *Porter. See* Porter v. United States, 163 F.3d at 1304. Porter was twice nonselected for promotion to captain in the Air Force and was involuntarily separated. Thinking his initial nonselection to be the result of a faulty Officer Evaluation Report (OER), he applied to the Air Force Board for the Correction of Military Records (Air Board) for correction of his record to exclude the challenged OER and reconsideration of his promotion by a SSB. The Air Board removed the faulty OER from his records and recommended that the Secretary of the Air Force convene a SSB to reconsider him for promotion. The Air Board did not, however, recommend voiding Porter's previous nonselections. Such a recommendation would have removed the legal basis for his discharge, resulting, at a minimum, in constructive reinstatement and entitlement to back pay. Porter challenged the Air Board's unwillingness to make such a recommendation by filing suit in the Court of Federal Claims. Porter argued that the Air Board lacks authority to refer his record to a SSB absent the voiding of the previous nonselections. The Court of Federal Claims agreed with him and the government appealed the decision to the Court of Appeals for the Federal Circuit. The Federal Circuit reversed the Claims Court and upheld the Air Board's decision to refer Porter's record to a SSB without voiding the previous nonselections. In doing so, the court provides extensive statutory interpretation of 10 U.S.C. § 628 that is useful to the practitioner. *Id.*

Note that the majority of reported military promotion re-look cases involved a STAB and the application of a harmless error test to the decisions of the STAB. The Court of Appeals for the Federal Circuit announced the death of the harmless error rule in *Porter v. United States*, shifting the focus in SSB cases to the issue of whether "a SSB has achieved its statutory function of producing a reasonable determination of the officer's original promotion prospects." *Id.* at 1325. As a result, the case law that developed around military promotion cases and the STAB appears inapplicable to promotion nonselections occurring after the advent of the SSB.

10. DOD DIR. 1320.11, *supra* note 4 (implementing 10 U.S.C. §§ 628, 14502 and establishing the policy and responsibilities regarding the use of SSBs for commissioned officers on both the Active Duty (AD) and RC Lists and chief warrant officers and commissioned warrant officers on the warrant officer AD and RC Lists).

11. AR 600-8-29, *supra* note 2, ch. 7 (providing basic information on the promotion re-look process).

12. Deputy Chief of Staff for Personnel (DCSPER), Standing Operating Procedure (SOP) (27 Sept. 1994) [hereinafter DCSPER SOP] (attached to a memorandum signed by Acting DCSPER Major General Wallace C. Arnold); SECARMY Memorandum of Instructions for President and Members of Special Selection Board (May 29, 1998) [hereinafter SSB MOI].

board process justifies promotion reconsideration. The second section of the article focuses on the nonselected officer's written request to the Department of the Army for a SSB to reconsider promotion. Only a well-drafted request for reconsideration will withstand the close scrutiny of the applicable re-look approval and denial authorities. The concluding section of the article examines the operations of the SSB, which parallel the composition and procedures utilized by normal selection boards. The article then focuses on the legal assistance scenario as a reference point for practical guidance, and to highlight important aspects of the promotion re-look process.

II. Getting Started: Promotion Re-look Basics

As a starting point, the original promotion selection procedure must have followed the law.

> The documents that are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer's record. If a Service Secretary places before the Board an alleged officer's record filled with prejudicial information or omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes.[13]

Officers who are convinced that some material error, not of their own making, resulted in the nonselection by the original promotion board can request reconsideration by a SSB. The statutory authority of the Secretary of the Army (SECARMY) to convene a SSB, however, is limited to only two circumstances. The first is to consider an officer for promotion whose file failed to go before the original selection board because of an administrative error.[14] The second circumstance is to reconsider an officer for promotion whom the original board considered in an unfair manner.[15]

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13. Weiss v. United States, 408 F.2d 416, 419 (Ct. Cl. 1969).

14. *See* 10 U.S.C. § 628(a).

15. *See id.* § 628(b) (stating that Congress requires the unfairness to be "material." To determine whether there was a "material unfairness," the Service Secretary must decide whether the original board acted contrary to law, or involved material error of fact or material administrative error, or did not have before it some material information to consider.)

A. Proper Bases for a SSB Consideration or Reconsideration

You first conduct an initial client interview with LTC Leftout. Lieutenant Colonel Leftout claims that her file did not go before the promotion board even though she was in the promotion zone. During the interview you call the installation's Officer Records Office and verify that because of some administrative error at U.S. Army Human Resources Command, the original selection board did not consider LTC Leftout's file for promotion.

1. Officer Not Considered

The DOPMA statute requires the Service Secretary to refer an officer's file to a SSB when an original promotion selection board failed to consider that officer for promotion because of some administrative error.[16] In LTC Leftout's situation, the original board did not consider her file, as it should have, so the SECARMY will convene a SSB to consider her for promotion to Colonel.[17] In accordance with Army regulation, the local Officer Records Office is responsible to notify the U.S. Total Army Personal Command (PERSCOM), (now U.S. Army Human Resources Command (HRC)) of the omission.[18] Additionally, the Officer Records Office

16. *Id.* § 628(a).

17. AR 600-8-29, *supra* note 2, para. 7-2(a)(1).

18. *Id.* para. 7-10. "The U.S Army Human Resources Command [HRC] formally activated on 2 October 2003, combining the U.S. Total Army Personnel Command [PERSCOM] and the U.S. Army Reserve Personnel Command. . . . HRC is headquartered in Alexandria, VA with an additional location in St. Louis, MO. . ." U.S. Army Human Resources Command, *About Us*, *available at* https://www.hrc.army.mil/AboutUs.asp (last visited Nov. 19, 2003) (explaining why the Army restructured PERSCOM and that the office formerly known as PERSCOM is available *at* https://www.perscomonline.army.mil/index2.asp). Note that for the sake of clarity, the remainder of the article refers to PERSCOM, nonetheless, the activity is now designated as the U.S. Army Human Resources Command (HRC).

will prepare the SSB request for the officer.[19] No further legal counsel may be necessary for LTC Leftout.[20]

2. Considered in a Manner "Materially Unfair"

A SSB can reconsider an officer for promotion if the original board nonselected him or her because of some material unfairness.[21] Under the statute, a promotion board's actions are "materially unfair," when: (1) the board acted contrary to law; (2) the board involved material error of fact or material administrative error; or (3) the board did not have before it some material information.[22] Each of the three "materially unfair" situations is discussed in more detail below. The first step an officer must take to determine if his or her nonselection was caused by some material unfairness, however, is to immediately request an exact copy of the file considered by the original promotion selection board from PERSCOM.[23] Appendix A contains a sample request for this file.[24]

You met with MAJ Correction and CPT Latoer, but they did not know why they were nonselected for promotion; so you helped them each draft a request to PERSCOM to obtain their promotion files. Once the officers received their files, they discovered possible bases for promotion reconsideration. MAJ Correction believes that an unfair evaluation by his senior rater in a previous Officer Evaluation Report (OER), that he had not previously seen, caused his nonselection. In addition, his picture and several awards are missing from his promotion file. CPT Latoer claims his promotion file contained a letter of reprimand that is not his. Additionally, he is concerned that the last OER he received before the board met was not in his file. This latest OER was for a rating period that ended three months

19. *Id.* tbl. 7-1.

20. If selected for promotion by the SSB, LTC Leftout will have the same date of rank, effective date, and pay, as if the original board had recommended her for promotion. 10 U.S.C. § 628(d)(2) (2000). If the SSB does not recommend LTC Leftout for advancement, she will incur a failure of selection for promotion. AR 600-8-29, *supra* note 2, para. 7-8.

21. 10 U.S.C. § 628(b)(1).

22. *Id.*

23. AR 600-8-29, *supra* note 2, para. 7-11(e).

24. The sample memorandum includes a request for copies of all reference materials (such as the Letter of Instruction), administrative materials, and records of board votes. All that PERSCOM normally provides to the officer per the request, however, is a copy of the OMPF, board ORB, and an official photograph.

before the cut-off date for submissions to the promotion board. Your mission is to determine if either aggrieved officer has a chance at a re-look.

3. Board Acted Contrary to Law

Neither the statute nor the implementing regulations address with any detail this specific basis for promotion reconsideration.[25] Presumably, due to the secret nature of the process,[26] it would be difficult to determine whether a promotion selection board acted contrary to law. Two types of situations, however, have come up in practice: improper composition of promotion board members[27] and standing procedures that violates an officer's constitutional rights.[28] Upon a showing by the aggrieved officer that the board acted contrary to law, the nature of the material error determines whether the Service Secretary will refer the case to a SSB.[29] In CPT Latoer's scenario, the promotion board considered some other officer's letter of reprimand. Consequently, CPT Latoer could argue that the SECARMY did not follow proper records management regulations when this letter of reprimand was misfiled in his promotion file. Therefore, he may assert that the board acted contrary to law when it improperly considered the letter of reprimand. Additionally, as discussed below, CPT Latoer could claim that the board's consideration of the letter of reprimand

25. *But see* Porter v. United States, 163 F.3d 1304, 1324 (Fed. Cir. 1998), *cert. denied*, 120 S. Ct. 41 (1999) (indicating that the Service Secretary must refer a file to a SSB upon a showing that the original board acted contrary to law).

26. AR 600-8-29, *supra* note 2, para. 1-32(c)(3).

27. The Service Secretary shall compose promotion boards in accordance with 10 U.S.C. § 612 and applicable regulations. 10 U.S.C. § 573(a) (2000). *See* Captain L. Neal Ellis, *Judicial Review of Promotions in the Military*, 98 MIL. L. REV. 129 (Fall 1982) (examining judicial review of military promotion decisions and specifically addressing defects in selection board procedures); *see also* AR 600-8-29, *supra* note 2, para. 1-31 (prescribing proper member composition of selection boards).

28. An example of this basis is the lawsuit filed a few years ago by two Judge Advocate General's Corps Lieutenant Colonels, who were passed over for promotion to Colonel, claiming the equal opportunity instructions provided to the promotion selection board violated their equal protection and due process rights under the Fifth Amendment to the Constitution. As part of a settlement, the SECARMY convened a SSB to reconsider the officers for promotion. *See* U.S. CONST. art. V; Adversity.Net, For Victims of Reverse Discrimination, *Older Military Reverse Discrimination News*, *at* http://www.adversity.net/military_older_news.htm (last visited Dec. 15, 2002) (providing numerous articles on this lawsuit and others of a similar nature).

29. Presumably, a board may act contrary to law but still not materially effect the aggrieved officer's promotion nonselection. AR 600-8-29, *supra* note 2, para. 7-2(a)(2) (providing that referral to a SSB is discretionary in this situation).

involved a material error of fact in that he has never received a letter of reprimand.

4. Board Involved Material Error of Fact

An error is considered material if it might have affected the outcome of a selection board decision.[30] A request for a SSB using this basis must assert that the original board considered an officer's file, which contained a "material error." An officer who believes an error of fact caused their nonselection should request that a corrected record go before a SSB.[31] In addition to the "board action contrary to law" basis discussed above,[32] the inclusion of someone else's letter of reprimand in CPT Lateoer's promotion file constitutes a material error of fact that should entitle him to reconsideration by a SSB. In contrast, MAJ Correction could seek promotion reconsideration because of the alleged faulty senior rater evaluation in a previous OER. MAJ Correction's request for promotion reconsideration, however, would be part of an OER appeal.

5. Board Did Not Consider Material Information

Additionally, the absence of material information from an officer's promotion file may justify a request for reconsideration.[33] In CPT Latoer's situation, his latest OER was missing from his promotion file. Army Regulation 600-8-29 requires that "late" OERs go before the board,[34] therefore, a late OER that was not considered by the original promotion board

30. *See Porter*, 163 F.3d at 1324.

31. AR 600-8-29, *supra* note 2, para. 7-2(a)(2). Examples of other errors of fact that are potentially material include "one of more evaluation reports seen by a board [that] were subsequently materially altered . . . from the officer's OMPF" and incorrectly depicted military or civilian education level in the individual's record. PERSCOM Information Paper, *Army Officer Special Selection Boards for Promotion Reconsideration* (January 2002), *available at* https://www.perscom.army.mil/select/InfoRec.htm (last visited Dec. 15, 2002) (providing information concerning request for reconsideration by a SSB).

32. U.S. DEP'T OF ARMY, REG. 623-105, OFFICER EVALUATION REPORT SYSTEM ch. 6 (1 Oct. 1997) [hereinafter AR 623-105] (governing OER Appeals; discussed further *infra* at note 52).

33. AR 600-8-29, *supra* note 2, para. 7-2(a)(3).

34. *Id.* para. 1-33(d)(2) (stating that an OER is considered "late" when it has a "thru" date more than sixty days earlier than the due date established in the selection board notice and is received at PERSCOM before the promotion selection board has completed its final, formal vote).

is arguably "material information." If CPT Latoer's OER is in fact late,[35] the SECARMY should convene a SSB to reconsider him for promotion. On the other hand, if the awards allegedly missing from MAJ Correction's file are lower in precedence than the Silver Star, the regulation presumes the error to not be material and the omission is not a recognized basis for a re-look.[36] Likewise, the SECARMY will not grant reconsideration based solely on the promotion board's failure to see an official photograph.[37] These types of omissions are *not* considered material because it is presumed that an officer could have discovered and corrected the errors had he or she properly managed or reviewed his or her personnel file prior to the convening of the original promotion board.[38]

B. Other Re-look Considerations

1. Proper Management of Personnel File

Each individual officer is responsible for managing his or her own personnel file.[39] This means exercising reasonable diligence in discovering and correcting any errors in the Officer Record Brief (ORB) or Official Military Personnel File (OMPF) before the promotion selection board convenes.[40] In MAJ Correction's scenario, he probably did not exercise reasonable diligence in managing his own file. A SSB will not reconsider any file of an "officer who might, by maintaining reasonably careful records, have discovered and taken steps to correct an error or omission on which the original board based its decision against promotion."[41] Again, an error or omission must be material to be the basis for a SSB.[42] Therefore, if the

35. To verify whether PERSCOM received a missing OER before the selection board adjourned, contact the OER Branch at PERSCOM at (703) 325-4202 or DSN at 221-4202/1703 or e-mail at tapcmser@hoffman.army.mil.

36. AR 600-8-29, *supra* note 2, para. 7-3(c).

37. *Id.* para. 7-3(e).

38. *Id.* para. 7-3(b).

39. *Id.* para. 7-3(b).

40. *Id.*

41. DOD DIR. 1320.11, *supra* note 4, para. 4.3; *see* AR 600-8-29, *supra* note 2, para. 7-3(b) (reaffirming the officer's responsibility).

42. AR 600-8-29, *supra* note 2, para. 7-2(a)(2); *see* DCSPER SOP, *supra* note 12, para. 6-4(b)(2)(b) (explaining that a material error is defined as being of such a nature that in the judgement of the reviewing official (or body), had it been corrected at the time the individual was considered by the board the failed to recommend him/her for promotion, there is a reasonable chance that the individual would have been recommended for promotion).

officer could have discovered and corrected the error before the promotion board convened, it is immaterial.[43]

The promotion regulation also provides several specific examples of cases that the SECARMY will not send before a SSB.[44] Reconsideration will not be granted solely because "letters of appreciation, commendation, or other commendatory data for awards below the Silver Star are missing from the officer's [OMPF]."[45] Likewise, a SSB will not reconsider an officer's file solely because the original board "did not see an official photograph;"[46] neither will a SSB consider correspondence to the board president delivered after the cutoff date for the submission of such correspondence.[47] Consequently, it is the officer's responsibility to notify the board, in writing, of possible administrative deficiencies in the ORB or OMPF before the board convenes.[48] Moreover, since an officer may have to exhaust administrative remedies to correct any error in the promotion file before requesting promotion reconsideration, a discussion of such is warranted.

2. Exhaustion of Administrative Remedies

Some re-look scenarios, such as LTC Leftout's and CPT Latoer's, do not require exhaustion of any administrative remedies.[49] Other situations, such as MAJ Correction's, require officers to use other available processes and exhaust all administrative remedies before a SSB can reconsider their

43. AR 600-8-29, *supra* note 2, para. 7-3(b).

44. *See id.* para. 7-3 (providing the complete list of case types a SSB will not reconsider).

45. *Id.* para. 7-3(c).

46. *Id.* para. 7-3(e).

47. The board's announcement message establishes the cutoff date. *Id.* para. 7-3(f).

48. *Id.* para. 7-3(b).

49. *Id.* ch. 7. Officers whose files did not go before a promotion selection board because of an administrative error should immediately request consideration by a SSB directly with PERSCOM. Also, officers who had missing or incorrect information in their promotion file that went before the original board should request reconsideration by a SSB directly from PERSCOM. Likewise, officers who believe that the promotion selection board acted contrary to law or made a material error should also request reconsideration by a SSB directly from PERSCOM. Such officers do not have to exhaust other administrative remedies before requesting reconsideration by a SSB.

promotion.[50] Since MAJ Correction believes an adverse OER caused his nonselection for promotion, he must appeal his OER first, but can request promotion reconsideration as part of that appeal.[51] Similarly, officers seeking to have adverse information such as Article 15s, Letters of Reprimand, or the like, removed from their files must first seek relief from the Army Board for the Correction of Military Records (ABCMR).[52] Nonetheless, sometimes officers skip the administrative process all together, to include a request for a SSB, and attempt to sue the Army in federal court over their nonselection for promotion. [53]

3. Is There a Judicial Shortcut to a Re-look?

After informing MAJ Correction that the SECARMY will most likely presume he failed to manage his personnel file, and assuming that his OER appeal and request for promotion reconsideration will fail, he inquires about a possible lawsuit.

Many courts consider requests for retroactive promotion to fall squarely within the realm of nonjusticiable military personnel decisions.[54] Consequently, courts will avoid rendering military personnel promotion decisions.[55] Because of this reluctance, it is doubtful a complaint filed by MAJ Correction would survive summary judgement. Furthermore, courts, just like a Service Secretary, will not review cases involving the issue of officer promotions unless the plaintiff has exhausted all administrative remedies and asserted legal error.[56] Simply put, some type of request for

50. Although not specifically set out by regulation, the contention that officers exhaust administrative remedies is the rule. The Secretary will not convene a SSB for an administrative error that the officer could have discovered and corrected before the promotion board. *Id.* para. 7-3. Additionally, any error must also be material. An error in an OER is considered material only if successfully challenged in the OER appeals process. Otherwise, the error is harmless and thus immaterial. Consequently, an officer must first attempt to have some material errors corrected before requesting a SSB, or risk having the request denied.

51. AR 623-105, *supra* note 32, governs OER appeals. A SSB may result directly from the OER appeal process. An Officer Special Review Board (OSRB) adjudicates OER appeals based upon a claim of inaccuracy or injustice that cannot be resolved between the officer and chain-of-command. *Id.* para. 6-6(i). The OSRB may, in turn, recommend that the Secretary convene a SSB to reconsider an officer's file that went before the original promotion selection board with an erroneous or unjust OER. *Id.* para. 6-6(j). Additionally, the government's denial of an OER appeal, which must be appealed to the ABCMR, could lead directly to the convening of a SSB. Specifically, the ABCMR, if it grants the appeal, may recommend the officer's file go directly before a SSB for promotion reconsideration.

reconsideration by a SSB is required before any type of re-look. There is no judicial shortcut.

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52. U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (29 Feb. 2000) [hereinafter AR 15-185]. If adverse information in the promotion file caused the nonselection, an officer may have to exhaust any ABCMR remedy. The ABCMR appeals are governed by statute (10 U.S.C. § 1552 (2000)) and regulation (U.S. DEP'T OF DEFENSE, DIR. 1336.6, CORRECTION OF MILITARY RECORDS (Dec. 28, 1994)). The statute that created and empowers this civilian board to correct military records does not limit the kind of military record subject to correction. Porter v. United States, 163 F.3d 1304, 1311 (Fed. Cir. 1998), *cert. denied*, 120 S. Ct. 41 (1999). Consequently, the ABCMR may entertain an application to amend a nonselection decision by a promotion board. *Id.* If it appears to the Board that reconsideration may be appropriate, it may refer a case directly to a SSB for an advisory opinion or it may recommend that the Secretary convene a SSB for a binding selection decision. *See supra* note 8 and accompanying text. If the error in the promotion file is material, the ABCMR can recommend that the Secretary refer the "fixed" file to a SSB for promotion reconsideration as part of its grant of relief. The ABCMR does not have unilateral authority to grant a retroactive promotion based upon nonselection if the promotion requires Senate confirmation. AR 15-185, *infra,* para. 2-13. Before DOPMA, the ABCMR had to conduct a harmless error test before recommending that the Secretary grant a retroactive promotion due to some "material error." *See supra* note 9 and accompanying text. The ABCMR accomplished this test by referring promotion nonselection cases to STABS. The STAB would decide whether the original selection board would have promoted the officer if it had the corrected record before it. Now, the ABCMR can use a SSB in the same way. The ABCMR can refer a particular case to a SSB for an advisory opinion of whether the officer would have been promoted by the original board "but for" the adverse information in the file. That is, to determine whether inclusion of the adverse information was a "material" error.

The rationale behind civilian corrections boards referring cases to a SSB is that military personnel applying the appropriate selection criteria make better promotion decisions. *Porter*, 163 F.3d at 1309. If the SSB, however, determines that nonselection is appropriate, the ABCMR "stands ready to receive and decide any complaints [the] officer may assert concerning the process and decision of [that] SSB." *Porter*, 163 F.3d at 1321. On the other hand, if the SSB decides in favor of the officer, that decision binds the Secretary, and ABCMR will make the necessary corrections to the officer's record and order any back-pay due. *Id.* at 1322.

53. *See* Ellis, *supra* note 27 (examining a myriad of judicial military promotion decisions).

54. Kreis v. Sec'y of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989); *see* Voge v. United States, 844 F.2d 776 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 941 (1988) (holding that claims for special professional pay and retroactive promotion are nonjusticiable).

III. The SSB Request

After you inform CPT Latoer that he has two potentially viable bases for a re-look, he wants you to help him get the SSB process started.

A. Drafting a Proper Request

An aggrieved officer must affirmatively and properly request consideration or reconsideration by a SSB from the appropriate authority.[57]

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55. The reluctance of courts to hear promotion cases is firmly rooted in the long-standing command from the Supreme Court:

> Judges are not given the task of running the Army. . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters . . . .

Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953). Also, the Court of Claims specifically has recognized the impropriety of courts intruding into military promotion decisions:

> The reluctance of the judiciary to review promotion actions of selection boards is rooted not only in the court's incurable lack of knowledge of the total grist which the boards sift, but also in a preference not to meddle with the internal workings of the military. . . The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to resolve and pass upon the highly complicated questions and problems involved in the promotion procedure, which includes, but is not limited to, an analysis of the fitness reports and personnel files and qualifications of all the officers considered. . .

Brenner v. United States, 202 Ct. Cl. 678, 692, 693-94 (1973), *cert. denied*, 419 U.S. 831 (1974).

56. *See* Arens v. United States, 969 F.2d 1034 (Fed. Cir. 1992) (recognizing that the judiciary should not interfere with legitimate Army matters unless the court is correcting an error of law).

57. The Service Secretary, however, has the unilateral authority to convene a SSB. This included using SSBs for Reserve or National Guard officers prior to ROPMA. *See* Dowds*, et. al.* v. Bush*, et. al.*, 792 F. Supp. 1289 (D. D.C.1992). Notwithstanding, the Service Secretary cannot unilaterally recommend an officer for promotion without consideration by a selection board of some type. Finkelstein v. United States, 29 Fed. Cl. 611, 627 (Fed. Cl. 1993).

There is no specific format or detailed requirements for this request.[58] A properly drafted memorandum, however, is critical for success. Appendix B provides a sample request using CPT Latoer's scenario.

B. Approval or Denial of the Request

1. Consideration Cases

The Commander, PERSCOM, as the delagee of the SECARMY, has authority to direct that a SSB be convened when an administrative error resulted in a failure of the original selection board to consider an individual officer when eligible.[59] Again, referral to a SSB is mandatory in this situation.[60]

2. Reconsideration Cases

The Officer Promotions Branch at PERSCOM has authority delegated by the SECARMY to deny an officer's request for a SSB that does not comply with the requirements of Army Regulation 600-8-29.[61] Furthermore, the SECARMY has delegated authority to grant requests for reconsideration to the Deputy Chief of Staff for Personnel (DCSPER) Officer Special Review Board (OSRB).[62] Consequently, if PERSCOM does not deny a request, the SECRETARY will refer it to an OSRB.[63] The OSRB makes the "subjective determination as to whether error in the pro-

58. AR 600-8-29, *supra* note 2, para. 7-11. *See id.* tbls. 7-1, 7-2 (listing information required in the request).

59. DCSPER SOP, *supra* note 12, para. 6-4(a).

60. 10 U.S.C. § 628(a).

61. AR 600-8-29, *supra* note 2. For chaplains, judge advocates, and Army medical officers, PERSCOM sends the case to the chief of the applicable special branch for a recommendation before disapproving the case for reconsideration. If the special branch and PERSCOM do not concur in the disposition of a case, it will be sent to DCSPER OSRB for a final determination. DCSPER SOP, *supra* note 12, para. 6-4(b)(2)(a)(1).

The Commander, PERSCOM, has sole authority to refer RC cases to a SSB. *Id.* para. 6-4(b)(2)(a)(2). Reserve Component cases may also be referred to a SSB by an OSRB following favorable action on OER appeals. *See* AR 623-105, *supra* note 32, para.6-6(i).

62. *Id.* para. 6-4(b)(2)(a)(1).

63. PERSCOM may make a recommendation as to the disposition of the case. *Id.* para. 6-4(b)(2)(a)(1).

motion file was material to the officer's nonselection for promotion."[64] If the OSRB determines that a SSB should reconsider an officer's file for promotion, the SECARMY must convene a SSB.[65]

3. Denial of a Request for a SSB

There is no provision in Army Regulation 600-8-29 for an appeal of a denial of a request for a SSB. A denial by the SECARMY's designee of a request for a re-look, however, is arguably a "final decision" that an officer can challenge in federal court under the Administrative Procedures Act.[66] The standard of review under the Administrative Procedures Act is whether the SECARMY acted arbitrarily or capriciously when denying the request.[67] Consequently, as long as the SECARMY, or his designee, followed proper administrative procedures and documented such, a successful lawsuit would be difficult for the aggrieved officer.

IV. The SSB Process

Several months have passed since CPT Latoer submitted the SSB request you drafted for him. Finally, he calls with information that PERSCOM has approved the request. CPT Latoer wants you to explain the SSB procedure.

To fully comprehend the operational details of a SSB, the practitioner must also understand the Army's officer promotion system. Therefore, the following discussion of the SSB process explains the original selection board process.

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64. *Id.* para. 6-4(b)(2)(b). A material error is defined as "being of such a nature that in the judgement of the reviewing official (or body), had it been corrected at the time the individual was considered by the [original] board . . . there is a reasonable chance that the individual would have been recommended for promotion." *Id.*

65. AR 600-8-29, *supra* note 2, para. 7-5(a). The determination by the OSRB that a SSB should be convened "does not signify a final conclusion by the Army that the action of the original board in not recommending the individual was incorrect, and it does not void the action of the original board." DCSPER SOP, *supra* note 12, para. 6-4(b)(2)(b).

66. 5 U.S.C. § 701 (2000).

67. *Id.* § 706.

A. Convening a Promotion Board

The Army's promotion system selects and advances officers from the grade of captain to major general. The system is based upon statutes but is implemented by regulation.[68] In the first step of the process, the SECARMY determines whether there is a need for additional officers in a certain grade.[69] Then, depending upon the maximum number of officers needed at the next grade, the SECARMY establishes a promotion zone.[70] Thereafter, the SECARMY identifies all officers whose dates of rank place them within that promotion zone.[71] The mission of the selection board is to recommend for promotion the "best qualified" officers from all officers considered to be "fully qualified" for advancement to the next higher grade.[72] If the promotion board makes a material error during this process, the SECARMY may convene a SSB to reconsider the nonselected officer for promotion.

B. Convening a SSB

After the SECARMY, or his designee, approves a request for consideration or reconsideration, the Department of Defense (DoD) directive requires him to convene a SSB within 180 days.[73] In turn, the Army regulation recommends convening a SSB within 120 days after an officer's

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68. *See* 10 U.S.C. §§ 611-632; U.S. DEP'T OF DEFENSE, DIR. 1320.12, COMMISSIONED OFFICER PROMOTION PROGRAM (Oct. 30, 1996) [hereinafter DOD DIR. 1320.12]; AR 600-8-29, *supra* note 2; *see also* Captain Holly O. Cook, *Affirmative Action: Should the Army Mend It or End It?*, 151 MIL. L. REV. 113, 140-45 (Winter 1996) (providing a comprehensive overview of the officer promotion system in the Army).

69. 10 U.S.C. § 611(a); DOD DIR. 1320.12, *supra* note 68, para. 4.3.3; AR 600-8-29, *supra* note 2, para. 1-30, glossary (listing Army competitive categories in the glossary).

70. 10 U.S.C. § 623.

71. *Id.* § 645; AR 600-8-29, *supra* note 2, para. 1-10. There are actually three promotion zones - above, in, and below the zone. Each promotion zone is defined in AR 600-8-29, *supra* note 2, glossary, sec. II.

72. 10 U.S.C. § 616; "Best qualified" is determined from the numerical constraints set by the Service Secretary while AR 600-8-29, *supra* note 2, para. 1-35(a)(3), defines a "fully qualified" officer as one of demonstrated integrity, who has shown that he or she is qualified professionally and morally to perform the duties expected of an officer in the next higher grade.

73. DOD DIR. 1320.11, *supra* note 4, para. 4.4 (barring extenuating circumstances, such as a heavy caseload, a SSB "shall be convened and the results made known to the officer concerned, within 180 days of the finding of the Secretary . . . that an error warranted consideration by [a SSB].").

case is approved for consideration.[74] Presumably, this sixty-day differential is to enable completion of the entire process within the 180 days specified by the DoD directive.[75] Furthermore, an officer being considered (but, not reconsidered) by a SSB will be notified by PERSCOM "at least thirty days before the board convenes."[76] The procedures the SSB will follow are similar to those of the original promotion selection board.

C. Standing Promotion Board Procedures

A promotion board consists of five or more officers in the grade of lieutenant colonel and higher; but in all cases the officers on the board will be higher in grade than the officers under consideration.[77] Before considering officers' files, the promotion board members swears an oath to follow detailed written instructions.[78] These instructions guide the board members through the process of scoring individual officer files, upon which the board makes the ultimate decision to recommend certain officers for promotion.[79]

After scoring all files, the board rank-orders them from the highest to the lowest score on an Order of Merit List (OML).[80] From this list, the board must identify those "officers who are fully qualified and who are not

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74. AR 600-8-29, *supra* note 2, para. 7-5(a).

75. DOD DIR. 1320.11, *supra* note 4, para. 4.4.

76. AR 600-8-29, *supra* note 2, para. 7-4(a). The officer, however, is not offered an opportunity to communicate with the board president. *Id.* para. 7-11(d).

77. *See* 10 U.S.C. § 612(a)(1); AR 600-8-29, *supra* note 2, para. 1-31.

78. AR 600-8-29, *supra* note 2, para. 1-33.

79. Cook, *supra* note 68, at 141 n.17.

> Board members use "blind vote sheets" to vote officer files during promotion boards. This means that each member writes the score for each file on a voting card that has removable slips. After writing the score, the member tears off the slip with the score written on it. A master voting card is attached to the back of the removable slips and carbon paper ensures that an imprint of each score remains with the file. As files pass between board members, no one can see how the other members voted a particular file. There also is no discussion between the board members during the voting process.

Id.

80. *Id.* at 142. *See* U.S. DEP'T OF ARMY, MEMO 600-2, POLICIES AND PROCEDURES FOR ACTIVE COMPONENT OFFICER SELECTION BOARDS para. A-7a(2) (24 Sept. 1999) [hereinafter DA MEMO 600-2]).

fully qualified for promotion."[81] Consequently, the board must determine by a majority vote the minimum score that represents those officers who are "fully qualified" for promotion.[82] The board then draws a line on the OML separating the "fully qualified" and not fully qualified scores. The board will not recommend for promotion any officer whose name falls below that line.[83]

Before determining which of the remaining officers are "best qualified" for promotion, the board must also review and score files of officers the SECARMY identified for possible early advancement from below the promotion zone.[84] Based upon the maximum and minimum number of below-the-zone selections authorized by the SECARMY,[85] the board tentatively selects below-the-zone officers for promotion consideration. Based upon the score previously determined to represent "fully qualified" officers, the board identifies below-the-zone officers whose scores exceed that number and integrates their names into them.[86] Finally, the board determines whom from the combined list it will recommend for promotion.

If the total number of officers on the OML exceeds the maximum number the SECARMY authorized for advancement,[87] the board can recommend for promotion only those officers who are "best qualified."[88] Then, starting at the top of the OML, the board draws a new line below the officer whose name marks the maximum number authorized for promotion.[89] Consequently, the board considers all officers above that line as "best qualified" and recommends them for promotion.[90] Conversely, the

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81. *Id.* para. A-5(a); *see* AR 600-8-29, *supra* note 2, para. 1-35(a)(3).

82. AR 600-8-29, *supra* note 2, para. 1-35(a)(3)(b).

83. Such officers are not considered "fully qualified" for promotion. *See* 10 U.S.C. § 616(c) (2000).

84. DA MEMO 600-2, *supra* note 80, para. A-7b.

85. AR 600-8-29, *supra* note 2, para. 1-34(e) (stating that the number of officers recommended for promotion below the promotion zone may not exceed ten percent of the total number recommended for promotion, unless the Secretary increases the percentage to not more than fifteen percent).

86. Cook, *supra* note 68, at 142 (citing DA MEMO 600-2, *supra* note 80, para. A-8b(5)). Presumably, those officers tentatively selected for below-the-zone promotion are considered "fully qualified" for promotion, but may not be recommended for promotion if they fall below the cut-off line for "best qualified."

87. 10 U.S.C. § 622 (2000).

88. AR 600-8-29, *supra* note 2, para. 1-35(a)(3).

89. Cook, *supra* note 68, at 143.

90. *Id.*

board does not select for promotion officers whose names fall below that line. Before the board adjourns, it formalizes the list of officers recommended and not recommended for promotion in a selection board report.[91]

D. Standing SSB Procedures

When a SSB considers or reconsiders an officer for promotion, it must follow the memorandum of instruction (MOI) used by the original promotion selection board that considered or should have considered the officer's file.[92] The SECARMY has also issued another MOI[93] providing guidance and instruction that each SSB must follow.[94]

The method the SSB will use to determine whether to recommend an officer for retroactive promotion is determined by the qualification method used by the original board.[95] If the original promotion board used the "fully qualified" method of selection, all members of the SSB will consider each officer's record brought before it and vote either to recommend or not to recommend promotion.[96] The promotion recommendation of the SSB will reflect the majority opinion of the board.[97] The SECARMY will not provide comparison files for the SSB to consider unless the original board used the "best qualified" method of selection.[98] If the original promotion board used the "best qualified" method of selection, so too will the SSB.[99] For each SSB using the "best qualified" method, the DA Secretariat provides comparison files from the original promotion board.[100] Specifically, the SSB will have before it fourteen other files of officers previously considered by the original promotion board; the last seven who made the cut and were promoted and the first seven that were nonselected on the order

91. AR 600-8-29, *supra* note 2, para. 1-35(c).

92. DCSPER SOP, *supra* note 12, para. 6-5.

93. SSB MOI, *supra* note 12.

94. If a SSB is convened to render an advisory opinion to the ABCMR, it will also conform to any instructions provided by that board. DCSPER SOP, *supra* note 12, para. 6-5.

95. *Id.* para. 6-6.

96. *Id.* para. 6-6(b).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*; *see* AR 600-8-29, *supra* note 2, para. 7-7 (stating that the SSB will compare the officer's corrected record against "a sampling of [records of] those officers of the same competitive category who were recommended and not recommended for promotion by the original selection board."); *see also* 10 U.S.C. § 628(a)(2), (b)(2) (2000).

of merit list.[101] To determine if the aggrieved officer is "best qualified" for promotion, each member of the SSB scores every file before it, to include the comparison files, because they do not know which officer is being reconsidered.[102] If the aggrieved officer's file receives a score equal to or higher than the lowest scored comparison file of an officer previously selected for promotion by the original board, the SSB must select the aggrieved officer for retroactive promotion.[103] In short, the SSB will recommend the aggrieved officer for retroactive promotion if any file previously selected by the original board has the same or lower score at the SSB than does the aggrieved officer's file. If a SSB does recommend promotion, the SECARMY must follow the same approval procedure as for an original promotion board report.[104]

E. Post-Promotion Board Administrative Processing

Each promotion board submits its report to the SECARMY, who must determine that the board acted in accordance with law and regulation.[105] Next, the President or his designee[106] must approve the selection board report before it becomes a promotion list.[107] If an officer on a recommended promotion list engages in misconduct or substandard performance before the SECDEF approves the report, the President, or his designee, may remove his or her name.[108] Finally, the Senate must confirm promotions to the grade of major and above.[109] After approval by the President (and Senate confirmation if required), the names of the selected officers are placed on the promotion list in order of seniority.[110] After exhaustion of previous promotion lists, the SECARMY promotes the recommended officers, as needed, in the order they appear on the list.[111]

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101. AR 600-29, *supra* note 2, para. 6-6(b)(1)(a), (b).

