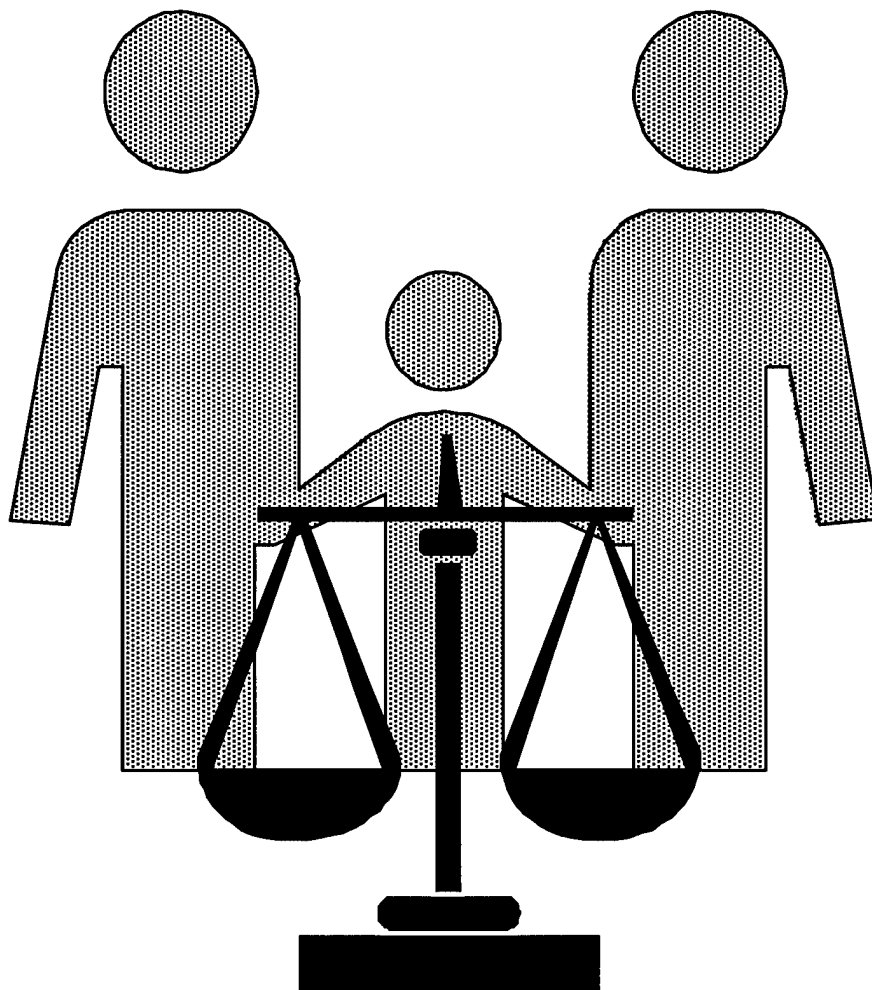


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FAMILY LAW

GUIDE



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Legal Assistance Branch
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The Judge Advocate General's School, U.S. Army
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JA 263

MAY 1998

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PREFACE

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JA 265	Legal Assistance Consumer Law Guide
JA 267	Uniformed Services Worldwide Legal Assistance Office Directory
JA 269	Legal Assistance Federal Income Tax Information Series
JA 271	Legal Assistance Office Administration Guide
JA 272	Legal Assistance Deployment Guide
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CHAPTER 1

MARRIAGE

I. INTRODUCTION

"It takes three to make a marriage--a male, a female and a state." J. GOLDSTEIN & J. KATZ, *FAMILY AND THE LAW* 9 (1964). These words capture a fundamental characteristic of marriage. It is an institution both public and private in nature. Its public dimension arises from the state's interest in structuring and maintaining the family as a societal unit:

The law without explicitly defining family, assumes that "family" is essential to the evolution and growth of society. This assumption rests on another assumption: that family, like law itself, is one of the basic processes for the control of human behavior.... [T]he law shapes and is shaped by the family.

Id. at 1. Perceived as a public institution, marriage has been extolled as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

But marriage has its private side as well. It is a product of voluntary choice by two individuals. The right to marry, including the right to choose one's partner in marriage, is "one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967), quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). When marriage is viewed in this private dimension, it acquires the trappings of contract law.

Consequently, a tension exists between marriage as a regulated public institution and marriage as a creature of private contract. This tension underlies many salient issues of family law facing military and civilian lawyers. See generally W. WADLINGTON, *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* 1-3 (1984). The outcome of each issue may depend upon whether the public or private dimension is accorded greater significance. Thus, in deference to the private aspect of marriage, a state may allow the parties to terminate a relationship upon showing nothing more than "irreconcilable differences." In contrast, the state, invoking its power to regulate marriage as a public institution, may restrict the parties' choices of certain marriage partners--such as close relatives or members of the same sex. On other issues, illustrated by the long-standing controversy over common law marriages, the states may disagree because they view differently the proper balance between public and private values.

II. PRE-MARRIAGE CONSIDERATIONS

- A. **Antenuptial Agreements.** To the extent that marriage is contractual, the parties have some liberty to shape their rights and obligations by agreement before entering the relationship.

The relationship contemplated by parties in modern forms of antenuptial agreements is not dissimilar from that of other long-term contracts, such as partnership, co-tenancy, and sometimes employment. Since the parties to a possible future marriage deal with each other on an assumed level of equality and equal bargaining power, their agreement, if it leads to marriage at all, tends to reflect financial and personal expectations like sexual preferences, whether to remain childless, when and how many children to have, and choice of career and domicile.

W. WEYRAUCH & KATZ, AMERICAN FAMILY LAW IN TRANSITION 1-2 (1983).

Although some couples contemplating marriage may seek a written agreement on such personal matters as sexual preferences and child planning, most will focus upon the economic ramifications of marriage. Some of the issues they usually address include the following: identification and protection of pre-marital (or "separate") property; proposed uses of marital (or "community") property; responsibilities for paying joint and individual debts incurred before or during the marriage; allocation of authority to manage the household budget, family businesses and investments; and the duty to provide financial support for each other and for children resulting from the marriage.

Because the scope and objectives of antenuptial agreements vary widely, they have not yet evolved to a point of stability where they can be readily reduced to standardized formats. Therefore, it can be difficult to draft an antenuptial agreement with any feeling of certainty that a court will enforce it. See, e.g., *In Re Noghrey*, 215 Cal. Rptr. 153 (Cal. 1985) (an antenuptial contract in which the husband promised to provide for his wife in the event of divorce was held unenforceable or violative of public policy for encouraging divorce). In view of the evolving state of this area of the law, this Guide does not provide sample clauses for antenuptial agreements. However, practitioners who are asked to advise clients regarding antenuptial agreements may find useful guidance in the Family Law Reporter and reported cases for the local jurisdiction. In all instances, the practitioner should caution the parties that their private freedom of contract may be circumscribed by public policy on some points, such as parental support of children.

- B. **Recognition of Marriages.** Practitioners may encounter inquiries regarding the likely validity of a proposed marriage, particularly where the parties intend to marry in one jurisdiction but to maintain a domicile, or to establish residency, in another jurisdiction. The general rule is set forth in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, at § 283(2):

A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which has the most significant relationship to the spouses and the marriage. [Emphasis added.]

In those cases where the state considering the validity of a marriage has a public policy reason to oppose it, the applicable law is determined by choice of law principles. The Restatement Second, at section 6, sets forth guidelines for determining which of two jurisdictions has the "most significant relationship" to the parties and to the subject matter. These guidelines include the relevant public policies of each jurisdiction, the protection of justified expectations, and the desirability of attaining certainty, predictability and uniformity of results among various jurisdictions.

C. Military Practice Note--Recognition of Marriage.

Department of Defense Financial Management Regulation, (DODFMR) Vol. 7A, discusses Department of Defense policy concerning the validity of marriages in general, and the services generally follow the civilian practice of recognizing a marriage that is valid under the laws of the jurisdiction where it was contracted. Ceremonial marriages are presumed valid, but when a marriage's validity is contested, a decision as to validity will be based on the facts and circumstances of the particular case. Similar guidance on validity of marriages appears in AR 37-104-4 (Military Pay and Allowances Policy and Procedures Active Component).

If marriages are irregular in form, such as the types of marriage discussed below, validity will not be presumed, and the military will employ a greater degree of scrutiny to determine if the parties are in fact married.

The issue of a marriage's validity typically arises in the context of applying for increased Basic Allowance for Housing (BAH) or other military-related benefits (such as health care) which accrue to the "lawful spouse" of a service member. While a valid marriage generally is a prerequisite for military benefits based on being married, under some circumstances benefits which have been received as a result of invalid marriage may be retained. See, e.g., 37 U.S.C. § 423 ("Validity of Allowance Payments Based on Purported Marriages").

The determination of validity of questionable marriages or relationships is done by the service representative at Defense Finance and Accounting Service (DFAS). Paragraph 260403F3 of DODFMR Vol. 7A lists the various service directors and addresses. For determinations in the Army, submissions are sent to Army Director, DFAS-IN, Indianapolis, IN 46249-0855. Questions regarding marriages generally arise after the fact; that is, the soldier may have married a person who was not divorced from a prior spouse, and the soldier may have received increased BAH for a substantial period of time. If finance officials later discover the impediment to the marriage, the soldier is in danger of having large sums collected from his pay as recoupment of his BAH benefits. If he is found to have entered the marriage in good faith, however, the money will not be collected.

There is one other administrative mechanism through which the federal government will rule on the validity of a marriage. In cases of "doubtful relationship" where a soldier has applied for increased BAH, the Finance Officer may submit a Request For An Advance Decision to the Comptroller General through finance channels. This is done in all cases involving a request for increased BAH where the claim is based on a common law marriage, or in any case that involves a divorce granted by a foreign country.

D. The Validity of Marriage in the Context of Military Criminal Prosecution and Administrative Actions.

Except in the regulation of certain overseas marriages, which is discussed below, the military does not prescribe any marriage requirements or procedures. The validity of a marriage can, of course, come up in many contexts in the rendering of legal assistance, but it can also be brought into question by a court-martial with respect to bigamy. For example, *United States v. McDonald*, 32 C.M.R. 689 (1962), involved a disputed remarriage that allegedly occurred in early January 1960, but "[a]s to this remarriage, the accused testified that he was intoxicated during the first week in January 1960 and had no knowledge of going through a marriage ceremony with his ex-wife."

While the military will defer to state law on whether a valid marriage exists, within the context of a military criminal prosecution, it is military law which defines the parameters of the offense of adultery, and not the law of the state in which the alleged adultery occurred. *See United States v. Johanns*, 17 M.J. 862 (A.F.C.M.R. 1983). For a comprehensive discussion of the history of adultery as a military offense, *see U.S. v. Hickson*, 22 M.J. 146 (C.M.A. 1986) and Major William T. Barto, *The Scarlet Letter and the Military Justice System*, ARMY LAW., Aug. 1997, at 3.

E. Military Regulation of Overseas Marriages.

General references (Although rescinded in January 1996, both of the following regulations provide a useful policy perspective which may be incorporated into MACOM guidance.):

1. AR 600-240, "Marriage in Overseas Commands," 1 June 1978 (Rescinded 1 Jan 96).
2. AR 608-61, "Application For Authorization to Marry Outside the United States," 16 October 1985 (Rescinded 1 Jan 96).

Soldiers tend to marry foreign nationals more than do civilians; for example, a 1989 article in the Washington Post cited the fact that out of about 32,000 troops in Korea, 2,400 marry Korean women each year. Many of these soldiers decide to marry in the foreign jurisdiction. For a number of reasons, the Armed Forces once imposed certain requirements on soldiers wishing to marry

overseas (these requirements did not apply to soldiers who returned to the United States to marry a foreign national).

On the whole, the regulation of soldiers' marriages to foreign nationals overseas was paternalistic. It reflected a belief that the soldier should be protected, at least to some extent, from making a hasty or ill-considered decision. In addition, the issues of immigration and naturalization faced by a soldier in such a marriage led to a regulatory program requiring permission from the MACOM commander.

AR 600-240 and AR 608-61, the regulations setting out the details of the overseas marriage requirements, were rescinded in January 1996. Although no longer mandated by regulation, the counseling requirements and opportunities set out in those regulations still make sense and would greatly benefit the soldier and the command. While the commander no longer must grant permission for the soldier to marry, commands should still look for opportunities to disseminate the information that underlies the spirit of the old program.

Admission to the United States is not automatic for a foreign national married to a soldier. Therefore, information regarding the potentially complex immigration and naturalization problems remains vital to soldiers contemplating marriage overseas to a foreign national. In addition, "social" counseling regarding the legal responsibilities and obligations of marriage is important to soldiers.

Soldiers must comply with all marriage requirements of the country in which they plan to marry. Although applications for authorization to marry are no longer mandated, soldiers and civilian personnel serving with, employed by, or accompanying the Armed Forces outside the United States should be encouraged to avail themselves of the consultative services the military can offer on the legal, moral, and procedural problems involved in overseas marriages, and the United States law on immigration and naturalization.

III. CATEGORIES OF MARRIAGE

The following paragraphs briefly discuss the various methods of contracting a marriage.

A. Formal Marriages.

1. Ceremonial. Marriages in this category are contracted during formal ceremonies conducted by religious or civil officials designated as authorized by the local jurisdiction to join people in wedlock. In the United States, a license to marry must be obtained by the parties prior to the ceremony. Although irregularities in the procedural and formal components of a ceremonial marriage will not necessarily invalidate the marriage, as a minimum the parties must have the legal capacity and each must voluntarily assent to the marriage for it to be valid.

2. By Proxy. A proxy marriage is a ceremonial marriage contracted through an agent (or agents) acting on behalf of one or both parties. For example, a soldier who is stationed overseas and is unable to return to the United States might use this mechanism to wed a person in the United States. Some states do not authorize proxy marriages within their borders, but almost all states recognize proxy marriages that were performed in other jurisdictions that do permit them.

Military Practice Note

While proxy marriages may be convenient and effective, soldiers should avoid them if possible. Proxy marriages create "doubtful relationships" for finance purposes, and therefore the soldier may experience delays in receiving an increase in BAQ and travel authorization while the case is reviewed. Moreover, survivor benefits hinge on the validity of the marriage, and tragic results can arise if deficiencies in the marriage are discovered only after the soldier has died.

The same can be said for common law marriages, marriages completed by telephone, and other variations from the norm of a ceremonial marriage with both parties present. They will be valid for military purposes if they are valid under the law of the jurisdiction where contracted (unless the marriage violates basic principles generally recognized in American law, such as the prohibition against brothers marrying their sisters), but the administrative burden of proving their validity can be cumbersome and time consuming. Moreover, the possibility of defects in the process is increased, and so is the possibility that latent defects will not be discovered until it is too late to correct the error.

B. Informal Marriages.

1. Common Law. A common law marriage is non-ceremonial. It occurs when a man and a woman, each with legal capacity to marry, engage in conduct which the law regards as sufficient to infer the existence of a marriage in fact. The states recognizing the formation of common law marriages within their borders require a present intent on the part of each party to enter into a marriage. In addition, most jurisdictions require that the parties openly cohabit as a married couple. Finally, a number of jurisdictions also require that the parties hold themselves out to the world as husband and wife. As for the advisability of entering a marriage through this mechanism, see the preceding military practice note. The following jurisdictions recognize common law marriage: Alabama, Colorado, District of Columbia, Georgia, Idaho (only if entered before 1 Jan 1996), Iowa, Kansas, Montana, Ohio (only if entered before 10 Oct 1991), Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas.

If recognized as valid, the status achieved by a common law marriage is identical to that accorded to a valid ceremonial marriage. Consequently, parties contemplating a common law marriage should be advised that the relationship, once established, cannot be terminated merely by ceasing to cohabit. Rather, the common law marriage can be terminated only through a formal, legal dissolution.

