



Best of the FAMLAWESQ List Serve

Question:

Listmates - My associate is representing the wife of a Navy pilot. Our client has moved to another state with Husband's written permission. Husband was personally served, and thereafter faxed to our office a pro per Response to the Petition for Dissolution, which he had signed and dated. However, he never filed the Response with the court. We are trying to decide whether we should go ahead and pay the filing fee to file the Husband's Response with the court. Then we could set the case for trial instead of having to go through the tedious process of a default.

Second question: Husband did not show up for today's hearing which Wife had filed to request temporary orders for custody and support. The Judge, citing concerns about the SCRA, refused to issue orders for interim support, and continued the hearing until March. She did not appoint counsel for Husband. We do not have a good address for Husband, and our attempts to locate him through his command have so far been unsuccessful. So we cannot even give him notice of the new hearing date! Husband is paying our client a minimal amount of voluntary support. The Judge told my associate that she would telephone Husband's command herself if he continued to refuse to cooperate. Does anyone have any ideas?

Nancy Stassinopoulos

Responses:

Response 1

Yes:

First, review, and then, copy your judge, with Mark Sullivan's excellent "Judges Guide." The last copy I have is under the prior act, however, so probably should use his current "SCRA Summary":
http://www.abanet.org/family/military/silent/scra_summary.pdf

This should give you all available options and requirements.

Marshal S. Willick, Esq.

Response 2

I am currently encountering the same problem – but on the flip side – while I don't rep the service person (who left this Saturday to Afghanistan) he was a respondent in my client's petition for in loco custody of his minor child. Our petition alleged that since he was in the service at the time and being deployed he could not care for the kids, and mom was recently convicted of drug offenses and not a proper parent. He supported my client's petition as to custody. He filed the pleading for the stay, and the judge granted it, but then sent us a minute entry stating that the case will be dismissed in June if we don't set it for trial – although he will not return until April 2008. Mom's attorney went ballistic and is trying to undue the stay... no attorney was appointed for him in these proceedings.... Any idea on what to advise the judge? And by the way while he filed the motion for stay, because of his deployment he faxed me the military orders and asked that I get them to the judge per his JAG officer, I got his permission to sign the notice on his behalf and filed them per his request – and now mom's attorney wants to file a bar complaint against me for conspiring with him to keep the kids from mom....

Stasy Clark

Response 3

Dear Stasy,

You need to read the ENTIRE chapter on SCRA in my book, *The Military Divorce Handbook* (ABA Family Law Section 2006). Also the first part of the Custody chapter, which deals with SCRA issues. This is WAY beyond an e-mail posting to the Listserv. Go to www.ababooks.org and type in the product code, 5130135 at the Search Button.

Then give me a phone call, 919-832-8507, & I'll be happy to discuss with you...

*Mark Sullivan, Chair
Military Committee, ABA FLS
Raleigh, NC*

Response 4

Of course, as suggested, Mark's book is a great resource and I recommend it highly.

Having said that, here are my thoughts:

1. The SCRA does not mandate a stay unless the Servicemember's (SM) commanding officer provides a letter stating that the SM's military duties renders the SM unavailable to attend Court. Otherwise, the case should go forward, and the SCRA requires the Court to appoint an attorney to represent the SM.

[Query: Who pays for that attorney?] Check the stat carefully, Appendix to Title 50 of the United States Code, 50 App. USC Secs. 501, et. seq., as well as any corresponding state statutes you might have.

2. The case law establishes that the two exceptions for a SCRA' stay, is for child support and custody/visitation, in which the case should proceed even if the requirements of the SCRA for a stay are met. I have a brief on this point, if you need it.

3. There are ways (though I don't have them, perhaps Mark, Marshal, or the others can direct you) to obtain the SM's location/military mailing address and means to serve him, through formal channels. Army Regulations explicitly provide that a letter from one-o-us (an attorney representing SM's spouse) sent to a JAG officer, needs to be forwarded to the SMs command, and has the force of a "command inquiry" and needs to be responded to in a timely fashion. I've got the regs [AR 608-99] if you need 'em.

Best-o-luck,
Chaim Steinberger, Esq.

Response 5

Dear all:

An important follow up to Chaim's comment (while I have every confidence his brief on this topic would be brilliant), be careful regarding the use of case law developed under the old Act. There is no "exception" to the requirement of a stay in child custody/ visitation or child support matters. Please remember that the prior version of this Act specifically excluded "administrative proceedings", many courts took the position that applications involving child support were therefore excluded as well, which is the analysis often set forth in this line of cases. The new version of the act, by its terms INCLUDES all administrative proceedings so the prior basis for exclusion under the case law, is gone.

Child custody litigation was never statutorily excluded from the Act, the basis for any exclusion was found in the discretionary aspects of the prior version of the Act. The current version operates to limit the exercise of discretion by the court, and thus, while the court still has the discretion to deny an application for a stay, the Congressional intent was that it should be harder to do so. The case law that has developed under the new Act has focused in child custody litigation on whether the service member is asking in good faith, or is using the Act as an inappropriate "sword". Additional issues include complying entirely with the provisions of the Act with regard to explaining the absence of the servicemember, as well as the material affect of absence of the service member on the litigation. (i.e. there is a big difference between an application to modify parenting time and an application to transfer custody to a parent that a child has never seen)

A misnomer is that somehow the Act doesn't apply to requests for Temporary orders. The case law under the new Act certainly distinguishes Temporary orders from "permanent" ones, but they also recognize that certain temporary determinations may cause prejudice, and even irreparable harm, to say nothing of implicating Constitutional protections. Issues of notice, timing and opportunity to be heard, pre- and post judgment litigation should all factor in to the analysis. Finally (and yes I'm almost done) With regard to paying for an attorney appointed, regarding an SCRA application. Please remember that dependant children, particularly if the service member is absent, are separately entitled to receive the protections of the Act. Thus, I have in certain circumstances requested that the court appoint a law

guardian on behalf of the children to weigh in on the SCRA issue. The arrangements for the payment of a law guardian are set typically set statutorily or by case law.

Patricia E Apy
Red Bank, New Jersey

Response 6

Great points, Tricia. You're absolutely right. The focus of the cases, generally, is on the sword/shield thing, rather than just the magic words of custody/visitation. The result is that Mom cannot prevent Dad's visitation by using her deployment to shield her [sword her?] from a visitation lawsuit.

Re payment, in the only reported case I've seen that explicitly deals with the issue, the non-servicemember agreed to pay for the atty for the SM.

Chaim
New York, New York

Response 7

Marshal... I've rewritten the Guide and it's posted on the Military Committee web page, www.abanet.org/family/military.

Since boards, commissions, admin law judges & hearing officers now come under the SCRA, I've also written a companion infoletter, "An Agency Guide to the SCRA."

Mark Sullivan

All lawyer members are invited to join the "famlawesq" e-mail discussion list to discuss current topics in family law, share ideas, provide and receive referrals and network. Student members are invited to join the "famlawstudents" e-mail discussion list; all Section members are welcome to join the "famlaw" and "famlawlpn" discussion lists. To subscribe to a discussion list, please send an email to familylaw@abanet.org with your email address and full name and put the list(s) you would like to join in the subject line.