102. *See supra* note 79 for an explanation of the scoring process.

103. DCSPER SOP, *supra* note 12, para. 6-6(d).

104. 10 U.S.C. § 617.

105. AR 600-8-29, *supra* note 2, para. 1-11(b).

106. The President has delegated to the Secretary of Defense (SECDEF) the authority to approve promotion board results. AR 600-8-29, *supra* note 2, para. 1-11(a); *see also id.* para. 8-1 (stating that in the case of warrant officers, after approval by the Secretary).

107. 10 U.S.C. § 624 (2000).

F. Post-SSB Processing

Title 10 U.S.C. § 628 authorizes a SSB to make promotion decisions that will bind the Service Secretary.[112] Post-board processing is the same as for the original promotion board.[113] Upon completion of the post-board processing, the SECARMY must notify in writing individuals whom a SSB recommended for promotion.[114] Once promoted to the next higher grade, the aggrieved officer will "have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the [original] board. . . ."[115] The final approval authority for all SSB board reports is the SECDEF.[116]

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108. 10 U.S.C. § 629(a); AR 600-8-29, *supra* note 2, para. 8-1(a). This authority has been delegated down to the SECARMY. AR 600-8-29, *supra* note 2, para. 8-1(b). After a warrant officer promotion list has been approved by the SECARMY, only the President or his designee (SECARMY) may remove a name from the list. 10 U.S.C. § 579(d). Each promotion list is continuously reviewed at Headquarters Department of the Army "to ensure that no officer is promoted where there is cause to believe that he or she is mentally, physically, morally, or professionally unqualified to perform the duties of the next higher rank." AR 600-8-29, *supra* note 2, para. 8-2. If the SECARMY determines that removal of an officer's name from the promotion list may be warranted, he can refer the case to a Promotion Review Board (PRB) for advice. *Id.* para. 8-1(b). Guidance for the PRB is found in 10 U.S.C. §§ 624, 629 and AR 600-8-29, *supra* note 2, ch. 8. A discussion of the PRB process is beyond the scope of this paper. What is important, however, is that an officer who is removed from a promotion list is not entitled to request a SSB. Instead, the officer continues to be eligible for promotion by his or her next regularly scheduled board. *Id.* para. 8-10 (explaining that is *not* the case if the removal constitutes a second nonselection for separation purposes under AR 600-8-24, *supra* note 2). If selected by the next promotion board, the officer may petition for the date of rank he would have had if not removed from the original promotion list. AR 600-8-29, *supra* note 2, para. 8-10.

109. 10 U.S.C. § 624(c); AR 600-8-29, *supra* note 2, para. 1-11(a). The promotions to first lieutenant and captain require no Senate confirmation.

110. 10 U.S.C. § 624(a)(1).

111. *Id.* § 624(a)(2).

112. Porter v. United States, 163 F.3d 1304, 1324 (Fed. Cir. 1998), *cert. denied*, 120 S. Ct. 41 (1999).

113. 10 U.S.C. § 617 (stating that SSB results are approved by the President, or his designee, and if they are field grade selections, confirmed by the Senate).

114. DCSPER SOP, *supra* note 12, para. 6-8.

115. 10 U.S.C. § 628(d)(2). This means the officer is entitled to back-pay.

116. Congress has delegated to the SECDEF authority to approve all officer promotion selection boards under 10 U.S.C. §§ 617, 618. If the officer considered by the SSB for promotion is in the RC, the case will automatically go before the ABCMR for review before going to the SECDEF for approval. DCSPER SOP, *supra* note 12, para. 6-8.

G. Appeal of an Adverse SSB Result

The decision of a SSB not to recommend the aggrieved officer for promotion signifies that "the cited error was harmless and the recommendation of the original board remains valid."[117] If, however, "an officer meets a SSB unsuccessfully and can point to a material flaw in the SSB's procedures, arguably undermining the SSB's nonselection judgment, he may petition the [ABCMR] to alter or void the SSB's decision."[118] On the other hand, an officer might challenge the SSB in federal court, but courts will be reluctant to hear any promotion case until the officer exhausts all administrative remedies.[119]

V. Conclusion

Eventually, almost every officer will be nonselected for promotion during an Army career. Nevertheless, the nonselection may be a mistake. To secure a promotion re-look, the officer must show the original board acted contrary to law or identify some error in his or her promotion file that was considered by the promotion board. If an error in the promotion file is material, i.e., caused the nonselection for promotion, a re-look may be justified. The officer, however, must first exhaust any applicable administrative remedy to correct the error. Thereafter, or in conjunction with the correction, the officer should request the SECARMY to convene a SSB to reconsider him or her for promotion. A judge advocate can play an impor-

117. *Id.* para. 6-4(b)(2).

118. Porter v. United States, 163 F.3d 1304, 1325 (Fed. Cir. 1998), *cert. denied*, 120 S. Ct. 41 (1999).

119. If a court heard a SSB case, the focus would be whether the "SSB has achieved its statutory function of producing a reasonable determination of the officer's original promotion prospects." *Id.* Additionally, the practitioner should note that the DoD attempted in 2000, unsuccessfully, to have Congress pass legislation that would completely prevent judicial review of adverse SSB decisions. *See* S. REP. NO. 106-292, at 295. Although passed by the Senate in its version of the Defense Authorization Act for Fiscal 2001 (S.2549, 106th Cong. (2000)), the House's version (H.R. 4205, 106th Cong. (2000)) did not include this provision. In conference, the language was removed from the bill (H.R. CONF. REP. NO. 106-945, at 799 (2000)) and thus was not part of the Act signed by the President (The National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000)). The most interesting aspect of this legislation is that it proposes the exact language already contained in the SSB statute for the RC that was passed back in 1994. ROPMA, Pub. L. No. 103-337, div. A, tit. XVI, subsect. A, pt. I, 1611, 108 Stat. 2947 (1994) (codified as amended at 10 U.S.C. § 14502)). Practically speaking, the federal courts are reluctant to intrude into the promotion decision process anyway and the remedies as limited by the proposed legislation basically codify the case law in this area.

tant role in assisting an officer in obtaining a re-look. To counsel such an officer properly, the practitioner must review several sources, including the statute that establishes the re-look process, the directive and regulation that implement the statute, and the SOP of the SSB.

Appendix A

Sample Memorandum for Requesting Promotion Board File

OFFICE SYMBOL DATE

MEMORANDUM FOR Commander, U.S. Total Army Personnel Command, Attn: TAPC-MSP-O, 200 Stovall Street, Alexandria, VA 22060

SUBJECT: Request Board File for (NAME), (SSN)

1. I was not selected for promotion to (RANK), (BRANCH), by the selection board that met in (MONTH, YEAR).

2. I request a copy of all releasable materials pertaining to me that were presented to or considered by the board. This includes, but is not limited to, copies of my OMPF, Board ORB, and official photograph, as well as copies of all reference materials (such as the Letter of Instruction), administrative materials, and records of board votes.

3. Please send these materials to me at the address below at your earliest convenience.

ADDRESS
ADDRESS

4. Thank you for assisting me with this matter. Please feel free to call me at (PHONE NUMBER) if you have any questions.

NAME
RANK, BRANCH
SSN

Appendix B

Sample Request for Reconsideration by a SSB

ATFS--MC-1 30 November 2003

MEMORANDUM THRU

Commander, Medical Company, Medical Brigade, Fort Swampy, Anystate 00000

Commander, Medical Brigade, Fort Swampy, Anystate 00000

Commander, Hospital, Fort Swampy 00000

FOR Commander, PERSCOM, Attn: TAPC-MSP-S, 200 Stovall Street, Alexandria, Virginia 22332-0443

SUBJECT: Request for Promotion Reconsideration by a Special Selection Board

1. I was not selected for promotion to Major, Medical Service Corps, by the selection board that convened on 27 October 2002. I request a special selection board (SSB) to reconsider my promotion because the original selection board considered an adverse document in my file belonging to another person and did not have before it some material information. Specifically, a letter of reprimand belonging to another Captain Latoer was in my file and my last evaluation report, which arrived late to PERSCOM, was not provided to the board as required.

2. Personal information:

   a. Name: LATOER, Wherism I.

   b. SSN: 000-00-0000

   c. BRANCH: Medical Services Corps

ATFS-MC-1
SUBJECT: Request for Promotion Reconsideration by a Special Selection Board

3. The selection board that considered me for promotion made a material error when it considered the letter of reprimand belonging to another Captain Latoer (AR 600-8-29, paragraph 7-2(a)(2)). Additionally, paragraph 1-33(d)(2), AR 600-8-29, mandates that a "late" evaluation report (if administratively correct) will be provided to the appropriate board upon receipt at PERSCOM (provided the board has not completed it final, formal vote as specified in the MOI). This paragraph defines a late evaluation report "as any report . . . which has a "thru" date more than 60 days earlier than the due date established in the selection board notice."

a. The letter of reprimand. The local Officer Records Branch has verified that the letter of reprimand contained in my promotion file belongs to another Captain Latoer and it was not reflected in the copy of the OMPF I requested and reviewed in preparation of the original selection board. As such, I could not have discovered and corrected this error before the board convened. The inclusion of the letter of reprimand in my promotion file is a material error because it is of such a nature that had it not been included in the file, there is a reasonable chance that I would have been recommended for promotion.

b. Late OER. The last OER I received before the convene date of the board (which is enclosed), has a "thru" date of 20 July 2002. The due date established in the selection board notice for the FY01 AMEDD Major Promotion Selection Board was 20 October 2002, which is more than 60 days after the "thru" date. PERSCOM received and date stamped the report on 26 October 2002 (confirmed by OER Branch, PERSCOM), one day before the board even convened on 27 October 2002. The later OER was administratively correct and not provided to the selection board as required by Army Regulation. There is no way I could have discovered and corrected the error that my OER was not provided to the board. I last saw my OER on 24 August 2002 at which time I obtained a copy. This was two months before the board cut-off date. My PSB knew my file was not going before the October selection board and assured me the OER would reach PERSCOM before the cut-off date.

ATFS-MC-1
SUBJECT: Request for Promotion Reconsideration by a Special Selection Board

4. I request that you convene a SSB to reconsider my entire file as it should have correctly appeared before the original board. If you have any questions, you can contact me at (000) 000-000.

Encls
as

NAME
CPT, MS
000-00-0000

Appendix C

Points of Contact and Websites

– **United States Total Army Personnel Command (PERSCOM)** – Promotions Branch, Reconsideration and Omissions. Ms. Rita Fisher is the POC for reconsideration and omissions and is available at (703) 325-4007 or DSN at 221-4007. The United States Total Army Personnel Command Homepage provides other Promotions Branch POCs at https://www.perscom.army.mil/select/ pocs.htm (last visited Dec 15, 2002). "The U.S Army Human Resources Command [HRC] formally activated on 2 October 2003, combining the U.S. Total Army Personnel Command [PERSCOM] and the U.S. Army Reserve Personnel Command. . . ." U.S. Army Human Resources Command, *About Us*, *available at* https://www.hrc.army.mil/AboutUs.asp (last visited Nov. 19, 2003) (explaining why the Army restructured PERSCOM and that the office formerly known as PERSCOM is available *at* https://www.perscomonline.army.mil/index2.asp).

– **Office of the Judge Advocate General** – Administrative Law Division, Personnel Law Branch. **Military attorneys only** with legal questions related to the promotion process can contact the judge advocate within the Personnel Law Branch at OTJAG tasked with responsibility in this area at (703) 588-6752 or DSN at 425-6752.

NEED-TO-KNOW DIVORCE TAX LAW FOR LEGAL ASSISTANCE OFFICERS

LIEUTENANT COLONEL CRAIG D. BELL, USAR[1]

I. Introduction

On two occasions during the 1980s, Congress passed comprehensive tax legislation that dramatically changed the principles of divorce and sep-

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aration taxation. The first major enactment occurred when the Tax Reform Act of 1984 (TRA 1984)[2] was signed into law on 18 July 1984. The TRA 1984 completely overhauled the tax treatment of property transfers between spouses and between former spouses when the transfer is "incident to a divorce."[3] In addition, while preserving the fundamental precept of alimony deductibility by the payor spouse, TRA 1984 redefined alimony and created "front-loading" anti-abuse rules designed to prevent a payor from transferring property as deductible alimony.[4] The TRA 1984 also changed the eligibility requirements for several tax credits (namely, the child care credit and earned income credit), the child dependency exemption, and other related rules.[5]

Soon after attorneys, IRS auditors, and the judiciary mastered these new rules, Congress passed the Tax Reform Act of 1986 (TRA 1986).[6] The TRA 1986 revised the anti-front-loading rules to permit a larger dollar-amount fluctuation in alimony payments, shorten the period subject to recapture of "excessive" alimony payments, and make additional changes to the alimony provisions.[7] The 1986 overhaul of the marginal tax brackets,[8] the addition of a phase-out of personal and dependent exemptions through a surtax,[9] the repeal of the capital gains sixty percent deduction,[10] and other fundamental changes[11] have all had a major impact on how attorneys must approach settlement negotiations and the structuring of the parties' obligations in separation agreements or divorce proceedings. The attorney who understands these rules is in a strong position to provide his client with valuable tax advice and the opportunity for significant tax savings.

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2. Pub. L. 98-369, 98 Stat. 494 (1984).
3. *Id.* Sec. 421.
4. *Id.* Sec. 422.
5. *Id.*
6. Pub. L. 99-514, 100 Stat. 2085 (1986).
7. *Id.* Sec. 1843.
8. *Id.* Sec. 101.
9. *Id.* Sec. 103.
10. *Id.* Sec. 406.
11. *See, e.g.*, *id.* Sec. 104.

II. Alimony

A. Overview of General Rules Before 1985

Alimony or maintenance payments have been considered as taxable ordinary income to the receiving spouse and deductible by the paying spouse since 1942.[12] Under prior law, for a payment to be considered as alimony it had to meet the following four requirements: (1) the payment had to be "periodic;" (2) the payment had to be in discharge of a legal obligation of support imposed as a result of the family relationship; (3) the payment must have been made subsequent to the entry of a divorce decree or the execution of a separation agreement; and (4) the payment must have been required by the divorce decree or separation agreement.[13] Any amounts paid in excess of that required by the divorce decree or separation instrument were not considered deductible alimony payments.[14] This definition of alimony led to inconsistent results when determining whether alimony existed for federal tax purposes. State law determined whether a payment was "periodic" or whether the payment was based upon an obligation of support that originated out of the family relationship.[15] The inconsistent treatment among the states led to divergent results among taxpayers who were otherwise similarly situated. The TRA 1984 sought to eliminate this disparate treatment.[16]

B. Tax Reform Act of 1984 Overhauls Alimony Definition

The TRA 1984's substantial changes to the alimony provisions were the result of a conscious effort by Congress to reduce the importance of state law differences that caused similarly situated taxpayers to receive different tax consequences.[17] Alimony payments continued to remain deductible by the payor spouse and includable in the income of the payee

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12. The Revenue Act of 1942, Pub. L. 77-753, § 120, 56 Stat. 798, amended the Internal Revenue Code of 1939 by adding a new section 22 (providing for the taxation of alimony payments received) and section 23(c) (providing for the deduction of alimony payments by the payor spouse).

13. I.R.C. § 71(a)(1) (1982).

14. Van Vlaanderen v. Comm'r, 175 F.2d 389 (3d Cir. 1949); Ellis v. Comm'r, 60 T.C.M. (CCH) 593 (1990).

15. *See* Zampini v. Comm'r, 62 T.C.M. (CCH) 475 (1991 (including the cases cited therein).

16. Staff of the Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Tax Reform Act of 1984*, 98th Cong., 2d Sess. 715 (Comm. Print. 1985).

17. *See* H.R. REP. NO. 98-432, at 1495 (1984).

spouse.[18] The TRA 1984 definition of alimony can be broken into five components:

1. The payment must be in cash;[19]

2. The payment must be received by (or on behalf of) the spouse under a divorce or separation instrument;[20]

3. The divorce or separation instrument must not designate the payment as non-deductible by the payor and non-includable by the payee;[21]

4. The spouses may not be members of the same household at the time the payment is made;[22] and

5. The divorce or separation instrument must provide that there is no liability to make payments for any period after the death of the payee spouse and that there is no liability to make any payment (in cash or property) as a substitute payment for such payments after the death of the payee spouse.[23]

Congress later repealed two requirements from the pre-1985 alimony definition. Payments were no longer required to be "periodic" or made on account of the marital relationship imposed under local (namely, state) law.[24] In an effort to prevent divorce and separation agreements from abusing the new "mechanical" alimony rules by attempting to transfer property as alimony (commonly referred to as "excessive front-loading"), Congress also enacted minimum-term and recapture rules.[25] Under the minimum-term rule, alimony payments of more than $10,000 per calendar year were not deductible unless the payor was obligated to make payments for at least six post-separation calendar years.[26] The payments could ter-

18. I.R.C. §§ 71(a), 215(a).

19. *Id.* § 71(b)(1).

20. *Id.* § 71(b)(1)(A).

21. *Id.* § 71(b)(1)(B).

22. *Id.* § 71(b)(1)(C).

23. *Id.* § 71(b)(1)(D); *see* Priv. Ltr. Rul. 85-51-012 (Sept. 19, 1985) (holding that if this requirement was not in the divorce or separation instrument, then the payments would be neither deductible by the payor spouse nor includable in payee spouse's gross income).

24. Pub. L. 99-514, 100 Stat. 2085, Sec. 1843 (1986).

25. I.R.C. § 71(f) (1982).

26. *Id.* § 71(f)(1) (before TRA 1986, which repealed this rule; § 1843(c)).

minate within the six-year period if one of the following three events occurred: (1) death of the payor spouse; (2) death of the payee spouse; or (3) remarriage of the payee spouse.[27] The purpose of the minimum-term rule was to ensure that deductible payments were only for purposes of support and not a mechanism to effect property settlements.[28]

In addition, if during any one of the first six post-separation calendar years the total of alimony payments made during the calendar decreases by more than $10,000 from any preceding year within the six post-separation calendar years, the difference in excess of $10,000 was "recaptured." The recapture provisions required the payor spouse to add this difference to his or her gross income. The payee spouse was then entitled to a corresponding deduction of the "recapture amount" from his or her gross income, because the amount recaptured had already been included in gross income during an earlier year as alimony income.[29] The purpose of the recapture provisions was to discourage "front-end loading" of alimony payments.

C. Tax Reform Act of 1986 Revised Alimony Provisions

The Tax Reform Act of 1986 made three changes to the alimony rules. First, Congress repealed the requirement that a divorce or separation instrument must specifically state that alimony payments must terminate upon the payee spouse's death.[30] The elimination of this express statement requirement was made retroactive to 1 January 1985.[31] It is important to realize that Congress only repealed the requirement to expressly provide that alimony payments must cease upon the payee's death in the divorce or separation instrument. The general prohibition that there must be no liability to make any alimony payment for any period subsequent to the payee's death remains in effect.[32] Therefore, a prudent attorney should include a specific provision in the divorce or separation instrument precluding alimony payments after the payee spouse dies. Since this 1986 revision, *Q&A 11* and *Q&A 12* of the Temporary Treasury Regulations[33]

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27. *Id.* § 71(f)(5) (before TRA 1986).

28. Staff on the Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Tax Reform Act of 1984*, 98th Cong., 2d Sess. 715 (Comm. Print. 1985).

29. *Id.* § 71(f) (before TRA 1986).

30. Tax Reform Act of 1986 § 1843(b) (amending I.R.C. § 71(b)(1)(D)); I.R.S. Notice 87-9, 1987-1 C.B. 421.

31. I.R.C. § 71(b)(1)(D); I.R.S. Notice 87-9, 1987-1 C.B. 421, 422; Tax Reform Act of 1986, § 1843(b).

32. *Id.*

remain unchanged. *Question 11* asks what the consequences would be if the divorce or separation instrument did not state that there was no liability to continue to make alimony payments for any period after the death of the payee spouse. The response was that if the instrument failed to include such a statement, none of the payments, regardless if they were made before or after the payee spouse's death, would qualify as alimony. It is also clear that *Answer 11* has no validity when state law does not require payments after the payee spouse dies. However, when state law does not contain this requirement, it would remain valid. Note that Section 20-109 of the Virginia Code provides that spousal support and maintenance (alimony) "shall terminate upon the death of the spouse receiving such support unless otherwise provided by stipulation or contract between the parties."[34]

Question 12 of the Temporary Treasury Regulations asks if a divorce or separation instrument will be treated as if it stated that there is no liability to make alimony payments after the payee spouse's death where such liability terminates under local (state) law. *Answer 12* provides that the divorce or separation agreement must state that liability to pay alimony will terminate upon the payee spouse's death. While *Answer 12* no longer states a requirement after the Tax Reform Act of 1986 revisions,[35] attorneys should still follow it and write a specific provision into divorce or separation instruments precluding alimony payments after the death of the payee spouse.

The TRA 1986's two other changes involving the alimony provisions concern the recapture rules. Congress revised the anti-front-loading rules to permit a wider fluctuation of payments, reduced the six-post-separation-year recapture period to three years, and increased the difference level triggering the recapture rules from $10,000 to $15,000.[36]

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33. Temp. Treas. Reg. § 1.71-1T(b), Q&A-11 (1984).
34. VA. CODE § 20-109 (2003).
35. *See*, e.g., Heller v. Comm'r, 103 F.3d 138 (9th Cir. 1996).
36. I.R.C. § 71(f).

III. Explanation of the Current Alimony Rules

A. General Requirements

Under TRA 1986, any payments that meet the statutory requirements of I.R.C. § 71 and *Temporary Treasury Regulation § 1.71-1T(a), Q&A-2* will be deductible by the payor spouse as alimony and taxable as income to the payee spouse.[37] An alimony or separation maintenance payment is any payment received by or on behalf of a spouse (which includes a former spouse for this purpose) of the payor under a divorce or separation instrument that meets all of the following requirements:

1. The payment is in cash;

2. The payment is not designated as a payment that is excludable from the gross income of the payee and non-deductible by the payor;

3. In the case of spouses legally separated under a decree of divorce or separate maintenance, the spouses are not members of the same household at the time the payment is made;

4. The payor has no liability to continue to make any payment after the death of the payee (or to make any payment as a substitute payment); and

5. The payment is not treated as child support.[38]

Internal Revenue Code § 71(e) requires each spouse to file his or her tax returns in a filing status other than married filing jointly to be able to use the provisions of I.R.C. §§ 71, 215.

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37. *Id.* §§ 71, 215; Temp. Treas. Reg. § 1.71-1T(a), Q&A-1, Q&A-2 (1984).

38. Temp. Treas. Reg. § 1.71-1T(a), Q&A-2 (1984). In light of the TRA 1986 revisions to Section 71 of the Internal Revenue Code, the temporary regulation's requirements on the minimum-term rule, and the $10,000 trigger level, as well as the requirement that the divorce or separation instrument explicitly state that the payor spouse has no liability for either payments or a substitute for such payment, are superseded and invalid. I.R.C. § 71(f).

B. Payment Must Be in Cash

Sections 71(b)(1) and 215(b) require alimony or separate maintenance payments to be made in cash. The Temporary Treasury Regulations include checks and money orders that are payable upon demand within the definition of cash.[39] Transfers of services or property, including a debt instrument of a third party or an annuity contract, execution of a debt instrument by the payor, or the use of property of the payor do not qualify as alimony or separate maintenance payments.[40] Cash payments made by the payor to a third party, if such payments are pursuant to the terms of the divorce or separation instrument, will qualify as a payment of cash that is received "on behalf of a spouse." Examples of such payments include cash payments of rent, mortgage, and tax and tuition liabilities of the payee spouse.[41] Premiums paid by the payor spouse for term or whole life insurance on the payor's life, if made under the terms of the divorce or separation instrument, will qualify as alimony payments on behalf of the payee spouse to the extent that the payee spouse is the owner of the policy.[42] In addition to alimony payments made to third parties under the terms of the divorce or separation instrument, a payor spouse may make a cash alimony payment to a third party if such payment is made at the written request of the payee spouse. The writing must specifically state that the parties intend the payment to be treated as an alimony payment. The payor spouse must receive this writing before filing of his or her first tax return for the taxable year in which the payment is made.[43]

If the payor spouse must make payments to maintain property owned by the payor spouse and used by the payee spouse (including mortgage payments, real estate taxes, and insurance premiums), such payments are not payments on behalf of a spouse even if the divorce or separation instrument requires them.[44] However, if for example, the payee spouse occupies the marital home and is a co-owner of that home, then payments by the non-occupying payor spouse for the mortgage, taxes, and insurance will be

39. Temp. Treas. Reg. § 1.71-1T(b), Q&A-5 (1984).
40. *Id.*
41. *Id.* § 1.71-1T(b), Q&A-6.
42. *Id.*
43. *Id.* § 1.71-1T(b), Q&A-7.
44. *Id.* § 1.71-1T(b), Q&A-6.

deductible to the extent of the payee spouse's legal interest in the property.[45]

In *Tseng v. Commissioner*,[46] the Tax Court held that a husband could not deduct mortgage payments made pursuant to a divorce decree as alimony. The residence was titled solely in husband's name at the time these payments were made. The husband made payments to the holder of the mortgage on the marital home in lieu of making alimony payments to his former wife. Relying on *Temporary Treasury Regulation § 1.71-1T(b), Q&A-6*, the court refused to permit the husband to classify mortgage payments as alimony when the husband still had an ownership interest in the property.[47] Specifically, the regulation provides that any payments to maintain property owned by the payor spouse and used by the payee spouse (including mortgage payments) are not payments on behalf of a spouse, even if those payments are made pursuant to the terms of the divorce or separation instrument.[48]

In *Israel v. Commissioner*,[49] the Tax Court allowed a former husband to deduct rent payments on an apartment occupied by his ex-wife. Pursuant to the parties' property agreement, the husband was to make a number of different payments to his wife. Their agreement provided for a weekly alimony support payment and also called for the former husband to pay his former spouse's rent payments at a particular location as "additional maintenance." The separation agreement also called for a number of other lump sum maintenance payments and for certain child support payments. The Tax Court reviewed the statutory requirements of alimony as set forth in I.R.C. § 71 and held the following: (1) the payments were pursuant to a

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45. Priv. Ltr. Rul. 87-10-089 (Dec. 11, 1986); *see* Zampini v. Comm'r, 62 T.C.M. (CCH) 475 (1991), in which the husband's payment of a mortgage for which the wife was also liable and which was secured by a residence owned by the husband and wife as tenant by the entirety, was treated as alimony to the extent of one-half of the principal portion of the payment, and as deductible interest to the extent of all of the interest portion of the payment. *Id.* at 482.

46. 67 T.C.M. (CCH) 2501 (1994), *aff'd*, 79 F.3d 1154 (9th Cir. 1996) (unpublished), *cert. denied*, 519 U.S. 820 (1996).

47. *Id.* at 2504.

48. *Id.*

49. 70 T.C.M. (CCH) 1037 (1995). *See also* Medlin v. Comm'r, 76 T.C.M. (CCH) 707 (1998) (holding that former husband's wholly-owned car dealership's cash payments for lease, insurance, and maintenance of ex-wife's car and reimbursement of medical insurance premiums were deductible as alimony and includible in ex-wife's income; payments were properly treated as made by former husband "on behalf of" the ex-wife and satisfied I.R.C. § 71(b)(1)(A)).

separation agreement; (2) the parties were legally separated rather than members of the same household; and (3) the former husband was not obligated to make payments after the former wife's death. On this basis, the former husband was permitted to deduct the rent payments as alimony.[50]

C. Payment Must Be Pursuant to a Divorce or Separation Instrument

Alimony payments must be made pursuant to a divorce or separation instrument for the benefit of the spouse. A divorce or separation instrument is defined as follows:

1. A decree of divorce or separate maintenance or written instrument incident to a divorce; or

2. A written separation agreement; or

3. Another type of decree requiring a spouse to make payments supporting the other spouse.[51] An example of this type of decree would be a temporary order to make support payments.[52]

The qualifying instruments described under the current law after the TRA 1986 revisions are the same as under the prior law.[53] Accordingly, a written instrument incident to a divorce that requires support could include a stipulation entered into pursuant to a divorce proceeding.[54] The primary concern leading to the writing requirement imposed by I.R.C. § 71(b)(2)(A) is to "ensure there is adequate proof of the existence of an obligation and the specific items thereof when a divorce has occurred."[55]

In *Mercurio v. Commissioner*,[56] the Tax Court held that a wife's willingness to sign a written stipulation regarding support payments would not satisfy the "writing requirement" for her husband's deduction of the pay-

50. 70 T.C.M. (CCH) at 1039.

51. I.R.C. § 71(b)(2).

52. Priv. Ltr. Rul. 87-10-089 (Dec. 11, 1986).

53. Temp. Treas. Reg. § 1.71-1T(a), Q&A-4 (1984).

54. Priv. Ltr. Rul. 88-21-069 (Mar. 1, 1988).

55. Prince v. Comm'r, 66 T.C. 1058, 1067 (1976); *see also* Herring v. Comm'r, 66 T.C. 308, 311 (1976); Ellis v. Comm'r, 60 T.C.M. (CCH) 593, 594 (1990) (holding that husband who paid one-third of his salary to former spouse instead of the lower amount established in a written divorce decree was not entitled to deduct the excess payments as alimony); Abood v. Comm'r, 60 T.C.M. (CCH) 584, 586 (1990).

ments as alimony under I.R.C. § 215. The Mercurios separated in 1988, and Mr. Mercurio began to make monthly payments of $1,000 to his wife. Through a mediator, Mr. and Mrs. Mercurio orally agreed to spousal support. In September 1990, a marital separation agreement was drafted reflecting the parties' oral agreement of support. Mr. Mercurio did not agree to other portions of the written document, and the draft agreement was never executed.[57]

In a letter dated November 13, 1990 to Mrs. Mercurio's attorney, Mr. Mercurio's attorney proposed a stipulation stating that the payments the husband made to his wife in 1990 be deductible as support. Mrs. Mercurio's attorney responded with a letter dated December 13, 1990, expressing her willingness to sign the stipulation. Such a stipulation was filed with the court, along with judgment papers to perfect a dissolution of the Mercurios' marriage. The court did not enter a judgment during the calendar year 1990. The Tax Court held that the husband's unilateral statement that he was willing to pay certain sums for support would not constitute a written separation agreement. Furthermore, the Tax Court concluded that even if there was an agreement between the parties, the agreement must be reduced to writing before payments are deductible.[58]

D. Spouses Must Reside in Separate Households

Spouses who are legally separated under a decree of divorce or separate maintenance may not be members of the same household at the time payments are being made.[59] The IRS will not treat spouses as residing separately if they physically live in different locations in the former marital dwelling unit.[60] However, the spouses will not be treated as members of the same household where one spouse is preparing to leave the household and departs not more than one month after the date the payment is made.[61] If, on the other hand, spouses are *not* legally separated under a decree of divorce or separate maintenance, a payment made under a written separa-

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56. 70 T.C.M. (CCH) 59 (1995); *see also* Ewell v. Comm'r, 71 T.C.M. (CCH) 3124 (1996) (holding that payments husband made to ex-wife before written separation agreement existed were not deductible as alimony except for one payment conceded by IRS; former wife's list of expenses, negotiation letters between attorneys, check negotiations, and the fact that payments were made did not constitute a written agreement).

57. *Id.* at 60.

58. *Id.*

59. I.R.C. § 71(b)(1)(C); Lyddan v. United States, 721 F.2d 873 (2d Cir. 1983); Washington v. Comm'r, 77 T.C. 601 (1981).

tion agreement or a decree described in I.R.C. § 71(b)(2)(C) may qualify as an alimony payment notwithstanding the fact that the spouses are still members of the same household at the time the payment is made.[62]

E. Payments Must Terminate Upon the Payee's Death

Alimony payments must stop upon the death of the payee, and there must be no liability for any kind of substitute payment.[63] Payments that are made simultaneously with the signing of an agreement, thus guaranteeing the payee spouse being alive, will not satisfy this requirement. In *Webb v. Commissioner*,[64] the husband was required to make two payments totaling $215,000 at the time the agreement was signed. These payments were in addition to other periodic payments required by the agreement, which qualified as deductible alimony payments and were not at issue. The husband made the two required payments and deducted them as alimony on his 1986 income tax return. The Tax Court denied the deduction. In so ruling, the court stated that the agreement created a liability that the wife's estate could have enforced should the two payments not have been made.[65]

The fact that the payments were made simultaneously with the execution of the agreement (creating the husband's liability to make the payments) was irrelevant. The agreement's creation of a "liability" that was enforceable by the wife's estate violated the requirement that payments

60. The requirement for spouses to reside in separate households is generally strictly construed. In Coltman v. Comm'r, 61 T.C.M. (CCH) 2207 (1991), the Tax Court held that a husband and wife were not "separated and living apart" when the husband resided several days per week in his former marital home and also spent considerable time residing in an apartment, in a condominium that he owned, and also at his girlfriend's home. When Mr. Coltman stayed in his former marital home, he resided in a separate bedroom from his wife, and they had virtually no contact throughout the day. The court ruled that despite the little contact between the husband and wife, the sharing of the entrances and other common areas of the house "under the same roof was not separate and living apart" for purposes of former I.R.C. § 71(a)(3), currently I.R.C. § 71(b)(1)(C). Accordingly, the alimony payments were not deductible by Mr. Coltman. *Id*. at 2214; *see also* Hopkins v. Comm'r, 63 T.C.M. (CCH) 3113 (1992). *But see* Sydnes v. Comm'r, 577 F.2d 60 (8th Cir. 1978).

61. Temp. Treas. Reg. § 1.71-1T(b), Q&A-9 (1984).

62. *Id. See*, *e.g.*, Benham v. Comm'r, 79 T.C.M. (CCH) 2054 (2000) (deciding a case in which taxpayers continued to reside in same household after executing separation agreement providing for temporary alimony; the Tax Court permitted a deduction for alimony paid prior to the parties' divorce).

63. I.R.C. § 71(b)(1)(D).

64. 60 T.C.M. (CCH) 1024 (1990).

65. *Id.* at 1027.

must terminate upon the payee's death.[66] The lesson is that form must prevail over substance when an attorney drafts an agreement for I.R.C. § 71 payments. The fact that compliance with the agreement creates a legal impossibility for the estate to make a valid claim appears to be irrelevant.

One way to overcome this problem would have been to draft the agreement to provide for the requirement that the two payments totaling $215,000 would be payable within a specified time after the execution of the agreement (for example, within six months), provided the wife is alive at the time of the payment. If the wife dies before receiving the payment, the obligation to make the payments would terminate. The estate would have no claim to seek collection of the $215,000. The wife must be willing to accept the risk that she will survive the relatively short time period to collect the money. A larger lump sum payment may entice her to accept this risk. Given the size of the lump sum payment, the alimony recapture provisions discussed in Paragraph 6.402 are likely to be applicable.[67]

In *Hoover v. Commissioner*,[68] the Tax Court held that failure to include terminate-at-death language in a final divorce decree converted payments that would have been deductible as alimony into a non-deductible property settlement. In October 1988, Mr. and Mrs. Hoover were granted a final decree of divorce in Ohio. Under a temporary order in effect before that time, Mrs. Hoover received payments of $10,000 from her husband in 1988. The parties agreed that the wife was ultimately to receive, among other things, a lump sum of "alimony as division of equity" that was to be paid in installments of no less than $3,000 per month until the whole amount was paid in full.[69] A preliminary draft of the divorce decree (which was separate from the temporary order noted above) provided that "all payments of alimony shall cease upon [Mrs. Hoover's] death, [or] remarriage."[70]

The actual final decree, however, did not contain the terminate-at-death language. The decree awarded the wife "alimony as division of

66. *Id.*

67. Author's comments. Furthermore, the court did not address the recapture provisions of I.R.C. § 71(f) that would have been applicable to these two payments if the court had concluded that the husband's obligation or liability to make the $215,000 payment did terminate upon wife's death. The recapture issue is moot given the court's interpretation of I.R.C. § 71(b)(1)(D).

68. 69 T.C.M. (CCH) 2466 (1995), *aff'd*, 102 F.3d 842 (6th Cir. 1996).

69. *Id.* at 2469.