2. Putative Marriages and Marriages by Estoppel. Even if the relationship between a man and a woman fails to satisfy statutory or common law requirements, in extreme cases a court may postulate a marriage for limited purposes in order to alleviate an intolerable injustice that otherwise would be visited upon a party who relied in good faith upon the existence of the marriage. Thus, for example, in *Hupp v. Hupp*, 235 S.W. 2d 753 (Tex. Civ. App. 1950), a Texas appellate court upheld a "putative" marriage of twelve years' duration in order to allow the putative wife to take, as against a former spouse, from the putative husband's estate. Marriages by estoppel similarly belong in the realm of legal fiction. The parties are treated as if they were married--although in reality they were not--in order to protect one "spouse" from injury caused by reliance upon a representation by the other "spouse" concerning his or her capacity to marry.
3. Quasi-Contractual "Marriages." Some jurisdictions have upheld the validity of a contractual agreement between a man and woman to live together in one household (with or without the benefit of sexual relations) and to share their earnings, assets, and responsibilities in a manner analogous to marriage. See, e.g., *Marvin v. Marvin*, 18 Cal. 3d 660 (1976). Judicial recognition of contractual cohabitation is particularly significant in those jurisdictions which do not recognize common law marriages (e.g., California). The validity of such arrangements is premised entirely upon contract law. Provisions involving the performance of sexual services are void as against public policy; but in the jurisdictions recognizing these arrangements, such partial invalidity does not negate the remainder of the "contract." Controversy regarding these relationships illustrates the tension, mentioned at the outset of this chapter, between marriage as a contract and marriage as a regulated public institution.

CHAPTER 2

TERMINATION OF MARRIAGE

As noted at the beginning of Chapter 1, it takes three--a male, a female and a state--to make a marriage. Unless death intervenes, the same three ordinarily are required to terminate a marriage. Because marriage is both a regulated public institution and a creature of private contract, the parties--or at least one of them--must seek to end the relationship and the state must sanction its demise.

The marriage may end with a decree of annulment, holding the marriage void from the outset. Alternatively, the marriage may end with a decree of divorce, recognizing the original validity of the marriage but dissolving the relationship and prescribing the obligations of the parties and the status of their property in the future. When counseling clients, practitioners must address the threshold choice between annulment and divorce. They also should consider the interim option of separation discussed in the next chapter.

I. ANNULMENT

Where no children are involved, it may be possible for a spouse to annul the marriage--particularly one of short duration--rather than suing for divorce. Annulment might be chosen as a means of terminating a marriage for social and religious reasons, for easier residence requirements in some jurisdictions, or, occasionally, for greater speed in effecting the termination of the marriage.

- A. **Jurisdiction.** The most commonly accepted statement of jurisdiction required for an annulment is set forth in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 76 (1971):

A state has power to exercise judicial jurisdiction to nullify a marriage from its beginning:

1. under the circumstances that would give the state jurisdiction to dissolve the marriage by divorce or
2. if the respondent spouse is personally subject to the judicial jurisdiction of the state, and it is either the state where the marriage was contracted or the state whose local law governs the validity of the marriage. . . .

- B. **Grounds for Annulment.** The commonly available grounds for annulment, and the frequency with which they are employed, have been summarized in a 1966 report of the Project of the Governor's Commission on the Family in California, cited in W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 125-126 (1984):

Annulment is presently granted upon six grounds: incapability (i.e., non-age); prior valid marriage still existing ("innocent" bigamy); unsound mind; fraud; force; and physical incapacity. These grounds relate to impediments or defects theoretically existing before the marriage which prevent the marriage's valid formation, as opposed to divorce grounds which relate to post-marriage occurrences. They apply to voidable marriages; in other words, the marriages subject to these defects are nevertheless good until annulled.

Additionally, two classes of marriages are denominated void ab initio: those which are knowingly bigamous, and those which are "incestuous" (i.e., within the prohibited degrees of consanguinity and affinity). Void marriages are not technically annulled, but are subject to a declaration of nullity sought by either party. Thus, failure to take legal action confers no validity upon a void marriage, while it has this effect upon a voidable marriage.

Annulments comprise less than 5% of all severance actions; 35% of them are grounded on bigamy, nearly 47% on fraud. It appears that the courts in reality try to subsume a breakdown of marriage standard under the annulment grounds much as they attempt to subsume it under the divorce grounds; the ground of fraud in annulments is used in much the same way as the ground of extreme cruelty in divorce cases.

Although antimiscegenation statutes in some states may still purport to prohibit interracial marriages, and may at one time have afforded an additional ground for annulment, such statutes no longer are effective. *Loving v. Virginia*, 388 U.S. 1 (1967). Moreover, although fraud is a ground for annulment in most jurisdictions, not all misrepresentations qualify as a basis for annulment. Only misrepresentations vital to the marriage, or relating to some essential purpose of the marriage, are proper grounds for annulment.

- C. **The Void/Voidable Distinction.** When a person enters into a marriage with knowledge of facts that would render the marriage voidable, as opposed to void, the individual generally is held (by courts in states recognizing this distinction) to be estopped from later securing an annulment for misrepresentation based upon those facts. Conversely, if the parties have cohabited after a ground for annulment has been removed or alleviated, such conduct may prevent a later annulment upon that ground.

The substantive law and procedures applicable to annulment vary considerably among the states. Practitioners asked to advise clients on this method of terminating a marriage are urged to consult the statutes and applicable case law directly.

Military Practice Note

Military practitioners must also be aware of what effects annulment may have on soldiers, former family members of soldiers, and widows and widowers. When a soldier's marriage is annulled, the military finance office may seek to recoup any increased Basic Allowance For Housing (BAH) that the soldier received because of the alleged marriage. The soldier can request a determination that he or she entered the marriage in good faith (and that therefore the recoupment action should not occur), but the ultimate decision lies with finance officials. (See Chapter 1 for a discussion of findings of good faith in purported marriage cases).

Legal assistance attorneys also advise spouses who seek to terminate their marriage to soldiers. Some of these soon-to-be former spouses face a similar problem; if they seek an annulment, upon what basis can they claim military benefits? Just as the soldier who obtains an annulment runs the risk of a recoupment of past BAH at the "with dependents" rate, the former spouse who would otherwise qualify for benefits, but who obtains an annulment, may risk losing those benefits.

The basis for this lies in a policy interpretation of the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408). Under this interpretation, former spouses who otherwise qualify for commissary, exchange, and medical privileges on the basis of their marriage to soldiers lose those benefits upon remarriage. Subsequent divorce or widowhood does not reinstate eligibility. (See Dep't of the Army Message 151530Z Jan 85, subject: Additional Guidance on Extending Benefits and Privileges to Unremarried Former Spouses (URFS), para. F reprinted in The Army Lawyer, Mar. 1985 at 71.) The Army, however, has specified that a former spouse whose eligibility for benefits ceases because of remarriage, but who has the subsequent remarriage terminated by an annulment, may have some benefits reinstated. (See Dep't of the Army Message 281800Z Feb 86, subject: Clarification On Extending Benefits and Privileges to Unremarried Former Spouses (URFS).)

Similarly, an annulment may have an effect on Survivor Benefit Plan (SBP) annuity payments. Under the Survivor Benefit Plan a widow or widower who has been named as the SBP beneficiary loses the annuity if he or she remarries before age 55. (Remarriage after age 55 does not terminate entitlement.) If the second marriage is terminated by death of the second spouse or by divorce, benefits are reestablished from the date of the second spouse's death or the date of divorce. If, however, the subsequent marriage is terminated by an annulment, the entitlements are reinstated back to the date on which they were originally lost (the date of the

second marriage). See 37 Comp. Gen. 188 (1958), 54 Comp. Gen. 600 (1975) and 59 Comp. Gen. 725 (1980).

II. DIVORCE

This discussion of divorce focuses on a complete dissolution of the marriage. Lesser forms of "divorce"--such as divorce a mensa et thoro, divorce from bed and board, and limited divorce--are more akin to separation and are discussed in the next chapter.

A. Requisites of Valid Decrees.

1. Jurisdiction. Jurisdiction in a divorce case involves two distinct elements.
 - (1) Jurisdiction over the marital status generally rests with the state where either spouse is domiciled (a status involving more than present residence).
 - (2) Jurisdiction over rights and duties incident to the divorce rests with a state that has in personam jurisdiction over both parties, usually by service of process on the parties within its borders. A state of domicile may grant a divorce, but any purported attempt in the divorce decree to grant alimony and child support, or to settle all property rights, may not be binding on a spouse over whom the state had no personal jurisdiction. Decisions tying jurisdiction to domicile have been criticized, see WADLINGTON, supra, at 633-41, but they remain controlling authority in many states.

a. Jurisdiction Over the Marital Status.

- (1) Domicile. Domicile of either party traditionally has been the basis for jurisdiction over the marital status in divorce proceedings. When it is established that one of the spouses is a domiciliary of the state in which the divorce action is brought, the court has met the constitutional prerequisite to terminate the marriage, even if only one spouse appears at the hearing (note, however, that state laws may be more restrictive; see the discussion of residence below). Determining the domicile of the parties may not always be a simple matter, particularly if one or both have made frequent moves or are the children of a military person who also has frequently moved pursuant to military orders.

Recently, some courts have opined that domicile is not an absolute prerequisite to conferring jurisdiction to grant a divorce if the state otherwise has sufficient contacts or interests in the

particular marital relationship. However, in view of the opinion still prevailing in most states that full faith and credit will not be given to a divorce decree rendered by a state in which neither of the parties was a domiciliary, the most prudent course of action is to sue for divorce only in the state of domicile of one of the parties.

- (2) Residence. Nearly all states, the District of Columbia, Puerto Rico, and the Virgin Islands prescribe a minimum period of time of residence in the state preceding the filing of divorce action, and a few also have county residence requirements. The requirement of residence is in addition to the requirement of domicile, but residence for the statutory period may raise a rebuttable presumption of domicile under the law of the state. A spouse who contemplates suing for divorce in a particular state merely because it grants "quickie" divorces (i.e., requires only a short period of residence, or none at all, and grants a final decree of divorce without any waiting period after the hearing), may run a risk of nonrecognition in other states.

Military Practice Note

Several states have enacted so-called "serviceman's divorce statutes." Under these laws, a military member will be deemed to have met the jurisdictional requirements for divorce if he or she was stationed in the state, pursuant to military orders, for a specified time (usually six months or one year) preceding the filing of suit. Some of the statutes purport to substitute such residence for domicile. Others simply provide that such residence creates a rebuttable presumption of domicile.

A military member absent from his or her domiciliary state pursuant to military assignment might be unable to comply with a physical presence requirement for obtaining a divorce in that home state. Fortunately, many states, by legislation or case law, have deemed the military person's residence to continue if his or her absence was due to military duty.

- (3) Divorces in Foreign Countries. Divorce decrees obtained outside the United States and its possessions and territories do not invoke the protection of the full faith and credit clause of the United States Constitution. State courts may recognize the validity of a foreign country divorce based on the concept of "comity," however. Foreign decrees are subject to challenge not only on the basis of improper jurisdiction, as defined by the state reviewing the decree, but also on a wide range of other factors, such as contrary public policy of the reviewing state, fraud, and denial of due process to one of the parties.

The probability that a jurisdiction of the United States will recognize a divorce obtained in a country which does not require an established domicile is doubtful. The method chosen to accomplish the divorce may be the deciding factor. The methods utilized fall into three categories: bilateral divorces, ex parte (or unilateral) divorces, and mail order divorces.

- (a) Bilateral Divorces. Under this method, the plaintiff personally appears in the court of the foreign country so that the court may acquire in personam jurisdiction and the defendant appears either in person or through an attorney duly appointed under a power of attorney. Such a bilateral divorce accomplished in the then "quickie" jurisdiction of the State of Chihuahua, Mexico, was recognized as valid on the grounds of comity by the State of New York. See Rosentiel v. Rosentiel, 16 N.Y.2d 64, N.Y.S.2d 86, 209 N.E. 2d 709 (1965). And notwithstanding the lack of domicile-based jurisdiction, the doctrines of estoppel, laches, unclean hands, and other equitable defenses have been relied upon to prevent a spouse from challenging a divorce when he or she had made a personal appearance in the foreign proceeding. See also Perrin v. Perrin, 408 P.2d 109 (3rd Cir. 1969).

- (b) Ex parte Divorces. For this divorce, only the plaintiff appears personally in the foreign court. The defendant is served by mail or by publication and does not appear either personally or by an attorney. The non-party spouse and/or third parties almost always are allowed to challenge such a decree in any U.S. jurisdiction, based on a lack of domiciliary jurisdiction as well as on the grounds mentioned in (a) above.
- (c) Mail Order Divorces. In this alternative, neither party appears in person at the trial. The parties are represented through counsel. Such decrees generally have no validity, even with reference to comity, in U.S. jurisdictions.
- (4) Challenges to Jurisdiction. If both parties appeared in the divorce proceeding in another state and had an opportunity to litigate the issue of the court's jurisdiction, then a finding of domicile by that court will be accorded full faith and credit by all other states as against all parties, regardless of how questionable the finding of domicile appears. But a decree of divorce rendered in one state can be collaterally attacked elsewhere by a defendant who has not appeared in the proceeding, where proof can be offered that the court rendering the decree actually had no jurisdiction. *Williams v. North Carolina*, 325 U.S. 226 (1945); *Williams v. Williams*, 317 U.S. 287 (1942).

If the defendant was personally served in the jurisdiction, although he was not a resident, and if he had an opportunity to litigate the jurisdictional issue of domicile, most courts adopt the view that the determination would be entitled to full faith and credit, as between the parties, regardless of whether the defendant actually appeared and contested the issue of domicile. *Sherrer v. Sherrer*, 334 U.S. 334 (1948). A more restrictive view may be taken, however, if the spouses acted in collusion to perpetrate a fraud on the court. Moreover, third parties, such as the state, when prosecuting a bigamy action upon remarriage of one of the parties, may not be bound by an erroneous finding of domicile.

b. Jurisdiction Over the Parties. Besides terminating the marriage, a divorce decree usually provides for transfers of property, spousal support, child support and custody of children. Such provisions may not be fully enforceable outside the state in which the decree was rendered unless the court issuing the decree had personal jurisdiction over the defendant, either (a) by personal service within the jurisdiction, (b) by substituted service in accordance with local rules if the defendant is a domiciliary, or (c) by the defendant's appearance in court (in person, by an attorney, or by other means, if such an appearance subjects the defendant to the jurisdiction of the court under local practice). However, if the subject property is located within the state, it might be made subject to the quasi in rem jurisdiction of the court even though personal jurisdiction had not been acquired.

(1) Jurisdiction Regarding Child Custody. Jurisdiction to provide for the needs of children generally depends upon whether the state has sufficient basis to assert an interest in a child's welfare, and whether the court would be able to enforce its orders. All states have adopted at least major portions the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA is intended to avoid jurisdictional conflict between states in matters of child custody so that custody decrees will be rendered in states that are best situated to evaluate and protect the best interests of the child. The state best situated is the one having the closest connection with the child; this generally will be the child's "home state." In the absence of a qualifying "home state," the statutory scheme confers jurisdiction upon the state where significant evidence essential to an informed custody order is most readily available. In addition to the UCCJA, the provisions of the Federal Parental Kidnapping Prevention Act (28 U.S.C. § 1728A) should be consulted to determine which state should exercise jurisdiction.

- (2) Jurisdiction Regarding Child Support. Jurisdiction to issue an order of child support, to enforce an order of child support or to modify an existing order of child support is controlled by the Uniform Interstate Family Support Act (UIFSA). Effective 1 January 1998, all United States jurisdictions adopted the UIFSA. The goal of the UIFSA is to achieve a "one-order" world for child support. In cases where there are several support orders, the UIFSA sets out rules to determine which order will control prospective support. The UIFSA also sets out rules for modification jurisdiction. The state child support guidelines control the amount and duration of support but the UIFSA controls which state has jurisdiction to issue the order. Copies of the UIFSA are available from the National Conference of Commissioners on Uniform Laws, 211 E. Ontario, Suite 1300, Chicago, Illinois, (312) 915-0195.
- (3) Bifurcated Proceedings. Due not only to the desire of the parties to dissolve the marriage bonds as soon as possible, but also to the need for extended discovery and evidentiary hearings in complex cases, courts in some states will grant motions to bifurcate the issues. A decree of divorce, together with an order concerning custody of the children and limited child or spousal support may be issued, with judgment reserved on other issues until a later date. In fact, provisions of the Child Support Enforcement Amendments of 1984 provide that when child support is at issue, support obligations should be determined through expedited process and other issues such as custody and property division should be reserved for final hearing.
- (4) Continuing Jurisdiction. The courts retain continuing jurisdiction over matters such as child custody and visitation, child support and spousal support. It is prudent to review the most recent court order pertinent to your client's case before providing advice on these subjects.