70. *Id.* at 2467.

equity" in the amount of $521,640.[71] At that time, Ohio law permitted "alimony as division of equity" to refer to equitable distribution of marital property as well as support payments made to a former spouse.[72] The Hoover's divorce decree stated that this "alimony" was payable in installments of no less than $3,000 per month until the entire amount was paid in full.[73]

In 1988 and 1989, Mr. Hoover reported his payments of $36,000 and $36,200 respectively, as deductible alimony. Mrs. Hoover, on the other hand, treated the money as a non- taxable property settlement. The IRS assessed deficiencies against both Hoovers. In reviewing the final divorce decree, the court looked at all relevant factors. The parties' removal of the language from the draft decree providing that the payments would cease upon Mrs. Hoover's death or remarriage was weighed especially heavily against Mr. Hoover. During the trial, Mr. Hoover testified that he agreed to delete the language because his "tax preparer" told him the divorce decree did not have to include it. The Tax Court held that the payments did not satisfy the terminate-at-death requirement and therefore would not be treated as alimony under the Internal Revenue Code.[74]

In *Cunningham v. Commissioner*,[75] the Tax Court reached a conclusion similar to that in the *Hoover* case. In *Cunningham*, the property settlement provided that the husband was to pay to his wife an established amount for a period of 142 months. The language was silent as to whether these payments would terminate upon the death of Mrs. Cunningham. The taxpayers resided in North Carolina, and under that state's law, payments would terminate on death of either party if such payments otherwise qualified as alimony. The Tax Court stated that the Cunningham's divorce set-

71. *Id.*

72. *Id.* at 2469.

73. *Id.* at 2467.

74. *Id.* at 2469. Practice Point: The learning point from this decision is that if the parties had retained the terminate-at-death provision in the final decree, the payments in *Hoover* would have qualified as deductible alimony. Mr. Hoover's tax advisor was technically correct in stating that for tax purposes, the divorce decree need not specifically include the terminate-at-death language. Leaving such language out, however, opens the real possibility that the IRS will successfully deny the payor a deduction for alimony if state law does not specifically require support payments to cease upon the death of the payee spouse. To make sure the payor spouse receives deductible alimony treatment, the separation agreement or divorce decree should specify that otherwise qualifying payments will cease at the death of the payee spouse. When the parties do *not* seek to treat payments as alimony, the instrument should specify that payments are not to be treated as deductible alimony.

75. 68 T.C.M. (CCH) 801 (1994).

tlement agreement was not approved or adopted by any North Carolina court.

Several commentators who reviewed the *Cunningham* case are unsure whether the failure of a North Carolina court to approve or adopt the property agreement, in and of itself, should disqualify spousal support that otherwise appears to meet the requirements of I.R.C. § 71. In *Cunningham*, however, the Tax Court also noted that no evidence before it demonstrated whether the Cunningham's intended support payments were to terminate in the event of the former wife's death. If the Cunninghams did present such evidence, perhaps the Tax Court would have held that the arrangement met the terminate-at-death requirement and that the alimony payments were deductible by the payor spouse.[76]

In 1995, the IRS also issued a private letter ruling that a lump sum payment from a divorced spouse to the former spouse's attorneys under a divorce decree did not qualify as alimony because the divorce decree did not meet the "terminate-at-death" requirement of I.R.C. § 71(b)(1)(D). Apparently, the taxpayers had attempted to establish a "third party" payment, but neglected to include the terminate-at-death requirement in the separation agreement.[77]

In *Private Letter Ruling 9542001*, the IRS reviewed an Illinois court's judgment for dissolution of marriage. The divorce judgment called for the wife to pay her former spouse the sum of $2000 for maintenance. In a subsequent modification motion filed by the husband, the Illinois court modified the spousal support payments and included language that specifically provided that the maintenance payments would terminate upon the death of the husband or upon his remarriage or upon his reaching the age of sixty-two years. The wife subsequently paid her former husband's attorney fees and deducted those payments. The husband did not include the payment as income on his tax return. In concluding that the attorney fees payment did not qualify as alimony, the IRS stated that the payment did not meet the termination requirement under I.R.C. § 71(b)(1)(D) because the

76. *Id*. at 809; *see also* Barrett v. United States, 878 F. Supp. 892 (S.D. Miss. 1995), *aff'd*, 74 F.3d 661 (5th Cir. 1996); Smith v. Comm'r, 75 T.C.M. (CCH) 2250 (1998); Human v. Comm'r, 75 T.C.M. (CCH) 1990 (1998); Riberia v. Comm'r, 70 T.C.M. (CCH) 1807 (1997), *aff'd* in unpub. opin. 98-1 U.S.T.C. (CCH) ¶ 50,260 (9th Cir. 1998), 1998 U.S. App. LEXIS 3030; Sroufe v. Comm'r, 69 T.C.M. (CCH) 2870 (1995); Heller v. Comm'r, 69 T.C.M. (CCH) 730 (1994); Pettet v. United States, 80 A.F.T.R. 2d 97-7987 (D.C.N.C. 1997).

77. Priv. Ltr. Rul. 9542001 (Oct. 10, 1995).

wife's liability did not terminate by operation of any specific language in the divorce decree nor by operation of any provision of Illinois law. That position, the IRS pointed out, was supported by the Tax Court's analysis in three recent cases addressing the same issue.[78]

In each of these three cases, the Tax Court focused on whether a liability was created that would have been enforceable by the payee spouse's estate had he or she died before the payments were actually made. To answer that inquiry, the Tax Court looked both at the terms of the agreement and at whether applicable state law would operate to terminate the obligation at some point. In all three cases, the IRS noted, the Tax Court held that the payments in question were not alimony because liability for the payments continued to exist even after death.[79]

In *Private Letter Ruling 9542001*, the IRS stated that the Illinois court documents did not indicate an intent by either party for the wife's liability for her former husband's attorney fees to cease on the occurrence of an event. Also, the IRS noted that there was no provision in Illinois law that would operate to terminate the wife's liability. The IRS followed the analysis in *Stokes*, *Webb*, and *Cunningham* and concluded that the wife's payment of her former husband's attorney fees did not meet the termination requirement because the former husband's estate would be able to enforce the obligation.[80]

More recently, in *Larry W. Human v. Commissioner*,[81] the Tax Court held that a man's obligation to make payments to a former wife under a divorce decree specifying the number and amount of each payment does not terminate on the payee's death under Georgia law; thus, the payments are not alimony under Section 71. Larry Human and his ex-wife obtained a divorce decree in 1990 that obligated him to make two lump sum pay-

78. *Id.* (citing Cunningham v. Comm'r, 69 T.C.M. (CCH) 801 (1994); Stokes v. Comm'r, 68 T.C.M. (CCH) 705 (1994); Webb v. Comm'r, 60 T.C.M. (CCH) 1050 (1990)).

79. Priv. Ltr. Rul. 9542001 (Oct. 10, 1995).

80. *Id.* Courts that review separation agreements will notice that including language calling for the cessation of payments upon the death of the payee spouse will favor characterization of the payments as spousal support because the payee spouse is not in a position to pass any payment obligation on to his or her heirs or legatees. *See* Prater v. Comm'r, 55 F.3d 527 (10th Cir. 1995) (reversing the Tax Court decision, 66 T.C.M. (CCH) 471 (1993)).

81. 75 T.C.M. (CCH) 1990 (1998).

ments to her totaling $775,000. The decree classified the payments as alimony, but did not specify whether the payments terminated on her death.[82]

Human paid $970,000 to his ex-wife in 1992 and claimed a tax deduction for the full payment. The Service disallowed the deduction, and Human filed a Tax Court petition. The court found that under Georgia law, Human's obligation to make lump sum payments survived his ex-wife's death. Because the divorce decree specified the number and amount of each payment, and contained no other limitations, conditions, or statements of intent, explained the court, state law construes the obligation as one surviving the payee's death.[83]

The TRA 1986 retroactively eliminated the TRA 1984's requirement that the divorce or separation instrument must specifically state the termination of alimony payments upon the death of the payee spouse.[84] Should the payor spouse be required to make either alimony payments or a substitute payment following the death of a payee spouse, the consequences would be that none of the prior payments made by the payor spouse would qualify as deductible alimony.[85]

Neither the statute nor the temporary regulations define a substitute payment; however, guidance can be found in the temporary regulations. To the extent that one or more payments begin, increase in amount, or become accelerated in time as a result of the death of the payee spouse, such payments may be treated as a substitute for the continuation of payments terminating on the death of the payee spouse which would otherwise qualify as alimony payments. A "facts and circumstances" test is used to determine if payments are substitute payments.[86] The temporary regulations provide several examples, one of which is as follows:

> *Example*. Under the terms of a divorce decree, A is obligated to make annual alimony payments to B of $30,000, terminating on the earlier of the expiration of 15 years or the death of B. The divorce decree provides that if B dies before the expiration of the 15-year period, A will pay to B's estate the difference between the total amount that A would have paid had B survived, minus the amount actually paid. For example, if B dies at the end of the

82. *Id.* at 1990.
83. *Id.* at 1991.
84. *See supra* §§ II B and C.
85. Temp. Treas. Reg. § 1.71-1T(b), Q&A-13 and Q&A-14 (1984).
86. *Id.* § 1.71-1T(b), Q&A-14.

> [tenth] year in which payments are made, A will pay to B's estate $150,000 ($450,000-$300,000). These facts indicate that A's liability to make a lump sum payment to B's estate upon the death of B is a substitute for the full amount of each of the annual $30,000 payments to B. Accordingly, none of the annual $30,000 payments to B will qualify as alimony or separate maintenance payments. The result would be the same if the lump sum payable at B's death were discounted by an appropriate interest factor to account for the prepayment.[87]

The IRS has also addressed a situation involving the establishment of a trust for children when the payee spouse dies. In this ruling, the husband was obligated to make spousal support payments to his former wife on a monthly basis until the year 2008. Should his ex-wife predecease him, the divorce decree required the ex-husband to establish a trust for their children. The trust would receive monthly payments, equal to the former spousal payments in amount and duration. The husband was required to make these payments to the trust until the year 2008. The payments to the ex-wife would stop upon her death. The IRS held that these payments to the trust were substitute payments. The IRS stated that the fact that the trust beneficiaries were adult children was irrelevant. Accordingly, none of the alimony payments made under the divorce decree would qualify as deductible alimony.[88]

A taxpayer can obtain the economic effect of a substituted payment in the event of the payee spouse's premature death by obtaining a life insurance policy on the life of the payee spouse. The payor can increase the alimony to the payee spouse by the amount of the premium payments.[89]

F. Payments Must Not Be Child Support

A payment made pursuant to a divorce or separation instrument that is fixed (or treated as fixed under special rules discussed later, in Paragraph III.B) as payable for the support of a child of the payor is not an alimony

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87. *Id.* (ex. 2).
88. Priv. Ltr. Rul. 90-10-051 (Dec. 12, 1989).
89. *See* Temp. Treas. Reg. § 1.71-1 T(b), Q&A-6 (1984).

payment.[90] In other words, if a payment is classified and treated as child support, it will not qualify as alimony.

G. Payments Must Not Be Designated as Non-Deductible or Excludable

Payments that otherwise qualify as alimony are nevertheless not treated as alimony if the divorce or separation instrument designates all or some of the payments as not includable in the payee spouse's gross income and not deductible by the payor spouse.[91] This designation may be evidenced by a written separation agreement (as defined by I.R.C. § 71(b)(2)(B)) or another writing signed by both parties that designates the otherwise qualifying payments as non-deductible and excludable. This latter writing must refer to the written separation agreement to have effect.[92] An example of suitable language, if included in a divorce or separation agreement, follows:

> Non-Alimony Treatment. In accordance with Internal Revenue Code § 71(b)(1)(B), the parties expressly agree to designate payments under [indicate relevant paragraph(s) in document] as excludible and non-deductible payments for purposes of § 71 and § 215, respectively.

If the payor makes any payments pursuant to a temporary support order that the parties seek to "elect out" of alimony treatment, then such temporary support order or a subsequent order must specifically designate the payments as non-alimony.[93] The spouses have until the deadline for the filing of IRS Form 1040 to make the election of non-alimony treatment. The parties can apparently make the election on a year-by-year basis by regularly executing appropriate designation instruments that effectively "amend" their written separation agreement. The spouses must attach copies of the instrument containing the designation of non-alimony treatment to the first tax return (Form 1040) the payee spouse files for *each* year to which the designation applies.[94]

The purpose of the "election" out of alimony treatment is to permit the spouses to negotiate and work out the tax and non-tax economic aspects of

90. *Id.* § 1.71-1T(c), Q&A-15.
91. I.R.C. § 71(b)(2)(B); § 1.71-1T(b), Q&A-8.
92. *Id.* § 1.71-1T(b), Q&A-8.
93. *Id.*
94. *Id.*

a separation or divorce rather than having a judge mandate a result that neither spouse may want. The designation of non-alimony treatment is restricted to cash payments that otherwise would qualify for alimony treatment under I.R.C. § 71 and I.R.C. § 215. However, when spouses use these provisions with I.R.C. § 1041,[95] which concerns spousal transfers of property, they gain powerful tools to negotiate an arrangement that suits both parties economically while accommodating their tax concerns.

H. Excess Front-Loading of Alimony Payments—The Rule and Recapture Provisions

The deductibility of alimony payments from gross income by the payor spouse has always served as a temptation to disguise property settlement payments, which are not deductible, as alimony. To curb this temptation, TRA 1984 added I.R.C. § 71(f), which established a set of rules to prevent excessive front-loading of alimony payments by providing a minimum-term rule and a recapture rule.[96] Under the 1984 minimum-term rule, if alimony payments exceeded $10,000 annually, then these payments had to continue for a minimum of six calendar years following the parties' separation; otherwise, only the first $10,000 in payments each year would be deductible to the payor and includable in the payee's gross income.[97] The recapture rule would then require a recalculation and inclusion in income by the payor and deduction by the payee of previously paid alimony, to the extent that the amount of such payments during any of the six "post-separation" years fell short of the amount of payments during a prior year by more than $10,000.[98]

These 1984 excess front-loading rules led to some very confusing calculations. The TRA 1986 reduced the six-year minimum-term rule to three post-separation years. The "first post-separation year" means the first calendar year in which the payor spouse paid I.R.C. § 71(f)-qualifying alimony payments.[99] The first calendar year that follows the first post-separation year is called the "second post-separation year," and the second calendar year following the first post-separation year is known as the

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95. *See infra* § V.

96. I.R.C. § 71(f)(1), (2); Temp. Treas. Reg. § 1.71-1T(c), (d), Q&A-18, Q&A-19 (1984).

97. *See* Temp. Treas. Reg. § 1.71-1T(d), Q&A-20, Q&A-23 (1984) (giving general guidance on how the minimum-term rule worked and an example).

98. *Id.* § 1.71-1T(d), Q&A-19.

99. I.R.C. § 71(f)(6).

"third post-separation year."[100] In addition, the TRA 1986 increased the safe harbor permitted excess payment amount to $15,000.[101]

Under these new recapture rules, alimony payments made in the first post-separation year that exceed the average of the alimony payments made in the second and third post-separation years by more than $15,000 are recaptured as ordinary income in the third post-separation year. The payee spouse must deduct this recapture amount from his or her gross income while the payor spouse must add the recapture amount in his or her gross income for the third post-separation year.[102] Only payments made in the first and second post-separation years are subject to recapture. The payments made in the third post-separation year and thereafter are not subject to recapture.

In the TRA 1986, Congress made the elimination of the six-year minimum-term rule and its replacement with a third-year recapture retroactive to 1 January 1985.[103] For divorce or separation instruments executed on or after 1 January 1987, there is no minimum payment term. The instrument need only be subject to the potential recapture in the third post-separation year of any excessive alimony payments that violate the new recapture provisions. The new recapture provisions will also apply to pre-1987 instruments if they are modified after 31 December 1986, and any such modification expressly provides that the TRA 1986 amendments shall apply.[104] The transition rule for all other instruments to which the minimum-term and recapture rules of TRA 1984 apply provides, in effect, that the $10,000 "safe harbor" will still control. However, the recapture period will only be for the first three post-separation years.[105]

I. Examples of the New Recapture Provisions

The recapture formula described in I.R.C. § 71(f) can be described as follows: the total recapture reported in post-separation year three is the

100. *Id*.
101. *Id.* § 71(f)(2)-(4).
102. *Id.* § 71(f)(1).
103. Pub. L. No. 99-514, § 1882(c)(2)(A), 100 Stat. 2085 (1986).
104. TRA 1986, § 1842(c)(2)(A)-(B).
105. *Id.* § 1842(c)(3).

sum of excess alimony payments made in years one and two, calculated as follows:

Excess Year 2 Payments
+ Excess Year 1 Payments
Total Year 3 Reportable Recapture

To calculate Year 1 and Year 2 excess, first calculate year two excess payments as follows:

Sum of All Year 2 Payments
- Sum of All Year 3 Payments + $15,000
Excess Year 2 Payments

Next, calculate year one excess payments as follows:

Sum of All Year 1 Payments
-$15,000 + ([Year 2 Payments – Year 2 excess payments + Year 3 Payments] ÷ 2)
Excess Year 1 Payments

In describing this three-part formula, the total amount of recapture that must be reported in the third post-separation year is the sum of excess payments made in the first and second post-separation years. Calculation of the amount of excess alimony in the second post-separation year is simply the amount of payments for year two that exceed the payments made in the third post-separation year by more than $15,000. Calculating the amount of excess alimony in the first post-separation year is a bit more complex. It is equal to the amount of payments made in year one that exceeds the average alimony payments made in the second post-separation year (less the excess already recaptured) and in the third post-separation year by more than $15,000.

Example 1. Payor makes payments totaling $70,000 in year one and payments totaling $35,000 in each of years two and three. The recapture

of these previously deducted alimony payments is computed using the following steps, starting with calculating year two excess payments:

$$\begin{array}{c} \$70{,}000 \\ \underline{-\ (\$35{,}000 + \$15{,}000)} \\ \text{Year 2 Excess} = 0 \end{array}$$

The $20,000 must be included in the payor's gross income for the third post-separation year and is deductible from the payee's gross income for that same year.

Example 2. Payor is required to make a lump sum alimony payment of $50,000 in year one and no payments in year two or thereafter. The lump sum alimony payment is not required to be paid if the payee spouse should die before the payment must be made. The recapture of this payment is calculated as follows:

$$\text{Excess Payments in Year 2} = 0 - (0 + \$15{,}000) = 0$$
$$\text{Excess Payments in Year 1} = \$50{,}000 - (\$15{,}000 + (0 - 0) + 0) = \$35{,}000$$

Thus, the amount to be recaptured in year three is $35,000.

J. Exceptions to the Recapture Provisions

There are four significant exceptions to the excess front-loading recapture rules. If any of these exceptions occur, the recapture of any excess alimony in year three will not be required. First, if either spouse dies before the close of the third post-separation year and the alimony payments terminate because of this death,[106] then the recapture rules do not apply. Second, the recapture provisions do not apply to support payments that are made pursuant to the type of support decree defined by I.R.C. § 71(b)(2)(C).[107] An example of this would be a temporary support order. Third, the recapture provisions do not apply to alimony payments that vary in amount because they are determined by a fixed formula that is based upon the payor spouse's income from a business or from compensation from employment or self-employment. The period during which the payor spouse is obligated to make these fluctuating payments must be not less than three years.[108] In other words, these payments can fluctuate in

106. I.R.C. § 71(f)(5)(A); *see also* Temp. Treas. Reg. § 1.71-1T(d), Q&A-25 (1984).

107. *Id.* § 71(f)(5)(B); *see also* Temp. Treas. Reg. § 1.71-1T(d), Q&A-21, Q&A-25 (1984).

amount as long as the percentage used is fixed by a preexisting formula. The fourth exception is if payments terminate because the payee spouse remarries before the end of the third post-separation year.[109]

K. Planning[110]

Since recapture may only occur in the third post-separation year, the parties may completely avoid it if they can agree to spread out the payments in excess of three years or stay within the $15,000 safe-harbor level. For example, the parties can arrange for alimony payments to remain fairly stable during the first three post-separation years and then dramatically increase or decrease during the fourth year. Another approach would be to insure that the separation agreement includes a contingency in the payor's alimony payment obligation that will cause one of the recapture exceptions to apply. One example might be where it is evident that the payee spouse will remarry after the dissolution of the current marriage. In this situation, the payor can only pay large amounts of alimony during the first two years after separation, and the payee spouse must remarry after receiving the payments but before the close of the third post-separation year.

The increase of the safe harbor level to permit $15,000 in excess alimony payments before such payments would trigger the recapture provisions which permits the parties to deduct disguised property settlements made during the first two separation years. For example, assume the spouses are both gainfully employed but have a significant amount of property to transfer between them. If the payor spouse is in a higher marginal tax bracket, she may negotiate the transfer of a larger overall payment in exchange for structuring it as alimony payments designed to avoid recapture. The maximum amount of payments that can be designed to resemble alimony for tax purposes is $37,500, if the parties push such payments into the first two post-separation years. They may transfer up to $22,500 in year one and another $15,000 in year two, according to the following formula:

Step 1:Subtract $37,000 from the property settlement amount;

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108. I.R.C. § 71(f)(5)(C); *see also* Temp. Treas. Reg. § 1.71-1T(d), Q&A-25 (1984).

109. I.R.C. § 71(f)(5)(A); *see also* Temp. Treas. Reg. § 1.71-1T(d), Q&A-25 (1984).

110. This section depicts the author's suggestions on alternative strategies a legal assistance attorney may use to plan around or seek to avoid application of the alimony recapture provisions contained in I.R.C. § 71(f).

Step 2:Divide the difference by 3 to calculate the base payment amount;
Step 3:Add $22,500 to calculate the year one base payment;
Step 4:Add $15,000 to calculate the year two base payment.

Example: H would like to transfer $199,998 to W as a property settlement and have this settlement qualify as deductible alimony.

Step 1:Subtract $37,000 from the property settlement amount:
$199,998 – 37,500 = $162,498
Step 2:Divide the difference by 3 to calculate the base payment amount:
$162,498 / 3 = $54,166
Step 3:Add $22,500 to calculate the year one payment:
$54,166 + $22,500 = $76,666
Step 4:Add $15,000 to calculate the year two payment:
$54,166 + $15,000 = $69,166

For year three and subsequent years, the payment will be equal to the base payment amount, $54,166. None of these payments will be subject to recapture.

IV. Child Support

A. Pre-1985 Rules

Before the enactment of the TRA 1984, I.R.C. § 71(b) permitted the payor spouse to treat payments made to support minor children of the marriage as alimony by making a "unitary" payment that combined child support and alimony. The payor spouse was not otherwise permitted to deduct child support payments.[111] Litigation was the common result, in which courts repeatedly struggled with the definition of "child support," and specifically, whether payments pursuant to an agreement or a decree were expressly specified or "fixed" as established amounts for child support. The leading case defining the former I.R.C. § 71(b)'s requirement that child support had to be firmly expressed or fixed in the agreement or decree to be eligible for deductible alimony treatment was *Commissioner v. Lester.*[112] In *Lester*, the husband paid a monthly amount of "family" sup-

111. I.R.C. §§ 71(b), 215(b) (1982) (pre-TRA 1984 statute).
112. 366 U.S. 299 (1961).

port for his wife and three children, pursuant to a written divorce agreement. The agreement provided for a reduced amount of support if any of the children married, died, or became emancipated. The Commissioner argued that this reduction, triggered by one of the three contingencies relating to the children, effectively fixed the amount of child support contained in their agreement.[113] The Supreme Court disagreed and held that the language must be clear and specific.[114]

> The agreement must expressly specify or "fix" a sum certain or percentage of the payment for child support before any of the payment is excluded from the wife's income. The statutory requirement is strict and carefully worded. It does not say that "a sufficiently clear purpose" on the part of the parties is sufficient to shift the tax. It says that the "written instrument" must "fix" that "portion of the payment" which is to go to the support of the children. Otherwise, the wife must pay the tax on the whole payment. We are obligated to enforce this mandate of the Congress.[115]

To disqualify the child support part of a unitary award from alimony treatment, the designation had to be express and specific and could not be implied from other terms of the decree or agreement (for example, a contingency calling for a reduction of support upon a child reaching majority such as in *Lester*).[116]

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113. *Id*. at 300.

114. *Id*. at 303.

115. 366 U.S. at 303. The *Lester* decision interpreted sections 22(k) and 23(c) of the 1939 Internal Revenue Code, the predecessor provisions to sections 71(b) and 215(b) of the Internal Revenue Code of 1954 (before the enactment of TRA 1984). In *Revenue Ruling 62-53*, 1962-1 C.B. 41, the IRS ruled that the *Lester* holding is equally applicable to sections 71 and 215 of the 1954 Code.

B. Current Law (Post-1985)

The TRA 1984 specifically addressed the *Lester* decision by legislatively overruling its result.[117] The general treatment of child support as being non-includable in the payee's gross income and non-deductible from the payor's gross income remained unchanged. If any amount of support will be reduced upon the occurrence of a contingency relating to a child, or at a time that can clearly be associated with a contingency relating to a child, then "an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of the children of the payor spouse."[118] This new definition provides an explanation of what will "fix" an amount as child support.

The Tax Court stated that the amount of child support must be fixed "by the terms of the instrument" under Section 71(c)(1). In *Lawton v. Commissioner*,[119] the Tax Court held that payments a woman received from her husband were alimony includible in her income because the divorce instrument did not fix a specific amount of the payments as support for their minor child. Judith Lawton was separated from her husband during 1994 and 1995. The Lawtons divorced in July 1995. Under the terms of a support order, Mr. Lawton made payments of $12,900 and $6950 in 1994 and 1995, respectively. The support order provided that these pay-

116. Nelson v. Comm'r, 32 T.C.M. (CCH) 356 (1973); Grummer v. Comm'r, 46 T.C. 674, 680 (1966) (finding that the *Lester* decision required the Tax Court to ignore the parole and other extrinsic evidence offered as irrelevant). The parties extensively litigated the question of what language fixed child support. For example, in *Nelson*, the husband was required to pay $475 to the wife each month until their daughter reached the age of twenty-one, at which time the agreement reduced the support to $332.50 per month, until their son reached twenty-one. In the event the wife died or remarried, however, the support obligation was to be $137.50 per child per month, until such child reached the age of twenty-one. Although the agreement describes the parties' apparent intention for the amount dedicated to child support, the Tax Court held that the entire amount constituted alimony. 31 T.C.M. (CCH) at 359-360. In *Talberth v. Comm'r*, 47 T.C. 326 (1966), a separation agreement required a husband to provide the wife with $7,200 annually, and also stated (for tax purposes) that $2,000 of this amount was for the wife and the remainder was to support their three children. A subsequent court judgment recorded the identical terms. A modification several years later reduced the amount of support allocated to the children, because one of the children reached the age of majority. The Tax Court held that this was not sufficient to fix an amount for child support after the *Lester* decision. *But see* West v. United States, 413 F.2d 294 (4th Cir. 1969); Comm'r v. Gotthelf, 407 F.2d 491 (2d Cir. 1969), *cert. denied*, 396 U.S. 828 (1969).

117. I.R.C. § 71(c) (2000).

118. *Id.* § 71(c)(2); Temp. Treas. Reg. § 1.71-1T(c), Q&A-16 (1984).

119. 78 T.C.M. (CCH) 153 (1999).

ments were "for support of spouse and one child." Mrs. Lawton did not report the amounts as income, and the IRS determined that the payments were alimony under Section 71. The Tax Court pointed out that the amount of child support must be fixed "by the terms of the instrument" under Section 71(c)(1). The court noted that the support order did not fix any specific amount for child support payments, instead making an "unallocated" award for spousal and child support. The Tax Court rejected Mrs. Lawton's assertion that the amounts were fixed under state law. The court reasoned that if Congress had intended that state law could fix the amount of child support payments, it would have changed the statutory language of Code Section 71(c).[120]

Section 71(c)(2) contains two alternative conditions that will fix an amount as child support. The first is a reduction in payments that occurs on the happening of a contingency relating to a child specified in the instrument, for example, the child attaining a specified age or income level, dying, marrying, leaving school, leaving the payee spouse's household, or gaining employment.[121]

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120. *Id*. at 156.

121. Temp. Treas. Reg. § 1.71-1T(c), Q&A-17 (1984). The Tax Court applied this alternative of fixing child support in *Fosberg v. Comm'r*, 64 T.C.M. (CCH) 1527 (1992). In *Fosberg*, the husband was ordered to pay his wife $175 per week as alimony until 31 December 1986. The alimony would then automatically be reduced to $150 per week until the earlier of his wife's death or remarriage or until the youngest child reached the age of eighteen. In a separate paragraph, the divorce decree ordered the husband to pay $75 per week per child as child support. The Tax Court held that because the alleged alimony payments were to be reduced when the child reached the age of eighteen, this constituted a "contingency involving a child" within the meaning of I.R.C. § 71(c)(2). Accordingly, the husband could not deduct the purported alimony payments. On substantially similar facts, the Tax Court reached the same result in *Hammond v. Comm'r*, 75 T.C.M. (CCH) 1745 (1998). In *Hammond*, the divorce judgment called for specified child support payments and also provided for $2000 monthly alimony payments until either the remarriage of Mrs. Hammond or until their child reached the age of eighteen. The latter "contingency" is precisely what the revised I.R.C. § 71(c)(2) was designed to prevent qualifying as deductible alimony. *See also* Simpson v. Comm'r, 78 T.C.M. (CCH) 191 (1999) (holding that a state's child support guidelines (Pennsylvania) did not operate to fix the child support portion of an unallocated award; reasoning that if Congress had intended that child support payments be fixed by operation of law, it could have amended the language of I.R.C. § 71(c)(1) to provide accordingly); Lawton v. Comm'r, 78 T.C.M. (CCH) 153 (1999) (holding that "child support" must be fixed "by the terms of the instrument" under I.R.C. § 71(c)(1); the amount to be fixed is not fixed by state law); Wells v. Comm'r, 75 T.C.M. (CCH) 1507 (1998).

The second alternative event that will permit the fixing of child support is the reduction of a payment at a time clearly "associated with" the happening of a contingency relating to the payor's child. There are two situations in which payments that would otherwise qualify as alimony will be presumed to be reduced at a time clearly associated with the happening of a contingency relating to a child. The first situation occurs when the payments are reduced within six months of the date the child is to attain the local age of majority.[122] The second situation is where the agreement provides for a reduction in payments on two or more occasions that occur not more than one year before or after a different child of the payor spouse attains any specific age between the ages of eighteen and twenty-four, inclusive. The age must be the same for each child, but need not be a whole number of years.[123]

The two situations described above are not conclusive; they merely create rebuttable presumptions. Either the IRS or the taxpayer may rebut them by showing that the parties chose the timing of the reduction of the payments to be independent of any contingencies relating to the payor's children.[124] In the first situation, when payments are reduced within six months of the child reaching the age of majority, the temporary regulations provide that if the reduction is a complete cessation of alimony during the sixth post-separation year or upon the expiration of a seventy-two-month period, the presumption is rebutted conclusively.[125] It is unclear whether the time period for this conclusive rebuttal of the presumption is still six years; since the IRS filed this temporary regulation, the TRA 1986 eliminated the six-year minimum-term rule. A three-year period may actually be adequate, or this portion of the regulation may simply no longer be valid. Other circumstances also support the rebuttal of the presumption, for example, evidence that the alimony payments will continue for a period

122. Temp. Treas. Reg. § 1.71-1T(c), Q&A-18 (1984).

123. *Id*.

124. *Id*.; *see* Hill v. Comm'r, 71 T.C.M. (CCH) 2759 (1996) (upholding the IRS's rebuttal of the presumption that payments terminating within six months of the child's eighteenth birthday was based on an independent date agreed by the parties unrelated to child reaching 18 years); *see also* Shepherd v. Comm'r, 79 T.C.M. (CCH) 2078 (2000) (concluding, based on the record, that the parties chose a termination date independent of any contingencies relating to the child).

125. *Id*.

customarily provided in the local jurisdiction, such as a period equal to one-half the duration of the marriage.[126]

The second situation that triggers the rebuttable presumption is when the agreement or divorce instrument calls for the reduction in payments on two or more occasions occurring within a year of the time a different child of the payor spouse attains a specific age between eighteen and twenty-four. The following examples show how the second situation works when the spouses have at least two children.

> ***Example 1:*** *A* and *B* are divorced on 1 July 1985, when their children, *C* (born 15 July 1970) and *D* (born 23 September 1972), are fourteen and twelve, respectively. Under the divorce decree, *A* is to make alimony payments of $2000 per month to *B*. Such payments are to be reduced to $1500 per month on 1 January 1991 and to $1000 per month on 1 January 1995. On 1 January 1991, the date of the first reduction in payments, *C* will be twenty years, five months, and seventeen days old. On 1 January 1996, the date of the second reduction in payments, *D* will be twenty-two years, three months, and nine days old. Each of the reductions in payments is to occur not more than one year before or after a different child of *A* attains the age of twenty-one years and four months. (Actually, the reductions are to occur not more than one year before or after *C* and *D* attain any of the ages of twenty-one years, three months, and nine days through twenty-one years, five months, and seventeen days.) Accordingly, the reductions will be presumed to clearly be associated with the happening of a contingency relating to *C* and *D*. Unless this presumption is rebutted, payments under the divorce decree equal to the sum of the reductions ($1000 per month) will be treated as fixed for the support of the children of *A* and, therefore, will not qualify as alimony or separate maintenance payments.[127]
>
> ***Example 2***. The husband and wife are divorced in 1986. They have two children, *A*, age sixteen, and *B*, age ten. The separation agreement requires the husband to pay his wife $2000 per month, reduces the payments to $1500 in 1985, and terminates them completely in 1999. The age of majority governing the state where the husband and wife reside is eighteen years. In

126. *Id*.
127. *Id*.

> 1985, child *A* will be twenty-five and *B* will be nineteen. Given that there is only one reduction in the separation agreement, the parties have avoided situation two. In addition, both children have passed the local age of majority for their state. Accordingly, all of the payments can be treated as alimony includable in the wife's gross income and deductible from the husband's gross income, assuming that the payments otherwise meet the alimony requirements.

A common problem arises when the parties want to structure payments so that they are subject to multiple reductions over several years without having a portion of the payments qualify as alimony. To accomplish this goal, the parties should do either of the following: (1) schedule the reductions so that they will occur before any child of the payor attains age seventeen, or after all children have reached the age of twenty-five; or (2) separate the reductions by a time period of at least two years, plus the difference in the ages between the payor's youngest and oldest children. The certainty and practicality of such a plan will depend on the financial condition of the parents, the number of children that need support, and the range of ages of the children.

The IRS has had several opportunities to consider various payment reductions in light of the temporary Treasury regulations that followed the enactment of the TRA 1984. The IRS ruled that when the agreement reduced payments to the payee spouse for two weeks out of the year when the child was visiting the payor spouse, the amount of such a reduction would fix the level of child support. The IRS used this reduction to prorate the payments into alimony and child support.[128]

In another ruling in 1988, the IRS was able to interpret whether several reductions in payments to a former spouse were "closely associated with the happening of a contingency relating to a child of the payor," enabling a portion of the payments to be fixed as child support.[129] In this case, the spouses divorced in January 1986. The payor's support obligation was $1000 per month from October 1985 (before the written agreement) until July 1992, when the payments would be reduced to $500 per month. The payments were set to terminate in December 1997. The parties had two children born in December 1973 and June 1976.[130] These

128. Priv. Ltr. Rul. 87-46-085 (Aug. 21, 1987).
129. Priv. Ltr. Rul. 88-20-052 (Feb. 19, 1988).
130. *Id*.

facts satisfy both sets of circumstances triggering the rebuttable presumption: the 1992 reduction would find both children under the age of eighteen by more than six months (thus, situation one applies); and the age of the youngest child at the time of the termination of payments in 1997 would be more than two years from the age of the first child at the time of the initial reduction scheduled for July 1992 (thus, situation two applies). Accordingly, the IRS held that the reductions of these payments were not associated with the happening of a contingency relating to the children of the payor. The IRS concluded that the payments qualified as alimony.[131]

The IRS also ruled that unallocated support payments reduced upon the eighteenth birthday of each of the taxpayer's children would be child support fixed by the divorce instrument. The facts in this ruling involved a former husband who was required to pay to his ex-wife "unallocated support" twice a month. The level of support was to be reduced on two separate dates that coincided with the eighteenth birthdays of two of the parties' children. The support payments would cease altogether when their third child attained the age of eighteen. Prior to the ruling request, the wife had been including these payments in her income as alimony.[132] The IRS held that the three support payment reductions were reduced at a time clearly associated with the happening of a contingency relating to the payor's child. The unallocated support payments were therefore fixed by the divorce instrument as child support, and would not be includable in the wife's income or be deductible by the husband. Language contained in the divorce instrument that the payments were alimony and includable in the ex-wife's income and deductible by the husband was not controlling for tax purposes. The IRS stated that when payments meet the statutory requirements for child support under I.R.C. § 71(c), it would disregard language in a divorce instrument indicating a contrary intent.[133]

In *Heller v. Commissioner*,[134] the Tax Court was faced with a situation that called for an offset arrangement. Pursuant to the Hellers' divorce instrument, Mrs. Heller received certain payments from her former husband. Some of the payments were designated as spousal support, but the remaining payments were designated as child support. The divorce instrument stated that in the event a court increased the amount of child support,

131. *Id*.

132. Priv. Ltr. Rul. 92-51-033 (Sept. 21, 1992).

133. *Id.*; *see also* Hammond v. Comm'r, 75 T.C.M. (CCH) 1745 (1998) (holding that the termination of $2000 monthly payments on a child's eighteenth birthday were child support, despite the agreement labeling them as alimony).

134. 68 T.C.M. (CCH) 538 (1994).

the divorce instrument would also operate to reduce the amount of spousal support to offset the amount of the increased in child support. The divorce left no room to doubt the parties' intentions—to maintain Mr. Heller's total monthly obligation for spousal and child support at a fixed level for a specified period of time. Conversely, the agreement provided that if Mrs. Heller obtained an increase in child support before the end of the same time period, the court-ordered increase in child support would operate to reduce Mr. Heller's spousal support by an equal amount.[135]

In *Heller*, therefore, the Tax Court considered the question of whether a court-ordered increase in spousal support, as offset by the contractual reduction in child support, constituted a "contingency related to a child" under I.R.C. § 71(c)(2). The Tax Court first reviewed the legislative history that led to the adoption of I.R.C. § 71(c)(2).[136] By adding I.R.C. § 71(c)(2) in 1984, Congress effectively overruled the U.S. Supreme Court's decision in *Commissioner v. Lester*,[137] which held that an allocation would not be considered child support unless the agreement "specifically designated" it as such.[138] While I.R.C. § 71(c)(2) makes it more difficult to disguise child support as alimony, this section still allows taxpayers some freedom in structuring their divorce instruments.[139]

The statutory list of contingencies in I.R.C. § 71(c)(2) contemplates situations that call for the termination of a certain amount of support on account of an occurrence relating to a child. The Tax Court in *Heller* noted that the contingencies listed in the text of I.R.C. § 71(c)(2) and its implementing regulations are not exhaustive; however, any contingency relied upon to reject the expressed allocation in a divorce instrument should be similar to the exceptions listed in that section.[140]

In *Heller*, the parties to the divorce instrument specifically designated the amounts of spousal and child support. The payments designated as spousal support met all of the definitional requirements of I.R.C. § 71(b)(1). Therefore, in order to distinguish these payments from the alimony definition of I.R.C. § 71(b)(1), the IRS was required to demonstrate

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135. *Id*. at 538, 540.

136. *See generally* STAFF OF JOINT COMMITTEE ON TAXATION, 99TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 713 (Jt. Comm. Print 1985).

137. 366 U.S. 299 (1961).

138. *Id.* at 306.

139. *See* I.R.C. § 71(c)(2).

140. 68 T.C.M. at 539.

that the spousal support provisions of the divorce instrument contained a contingency related to a child. The Hellers' divorce instrument allowed the parties to seek future modifications of child support. While any increase in child support would be offset by a corresponding decrease in spousal support, the Tax Court stated that it did not believe the ability to modify child support rose to the level of a contingency related to a child. The court noted that the temporary treasury regulations implementing I.R.C. § 71 contemplate agreements in which the amount of child support can fluctuate.[141]

C. Mixed Payments (Part Alimony, Part Child Support)

Divorce and separation instruments usually designate payments as either alimony or child support. If the payments the payor spouse actually makes are less than that required by the instrument, the IRS will classify any portion of the actual payments up to the amount of agreed child support as child support. The amount exceeding the agreed child support obligation will be treated as alimony.[142]

V. Transfers of Property Between Spouses and Former Spouses

A. Overview of General Rules Before 1985

Transfers of property in return for the transferee's interest in the marital property formerly required courts to examine state laws of ownership to determine what federal tax treatment was appropriate for the transaction. As might be expected, this resulted in different tax treatment for residents of different states despite the clear similarities between the transfers. At one extreme, a common law state would require a spouse to hold some type of title in the property for payments received to be attributable to the marital asset. At the opposite end of the spectrum, a community property state assumed that the spouse had a vested interest in any marital asset. Between these two extremes were states that provided spouses with some varying degree of equitable vested ownership interest in the marital assets. Accordingly, transfers of assets in connection with a divorce or separation

141. *See* Temp. Treas. Reg. § 1.71-1T(c), Q&A-16.

142. I.R.C. § 71(c)(3); *see* Baron v. Comm'r, 56 T.C.M. (CCH) 1391 (1989); Blair v. Comm'r, 56 T.C.M. (CCH) 923 (1988).

produced different tax treatment for similar property transfers among similarly situated taxpayers.[143]

The leading case on the tax effects of marital property divisions was the Supreme Court decision in *United States v. Davis*.[144] In *Davis*, the Court held that when a spouse transfers property to the other spouse in satisfaction of the transferee's marital or support rights, the transfer results in the transferor spouse realizing a gain or loss on the transfer. The amount of gain or loss is the difference between the adjusted basis in the property and its fair market value on the date of transfer. In *Davis*, the husband agreed to transfer 1000 shares of DuPont stock in exchange for the wife releasing all claims and rights against him for her dower share of the family assets. The stock had appreciated greatly since its purchase by the husband.[145] The Supreme Court held that the transfer of stock in satisfaction of the release of inchoate marital rights by the wife was a taxable event. The Court held that the transfer was an "other disposition" under I.R.C. § 1001.[146]

The Court next considered how to determine the nature of the wife's property interests in the stock. The Court looked at the state law of Delaware, a common law state, and held that the wife had "no interest—passive or active—over the management or disposition of her husband's personal property."[147] Consequently, the Court was not merely dividing jointly owned property in a non-taxable transaction. Rather, the Court held that the transfer of stock required an immediate recognition of gain by the husband.[148] The wife received a basis in the stock equal to the money she paid plus the fair market value of property (other than money) given to the husband. The wife transferred no money for the stock. The release of her inchoate marital rights was valued as equal to the fair market value of the stock because the values "of the two properties exchanged in an arms-length transaction are either equal in fact, or are presumed to be equal."[149] The rationale of *Davis* is that the transferee spouse exchanges the release of inchoate marital rights under state law for the property transferred and that the value of those inchoate rights is deemed to be equal to the value of

143. *See* the discussion in *McIntosh v. Comm'r*, 85 T.C. 31 (1985), and the cases cited therein.

144. 370 U.S. 65 (1962).

145. *Id*. at 66-67.

146. *Id*. at 69.

147. *Id*. at 70.

148. *Id*. at 70-71.

149. *Id*. at 72.

the transferred property. The IRS has ruled that the spouse receiving the property received a basis in the asset equal to its fair market value.[150]

The rules established by *Davis* did not apply in the case of equal divisions of community property;[151] the IRS also ruled that they did not apply to the partition of jointly held property.[152]

B. Tax Reform Acts of 1984 and 1986 Overhaul Property Transfers Between Spouses and Former Spouses

Because of the varying tax consequences that resulted from the importance given state law, Congress believed a change was necessary.[153] Congress decided that it was inappropriate to tax transfers between spouses,[154] and that the law of property transfers incident to divorce created too much controversy and litigation.[155] The rules often proved a trap for the unwary if, for example, the parties viewed property acquired during marriage (even though held in one spouse's name) as jointly owned, only to find that the equal division of the property upon divorce triggered the recognition of a gain.[156] Congress also showed concern for the IRS, noting

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150. Rev. Rul. 67-221, 1967-2 C.B. 63; Field Service Advice 200005006 (Feb. 4, 2000). Field Service Advice *200005006* involved a situation in which the husband received awards of both incentive stock options and non-qualified stock options from his employer. Pursuant to the parties' divorce, the wife received half of the options in the divorce decree. After the divorce, the ex-wife exercised her options. The corporation issued the ex-husband a Form 1099, which he used to report the difference between the fair market value and the exercise price paid by his ex-wife. The ex-husband included this gain on his federal income tax return and filed a claim for a refund of the tax related to the gain. The IRS advised the parties that neither of them would be taxed under I.R.C. § 83 when the ex-wife exercised her options. The IRS stated that ex-husband's transfer of the options to his wife was an arms-length transaction, citing *United States v. Davis*, 370 U.S. 65 (1962). As a result of this decision, the IRS determined that the ex-husband received compensation income equal to the fair market value of the options when he transferred them to his ex-wife under the divorce decree. When the ex-wife subsequently exercised the options, there was no taxable event for her ex-husband under I.R.C. § 83, and there were no tax consequences for the ex-wife. The IRS did note, however, that the ex-wife would be taxed on any subsequent gain or loss on the sale of the underlying stock, which would then have a basis equal to the amount previously includable in the ex-husband's gross income. Field Service Advice 200005006 (Feb. 4, 2000).

151. H.R. REP. NO. 98-4170, at 1491 (1984).

152. Rev. Rul. 74-347, 1974-2 C.B. 26.

153. H.R. REP. NO. 98-4170, at 1491 (1984).

154. *Id.*

155. *Id.*

156. *Id.*

that the government frequently found itself caught between the parties' contradictory assertions. The transferor spouse frequently reported no gain on the transfer, while *Davis* entitled the transferee spouse to compute her gain or loss by reference to a basis equal to the fair market value of the property at the time of receipt.[157]

Mindful of these concerns, the TRA 1984 created a new I.R.C. § 1041, the effect of which was to legislatively reverse the portion of *Davis* relating to property transfers. The new section provided that an individual spouse does not recognize a gain or loss on a transfer of property to (or in trust for the benefit of) his spouse during the marriage or to "a former spouse, but only if the transfer is incident to the divorce."[158] Generally, new law treats the transfer as a gift. The transferor's adjusted basis carries over to the transferee and becomes the recipient's basis. This carry-over of the transferor's basis obtains (as contrasted with the result under the gift rules), even if the fair market value of the property at the time of the transfer is less than the transferor's adjusted basis.[159]

The TRA 1986 made a technical change to I.R.C. § 267, which generally disallows losses between related taxpayers. Section 1842(a) of the TRA 1986 created I.R.C. § 267(g), which requires coordination between sections 267 and 1041.[160] Section 1041 expressly prohibits recognizing both gains and losses in transfers between spouses.[161] Section 267(g) insures that I.R.C. § 267(d), which does permit a loss created by a transfer between related taxpayers to offset a subsequent gain caused by the sale or other disposition of the asset, does not apply.[162]

> ***Example:*** A husband sells 100 shares of stock to his wife for $5000. The husband's basis in the stock was $10,000. Under I.R.C. § 1041(b), the wife takes the husband's basis of $10,000, and the husband does not recognize any loss by virtue of I.R.C. § 1041(a). If I.R.C. § 267(d) were permitted to apply, in addition to I.R.C. § 1041, a subsequent sale of the stock by the wife for $14,000 would provide her with a gain of $4000 ($14,000 sale proceeds minus the $10,000 basis). Section 267(d) might have reduced this gain by offsetting it with the husband's previously

157. *Id*. at 1491-92.
158. I.R.C. § 1041(a); Temp. Treas. Reg. § 1.1041-1T, Q&A-1 (1984).
159. I.R.C. § 1041(b); *see also infra* § V.C.7.
160. I.R.C. § 267(g); *see also* Rev. Rul. 76-377, 1976-2 C.B. 89.
161. I.R.C. § 1041.
162. *Id*. § 267(g), (d).

> disallowed loss of $5000, resulting from his original sale of the stock to his wife. Section 267(g), however, precludes this offset. The wife must report the full $4000 gain.

The TRA 1986 made two other important changes to I.R.C. § 1041. Both involved transfers of property in trust. First, if a spouse transfers an installment obligation to a trust established for the other spouse, the deferred gain on the installment obligation is accelerated and recognized.[163] Second, when a spouse transfers property subject to liabilities that exceed its basis to a trust established for a spouse, the transferor will recognize a gain for the difference between the amount of the liabilities and the basis.[164] The transferor will no realize such a gain, however, if the transferor transfers the property directly to the other spouse, exclusive of the trust.[165] For example, the IRS applied the I.R.C. § 1041 non-recognition rule to the transfer of a partnership interest when the transferring partner's share of partnership liability exceeded his basis in his partnership interest.[166]

C. Explanation of the Current Rules on Property Transfers Between Spouses and Former Spouses

1. General Requirements

Under I.R.C. § 1041, any transfer of property between spouses during the marriage or any property transfers after the marriage terminates, if such transfers are "incident to a divorce," are not taxable.[167] All such transfers are treated as gifts,[168] and the transferee's basis in the property shall be the adjusted basis of the transferor.[169]

Section 1041 applies to any transfer between spouses regardless of whether the transfer is a gift or a sale or exchange between spouses acting at arm's length.[170] No divorce or legal separation need be contemplated

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163. *Id.* § 453B(g).
164. *Id.* § 1041(e).
165. *Id*.
166. Priv. Ltr. Rul. 92-50-031 (Sept. 14 1992).
167. *Id*.
168. I.R.C. § 1041(b)(1).
169. *Id.* § 1041(b)(2).
170. Temp. Treas. Reg. § 1.1041-1T(a), Q&A-2 (1984).

between the spouses at the time of the transfer, nor does a divorce or legal separation ever have to occur.[171]

There is one exception to the tax-free transfer of property between spouses (or former spouses): if the transferee is a nonresident alien, then gain or loss will be recognized at the time the property is transferred to the nonresident alien spouse.[172] The purpose of this exception is presumably because either nonresident aliens frequently are not subject to U.S. taxes by virtue of tax treaties, or nonresident spouses (or former spouses) sometimes simply fail to report subsequent sales of the appreciated transferred property. Such tax avoidance is possible since nonresident aliens generally are not subject to U.S. taxes on property sales outside of the United States.[173]

Any transfers between former spouses must be "incident to the divorce" to qualify for tax-free treatment.[174] A transfer of property is "incident to the divorce" if it occurs within one year after the date on which the marriage ends or is related to the cessation of the marriage.[175] If the transfer occurs within one year after the date the marriage ends, the transfer does not need to be related to the cessation of the marriage to qualify for I.R.C. § 1041 treatment.[176] If the one-year "safe harbor" rule covering transfers made within one year after the marriage ends applies, the transfer may still be tax-free if the transfer is related to the cessation of the marriage. A transfer of property is treated as related to the cessation of the marriage if the transfer is pursuant to a divorce or separation instrument, and the transfer occurs within six years after the date the marriage ends.[177]

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171. *Id*.

172. I.R.C. § 1041(d); Temp. Treas. Reg. § 1.1041-1T(a), Q&A-3 (1984).

173. *See*, e.g., I.R.C. § 865(a)(2)(2002).

174. *Id.* § 1041(a)(2).

175. *Id.* § 1041(c); Temp. Treas. Reg. § 1.1041-1T(b), Q&A-6 (1984).

176. Temp. Treas. Reg. § 1.1041-1T(b), Q&A-6 (1984).

177. *Id.* § 1.1041-1T(b), Q&A-7; *see also* Priv. Ltr. Rul. 88-33-018 (May 20, 1988); Young v. Comm'r, 113 T.C. 152 (1999), *aff'd*, 240 F.3d 369 (4th Cir. 2001). In *Young*, the Tax Court held that a fifty-nine acre property Mr. Young conveyed to his ex-wife four years after their divorce, and because of his default on a $1.5 million promissory note given to ex-wife under property separation agreement, was "incident to divorce." *Id.* at 156. The court reasoned that it was "related to the cessation of the marriage," found that the promissory note was part of the property settlement, and found that the dispute leading to the land transfer resolved a dispute arising under the property settlement and completed the division of marital property. *Id.* at 156.

For purposes of this rule, a divorce or separation instrument includes a modification or amendment to such decree or instrument.[178]

Any transfer not pursuant to a divorce or separation instrument and any transfer occurring more than six years after the cessation of the marriage is presumed not to be related to the cessation of the marriage. A party may rebut this presumption only by showing that he made the transfer to effect the division of property owned by the former spouses at the time of the cessation of the marriage.[179] For example, evidence to rebut the presumption may include evidence that: (1) the transfer was not within the one and six-year periods because of factors that hampered an earlier transfer of the property, such as legal or business impediments to transfer or disputes concerning the value of the property owned at the time the marriage terminated; and (2) the parties effected the transfer promptly after removing the impediment to the transfer.[180]

The IRS has addressed this rebuttable presumption on several occasions. In *Private Letter Ruling 92-35-026*,[181] the husband and wife entered into a property settlement that required the husband to purchase the wife's entire interest in a business, and in certain realty held by the business, for a specified sum. The husband refused to purchase the business and real property under the agreement. The husband disputed the price, and the parties agreed to arbitrate the matter. They reached a tentative arbitration agreement, but the husband again refused to purchase the business and realty. The wife sued to enforce the transfer as set forth in their marital separation agreement. The former spouses settled, and the husband purchased the business and real estate. The transfer of property occurred more than six years after the date of their divorce. The IRS ruled that the wife's transfer of the business and related realty to her former husband qualified for non-recognition treatment as a transfer between former spouses incident to divorce under I.R.C. § 1041(a).[182] The IRS explained that the wife successfully rebutted the presumption of *Temporary Treasury Regulation § 1041(a)-1T(b), Q&A-7*, by showing that: (1) the parties transferred the property to accomplish the division of property the parties owned at the time of the divorce; and (2) the transfer did not occur within the six-year

178. Temp. Treas. Reg. § 1-1041-1T(b), Q&A – 7 (1984).
179. *Id*.
180. *Id*.
181. Priv. Ltr. Rul. 92-35-026 (May 29, 1992).
182. *Id*.

period because a dispute concerning the value of the property, which resulted in litigation, prevented an earlier transfer.[183]

In *Private Letter Ruling 91-23-053*,[184] the IRS ruled that a taxpayer's payment (in a community property state) of one-half of a business interest to his former spouse, in monthly installments lasting more than six years after the divorce, qualified as nontaxable transfers under I.R.C. § 1041. The IRS stated that while *Temporary Treasury Regulation § 1.1041-1T(b), Q&A-7* establishes a rebuttable presumption that payments more than six years after the end of the marriage are not related to the cessation of the marriage, in this case, it was clear that the payments were made to accomplish a division of property owned by the couple at the time of divorce.[185]

Private Letter Ruling 93-06-015[186] addressed an eight-year delay between the divorce and the transfer. The original judgment of divorce required that the parties' residence, which the former spouses owned jointly, be sold when the youngest child was emancipated, and that the parties divide the proceeds between them equally. Instead, eight years later, the parties amended the divorce instrument, and under that amendment, the husband sold the residence to the wife. The IRS concluded that this transaction was not made to effect a division of property between them. The original divorce judgment had already accomplished that. Instead, the IRS considered this to be an arms-length transfer between two individuals who were not married to each other.[187]

In *Private Letter Ruling 93-48-020*,[188] a marital settlement agreement between a husband and wife who were divorced on December 26, 1990 provided that the parties would sell certain property they held as tenants in common to a third party, unless the husband exercised his right of first refusal. The IRS concluded that the husband's purchase of the property would be a purchase pursuant to a divorce or separation instrument, and that I.R.C. § 1041(a)(1) would apply to any such sale if it took place before December 27, 1996.[189] For purposes of I.R.C. § 1041, annulments and

183. *Id*.
184. Priv. Ltr. Rul. 91-23-053 (Mar. 13, 1991).
185. *Id*.
186. Priv. Ltr. Rul. 93-06-015 (Nov. 13, 1992).
187. *Id*.
188. Priv. Ltr. Rul. 93-48-020 (Sept. 1, 1993).
189. *Id*.

cessations of marriage that are void ab initio for violations of state law constitute divorces.[190]

In addition to direct transfers between spouses or former spouses, I.R.C. § 1041 permits certain "indirect" transfers to third parties.[191] The temporary regulations authorize three situations in which third parties may receive property on behalf of spouses or former spouses without triggering a gain or loss to the transferring spouse: (1) when the divorce or separation instrument requires the transfer to the third party; (2) when the transfer to the third party is pursuant to the written request of the other spouse (or former spouse); and (3) when the transferor receives a written consent or ratification of the transfer to the third party from the other spouse (or former spouse).[192] With respect to the latter situation, the consent or ratification must state that the parties intend for the transfer to be treated as a transfer to the non-transferring spouse (or former spouse), subject to the rules of I.R.C. § 1041, and the transferor must receive the consent before the date of filing of the transferor's first tax return for the taxable year in which the transfer is made.[193] In each of these three situations, the tax laws will treat the transfer of property as if the non-transferring spouse (or former spouse) made it to the third party. This deemed transfer by the non-transferring spouse is not a transaction that qualifies for non-recognition of gain under I.R.C. § 1041.[194] Thus, the non-transferring spouse may have to recognize gain or loss as a result of the transfer.

2. Basis Considerations

As indicated earlier, I.R.C. § 1041 covers all transfers between spouses, and virtually all transfers between former spouses. The provisions of I.R.C. § 1041 are mandatory. The general rule of no gain or loss recognition on a transfer between spouses or former spouses is designed to cover any such transfer even when the transfer is in exchange for the release of marital rights or other consideration.[195] The general rule applies regardless of whether the transfer is of property separately owned by the transferor or is a division—whether equal or unequal—of community property.[196] Section 1041 may even govern transfers of property acquired

190. Temp. Treas. Reg. § 1.1041-1T(b), Q&A-8 (1984).
191. *Id.* § 1.1041-1T(b), Q&A.
192. *Id.* § 1.1041-1T(c), Q&A-9.
193. *Id*.
194. *Id*.
195. *Id.* § 1.1041-1T(d), Q&A-10.

by one or both former spouses after the marriage ceases if the acquisition satisfies the provision's other requirements.[197] The holding period "tacking rule" of I.R.C. § 1223 also applies to I.R.C. § 1041 transfers. A transferee who takes a carry-over basis in property is treated as having owned the property for as long as the transferor owned it.[198]

The spouse or former spouse who receives property under I.R.C. § 1041 recognizes no gain or loss upon receipt of the transferred property. In all cases, the basis of the transferred property in the hands of the transferee is the adjusted basis of such property in the hands of the transferor immediately before the transfer. Even if the transfer is a bona fide sale, the transferee spouse (or former spouse) does not acquire a basis in the transferred property equal to the transferee's cost (the fair market value).[199] This carry-over basis rule applies whether the adjusted basis of the transferred property is less than, equal to, or greater than its fair market value at the time of transfer—or the value of any consideration provided by the transferee—and applies for purposes of determining loss as well as gain upon the transferee spouse's subsequent disposition of the property.[200] Thus, this rule is different from the rule applied in I.R.C. § 1015(a) for determining the basis of property acquired by gift.[201]

The most frequently encountered application of this rule is when the parties negotiate the transfer of the marital residence. The home is typically one of the largest assets the husband and wife own, and usually has the most appreciation of any of their assets. Accordingly, one spouse will usually seek to purchase the other spouse's ownership interest in the home with cash, property, or a promissory note. Counsel must ensure that the transferee spouse is aware that buying his spouse's ownership interest in the home will not increase the basis of the property upon its subsequent sale by the transferee.

The Tax Court recently applied the new basis rules of I.R.C. § 1041 in *Godlewski v. Comm'r.*[202] This case involved the transfer of the marital

196. *Id.*

197. *Id.* § 1.1041-1T(a), Q&A-5 (1984).

198. I.R.C. § 1223(2); *see also* Priv. Ltr. Rul. 87-19-007 (Feb. 2, 1987) (determining a wife's holding period in shares of business interests purchased from her husband in an I.R.C. § 1041 transfer by taking the husband's holding period in such property into account).

199. Temp. Treas. Reg. § 1.1041-1T(d), Q&A-11 (1984).

200. *Id.*

201. *Id*; *see supra* § II.B.

home from one spouse to the other, and the transferee's subsequent sale of the house. The Godlewskis purchased a house for $32,200 in 1973 and resided in it until the husband moved out due to marital difficulties in 1981. In 1984, the parties negotiated a property agreement in which the husband agreed to purchase his wife's ownership interest in the home for $18,000. The parties executed the property agreement after the effective date for making I.R.C. § 1041 applicable to spousal property transfers. In 1984, after the transfer of ownership, the husband sold the house for $64,000. He failed to report the purchase of his wife's interest in the house and his subsequent sale of the house in his income tax return. The IRS calculated the amount realized on the sale using the original basis of $32,200. Mr. Godlewski contended that he had the right to increase his basis in the home by $18,000 to reflect the amount he paid his former wife. The Tax Court disagreed with the taxpayer and held that both I.R.C. § 1041(b)(2) and *Temporary Treasury Regulation § 1.1041-1T(d)A-11* preclude the transferee spouse from increasing the basis of an asset, even in a bona fide sale, when I.R.C. § 1041 governs the transfer.[203]

Clients frequently encounter the same rule when they own a family business, and only one spouse wishes to continue operating it. If the transferee spouse purchases the other spouse's ownership interest in the business for cash or other property, the transferee will only be entitled to a basis equal to the transferor spouse's adjusted basis in the business. The tax laws will not permit any additional increase in the basis for the money or property used to purchase the transferor spouse's ownership interest.[204] It may be possible, however, to arrange a transfer outside of the I.R.C. § 1041 provisions. Section 1041 only covers transfers between spouses or former spouses if "incident to a divorce." A transaction between a spouse and a corporation wholly owned by the other spouse, or between two corporations, is not a sale between spouses subject to the rules of I.R.C. § 1041.[205] This creates a tax planning opportunity. If a taxable transaction can use a controlled corporation or other entity, thereby permitting a step-up in the basis of the purchased property to its cost (as opposed to a carry-over of the other spouse's adjusted basis), the parties may benefit from increased depreciation allowances and other tax benefits. Such a transaction is not

202. 90 T.C. 200 (1988).
203. *Id*. at 206.
204. *See* Priv. Ltr. Rul. 87-19-007 (Feb. 2, 1987).
205. Temp. Treas. Reg. § 1.1041-1T(a), Q&A-2, Example (3) (1984).

without risks, however; the IRS may seek to recharacterize the transfer using a common law principle such as the step transaction doctrine.[206]

3. Section 1041 Non-Recognition Has Broad Implications

The breadth of the non-recognition-of-gain rule of I.R.C. § 1041 means that it also overrides other normal gain recognition events. For example, the non-recognition treatment the tax laws afford to spouses overrides the gain that would normally be recognized when spouses or former spouses transfer property to each other that is subject to liabilities exceeding its adjusted basis.[207]

> ***Example:*** Assume that *Husband* (*H*) owns property having a fair market value of $10,000 and an adjusted basis of $1000. In contemplation of making a transfer of this property incident to a divorce from *Wife* (*W*), *H* borrows $5000 from a bank, using the property as security for the borrowing. *H* then transfers the property to *W* and *W* assumes, or takes the property subject to, the liability to pay the $5000 debt. Under I.R.C. § 1041, *H* recognizes no gain or loss upon the transfer of the property, and the adjusted basis of the property in the hands of *W* is $1000.[208]

The non-recognition of gain rule that applies when the property's liabilities exceed its adjusted basis will only apply if the transferee spouse owns the property after the transfer is completed. If the transferee spouse transfers property for which liabilities exceed basis to a trust for the transferee spouse, that spouse will immediately recognize a gain.[209] The amount of the gain recognized will be added to the trust's basis in the property. Counsel for transferee spouses who receive, for example, tax shelter properties for which the fair market value of the property is less than its associated liabilities, must exercise caution. "Burned out" tax shelters exist, in which accelerated depreciation deductions have reduced the basis of the property, which when coupled with tax credits taken and highly leveraged debt, place the projects well below economic viability. In many

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206. *Id.*; *see also* Priv. Ltr. Rul. 88-42-072 (July 29, 1988) (holding that a promissory note transferred by a controlled corporation to the transferee spouse for the latter's ownership interests in several assets, including some of the corporation's stock, was within the non-recognition provisions of I.R.C. § 1041).

207. Temp. Treas. Reg. § 1.1041-1T(d), Q&A-12 (1984).

208. *Id.*

209. I.R.C. § 1041(e).

cases, the shelter may now produce taxable income that exceeds its cash flow. The transferee of such a property, upon subsequent disposition (or foreclosure) of the shelter, may experience depreciation recapture, tax credit recapture, and the recognition of "phantom income" resulting from the release of liabilities. Before a spouse or former spouse agrees to accept such a property, that spouse's counsel should ensure the client is "compensated" for any additional tax liability with other payments of cash or property.

The broad scope of I.R.C. §1041 will also serve to prevent property which has enjoyed the benefits of investment tax credits relating to the property from tax credit recapture gain, when the property transfer is governed by I.R.C. § 1041. The TRA 1984 added I.R.C. § 47(e), which states that as long as the transferee spouse continues to use the property in the trade or business that qualified it for the investment tax credit, the property transfer does not trigger investment tax credit recapture.[210] If, at the time of or after the transfer, however, the owner ceases to use the property for its qualifying use, the IRS will recapture the investment tax credit.[211]

Spouses also may arrange transfers of property to avoid depreciation recapture. Sections 1245 and 1250 of the I.R.C. will cause gain realized on certain sales or exchanges of real and personal property to be taxed as ordinary income, to the extent of certain portions of depreciation deductions that taxpayers have already claimed. Section 1041 treats transfers between spouses as gifts. The recapture provisions of I.R.C. § 1245 and I.R.C. § 1250 do not apply to transfers that are treated as gifts.[212] The transferee spouse, however, will take the property subject to the transferor's potential recapture. The transferee spouse will be required to recognize the depreciation recapture when he disposes of the property.[213]

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210. Temp. Treas. Reg. § 1.1041-1T(d), Q&A-13 (1984); Priv. Ltr. Rul. 87-19-007 (Feb. 2, 1987).

211. *Id.*

212. I.R.C. § 1245(b)(1), 1250(d)(1); Priv. Ltr. Rul. 87-19-007 (Feb. 2, 1987).

213. Treas. Reg. § 1.1245-2(a)(4), 1.1250-2(d)(3).

4. Transfers of Installment Obligations Between Spouses

Before the TRA 1984, if one spouse transferred an installment obligation to the other, either during the marriage or incident to a divorce, the transferee spouse was immediately required to recognize the remaining outstanding gain represented by the installment obligation instrument. The Tax Reform Act of 1984 added a new I.R.C. § 453B(g). This new provision expressly excludes transfers of installment obligations that qualify for non-recognition under I.R.C. § 1041. No gain is recognized on the transfer, and the transferee receives the same tax treatment that would have applied to the transferor.[214] However, if such installment obligation is transferred to a trust for the other spouse, the deferred gain on the installment obligation is recognized.[215]

5. Record-Keeping Requirements Under I.R.C. § 1041

At the time of the transfer, a transferor of property under I.R.C. § 1041 must supply the transferee with sufficient records to determine the adjusted basis and holding period of the property as of the date of transfer. If the transfer carries a potential liability for investment tax credit recapture, the transferor must also supply the transferee with sufficient records to determine the amount and period of such potential liability at the time of the transfer.[216] The transferee must preserve these records and keep them accessible.[217]

6. Effective Dates

In most cases, I.R.C. § 1041 applies to all transfers after 18 July 1984. Section 1041 will not, however, apply to transfers after 18 July 1984 made pursuant to a divorce or separation instrument that was in effect before 18 July 1984.[218] There are two exceptions to the 18 July 1984 effective-date

214. I.R.C. § 453B(g).

215. *Id.* Section 1842(b) of the TRA 1986 amended I.R.C. § 453B(g) to preclude installment obligations transferred in trust from the gain deferral rules under section 453B(g). TRA 1986, § 453B(g).

216. Temp. Treas. Reg. § 1.1041-1T(e), Q&A-14 (1984).

217. *Id.*

218. *Id.* § 1.1041-1T(f), Q&A-15.

rule, and both exceptions require the concurrence of both spouses or former spouses:

> a. Section 1041 will apply to transfers of property made after 18 July 1984 under a divorce or separation instrument that is in effect before 18 July 1984 if both spouses (or former spouses) elect to have I.R.C. § 1041 apply to such transfers.[219]
> b. Section 1041 will apply to all transfers after 31 December 1983 if both spouses (or former spouses) elect to have I.R.C. § 1041 apply.[220]

Temporary Treasury Regulation § 1.1041-1T(g), A-18, provides a form that will permit a spouse or former spouse to make the election for I.R.C. § 1041 treatment for either of the exceptions.[221] The transferor must attach a copy of the form to his first filed income tax return for the taxable year in which the first transfer occurs. The transferor must attach a copy of the election form to each tax return for each subsequent taxable year in which he makes a transfer that is governed by the exception.[222]

In a 1987 letter ruling, the IRS permitted former spouses to elect I.R.C. § 1041 treatment after they modified a 1982 divorce decree to permit the transfer of the former marital home from one spouse to his former spouse. The former spouses had to show that the transfer was related to the cessation of the marriage, as required by I.R.C. § 1041(c)(2).[223]

In the case of either of the alternatives to elect I.R.C. § 1041 treatment, such an election will subject all property transfers to the provisions of I.R.C. § 1041. Partial elections are not allowed.[224] The election, once made, is irrevocable.[225]

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219. *Id.* § 1.1041-1T(f), Q&A-16 (1984).
220. *Id*.
221. *Id.* § 1.1041-1T(g), Q&A-18 (1984).
222. *Id*.
223. Priv. Ltr. Rul. 87-32-036 (May 12, 1987); *see also* Priv. Ltr. Rul. 89-49-085 (Sept. 14, 1989).
224. Temp. Treas. Reg. § 1.1041-1T(f), Q&A-17 (1984).
225. *Id*.

7. Gift and Estate Tax Considerations in Property Transfers

It may seem ironic to think of the possible imposition of a gift tax on property transfers between spouses or former spouses when pursuing a divorce. The donative intent one normally encounters when making a gift is rarely present in these situations. The Economic Recovery Tax Act of 1981[226] completely eliminated federal transfer taxes (gift and estate) for inter-spousal transfers by amending the marital deduction provisions to make the marital deduction unlimited for property transfers between spouses as long as they are married. Gift taxes could be imposed on transfers of property between former spouses, however. Such transfers of property between former spouses were subject to a gift tax unless the property was transferred for an adequate and full consideration in money or money's worth.[227]

Before the TRA 1984, I.R.C. § 2516 prevented the imposition of a gift tax on property transferred between two former spouses if the transfer was pursuant to a written agreement entered into not more than two years prior to a divorce. The written agreement had to be either in settlement of marital or property rights or provide a reasonable allowance for the support of the parties' minor children.[228] Transfers that were included within the coverage of I.R.C. § 2516 would treat the transfer of marital and property rights as being made for adequate and full consideration in money or "deemed consideration." In addition, the Supreme Court held in *Harris v. Commissioner*[229] that no gift taxes were applicable when property was transferred in satisfaction of the release of marital rights pursuant to a divorce decree or judgment. The IRS broadened the *Harris* decision to exclude gift taxes from situations in which a divorce decree or judgment required the transfer of property to discharge a transferee spouse's right to support.[230]

Problems with transfer taxes still existed, however. If two spouses made a property transfer pursuant to a written agreement, for example, but they did not divorce within two years after the date of the agreement, the tax implications of the transfer were not clear. In such situation, the transfer was a taxable gift unless it qualified for the unlimited marital deduc-

226. Pub. L. No. 97-34, 95 Stat. 172 (1981).

227. I.R.C. §§ 2056, 2523 (for estate and gift taxes, respectively).

228. *Id.* § 2516 (before TRA 1984).

229. 340 U.S. 106 (1950).

230. Rev. Rul. 68-379, 1968-2 C.B. 414; Rev. Rul. 71-67, 1971-1 C.B. 271; Rev. Rul. 77-314, 1977-2 C.B. 349.

tion. Counsel also had to make factual inquiries to determine whether the transfer of property was a completed gift. Was the consideration given for the property adequate and full in cash (or cash equivalent)? Did a divorce decree incorporate the property transfer? Did the transfer qualify for the unlimited marital deduction?

The TRA 1984 made two changes to the transfer tax provisions involving property transfers between spouses. First, Congress broadened I.R.C. § 2516 to include certain post-divorce transfers if they are made pursuant to a written separation agreement entered into up to one year after the divorce,[231] in addition to the two years preceding the divorce—a total period of three years. Second, TRA 1984 made estate and gift tax laws the same when property transfers arise out of a divorce. Congress amended I.R.C. § 2043(b)(2) to include any transfer that qualified for I.R.C. § 2516; such transfers are now also considered made for adequate and full consideration in money and money's worth for estate tax purposes.[232] Such transfers would also qualify for an estate tax deduction. This amendment permits an estate tax deduction for property transfers completed as a result of a claim by a spouse or former spouse that arises under a written separation agreement, should such transfer meet the criteria of a gift under I.R.C. § 2516. This situation occurs when a spouse dies before completing all of the required transfers called for under the parties' written separation agreement. Section 2043(b)(2) prevents the imposition of an estate tax with respect to the property transfers that have not been completed as long as the estate executes the transfers that the written agreement requires. The revised sections 2043 and 2516 apply to transfers that occur after 18 July 1984.