Military Practice Notes

The fact that a person is in the military service does not preclude a spouse from obtaining a divorce. However, if the military member is named as a defendant, the court may, in its discretion or by request, stay the proceedings or take the other protective actions as provided in 50 U.S.C. Appendix Sections 520, 521, and 523-525 (the Soldiers' and Sailors' Civil Relief Act). Normally, a stay is requested if the member feels the marital breach can be healed upon his or her return from duty, if personal interests cannot be protected without his or her presence in court, or if the spouses cannot agree on the terms of a written marital settlement. The best method for requesting a stay is to have a member of the chain of command notify the court that the member's military duties preclude his or her appearance (for a stated, and reasonable, period of time). Or, the commander may send an informal letter (not a legal document) to the clerk of the court or the judge, pointing out the fact of the soldier's military service and his or her consequent inability to appear as directed. Alternatively, a legal assistance attorney may contact opposing counsel, pointing out the protections required by the SSCRA.

In cases where the soldier may have a defense against a default judgment if it is rendered, or where the court's jurisdiction over the member is questionable, **the legal assistance attorney should not sign any letter or document that is sent to the court.** Such actions have been construed by some judges to constitute a personal appearance by the member (through counsel), thus nullifying some of the other protections of the SSCRA and also strengthening the court's jurisdictional claims. Remember also that at best the relief under the SSCRA is a stay, rather than a bar, to divorce proceedings. The distinction is important because some personnel are of the erroneous opinion that a divorce action may not be instituted against a military member.

The Soldiers' and Sailors' Civil Relief Act also provides that the court must appoint an attorney to invoke a soldier's SSCRA rights before any default judgment is entered against the member. See 50 U.S.C. App. § 520(3).

After a decree has been entered by a state court, the Department of the Army will treat it as valid if it appears to be regular on its face. If the decree of judgment imposed an obligation on a military member, it is considered prima facie evidence of the matters set forth therein. When a decree or judgment appears to be regular on its face, the advice to be furnished the client often will be limited to suggestions on how to set aside or amend the decree.

Foreign-nation divorce decrees, even though they appear to be valid, create a substantial doubt as to whether the marriage actually has been terminated. Until such substantial doubt is resolved by a decision of a court of competent jurisdiction in the United States, authorized or increased allowances previously given on the basis of such prior marriage will be suspended. See 55 Comp. Gen. 533 (1975).

2. Grounds for Divorce. All states now have some form of "no fault" divorce, based on such "neutral" grounds as incompatibility, irreconcilable differences, or physical separation for an extended period of time. In addition, many states still permit a traditional divorce for grounds based upon the fault of one of the parties. There are 17 jurisdictions with only no-fault grounds for divorce: Arizona, California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Iowa, Kentucky, Maine, Minnesota, Montana, Nebraska, Oregon, Washington, Wisconsin, and Wyoming.

If fault is alleged, some states require the allegation to be proven with evidence beyond a mere admission by the defendant. The most common fault-related ground still in use is mental cruelty. While constant statements or admissions of wrongdoing, together with numerous acts and expressions of lack of affection or marital interest, may be sufficient evidence to establish the ground of mental cruelty, similar evidence will not necessarily establish other grounds (e.g., adultery) to which the opposing spouse may testify. The grounds for divorce in the various states, and territories, must be determined on an individual basis.

B. **Contents of Decrees.**

1. **Matters Between the Spouses.**
 - a. Spousal Support. In most states the divorce court may provide for support of a spouse during and after the divorce proceeding. Such an obligation ordinarily continues until modification by the court, remarriage of the spouse receiving support, or the death of either spouse. The parties by agreement may provide that the support obligation will survive these events. Spousal support is usually modified by the court only upon proof that a substantial change of financial circumstances has occurred. Further, even though statutes may provide for termination of support upon remarriage of the recipient or death of either party, such statutes in some states may not be self-executing. A court order will be required to extinguish the obligation. Spousal support (occasionally called "maintenance") is now gender-neutral and ordinarily is awarded on the basis of need. See Orr v. Orr, 440 U.S. 268 (1979) (holding gender-based alimony statutes unconstitutional).

Some clients erroneously believe that support payments under a decree may be reduced or terminated unilaterally, without court action, upon the occurrence of some event that provides a justification for

modifying the payments. However, the military member should not make any unilateral pro rata reduction. Instead, he or she should seek a modification in court. It should be kept in mind that several states impose fixed and purportedly unalterable support obligations.

Military Practice Note

Pursuant to AR 608-99, a soldier must provide adequate and continuous support for family members, including his or her spouse. "Adequate" is defined as the amount (a) specified in a court order; (b) agreed upon by the parties; or (c) the interim support requirement as specified in the regulation in the absence of an agreement or a court order. The interim support requirement is based on the BAQ entitlement at the with-dependents rate for the soldier's pay grade, but AR 608-99 specifies that the Variable Housing Allowance (VHA) is not includable with the BAQ in determining the minimum support requirement.

As of 1 January 1998, soldiers' Leave and Earning Statements (LES) reflect a figure for BAH. Basic Allowance for Housing is a combination of the Basic Allowance for Quarters (BAQ) amount a soldier is entitled to and the VHA amount for the locale. The interim support requirement of AR 608-99 remains based on the BAQ-With Dependents rate. Under certain circumstances, a soldier owes only the difference between the BAQ-With Dependents and the BAQ-Without Dependents rate for the soldiers' rank. DFAS maintains a separate table called BAH Table II and Differential that sets out the BAQ-With rate for a soldier's rank and the Differential amount for the soldier's rank.

As in the case of other dishonorable failures to pay just debts, a military person who refuses, without legal justification, to pay spousal support and/or child support may be subject to court-martial for violations of Article 92, 133, and 134 of the Uniform Code of Military Justice, or to administrative discharge under the misconduct provisions of AR 635-200 (enlisted) or AR 600-8-24 (officer).

- b. Division of Property. The property of the spouses may be divided by the court or by a property settlement agreement. An increasing number of states use an "equitable division" approach for the division of marital assets, providing that the distribution should be equal unless the court finds that justice otherwise requires. The division of property also entails allocating primary responsibility for payment of debts.

Lawyers should aid their clients in identifying and characterizing marital property, as well as in negotiating satisfactory property settlement

agreements. Possible trade-offs between immediate distributions of property and long-term payments of spousal support may be weighed.

Until recently, unequal divisions of marital (or "community") property could be treated as sales or exchanges, triggering potential income tax liability. However, the Federal Deficit Reduction Act of 1984, at 26 U.S.C. § 1041, has virtually eliminated recognition of gain or loss in divorce-related property transfers between spouses (unless one of the spouses is a nonresident alien). Section § 2516 of title 26 further provides that property transfers incident to settlement agreements are deemed to have been made "for a full and adequate consideration," negating any gift tax consequences.

Military Practice Note

Certain kinds of property are subject to government-imposed restrictions which must be considered in any division. By virtue of the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408), this may include the spouse's rights relating to retirement benefits. All states recognize the possibility of dividing military disposable retired pay in a divorce given the right circumstances. Division of disposable retired pay is not an automatic right. (Puerto Rico remains a territory that does not treat military retired pay as marital property.)

2. Children.

- a. **Child Support.** Child support, or payments made for the maintenance and care of children of the marriage, continue under most state laws for each child until he or she reaches majority, marries, dies, is otherwise emancipated, or until further order of the court. Remarriage of the custodial spouse does not affect the other spouse's child support obligation, but a change in circumstances, especially financial, may justify a modification by the court. The extent and amount of a divorced parent's obligation to support his or her children will be determined by the court.

Some statutes dealing with termination of child support may not be self-executing. Frequently, an order may be nonseverable and provide for a lump sum as support for several minor children. A military member should not unilaterally reduce payments when one of several children reaches majority. A further order of the court should be obtained.

In some states the children conceived by a woman during marriage may be rebuttably or conclusively presumed to be the children of her

husband. However, if the children were conceived during a period when the spouses were not cohabiting, the presumption usually will be rebuttable only, or may be eliminated entirely.

Military Practice Note

Pursuant to AR 608-99, even in the absence of a court order, a soldier is required to support his or her children. The soldier must support family members, including all children of a marriage, or adopted children at least in the amount set out in paragraph 2-6 of AR 608-99. Illegitimate children of female soldiers are family members for purposes of AR 608-99. Illegitimate children of male soldiers are not family members under AR 608-99 unless there is a court order of paternity **and** support. Legal assistance attorneys should be aware that many states are moving to administrative proceedings in the child support and paternity establishment areas. Therefore, some states will make paternity and support determinations with the binding effect of a court order by administrative hearings and officers.

- b. Child Custody and Visitation. It is often said that no other area of the law gives rise to as much emotional conflict as disputes over child custody. Civil and criminal consequences may follow if one parent impulsively assumes custody in violation of a court order. Here is a summary of seminal concepts governing this subject.

- c. Traditional Jurisdiction to Award Custody. Usually, although not invariably, the court that issues a divorce decree also resolves the child custody and support issues. Prior to the UCCJA, jurisdiction over custody often was based solely on the child's physical presence in the state at the time proceedings were initiated. This rule created much hardship where the parties have been separated by a great distance, and it rewarded spouses who unilaterally took children away from the other parent. Today, however, the Uniform Child Custody Jurisdiction Act has substantially limited a court's authority to issue custody decrees based on physical presence.

- d. Uniform Child Custody Jurisdiction Act. All states have enacted statutes that are patterned after, or adopt, the Uniform Child Custody Jurisdiction Act (UCCJA) to avoid the disruption, impact and damage caused by forum shopping and/or child snatching by parents. The UCCJA establishes guidelines to determine which court should exercise its jurisdiction over custody, including visitation and modification of custody or visitation. It provides for interstate court communication and a means of ordering a parent and child to go to another, more appropriate jurisdiction to litigate the custody issue.
- e. Forms of Custody Awards. The conventional form of custody has been to award one parent the right to have the child reside with him or her while the other parent receives a right of reasonable visitation. Traditionally, the law often has favored the mother as the custodial parent for young children by assuming that such a custody award promotes the best interests of the child. Many states have abolished this presumption, although in most cases it still is the mother who receives custody.

Increasingly, the states are accepting shared or joint custody arrangements. Shared or joint physical custody employs alternating periods of sole physical custody, with or without visitation rights. For example, the child may live with the mother for six months and then the father for six months each year. Joint legal custody awards both parents equal rights concerning the raising of the child but typically does not involve shared physical custody. Currently, there is considerable judicial reluctance to make such awards unless both parents are in agreement and of sufficient sophistication to make it work amicably. In fact, some states specifically require parents to agree before joint custody will be awarded.

- f. Third Party Visitation. In some jurisdictions a third party, such as a grandparent, may be joined or may join as a party litigant and be granted visitation rights, consistent with the best interests of the child. During prolonged absences of one parent away from the child, such third party visitation may be of vital importance in maintaining an influence on the child by the family of the absent parent.

- g. Visitation. The non-custodial parent's right of visitation may be stated in the decree in broad language as "right of reasonable visitation" or may be stated in great detail. Often it is preferable to recite in the decree that the noncustodial parent shall have "such reasonable visitation as the parties may agree, but if they fail to agree, then the following: [set forth a specific schedule]." This minimizes the need to obtain judicial interpretations of "reasonable" visitation.

Military Practice Note

In counseling soldiers on visitation matters, legal assistance attorneys should keep in mind that at some point the soldier will be transferred from the locale where the child is located and where the visitation arrangements may have been negotiated. Issues such as who pays the transportation costs of the child, how long the child remains with the non-custodial parent on summer visitation, and who has the child on what holidays, which did not seem important before the transfer, may become the subject of intense emotional debate. These issues must be anticipated and addressed.

C. Post-Divorce Considerations.

1. Records. When a divorce is granted, the spouses should be advised to make proper changes in personal and business records. Particular attention should be given to changing (1) life insurance policy beneficiaries; (2) wills; and (3) tax withholding elections. Care must be exercised, however, to ensure such changes do not violate requirements in the court decree or settlement agreement. For example, a spouse may be required to maintain the former spouse and/or children as beneficiaries of life insurance as part of a negotiated settlement agreement or a court order.

Military Practice Note

Military members also should amend military personnel forms relating to marital status, dependency, designation of beneficiaries, and other pertinent matters. Of particular importance are the Serviceman's Group Life Insurance (SGLI) beneficiary designation form and DD Form 93, the Emergency Data Card. Cases abound in which a divorced spouse has collected insurance proceeds although the marriage relationship was dissolved for a number of years and the obvious intent of the insured was to make a second spouse the beneficiary.

2. **Remarriage.** When restrictions are imposed in a divorce decree or by statute, specifying the time before remarriage is permitted or prohibiting remarriage without permission of the court, the attempted remarriage of a person within such time is unwise and may create serious problems. If a second marriage is contracted within the divorcing state in violation of the decree's prohibition, the marriage usually is void. If an individual goes to another state to remarry in violation of the restrictions, but retains domicile in the state granting the divorce, most states would hold the marriage invalid to the same extent as would the state of domicile. However, if the person makes a bona fide change of domicile to the state in which the remarriage occurs, the remarriage might be recognized, except possibly in the state which granted the divorce.

Military Practice Note

Cases have been reported in which a military member honestly, but mistakenly, believed he or she had been divorced from a previous spouse. The mistake may have been based upon correspondence with the other spouse or with the military attorney. To avoid difficulties arising from such mistakes, the member should be advised to secure a copy of the decree of the final divorce and to receive qualified legal advice on any restrictions on remarriage, prior to entering into a subsequent marriage.

CHAPTER 3

SEPARATION: SUBSTANTIVE LAW AND FORM OF AGREEMENT

PART I--SUBSTANTIVE LAW

I. INTRODUCTION

- A. **Separation and Limited Divorce.** The topic of separation occasionally overlaps, and is confused with, the subject of divorce. Indeed, legal separation occasionally is called divorce a mensa et thoro or divorce from bed and board. When used in this sense, it denotes a form of limited divorce. Statutes in approximately half the states provide for limited divorce or its equivalent. A limited divorce decree not only authorizes the spouses to live apart but also may impose a continuing obligation upon one spouse to support the other in an amount fixed by a court. In most states, the support obligation ceases upon death of the supporting spouse. Conversely, the supporting spouse has no obligation to the other spouse except to pay the amount provided in the decree.

In court-ordered separations or limited divorces, domicile is not usually required to make the decree valid, so long as there is personal jurisdiction over the parties. However, because many legal separation and limited divorce decrees eventually ripen into total dissolutions of the marriage, it is wise to provide for an ultimate property settlement and to assure that the court has, or will have, proper jurisdiction to enter the eventual decree.

Limited divorces and separations differ in one significant respect. Limited divorces permit one spouse to refuse, without adverse legal consequences, an offer of reconciliation by the other. In some jurisdictions, if reconciliation occurs, it will terminate the decree, at least as to payments of spousal support. In contrast, many jurisdictions provide that under a court-imposed separation involving separate maintenance, a good faith offer of reconciliation by the spouse paying support imposes upon the recipient spouse a duty explicitly to accept or to reject the offer. If the offer is rejected, the supported spouse is deemed to have deserted the supporting spouse, affording a basis for divorce. In such cases, total dissolution usually follows and the question of spousal support is addressed in that new context.

Military Practice Note

Even though a limited divorce decree may require a soldier to support his or her spouse, the spouse will not be treated as a family member for the purposes of authorized or increased housing allowances and other rights. See DOD Financial Management Regulation, Vol. 7A, para. 260304. Nonetheless, AR 608-99 expressly requires soldiers to comply with all provisions of court orders, including spousal and child support obligations, and the obligation generally may apply even in the absence of a provision in an order. In some cases, however, decrees that are silent about support may excuse the soldier from the requirements otherwise imposed by the regulation. (See Ar 608-99, para. 2-11).

The Comptroller General has recognized that a properly executed separation agreement is legally sufficient as a statement of the parties' legal obligations for purposes of determining entitlement to a Basic Allowance for Quarters, (now BAH) even though the agreement was not issued or sanctioned by a court. 62 Comp. Gen. 315 (1983).