D. Transfer of Retirement Benefits.

The division of a family's retirement benefits, which may frequently be the couple's most significant asset, requires an examination of both state law and federal tax law. Typically, a qualified pension, profit-sharing, or stock bonus plan is strictly defined and regulated by federal tax law. Principal among the federal regulatory and statutory control of qualified retirement plans is the Employment Retirement Income Security Act of 1974 (ERISA).[233] Under ERISA, qualified employee retirement plans were

231. I.R.C. § 2516 (1982) (amended by TRA 1984, § 425(b)).
232. *Id.* § 2043(b)(2) (amended by TRA 1984, § 425(a)(1)).
233. 29 U.S.C. § 1144 (2000).

required to include spendthrift provisions that prohibited the assignment of vested accrued benefits to anyone other than the person who earned them. Before the Retirement Equity Act of 1984 (REA 1984),[234] retirement plans were generally prohibited from assigning retirement benefits to anyone other than the plan participant. Thus, court orders granting the spouse of a plan participant an interest in a portion of the vested benefits sometimes proved fruitless. Conflicts emerged as state courts began to define retirement benefits as marital property subject to division.

This same issue exists for non-ERISA government retirement programs such as military sponsored retirement plans. The appropriate tax treatment applicable to military retirement payments received by the former spouse of a retired service member generally hinges on whether the property is classified as community property under state law. For example, in a private letter ruling,[235] the IRS held that payments by the husband to the wife in exchange for the wife's relinquishment of claims on her ex-husband's military retirement plan under the Uniformed Services Former Spouse's Protection Act[236] should be treated as an assignment of the wife's future right to receive income and not as a tax-free transfer of property under I.R.C. § 1041(a)(2). The wife was required to report her receipt of the payments as ordinary income under I.R.C. § 61. The Tax Court has reached similar results in a recent case including the receipt of Air Force retirement benefits.[237]

In *Private Letter Ruling 8813023*[238], Mrs. Balding's marriage was dissolved in a community property state (California) in December 1981. At that time, the Supreme Court's ruling in *McCarty v. McCarty*[239] was in effect. *McCarty* held that a military spouse's retirement benefit was that spouse's separate property in community property states and therefore would not be subject to division as part of the community property.[240] Pursuant to *McCarty*, the divorce decree stated that the husband's military retirement plan was the separate property of Mr. Balding.[241] The Uniformed Services Former Spouse's Protection Act effectively overruled

234. *Id.* § 1001.

235. Priv. Ltr. Rul. 88-13-023 (Dec.29, 1987). This ruling was released prior to the enactment of the Uniformed Services Former Spouse's Protection Act.

236. Pub. L. No. 97-252, tit. X, 96 Stat. §§ 730-738 (1982).

237. Denbow v. Comm'r, 56 T.C.M. (CCH) 1397 (1989).

238. Priv. Ltr. Rul. 88-130-23 (Dec. 29, 1987).

239. 453 U.S. 210 (1981).

240. *Id*. at 223-224, 232

241. Priv. Ltr. Rul. 88-130-23 (Dec. 29, 1987).

McCarty, however.[242] Mrs. Balding moved to modify the divorce decree to recognize her interest in her husband's military retirement plan, and then agreed to relinquish her claims in exchange for three payments, of $15,000 in 1986, $14,000 in 1987, and $13,000 in 1988.[243]

In *Private Letter Ruling 8813023*, the IRS ruled that such payments would be taxable to Mrs. Balding. The IRS's rationale was that the payments should be treated as an assignment of Mrs. Balding's future right to receive income, not as a tax-free transfer of property under I.R.C. § 1041(a)(2). The IRS stated that Mrs. Balding would be required to report the three payments as ordinary income in the respective tax years.[244]

Mrs. Balding filed a petition with the Tax Court, which ruled in her favor in *Balding v. Commissioner*.[245] The Tax Court concluded that the cash payments to Mrs. Balding were "property" within the meaning of I.R.C. § 1041 and thus excludable, notwithstanding the IRS's argument that the assignment of income doctrine required taxation of the three payments.[246] In a footnote, the Tax Court expressly declined to rule whether the assignment of income doctrine might apply in future years in which Mrs. Balding actually received payments under the plan, but cited a law review article as authority for the argument that Mrs. Balding was not required, under the assignment of income doctrine, to report any portion of the retirement benefits she received as taxable income.[247]

Subsequent decisions in community property jurisdictions have decided that I.R.C. § 1041 does not apply to the division of retired military pensions because there is no transfer of property. In one such decision, *Fulgram v. Commissioner*,[248] the petitioner and her former husband divorced in Texas. Under divorce decree, the court awarded Mrs. Fulgram twenty percent of her husband's net military retirement pay (gross pension, veterans' compensation, and federal income tax withheld) as a property settlement. Mrs. Fulgham did not report any portion of the distribution and

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242. *See* 10 U.S.C. § 1408 (2000). (recognizing the fact that a military retirement program is similar in purpose and intent to private employer and government sponsored retirement programs which are treated as marital property for purposes of I.R.C. § 1041).

243. Priv. Ltr. Rul. 88-130-23 (Dec. 29, 1987).

244. *Id*.

245. 98 T.C. 368 (1992).

246. *Id*. at 370, 372-373.

247. *Id.* at 373 n.8 (citing Michael Asimow, *The Assault on Tax-Free Divorce: Carryover Basis and Assignment of Income*, 44 TAX L. REV. 65 (1988)).

248. T.C. Sum. Op. 2001-29 (Mar. 14, 2001), 2001 Tax Ct. Summary LEXIS 136.

received a notice of deficiency, dated 18 August 1999, for $1515. The petitioner disputed the deficiency determination and contended that the pension was taxable only with respect to her husband. She also contended that if she were responsible for the tax, she should get a twenty-percent credit for federal income tax withheld in the course of determining "net."[249] The Tax Court found that military retirement benefits earned during marriage are community property in Texas.[250] The payments are characterized as compensation for services that are earned over the course of employment, and under Texas law, a spouse's rights to her husband's military retirement benefits become vested at the time the couple earns such benefits.[251] The petitioner did not present any evidence that it was not community property. Because the petitioner had a vested interest in the retired military pension, she had to pay tax on that share of it when she received it.[252]

In a more recent California case, *Weir v. Commissioner*,[253] the Tax Court reached the same decision as in *Fulgram*, and distinguished itself from *Balding*. The petitioner argued that at the time of the divorce, her husband was ordered to make settlement payments to her in lieu of her community property interest in the military retirement benefits. The petitioner argued that she received cash settlement payments while her ex-husband received the benefits as his separate property.[254] While this appears similar to the facts in *Balding*, the Tax Court did not accept this argument and emphasized that the separation agreement and its addendum, both of which were incorporated into the interlocutory judgment of dissolution of marriage and the final judgment of dissolution of marriage, contained language that clearly identified her as having a "vested community interest" in the pension. The petitioner failed to persuade the Tax Court that the agreement language intended for the ex-husband to act as anything other than a collection agent on her behalf.[255]

Relatively few decisions explain I.R.C. § 1041 property transfers involving the military pension in equitable distribution law states, but a recent Oregon case suggests a likely outcome. In *Huggins v. Commissioner*,[256] a divorce decree, effective 18 January 1986, dissolved the peti-

249. 2001 Tax Ct. Summary LEXIS at 138-139.
250. *Id*. at 142.
251. *Id.* at 142-143.
252. *Id.*
253. 82 T.C.M. (CCH) 281 (2001).
254. *Id.*
255. *Id.*

tioner's marriage. The decree provided that the husband would pay the petitioner a sum of money equaling one-half of [the] monthly net amount, after deductions for federal and state taxes, of the U.S. Coast Guard retirement pension received by [the petitioner's former husband]. Payment to [the petitioner] shall not be included as taxable income to [the petitioner], nor shall such payments be deductible by [the petitioner husband].[257]

The decree further directed that the payments be made directly to the petitioner and continue until the mortgage on the marital home was paid, foreclosed upon, or sold.[258] The IRS argued that what the petitioner received was "simply a right to receive a future stream of income."[259] The Tax Court opined that under Oregon law, the retired military pension was property, and that the petitioner's husband was the recipient of the pension. Thus, the petitioner's husband remained fully taxable on his retired pay.[260]

Recently, the Tax Court was able to directly address the tax treatment of the military pension under the equitable distribution laws of Virginia. In *Pfister v. Commissioner*,[261] the Tax Court held that a former spouse of a retired service member awarded an ownership interest in a military pension as a division of military property or pursuant to a divorce settlement must include her proportionate share of the benefits in her gross income.[262]

Another issue pertaining to the tax treatment afforded to pension plans relates to the tax treatment applicable to payments an employee's spouse receives from deferred compensation plans. This issue was the subject of *IRS Letter Ruling 93-40-032*,[263] in which the IRS considered the

256. T.C. Sum. Op. 2001-69 (May 14, 2001), 2001 Tax Ct. Summary LEXIS 173.

257. 2001 Tax Ct. Summary LEXIS at 174.

258. *Id.*

259. *Id*. at 175.

260. *Id*. at 183.

261. T.C. Memo 2002-198, 84 T.C.M. (CCH) 172 (2002).

262. *Id.* at 10. The Tax Court concluded that a Virginia divorce decree did transfer an ownership interest in a military pension. *See also* Newell v. Comm'r, T.C. Sum. Op. 2003-1 (Jan. 7, 2003); Witcher v. Comm'r, T.C. Memo 2002-184, 84 T.C.M. (CCH) 582 (2002). If not properly dated, there is a chance the pension payments or cash equivalents may be treated as alimony instead of property transfers. In *Baker v. Comm'r*, T.C. Memo 2000-164, 79 T.C.M. (CCH) 2050 (2000), an Alabama case, the divorce decree indicated that the payments were a "property settlement." *Id*. at 2051. Because the decree did not clearly designate that the payments were non-taxable under I.R.C. § 71 or non-deductible under I.R.C. § 215, the court considered the payments to alimony, and therefore includable in petitioner's income. *Id.* at 11.

263. Priv. Ltr. Rul. 93-40-032 (July 6, 1993).

tax treatment of payments under a deferred compensation plan that had been assigned to the employee's wife in a divorce decree. The employee, a baseball player, participated in his employer's deferred compensation plan, which permitted him to defer a portion of his salary. A divorce decree between the employee and his wife gave her a percentage of his interest in the deferred compensation plan. The decree provided that if the IRS determined that the employee was liable for taxes on payments to his wife made under the plan, that the wife was to reimburse him for his tax liability on such payments.[264]

Curiously, the IRS did not renew the position it took in *Private Letter Ruling 88-13-023*.[265] The theory of that ruling would have resulted in immediate taxation to the employee when the court assigned an interest in his deferred compensation plan to his wife.[266] If I.R.C. § 1041 does not protect an assignment of deferred compensation in satisfaction of marital rights, under the rationale of *United States v. Davis*,[267] the assignment should cause recognition of income in the same manner as an assignment of deferred compensation rights in exchange for a cash payment.

Instead, the IRS concluded that assignment of income principles require that the employee recognize income when his employer paid his wife amounts under his deferred compensation plan. This conclusion clarified that, despite I.R.C. § 1041's attempt to repeal *Davis*, important tax differences persist between marital settlements in common law and community property states. The non-employee spouse in a community property state has state law rights to his spouse's deferred compensation; no assignment is necessary. Accordingly, the assignment of income doctrine did not cause the employee spouse a tax liability attributable to the payments paid to and received by the non-employee spouse from the employee's deferred compensation plan.[268]

In some cases, it is difficult to distinguish between rights to future compensatory payments and rights to future payments for transferred or released property rights. The taxpayer in *Meisner v. United States*[269] faced this dilemma. Jennifer Meisner, the taxpayer, had been married to Randall Meisner, a former member of The Eagles. When Mr. Meisner left the

264. *Id*.
265. Priv. Ltr. Rul. 88-13-023 (Dec. 29, 1987).
266. *Id*.
267. 370 U.S. 65 (1962).
268. *See, e.g.*, Graham v. Comm'r, 72 T.C.M. (CCH) (1996).
269. 133 F.3d 654 (8th Cir. 1998).

group, he was entitled to performance and composer royalties under his termination agreement with The Eagles. The Meisners' property settlement agreement gave Mrs. Meisner an "undivided forty percent interest in the royalty contract."[270] If the basis for the termination contract was Mr. Meisner's performance of services for the Eagles, presumably he should have fared no differently than the baseball player in *Private Letter Ruling 93-40-032*.[271] The U.S. Court of Appeals for the Eighth Circuit, however concluded that Mrs. Meisner, not Mr. Meisner, should be taxed on the share of the royalties paid to her because Randall had retained no power or control over that share.[272] The court did not discuss whether the origin of the royalty payments was compensation for services or property.

The IRS's position on this issue presents a difficult problem for parties negotiating marital settlement agreements. In some cases, a significant portion of the parties' marital property will consist of various rights to deferred compensation that are not a part of a qualified pension plan. Assignment of these rights to a spouse under a marital settlement agreement may trigger the immediate recognition of income. Alternatively, an assignment may result in income recognition by the spouse who has assigned his rights under the plan, as his employer makes payments to his spouse. Until the IRS resolves this issue, attorneys should not assign these rights as part of a property settlement. If counsel cannot avoid an assignment, perhaps because other assets are not sufficient, the marital settlement agreement should contain a tax adjustment clause to compensate the transferring spouse for any unexpected tax liability.

To provide more certainty in the division of qualified retirement benefits between a plan participant and his spouse, the REA 1984 created a limited exception to the prohibition on the assignment of benefits. Section 401(a)(13)(B) of the I.R.C. permits an employee to assign future benefits of a qualified retirement plan to a non-participant spouse, pursuant to a "qualified domestic relations order" (QDRO). A QDRO assignment of benefits will not disqualify the plan because I.R.C. § 401(a)(13) recognizes

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270. *Id*. at 655.
271. Priv. Ltr. Rul. 93-40-032 (July 6, 1993).
272. 133 F.3d at 657.

the QDRO as an exception to the anti-alienation rules applicable to qualified retirement plans.[273]

For purposes of the QDRO rules, a "domestic relations order" is a judgment, decree, or order—including an approved property settlement—that relates to child support, alimony payments, or marital property rights, and is made pursuant to the state's domestic relations law.[274] A domestic relations order is a "qualified" order (and thus, a qualifying QDRO) if it meets the following requirements:

> 1. Creates or recognizes the right of an alternative payee (*i.e.*, a spouse, former spouse, child or other dependent of a plan participant) to receive all or a portion of the accrued benefits payable with respect to the participant; and
>
> 2. Specifies the following information:
>
> a. The name and last known mailing address of the plan participant and each alternate payee;
>
> b. The amount or percentage of the participant's benefits to be paid to each alternate payee;
>
> c. The number of payments or period to which such order applies; and
>
> d. Each plan to which such order applies.[275]

The QDRO cannot require a plan to provide any type or form of benefit, or any option not otherwise provided under the plan. It also cannot require a plan to pay the payee more benefits than the amount to which the participant is entitled. Lastly, the QDRO may not require a plan to pay any

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273. I.R.C. § 401(a)(13)(A) and (B).

274. *Id.* § 414(p)(1)(B). The anti-alienation rules have the effect of protecting qualified plan benefits from the participant's creditors. *See* Johnston v. Mayer, Trustee, 218 B.R. 813 (Bankr. E.D. Va. 1998).

275. I.R.C. § 414(p)(2).

benefits to a payee if another QDRO already requires the payment of those benefits to another, pre-existing payee.[276]

Although a QDRO cannot increase or modify the form of benefits, it is not bound by the elections or circumstances of the plan participant. Thus, a QDRO may require that payments to an alternate payee begin on or after the date on which the participant is first eligible to receive retirement benefits under the plan, regardless of whether the participant actually retires on that date.[277] Should the plan participant die before the date on which the QDRO requires payments to begin to the alternate payee, survivor benefits may be paid to the alternate payee if the QDRO requires.[278]

The TRA 1986 made several revisions to the QDRO provisions, primarily as they relate to government retirement plans and other plans to which the assignment or alienation restrictions do not apply.[279] In *Hawkins v. Commissioner*,[280] a husband and wife entered into a marital agreement, which provided that Mrs. Hawkins would receive $1,000,000 in cash from Mr. Hawkins' share of a pension plan. Mr. Hawkins paid Mrs. Hawkins the $1,000,000 in installment checks written on the pension plan bank account. Subsequently, Mr. Hawkins filed a nunc pro tunc motion for entry of a QDRO in state court. The state court denied the motion, holding that nothing in the marital agreement or the final decree specified the creation of a QDRO, or that Mrs. Hawkins would be designated as an alternate payee.[281]

The Tax Court held that the agreement did not constitute a valid QDRO. The divorce decree's reference to the pension plan as the source of the $1,000,000 in payments did not create any rights to benefits under the plan because the agreement did not refer to Mrs. Hawkins as the alternate payee, as I.R.C. § 414(p)(1)(A) requires. The agreement did not contain the other I.R.C. § 414(p)(2)(c) requirements concerning the number of payments or payment period, either. The Tax Court specifically rejected Mr. Hawkins' argument that the QDRO did not have to specify required

276. *Id.* § 414(p)(1)-(3).
277. *Id.* § 414(p)(4).
278. *Id*.
279. *See* TRA 1986. § 1898(c)(1)-(7).
280. 102 T.C. 61 (1994), *rev'd*, 86 F. 3d 982 (10th Cir. 1996).
281. *Id*. at 64-65.

facts when the plan administrator already knows them (commonly referred to as the "subjective knowledge standard").[282]

The U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) reversed, disagreeing with the Tax Court's conclusion that the marital agreement incorporated into the decree did not constitute a QDRO. The Tenth Circuit concluded that the issue of whether the agreement as incorporated into the decree constituted a QDRO was neither "actually litigated nor necessarily decided" in the divorce proceeding, and held that the parties should have litigated the issue in Tax Court.[283] Finding that the parties' agreement and decree included the information necessary to create a QDRO under I.R.C. § 414(p), the Tenth Circuit held that under I.R.C.§ 402(a)(1), Mrs. Hawkins, as the pension plan distributee, was liable for the tax on the entire distribution.[284]

To be a QDRO, an order must be entered *before* the plan makes a distribution to an alternate payee. It is not sufficient for an order to recognize the alternate payee's rights after the distribution.[285] In *Rodoni*, the Tax Court held that Mr. Rodoni's receipt of a lump sum distribution from his employer's terminated profit-sharing plan, which was subsequently transferred to Mrs. Rodoni's individual retirement account (IRA), did not qual-

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282. *Id.* at 76-77; *see also In re* Boudreau, 95-1 U.S.T.C. (CCH) ¶ A50, 115 (Bankr. M.D. Fla. 1995).

283. 86 F.3d at 987.

284. Hawkins v. United States, 86 F. 3d 982, 988 (10th Cir. 1996); *see also* Wilcox v. Williams, 50 F. Supp. 2d 951 (C.D. Cal. 1999) (treating a domestic relations order as a QDRO even though it did not conform to the strict requirements of a QDRO; holding that the intent of the order was clear). Practitioners must exercise particular care when complying with the statutory rules for drafting and entering QDROs. Failure to abide by the rules in I.R.C. § 414(p) could lead to unintentional and disastrous results for the client and subsequent heartache to the attorney, whom more senior partners may ultimately advise to "call the malpractice insurance carrier." Attorneys should always draft QDROs specifically to meet the requirements of I.R.C. § 414(p). Attention to detail is critical. A prudent counsel should consider showing a draft QDRO to the plan administrator before submitting it to the court, to ensure that it conforms to the particular retirement plan's provisions, as well as to the requirements of I.R.C. § 414(p) (for example, early withdrawal provisions). Plan administrators, particularly those from large employer plans, will usually provide sample QDROs that have been approved previously. Counsel should exercise extreme caution when using such samples, however; they may lack elections or provisions favorable to alternate payees, provisions the plan may authorize. The plan administrator frequently provides information that will make an attorney's job easier. It is not the role of the plan administrator, however, to inform counsel for the alternate payee about options and elections that may be more beneficial for the alternate payee.

285. *See* Rodoni v. Comm'r, 105 T.C. 29 (1995).

ify as a QDRO plan (and thus, taxable to Mrs. Rodoni). The parties executed the marital agreement providing Mrs. Rodoni with a portion of Mr. Rodoni's profit-sharing plan after receipt of the lump sum distribution. The Tax Court held that the domestic relations order judgment was not "qualified" before the payment of the distribution; it also did not specify payments, the period to which it applied, or the amount of benefits to be paid. Mrs. Rodoni could not roll over her receipt of the lump sum payment to her IRA tax-free. Her IRA was not an "eligible retirement plan" because the IRA was not established for the benefit of the employee—Mr. Rodoni.[286]

The primary emphasis of the REA 1984 and subsequent amendments is not to determine how benefits are to be allocated. State law will govern whether a non-employee spouse has any claim to the employee spouse's retirement benefits, and the extent of the claims. The provisions of the REA 1984 are primarily a mechanism to insure that once a court recognizes any claims, the court orders will be enforceable, and the plan will pay the alternate payee directly. Generally, the alternate payee will be taxed on distribution payments received in the same manner as if the participant received them.[287]

E. Treatment of Promissory Notes and Related Issues Under Section 1041

1. The Problem

In many property settlements, one spouse may not have sufficient liquid or readily divisible assets at the time of a transfer to "equalize" a property division. The situation is common when it is impractical or inadvisable to divide or liquidate certain large assets (for example, stock in a closely held family corporation). In such cases, the spouse retaining the business must often buy the other spouse's interest in the asset. In such cases, the transferee spouse or retaining spouse usually gives the transferor spouse a promissory note obligating him to make installment payments of the outstanding balance. The use of promissory notes raises multiple issues. For example, what basis will the note have? Must the promissory note pay interest? If the note must pay interest, is such interest property under I.R.C. § 1041? Is such interest deductible by the payor and includ-

286. *Id*. at 33.

287. I.R.C. §§ 402(e)(1)(A), 402(a), and 72.

able in the payee's gross income? If no interest is stated on the note, do the rules concerning imputed interest apply to the note?

2. Treatment of Stated Interest and Imputed Interest

If the promissory note provides for a stated amount of interest (for example, ten percent) payable on the outstanding balance due, is such interest income or property? In a more recent case, the Tax Court addressed the issue on the tax treatment of the interest received on an installment note executed between former spouses. In *Gibbs v. Commissioner*,[288] the payee (former wife) argued that the interest she received from her former husband on installment payments she received in exchange for her ownership interests in the marital residence, securities, and other marital property should be treated as property payments received which are excludible from income pursuant to I.R.C. §1041.[289] The Tax Court disagreed and noted that the interest and any nontaxable gain realized on the assets conveyed by the former wife are "two distinct items that give rise to separate federal income tax consequences, . . ."[290] The court held that I.R.C. §1041 did not apply to the interest portion of the payments the former wife received and such interest must be included in the former wife's gross income in the year received.[291] In a private letter ruling,[292] the IRS held that the parties must include the stated interest provided for in a property judgment in a wife's gross income at the time she receives such interest. Such a ruling carries a corollary that the husband would be entitled to deduct the interest payments, subject to the limitations of I.R.C. § 163(h), which governs personal interest deductions.[293]

The treatment of potential imputed interest presents a much clearer question. The imputed interest rules of I.R.C. sections 483, 1274, and 7872 concern themselves with requiring that interest be imputed (includable in the gross income of the payee and deductible by the payor) if the interest on an obligation is not equal to the applicable federal rate. Treasury income tax regulations provide that interest will not be imputed under I.R.C. § 483 (interest on certain deferred payments) and sections 1272 to

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288. 73 T.C.M. (CCH) 2669 (1997).
289. *Id*. at 2671.
290. *Id*. at 2672
291. *Id*. at 2672-2673.
292. Priv. Ltr. Rul. 86-40-046 (July 8, 1986).
293. *See* I.R.C. § 163(h); Seymour v. Comm'r, 109 T.C. 270 (1997), Treas. Reg. §1.163-8T (tracing rules); IRS Notice 88-74, 1988-2 C.B. 385.

1274 (original issue discount), if the debt obligation arises out of a property transfer that qualifies for non-recognition under I.R.C. § 1041.[294] The IRS has also held that the rules for imputed interest on gift loans are inapplicable to note payments made in connection with an I.R.C. § 1041 property transfer.[295] This latter private letter ruling involved a promissory note by the husband and given to his wife pursuant to a separation agreement. The parties used this note to equalize the property division; it carried a variable interest rate ranging from 5.5% to 7.5%. The interest alone was payable monthly for ten years, followed by principal payments with amortized interest for the next ten years. The IRS held that neither I.R.C. § 483 nor I.R.C. § 1274 would apply to recharacterize principal payments as interest, and that I.R.C. § 7872 would not apply to any of the note payments.[296]

The tax treatment of accrued but unpaid interest that is transferred between spouses in I.R.C. § 1041 transactions remains unsettled. In *Revenue Ruling 87-112*,[297] the IRS took a restrictive approach in applying I.R.C. § 1041 to interest.[298] In this ruling, the IRS addressed the transfer of savings bonds between spouses. The husband transferred Series E and EE bonds to his wife, pursuant to a property agreement qualifying for I.R.C. § 1041 treatment. Typically, interest earned on bonds of these types is not reportable in the owner's income until he redeems or otherwise disposed of them—for example, by gift. The owner is taxed on the accrued interest when he redeems the bonds.[299] The IRS ruled that while I.R.C. § 1041 prevents gain recognition on the sale or exchange of property between spouses, it does not apply to income assignments pursuant to a divorce. The ruling required the husband (the transferee) to include all of the deferred income in his gross income in the year of transfer, stating that:

> Although § 1041(a) of the Code shields from recognition gain that would ordinarily be recognized on a sale or exchange of property, it does not shield from recognition income that is ordinarily recognized upon the assignment of that income to another taxpayer. Because the income at issue here is accrued but unrec-

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294. Prop. Treas. Reg. § 1.483-1(c)(3); Prop. Treas. Reg. § 1.1274-1(b)(3)(iii); *see* Priv. Ltr. Rul. 86-45-082 (Aug. 14, 1986).

295. Priv. Ltr. Rul. 86-45-082 (Aug. 14, 1986); *see* I.R.C. § 7872.

296. *Id*.

297. 1987-2 C.B. 207.

298. Rev. Rul. 87-112, 1987-2 C.B. 207.

299. *Id*. Treas. Reg. § 1-454-1(a).

> ognized interest, rather than gain, § 1041(a) does not shield that income from recognition.[300]

The wife was thus entitled to an adjusted basis equal to the carryover basis in the bonds, plus an amount equal to the interest income that was includable to the husband as a result of the transfer. Interest accrued after the transfer would be includable in the wife's income.[301]

In a private letter ruling issued after *Revenue Ruling 87-112*, the IRS ruled that principal payments on a promissory note received by the wife were nontaxable under I.R.C. § 1041, even though such payments came from her husband's corporation. At the end of the ruling, however, the IRS stated the following: "We express no opinion on whether the entire principal payment is property subject to [I.R.C. § 1041] because the note may represent payment for a right to earned or accrued income that is subject to the assignment of income principle."[302] The letter ruling cited *Revenue Ruling 87-112* as authority for the comment.[303] Thus, to the extent assignment of income principles may be applicable to note payments or other assets transferred under I.R.C. § 1041, taxpayers can expect the IRS to seek to recognize income to the transferor at the time of transfer.

In *Seymour v. Commissioner*,[304] the Tax Court applied *Temporary Treasury Regulation § 163-8T* (the interest tracing rules) and held that interest paid on a $925,000 promissory note given by the husband to his wife, given as part of the property settlement in a divorce, should be allocated by the wife among the various property interests the wife transferred to her husband as part of the property settlement. Thus, to the extent the note's principal was in exchange for the wife's interest in corporate stock transferred to the husband, the interest was deductible as investment interest, subject to the limitations in I.R.C. § 163(d). To the extent the note was in exchange for the wife's interest in rental real estate, the interest was deductible, subject to the passive activity loss rules of I.R.C. § 469. Because the note was secured by the taxpayer's principal residence to the extent that it was in exchange for the wife's interest in the residence, interest was deductible as qualified residence interest under I.R.C. § 163(h)(3).[305] To the extent that the note was in exchange for the wife's

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300. Rev. Rul. 87-112, at 208.

301. *Id.*

302. Priv. Ltr. Rul. 88-42-072 (July 29, 1988).

303. *Id*.

304. 109 T.C. 279 (1997); *see also* Redlark v. Comm'r, 114 F.3d 936 (9th Cir. 1998) (reversing the decision of the Tax Court below, 106 T.C. 31 (1996)).

interest in personal use property, such as home furnishings, however, the interest was nondeductible personal interest under I.R.C. § 163(h)(1). The divorce instrument's failure to allocate any amount of the note as a payment for any particular asset transferred to the husband did not affect the essential nature of the transaction.[306]

In another case, the Tax Court held that the interest portion of annual payments the wife received from her ex-husband in exchange for her property interest in a convenience store was not excludable as a transfer incident to divorce under I.R.C. § 1041.[307] Although the court noted that this result differed from the hypothetical result in the event a taxpayer received I.R.C. § 483 "unstated" interest, the court saw the problem as one of proof rather than principle.[308]

3. What Basis Will the Promissory Note Have?

It is not settled what basis, if any, a spouse's promissory note will have when he transfers it in exchange for property under I.R.C. § 1041. Typically, one's own promissory note has a basis of zero.[309] If this is the case, then the parties may lose the basis of the property that they exchange for the note, in which case, the transferor of the property would have no basis in the note she receives. For example, assume that a husband and wife own a home with a fair market value of $100,000. Next, assume that the parties enter into a written separation agreement in which the husband will give his wife a promissory note for $50,000 in exchange for the wife's relinquishment of all of her ownership rights in the home. The note provides for annual payments of $10,000 for five years. Presumably, this note will have a basis of $50,000 at the time the wife receives it. As she receives her annual payments, the wife recognizes no gain by virtue of I.R.C. § 1041.

Temporary Treasury Regulation § 1.1041-1T(d) leaves much uncertainty about the basis of a note a maker spouse gives to a holder spouse as part of a property settlement in a divorce. If the holder sells the note at the note's face value, it is unclear whether gain or loss will result. Also, once the individual issues the note to his or her spouse or former spouse, the tax

305. *See also* Notice 88-74, 1988-2 C.B. 385.
306. *Id*. at 289.
307. Gibbs v. Comm'r, 73 T.C.M. (CCH) 2669 (1997).
308. *Id*. at 26721.
309. United States v. Davis, 370 U.S. 65 (1962).

consequences of full or partial discharge of the indebtedness are not clear.[310] The IRS, however, has ruled that principal payments on an installment note transferred from one spouse to the other incident to a divorce are excluded from income as a transfer of "property" under I.R.C. § 1041.[311]

F. Miscellaneous Issues in Property Transfers Under I.R.C. § 1041

1. Services Are Not Property

Only transfers of property (whether real or personal, tangible or intangible) are governed by I.R.C. § 1041. Transfers of services are not subject to the rules of I.R.C. § 1041.[312]

2. Transfers of IRAs, Retirement Annuities, and Retirement Bonds

Section 408(d)(6) of the I.R.C. provides that a transfer of an IRA, retirement annuity, or retirement bond by one spouse to the other under a divorce or separation instrument will have no tax consequences. After the transfer of such account, annuity, or bond, the IRS will treat it as if it is maintained for the benefit of the transferee spouse.[313]

After December 31, 1984, the IRS considers alimony received by a payee spouse as "compensation" for the purpose of permitting the payee spouse to fund an IRA.[314] In some cases, it may be prudent to treat a por-

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310. *See generally* I.R.C. § 108 (containing statutory tax rules pertaining to income realized from discharge of indebtedness).

311. *See* Priv. Ltr. Rul. 92-35-026 (May 29, 1992); Priv. Ltr. Rul. 91-23-053 (Mar. 13, 1991). These private letter rulings suggest that the maker's basis in its own note could be an amount less than face value. Under these circumstances only, I.R.C. § 1041(a) would have to take effect to exclude the gain. Commentators have criticized the underlying logic of these rulings as faulty, arguing that the application of I.R.C. § 1041 should not be necessary if the face of the note and the basis in the note are the same, as no gain or loss should result in such a case. They argue that maker of a note should have a basis in his own note equivalent to the fact of the note. *See* Asimov, *The Assault on Tax Free Divorce: Carryover Basis and Assignment of Income*, 44 TAX L. REV. 65, 84-112 (1988).

312. Temp. Treas. Reg. § 1.1041-1T(a), Q&A-4 (1984).

313. I.R.C. § 408(d)(6).

314. *Id.* § 219(f)(1).

tion of a property settlement as alimony simply to qualify the payee spouse for IRA contributions eligibility.

3. Transfer of Annuities

Before Congress enacted the TRA 1984, if one spouse assigned the benefits of an annuity contract to the other spouse under a divorce or separation instrument, each annuity payment received by the transferee spouse would be fully taxable.[315] The exclusion rules of I.R.C. § 72(b), permitting a tax-free return of investment, would not apply to reduce the amount of annuity payments that a transferee spouse must report as gross income. As a result of the TRA 1984, however, Congress repealed I.R.C. § 71(k). An assignment of an annuity contract is now a non-taxable event under I.R.C. § 1041. Accordingly, the transferee spouse will step into the shoes of the transferor spouse who made the contributory investment into the contract. This result permits the transferee spouse to recover (that is, to exclude) the transferor's investment under the normal I.R.C. § 72 annuity rules, as if the transferee were the purchaser of the annuity.[316]

4. Issues Relating to the Transfer of the Family Home

a. Residence Sales and Transfers Before 6 May 1997

The Taxpayer Relief Act of 1997[317] (TRA 1997) repealed I.R.C. § 1034 and amended I.R.C. § 121. The former I.R.C. § 1034 still applies to sales and non-I.R.C. § 1041 transfers of personal residences before May 7, 1997.[318]

The former I.R.C. § 1034 allowed any gain realized upon the sale of a personal residence to be rolled over into a new personal residence within two years before or after the sale of the former residence. The gain was not recognized as long as the cost of the new residence exceeded the adjusted sale price of the former residence. Typically, both spouses jointly own a marital home, and each spouse must independently qualify for I.R.C. § 1034 treatment.[319] If one spouse is transferring the home to the

315. I.R.C. § 72(k) (1982) (repealed by the TRA 1984).
316. Temp. Treas. Reg. § 1-1041-1T(d), Q&A-10 and Q&A-11 (1984).
317. Pub. L. No. 105-34, 788 Stat. 111 (1997).
318. *Id*. art. § 312(d); I.R.C. § 121(b)(3)(B).
319. Rev. Rul. 74-250, 1974-1 C.B. 202.

other, I.R.C. § 1041 will always prevent recognition of gain to the transferor spouse. If both parties remain joint owners of the home and one spouse vacates the home, however, the spouse who leaves the home and lives elsewhere may no longer qualify for non-recognition treatment under I.R.C. § 1034.

> ***Example:*** *H* and *W* jointly own a home that they purchased for $100,000. In 1986, *H* leaves the home and moves into an apartment. The parties execute a property agreement that permits *W* to live in the home for ten years, at which time their only child will reach the age of nineteen. The parties will then sell the home, with the proceeds to be divided equally between *H* and *W*. Ten years pass, and the home sells for $350,000. *W* is allowed to roll over her $125,000 gain (one-half of $350,000 minus one-half of the $100,000 basis) into her new home, which she purchased for $200,000 (or if *W* was fifty-five or older, she could exclude the entire gain by using the one-time exclusion under I.R.C. § 121). *H*, however, must recognize $125,000 of gain, because the former residence no longer qualifies as his principal residence under I.R.C. § 1034 or I.R.C. § 121.

This result varies greatly with changes to the facts; counsel should similarly be alert to important facts that can change their clients' tax consequences. The spouse who remains in the house will enjoy the advantages of a subsequent rollover or exclusion of any gain upon the subsequent sale of the home. In addition, the homeowner will continue to have deductions for interest expenses and real estate taxes. Counsel for the transferor spouse should be aware of the potential loss of these tax advantages in the negotiating process.

The courts and the IRS have held that in certain situations, a taxpayer may temporarily leave his or her residence and subsequently sell the home without reoccupying it, and still claim a tax-free rollover of the gain. The key factor in this favorable result is establishing the taxpayer's intent to return to the home.[320] In *Trisko v. Commissioner*,[321] the taxpayer, a federal employee, accepted an overseas temporary assignment in Europe. He rented out his home, intending to return to it upon completion of his temporary assignment. When he returned several years later, however, he was unable to reoccupy the home because of the federal rent control regula-

320. *See* Trisko v. Comm'r, 29 T.C. 515 (1957), *acq.*, 1959-1 C.B. 5.
321. *Id.*

tions. Trisko sold the home and purchased a new one.[322] The Tax Court permitted the taxpayer to treat the former home as his primary residence and deferred recognition of any gain on the sale under Section 112 of the 1939 Code, the predecessor to I.R.C. § 1034.[323]

In *Barry v. Commissioner*,[324] an Army officer rented out his home when he was transferred to Germany, where he lived in government quarters. Barry intended to reoccupy the home and retire in the area. Upon returning, however, he retired from the Army, accepted a job in another state, and sold the home. The court permitted the taxpayer to treat the home as his primary residence and use the tax-free rollover provisions of I.R.C. § 1034.[325] While these cases and rulings involved the taxpayer's absence from his primary residence due to employment conditions, the courts have also permitted temporary absences due to market exigencies to qualify, and allowed I.R.C. § 1034 rollover treatment.[326]

The Tax Court applied a liberal interpretation of I.R.C. § 1034 in *Green v. Commissioner*.[327] In *Green*, the taxpayer purchased a home with her boyfriend in Los Angeles, California in 1975. The taxpayer's relationship with her boyfriend had become strained by the end of December 1979. Ms. Green obtained a job transfer to Baltimore. After two months in Baltimore, Ms. Green tried to obtain a transfer back to Los Angeles, but her employer refused. From 1980 to mid-1982, Ms. Green returned to the Los Angeles home periodically for periods ranging from two weeks to two months. She continued to vote and pay taxes in California. She also paid all mortgage, tax, and insurance payments on the home; her former boyfriend refused to do so. In June 1982, Ms. Green removed all of her belongings from the Los Angeles home. In August 1982, the ex-boyfriend married another woman and moved back into the Los Angeles residence. The next month, Ms. Green listed the property for sale with a real estate

322. *Id*. at 517.

323. *Id*. at 519-520.

324. 30 T.C.M. (CCH) 757 (1971).

325. *See also* Rev. Rul. 78-146, 1978-1 C.B. 260.

326. *See* Bolaris v. Comm'r, 776 F.2d 1428 (9th Cir. 1985) (holding that the taxpayer was permitted to take full depreciation and rental expense deductions during the rental period until he subsequently sold the home); Clapham v. Comm'r, 63 T.C. 505 (1975), *acq.*, 1979-2 C.B. 1 (permitting a temporary absence where the owner rented the home after listing it for sale). *But see* Rogers v. Comm'r, 45 T.C.M. (CCH) 318 (1982).

327. 64 T.C.M. (CCH) 369 (1992).

agent. Although she found a qualified buyer, her ex-boyfriend refused to sell his interest in the house.[328]

Ultimately, the California Superior Court ordered the boyfriend to make the mortgage payments. Ms. Green treated these payments as rental to claim a net loss on the property from 1983 through 1986. The Superior Court ordered a partition of the property in July 1986, and the ex-boyfriend paid $262,500 to Ms. Green for her interest in the house. In April 1987, Ms. Green purchased a house in Baltimore for $135,000.[329] The Tax Court allowed Ms. Green to treat the Los Angeles house as her principal residence and to enjoy the rollover benefits of I.R.C. § 1034.[330]

The Tax Court placed particular emphasis on the facts that Ms. Green left her belongings in the house until mid-1982, that she immediately sought a transfer from Baltimore back to Los Angeles, and that she made frequent extended visits to the house. The court found that Ms. Green's absence from the house until June 1982 was temporary. Thus, she did not abandon the house as her primary residence. Ms. Green's treatment of the house as a rental property from 1983 to 1986 was not an abandonment of the residence. Her actions were consistent with an intent to reoccupy the house, pending the resolution of the action for partition. The court ordered the boyfriend to make the mortgage, tax, and insurance payments during the partition action.[331]

In *Snowa v. Commissioner*,[332] the U.S. Court of Appeals for the Fourth Circuit held that for purposes of former I.R.C. § 1034 principal residence rollover rules, a taxpayer may treat a spouse's payment for a replacement home as the taxpayer's own cost, even though the taxpayer sold the old home with a different spouse. The decision invalidates a treasury regulation that maintains a contrary view.

Mr. and Mrs. Spivey sold their jointly owned home for $380,000 in 1989; they were divorced at about the same time. Mrs. Spivey filed her 1989 income tax return as a single individual and reported one-half of the selling price ($190,000), the amount realized ($178,000) and the gain ($69,000) from the sale of the residence. Mrs. Spivey reported on IRS

328. *Id*. at 370.
329. *Id*.
330. *Id*. at 373.
331. *Id.* at 373 (citing Clapham v. Comm'r, 63 T.C. 505 (1975), *acq*., 1979-2 C.B.1).
332. 123 F.3d 190 (4th Cir. 1997) (reversing T.C. Memo 1995-336).

Form 2119 that she intended to replace the residence, and therefore did not recognize the gain in 1989.[333]

In 1991, Mrs. Spivey and her new husband purchased a home at a total cost of $180,000. On their 1991 income tax return, the former Mrs. Spivey (now Mrs. Snowa) and her new husband reported the new residence as a replacement property for the home Mrs. Snowa had sold in 1989. In an audit, the IRS determined that Mrs. Snowa's share of the cost of the new property purchased in 1991 was $90,000 (one-half of the total cost of $180,000), which was less than her share ($178,000) of the adjusted sales price of the former home. The IRS concluded, therefore, that Mrs. Snowa must recognize the gain on the sale of the prior residence 1989.[334]

The Tax Court held that Mrs. Snowa was not entitled to the benefit of I.R.C. § 1034 and must recognize the entire gain from the sale of her former residence in 1989. The Court noted that I.R.C. § 1034(g) provides a limited inter-spousal exception to the general requirement that the same taxpayer must own the new and old homes, and that the exception applies only if each of the taxpayers uses the old and new residences as his or her principal residence. The court quoted I.R.C. § 1034(g), noting that this statute consistently uses the phrase "taxpayer and his spouse," and that the exception applies only to the taxpayer and the *same* spouse who owned the old residence and who jointly consented to the requirements of I.R.C. § 1034(g).[335] The Tax Court also cited *Treasury Regulations § 1.1034-1(f)(1)*,[336] the instructions for *IRS Form 2119*[337] and *IRS Publication 523, Tax Information on Selling Your Home*,[338] to support its conclusion.[339]

Reversing the Tax Court, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) held that a taxpayer need not be married to the same spouse to take advantage of I.R.C. § 1034(g). It held that the statutory language was ambiguous, and that *Treasury Regulations § 1034-1(f)(1)* was an interpretative (rather than legislative) regulation that did not reasonably implement Congress's mandate to treat family finances as being run from a single pocketbook (according to the elective spousal consent procedure). True, the law directs the IRS to write regulations explain-

333. 70 T.C.M. (CCH) 163, 165 (1995).
334. *Id*.
335. *Id*. at 165-166.
336. *Id*. at 166
337. *Id*.
338. *Id*.
339. *Id*.

ing the elective spouse consent, but the manner of the consent was the gap in the I.R.C. provision that Congress impliedly wanted the IRS to fill. Congress did not leave a gap in the I.R.C. as to who qualifies as a spouse, and did not specifically direct the IRS to explain this requirement.[340] The Fourth Circuit cited the legislative history of I.R.C. § 1034[341] to support its conclusion that the IRS was to write permissive—not restrictive—regulations implementing spousal rollovers. The court held that same-spouse rule in *Treasury Regulations § 1034-1(f)(1)* did not implement the congressional mandate in a reasonable manner and was therefore invalid.[342]

b. Post-6 May 1997 Sales—Exclusion of Gain from Sale of Principal Residence

Article 312 of TRA 1997 amended I.R.C. § 121 to permit taxpayers to exclude $250,000 ($500,000 in the case of a joint return) of gain from the sale or exchange of their principal residence from income if they owned and used the residence as their principal residence for periods aggregating two years or more during the five-year period ending on the date of the home's sale or exchange. In order to obtain the $500,000 exclusion in the case of a joint return, taxpayers must meet the following conditions: (1) either spouse may meet the ownership requirements; (2) both spouses must meet the use requirements; and (3) neither spouse must be ineligible because of the sale or exchange of another principal residence within the two-year period ending on the date of the sale or exchange.[343] The IRS has stated it will not issue any advance rulings on whether a particular property qualifies as the taxpayer's principal residence.[344]

The exclusion is only available for a sale or exchange by the taxpayer if, during the two-year period ending on the date of the sale or exchange, the taxpayer had not claimed the exclusion of gain from the sale of principal residence for any other sale or exchange. If the reason for the sale or exchange is a change in place of employment, health, or, to the extent provided in regulations, unforeseen circumstances, however, the amount of

340. 123 F.3d 190, 195-197 (4th Cir. 1997).
341. *Id*. at 198-199.
342. *Id*. at 200.
343. I.R.C. § 121(b)(2).
344. Rev. Proc. 99-3, 1999-1 I.R.B. 103.

the exclusion will be the same ratio of the exclusion as the period of ownership and use after the sale or exchange bears to two years.[345]

In the case of a joint return, either spouse may meet the ownership and use requirements, but the exclusion will be limited to $250,000 if both spouses do not meet the use requirements. In the case of an unmarried individual whose spouse is deceased on the date of the sale or exchange of the property, the period such unmarried individual owned and used the property will include the period the deceased spouse owned and used the property before death.[346]

A period of ownership will include ownership by a spouse before a transfer, subject to I.R.C. § 1041(a), the provision for non-taxable interspousal sales or exchanges. During the period that a taxpayer's spouse or former spouse is granted use of the property under a divorce or separation instrument as defined in I.R.C. § 71(b)(2), the IRS will treat the taxpayer as using the property as his principal residence.[347] The exclusion will also apply to a taxpayer holding stock as a tenant-stockholder in a cooperative housing corporation, as defined in I.R.C. § 216.[348] The holding and use period of property acquired in an involuntary exchange under I.R.C. § 1033 will include the property that was sold or exchanged.[349]

The exclusion of income from the sale of the home will not apply to the portion of the property for which the taxpayer claimed depreciation (e.g., home office rules) with respect to periods after 6 May 1997.[350]

If a taxpayer becomes physically or mentally incapable of self-care, and the taxpayer owns and uses property as his principal residence during the five-year period ending on the date of the sale or exchange of the principal residence for periods aggregating at least one year, the IRS will treat the taxpayer as using the property as his principal residence at any time

345. I.R.C. § 121(c)(1) and (2).
346. *Id.* § 121(d).
347. *Id.* § 121 (d)(3).
348. *Id.* § 121 (d)(4).
349. *Id.* § 121(d)(5).
350. *Id.* § 121(d)(6).

during the five-year period in which he owns the property and resides in any licensed medical facility or nursing home.[351]

The exclusion also applies to the sale of a remainder interest in a principal residence to a person other than a related party, as defined under I.R.C. § 267(b) or 707(b).[352] The exclusion is not available to expatriates if I.R.C. § 877(a)(1) applies.[353] The section will also not apply to a sale or exchange with respect to which the taxpayer elects not to have the exclusion apply.[354]

The holding and use period for the taxpayer's principal residence includes the holding period for prior residences for which non-recognition treatment was applicable under I.R.C. § 1034.[355]

The changes to I.R.C. § 121 apply to sales and exchanges after 6 May 1997. One exception to this general rule is that a sale or exchange during the two-year period ending on 6 May 1999 will not be subject to the requirement that a previous sale or exchange not have taken place within two years of a subsequent sale or exchange.

c. Deductibility of Qualified Residence Interest

Another issue regarding the marital home involves the deductibility of qualified residence interest. The general rule is that acquisition indebtedness interest expenses for a personal residence (or a designated second residence) are fully deductible. The total amount of acquisition debt for which interest is deductible is limited to $1,000,000 for married taxpayers filing jointly ($500,000 for married persons filing separately). Total home equity (non-acquisition) debt is subject to a $100,000 limitation ($50,000 for married persons filing separate returns). In either case, the applicable loan must be secured by the personal residence (or designated second residence).[356] The debt (including all other debt secured by the home) must not exceed the lesser of the cost of the house[357] or its fair market value.[358]

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351. *Id.* § 121(d)(7).
352. *Id.* § 121(d)(8).
353. *Id.* § 121 (e).
354. *Id.* § 121 (f).
355. *Id.* § 121(g).
356. *Id.* § 163(h)(3); *see also* Armacast v. Comm'r, T.C. Memo 1998-150 (1998).
357. *See* I.R.C. § 163(h)(5)(B)(ii)(I).
358. *See id.* § 163(h)(3).

Section 163(h)(3) also includes debt that is incurred in acquiring, constructing, or substantially improving the taxpayer's qualifying residence within the definition of "acquisition indebtedness." The debt must be secured by the personal residence (commonly referred to as qualified debt). For purposes of I.R.C. § 163, and without regard to the treatment of the transaction under I.R.C. § 1041, the IRS has concluded that debt incurred to acquire a spouse's (or former spouse's) interest in a residence incident to a divorce or legal separation is eligible for treatment as debt incurred in acquiring a residence.[359]

5. Stock Redemptions Incident to Divorce

Frequently, a spouse who is a controlling shareholder and intimately involved in the day-to-day operations of a closely held or family owned business wishes to retain control of the corporation after a divorce. The usual method to obtain this result is for the controlling shareholder spouse to transfer his or her property interests in other marital assets (for example, family residence, liquid investment assets, etc.) or items of "separately owned property" in exchange for the other spouse's entire property interest rights (direct stock ownership or other indirect equitable ownership rights) in the stock. Under I.R.C. § 1041, the spouse does not realize a taxable gain from the various property transfers. If the spouse wishing to remain in control of the corporation lacks sufficient assets to buy out the other spouse's corporate interest, he often will use a promissory note to make payments over a period of years.[360]

An alternative approach is to have the controlling shareholder spouse transfer a portion of his stock to the other spouse, followed by an immediate stock redemption of the latter spouse's entire stock interest in the corporation.

Unfortunately, recent IRS and court opinions have made it virtually impossible to predict the tax consequences of these redemptions. The focus of the uncertainty is the identity of the party whose interest is redeemed, and on whether the redemption of shares owned by one spouse satisfies an obligation of the other spouse. The IRS and the Tax Court appear to treat the redemption as a redemption by the spouse whose stock is actually redeemed.[361] The U.S. Court of Appeals for the Ninth Circuit

359. I.R.S. Notice 88-74, 1988-27 I.R.B. 27.

360. *See supra* § V.E. (use of promissory note).

apparently treats it as a transfer of the stock to the corporation on behalf of the spouse whose interest in the corporation continues and a payment by the corporation on behalf of that spouse.[362]

The IRS promulgated new regulations to address the difficulty in ascertaining whether stock transfers are "on behalf of" one spouse. On January 13, 2003, the IRS issued *Treasury Regulations §* 1.1041-2, clarifying the tax treatment of stock redemptions between spouses and former spouses incident to a divorce.[363]

Resolution of this issue will determine not only the identity of the taxpayer but also the amount and character of the income arising from the redemption. If the spouse whose interest in the corporation is terminated qualifies as the redeeming shareholder, he will generally be able to treat the redemption as a sale or exchange under I.R.C. § 302(a).[364] In contrast, if the spouse who will continue to own stock in the corporation qualifies as the redeeming shareholder, the IRS will treat her as though she received a distribution of property under I.R.C. § 301. To the extent the corporation has earnings and profits, the distribution is a dividend, and any excess will be considered a return of capital or a gain from the sale or exchange of property.[365]

Treatment as a sale or exchange entitles the taxpayer to offset his basis in a stock against the amount received. If the taxpayer has held the stock for at least eighteen months, sale or exchange treatment characterizes the income as long-term capital gain rather than ordinary income. If the taxpayer held the stock for more than one year but less than eighteen months, sale or exchange treatment characterizes the income as mid-term capital gain rather than ordinary income. The distinctions among long-term cap-

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361. *See, e.g.*, Arnes v. United States, 981 F.2d 456 (9th Cir. 1992); Tech. Adv. Mem. 90-46-004 (July 20, 1990).

362. *Id*.

363. Treas. Doc. 9035, 67 Fed. Reg. 1534 (Jan. 13, 2003).

364. A redemption is treated as a sale or exchange if the redeeming shareholder has completely terminated his or her interest in the corporation or in the case of certain disproportionate redemptions. I.R.C. § 302(b). If, however, the redemption occurs before the divorce or if other family members, such as children, continue to own shares in the corporation, the family attribution rules of I.R.C. section 318 may preclude satisfaction of this requirement. In some cases, section 318 attribution can be avoided by complying with Code section 302(c), which generally requires the termination of all interests in the corporation (including interests as an employee, director, or officer but excluding interests as a creditor) for ten years.

365. I.R.C. § 301(c).

ital gain treatment, mid-term capital gain treatment, and ordinary income or short-term capital gain treatment are significant. Ordinary income is now subject to tax rates as high as 39.1%; the top rate for mid-term capital gains is 28%; and the top rate for long-term capital gains is 15%.[366]

a. Redemption If Only One Spouse Owns Shares

If only one spouse owns shares in the closely held corporation, the spouse may need corporate-held funds to compensate the other spouse for her marital property interest in the shares or in other property. If the owner redeems a portion of his shares to obtain the necessary funds, the redemption is a distribution with the undesirable tax results described above.[367]

Suppose, instead, that the owner-spouse first transferred the shares to the other spouse and the corporation then redeemed the shares from the spouse. Outside the divorce context, the step-transaction doctrine would likely characterize this type of arrangement as a redemption from the original owner followed by the transfer of the redemption proceeds to the other spouse, but only if: (1) the transferee is legally obligated to surrender the stock for redemption;[368] or (2) there is an understanding that the recipient of the stock will have their stock redeemed by the corporation, and the original owner received something of value back from the transferee.[369]

The IRS seems to have carved out an exception to the step-transaction doctrine for redemption of shares that one spouse transfers to the other pursuant to a marital settlement agreement. In *Technical Advice Memorandum 90-46-004*,[370] the IRS took the position that a redemption was a redemption by the spouse whose shares were actually redeemed, despite the fact that she had received the shares pursuant to a divorce decree, which required her to offer the shares for redemption, by the corporation. The IRS recognized that the spouse's obligation to offer her shares for redemption would ordinarily require treating the original owner as the redeeming shareholder.[371] In this particular case, the husband was the

366. *Id.* § 1(h).

367. *See* I.R.C. §§ 301, 302.

368. *See*, *e.g.*, Rev. Rul. 69-608, 1969-2 C.B. 42. In this case, the corporation's earnings and profits will be reduced by the amount of the distribution. I.R.C. § 312(a).

369. *Cf.* Blake v. Comm'r, 697 F.2d 473 (2d Cir. 1982); Tech. Adv. Mem. 85-20-09 (Sept. 25, 1985).

370. Tech. Adv. Mem. 90-46-004 (July 20, 1990).

371. *Id*.

president and ninety-percent stockholder of a corporation. Members of the husband's family (other than his wife) owned the remaining ten percent of corporate stock. Pursuant to the parties' divorce decree, the husband transferred thirty-nine percent of the corporation's outstanding stock (from his ninety-percent ownership interest) to his ex-wife. Immediately thereafter, the corporation completely redeemed the ex-wife's shares of stock in the corporation. The divorce decree required the redemption, and the corporation funded it with a promissory note payable to the ex-wife. The husband guaranteed and collateralized the note. The IRS respected the structure of the transaction and ruled that the transfer of stock from the ex-husband to the ex-wife was incident to the divorce under I.R.C. § 1041. The ex-wife then transferred stock to the corporation, resulting in a taxable sale to the ex-wife. In reaching this result, the IRS relied on *Temporary Treasury Regulation § 1.1041-1T(c), Q&A-9*, which applies I.R.C. § 1041 to transfers of property to third parties (for example, corporations) on behalf of spouses (for example, the ex-wife). In such cases, the IRS considers the transfer of property as though made directly to the non-transferring spouse, and treats the non-transferring spouse as though she had immediately transferred the property to the third party. The same provision allows the parties to transfer the tax consequences of the transfer to the third party (the corporation) to the non-transferring spouse (the ex-wife), even though the non-transferring spouse was never an actual owner of the property (the stock). By agreeing to immediately redeem the stock, the ex-wife exercised sufficient "ownership" rights to be responsible for the tax consequences of the transfer to the corporation. The IRS indicated that, but for I.R.C. § 1041 and its regulations providing for no gain or loss on transfers between spouses, it would have characterized the transaction as a taxable redemption by the ex-husband, followed by a transfer of the redemption proceeds to the ex-wife under the divorce decree.[372]

The IRS justified its conclusion in *Technical Advice Memorandum 90-46-004* with a surprisingly broad reading of I.R.C. § 1041, stating the following:

> [Section 1041 provides] taxpayers a mechanism for determining which of the two spouses will pay the tax on the ultimate disposition of the asset. The spouses are thus free to negotiate between themselves whether the "owner" spouse will first sell the asset, recognize the gain or loss and then transfer to the transferee spouse the proceeds from that sale, or whether the owner

372. *Id.*

> spouse will first transfer the asset to the transferee spouse who will then recognize gain or loss upon its subsequent sale.[373]

In *Private Letter Ruling 94-27-009*,[374] the IRS stepped back from this broad reading of the statute. The marital settlement agreement described in the letter ruling required the spouse who owned the shares of a closely held corporation to transfer a portion of the shares to the other spouse. It also stated that the transferee spouse intended to negotiate the redemption of the newly acquired shares, but that there was no obligation to do so. In fact, immediately after the transferee spouse received the shares, the corporation redeemed them. The letter ruling concluded that the gain was attributable to the transferee spouse, but relied on the absence of any obligation on the part of the transferee spouse to offer her shares for redemption.[375]

b. Redemption If Both Spouses Own Shares

If both spouses own shares in the closely held corporation and agree to redeem the shares belonging to one of them, the step-transaction doctrine issue discussed above will not be a problem. Ordinarily, the redemption qualifies as a redemption of the shares of the spouse who is surrendering his or her shares. If, however, the redemption satisfies an obligation of the non-redeeming shareholder, that shareholder may have to report the redemption as a constructive dividend.[376]

Under long-established corporate income tax principles, when two shareholders own all of the shares of a corporation and the corporation redeems shares owned by one of them, the remaining shareholder is not

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373. *Id.*

374. Priv. Letr. Rul. 94-27-009 (Apr. 6, 1994).

375. *Id*.

376. *See, e.g.*, Rev. Rul. 69-608, 1969-2 C.B. 42; *see also* Marvin A. Chirelstein, Optional Redemptions and Optional Dividends: Taxing the Repurchase of Common Shares, 78 YALE L.J. 739 (1969).

taxed on the transaction, despite the fact that he indirectly benefits from an increase in his proportional interest in the corporation.[377]

There is one principal exception to this general rule: if the redemption satisfies a primary, unconditional obligation of the non-redeeming spouse to purchase the redeemed shares, the IRS could treat the redemption as a constructive dividend to the non-redeeming spouse.[378]

(i) Marital Settlement Agreements that Obligate One Spouse to Purchase the Shares of the Other Spouse

Some marital settlement agreements obligate one spouse to purchase the shares of the other spouse. This kind of agreement was the focus of the Tax Court in *Hayes v. Commissioner*.[379] In *Hayes*, the spouses, Jimmy and Mary Hayes, each owned shares in a corporation that operated a McDonald's franchise. McDonald's required that the wife, who owned a minority interest in the corporation, dispose of her stock in order for the husband to retain the franchise. The spouses executed a separation agreement that required Jimmy to purchase Mary's interest in the corporation. Several months later, Mary and the corporation executed a redemption agreement. The corporation ultimately redeemed her shares.[380]

The Tax Court agreed with the IRS's position that the corporation's redemption of Mary's shares was a constructive dividend for the husband because it satisfied his primary and unconditional obligation to purchase his wife's shares.[381]

Although both spouses were before the Tax Court, *Hayes* does not resolve the issue of how the redeeming spouse is to be treated when the non-redeeming spouse receives a constructive dividend. Ordinarily, the treatment of one shareholder as having received a constructive dividend—

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377. *See, e.g.*, Edler v. Comm'r, 727 F.2d 857 (9th Cir. 1984) (affirming T.C. Memo. 1982-67); Holsey v. Comm'r, 258 F.2d 865 (3d Cir. 1958); Wall v. United States, 164 F.2d 462 (4th Cir. 1947); Rev. Rul 69-608, 1969-2 C.B. 42; *see generally* Michael B. Lang, *Dividends Essentially Equivalent to Redemptions: The Taxation of Bootstrap Acquisitions*, 41 TAX L. REV. 309 (1986); Marvin A. Chirelstein, *Optional Redemptions and Optional Dividends: Taxing the Repurchase of Common Shares*, 78 YALE L.J. 739 (1969).

378. *See, e.g.*, Sullivan v. United States, 363 F. 2d 724 (8th Cir. 1966); Rev. Rul 69-608, 1969-2 C.B. 42.

379. Hayes v. Comm'r, 101 T.C. 593 (1993).

380. *Id*. at 596-597.

381. *Id*. at 599.

because his other corporation satisfies his obligation to buy the shares of another shareholder—does not affect the tax consequences of the transaction to the other shareholder.[382]

The Tax Court was able to avoid deciding the issue because the IRS had conceded that if the court held one of the spouses liable for income tax on the transaction, the other spouse would not be liable. In dicta, however, the court stated that if the IRS treated the ex-husband as having received a constructive dividend, the ex-wife "would be shielded by [I.R.C. § 1041] from recognizing gain on the redemption."[383]

The opinion points to *Temporary Treasury Regulations § 1.1041-1T(c), Q&A-9* to support this conclusion. The temporary regulation provides that the transfer of property by one spouse to a third party on behalf of the other spouse is considered made to the non-transferring spouse instead of the third party. Section 1041 protects such a transfer from recognition. The non-transferring spouse is then treated as having transferred the property to the third party in a transaction that does not qualify for non-recognition treatment.[384]

In keeping with the temporary regulation, the Tax Court in *Hayes* treated the redeeming spouse (Mrs. Hayes) as having transferred the shares to the third party (the corporation) on behalf of the non-redeeming spouse (Mr. Hayes). In the Tax Court's view, I.R.C. § 1041 protected Mrs. Hayes's recharacterized transfer, but not Mr. Hayes's transfer.[385]

(ii) Marital Settlement Agreements that Obligate the Spouses to Cause the Corporation to Redeem the Shares of One of the Spouses

Some marital settlement agreements require that the spouse cause a closely held corporation in which both spouses hold shares to redeem the shares of one of the spouses. In *Arnes v. United States*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) held that this type of agreement imposes an obligation on the non-redeeming spouse, and that the redeeming spouse's transfer of shares to the corporation under such a marital settlement agreement is a transfer on behalf of the non-redeeming

382. *Id*. at 597.
383. *Id*.
384. *Id*. at 598.
385. *See* discussion of this issue in Leandra Gassenheimer, *Redemptions Incident to Divorce*, 72 TAXES 651, 658 (Nov. 1994).

spouse within the meaning of *Temporary Treasury Regulations § 1.1041-1T(c), Q&A-9*, discussed above.[386]

Arnes involved a fact pattern similar to *Hayes*; John and Joanne Arnes each owned fifty percent of the shares of a corporation that operated a McDonald's franchise. As in the *Hayes* case, McDonald's would not permit continued ownership by both spouses after the divorce. John and Joann entered into an agreement that their corporation would redeem Joann's shares for a price paid partly in cash, to be paid over a number of years. John guaranteed the corporation's obligation.[387]

Unlike the husband in *Hayes*, however, John had no explicit primary, personal obligation to purchase Joann's shares. Nevertheless, the Ninth Circuit concluded that "John Arnes had an obligation to Joann Arnes that was relieved by [the corporation's] payment to Joann. That obligation was based in their divorce property settlement, which called for the redemption of Joann's stock."[388] Having determined that the corporation's purchase from Joann relieved John of an obligation, the Ninth Circuit concluded that Joann's transfer of shares to the corporation was a transfer on behalf of John that fell within the reach of *Temporary Treasury Regulations § 1.1041-1T(c), Q&A-9*. Under the temporary regulation, the court treated the transfer as a constructive transfer to Mr. Arnes. As such, I.R.C. § 1041 shielded Mrs. Arnes from recognition of gain.[389]

The linchpin of the Ninth Circuit's decision is its factual finding of the existence of John's obligation. It does not, however, explain the source of this obligation. John's guarantee of the payments to be made by the corporation is not sufficient to establish a primary, unconditional obligation. As discussed above, when a corporation is obligated to redeem the shares of one shareholder, the corporate obligation is not imputed to the remaining shareholder.[390]

In two subsequent cases, the Tax Court has refused to follow the Ninth Circuit's opinion in *Arnes*. In *Blatt v. Commissioner*,[391] the corpo-

386. Arnes v. United States, 981 F.2d 456 (9th Cir. 1992); *see also* Craven v. United States, 99-1 USTC ¶ 50,336 (N.D. Ga. Feb. 18, 1999), *aff'd*, 215 F.3d 1201 (11th Cir. 2000).

387. Arnes, 981 F.2d at 457.

388. *Id*. at 459.

389. *Id*. at 460.

390. *Id*. at 459-460.

391. Blatt v. Comm'r, 102 T.C. 77 (1994).

ration redeemed stock from an ex-wife pursuant to a court decree that ordered the husband and wife to cause their corporation to redeem the wife's shares. In *Arnes v. Commissioner*,[392] the Tax Court had before it the same set of facts that the Ninth Circuit dealt with in *Arnes*, except that both ex-spouses were before the Tax Court. Only the ex-wife was before the court in the Ninth Circuit's *Arnes* case. In its *Arnes* case, the Tax Court determined the liability of the husband. In both *Blatt* and *Arnes*, the Tax Court rejected the Ninth Circuit's conclusion. In both cases, it concluded that the husband did not have a primary obligation to acquire the wife's stock. As a result, the Tax Court treated the wife as having sold her shares to the corporation in a transaction not protected by I.R.C. § 1041.[393]

The split between the Tax Court and the Ninth Circuit causes an unfortunate level of uncertainty for divorcing parties with interests in closely held corporations. Until the issue is resolved, spouses who wish to arrange for redemption of corporate stock as part of a marital settlement should execute a separate agreement with their corporation in which it is clear that the corporation is obligated to purchase the shares. The obligation, if any, of the non-redeeming shareholder should be clearly limited to that of a guarantor of the primary corporate obligation.[394]

In *Pozzi v. United States*,[395] the U.S. District Court for the District of Oregon, following *Arnes*, held that monies paid by the husband to his former wife to relieve the husband of his obligation to convey the value of the stock in a closely held corporation to his ex-wife was incident to their divorce within the meaning of I.R.C. § 1041.[396] A full explanation of the facts is required to appreciate the court's holding.

Gertrude and Arthur Pozzi married in 1951. During their marriage, they acquired substantial marital assets, mostly in the form of stocks in

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392. Arnes v. Comm'r, 102 T.C. 522 (1994).

393. *Id*. at 530.

394. *See also* Gassenheimer, *supra* note 385; Alan L. Feld, *Divorce and Redemption*, 64 TAX NOTES 651 (1994); Geir, *Form, Substance, and Section 1041*, 60 TAX NOTES 519 (1993); Thomas Monaghan, *Corporate Redemption in the Context of Marital Dissolutions; I.R.C. Sec. 1041 and* Arnes v. United States, 68 WASH. L. REV. 923 (1993); Robert J. Preston & Richard K. Hart, *Spouse's Stock in a Divorce Can Be Redeemed Tax Free*, 78 J. TAX'N 360 (1993); William L. Raby, *If He Gets the Big Mac, Does She Pay the Tax? A Commentary on Stock Redemptions Pursuant to Divorce*, 62 TAX NOTES 347 (1994); William L. Raby, *Raby Revisits Stock Redemptions Incident to Divorce*, 62 TAX NOTES 1031 (1994).

395. Pozzi v. United States, 1993 U.S. Dist. LEXIS 14174 (D. Or. Oct. 4, 1993).

396. *Id*. at 14183-14184.

three closely held companies, the Arthur Pozzi Company, the Bend Millwork Company, and Florentco, Inc. On 23 October 1984, Arthur and Gertrude signed a property settlement agreement and a corporate stock agreement. The parties negotiated the two agreements together as a step toward the termination of their marriage. The design and purpose of the agreements was to provide for the equitable division of the property they had accumulated during their marriage, including the closely held interests of the Pozzis in the three corporations. The property settlement agreement and the corporate stock agreement required Arthur Pozzi to indemnify Gertrude Pozzi for her liability on all loans to the closely held corporations, and to cause the creditor banks to release Gertrude Pozzi from all personal guarantees relating to these loans. The corporate stock agreement also required Arthur Pozzi to cause the Arthur Pozzi Company and the Bend Millwork Company to pay Gertrude Pozzi cash for her shares when the divorce became final.[397]

The property settlement agreement and the corporate stock agreement required Arthur to pay Gertrude additional sums if, within three years of the divorce, it became known that the interest of Gertrude Pozzi in the Arthur Pozzi Company and the Bend Millwork Company had a greater value than originally relied on in the divorce negotiations. As to Florentco, Inc., the property settlement agreement stated that Gertrude Pozzi was to receive all shares of stock in Florentco, Inc., all of which were registered in Arthur Pozzi's name. In a side letter agreement, Florentco, Inc. was to purchase all of Arthur Pozzi's shares in Florentco, Inc.[398]

On November 27, 1984, the Pozzis divorced. The divorce decree incorporated the property settlement agreement and the corporate stock agreement. Arthur Pozzi made cash payments to Gertrude in January 1985 to cash out the interests of Gertrude Pozzi in the Arthur Pozzi Company and the Bend Millwork Company. Mr. Pozzi also obtained the required releases from the loan guarantees for the obligation of Gertrude Pozzi. On May 5, 1986, pursuant to an oral agreement that Arthur Pozzi made with Gertrude regarding the failure of Florentco, Inc. to honor the letter agreement of April 19, 1984, Arthur Pozzi made a direct cash payment to Gertrude in the amount of $87,142.46. On that same date, Arthur Pozzi made two direct cash payments to his former wife in the amount of $1,225,932.40 in connection Gertrude Pozzi's interest in the Arthur Pozzi

397. *Id*. at 14175-14176.
398. *Id*. at 14176.

Company, and a payment of $145,542 in connection Gertrude Pozzi's interest in the Bend Millwork Company.[399]

The court treated the two payments to Mrs. Pozzi in connection with her interests in the Arthur Pozzi Company and the Bend Millwork Company as incident to the Pozzis' divorce and covered by I.R.C. § 1041. The two payments were pursuant to the divorce decree to equalize valuations of the two companies.[400]

Gertrude Pozzi reported all three payments as capital gains on her 1986 tax return and paid all income taxes due for tax year 1986. Subsequently, she filed a refund claim with the IRS and sought a refund of $286,681, plus interest. The IRS disallowed the claim. The IRS conceded that the two cash payments to Mrs. Pozzi in exchange for her interests in the Arthur Pozzi Company and Bend Millwork Company were pursuant to I.R.C. § 1041. The IRS would not, however, concede that the 1986 payment of $87,142.46 in connection with Mrs. Pozzi's interest in Florentco, Inc. fell within the scope of I.R.C. § 1041.[401]

The court held that the $87,142.46 payment by Arthur Pozzi to Gertrude Pozzi relieved Mr. Pozzi of his obligation to convey the value of the stock in Florentco, Inc. to his wife to obtain the divorce. The court concluded that Mr. Pozzi made the payment directly to Mrs. Pozzi, that it was related to the cessation of their marriage, and that it was incident to their divorce. The court had little problem deciding that the transfer fit within the plain language of I.R.C. § 1041. In deciding to grant Gertrude a refund, the court relied heavily on the Ninth Circuit's decision in *Arnes*.[402]

(iii) Martial Settlement Agreements that Provide for One of the Spouses to Select Purchase or to Cause the Corporation to Redeem the Shares of One of the Spouses

In *Read v. Commissioner*,[403] the Tax Court recently held that a former spouse's transfer of stock back to the corporate issuer in accordance with an election by the ex-husband—an election granted in a divorce judgment that gave him the option to have the stock transferred for consideration to

399. *Id*. at 14177-14178.

400. *Id*.

401. *Id*. at 14180.

402. *Id*. at 14182-14183. (citing United States v. Arnes, 981 F.2d 456 (9th Cir. 1992)).

403. Read v. Comm'r, 114 T.C. 14 (2000).

either him, the corporation or the corporation's Employee Stock Option Plan (ESOP)—qualified for non-recognition under I.R.C. § 1041.[404]

Mr. and Mrs. Read owned all of the stock in a corporation. The Reads' divorce judgment ordered that Mrs. Read sell and convey her stock in the corporation to Mr. Read or, at her husband's election, to the corporation or its ESOP. The divorce judgment ordered that the husband, or the corporation (or its ESOP) would pay a stated amount of cash to the wife simultaneously with the sale and conveyance of the stock. The party paying for the stock would be the party that actually received the stock from the ex-wife. If the eventual purchaser did not make full payment on the stock, the husband, corporation, or corporation's ESOP (whichever party actually received the stock) would give Mrs. Read a promissory note bearing nine percent interest on any unpaid balance of the purchase price of the stock. Pursuant to the divorce judgment, husband elected that: (1) the sale and conveyance be made to the corporation; (2) that the corporation make the payment of cash to the wife; and (3) that the corporation issue a promissory note to wife for the balance of the purchase price.[405]

Mrs. Read did not report any income on the cash payment, arguing I.R.C. § 1041 applied to the transaction. She reported the interest on payments under the promissory note as interest income, however. Mr. Read did not report any income from the transactions. The corporation deducted the interest payments made to the former wife. The IRS determined that the principal payments to Mrs. Read constituted a long-term capital gain, that the principal and interest payments under the installment promissory note were constructive dividends to the husband, and that the interest payments under the installment promissory note were not deductible by the corporation.[406]

Mrs. Read argued that she was entitled to non-recognition tax treatment under I.R.C. § 1041(a) and *Treasury Regulations § 1.1041-1T(c), Q&A-9* (*Q&A-9*).[407] These provisions treat certain transfers to third parties as transfers of property by the transferring spouse directly to the non-transferring spouse, and qualify them for non-recognition treatment under I.R.C. § 1041 if the non-transferring spouse immediately transfers the property to the third party in a transaction that is not subject to I.R.C. §

404. *Id.* at 27-28.
405. *Id*. at 17-19.
406. *Id*. at 24.
407. *Id*. at 27-28.