B. The Role of Voluntary Agreements.

1. General. As opposed to legal separations and limited divorces, which are court-ordered, voluntary separation agreements are simply exercises of the private power to contract. They do not necessarily imply the eventual dissolution of the marriage; rather, they may simply be forms of "postnuptial agreements" arising from circumstances that have forced the parties temporarily to live apart. Such circumstances often arise in military life. For that reason, voluntary separation agreements may play a larger part in military domestic relations practice than they play in many civilian practices.
2. Impact of Contractual Nature of Separation Agreements. Under general contract law principles the parties may agree as to what state law governs. State courts, however, often reserve the right to construe such agreements. This can have an impact where military personnel are concerned. The mobile nature of military personnel and the importance of state law considerations are best illustrated by *Morton v. Morton*, 332 S.E.2d 736, 76 N.C. App. 295 (1985).

Morton involved a military retiree and his ex-wife who separated in Maryland in 1977 and executed a separation agreement there. It contained mutual releases in which each party released the other from all obligations. The caption of the document, however, was styled "In North Carolina Guilford County." Mrs. Morton sued for divorce in North Carolina and asked for a share of Morton's

military retired pay. Morton contended that the release language of the separation agreement controlled. The court held that the separation agreement executed in Maryland was valid in Maryland but not valid in North Carolina because it was not acknowledged by both spouses before a certifying official (such as a notary public) as required by North Carolina law.

The general rule is that the law of the place where the contract is executed governs the validity of the contract (*lex loci contractus*), which is based on the presumed intent of the parties. But North Carolina recognized an exception to the general rule. The express or implied contrary intent of the parties rebuts the parties' presumed intent. The North Carolina court held that there was an implied intent on the part of the parties to apply North Carolina law.

- C. **Drafting Separation Agreements.** Military attorneys often find themselves in the position of drafting separation agreements for only one party. Frequently the unrepresented party indicates a desire to waive the right to see an attorney. Military attorneys are directed by AR 27-3, para. 4-9, to establish a system whereby conflicting clients can receive legal assistance. Military attorneys are to actively assist the conflicting client in obtaining an appointment with another military attorney. If the unrepresented party still declines legal assistance, it is good practice to include a provision in any resulting separation agreement that the unrepresented spouse had the opportunity to see other counsel and expressly waived that right by executing the agreement.

Beyond that, the drafting attorney must exercise great care in all other particulars. See *Trenholm v. Trenholm*, 701 S.W.2d 209 (Mo. App. 1985), for a case in which a wife's partition action for sale of the marital home was dismissed. The wife's attorney drafted the agreement and the husband was unrepresented. The agreement gave the husband the exclusive right to decide when the home would be sold, although upon sale the proceeds were to be divided.

II. KEY ELEMENTS

Post-nuptial agreements between spouses are regulated in many states by statute. Most jurisdictions permit voluntary agreements between spouses concerning support and the adjustment of property rights provided certain conditions are met. Some judicial checkpoints for these contracts are: (1) requirement of a valid marriage; (2) capacity of the parties to contract; (3) existence of a continuing separation; (4) good contractual consideration; (5) legality of purpose; (6) fair provisions for the wife; and (7) reality of consent of one spouse (usually the wife) in conjunction with full disclosure on the part of the other spouse (usually the husband). For a contract of this type to be valid in some states, it must be clear that the separation is the result of more than mere volition of the parties. For example, in Nebraska, grounds for separation or divorce must exist at the time of the execution of the agreement. Idiosyncracies of Louisiana law stipulate

that the agreement either be incorporated in the decree of divorce or be made after the judicial separation of the parties. A Louisiana agreement would be of doubtful enforceability prior to the granting of a divorce and subsequent ratification of the contract by the parties.

- A. **Valid Marriage.** A valid marriage forms the foundation of a lawful separation agreement and may be shown in the contract by including the place and date of the event. A marital relationship imposed by common law could be shown by a recital of the dates, occasions, and jurisdictions under which the required legal indicia of marriage were maintained.
- B. **Contractual Capacity.** The capacity of the parties to contract is an essential ingredient for the creation of a separation agreement. This was a significant problem in jurisdictions where the disability of a husband and wife to contract with each other was recognized. Most states now permit a husband and wife to make a property settlement by virtue of a statute specifically authorizing them to do so, or by a statute giving either spouse the general power to contract with the other. Although minors may have the capacity to contract, they also have the ability to avoid certain contracts, and a separation agreement may be voidable, depending on state law, at the option of the spouse who entered into it while underage. However, in many states, marriage confers full contractual capacity on otherwise underage persons.
- C. **Physical Separation.** An agreement by the spouses to physically separate at an indefinite time in the future may render the agreement void as against public policy because it is seen as promoting marital discord. An orderly and satisfactory resolution of the marital property problems facilitates separation and/or divorce. Often there is an oral understanding between the parties that one of them will seek a divorce. But, overt encouragement of separation or divorce may fatally taint the agreement. The majority rule on physical separation requires that the parties must either be living apart or must be planning to do so at the time of the agreement. A recital that the parties are not living together is sufficient. Courts rarely look into the grounds for separation. It often is wise to mention in the agreement that the difficulties and differences necessitating separation are based on the health and welfare of the parties in addition to considerations of their wishes and happiness.

- D. **Consideration.** Separation agreements, like other contracts, must be supported by consideration. For example, the consideration offered by the wife is her promise to live apart from her husband, and not pursue her right to support or other property interests in a legal action. The husband furnishes as his consideration the promise to liquidate his duty of support of his wife (which was a legal, but unliquidated duty, until the making of the agreement) by certain fixed payments to her. Spouses rarely are excused from these agreements by reason of lack of consideration. Courts may use this factor to upset an agreement in which one spouse appears to have made a bad bargain.
- E. **Legality of Contractual Purpose.** The legality of purpose requirement goes once more to the public policy proscription concerning the encouragement of separation and divorce. Agreements containing clauses in which the parties agree to procure a divorce, or agree not to defend on, or use certain defenses, are invalid in many jurisdictions because they are collusive and work a fraud on the courts. There is a split of authority on the validity of an agreement conditioned on the granting of a divorce. A majority of courts permit such a condition if it is a mere inducement to get a divorce and does not have a direct tendency to dissolve the marriage. An agreement is not automatically invalid even though it is to take effect only upon divorce: (a) if it is to terminate by a certain date should the parties still be married then; (b) if payments to the wife are to be placed in escrow and paid over after divorce; or (c) if certain property is to be conveyed to the wife in the event of divorce, although one might suppose that clauses such as these would render the agreement illegal. If the purpose of the contract is illegal (i.e., it directly promotes divorce) the entire contract must fall. If only part of the agreement is unlawful (e.g., it purports to waive the child's right to support) then the contract generally remains in effect except for an invalid child support provision. Due to the conflict in the courts regarding the validity of clauses which condition the contract in some way upon divorce, provisions of this type should be avoided.
- F. **Fair Provisions.** The requirement of fair provisions for the wife is related to the voluntariness of her consent and the husband's fulfillment of his duty to disclose his assets. (To date, this problem has always concerned the wife. Depending on the circumstances, this requirement could apply to a husband.) Unless the terms of a separation agreement are outrageous or the agreement itself is a result of fraud, overreaching, or duress, the courts tend to accept whatever arrangements have been made by the parties in the agreement. Because these domestic agreements are not ordinary contracts, the amount of unconscionability or unfairness needed to overturn them is small and includes the pressure of economic necessity or the occurrence of personal attacks on the wife. Because the parties may have to live with this agreement for some time, extreme settlements, although pleasing to the party they favor, may ultimately result in a failure of performance on the part of the nonfavored party.

- G. **Fiduciary Duty.** Society has a great interest in marriage. This can be seen in the fact that, while marriage is a civil contract created by mutual consent, mutual consent alone cannot terminate it. Once contracted, the legal status of marriage, with its concurrent rights and obligations, is independent of the will of the parties. Courts zealously guard the fiduciary relationship which exists between spouses, and utmost good faith is a basic element for contracts between a husband and wife. The integrity of this standard is particularly important in a separation contract where an unwise decision made as a result of misleading information could cause hardship for one of the parties for many years, in addition to defeating society's interest. Often, the wife, as the seeker of support, is considered to be in a relatively weaker position. Therefore, most courts deem the husband to be the dominant party in the negotiations in the absence of contrary evidence. As a result, the husband's conduct is subjected to much higher scrutiny than the wife's, almost as if he were a trustee and his wife a beneficiary. The presumption against the husband will be strong if the parties are hostile, or if relations between the parties have been settled and they are dealing at arm's length or through their lawyers.

III. SPOUSAL SUPPORT PROVISIONS

- A. **Disclosures.** A separation agreement may be subject to interpretation at a later date. Therefore, the instrument should disclose all significant representations or facts upon which it is based. If the spousal support provision is subject to modification, the basis for determining the initial amount of support should be stated in the agreement. This establishes a foundation for any future action to determine whether a change of circumstances has occurred which would justify modification of the original level of support.

A clause wherein each party represents and warrants that he or she has made full and complete disclosure of all assets and income should be considered. When representing a spouse with substantially larger income and assets, an agreement should specifically state that the spouse with lesser income has not relied on any representations made by the more affluent spouse concerning that spouse's economic status, but has relied on his or her own investigation.

If appropriate, a promise to make future disclosures such as copies of tax returns may be considered for inclusion in the agreement. Careful thought must be given to its structure so as to ensure future compliance. Disclosure provisions often are placed in the preamble or introduction to the separation agreement.

- B. **Amount.** Counsel representing a party with minimum income or earning capability should seek a provision requiring the spouse with substantially greater income and/or assets to pay spousal support. Determination of the amount of spousal support to be paid depends on the needs of the spouse seeking support, the supporting spouse's ability to pay, the length of the marriage, the value of the marital property, the parties' personal assets, and their ages and accustomed standard of living. If one or both parties waive spousal support, the agreement should include all pertinent factors considered for the waiver to minimize the possibility of judicial non-acceptance of the agreement. Some states do not permit a wife to waive her right to future support.
- C. **Duration.** The duration of, and grounds for the termination of, spousal support payments should be specified in the document or predicated on the application of state law. In most jurisdictions, should the agreement so provide, payments can continue after the death or remarriage of a spouse. When the agreement fails to provide otherwise, spousal support usually ceases upon remarriage of the supported spouse or the death of either spouse. If the payment is to receive tax treatment as alimony, the agreement must specify that there is no further liability for payments upon the death of the payee spouse.
- D. **Effect of Bankruptcy.** A spouse's bankruptcy does not generally terminate support duties under a separation agreement as it may other contractual obligations. Support obligations owed to spouses, former spouses or children are excepted from discharge under 11 U.S.C. § 523(a)(5). Careful drafting, however, is required, as was demonstrated in *Tilley v. Jesse*, 789 F.2d 1074 (4th Cir. 1986). There, the court found that a promissory note, given in exchange for property as a part of a separation agreement, was dischargeable in bankruptcy. It was argued that the note had the character of maintenance and support. The court, however, found that the separation agreement was structured to distinguish between the property settlement and alimony as separate issues. However, where a spouse or former spouse has assigned the support to a third party, such as a state public assistance agency, the obligation is dischargeable in bankruptcy. See 11 U.S.C. § 523(a)(5).
- E. **Modification.** Modification of spousal support payments under a separation agreement usually is predicated on a provision in the contract which permits modification. The agreement can either specify certain events which trigger modification, or allow for modification in the discretion of the court.

- F. **Enforcement.** The spouse receiving support should seek the inclusion of a provision for the enforcement of spousal support requirements. In particular, this provision should provide for attorney's fees for action or arrearages, and interest on arrearages. If the separation agreement is not merged or incorporated as part of the final decree, it cannot be enforced through contempt proceedings. However, equity traditionally has been used to enforce the payment of support or maintenance in separation agreements. See *Schlemm v. Schlemm*, 158 A.2d 508 (N.J. 1980) and *Gibson v. Gibson*, 270 S.E.2d 600 (NC 1980). See also Section G, Modification and Merger, infra, this Chapter.

IV. CHILD SUPPORT, CUSTODY, AND VISITATION

- A. **General Consideration.** No agreement between the parents ever binds the courts regarding the support, custody, visitation rights, or the educational program of a child. Not only is the child not a party to the agreement, but the state has a paramount interest in ensuring that the support, custody, and visitation provisions touching upon the children of its citizens can be altered to take changed circumstances into account. An increase in support or a modification of the custody or visitation rights may be essential to the child as he or she grows older. On the other hand, courts usually do ratify reasonable provisions that the parties agree upon.
- B. **Child Support.** The amount of child support is based on the care and welfare of the child and the respective parent's financial situation, and today this amount is established by child support guidelines in all states. The right to support belongs to the child, at least to the extent a parent cannot waive the right to support from the other parent, but the custodial parent generally has the right to determine how the money will be used. Additionally, when arrearages accrue and later are enforced, the money goes to the custodial parent, even if the child has been emancipated.
- C. **Custody and Visitation.** The form of the custody and visitation provision depends on the type of custody arrangement agreed upon by the parties or ordered by the court (i.e., joint custody, sole custody with visitation, etc.). No matter what form of custody is agreed upon, clarity and detail are the key elements of an effective child custody and visitation provision. The agreement should explicitly state all of the conditions agreed upon concerning living arrangements, decision-making, developmental concerns, visitation rights, and other factors involving any children. Because of the transient nature of a military career, a military spouse should obtain a clause specifically dealing with removal of the child upon relocation, orders or modification of visitation rights because of overseas duty, and responsibility for costs incurred in transporting a child for visitation purposes.

Military Practice Note

The military service is increasingly populated by married couples who are both on active duty. Special consideration must be given when drafting separation agreements pertaining to them. See, e.g., *In re McCoy*, 62 Comp. Gen. 315 (1983). There the Comptroller General opined that a properly executed separation agreement is legally sufficient as a statement of the parties' marital separation and resulting legal obligations for purposes of determining eligibility for Basic Allowance for Housing, even though the agreement was not issued by or sanctioned by a court. The opinion combined two cases, one involving an Air Force couple in the U.S. and the other an Army couple in Europe.

V. DIVISION OF PROPERTY

A. **Real Property.** Incompletely drafted provisions concerning distribution of real property upon separation of the marital parties have resulted in substantial litigation. See, e.g., *Trenholm v. Trenholm*, 701 S.W.2d 209 (Mo. Ct. App. 1985) where a wife brought a partition action to sell the marital home. The couple's separation agreement, however, gave the husband the exclusive right to sell (although the proceeds were to be divided). The court held that the separation agreement controlled and the partition action could not go forward. The agreement should contain specific information concerning:

1. How title is held (e.g., joint tenancy, etc.);
2. The equitable interests of the spouses;
3. Manner of agreed disposition (sale, ownership to wife, etc.);
4. Agreed time of transfer;
5. Form of deed;
6. Assumption of encumbrances; and
7. Any responsibilities of the parties to take actions to complete transfer.

- B. **Personalty.** Division of personal property is less complicated. The parties can either list the property each is to receive or specify that each shall retain the personalty in his or her respective possession. The latter method relieves all concerned of the burden of preparing an extensive list of the spouses' personal property. If any such property is security for a debt, responsibility for paying the debt must be satisfied, usually by the party in possession of the property.

VI. INCOME TAX CONSIDERATIONS

A. **Filing Status:**

1. **Joint Returns.** Because of our graduated tax rates and other features of the federal income tax system, most married parties benefit by filing a joint tax return. To be eligible to file a joint return, the parties must be married and must be willing to cooperate by signing the return. Marital status is determined as of the last day of the tax year (I.R.C. § 6013(d)(1)(A) and I.R.C. § 7703(a)(1)). Married parties retain their married status until there is a final divorce decree or final decree of separate maintenance issued (I.R.C. § 6013(d)(2)). In many jurisdictions, interlocutory divorce decrees are issued and do not become final for an appreciable period of time. The parties are considered married and eligible to file a joint return until the final decree is issued. (*Joseph Peruisich*, T.C. Memo 1970-120).

Military Practice Note

Frequently, couples in the military anticipate waiting a substantial period before obtaining a divorce decree. Because of this, the parties should give careful consideration to including a provision requiring the parties to cooperate in filing a joint return. As mentioned, the rate of tax on the combined incomes is generally less if the parties file jointly. Additionally, if the parties file separately while married and one spouse itemizes, the other must also itemize, even though the tax consequences for the non-itemizer can be quite severe. There are other adverse results which arise from married parties not filing jointly. Specifically, they may lose the earned income credit (I.R.C. § 32). Accordingly, the parties should consider filing jointly. The major risk in filing jointly is that the spouses become jointly and severally liable for all tax due on the joint incomes. Thus, a taxpayer can be held liable for a former spouse's under-reporting of income during the period of separation (and resultant penalties) if a joint return was filed. Additionally, a practical problem arises regarding division of refunds and allocation of refunds and taxes that may be due. Nevertheless, if the parties can cooperate, it will likely be in their best interests to file jointly as long as they are eligible to do so.

2. Married Filing Separately. As a general rule, if married parties do not file jointly, they must file as married filing separately (I.R.C. § 1(d)). When the parties file as married filing separately, each becomes responsible for reporting only his or her own income and for claiming his or her own deductions and credits. Additionally, the parties pay taxes in the highest tax table.
3. Married Living Apart. More advantageous tax rates are provided for a married person who can file using the married living apart status (I.R.C. § 2(b), (c) & § 7703). To qualify, the individual must be married at the close of the tax year, must file a separate return, and must provide over one-half of the costs of maintaining a household which, for over one-half of the year, constitutes the principal home for a child who qualifies as a dependent for tax purposes (or would qualify but for a waiver of the dependency exemption under I.R.C. § 152(e)). Additionally, the other spouse may not have been a member of the house during the last six months of the tax year.
4. Head of Household. Single individuals, including those who were married but now have a final decree of divorce or separate maintenance, may be eligible to use the head of household tax table if they meet the test provided in I.R.C. § 2(b). In general terms, this requires that the individual not be married at the close of the tax year and that the individual have paid more than one-half the cost of keeping up a home for the individual and a dependent. A taxpayer also may qualify for head of household filing status if he or she maintains a home (not necessarily the taxpayer's home) for parents and claims the parents as dependents for tax purposes.

B. **Alimony/Spousal Support:** A key consideration in drafting a separation agreement involves proper characterization of payments as either alimony, as child support, or as a distribution of property. The basic rules are simple. An alimony payment is deductible by the payor and is included in the income of the recipient. Child support is not deductible by the payor nor is it included in the income of the recipient. When there is a significant difference in the annual income of the parties, the characterization of the payment can make a dramatic difference in the parties' total tax liability. In other words, changing the character of a payment from child support to alimony may result in permissible income shifting between the parties and overall tax savings. If the parties choose, these savings then can be allocated between them however they wish. Thus, the attorney should give specific attention to properly characterizing the nature of the payment to ensure that it receives the intended tax treatment.

For a support payment to be treated as alimony, it must meet the following requirements of I.R.C. § 71:

Cash. The payment must be in cash or cash equivalent. This precludes alimony treatment for transfers of tangible property or for rendering of services.

Required by a Divorce or Separation Instrument. For the payment to be treated as alimony it must be required by the separation agreement or court order. Thus, any payment which is intended to be treated as alimony must be called for by the agreement. Voluntary payments made in addition to those required by the separation agreement, or paid before the agreement, will not be deductible by the payor as alimony. Payments made because they are required by AR 608-99 also will not be deductible.

Paid to the Spouse. Generally, to be treated as alimony the payment must be made to the spouse. Thus, as a general rule, payments to third parties will not be treated as alimony. The exception to this rule is for payments which are required to be made to a third party by the terms of the separation agreement or court decree (or by subsequent ratification by the spouse). This can be important when, as part of the alimony payments, the parties intend that a payment be made directly to a third party creditor, such as to the lender for a car loan. If that is the parties' intent, the separation agreement should specify that the appropriate portion of the alimony payment is to be made directly to the third party.

Terminate on Death of Payee Spouse. This is a crucial element. It is currently the most frequently missed and the subject of litigation between parties and malpractice claims against attorneys. To qualify as alimony the payment must be one that terminates upon the death of the payee spouse.

These are the most crucial technical requirements for obtaining alimony characterization of a payment. Additional rules can cause the otherwise qualifying payment to lose alimony treatment, however. First, a payor cannot claim a deduction for support payments if the agreement or order requiring the support includes a statement that payments will not be treated as alimony and will not be deductible by the payor nor included in the income of the payee. Thus, for purposes of denying alimony treatment to a payment, the parties can authoritatively specify the tax treatment of the payment in the agreement. The reverse, however, does not hold true. The parties cannot direct, in the agreement, alimony treatment to a payment which does not otherwise qualify for alimony treatment.

Second, payments made pursuant to a divorce decree or separate maintenance order while the parties remain members of the same household generally will be denied alimony treatment. The temporary regulations permit the parties to deduct the payment if it is made while the parties are living together, but while they are preparing to live apart. This means that the payment will be deductible if one of the parties moves out within one month of the payment. Parties who are merely separated under a written separation agreement, as opposed to being fully divorced or legally separated, can deduct alimony payments even though living together at the time the payments are made.

Third, if the parties are married and file a joint return, they will not be permitted to deduct alimony payments made.

The recapture rule limits the parties from deducting as alimony payments those payments which, in reality, are a distribution of property. The recapture rule, which applies to orders issued after 1985, actually is two separate rules. One applies to divorce decrees and agreements that became effective in 1985 and 1986 while the second applies to decrees and agreements entered into on and after January 1, 1987. The first rule provides that to the extent total alimony payments in any of the first 6 years declines by more than \$10,000 from the total paid in any prior year, the difference in excess of \$10,000 will be recaptured as ordinary income to the payor (and the payee will be permitted a deduction in income for the amount recaptured). This admittedly complicated rule requires the parties to make an adjustment on the current years' taxes for "excess" alimony paid in a prior year.

For example, assume that the separation agreement called for alimony payments of \$20,000 in year 1 and \$5,000 in year 2. Because the payments in year 2 are less than those in year 1 by an amount in excess of \$10,000 ($\$20,000 - \$5,000 = \$15,000$), the difference in excess of \$10,000, which is \$5,000 ($\$15,000 - \$10,000 = \$5,000$) must be recaptured. In this example, the payor would recapture \$5,000 as ordinary income in year 2 (and the payee would be given an income deduction of \$5,000). Each year the total alimony payments must be considered against each prior year's payments (for the first 6 years). It is possible that a given year's payments might trigger recapture against more than one prior year's payments. Once there has been a recapture, the payment against which the recapture occurred is adjusted to reflect the recapture. In the example given, \$5,000 was recaptured in year 2 against the \$20,000 payment in year 1. So, in the future, year 1's payment will be considered to be \$15,000, rather than \$20,000, to reflect the \$5,000 recapture.

The current recapture rule is equally complex. It focuses on the first 3 years of payment rather than the first 6, and it provides that if alimony payments in year 1 exceed the average of the payments in years 2 and 3 by more than \$15,000, then the payor must recapture the excess over \$15,000 as ordinary income in year 3 (and the payee can deduct the recaptured amount from income in year 3). Additionally, the rule also provides that if payments in year 2 exceed the payments in year 3 by more than \$15,000, then this excess payment also must be recaptured by the payor.

For example, suppose a separation agreement calls for alimony payments of \$90,000 in year 1, \$80,000 in year 2, and nothing after that. The average for years 2 and 3 is \$40,000 (i.e., $(\$80,000 + \$0) / 2 = \$40,000$), and the payments in year 1 (\$90,000) exceed this by more than \$15,000. Thus, the payor would have to recapture \$35,000 as ordinary income (i.e., $(\$40,000 + \$15,000) - \$90,000 = \$35,000$) in his or her taxes for year 3. The second step requires a separate analysis of years 2 and 3. Here, the payment for year 2 exceeds the payment for year 3 by more than \$15,000 (i.e., $\$80,000 - 0 = \text{more than } \$15,000$), so the payor also would have to recapture an additional \$65,000 ($\$80,000 - \$15,000$) in year 3 as ordinary income. Initially it would look as if the payor could deduct a

total of \$170,000 as alimony payments in years 1 and 2, but in fact he or she would have to recover \$100,000 of that (i.e., \$35,000 + \$65,000) as ordinary income in year 3. If the same \$170,000 had been spread more evenly over all 3 years (e.g., \$56,666 each year, or \$60,000/\$55,000/\$55,000, etc.), there would have been no recapture.

The recapture rules and the old minimum term rule are somewhat complex, but fortunately legal assistance attorneys rarely will encounter them. For new separation agreements (and court orders), the rule will not apply unless alimony payments in year 1 exceed the average of payments in years 2 and 3 by more than \$15,000 or unless payments in year 2 exceed payments in year 3 by more than \$15,000. Legal assistance attorneys rarely draft agreements that require alimony payments even of \$15,000 per year, let alone payments that are substantially in excess of this amount.

- C. **Child Support.** The last limitation on characterization of a payment as alimony is really found in the definition of child support. To the extent that a payment constitutes child support, it will not be deductible as alimony. Thus, as in the past, if a support provision in a separation agreement specifically fixes an amount as child support, it will be treated as child support and will not be deductible by the payor as alimony. For example, if an agreement indicates that the husband will pay \$200 per month in spousal support and \$300 per month in child support, the husband would be permitted to deduct only \$200 per month. The \$300 per month payment is expressly fixed as child support and would not be deductible.

If an agreement provides for a total support payment of, for example, \$500 per month for both spousal and child support, but also specifies that the payment will be reduced by \$300 per month when the child reaches age 18, under the current law, only \$200 of the payment will be treated as alimony. The \$300 per month will be treated as child support. Thus, to the extent that a support payment is to be reduced based upon a contingency related to a child, such as marriage, emancipation, or reaching a specified age, the amount of the payment reduction will be treated as child support, and not as alimony. Under the Supreme Court case of *Commissioner v. Lester*, 366 U.S. 299 (1961), a taxpayer could deduct the full combined payment. The Tax Reform Act of 1984 reversed *Lester*, and now taxpayers may only deduct the amount which is clearly alimony, not the portion of the total payment which would be later reduced upon a contingency related to a child.

- D. **Dependency Exemption for Children.** Another significant decision for the parties concerns which of them will receive the dependency exemption for a given child. The dependency exemption, I.R.C. § 151, can amount to a significant offset against income, when there are several children involved.

As a general rule, the custodial spouse gets the dependency exemption unless that parent makes an express waiver of the exemption. The waiver can be made on an annual basis, for a specified number of years, or permanently. The waiver must be made on IRS

Form 8332 or an equivalent form. Importantly, IRS expects the waiver to be made on a separate form and not just within the separation agreement or court order.

When negotiating a separation agreement, the attorney should give strong consideration to which party should receive the dependency exemption. Generally, the greatest tax savings will be achieved by giving the exemption to the spouse in the higher income tax bracket. Though this is true, if the noncustodial spouse is the one in the higher bracket, the custodial spouse should receive fair exchange for transferring the exemption to the noncustodial spouse. Additionally, consideration should be given as to whether the waiver is to be made annually, permanently, or for a number of years. Making the waiver annually gives the custodial spouse a form of self-help to ensure that support payments are received. Because the noncustodial spouse must attach the waiver to the tax return each year when claiming the exemption, the custodial spouse can refuse to deliver it to the noncustodial spouse until payments are made. Obviously, from the standpoint of the noncustodial spouse, it would be better to obtain a permanent waiver so that it could be duplicated each year and attached to the tax return avoiding the difficulties of obtaining it annually from the custodial spouse.

A last point concerning the dependency exemption: the amount of child support has no bearing on which party is entitled to claim the child as a dependent. The parties may wish to negotiate more payments as alimony and less as child support to maximize tax benefits. Note, however, that while this is true from a pure tax standpoint, agreeing to unreasonably low child support payments may not be wise since state divorce courts may not accept the agreement and since provisions concerning child support always remain subject to court modification.

E. **Property Transfers.** A significant aspect of negotiating and drafting separation agreements involves dividing property between the parties. The attorney drafting or reviewing a proposed agreement should discuss with the client the tax aspects of various provisions of the agreement.

All transfers of property after 18 July 1984 between spouses, or between former spouses if incident to divorce, would be given gift treatment. Thus, anytime the transfer is between parties who are still married, the transfer will be treated as a gift. Additionally, if the parties are divorced at the time of the transfer, it will still be treated as a gift if the transfer is made "incident to divorce." A transfer will be "incident to divorce" if it occurs within one year of divorce, or if it occurs within six years of divorce and is made pursuant to a divorce or separation instrument.

Because the transfer is treated as a gift, there will be no recognition of gain or loss as a result of the transfer. The transferee will receive the property with the "carry over" basis, the basis in the hands of the transferor. While this gift treatment does mean that the transferor need not worry about recognition of gain or loss on the transfer, and therefore would seem to simplify the planning at the time of the divorce, it does not mean that the

parties should disregard the tax significance of what is occurring. For example, if the property to be transferred has appreciated significantly since its acquisition, the recipient of the property should realize that if the property is later sold, the seller will be responsible for any gain, based on the difference between the amount received and the basis in the hands of the transferor. Additionally, this would include responsibility for recognizing as ordinary income any amounts to be recaptured because of past accelerated depreciation or investment tax credits taken. Importantly, therefore, if there is any likelihood that the property will later be sold or transferred, the recipient should be fully aware of the potential tax liability from a sale.

When valuing the property as part of an equal division of assets, the attorney should calculate the potential shrinkage in actual value of the property due to a subsequent sale and resulting tax liability. For example, assume that the husband has stock with a basis of \$1,000 and a current value of \$11,000. The parties propose that the stock be transferred to the wife as part of the property distribution. Rather than valuing the stock at the market value of \$11,000, if the wife anticipates having to sell the property, she should value it at the after tax-value. In other words, the value of the stock should be discounted by the tax she would have to pay on the gain. If she sold the stock, the wife would have to recognize a gain of \$10,000 [$\$11,000$ (fair market value) - $\$1,000$ (carryover basis from husband)]. If the wife were in a 15 percent tax bracket, the result would be an additional \$1,500 in tax. Thus, the wife should value the stock not at \$11,000, the fair market value, but at \$9,500, the value after discounting for the potential tax liability.

The tax significance should also be considered when the property to be transferred has declined in value. If the property were to be transferred, there would be no recognition of the loss. This might be a foolish move if the transferor is in a higher income tax bracket than the transferee. The transferor would be better off to sell the property, recognize the loss for tax purposes, and transfer the proceeds of the sale to the spouse.

Military Practice Note

Legal assistance attorneys frequently have clients who are (or are married to) nonresident aliens. One significant exception to the rule granting gift treatment to transfers involves transfers to a nonresident alien spouse. If the transfer is to a nonresident alien spouse, the transfer will not be given gift treatment. Rather, the transfer will result in recognition of any gain and resulting capital gains tax.

A significant aspect of property transfers concerns the family residence. The gift tax Treatment discussed above applies. The Taxpayer Relief Act of 1997 significantly changed this area of the law. If the divorcing spouses have lived in the home for two of the previous five years, they will be able to exclude the gain on the sale of the home. (Note: They will most likely be limited to excluding only \$250,000 of gain, but this should equate to excluding all of the gain for the vast majority of service members.) If one spouse moves out of the home prior to its sale, this could cause a problem when the departing spouse has not lived in the home for two of the previous five years. Fortunately, the departing spouse

will be treated as having lived in the home so long as the remaining spouse's (or former spouse's) continued occupancy of the home is pursuant to a divorce or separation instrument. A separation instrument includes a decree of divorce or separate maintenance, a written separation agreement, or a decree requiring a spouse to make payments for the support or maintenance of the other spouse.

VII. MODIFICATION AND MERGER

- A. **Modification.** Modification of a separation agreement may be provided for in the agreement itself. In the absence of a modification clause, most state courts will not modify a separation agreement except for those provisions affecting children, and, possibly, spousal support. Modification can be provided for by explicit delineation of the terms governing modification or by authorizing a court, in its discretion, to modify the agreement. Most agreements provide that no alteration or modification of the contract shall be effective unless it is in writing and signed by both parties.
- B. **Merger.** Courts normally will not incorporate, or "merge," the provisions of the agreement into the decree of divorce if the parties have stated in the contract that they do not agree to judicial merger of the agreement. The election to merge the agreement, or portions of it, into the judgment can have several important consequences. First, a merged agreement can be modified on the same basis as any other judgment; that is, the agreement itself ceases to exist as a contract between the parties. Additionally, certain types of provisions in the agreement may become enforceable through contempt proceedings. If there is no merger, the agreement retains its status as a contract between the parties. A court generally cannot modify the terms of the agreement, and violations of the agreement can be remedied only through an action for breach of contract.

VIII. LEGAL EFFECT AND DURATION

- A. **Legal Effect.** A valid separation agreement binds the parties, is enforceable upon them, and usually is not abrogated by divorce or modified by a support decree without the consent of the parties.