1041. Mr. Read argued that I.R.C. § 1041(a) and *Q&A-9* did not apply because he never had an unconditional obligation to purchase his wife's stock. According to his argument, he had recognized no income, but his wife had recognized gain on the redemption of her stock. The Commissioner took the position that Mr. Read was a mere stakeholder. Although he issued deficiency notices to both taxpayers in the joined cases to avoid becoming embroiled in a dispute between the ex-spouses, the Commissioner argued that wife "has the better argument."[408]

In an eight-to-seven reviewed opinion by Judge Chiechi, the Tax Court agreed with the Commissioner and Mrs. Read. The court held that in cases involving corporate redemptions in divorce settings, the primary-and-unconditional-obligation standard that generally applies in "bootstrap-acquisitions"[409] is inappropriate for determining whether the transfer of property by the transferring spouse to a third party is on behalf of the non-transferring spouse within the meaning of *Q&A-9*. Applying the common, ordinary meaning of the phrase "on behalf of" in *Q&A-9*, the wife's transfer of her stock in the parties' closely held corporation was a transfer of property by wife to a third party on behalf of husband within the meaning of the regulation.[410] Thus, under I.R.C. § 1041(a), Mrs. Read did not recognize a gain and Mr. Read recognized a dividend. The majority reasoned that *Hayes v. Commissioner*[411] did not limit the treatment of a redemption of one divorcing spouse's stock as an I.R.C. § 1041 transfer by that spouse and a dividend to the non-redeeming spouse. It distinguished *Blatt v. Commissioner*,[412] a case in which the record did not establish that the corporation acted on behalf of the husband in redeeming the wife's stock. The majority attempted to distinguish *Arnes v. Commissioner*,[413] in which the ex-husband did not have an unconditional obligation to acquire his ex-wife's stock.[414]

Dissents by Judges Ruwe, Halpern, and Beghe made various arguments that the primary-and-unconditional-obligation standard that generally applies in bootstrap acquisitions was the appropriate standard, that nothing in *Q&A-9* indicated otherwise, and that the husband did not have

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408. *Id*. at 25.

409. *See* Rev. Rul. 69-608, 1969-2 C.B. 42.

410. Temp. Treas. Reg. § 1-1041-1(d) Q&A-9 (1984) (stating "where the transfer to the third party is required by a divorce or separation instrument").

411. 101 T.C. 593 (1993).

412. 102 T.C. 77 (1994).

413. 102 T.C. 522 (1994).

414. *Id*. at 529-530.

a primary and unconditional obligation to purchase wife's stock.[415] A joint dissent by Judges Laro and Marvel argued that *Q&A-9* should never should apply to redemptions like those in any of these cases.[416]

In *Craven v. United States*,[417] the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) held that a stock redemption for $4.8 million in future cash incident to a 1989 divorce was governed by I.R.C. § 1041; thus, the redeeming spouse does not recognize gain, nor (because I.R.C. § 1041 applies) does she have imputed an interest during the period before receiving cash.[418] The stock redemption agreement executed by the redeeming spouse and the corporation did not specify the amount of interest to accompany each payment, but did require the corporation would send the ex-wife *Form 1099-INT*,[419] specifying the amounts of interest imputed to her under I.R.C. § 1272. The Court of Appeals for the Ninth Circuit in *Cravens* followed the *Read* tax court's decision to find that the redemption was governed by I.R.C. § 1041, pursuant to *Q&A-9*.[420]

The apparent intention of the parties in 1989 was to structure the redemption as a taxable redemption by the redeeming spouse, and to make the gain taxable to the wife. The stock redemption agreement provided that because the payments under the note were without stated interest, the corporation would send the wife copies of *IRS Form 1099-INT* stating the amounts of interest imputed to her under I.R.C. § 1272. The corporation complied with this obligation. The parties, however, appear not to have contemplated an I.R.C. § 1041 transfer because under I.R.C. § 1.1274-1(b)(iii), the original issue discount rules do not apply to transactions covered by I.R.C. § 1041.[421]

The court followed the Ninth Circuit's decision in *Arnes v. United States*,[422] to apply I.R.C. § 1041 and provide non-recognition on redemption (pursuant to the divorce decree) of the ex-wife's forty-seven percent of stock in a corporation controlled by husband. The court reasoned that the purpose of the redemption was to effect a division of marital property, and thus, I.R.C. § 1041 applied to the wife. The opinion states that the

415. *Id*. at 531-550.
416. *Id*. at 549.
417. 215 F. 3d 1201 (11th Cir. 2000).
418. *Id*. at 1207-1208.
419. *See* U.S. Dep't of Treas., Internal Revenue Serv., IRS Form 1099-INT.
420. 215 F.3d at 1206-1207.
421. Treas. Reg. § 1-1274-1(b)(3)(iii).
422. 981 F.2d 456 (9th Cir. 1992).

question of proper treatment of the husband—whether the husband had a constructive dividend by reason of the redemption—was not before the court, and in any event, was not relevant to the proper treatment of the wife's redemption. The court held that I.R.C. § 1041 applied to the original issue discount (OID) component of the promissory note that the wife received in exchange for the redeemed stock.[423]

VI. Dependency Exemption for Children of Divorced or Separated Parents

A. Pre-TRA 1984

Before enactment of the TRA 1984, I.R.C. § 152(e)[424] established the general rule and exceptions to the rule governing the allocation of the dependency exemption in situations where the parents were divorced or separated. The general rule of I.R.C. § 152(e)(1) granted the exemption to the custodial parent if the parties met the following conditions: (1) one or both of the parents must have had custody of the child for more than one-half of the calendar year; (2) one or both of the parents must have provided more than one-half of the support for the child; and (3) the parents must be divorced or legally separated under a decree of divorce or separate maintenance, or separated under a written separation agreement.[425]

There were two exceptions to the general rule that permitted the non-custodial parent to claim the child as an exemption. The first exception required the non-custodial parent to provide at least $600 for the support of the child and the decree of divorce or separate maintenance, or a written agreement was required to allocate the exemption to the parent not having custody.[426] The second exception applied to situations in which the divorce decree or agreement remained silent about which parent was entitled to the exemption. In this circumstance, the non-custodial parent was entitled to the exemption if he or she provided at least $1200 or more of

423. *Id*.

424. I.R.C. § 152(e) (1982). This section predates amendment by the Tax Reform Act of 1984, Pub. L. 98-369, § 423(a), 98 Stat. 494 (1984). Congress originally added I.R.C. § 152(e) with Pub. L. 90-78, § 1(a), 81 Stat. 191, enacted on 31 Aug. 1967, and effective with respect to taxable years beginning after 31 Dec. 1966.

425. I.R.C. § 152(e).

426. *Id.* § 152(e)(2)(A).

support for the child, and if the custodial parent did not establish that he or she provided more support for the child during the calendar year.[427]

The express purpose of I.R.C. § 152(e) was to eliminate the uncertainty to taxpayers and ease the administrative burden on the IRS in the allocation of dependency exemptions in divorce and separation cases.[428] The IRS hoped that the presumption granting the dependency exemptions to the custodial parent, unless one of the two exceptions applied, would reduce litigation. Litigation involving dependency exemption claims persisted, however, because I.R.C. § 152(e) and its implementing rules did not "guarantee" the exemption to one parent. Section 152(e)(2)(B)(ii) would always permit the non-custodial parent to claim the exemption if he or she contributed over $1200 of support during the calendar year, and if the custodial parent could not clearly establish that he or she provided more than one-half of the child's support.[429] In addition, the tax regulations vaguely defined support as including "food, shelter, clothing, medical and dental care, education, and the like."[430] Accordingly, the courts were required to interpret and define qualifying expenditures for support and make fair market value determinations for support provided in kind.[431]

B. TRA 1984

1. General Rule

In 1984, Congress substantially revised I.R.C. § 152(e) in a conscious attempt to provide certainty in the area of dependency exemptions.[432] The TRA 1984 simplified the dependency exemption issue by always allocating the exemption to the custodial parent, unless the custodial parent signed a written declaration disclaiming the child as a dependent for a given tax year.[433] The "custodial parent rule" has several threshold requirements that must be satisfied. First, the child must receive over half of his support from the custodial parent during the calendar year.[434] For this purpose, I.R.C. §152(e)(5) specifically provides that payments by a new spouse of one of the divorced parents are treated as if made by the divorced parent. Second, the child's parents must either be divorced or legally separated under a decree of divorce or separate maintenance,[435]

427. *Id.* § 152(e)(2)(B).
428. Bridgett v. Comm'r, 31 T.C.M. (CCH) 798 (1972).
429. *See, e.g.*, Bodine v. Comm'r, 47 T.C.M. (CCH) 1337 (1984).
430. Treas. Reg. § 1.152-1(a)(2)(i).
431. Tharp v. Comm'r, 36 T.C.M. (CCH) 162 (1977).

separated under a written separation agreement,[436] or living apart at all times during the last six months of the calendar year.[437] Third, the child must be in the custody of one or both of the parents for more than one-half of the calendar year.[438] If these three threshold requirements are met, the custodial parent will receive the dependency exemption regardless of whether the non-custodial parent provided over one-half of the child's support for the calendar year. When determining which parent has custody for purposes of the dependency exemption, the most recent divorce or custody decree or (if none) a written separation agreement will govern. In the event either such a decree or agreement is ambiguous, or no such decree or agreement exists, or the decree or agreement awarded joint custody, then custody will be determined based on the length of time a parent has physical custody of the child. The parent who has the smallest portion of phys-

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432. The legislative history of the TRA 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984), sets forth the following reasons for the change:

> The present rules governing the allocations of the dependency exemption are often subjective and present difficult problems of proof and substantiation. The Internal Revenue Service becomes involved in many disputes between parents who both claim the dependency exemption based on providing support over the applicable thresholds. The cost to the parties and the Government to resolve these disputes is relatively high and the Government generally has little tax revenue at stake in the outcome. The committee wishes to provide more certainty by allowing the custodial spouse the exemption unless the spouse waives his or her right to claim the exemption. Thus, dependency disputes between parents will be resolved without the involvement of the Internal Revenue Service.

H. REP. NO. 432, pt. II (1984), *reprinted in* 1985 U.S.C.C.A.N. 697, 1140.

433. I.R.C. § 152(e)(1).

434. *Id*.

435. *Id.* § 152(e)(1)(A)(i).

436. *Id.* § 152(e)(1)(A)(ii).

437. *Id.* § 152(e)(1)(A)(iii).

438. *Id.* § 152(e)(1)(B).

ical custody of the child over the calendar year is considered the custodial parent.[439]

These dependency exemption rules apply to all tax years beginning after 31 December 1984.[440]

> ***Example:*** *H* and *W* divorced on 30 June 1983. They have two minor children. The divorce decree was silent as to who was entitled to the dependency exemptions. The two children stayed with *H* in July and August and then resided with *W* for the remainder of 1983. In 1984, the children lived with *W* all year except for June, July, and August, when the children lived with *H*. In 1983, *H* paid *W* $300 per month in child support (a total of $1800 per child for the year) and $3600 per year per child in 1984. *W* could not prove that she provided more support in either year. Under the pre-TRA 1984 rules, *H* was entitled to both exemptions for the children in 1983 and 1984. In 1985, however, *W*, as the custodial parent by virtue of having the children for nine months during the year, would receive both dependency exemptions, regardless of whether she provided little or no support for the children.

In *Knight v. Commissioner*,[441] the Ninth Circuit upheld the constitutionality of the I.R.C. § 152(e) presumption of a custodial parent's entitlement to the dependency exemption. The Ninth Circuit held that the Tax Court properly rejected Mr. Knight's arguments that I.R.C. § 152(e) creates an unconstitutional, irrebuttable presumption; that it constitutes a bill of attainder; and that it violates the right to equal protection (because ex-spouses can deduct alimony payments but non-custodial parents cannot deduct child support). In reaching this decision, the Ninth Circuit noted that an irrebuttable presumption is not *per se* unconstitutional so long as it is rational. The Court noted that I.R.C. § 152(e) is rationally related to and advances a legitimate congressional purpose.[442]

2. Exceptions to the General Rule

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439. Treas. Reg. § 1.152-4(b).

440. Temp. Treas. Reg. § 1.152-4T(a), Q&A-6 (1984).

441. 74 A.F.T.R. 2d 94-5177 (9th Cir. 1994) (affirming T.C. Memo 1992-710 (1992)).

442. *Id*.

Three situations exist in which a non-custodial parent may take the dependency exemption for a child. First, the custodial parent may transfer the exemption to the non-custodial parent through a written declaration.[443] Second, if a "multiple support agreement" is in effect, it will always take precedence over the support test rules of I.R.C. § 152(e).[444] Lastly, when a pre-1985 instrument, as defined by I.R.C. § 152(e)(4)(B), is in effect and has not been modified to apply current rules of I.R.C. § 152(e)(2), the former rules may apply.[445] Each of these exceptions is discussed below.

a. Transfer of Exemption Through Written Declaration

While the custodial parent is generally entitled to the dependency exemption under I.R.C. § 152(e)(1), that parent may waive the right to the exemption by executing a written declaration stating that he or she will not claim such child as a dependent for the taxable year.[446] The non-custodial parent must attach this written declaration to the non-custodial parent's tax return for the year for which the waiver is effective.[447] The provision has some flexibility built into it. The written declaration does not have to be made on the official IRS form;[448] however, if the parties do not use the IRS form, the written declaration must provide the same substantive information the form contains.[449] The waiver of the exemption by the custodial parent may be for a single year or for a number of specified years, or it can be permanent.[450] When the waiver covers more than one year, the original release must be attached to the non-custodial parent's tax return and a copy of the release must be attached to the non-custodial parent's tax returns for each subsequent year in which he or she is claiming the exemption.[451] When negotiating a separation and property agreement, the parties should specifically provide how they will allocate the dependency exemption between them with respect to each of their children. Given the breadth of the temporary regulations implementing this exception, the separation agreement itself could then serve as the written declaration. Alternatively, the separation agreement could specify the allocations and then require the

443. I.R.C. § 152(e)(2).
444. *Id.* § 152(e)(3).
445. *Id.* § 152(e)(4).
446. *Id.* § 152(e)(2)(A).
447. *Id.* § 152(e)(2)(B); *see* Paulson v. Comm'r, 72 T.C.M. (CCH) 1600 (1996).
448. *See* U.S. Dep't of Treas., Internal Revenue Serv., IRS Form 8332.
449. Temp. Treas. Reg. § 1.152-4T(a), Q&A-3 (1984).
450. *Id.* § 1.152-4T(a), Q&A-4 .
451. *Id*.

custodial parent to complete the appropriate IRS form each year. If the custodial parent is concerned that the other parent will not pay the required child on time, the declaration can be renewable annually, contingent upon the timely payment of all child support payments.[452] There is no required minimum support to be paid by the non-custodial parent in order to claim the exemption if the custodial parent waives his or her right to claim the child under this exception.[453]

In *Nieto v. Commissioner*,[454] the Tax Court held that the non-custodial parent (husband) could not claim the dependency exemption for two children who lived with his former wife. In 1984, the parties were divorced and awarded joint legal custody of their three children. The husband was awarded physical custody of all three children. In 1986, however, the husband agreed to give his wife physical custody of his two sons, and both children lived with their mother for all twelve months of tax years 1987 and 1988. On audit, the IRS held that the husband did not have physical custody of the two boys during those two tax years and therefore was not entitled to the dependency exemptions for them, citing *Treasury Regulation § 1.152-4(b)*. The court noted that as the non-custodial parent of the two boys, the only way the former husband could claim the dependency exemptions for the two sons was by obtaining a written declaration from his ex-wife that she would not claim such exemptions, and by attaching the declaration to his income tax return. Because the husband did not do this, the court ruled he was not entitled to the dependency exemptions for the two boys for 1987 and 1988.[455]

b. Multiple Support Agreement

One of the foundation requirements of I.R.C. § 152(e)(1) and (2) is that one or both of the parents must provide over one-half of the support to the child during the calendar year to qualify for the dependency exemption. There may be situations where this does not exist. For example, several of the child's grandparents may provide over fifty percent of the child's support or a non-grantor trust may fund in excess of one-half of the support furnished to the child. In these situations, neither of the parents will be able to meet the fifty-percent funding threshold.[456] However, the depen-

452. H.R. REP. NO. 4170, at 1499 (1984).

453. I.R.C. § 152(e)(2).

454. 63 T.C.M. (CCH) 3050 (1992); *see Peck v. Comm'r*, 71 T.C.M. (CCH) 1933 (1996); *McCarthy v. Comm'r*, 70 T.C.M. (CCH) 1404 (1994).

455. *Id*. at 3052.

dent deduction may still be available if a multiple support agreement is in effect. Section 152(c) provides that a taxpayer shall be treated as having contributed over half of the support for a child during the calendar year if (i) no one person contributed over half of the child's support; (ii) the group collectively provided in excess of fifty percent of the child's support; (iii) the member of the group who will claim the dependency exemption contributed more than ten percent of the child's support; and (iv) the other members of the group who also contributed more than 10 percent of the child's support file a written declaration that they will not claim the child for the tax year.[457] The Treasury Department has issued IRS Form 2120 to accomplish the written declaration of waiver requirement. The taxpayer who seeks the dependency exemption must attach the Form 2120 waivers to his or her tax return and must otherwise be eligible to claim the child independently if he or she had provided in excess of fifty percent of the child's support.[458]

c. Pre-1985 Instruments

Only one of the support tests for determining which parent may properly claim a child in divorce or separation situations under I.R.C. § 152(e) survived the TRA 1984 overhaul of the dependency exemption. Section 152(e)(4) preserves the exemption for the non-custodial parent with respect to certain divorce or separation maintenance decrees or written agreements executed before 1 January 1985. The non-custodial parent will be entitled to retain the dependency exemption if the following criteria are met: (1) the decree, judgment, or written agreement must have been executed before 1 January 1985;[459] (2) the instrument must provide that the non-custodial parent is entitled to the exemption;[460] (3) the non-custodial parent must provide at least $600 for the child's support;[461] and (4) the decree, judgment, or agreement must not have been modified on or after 1

456. In such case, the child may be entitled to use his or her own personal exemption to offset unearned income. *See* I.R.C. § 151(d)(3)(D), 63(c)(5).

457. Treas. Reg. § 1.152-3(a) (1957) (republished in T.D. 6500, filed Nov. 25, 1960; amended by T.D. 6663, filed July 10, 1963).

458. I.R.C. § 152(c)(2).

459. *Id.* § 152(e)(4)(B)(i).

460. *Id.* § 152(e)(4)(A)(i), (B)(ii).

461. *Id.* § 152(e)(4)(A)(ii).

January 1985 to expressly preclude the application of the I.R.C. § 152(e)(4) exception.[462]

If the non-custodial parent has remarried, the IRS will treat any support the spouse of the non-custodial parent furnished to the child as deemed support provided by the non-custodial parent.[463]

3. Relevance of the General Definition of Dependent

A scenario may arise in which the children of divorced parents are no longer considered dependents under state law. Many states treat a child as emancipated under state law when the child reaches the age of eighteen or nineteen.[464] What happens when the child is considered emancipated under state law but is also a full-time student? The Tax Court recently addressed this situation in *Kaechele v. Commissioner.*[465]

The issue in *Kaechele* was which parent was entitled to claim the dependency exemptions for their two daughters. The Kaecheles divorced in 1985. Their daughters were both full-time students in college and resided on their respective college campuses. During the summers and certain holidays, the daughters resided with their mother. The husband, however, provided more than one-half of their support. The Kaecheles' divorce decree did not provide either parent with custody, because at the

462. *Id.* § 152(e)(4)(B)(iii).

463. *Id.* § 152(e)(5).

464. *E.g.*, FLA. STAT. § 743.07(1) (2003) ("the disability of nonage is removed for all persons . . . who are eighteen years of age or older, . . ."); N.C.G.S. § 48A-2 (2003) (defining a minor as any person who has not reached the age of eighteen years); VA. CODE ANN. § 20-61 (2003) (explaining that it is the age of eighteen years, unless child is crippled or otherwise incapacitated).

465. 64 T.C.M. (CCH) 459 (1992); *see also* Rownd v. Comm'r, 68 T.C.M. (CCH) 738 (1994). In *Rownd*, the father paid for all college tuition, dormitory, and health care expenses for his nineteen-year-old son, who was a full-time student at the University of Georgia. This support constituted over half of the son's total support. The court held that the father was entitled to claim his son as a dependent under I.R.C. § 152(a). The court also held that I.R.C. § 152(e) no longer applied to the Rownds, because their child had already reached the age of majority. *Id*. at 739.

time of their divorce, both daughters had reached the age of majority under Ohio law.[466]

The Tax Court held that the support test rules for divorced parents in I.R.C. § 152(e) did not apply. The children did not reside with either parent for more than six months, as required by I.R.C. § 152(e)(1)(B). The children were not in the custody of either parent, because they were emancipated under Ohio law. The Tax Court concluded that the general rule of I.R.C. § 152(a) would control. Under I.R.C. § 152(a), the parent who provides more than one-half of the support for the child is entitled to the dependency exemption. The father was awarded the dependency exemptions for both of his daughters for the two tax years at issue.[467]

C. Revisions of the TRA 1986 and Revenue Reconciliation Acts of 1990 and 1993

The TRA 1986 did not change the support test rules of I.R.C. § 152(e); however, it did increase the dollar amount of the exemption. For 2003, the amount of each exemption was $3050.[468] For subsequent years, the exemption amount is adjusted for inflation.[469]

Counsel must be aware of the phase-out rules under I.R.C. § 151(d) and the impact they may have on negotiations over dependency exemptions. Once taxable income exceeds certain specified levels, the benefit of the exemptions begins to phase out. The benefits of personal exemptions

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466. 64 T.C.M. (CCH) at 459-460.
467. *Id*. at 460.
468. I.R.C. § 151(d)(1)(C).
469. *Id.* § 151(d)(4).

are phased out if a taxpayer's adjusted gross income (AGI) exceeds certain thresholds.[470]

Filing Status	Threshold Amount (AGI)
Unmarried	$139,500
Head of Household	$174,400
Married Filing Jointly	$209,250
Married Filing Separately	$104,625

When the taxpayer's adjusted gross income exceeds the applicable threshold amount, the personal dependency deduction is reduced by two percent for each $2500 (or fraction thereof) by which the adjusted gross income exceeds the threshold amount.[471] The result of the personal dependent deduction phase out rules will be to completely eliminate the tax benefit gained from taking the deduction whenever a taxpayer's adjusted gross income exceeds the applicable threshold amount by more than $122,500. These phase out rules will be adjusted for inflation (cost-of-living adjustment).[472]

> ***Example:*** *Husband(H)* and *Wife(W)* divorced in 1997. The court awarded *W* custody of their only child, *A*. *W* has waived her right to claim the child as a dependent in a written document that qualifies under I.R.C. § 152(e)(2) transferring the exemption to *H*. In 2000, *H* remarries and his new spouse has no taxable income. *H* and his new bride have an adjusted gross income of $230,800 and they will claim three exemptions (himself, his new spouse, and *A*). Assume each personal exemption adjusted for inflation is $3050. The exemption deduction before reduction is $9150 (3 x $3050). The actual deduction permitted is calculated as follows:
>
> | | |
> |---|---|
> | *H* and new spouse's AGI | $230,800 |
> | Less: | |
> | Applicable threshold | ($209,250) |
> | Excess amount subject | |

470. *Id.* § 151(d)(3)(C). The phase-out of personal exemptions for certain taxpayers were originally set to expire in 1997. The 1993 Act eliminated the sunset provision. The phase-out of personal exemptions is now permanent. Pub. L. 103-66, § 13205, 107 Stat. 312 (1993). The threshold amounts are adjusted for inflation. I.R.C. § 151(d)(4).

471. *Id.* § 151(d)(3)(A), (B).

472. *Id.* § 151(d)(4); *see* Rev. Proc. 2002-70, 2002-46 I.R.B. 845.

to reduction $ 21,550
Excess amount: 21,550 / 2500 = 9
Reduction percentage: 9 x 2% = 18%

Permitted personal exemption deduction: Unreduced deduction - (Unreduced deduction x Reduction percentage)

$9150 - ($9150 x 18%)
$9150 - $1647 = $7503

H can take a personal exemption deduction of $7503. The phase-out rules reduced the tax benefit of the personal exemption deduction by $1647.

When representing taxpayers with high levels of taxable income, attorneys should remember that the phase-out rules on exemptions may reverse the tradition of giving the higher income spouse the dependency exemption. It does not help to negotiate for the child dependency exemption for a taxpayer who has a high level of taxable income when receipt of the additional exemption does little to reduce his or her total tax liability.

VII. Collateral Income Tax Considerations Relating to Children

A. Medical Expense Deduction

Before the TRA 1984, the medical expense deduction was only available to the parent who was entitled to claim the dependency exemption for the child who received the benefits of the medical expenditures. Section 213(a) provided a deduction for medical care and treatment expenses incurred by the taxpayer, the taxpayer's spouse, and any dependent as defined under I.R.C. § 152, to the extent such expenses were above a "percentage floor" (currently 7.5%).[473] The interrelation of I.R.C. § 213(a) and I.R.C. § 152 necessarily precluded the non-custodial parent from deducting any qualified medical expenses he or she incurred on behalf of the child. This could lead to a very inequitable result in which a non-custodial parent with a high taxable income could spend a large amount of money to treat the child for a medical problem and receive no tax benefit. The TRA 1984 rectified this problem by enacting a new I.R.C. § 213(d)(5), which

473. I.R.C. § 213(a).

permits both parents to treat a child as a dependent for purposes of the medical expense deduction.[474]

A prerequisite to taking the medical expense deduction for expenses incurred on behalf of a child is that one of the two parents must be able to claim the child as a dependent under the custodial parent rule or one of the exceptions listed in I.R.C. § 152(e). This requirement ensures that one or both of the parents provide over one-half of the child's support.[475] If the parent is entitled to the dependency exemption by virtue of a multiple support agreement, then only the parent taking the dependency exemption can claim the medical expense deduction for medical care and treatment for the child during that year.[476]

B. Child Care Credit Availability

A tax credit is available for a portion of the qualifying child or dependent care expenses a parent incurs, if the parent is eligible to claim the dependency exemption for that child.[477] The child must be under the age of thirteen, unless the child is physically or mentally incapable of caring for himself.[478] The ceiling dollar amount on employment-related expenses[479] to which the child care credit applies is $3000 for one child or dependent and $6000 for two or more children or dependents.[480] The credit itself is equal to thirty-five percent of the qualified employment-related expenses for taxpayers who have an adjusted gross income of $15,000 or less. The credit is reduced by one percent for each $2000 of adjusted gross income (or fraction thereof) over $15,000, until the credit percentage rate is reduced to a minimum of twenty percent when a taxpayer's adjusted gross income is more than $43,000).[481]

The key to the child care credit for divorced or separated parents is that only the custodial parent is eligible to take the child care credit.[482]

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474. Pub. L. No. 98-369, § 423(b), 98 Stat. 494 (1984); *see also* Temp. Treas. Reg. § 1.152-4T(a), Q&A-5 (1984).

475. I.R.C. § 152(e).

476. *See id.* § 152(c) (governing the conditions for claiming the dependency exemption when no single person provides over one-half of the child's support).

477. *See id.* § 21(a), (e)(5).

478. *Id*.

479. *See id.* § 21(b) (listing the statutory requirements for a valid employment-related expense for purposes of qualifying for the child care credit).

480. *Id.* § 21(c)(1), (c)(2).

Therefore, the custodial parent must ensure that he meets the custodial parent requirements of I.R.C. § 152(e)(1) to be able to take the credit. In situations in which the non-custodial parent provides more support for the child, the custodial parent is the one who may attempt to qualify for the credit.[483] Only the custodial parent may claim the child care credit, even when the custodial parent has executed a valid written document under I.R.C. § 152(e)(2) transferring the dependency exemption to the non-custodial parent, or when there was a pre-1985 instrument as defined by I.R.C. § 152(e)(4), granting the dependency exemption to the non-custodial parent.[484]

Another problem in determining eligibility for the child care credit occurs when the parents are separated but not divorced. When the parents are still married (albeit separated under a written separation agreement) at the close of the tax year, the credit is allowed only if the parents agree to file a joint tax return for the year.[485] If they file separately, neither parent is eligible to claim the credit. If one parent has abandoned the other spouse for at least the last six months of the tax year, however, then the parent who maintains a household that is the child's principal home for more than one-half of the tax year and furnishes more than one-half of the cost of maintaining the household during the same period will be considered not married for purposes of the child care credit and can file separately.[486]

C. Child Tax Credit

The Taxpayer Relief Act of 1997 (TRA 1997)[487] added I.R.C. § 24 and amended I.R.C. sections 31,501(c) and 6213(g), creating a $1000

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481. *Id.* § 21(a)(2). Note that I.R.C. § 21 was formerly I.R.C. § 44A until the TRA 1984 redesignated it. Section 1.44A still lists the Treasury Regulations, which refer to the old child care credit, which had a number of differences with respect to child age limits and the rules that governed who was entitled to claim it when the parents were divorced or separated. However, for definitions of what constitutes a qualified employment-related expense, physical or mental incapacity, types of care, and other related items, these regulations should still be useful. Pub. L. No. 98-369, art. § 474(m)(1), 98 Stat. 494 (1984).

482. I.R.C. § 21(e)(5).

483. *Id*.

484. *Id.* § 21(e)(5); *see also* Treas. Reg. § 1.44A-1(b)(2) (1984).

485. I.R.C. § 21(e)(2).

486. I.R.C. § 21(e)(4).

487. Pub. Law No. 105-34, § 101, 788 Stat. 111. The maximum credit per child will be $700 for the years 2005-2008, $800 for 2009, $1000 for 2010, and $500 after year 2010. I.R.C. §24(a)(2).

income tax credit for each of the taxpayer's qualifying children. The amount of credit decreases by $50 for each $1000 (or fraction thereof) of modified adjusted gross income in excess of a threshold amount, as follows: (1) $110,000 for joint return filers; (2) $75,000 for single return filers; and (3) $55,000 for a married individual filing a separate return. These amounts are not indexed for inflation.[488]

Modified adjusted gross income is adjusted gross income increased by amounts excluded under I.R.C. sections 911, 931 or 933, including foreign source income, housing costs of individuals living abroad, and income from sources within Guam, American Samoa, the Mariana Islands, or Puerto Rico.[489]A qualifying child is the taxpayer's child, stepchild, or foster child who is under age 17, a dependent of the taxpayer for whom the taxpayer is allowed a personal exemption deduction, and not a non-resident alien.[490] The taxpayer must include the name and taxpayer identification number for each qualifying child on the return.[491]

If the taxpayer's income tax liability is less than the taxpayer's allowable credit, the Act allows for a refundable credit, referred to as a supplemental credit, which is limited by the amount that the sum of the taxpayer's share of Federal Insurance Contributions Act (FICA) and one-half of the taxpayer's Self-Employment Contributions Act of 1954 (SECA) exceeds the taxpayer's refundable earned income credit.[492] In addition, a taxpayer with more than two children may be entitled to a refundable tax credit in excess of the supplemental credit.[493]

D. Earned Income Tax Credit

The earned income tax credit is designed to help low-income taxpayers who have earned income, meet modified adjusted gross income thresholds, and do not have more than a certain amount of disqualified income for purposes of individuals having excess investment income.[494] Individuals who have at least one qualifying child for the taxable year are usually eligible,[495] as are those who meet the four following conditions:[496] (1) the

488. I.R.C. § 24(b).
489. *Id*.
490. *Id.* § 24(c).
491. *Id.* § 24(e).
492. *Id.* § 24(d); *see also id.* §§ 3101, 1401.
493. *Id.* § 24(d).
494. *Id.* §§ 32(a), 32(i).

individual must not have a qualifying child for the taxable year;[497] (2) the individual's place of abode must be in the United States for more than one-half of the taxable year;[498] (3) the individual must be between the age of twenty-five and sixty-four years at the close of the tax year;[499] and (4) the individual must not be someone for whom another taxpayer is allowed a dependency exemption for the same taxable year.[500]

An individual is a qualifying child of a taxpayer for a taxable year if he meets the relationship, abode, and age requirements.[501] A qualifying child will not be taken into account in computing the earned income credit unless the taxpayer includes the name, age, and social security number of the qualifying child on the tax return for the taxable year.[502] A person meets the relationship requirement if he or she is the son or daughter of the taxpayer, a descendant of a son or daughter of the taxpayer, a stepson or stepdaughter of the taxpayer, a descendant of such stepchild, or an eligible foster child of the taxpayer.[503] For the tax year 2002 and thereafter, a person also meets the relationship requirement if he or she is a sibling, step-sibling, descendant of a sibling, or descendant of a step-siblings, if the taxpayer cares for that person as the taxpayer would care for his own children.[504]

The abode requirement is satisfied if the individual has the same principal place of abode as the taxpayer for more than one-half of the taxpayer's taxable year.[505]

The age requirement is satisfied if the individual meets any one of the following alternative criteria: (1) the individual is under the age of nineteen as of the close of tax year;[506] (2) the individual is a student under age twenty-four at the end of the tax year;[507] or (3) the individual is perma-

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495. *Id.* § 32(c)(1)(A)(i).

496. *Id.* § 32(c)(1)(A)(ii).

497. *Id.*

498. *Id.* § 32(c)(1)(A)(ii)(I).

499. *Id.* § 32(c)(1)(A)(ii)(II). If the individual is married then either the individual or the spouse must meet this condition. *Id.*

500. *Id.* § 32(c)(1)(A)(ii)(III).

501. *Id.* § 32(c)(3)(A).

502. *Id.* § 32(c)(3)(D).

503. *Id.* § 32(c)(3)(B)(i)(I)-(III). An individual must meet five conditions to qualify as an eligible foster child. *Id.* § 32(c)(3)(B)(iii), (E).

504. *Id.* § 32(c)(3)(B)(i)(II).

505. *Id.* § 32(c)(3)(A)(ii); Wooten v. Comm'r, 79 T.C.M. (CCH) (2000).

506. I.R.C. § 32(c)(3)(C)(i).

nently and totally disabled at any time during the tax year.[508] A person who meets the definition of a qualifying child must also have a taxpayer identification number (TIN),[509] usually the same as the child's social security number.[510]

The credit is based on earned income, which includes all wages, salaries, tips, and other employee compensation, plus the amount of the taxpayer's net earnings from self-employment. Beginning with the 2003 tax year, combat zone pay excluded from income is not treated as earned income.[511] Basic Allowance for Housing (BAH) and the Basic Allowance for Subsistence (BAS) are also excluded from earned income.[512]

The amount of earned income tax credit is phased out as a taxpayer's earned income increases. These phase-out limitations are adjusted for inflation.[513]

After taking into account the required inflation adjustments, the earned income limitation amount for 2003 is $7490 for eligible individuals with one qualifying child, $10,510 for eligible individuals with two or more qualifying children, and $4990 for eligible individuals with no qualifying children.[514] For 2003, the maximum earned income credit for eligible individuals with one qualifying child is $2547, with two or more qualifying children $4203, and with no qualifying children, $382.

Taxpayers who qualify for the earned income tax credit may do so when they prepare and file their tax returns. However, taxpayers who have at least one qualifying child may receive up to sixty percent of the earned income tax credit through advance payments. The advance payment option requires the taxpayer to certify that he has one or more qualifying

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507. *Id.* § 32(c)(3)(C)(ii).
508. *Id.* § 32(c)(3)(C)(iii).
509. *Id.* § 32(c)(3)(D)(i).
510. *Id.* § 32(m).
511. IRS Notice 2003-21, 2003-17 I.R.B. 817, Q&A-37.
512. *Id.* This new release by the IRS implements a significant change from prior law implemented by the 2001 Tax Relief Act, Pub. L. No. 107-16, § 901, 115 Stat. 38. Pre-2002 law, which will also apply after 2010, included the value of military quarters and subsistence allowances as earned income for purpose of computing the earned income tax credit. *See* Neff v. United States, No. 97-750T, 1999 WL 333410 (Ct. Fed. Cl. May 25, 1999).
513. I.R.C. § 32(i): Rev. Proc. 2002-70, 2002-46 I.R.B. 845.
514. Rev. Proc. 2002-70, 2002-46 I.R.B. 845.

children for the taxable year.[515] The taxpayer certification is made on *IRS Form W-5*.[516]

E. Filing Status

The following are the four filing categories for individual taxpayers: (1) married filing a joint return (and surviving spouses);[517] (2) head of household;[518] (3) unmarried (other than surviving spouses and head of households);[519] and (4) married filing separate returns.[520]

These options are relatively straightforward. Married taxpayers may file jointly with their spouses, or they may file separately. A taxpayer who is not married on the last day of the calendar year may file as a single taxpayer, but should remember that he may also qualify for the head of household filing status, which is usually more favorable.

Internal Revenue Code § 7703 defines whether a taxpayer will be considered married for tax purposes.[521] If a decree of divorce or separate maintenance exists between the taxpayer and another on the last day of the taxable year, the taxpayer will not be considered married.[522] Nevertheless, a married taxpayer may qualify as an unmarried taxpayer under what is commonly referred to as the "abandoned spouse" rule.[523] In order to satisfy this rule, the spouse does not have to be abandoned, only living apart from the other spouse for at least the last six months of the taxable year.[524] The "abandoned" spouse who meets the other requirements of the filing status may file as an unmarried taxpayer under I.R.C. § 1(c), or as a head of household.[525]

In general, for a parent to qualify as a head of household, he or she must meet the following criteria: (1) be divorced or legally separated;[526]

515. I.R.C. § 32(g).
516. *See* U.S. Dept. of Treas., Internal Revenue Serv., IRS Form W-5.
517. I.R.C. § 1(a).
518. *Id.* § 1(b).
519. *Id.* § 1(c).
520. *Id.* § 1(d).
521. *Id.* § 1(a).
522. *Id.* § 7703(a).
523. *Id.* § 7703(b).
524. *Id*.
525. *Id.* § 1(b) and (c).
526. *Id.* § 2(b).

(2) provide for more than one-half of the cost of maintaining the household during the taxable year; and (3) maintain a home that constitutes the child's principal place of abode for more than one-half of the taxable years. Generally, the child must also qualify as a dependent of the parent. After passage of the TRA 1984, the requirements to qualify for head of household filing status changed. It is no longer necessary for a divorced parent to claim the child as a dependent on the tax return to be entitled to file a tax return as head of household and take advantage of the more favorable tax rates.[527] The parent is free to transfer the dependency exemption to the non-custodial parent in a written declaration under I.R.C. § 152(e)(2), or the dependency exemption may already have been awarded to the non-custodial parent in a pre-1985 instrument.[528]

The head of household rules are slightly different when the parents are still married but not residing together. The parent must do the following: (1) separately file a return; (2) maintain a household that serves as the child's principal place of abode for more than one-half of the taxable year; (3) provide more than one-half the cost of maintaining the household during the taxable year; (4) be entitled to the dependency exemption for the child, or have transferred the exemption to the other parent (or the child may qualify as a dependent exemption for the non-custodial parent under a pre-1985 instrument); and (5) reside separately from the spouse for at least the last six months of the taxable year.[529]

F. Deductibility of Legal Fees

A spouse is not usually permitted to deduct attorney fees incurred in connection with a divorce or separation. The IRS considers legal fees to be personal, like other nondeductible personal, living, or family expenses.[530] In *United States v. Gilmore*,[531] an ex-husband attempted to deduct eighty percent of the legal fees he incurred over two tax years in his bitterly contested divorce. The husband was the president and controlling shareholder of three car dealerships. In the proceeding, Mr. Gilmore argued that the legal fees were incurred to conserve his income-producing property and protect his business reputation from his wife's accusations of marital infidelity. He argued that they were deductible under the predeces-

527. *Id.*
528. *Id.* § 152(e)(4).
529. *Id.* §§ 2(b), 7703(b).
530. United States v. Gilmore, 372 U.S. 39 (1963); I.R.C. § 262(a).
531. 372 U.S. 39 (1963).

sor to I.R.C. § 212(2). The U.S. Supreme Court held that none of the legal expenses were deductible. The Court reasoned that it is not appropriate to look at the consequences that might result to the income-producing properties, but rather at whether the claim originates with the taxpayer's profit-seeking activities.[532] The Court ruled that the taxpayer's claim "originated"[533] out of marital difficulties, which were personal and not business related. This is referred to as the "origin of the claim" doctrine.[534]

There are exceptions to the general rule that legal fees paid to an attorney are not deductible. Such exceptions usually involve one of the subparts of I.R.C. § 212. Although *Gilmore* has curtailed the use of I.R.C. § 212(2)[535] to deduct fees incurred during a divorce or legal separation, taxpayers have had more success under either I.R.C. § 212(1) or I.R.C. § 212(3).[536]

1. Production or Collection of Income—I.R.C. § 212(1)

Section 212(1) allows a deduction for expenses incurred for the production or collection of income. The IRS has allowed deductions under this provision in proceedings in which taxpayers incurred legal fees to obtain or increase alimony. In *Wild v. Commissioner*,[537] the Tax Court permitted a wife to deduct $6000 out of a $10,000 legal bill when her attorney had allocated the $6000 had been allocated by her attorney as representing the amount attributable to obtaining monthly alimony payments. The court ruled that the costs to the wife to produce the alimony were deductible under I.R.C. § 212(1).[538] The tax regulations now recognize this prin-

532. *Id*. at 48.

533. *Id*. at 49.

534. *Id*.

535. Internal Revenue Code § 212(2) permits a deduction for ordinary and necessary expenses paid or incurred "for the management, conservation, or maintenance of property held for the production of income." I.R.C. § 212(2).

536. *See, e.g.,* Hesse v. Comm'r, 60 T.C. 685 (1973), *aff'd* in unpub. opin., 511 F.2d 1393 (3d Cir. 1975), *acq.* 1974-2 C.B. 2; Rev. Rul. 72-545, 1972-2 C.B. 179.

537. 42 T.C. 706 (1964), *acq.*, 1967-2 C.B. 4.

538. *Id*. at 711; *see also* Hesse v. Comm'r, 60 T.C. 685 (1973), *aff'd*, 511 F.2d 1393 (3d Cir. 1975), *cert. denied*, 423 U.S. 834 (1975); Schafler v. Comm'r, 75 T.C.M. (CCH) 1897 (1998).

ciple.[539] A spouse may also deduct legal fees incurred to collect alimony arrearages.[540]

On the reverse side, the party defending against an award or collection of alimony cannot deduct his or her legal fees. In *Hunter v. United States*,[541] the U.S. Court of Appeals for the Second Circuit (Second Circuit) stated that "production of income" as that term is used in I.R.C. § 212(1) refers to the creation of additional income, not to reducing a liability.[542] Reducing a tax-deductible alimony obligation does not create an amount of income includable in gross income, although the net effect may be to increase a payor's taxable income level.[543]

2. Determination, Collection, or Refund of Any Tax: Tax Advice—I.R.C. § 212(3))

Section 212(3) permits a deduction for all ordinary and necessary expenses paid or incurred during the taxable year in connection with the determination, collection, or refund of any tax.[544] The regulations under I.R.C. § 212(3) include expenses for tax counsel, preparation of tax returns, and fees incurred in connection with any proceedings involving the determination of tax liability or contesting a person's tax liability.[545] Courts have allowed deductions for tax advice concerning the rights to claim dependency exemptions; characterization and treatment of alimony obligations; property transfers in connection with divorce; and income, estate, and gift tax consequences to a taxpayer who establishes a trust to discharge the alimony obligation.[546]

For legal fees incurred with respect to a divorce to be deductible, the attorney must determine what portion of the fees is allocable to tax advice, as opposed to the non-deductible advice and services. The allocation should be reasonable and one that can be substantiated.[547] In *Revenue Rul-*

539. Treas. Reg. § 1.262-1(b)(7) (1993).

540. Elliott v. Comm'r, 40 T.C. 304 (1963), *acq*., 1964-1 C.B. 4; *see* Treas. Reg. § 1.262-1(b)(7) (1993).

541. 219 F.2d 69 (2d Cir. 1955).

542. *Id*. at 70.

543. *See* Sunderland v. Comm'r, 36 T.C.M. (CCH) 512 (1977).

544. I.R.C. § 212(3).

545. Treas. Reg. § 1.212-1(k) (1993).

546. *See* United States v. Davis, 370 U.S. 65 (1962); Carpenter v. United States, 338 F.2d 366 (Ct. Cl. 1964); Rev. Rul. 72-545, 1972-2 C.B. 179.

ing 72-545,[548] the IRS suggested that the allocation should be based on time attributable to tax-related advice, plus other factors such as the fee customarily charged in the locality for similar services, the amount of taxes involved, and the difficulty of the tax questions presented. If the taxpayer is unable to document his allocation with records such as time sheets, diaries, or other evidence of time spent on tax advice, the IRS or courts may refuse to permit the deduction. In *Hall v. United States*,[549] a taxpayer (the ex-husband) paid a law firm legal fees of $15,000. Three attorneys from the firm worked on the case, including a tax lawyer who testified that he spent approximately twenty to twenty-five hours on tax matters with a billing rate of $100 per hour. The attorney kept no time sheets, logs, or diaries to evidence his time. During the tax year in question, the taxpayer paid $7000 in legal fees. The court refused to allow the taxpayer to deduct any part of the legal fees paid to the law firm because the taxpayer failed to prove, by a preponderance of the evidence, that any part of the legal fee was for tax advice.[550]

The obvious lesson of *Hall* is that the attorney should prepare an itemized bill showing exactly what portion of the fee is tax deductible. If the attorney charges for his services by the hour, it should not be difficult to substantiate the deduction if the IRS questions it later. If the attorney charges a set legal fee based on the attorney's experience, knowledge, difficulty of issues, and other similar factors, the attorney should divide the bill into the various deductible and non-deductible areas.[551] The deductible tax-related legal fees are treated as itemized deductions.[552] They are reported as miscellaneous deductions on *IRS Form 1040, Schedule A*, and as such, are subject to the two- percent floor.[553] The taxpayer may not deduct legal fees unless he itemizes his deductions.[554]

The deduction of tax-related legal fees is permitted only to the spouse who incurs the expense on his or her own behalf. When one spouse pays the other spouse's legal fees, the payor spouse will not be allowed to

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547. *See* Merians v. Comm'r, 60 T.C. 187 (1973).

548. Rev. Rul. 72-545, 1972-2 C.B. 179, situations 2, 3.

549. 78-1 U.S. Tax. Cas. (CCH) 83,086 (Ct. Cl. 1977).

550. *Id*. at 83,091.

551. *See* Goldaper v. Comm'r, 36 T.C.M. (CCH) 1381 (1977); Mirsky v. Comm'r, 56 T.C. 664 (1971). These cases are examples of what can happen if the attorney does not allocate fees—the court is left to make the allocation itself.

552. I.R.C. § 63(d).

553. *Id.* § 67(a), (b).

554. *Id.* § 67 (b).

deduct the payee spouse's tax-related legal fees.[555] Counsel who represent a spouse who is paying the other spouse's legal fees should consider treating the payment as alimony. Since the TRA 1984 repealed the "periodic payment" requirement for alimony, it is much easier to structure the payment of the other spouse's legal fees as alimony.[556] When negotiating the alimony payment obligation, the payee spouse's expected attorney fees can be incorporated into the payment schedule. If the fees are expected to be high, they should be spread out over several years to ensure the payor does not violate the rules by "front-end loading" of cash payments in the first three years following the divorce, which could trigger the recapture provisions.[557] If this option is used, the attorney for the payor should, of course, ensure that the agreement or decree requires that the payee spouse is responsible for paying his or her own attorney fees. In the alternative, the temporary regulations permit a payor spouse to make a cash payment to a third party on behalf of a spouse and such payment will qualify as alimony if it is pursuant to a divorce, separation agreement, or a written request for such payment by the payee spouse.[558] This method will ensure payment and ensure that the payment qualifies as deductible alimony to the payor spouse.

Another approach would be for the payor spouse to transfer appreciated property to the payee spouse. Such transfer would be income-tax free[559] as well as gift-tax free.[560] The payee spouse takes over the transferor's basis. The parties may add the legal fees for the transfer to the transferor's basis, thereby increasing the basis to the payee upon receipt of the property, if the legal fees are not deductible by the transferor spouse.[561] The gain that is realized and recognized by the payee (transferee) spouse can be at least partially offset by a deduction for the allocation of tax-advice related legal fees incurred by the transferee spouse.[562] Each of these alternatives will require close scrutiny in light of each party's respective marginal tax rates and the ability of the payee spouse to itemize.

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555. United States v. Davis, 370 U.S. 65, 74 (1962).
556. *See generally* I.R.C. § 71(b) (containing the applicable requirements).
557. I.R.C. § 71(b)(1), (f).
558. Temp. Treas. Reg. § 1.71-lT(b), Q&A-6, Q&A-7 (1984).
559. I.R.C. § 1041(a).
560. *Id.* § 2516.
561. *Id.* §§ 212(2), 1041(b); Treas. Reg. § 1.212-1(k).
562. I.R.C. § 212(1).

G. Entitlement to Tax Refunds

Property settlement agreements sometimes state which party will be responsible for paying any unpaid income tax liabilities and which party will receive any tax refunds with respect to prior and future year joint returns. These allocations are binding on the parties, but do not bind the IRS. The IRS may seek payment from either party, regardless of the property settlement terms. The typical scenario involves a husband and wife who file a joint tax return during a year when they are entitled to a refund. If the parties are divorced or separated before the refund check arrives, both spouses may claim entitlement to the refund.

1. Applicable Law

An overpayment is the property of the spouse whose income and tax payments created the overpayment.[563] Court decisions have consistently held that a husband and wife who file a joint return do not have a joint interest in an overpayment; each spouse or former spouse has a separate interest.[564] For example, if one spouse goes bankrupt, only his share of the refund goes to the trustee in bankruptcy.[565] If one spouse dies, his share of the refund goes to his estate, not to the surviving spouse.[566]

The Tax Court has held on several occasions that filing a joint return does not have the effect of converting the income of one spouse into the income of the other.[567] Spouses who file joint returns do not have a joint interest in an overpayment; filing a joint return does not convert the income and tax payments of one spouse into the income and tax payments of the other spouse. In other words, a joint income tax return does not give

563. Rev. Rul. 74-611, 1974-2 C.B. 399.

564. *See* Maragon v. United States, 153 F. Supp. 365 (Ct. Cl. 1957).

565. *In re* Wetteroff, 324 F.Supp. 1365 (E.D. Mo. 1971), *aff'd*, 453 F.2d 544 (8th Cir. 1972).

566. Estate Tax Reg. § 20.2053-6(f); McClure v. United States, 288 F.2d 190 (Ct. Cl. 1961).

567. *See* Dolan v. Comm'r, 44 T.C. 420 (1965); Coerver v. Comm'r, 36 T.C. 252 (1961), *aff'd per curium*, 297 F.2d 837 (3d Cir. 1962).

a spouse a property interest in the other spouse's income tax overpayment.[568]

Occasionally, the IRS will apply one spouse's overpayment to the separate debt of the other spouse. If this occurs, the non-debtor spouse can recover his share of the refunds erroneously applied to the other spouse's debt by filing an amended tax return for the tax year in question with *IRS Form 8379*.[569]

2. Allocation Formula

In *Revenue Ruling 80-7*,[570] the IRS established a two-step formula to calculate each spouse's interest in a refund or overpayment. In step one, one determines each spouse's allocable percentage of the joint tax liability on the return by multiplying the joint tax liability by a "separate share" fraction, computed as follows: (1) the amount of tax the spouse would have paid if he had filed a separate return computed using married filing separately rates; (2) divide this sum by the sum of the husband's separate tax plus the wife's separate tax. To compute the separate share fraction, one must recalculate the taxes for the taxable year on two separate returns for the husband and the wife.[571] In step two, one determines a spouse's share of a joint refund or other overpayment. To calculate this share, one subtracts the spouse's percentage of the joint tax liability, as calculated in step one, above, from his or her actual contributions toward the payment of the joint liability. A spouse's contribution includes his or her withholding and estimated tax credits during the tax year.[572]

The following examples will illustrate the Allocation Formula rules:

Example: *H* and *W* filed a joint return. *H*'s income for the year was $100,000. *W*'s income was $25,000. They used the $7950 standard deduction and claimed $6100 in personal exemptions. They had no other deductions. Their joint tax liability on $110,950 of taxable income was $23,858. Had they filed separate returns, *H*'s taxable income would have been $92,975, with

568. Dolan v. Comm'r, 44 T.C. 420 (1965); Rev. Rul. 74-611, 1974-2 C.B. 399.

569. U.S. Dep't of Treas., IRS Form 8379, Innocent Spouse Claim and Allocation.

570. 1980-1 C.B. 296. *But see* Rev. Rul. 85-70, 1985-1 C.B. 361 (expressing a different allocation formula for certain community property credits).

571. Rev. Rul. 80-7, 1980-1 C.B. 296.

572. *Id*.

a tax liability of $23,307, and *W*'s taxable income would have been $17,975, with a $2396 tax liability. *H*'s share of the joint tax liability is 91%; *W*'s share is 9% percent. Therefore, *H*'s portion of the joint tax liability is $21,711 (91% percent x $23,858), and *W*'s portion of the joint tax liability is $2147 (9% x $23,858).

Although *H* provided 80% of the income and *W* provided 20%, the allocable share of the joint tax liability is different, because each spouse is entitled to use a $3050 personal exemption and half of the standard deduction ($7950).

Example: Using the facts in the example above, *H* had $22,000 withheld during the year and *W* had $3000 in withholding. Their total tax payments were $25,000 and their refund is $1142. *H* is entitled to $289 of the refund ($22,000 withheld - $21,711 separate tax liability). *W* is entitled to the remaining $853 ($3000 withheld - $2147 separate tax liability).

Example: Using the facts in example (1) above *H* had $21,000 and *W*'s withholding was $4000. Their total tax payments were $25,000 and their refund is only $1142. *W* is entitled to the entire $1142 refund.

As illustrated in the example above, $1000 of *W*'s tax payments was used to satisfy *H*'s tax liability. Unless this is specifically addressed by a clause in the divorce decree, *W* is not entitled to any indemnification from *H* for the $1000.

H. Innocent Spouse, Separate Liability and Equitable Tax Relief

1. Overview of General Rules Before 1998

Section 6013(a) authorizes a joint return for a husband and wife.[573] In general, a husband and wife are jointly and severally liable for any tax for a tax year in which they filed a joint return.[574] Under recently adopted regulations, if one spouse signed the return under duress, the return does not constitute a joint return.[575] In order to alleviate the burden on a spouse who

573. I.R.C. § 6013(a).
574. *Id.* § 6013(d)(3).
575. Treas. Reg. § 1.6013-4(d).

did not engage in the activity giving rise to an understatement of tax, and who was unaware of the understatement, Congress enacted an "innocent spouse" exception to joint and several liability.[576] Former I.R.C. § 6013(e) provided the innocent spouse exception until 1998, when Congress repealed it and re-codified portions of the statute as I.R.C. § 6015.[577]

Former I.R.C. § 6013(e) had the following four main requirements: (1) the spouses must have filed a joint return for the taxable year; (2) the return must have contained a substantial understatement of tax attributable to grossly erroneous items of one spouse; (3) the other spouse must have established that in signing the return, he did not know—and had no reason to know—that there was such a substantial understatement; and (4) taking into account all the facts and circumstances, it was inequitable to hold the other spouse liable.[578] "Grossly erroneous items" meant any unreported item of gross income and any claim of a deduction, credit, or basis in an amount for which there was "no basis in fact or law."[579] Taxpayers had a difficult time proving the presence of "grossly erroneous items" in erroneous deduction cases.[580] Furthermore, even if a taxpayer did not have actual knowledge that a deduction claimed on a return would give rise to a substantial understatement, a taxpayer who had reason to know of such an understatement was not entitled to innocent spouse relief under former I.R.C. § 6013(e).[581]

2. Current Rules For Innocent Spouse, Separate Liability, and Equitable Tax Relief

The 1998 IRS Reform Act[582] created I.R.C. § 6015. This new statute contains the following three exceptions to joint and several liability for tax arising from a joint tax return: (1) innocent spouse relief;[583] (2) election for separate liability;[584] and (3) equitable tax relief.[585] The IRS makes its

576. Former I.R.C. § 6013)(e)(1998).

577. I.R.C. § 6015.

578. *Id.* § 6013(e)(1) (1998); Pub. L. No. 105-206, § 3201(e)(1), 112 Stat. 685 (1998).

579. I.R.C. § 6013(e)(2) (1998).

580. *See* Crowley v. Comm'r, 66 T.C.M. (CCH) 1180 (1993); Anthony v. Comm'r, 63 T.C.M. (CCH) 2294 (1992); Neary v. Comm'r, 50 T.C.M. (CCH) 4 (1985).

581. I.R.C. § 6013(e)(1)(C) (1998).

582. Pub. L. No. 105-206, 112 Stat. 685 (1998) *amended*, Tax Extension Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-906 (1998); Community Renewal Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

583. I.R.C. § 6015(b).

determinations under this section without regard to community property laws.[586]

a. Innocent Spouse Rules—I.R.C. § 6015(b)

To qualify for innocent spouse relief, the requesting spouse must satisfy each of the following elements: (1) the requesting spouse must have filed a joint return on which there is an understatement of tax due to an erroneous item of the non-requesting spouse;[587] (2) the requesting spouse must not have known or had reason to know about the understatement at the time of signing the return;[588] (3) taking into account all the facts and circumstances, holding the requesting spouse liable for the additional tax must be inequitable;[589] and (4) the requesting spouse must make a valid election for I.R.C. § 6015(b) relief.[590]

Section 6015(b) is silent about the burden of proof, except that it requires that the requesting spouse to establish his lack of knowledge of the understatement. Cases applying former I.R.C. § 6013(e) uniformly held that the requesting spouse had the burden of proving each element of the innocent spouse defense by a preponderance of the evidence.[591]

The understatement of tax must be attributable to an "erroneous item" of the non-requesting spouse.[592] Section 6015 does not expressly define "erroneous item," but the regulations provide definitions of both "item" and "erroneous item." *Treasury Regulation § 1.6015-1(h)(3)* defines "item" as that which is required to be separately listed on an individual return or attachments to the return.[593] *Treasury Regulation § 1.6015-1(h)(4)* defines "erroneous item" as an item resulting in an understatement

584. *Id.* § 6015(c).
585. *Id.* § 6015(f).
586. *Id.* § 6015(a).
587. *Id.* § 6015(b)(1)(A),(B); Treas. Reg. § 1.6015-2(a)(1)-(2).
588. I.R.C. § 6015(b)(1)(c); Treas. Reg. § 1.6015-2(a)(3).
589. I.R.C. § 6015(b)(1)(D); Treas. Reg. § 1.6015-2(a)(4).
590. I.R.C. § 6015(b)(1)(E); Treas. Reg. § 1.6015-2a, - 1(h)(5).
591. *See* Stephens v. Comm'r, 872 F.2d 1499 (11th Cir. 1989); Purcell v. Comm'r, 826 F.2d 470, 473 (6th Cir. 1987).
592. I.R.C. § 6015(b)(1)(B); Treas. Reg. § 1.6015-2(a)(2).
593. Treas. Reg. § 1.6015-(h)(3).

or deficiency, such as unreported gross income or a deduction, credit, or basis improperly characterized or reported on the tax return.[594]

The most-litigated issue under the innocent spouse relief provisions is whether the spouse seeking the innocent spouse relief had reason to know about the understatement of tax.[595] A review of the reported cases shows courts have analyzed this issue in a multitude of ways, depending on the particular facts of each case.[596] Mere knowledge of the underlying transaction is sufficient to justify denying innocent spouse relief.[597]

b. Separate Tax Liability for Divorced and Separated Taxpayers—I.R.C. § 6015(c)

Section 6015(c) allows a spouse to elect to limit his liability for any deficiency arising from a joint return to that portion of the deficiency attributable to errors allocable to that spouse.[598] The election applies to both income taxes and self-employment taxes.[599] Section 6015(c) applies only to deficiencies of tax arising with respect to a joint return, not liabilities for unpaid taxes reported on the return.[600]

To elect separate liability under I.R.C. § 6015(c), a requesting spouse must satisfy the following requirements: (1) at the time of making the election, the requesting spouse is no longer married to or is legally separated from the other spouse, and has not been a member of the same household as the other spouse for the last twelve months;[601] (2) before making the election, the requesting spouse and the other spouse must not have transferred assets between themselves as part of a fraudulent scheme;[602] (3) at the time of signing the tax return, the requesting spouse must not have had

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594. *Id.* § 1.6015-1(h)(4).

595. *See, e.g.*, Cheshire v. Comm'r, 115 T.C. 183 (2000), *aff'd* 282 F.3d 326 (5th Cir. 2002), *cert. denied* 537 U.S. 881 (2002); Grossman v. Comm'r, 182 F.3d 275 (4th Cir. 1999); Buchine v. Comm'r, 2c F.3d 173 (5th Cir. 1994); Altman v. Comm'r, 475 F. 2d 876 (2d Cir. 1973).

596. *See supra* note 595; I.R.C. § 6015(b)(1).

597. *See* Erdahl v. Comm'r, 930 F.2d 585, 589 (8th Cir. 1991); Cheshire v. Comm'r, 115 T.C. at 183.

598. I.R.C. § 6015(c)(1); Treas. Reg. § 1,6015-3(a), (d).

599. *See* S. REP. NO. 174, at 56 (1998).

600. I.R.C. § 6015(a) and (c)(1).

601. *Id.* § 6015(c)(3)(A)(i)(I)-(II); Treas. Reg. § 1.6015-3(a).

602. I.R.C. § 6015(c)(3)(A)(ii); Treas. Reg. § 1.6015-1(d).

actual knowledge of the item giving rise to the deficiency;[603] and (4) the requesting spouse makes a timely election for I.R.C. § 6015(c) relief.[604]

Practitioners must remember that when making a request for separate tax liability under I.R.C. § 6015(c), the election will not apply to any item of the other spouse with respect to which the electing spouse had actual knowledge. The knowledge referred to in I.R.C. § 6015(c) is knowledge of the item, not its tax consequences.[605] Unlike I.R.C. § 6015(b) (innocent spouse relief, discussed above), I.R.C. § 6015(c) does not have a constructive knowledge provision.[606] The IRS cannot infer actual knowledge from the requesting spouse's reason to know of the erroneous item.[607]

c. Equitable Relief—I.R.C. § 6015(f)

The 1998 IRS Reform Act added a third new liability relief provision called "Equitable Relief," at I.R.C. § 6015(f).[608] Section 6015(f) provides a last-resort equitable relief provision authorizing the IRS to relieve a spouse from liability for a deficiency arising with respect to a joint tax return or any unpaid tax properly reported on the return if, "taking into account all the facts and circumstances it is [in]equitable to hold the individual liable" for all or a portion of such deficiency or unpaid tax,[609] and relief is not available under the other two subsections of I.R.C. § 6015.[610] Relief under I.R.C. § 6015(f) is discretionary on the part of the IRS.[611]

In *Revenue Procedure 2000-15*,[612] the IRS provided guidance for taxpayers seeking equitable relief under I.R.C. § 6015(f). The procedure provides a requesting spouse with various threshold conditions to be eligible for relief from tax liability arising from a joint tax return under I.R.C. § 6015(f). The requesting party must meet the following threshold requirements under *Revenue Procedure 2000-15*: (1) relief must not be available

603. I.R.C. § 6015(c)(3)(C); Treas. Reg. § 1.6015-3(c)(2). This limitation does not apply if the requesting spouse can demonstrate he signed the tax return under duress. I.R.C. § 6015(c)(3)(C); *see* Treas. Reg. § 1.6015-1(b) (citing Treas. Reg. § 1.6013-4(d)).

604. I.R.C. § 6015(c)(3)(B).

605. Treas. Reg. § 1.6015-3(c)(4), ex. 2.

606. *Id.* § 1.6015-2(c).

607. *Id.* § 1.6015-3(c)(2).

608. Pub. L. No. 105-206, § 3201(a), 112 Stat. 685 (1998).

609. I.R.C. § 6015(f)(1); Treas. Reg. § 1.6015-4(a).

610. I.R.C. § 6015(f)(2).

611. *Id.* § 6015(f).

612. 2000-1 C.B. 447.

under I.R.C. § 6015(b) or (c);[613] (2) the requesting spouse must make a valid election for I.R.C. § 6015(f) relief;[614] (3) the spouses filing the joint return must not have transferred any assets to each other as part of a fraudulent scheme;[615] (4) liability for which relief is requested must remain unpaid at the time of the request, or if paid, must either have been paid after July 22, 1998 as part of an installment agreement which is not in default,[616] or have been paid between July 2, 1998 and April 14, 1999;[617] (5) the requesting spouse must not have filed the joint tax return with fraudulent intent;[618] and (6) the non-requesting spouse must not have transferred any disqualified assets transferred to the requesting spouse.[619]

Except to say that "disqualified assets" has the same meaning as under I.R.C. § 6015(c)(4)(B), and to clarify that a transfer of a disqualified asset only precludes relief to the extent of the value of the asset, the revenue procedure does not elaborate on these requirements, [620] but it lists circumstances, under which the IRS will ordinarily grant equitable relief,[621] in addition to factors the IRS will consider in determining whether relief is appropriate in other cases.[622]

d. "Ordinarily" Qualifying Circumstances—A Safe Harbor

As stated above, the requesting spouse must satisfy the above threshold requirements to be considered for equitable relief. According to *Revenue Procedure 2000-15*,[623] a spouse who meets the threshold requirements and also meets the following criteria will ordinarily obtain relief: (1) the tax due as reported on the return must have been unpaid at the time of filing;[624] (2) at the time the taxpayer requests the relief, the

613. Rev. Proc. 2000-15, § 4.01.
614. *Id.* § 5.
615. Rev. Proc. 2000-15, § 4.01.
616. *See* I.R.C. § 6159(b)(4) (governing IRS installment agreements).
617. Rev. Proc. 2000-15, § 4.01. In *Field Service Advice 2002-13-006*, the IRS Chief Counsel's Office advised that the IRS did not abuse its discretion in creating a "window period" between 22 July 1998 and 15 April 1999. Field Serv. Advice 2002-13-006 (October 23, 2001).
618. *Id.*
619. *Id.*
620. *Id.*
621. *Id.*
622. *Id.*
623. 2001-C.B. 447.
624. *Id.* § 4.02.

requesting spouse must no longer be married to the non-requesting spouse, or be legally separated from him, or must not have been a member of the same household for the previous twelve months;[625] (3) at the time the return was signed, the requesting spouse must not have known or had reason to know that the tax would not be paid, and must show that it was reasonable for the requesting spouse to believe that the non-requesting spouse would not pay the reported liability;[626] (4) the requesting spouse must show that she would suffer economic hardship if the IRS does not grant relief from liability;[627] and (5) the tax liability must be attributable to the non-requesting spouse.[628]

e. Other Relevant Factors

According to *Revenue Procedure 2000-15*, a requesting spouse satisfying the threshold requirements but whose circumstances do not fall within the above safe harbor test may still be entitled to equitable relief.[629] *Revenue Procedure 2000-15* lists a number of factors that the IRS will take account in making its determination, and notes that these listed factors are not intended to be exhaustive. A summary of the factors are as follows:

(i) Factors Weighing in Favor of Relief

a) Marital Status. The requesting spouse is legally separated from, living apart from, or divorced from the nonrequesting spouse;
(b) Economic Hardship. The requesting spouse would suffer economic hardship if relief is not granted;
(c) Abuse. The requesting spouse was abused by his or her spouse but such abuse did not constitute duress;

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625. *Id.*.

626. *Id.* § 4.02(b).

627. *Id.* § 4.02(c). The determination of economic hardship is made by the Commissioner of the Internal Revenue Service, or delegate, based on rules similar to those provided in Treasury Regulation § 301.6343-1(b)(4), describing circumstances under which the IRS will release a levy. *Id.*

628. Rev. Proc. 2000-15, § 4.02. The IRS derived these criteria from language in the 1998 Conference Report. H.R. CONF. REP. NO. 599, at 254 (1998). Discussing the scope of I.R.C. § 6015(f), the 1998 Conference Report states: "The conferees intend that equitable relief be available to a spouse that does not know, and has no reason to know, that funds intended for the payment of tax were instead taken by the other spouse for such other spouse's benefit." *Id.*

629. Rev. Proc. 2000-15, § 4.0.

(d) No knowledge or reason to know. The non-requesting spouse has a legal obligation pursuant to a divorce decree or agreement to pay the outstanding liability, and the requesting spouse had no knowledge or reason to know that the non-requesting spouse would not pay the liability as required by the divorce decree or agreement.

(e) Attributable to non-requesting spouse. The divorce instrument obligates the nonrequesting spouse to pay the liability for which relief is sought.[630]

. . . .

(ii) Factors Weighing Against Relief

(a) The liability for which relief is sought is attributable to the requesting spouse;
(b) The requesting spouse knew or had reason to know of the unpaid liability or deficiency (although, according to the revenue procedure, in extreme cases, knowledge will not preclude relief);
(c) The requesting spouse received a significant benefit (beyond normal support) from the unpaid liability or items giving rise to the deficiency, such as described in former Regs. § 1.6013-5(b) (listing factors relevant in determining whether it would be inequitable to hold a relief-seeking spouse liable for tax under the former § 6013(e));
(d) The divorce instrument obligates the requesting spouse to pay the liability for which relief is sought;
(e) The requesting spouse will not experience economic hardship if relief is not granted;
(f) The requesting spouse has not made a good faith effort to comply with federal income tax laws in the tax years following the tax year or years to which the request relief relates.[631]

f. Making an Election for Relief Under I.R.C. § 6015

Section 6015(b)(1)(E) expressly provides that a spouse seeking relief from liability on a joint tax return must file an election-for-relief form approved by the IRS within the statutory time period. The IRS revised

630. *Id.* § 4.03(1).
631. *Id*. § 4.03(2).

Form 8857,[632] the form previously used for requesting innocent spouse relief under former I.R.C. § 6013, to make it usable for making elections and requests for relief under all three I.R.C. § 6015 relief categories.[633]

Section 6015(a) expressly states that an individual may elect to seek relief under § 6015(b),[634] and, if eligible, to elect separate liability under § 6015(c).[635] Form 8857 also advises that the IRS will automatically consider whether a taxpayer ineligible for relief under § 6015(b) or (c) qualifies for equitable relief under § 6015(f).[636]

The earliest date for filing any election is the first date the IRS asserts the deficiency.[637] For liabilities arising after 22 July 1998, the last date for filing an election is two years after the date the IRS commenced collection activities against the taxpayer with respect to the liability.[638]

Section 6015(b)(2)[639] directs the IRS to prescribe regulations designed to give the non-requesting spouse notice of and an opportunity to participate in the requesting spouse's I.R.C. § 6015 administrative proceeding. The implementing regulations specify that, upon receipt of a requesting spouse's application using *IRS Form 8857*, the IRS must send a notice to the last known address of the non-requesting spouse informing him or her of the election.[640] The IRS must give the non-requesting spouse an opportunity to submit information relevant to its determination[641] and must notify him or her of its final determination.[642]

In *Revenue Procedure 2003-19*,[643] the IRS published rules under which a non-requesting spouse may administratively appeal a preliminary determination granting full or partial relief from joint liability to the requesting spouse.[644] The revenue procedure, which significantly expands

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632. U.S. Dept. of Treas., IRS Form 8857, Request for Innocent Spouse Relief (Rev. May 2002).

633. *Id*.

634. I.R.C. § 6015(a)(1).

635. *Id.* § 6015(a)(2).

636. *See* U.S. Dep't of Treasury, Internal Revenue Service, Form 8857, paras. 3-5.

637. Pub. L. No. 106-554, 114 Stat. 2763 (2000)(amending I.R.C. § 6015(c)(3)(B)).

638. *Id.* § 6015(b)(1)(E).

639. I.R.C. § 6015(b)(2).

640. Treas. Reg. § 1.6015-6(a)(1).

641. *Id.*

642. Treas. Reg. § 1.6015-6(a)(2).

643. 2003-5 I.R.B. 371.

644. Rev. Proc. 2003-19, 2003-1 C.B. 371.

the due process rights of non-requesting spouses, specifies the procedures that the IRS will follow after making a preliminary decision regarding a claim for relief, and the time and manner for protesting a determination to grant relief. Under the new rules, the non-requesting spouse may request an appeals conference both to challenge a preliminary grant of relief and to protest a proposed increase in the recommended relief resulting from the requesting spouse's appeal of the preliminary determination.[645] *Revenue Procedure 2003-19* is effective for claims for relief filed on or after 1 April 2003, and for claims filed before that date for which the IRS has issued no preliminary determination as of 1 April 2003.[646]

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645. *Id.*
646. *Id.*

By Order of the Secretary of the Army:

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