Parties to a separation agreement are, of course, required to comply with applicable marital laws until they are divorced. Community property status is unchanged by the mere physical separation of the spouses, but even in these states a husband and wife may terminate the community property regime by agreement at any point during the marriage. In some equitable distribution jurisdictions, property acquired after the date of separation is separate property.

A general release of all claims and rights against the other spouse is valid in most states. A release should cover after-acquired property and statutory interests in estates as well not only presently-owned assets. In addition to the release, the agreement should include a clause in which the parties agree to execute all papers, deeds, and other documents which are necessary to put the agreement into practice. If the agreement is to be incorporated into the decree, it may be helpful to include a provision authorizing the court or some officer thereof to execute documents if the other party wrongfully refuses to do so. Clauses which require the parties to make mutual wills for the benefit of third persons (such as the children) should be avoided. A general release, in most jurisdictions, waives all rights not otherwise specifically granted or reserved in a separation agreement (e.g., military pension rights). *Knisley v. U.S.*, 817 F.Supp. 680 (S.D. Ohio 1993). Because divorce automatically revokes will provisions for former spouses in many jurisdictions, a new will should be executed following separation and/or divorce to prevent the unfortunate and often unexpected results which occur when an estate passes by intestacy.

- B. **Duration.** The duration of separation agreements depends primarily on the provisions included by the parties. Should the agreement so provide, it could be terminated by the death or adultery of a spouse, reconciliation of the spouses, or by the commencing of a divorce action. Cohabitation or the resumption of marital relations may dissolve the contract as a matter of law in some jurisdictions. Careful and explicit draftsmanship should avoid problems in this area.

When the clauses of a separation agreement are held to be independent of each other, the court will award damages only for the breach of a given provision, instead of excusing the performance of the other party, as would be the case where the clauses are dependent. The courts appear reluctant to hold obligations under these agreements conditional, so that if a condition is intended, it should be expressly stated. A general conditional provision often has been held to have no legal effect on anyone's duties.

SEPARATION

PART II - FORM OF AGREEMENT

IX. INTRODUCTION AND DIRECTIONS FOR USE

The form provisions provided in this chapter were selected because they will, in various combinations, meet the needs of many military personnel seeking legal separation. The legal assistance attorney using this chapter to formulate a client's separation agreement must be mindful of the potential problems inherent in form provisions. No form provision can be expected to fulfill every need. This is particularly true when the provision must reflect the agreement between two adverse parties. Although the provisions included here will meet some needs as they are written, their primary function is to provide an initial step in the process of selecting and drafting effective separation agreements for legal assistance clients. The final document must always represent a careful assessment of the client's desires and needs, including a complete evaluation of all tax matters. Only a word-by-word analysis of what each provision does, and does not do, will allow the drafter to produce a correct instrument.

X. STANDARD PROVISIONS

The clauses in this section can be used to form a complete separation agreement, or they can be lifted out and used individually, as needed. Section C contains other special provisions. The provisions included and their order of appearance are as follows:

- I. Preamble
- II. Separation Of The Parties
- III. Child Custody And Visitation
- IV. Child Support
- V. Spousal Support
- VI. Division Of Personal Property
- VII. Division Of Real Property
- VIII. Marital Debts
- IX. Life Insurance
- X. Emancipation Event
- XI. Acceptance And Mutual Release
- XII. Release Of Estate Rights
- XIII. Military Privileges
- XIV. Tax Matters
- XV. Prior And Subsequent Agreements
- XVI. Additional Instruments

- XVII. Subsequent Divorce
- XVIII. Counsel Fees
- XIX. Waiver of Rights Under the Soldiers' And Sailors' Civil Relief Act
- XX. Enforcement
- XXI. Binding Effect
- XXII. Notices
- XXIII. Entire Agreement
- XXIV. Governing Law
- XXV. Execution
- XXVI. Acknowledgment

In addition to the above clauses, attorneys should consider adding provisions that address the division of military retired pay. This subject area, to include sample clauses, is discussed in depth in JA 274, The Uniform Services Former Spouses' Protection Act.

SAMPLE MARITAL SEPARATION AGREEMENT

I. PREAMBLE

THIS AGREEMENT, made and entered this _____ day of _____, 19_____, by and between _____, hereinafter referred to as the Wife, and _____, hereinafter referred to as the Husband.

WITNESSETH:

A. MARRIAGE

WHEREAS, the parties hereto were married on the _____ day of _____, 19_____, in _____, and have been and are now Husband and Wife;¹

¹ A valid marriage establishes the basis of a legal separation agreement and should be shown in the agreement by including the place and date of the event. A common law marriage can be shown by a recital of the dates, occasions, and jurisdiction under which the marriage was contracted.

B. CHILDREN

WHEREAS, _____ children have been born as issue of this marriage, to-wit: _____, born _____, 19_____, and _____, born _____, 19_____, and there are no other children born or conceived of this marriage;

OR

WHEREAS, no children have been born or conceived of this marriage;

C. PHYSICAL SEPARATION

WHEREAS, in consequence of [disputes and unhappy differences] [certain events], the parties have [voluntarily] separated on or about the _____ day of _____, 19_____, with the intention of permanently terminating the marital relationship, and are currently living separate and apart from each other without expectation of resuming marital relations;²

² Provision acknowledges the intentions of the parties to seek permanent dissolution of their marriage.

OR

WHEREAS, [Circumstances have forced the parties to live separate and apart] or [Unhappy differences have arisen between the parties] and the relations between them are and have been of such a character as to render their separation a matter of necessity for the health, welfare, and happiness of both, on account of which the parties have separated and now live separate and apart and intend to live separate and apart from each other for the rest of their natural lives;³

³ Unlike the provision accompanying footnote 2, this provision only acknowledges the intentions of the parties to live separate lives, as a result of circumstance or preference. It does not express any intention concerning a subsequent divorce and should be used in jurisdictions which permit property settlement but do not allow agreements in contemplation of divorce.

D. AGREEMENT

WHEREAS, both parties have arrived at mutually agreeable provisions to settle, adjust, compromise, and determine (for all time) the custody of their minor children, all rights of support and maintenance by either party against the other by reason of their marriage, and all property (including a fair and equitable division of all community property) and other rights and obligations existing between the parties arising out of their marital relationship;

OR

WHEREAS, the parties intend this agreement to be an amicable settlement by contract of all property and other rights and obligations arising out of their marital relationship and not as an inducement for, or agreement to procure, a divorce;⁴

⁴ Provision disclaims that the agreement is for a divorce. This clause should be used with the provision accompanying footnote 3 in jurisdictions which do not allow agreements in contemplation of divorce.

E. CONSIDERATION

NOW THEREFORE, in consideration of the promises, the considerations hereinafter mentioned, the mutual promises herein made and of acts to be performed by them, the parties have agreed and by these presents do agree as follows:⁵

⁵ Separation agreements, like other contracts, must be supported by consideration.

II. SEPARATION OF THE PARTIES

A. SEPARATE LIVES

The parties may and shall at all times hereafter live and continue to live separate and apart for the rest of their natural lives. Each shall be free from interference, authority, and control, direct or indirect, by the other as fully as if he or she were single and unmarried. Subject to the provisions of this agreement, each may reside at such place or places as he or she may select. The parties shall not molest each other or compel the other to cohabit or dwell with him or her by any legal or other proceedings for restitution of conjugal rights or otherwise.⁶

⁶ Provision should be used with provisions accompanying footnotes 3 and 4 for the reasons stated in those footnotes.

OR

The parties mutually and voluntarily agree, with the intention of terminating the marriage, to continue to live separate and apart in separate places of abode, without any cohabitation, as they have since _____.

B. RECONCILIATION

It is the parties' intention that a reconciliation, either temporary or permanent, shall in no way affect the provisions of this agreement having to do with the settlement and disposition of their property rights in their respective realty, if any, and personalty, unless a new agreement is entered into in writing mutually revoking and rescinding this agreement and entering into a new one.

OR

Any reconciliation by the parties, however temporary, thereby revokes all provisions of this agreement having to do with the settlement or disposition of property rights in their respective realty, if any, and personalty.

C. RIGHT OF DIVORCE RESERVED

Nothing contained in this agreement shall be construed as a waiver by either of the parties of any ground for divorce which either of them may now or hereafter have against the other, the same being hereby expressly reserved.

III. CHILD CUSTODY AND VISITATION

A. NO CHILDREN

The parties represent that no children have been born or conceived as issue of this marriage.

B. SOLE CUSTODY WITH VISITATION

(Wife) (Husband) shall retain custody and control over the minor children of the parties, namely: _____. The parent retaining custody shall be referred to herein as the custodial parent. The parent relinquishing custody shall be referred to as the noncustodial parent. The custodial parent agrees to consult with the Noncustodial Parent on such matters as major medical treatments and selection of schools for the (child)(children) to promote the best interests of the (child)(children). The custodial parent shall exercise final determination over these matters. The noncustodial parent shall have the right to visit the children (contingent upon (him)(her) being current in the hereinafter required child support payments)⁷

⁷ Provision favors custodial parent.

at all reasonable times and places) (designate exact terms, i.e., two weekends each month). The noncustodial parent (may)⁸

⁸ Provision favors noncustodial parent.

(shall have the privilege)⁹

⁹ Provision favors custodial parent.

during these times, to take the children home or on outings and excursions, and (with the custodial parent's prior consent) visit the children in their home. The noncustodial parent shall be responsible to pick up the children and ensure their return. (If either parent shall move from the locale where the children resided at the time of this agreement, then said parent shall be responsible for the cost of transporting the child for the purpose of visitation). (The noncustodial parent shall be responsible for the cost of transporting the child for the purposes of visitation). (The noncustodial parent shall be responsible for costs of transporting the children for visitation purposes). (Proper advance arrangements shall be made by the noncustodial parent with respect to the exercise of these visitation rights).

C. JOINT CUSTODY

The custody of the minor (child)(children) of the parties, namely, _____, shall be shared jointly by Husband and Wife. The parties agree that although the (child)(children) may reside with (Husband)(Wife), both parties shall exercise joint care and control of the (child)(children) and both parents may visit said minor (child)(children) (at any and all reasonable times and places) (specify terms . . .). The parties hereto represent and agree that the welfare of the (child)(children) shall be the major factor governing all aspects of custody and visitation rights and it is further understood that nothing contained herein shall constitute an abandonment of the said (child)(children) by either of the parties. The parties agree to consult one another with regard to any and all major decisions affecting the health, education, and welfare in the best interests of said (child)(children).

D. SPLIT CUSTODY OF SEVERAL CHILDREN.

Wife shall retain custody and control over _____.
Husband shall retain custody and control over _____. Both parties agree to consult with the other on such matters as surgery, major medical treatments and selection of schools for the children. Both shall have the right to visit the children (at all reasonable times and places) (specify terms . . .).

IV. CHILD SUPPORT

A. AMOUNT

1. Basic Provision.

The noncustodial parent agrees to pay to the custodial parent (to be used solely for the benefit of such (child)(children) the sum of \$ _____ per month (or such increased amount as determined by a court of competent jurisdiction)¹⁰

¹⁰ No agreement between the parents ever binds the courts concerning child support. However, provision may permit custodial parent to seek modification of child support based on the agreement.

per child for the support and maintenance of each of the (minor) children: (Name children) commencing on the first day of _____, 19 _____, so long as the (child)(children) reside and live with the custodial parent. Such child support payments shall continue until (such (child)(children)) reach the age of eighteen (18 years), marry, die, enter the armed forces, or are otherwise emancipated)¹¹

¹¹ Provision favors noncustodial parent.

(the occurrence of the emancipation event as stated in this agreement) (each of such children are twenty-one(21) years of age or in the event that such (child)(children) are in school (as a (full-time) student) the support payments for such child shall continue to age twenty-two (22) years of age, or until the child is no longer attending school.)¹²

¹² Provision favors Custodial Parent.

2. Automatic Adjustment Based on Consumer Price Index, with Escalating Provision for Defraying Expenses of Older Children.

At a more sophisticated level, parties may wish to consider automatic adjustments of the child support amount in response to the increased cost of supporting older children and to changes in the purchasing power of the dollar. Use the Basic Provision above, but modify it to specify:

"The monthly support for each child shall automatically adjust on April 1 of each year by the percentage change in the Consumer Price Index (CPI) during the preceding calendar year, as reported by the U.S. Bureau of Labor Statistics. The party receiving support payments shall obtain the applicable CPI report and furnish a copy to the payor before April 1 each year. In addition to such annual adjustments, the monthly payment for each particular child shall be increased by \$_____ per month, commencing the month following that child's _____ (e.g., 14th) birthday, in order to defray the additional expenses of caring for older children."

Note: CPI reports may contain national data and data relating specifically to particular geographical regions of the country. Counsel should examine a sample CPI report and provide in the agreement an adequate description of the data to be used.

B. MODIFICATION

The parties further acknowledge that the child support required by this agreement is (only) subject to modification by a court of competent jurisdiction (upon a showing of a substantial change of circumstances)¹³

¹³ Provision favors Noncustodial Parent.

(in the best interests of the children).¹⁴

¹⁴ Provision favors Custodial Parent.

To assist the court in any subsequent action concerning child support, the amount of child support stated herein was predicated on the present income of the parties at the time of this agreement of \$_____ per month (gross) for Husband and \$_____ per month (gross) for Wife.

C. MEDICAL CARE¹⁵

¹⁵ See also Special Provisions, Section C, this Chapter and IIIB of this section.

The custodial parent will, as necessary and to the maximum extent possible, seek treatment at U.S. Armed Services hospitals for any medical problem for (herself or himself, so long as she or he is entitled to such services) any children in his/her custody. (The custodial parent shall pay the first \$100.00 and one-half the excess over \$100.00 annually for necessary medical and dental services, hospital care, and medicines for the (child)(children) which are not available at armed services hospitals; and) the noncustodial parent shall pay the balance of the cost of necessary medical and dental services, hospital care and medicines, provided that the custodial parent notifies the noncustodial parent prior to incurring such expenses, except that notice shall not be required in an emergency situation. (As an exception, the total subsistence charges incident to inpatient treatment at a military medical facility or at a civilian hospital under CHAMPUS coverage shall be paid by the custodial parent.)

D. POST-SECONDARY EDUCATION

(Husband)(Wife)(Parties) agree(s) that the differences of the parties in no way affect(s) (his)(her)(their) affection for the (child)(children) and (he)(she)(they both) agree(s) to assist the (child)(children) with the reasonable expenses of vocational or academic education beyond secondary schooling, whenever necessary and appropriate, in the same manner as if the parties had continued to live together: provided such child is in legitimate and diligent pursuit of such education (not to exceed the attainment of a bachelor's degree)(until age 25).

V. SPOUSAL SUPPORT

A. WAIVER

The parties agree to and do hereby waive all claims for spousal support of any kind from the other.

OR

Wife, (acknowledging that her income and assets are substantially less than that of Husband), agrees to receive no spousal support under this agreement. However, Wife reserves the right to petition a court of competent jurisdiction for an award of periodic and/or lump sum spousal support in the future.

OR

Husband agrees to and does hereby waive all claims to spousal support from Wife, both periodic and lump sum.

B. AMOUNT

(Husband)(Wife) agrees to pay to (Wife)(Husband) for support and maintenance the sum of \$_____ per month (describe length of support period, i.e. twelve (12) months) (until further order of the court). There will be no further liability for spousal support payments upon the death (or remarriage) of the (Husband)(Wife).

C. TAX TREATMENT

The parties agree that the support payments will not be treated as alimony for purposes of I.R.C. §§ 71 and 215, and that the payments will not be deductible by the (Husband)(Wife) and will not be treated as gross income to the (Wife)(Husband).¹⁶

¹⁶ This provision denies alimony treatment to the spousal support payments. Thus, payments will not be deductible by the payor and will not be included in the recipient's gross income.

D. DURATION

Upon the death of the spouse providing support, all spousal support (and child support) payments shall cease, and all claims for future support shall be released.¹⁷

¹⁷ Provision terminates the support obligation upon the death of the supporting spouse.

OR

All spousal support (and child support) payments provided herein shall constitute an obligation of the estate of the (spouse providing support) and this agreement as to the payment of spousal support shall be binding upon said spouse's heirs, executors, administrators, successors and assigns.¹⁸

¹⁸ Provision extends the support obligation to the estate of the supporting spouse. CAUTION: Inclusion of this provision would cause all of the spousal support payments to lose alimony treatment. Thus, none of the payments would be deductible by the payor.

VI. DIVISION OF PERSONAL PROPERTY

(Respective possession)

The parties have already divided their personal property, formerly located in the marital domicile and otherwise, to their mutual satisfaction. It is expressly agreed between the parties that each of them shall retain possession of and title to and shall have and enjoy

independently of any claim or right of the other party, as his or her own property, that tangible and intangible property which is in his or her respective possessions as of the signing of this agreement, the same as though he or she were unmarried.

OR

(Separate schedules)

Each party shall have as his or her own property all of their own personal clothing, books, and effects. Husband shall have as his own property all of the personalty enumerated in the attached Schedule A, which is incorporated by reference. Wife shall have as her own property all of the personalty enumerated in the attached Schedule B, which is incorporated by reference.

OR

(Enumeration of items)¹⁹

¹⁹ The enumeration of items method can be combined with a respective possession clause to designate only certain items by name and divide the remaining property to the party in possession.

The parties have agreed to divide their personal property to their mutual satisfaction. Henceforth, each of the parties shall own, have and enjoy independently of any claim or right of the other party, all items of personal property of every kind, nature and description and wheresoever situated, as provided herein:

1. Automobile: The _____ automobile now titled in the name of the (Husband)(Wife) (both the Husband and the Wife) and of an agreed value of _____, which is free and clear of all liens, shall be the property of the (Husband)(Wife).

or

The _____ automobile now owned by the parties titled in the name of the (Husband)(Wife) (both the Husband and the Wife) and of an agreed value of _____, subject to an existing lien with a balance due of _____ and payable at the rate of _____ per month with _____ payments remaining shall be the property of the (Husband)(Wife), who assumes liability for and shall make payments on the lien note when due and hold the other harmless therefrom.

2. Personal Effects: All items of personal effects such as, but not limited to, clothing, jewelry, luggage, sports equipment, hobby collections and books, but not including furniture or any property, personal or otherwise specifically disposed of pursuant to this agreement, shall become the absolute and sole property of that party who has had the principal use thereof or to whom the property was given or for whom it was purchased, and each party hereby surrenders such interest he or she may have in any such tangible personal property of the other.

3. Intangible Personal Property (other than life insurance): All stocks, bonds, cash, and sums on deposit in checking and savings accounts (owned by either or both parties) shall be divided as soon after execution of this agreement as practicable in the following manner:

a. Bank Accounts: All sums on deposit in checking accounts (name of owner, account number and bank location) and savings accounts (name of owner, account number and bank location) owned by either or both of the parties in excess of outstanding checks drawn thereon prior to midnight on _____, shall be divided so that Wife receives _____ and Husband receives _____ of these sums as soon after the execution of this agreement as practicable. Sums which either party has withdrawn from such accounts since midnight on _____ shall be charged as partial distribution to the withdrawing party except to the extent that the proceeds of such withdrawals have been used by the withdrawing party to pay obligations of the other party and except as agreed upon by the parties.

b. Stocks and Bonds: Wife shall receive and retain as her sole and separate property the following stocks and/or bonds in the amounts indicated (list stock number and cost basis). Husband shall receive and retain as his sole and separate property the following stocks and/or bonds in the amounts indicated (list stock number and cost basis).

c. Cash: All cash owned by either or both parties as of the date of the agreement shall be divided equally.

OR

All cash in the possession of each party shall be and is hereby confirmed as the separate property of the person with possession.

d. Furniture and Other Tangible Property: All furniture and other tangible personal property not disposed of pursuant to other paragraphs of this agreement shall be divided equally according to value between the parties. Air conditioners and other removable large appliances shall be considered to fall within this sub-section.

VII. DIVISION OF REAL PROPERTY

A. NON-OWNERSHIP

The parties acknowledge and warrant to each other that they do not own or possess any interest, either individually or jointly, in any real property.

OR

B. INTER-SPOUSAL TRANSFER

(Husband)(Wife) agrees to execute a deed conveying to (Wife)(Husband) as and for her/his sole and separate equitable estate all of his right, title and interest in and to the (improved) real property described as

_____, (their residence). (Wife)(Husband) agrees to assume and to pay the amount due and secured upon said premises and to hold (Husband)(Wife) harmless therefrom.

C. SALE

Both parties hereto acknowledge that they are the owners (form of ownership) of their residence located at _____, and agree to list this property for sale with a mutually agreeable real estate broker and to sell said property for or in excess of its fair market value and to divide the proceeds of this sale, after deduction for expenses of sale including realtor fees (equally) (describe agreed percentage of splitting proceeds) between them, which division is acknowledged by the parties as the fair evaluation of the interest of each in and to said property. The parties agree to execute the required documents of sale for or in excess of the fair market value of said home. In any dispute regarding the fair market value of said property, an appraisal by a mutually agreeable land appraiser shall be binding upon both parties. The parties agree to execute a general warranty deed conveying this property to purchasers.

D. ONE PARTY POSSESSION WITH SUBSEQUENT SALE

(Husband)(Wife) (owns) (parties are joint owners of) certain real property located at _____ and _____. The home located at _____ shall be treated as follows:

1. (Wife)(Husband) shall have the exclusive right from and after the date of this agreement personally to occupy the "home" without paying any remuneration therefor to the (Husband)(Wife). While occupying the "home," the (Wife)(Husband) shall pay all charges, mortgage payments, taxes and assessments thereon.
2. In the event (Wife)(Husband) ceases personally to occupy "home" and in any event, no more than _____ years from the date of this agreement, Wife shall exercise the option either to:
 - a. Sell the "home" at the fair market value and to pay over one-half the net proceeds, as hereinafter defined, to the (Husband)(Wife); or

- b. Take title to the "home" in her sole name and pay over to (Husband)(Wife) a sum equal to one-half of the difference between the then appraised fair market value of the "home" and the balance either then due on the currently existing liens on the "home" or balance which would be due thereon if all payments subsequent to the date of this agreement had been made on time, whichever is the lesser sum. The appraised market value for the purpose of this paragraph shall be determined by an independent appraiser to be selected by mutual agreement between Husband and Wife, or, if they are unable to agree on the selection of such an appraiser, by an appraiser selected by the persons suggested as appraisers by Husband and Wife. The cost of such appraisal shall be divided equally between the parties.
- c. If (Wife)(Husband) elects to sell the "home," the net proceeds thereof, subject to division pursuant to subparagraph b above, shall mean the gross sales price in the contract of sale less balance then due on currently existing liens on the home, any real estate broker's commissions, attorney's fees, advertising costs, transfer and sales and documentary taxes and other closing costs exclusive of prorated taxes and interest payable by the seller, the cost of any capital improvements made by (Wife)(Husband) following the date of this agreement (less reasonable depreciation), and the actual cost of any fixing up expenses, repairs, maintenance, and non-capital improvements (Wife)(Husband) may make to the "home" during the 90 days immediately preceding the date on which the sales contract was made and actually paid not later than 30 days after the date of sale. However, (Wife)(Husband) shall not incur any such capital expenditures or improvement in excess of \$500.00 without the prior written consent of (Husband)(Wife).
- d. The following items now located at the "home" are to be considered a part of the "home" and not items of furniture or tangible personal property within the meaning of paragraph 5 of this agreement: rugs, fireplace equipment, drapes, blinds, and garden tools. The (Wife)(Husband) may have the use of the large appliances such as range, refrigerator, washer and dryer as long as she/he occupies the "home" under this agreement. If the items mentioned in the two preceding sentences are not subsequently sold as part of the "home," they shall be divided as provided in paragraph 5.
- e. There shall be no major alteration of the real estate or the building without the express written consent of the (Husband)(Wife) or his/her representative. A major alteration shall be that which, when completed, costs more than (specify amount . . .).

E. OTHER REAL ESTATE

Other real estate located at _____

_____ shall be sold and the proceeds after expenses of sale shall be paid (one-half to Husband and one-half to Wife) (describe agreed division of proceeds). Husband and Wife shall have the option over all other persons to purchase the property upon payment of one-half the fair market to the non-purchasing spouse, but (Husband's)(Wife's) option shall have priority over that of (Wife)(Husband).

VIII. MARITAL DEBTS

A. RESPONSIBILITY

Both parties agree that they have not at the time of this agreement and will not in the future incur any debts or make any contracts for which the other shall be liable and each further covenants to save the other, or their estate, free, harmless and indemnified of and from all such debts and liabilities.

OR

(Husband)(Wife) shall be solely responsible for the following presently outstanding debts of the parties and children:

_____.

Each party shall hold harmless and indemnify the other against any and all liability in connection with those bills that he or she is obligated to pay under the terms of this agreement.

B. SET OFF

If either party shall be requested to pay any legally binding debts or parts of such debts of the other party or a child for which he or she is not liable under the terms of this agreement, that party may pay such debts and charge the payment against support payments.

C. FUTURE DEBTS

The parties hereto agree that no further debts will be contracted in the name of the other party, and to hold the other harmless in the event of a breach of this paragraph. The parties further agree that neither party shall charge or cause or permit to be charged to or against the other any purchase or purchases which either of them may hereafter make, and neither shall hereafter secure or attempt to secure any credit upon or in connection with the other, or in his or her name, and each of them will promptly pay all debts and discharge all financial obligations which each may incur for himself or herself.

IX. LIFE INSURANCE

The parties acknowledge that certain life insurance policies are in force on the lives of the parties with the other as beneficiary. The parties hereby agree that the party in possession of a policy or policies may do with such as he/she in his/her sole discretion deem proper including, but not limited to, the termination of said policies, or the designation of another beneficiary.

OR

(Husband)(Wife) agrees to irrevocably designate (Wife)(Husband) as beneficiary on the life insurance policies currently existing on his/her life and to continue to pay the premiums thereon so long as he/she is required to make spousal support payments under the terms of this agreement.

OR

(Husband)(Wife) agrees to pay the premiums and to maintain in full force and effect insurance on his/her life payable to the (Wife)(Husband) in a net amount of _____ and insurance on his/her life payable to children, share and share alike, in a new amount of _____. The designation of (Wife)(Husband) as beneficiary under the _____ (company and policy number) policy and the children as the beneficiaries under the _____ (company and policy number) policy shall be irrevocable, and (Husband/Wife) agrees to execute the necessary instruments to make such irrevocable designation. (Husband)(Wife) shall not encumber or borrow against such policies without prior written consent of (Wife)(Husband).

X. EMANCIPATION EVENT

With respect to a child, an emancipation event shall be deemed to occur upon the earliest happening of any of the following:

- A. Reaching the age of (twenty-one)²⁰

²⁰ Provision favors custodial parent and children.

(eighteen)²¹

²¹ Provision favors noncustodial parent.

years or the completion of four academic years of college education, whichever occurs first, except in the case of a handicapped child;

- B. Marriage;

- C. Death;

D. Entry into the Armed Forces of the United States, (however, if the child is discharged from the service before his/her twenty-first birthday, an emancipation event will not have been deemed to occur except for the period of actual service in the armed force;)²²

²² Provision favors custodial parent.

- E. Engaging in full-time employment other than during vacation and summer periods;

- F. Engaging in part-time employment, if not a student.

An emancipation event shall be deferred beyond the eighteenth birthday of the child only if, and for only as long as, that child pursues a college education with reasonable diligence and on a normally continuous basis, but in no event shall emancipation be deferred beyond the (number) birthday of the child. College education does not include (part-time) (evening only) education. In the event of such deferral, the noncustodial parent at his/her option, may pay the support provided for herein, as may be later modified, direct to the child and/or directly to the educational institution for the benefit of the child.

For the purposes of this agreement, a handicapped child shall mean one who is physically or mentally incapable of continuous self-support, as opposed to unwilling to support himself or herself at the age of eighteen years and thereafter. During the period of time the handicapped child is engaged in full or part-time employment, the obligation of the noncustodial parent for

child support shall be reduced by the amount of the handicapped child's net income; but upon the termination of such employment, the noncustodial parent's obligation shall continue in full effect.

XI. ACCEPTANCE AND MUTUAL RELEASE

Each of the parties receives the property set apart to them and the undertakings hereof in full and complete settlement and release of all claims and demands of every kind, name, or nature against the other party hereto, including all liability now or at any time hereafter existing or accruing on account of support, maintenance, spousal support, dower, courtesy, or other allowances, either statutory or arising at common law, incident to the marriage relation; and after this settlement, Husband and Wife shall require nothing whatever of the other, except as herein provided, as though the marriage relation between them had never existed.

XII. RELEASE OF ESTATE RIGHTS

Wife agrees that the estate of Husband, after payment of the consideration herein mentioned to Wife, shall belong to the person or persons who would have become entitled thereof if the Wife had died during the lifetime of Husband; and Wife further agrees that she will not contest any will of Husband to be probated, and will allow administration upon his personal estate to be taken out by the person or persons who would have been entitled to do so had Wife died during the lifetime of Husband. Husband agrees that the estate of Wife, including the consideration herein mentioned, shall belong to the persons who would have become entitled thereto if Husband had died during the lifetime of Wife; and Husband further agrees that he will not contest the will of Wife to be probated, and will allow administration upon her personal estate to be taken out by the person or persons who would have been entitled to do so had Husband died during the lifetime of Wife. Each party releases to the other and to the heirs, executors, administrators and assigns thereof all claims to or rights of, dower, courtesy, or inheritance, descent, distribution, election, or alimony (except that accruing under provisions of this agreement) in and to all property, real or personal, of the other, whether now owned or hereafter acquired. Each party renounces any claim or right to petition for letters of administration or to act as representatives of the other's estate even though there be no dissolution of marriage.

XIII. MILITARY PRIVILEGES

A. CHILDREN'S ENTITLEMENTS

It is further mutually agreed by and between the parties that, consistent with existing regulations of the United States Army, (Husband)(Wife) hereby specifically agrees to cooperate fully in furnishing any and all assistance in obtaining and maintaining all benefits due to the minor child(ren) of the parties, namely, _____, by reason of (his)(her)(their) status as (a) military dependent(s). (Husband)(Wife) further

specifically agrees to take whatever action is necessary to obtain any and all service-connected benefits for the minor child(ren), including, but not limited to, post exchange benefits, commissary benefits, education benefits, medical treatment benefits or any other benefits the minor child(ren) (is)(are) able to derive by reason of military dependent status, consistent with the regulations of the United States Army.

B. MEDICAL CARE

It is further mutually agreed by and between the parties that (Wife)(Husband) will comply to the maximum extent possible with the provisions of any military service health program for the care of the minor child(ren). (Wife)(Husband) specifically agrees to maintain all records and receipts required by said program and to prepare whatever forms are required for obtaining reimbursement for medical and/or dental care and treatment for the minor child(ren). (Wife)(Husband) shall obtain identification cards, and take all other actions necessary to assure that the children enjoy full access to, and benefits from, any government operated, funded or reimbursed medical or dental care program for which dependents of present and former service members are eligible under the law. A copy of this Agreement, or of an abstract containing this paragraph, shall constitute the (Wife's)(Husband's) direction and request to the administrator of any such program to enroll the children as participants.

C. SPOUSAL ENTITLEMENTS

(Husband)(Wife) will continue to sponsor (Wife)(Husband) in order to keep (her)(him) entitled to all military privileges provided under (U.S. Army)(NATO-SOFA)(USAREUR) Regulations as long as (Wife) (Husband) continues to qualify as a dependent and for the benefits. In the event a final decree of divorce or dissolution of marriage is entered as between the parties, (Wife)(Husband) agrees to return to (Husband)(Wife) all (her)(his) military privilege cards in (her)(his) possession. (Husband)(Wife) agrees to continue to sponsor the minor child(ren) as (his)(her) dependent(s) for all military benefits until the child(ren) no longer qualif(ies)(y) for dependent status under law or military regulations.

D. TRANSPORTATION

(Husband)(Wife) will arrange for transportation of the (Wife)(Husband) and child(ren) and all their property in accordance with military regulations to a place to be designated by (Wife)(Husband), which transportation shall be at no expense to them. (Wife)(Husband) agrees to use (her)(his) best efforts to not exceed (Husband's)(Wife's) weight allowance. The excess weight allowance shall be borne by (Husband)(Wife). The military sponsor agrees to execute all necessary documents in a timely manner (including DD Form 1299, Application For Shipment/Storage of Personal Property) to enable (Husband)(Wife) to secure release of such property.

XIV. TAX MATTERS

A. ANNUAL RETURNS

The parties agree to file joint federal and state income tax returns for the year _____, and for any subsequent year during which they shall be Husband and Wife and entitled under the applicable laws and regulations to file joint returns, provided that such filing results in a lesser combined tax than would result from separate filing. Each party shall pay that proportionate share of the tax due as shall be attributable to his or her respective earnings or income and each shall indemnify and hold harmless the other against any liability for his or her own proportionate share of said tax. Any refund that is realized as a result of a joint return shall be divided (proportionately)(equally) between the parties.

OR

The parties agree to file separate federal and state income tax returns for the year _____, and for all subsequent years. Any tax refund from said returns shall be the sole property of the party filing the separate return.

B. DEPENDENCY EXEMPTION

The parties agree that the (Husband)(Wife) is hereby entitled to the dependency exemption for the child(ren) for any calendar year in which (he)(she) provides the child support required by this agreement. The (Husband)(Wife) agrees to make a permanent waiver of the dependency exemption for the child(ren) by signing an IRS Form 8332 and providing same to the (Husband)(Wife).²³

²³ Provision favors noncustodial parent by having the custodial spouse make a permanent waiver of the dependency exemption.

OR

Provided that no arrearage in the payment of child support exists, the (Husband)(Wife) shall be entitled to claim _____ as a dependent for tax purposes in any year in which separate tax returns are filed²⁴

²⁴ Provision favors custodial parent by requiring an annual waiver of the dependency exemption and conditioning the waiver on full payment of child support.

and the (Wife)(Husband) agrees to sign an IRS Form 8332 and deliver same to the (Husband)(Wife) by the first day of February of the year following the year for which the dependency exemption is to be claimed.

C. DISCLOSURE

For the purpose of giving effect to this agreement, each party agrees to send the other on or before _____ of each year beginning with 19____, a copy of his or her respective federal income tax return, including appended schedules.

D. INDEMNIFICATION

(Husband)(Wife) agrees to hold (Wife)(Husband) harmless from any claim, damage, or expense arising out of any deficiency assessment made against a joint return due to the error, neglect or malfeasance of (Husband)(Wife) (in the preparation of the return).

XV. PRIOR AND SUBSEQUENT AGREEMENTS

The parties hereto hereby cancel, annul and invalidate any and all prior property settlements by them at anytime heretofore made. All modifications of this agreement shall be of no effect unless expressed in writing and signed by both parties.

XVI. ADDITIONAL INSTRUMENTS

Each of the parties shall promptly execute and deliver such deeds, title documents, releases, assignments, identification cards, applications for dependent identification cards, medical policies, applications for benefits, or other written instruments as may be required from time to time to carry into effect fully the terms and conditions of this agreement according to the true intent and meaning thereof.

XVII. SUBSEQUENT DIVORCE

In the event that an action for divorce is instituted at anytime hereafter by either party against the other in this or any other state or country, the parties hereto agree that they shall be bound by all the terms of this agreement and that this agreement shall not be merged in any decree or judgment that may be granted in such an action but shall survive same and shall be forever binding and conclusive on the parties, but nothing herein shall be construed to prevent the decree of judgment in any such action from incorporating in full or in substance the terms of this agreement.

XVIII. COUNSEL FEES

(The parties agree to divide equally) (The party initiating the suit agrees to pay) all court costs in connection with any divorce action which may be instituted at any time in the future between the parties hereto. Each party will pay his or her own attorney's fee. Each party hereby releases the other from any further obligations to pay any other or further counsel fees for each other or on each other's behalf in connection with any matter, except for the costs of the enforcement of the terms of this agreement in the event of one party's non-compliance, in which case the non-complying party shall be responsible for all reasonable expenses incurred in enforcement.²⁵

²⁵ Provision separates the responsibility for court costs from the obligation for attorney's fees. This allows the parties to split the court costs while remaining responsible for their respective attorney's fees. It also permits the recovery of attorney's fees from a party in noncompliance with the agreement.

However, if any suit or action is brought to declare or to enforce the rights of one of the parties under this agreement, the court may in its sound discretion award attorney fees and costs to the prevailing party; and the court shall make such an award if the suit or action is brought successfully to enforce a child or spousal support obligation.

Although this is not an agreement to obtain a divorce, it is understood that the parties will be responsible for their own counsel fees and costs in any subsequent divorce action or other proceeding brought by either party.²⁶

²⁶ Provision maintains separate responsibility for all costs and fees, including expenses to enforce the agreement.

OR

Although this is not an agreement to obtain a divorce, in the event that divorce proceedings are filed, it is understood that (Husband)(Wife) will pay the counsel fees for (Wife)(Husband) for such proceedings not to exceed the amount of \$ _____. Thereafter (Wife) (Husband) will be responsible for her/his own counsel fees in any divorce proceeding brought by either party. (Husband)(Wife) also agrees to pay all court costs for any future divorce action.²⁷

²⁷ Provision requires one party to pay a portion of the other party's expenses in a subsequent divorce action.

XIX. WAIVER OF RIGHTS UNDER THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

(Both parties)(Husband)(Wife) hereby agree(s) to waive any and all rights (they/he/she) may have under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended,

in any subsequent action for divorce instituted by (Wife)(Husband) provided that the terms of the divorce decree will not contradict, change, add or delete from any of the terms of this agreement in any manner whatsoever. (Husband)(Wife) (Parties) realize(s) that this waiver will allow a default judgment of divorce to be entered against (him)(her)(either of them) in accordance with the terms of this agreement.

XX. ENFORCEMENT

(Wife)(Husband) agrees that she/he will not contact either directly or indirectly, the armed forces or commanding officer of (Husband)(Wife) with respect to the enforcement of this agreement as long as there is compliance with the terms of this agreement.

XXI. BINDING EFFECT

All covenants, promises, stipulations, agreements and provisions contained herein shall apply to, bind and be obligatory upon, the heirs, executors, administrators, personal representatives and assigns of the parties herein.

XXII. NOTICES

For purposes of this agreement, all notices or other communications given or made hereunder shall, until written notice to the contrary, be given or mailed to Wife at _____, and Husband at _____. (Each may have more than one.)

XXIII. ENTIRE AGREEMENT

Both the legal and practical effect of this agreement in each and every respect and the financial status of the parties have been fully explained to both parties by legal counsel of each party's independent choice, and both parties acknowledge that the agreement is fair and is not the result of fraud, duress or undue influence exercised by either party upon the other or by any other person or persons upon either, and they further agree that this agreement contains the entire understanding of the parties, there being no representations, promises, warranties, covenants or undertakings other than those expressly set forth herein.

XXIV. GOVERNING LAW

This agreement shall be interpreted in accordance with the laws of the State of _____.

²⁸

²⁸ Provision establishes the controlling state law for any subsequent action for enforcement or interpretation of the agreement. See also the text in Part I.

XXV. COUNSEL

The parties represent and acknowledge that they have been represented by counsel or have consulted with counsel or have been given the opportunity to consult with counsel prior to the execution of this agreement and have read and fully understand each and every provision of the agreement.

XXVI. EXECUTION

The parties have been advised and are aware that this agreement shall not be binding on either party unless it is duly executed by both parties.

IN WITNESS WHEREOF, I have at _____, this _____ day of _____, 19 _____, set my hand and seal to this separation agreement consisting of _____ () typewritten pages, this included, the preceding pages hereof bearing my initials.

(HUSBAND'S SIGNATURE)

ACKNOWLEDGMENT

(Civilian notary)

STATE OF _____)
COUNTY OF _____)

On this _____ day of _____, 19 _____, before me, a Notary Public in and for the _____, personally appeared _____, known to me to be the person whose name is subscribed to the foregoing separation agreement, and acknowledged to me that he voluntarily executed the same for the purposes therein contained.

Witness my hand and official seal on the day and year first above written.

(Signature of Notary Public)

My Commissions Expires:

(Alternative military notary format)

STATE OF _____)
COUNTY OF _____)

or

WITH THE UNITED STATES
ARMED FORCES IN _____)

On this _____ day of _____, 19____, before me, the undersigned officer of the United States Army, granted the general powers of a Notary Public under 10 U.S.C. § 936 and appropriate state laws, personally appeared _____, known to me to be the person whose name is subscribed to the foregoing separation agreement, and acknowledged to me that he voluntarily executed the same for the purposes therein contained.

Witness my hand on the day and year first above written. (By statute, no seal is required).

(Signature of Officer)

(Printed Name, Rank, Title, and Branch)

IN WITNESS WHEREOF, I have at _____, this _____ day of _____, 19____, set my hand and seal to this separation agreement consisting of _____ () typewritten pages, this included, the preceding pages hereof bearing my initials.

(WIFE'S SIGNATURE)

ACKNOWLEDGMENT

(Civilian notary)

STATE OF _____)
COUNTY OF _____)

On this _____ day of _____, 19____, before me, a Notary Public in
and for the _____, personally appeared
_____, known to me to be the person whose name is
subscribed to the foregoing separation agreement, and acknowledged to me that she voluntarily
executed the same for the purposes therein contained.

Witness my hand and official seal on the day and year first above written.

(Signature of Notary Public)

My Commissions Expires:

(Alternative military notary format)

STATE OF _____)
COUNTY OF _____)

or

WITH THE UNITED STATES
ARMED FORCES IN _____)

On this _____ day of _____, 19____, before me, the undersigned officer of the United States Army, granted the general powers of a Notary Public under 10 U.S.C. § 936 and appropriate state laws, personally appeared _____, known to me to be the person whose name is subscribed to the foregoing separation agreement, and acknowledged to me that she voluntarily executed the same for the purposes therein contained.

Witness my hand on the day and year first above written. (By statute, no seal is required).

(Signature of Officer)

(Printed Name, Rank, Title, and Branch)

XI. SPECIAL PROVISIONS

A. Coverage Clauses Special Spousal Medical.

NOTE - Clauses a through d were drafted by Mr. Willard H. DaSilva, a New York practitioner who is a past president of the American Academy of Matrimonial Lawyers, New York Chapter.

1. Minimal Coverage.

The Husband during his lifetime agrees to furnish at his own expense Blue Cross, Blue Shield and major medical insurance (or their equivalent) for the benefit of the Wife until the earlier of her death or remarriage, as "remarriage" is hereinbefore defined in this agreement.

2. Clause Placing Dollar And Time Limitations On Husband's Obligation.

The Husband agrees during his lifetime to furnish at his own expense Blue Cross, Blue Shield and major medical insurance (or their equivalent) for the benefit of the Wife until the earliest happening of her death, her remarriage (as "remarriage" is hereinbefore defined in this agreement) or the fifth anniversary date of this agreement, provided however that the Husband's liability therefor does not exceed the sum of \$1,200 in any calendar year and with the understanding that in the event that said premiums shall exceed the sum of \$1,200 in any calendar year, the Wife shall bear said excess cost.

3. Clause To Provide For Broad Coverage To Spouse.

The Husband during his lifetime agrees to furnish at his own expense Blue Cross, Blue Shield and major medical insurance (or their equivalent) with the broadest coverage available and with the minimum deductible provision for the benefit of the Wife until . . .

4. Clause To Continue Existing Private Coverage.

The Husband during his lifetime agrees to furnish at his own expense medical insurance with benefits which are presently available to the Wife under the existing policy until . . .

5. General Medical Coverage Provision.

_____ agrees to maintain in full force and effect (his)(her) group hospitalization coverage with _____, policy no. _____, for the benefit of _____, and the minor child(ren) and to pay all necessary dental, medical, hospitalization, and major medical expenses should they be required.

B. Special Military Medical Provisions. (See Appendix D for a discussion of the different TRICARE Programs available to military family members.)

1. TRICARE Standard Deductible Only.

(Husband)(Wife) agrees to pay the annual TRICARE Standard deductible but will not be responsible for any other costs incurred which are in excess of TRICARE Standard coverage.

2. TRICARE Standard Deductible and Excess Medical Costs.

(Husband)(Wife) agrees to pay the annual TRICARE Standard deductible and any other costs incurred which are not reimbursed by TRICARE Standard, whether for in patient or out patient care.

3. Clause Requiring Custodial Spouse to Use Military Medical Treatment Facilities, If Available.

When obtaining medical care on behalf of the parties' minor children, the custodial spouse agrees to use military medical treatment facilities, if at all possible. If civilian facilities are used, custodial spouse agrees to timely seek TRICARE reimbursement and/or agrees to assist the non-custodial military parent in completing any necessary TRICARE forms. If military facilities are available and the custodial spouse, in a non-emergency, fails to use them, the non-custodial military spouse will not be liable for any expenses incurred.

4. Clause Requiring Military Member to Enroll Children in TRICARE Prime.

The military member agrees to enroll the minor children of the marriage in the TRICARE Prime program. The military member will take all necessary steps and fill out all enrollment forms to make the minor children eligible for TRICARE Prime coverage. If civilian facilities are used, the custodial spouse agrees to abide by the requirements of TRICARE Prime for coverage and agrees to pay the per visit charge for medical care. The military member will not be liable for any expenses incurred if the custodial parent fails to comply with the TRICARE Prime rules on routine or emergency care.

C. Attorney Representation Provisions.

1. Both Parties Represented by Counsel.

Both parties represent and acknowledge that they have been represented by counsel and have consulted with counsel prior to the execution of this agreement and have read and fully understand each and every provision of this agreement.

2. One Party Not Represented By Counsel.

(Wife)(Husband) acknowledges that (Wife)(Husband) has been represented by counsel in negotiating this Agreement. (Wife)(Husband) further acknowledges that (he)(she) has been offered the opportunity and strongly encouraged to consult with an

attorney and expressly waives such consultation. (Wife)(Husband) has read and fully understands each and every provision of this Agreement.

D. Transfer of Automobile.

The (Husband)(Wife) hereby assigns to the (Wife)(Husband, free of all liens and encumbrances, and releases and relinquishes unto (him)(her) any and all right, title, and interest in and to a _____ automobile belonging to the parties and now in the possession of _____. Both parties agree to execute any bill of sale, registration certificate, or other document necessary to transfer full and complete title to said automobiles as aforesaid.

E. Release of Interest in Realty.

_____ hereby releases and relinquishes any and all right, title, interest, equity, and estate in and to the property now held by the parties as tenants by the entirety and situation at _____, and (he)(she) agrees, upon request of _____, to execute his warranty deed conveying interest. [Under the current law, it will probably be necessary to sell such property or for one spouse to buy out the other.]

F. Survivor Benefit Plan Provision.

(Husband)(Wife) hereby agrees to designate (Husband)(Wife) as the beneficiary of (his)(her) Survivor Benefit Plan and agrees to provide the appropriate military finance center retired pay office with any necessary forms or other information to accomplish this designation.

G. Military Retired Pay Provisions.

1. Fractional or Percentage Share.²⁹

²⁹ This provision gives the former spouse the benefit of subsequent Cost of Living pay increases.

The parties hereby agree that the nonmilitary spouse is awarded (specify fraction, e.g., "1/2" or specify percentage, e.g., "50%") of the military member's disposable military retired pay as his/her separate property. If the nonmilitary spouse qualifies for a direct payment from the appropriate finance center, the military member/retiree agrees to provide any necessary forms or other information necessary to accomplish this designation. (The military finance center is hereby directed to initiate a direct payment from (husband's)(wife's) retired pay.)

2. Set Dollar Amount.³⁰

³⁰ This provision safeguards any subsequent Cost of Living pay increases for the retiree (unless the spouse has the order modified each time a raise is received).

The parties hereby agree that the nonmilitary spouse is awarded _____ (\$_____) of the military member's or retiree's disposable military retired pay as his/her separate property. If the nonmilitary spouse qualifies for a direct payment from the appropriate military finance center, the military member/retiree agrees to provide any necessary forms or other information necessary to accomplish this designation. (The military finance center is hereby directed to initiate a direct payment from (husband's)(wife's) retired pay.)

3. Share Based On Rank At Time of Divorce.³¹

³¹ This clause denies the former spouse the benefit of increased pay for a member who is promoted after the divorce.

The parties hereby agree that the nonmilitary spouse is awarded (specify fraction, e.g., "1/2" or percentage, e.g., "50%") of the military member's or retiree's disposable military retired pay as his/her separate property, based upon the military member/retiree's rank and pay level at the time this agreement is executed. If the nonmilitary spouse qualifies for a direct payment from the appropriate military finance center, the military member/retiree agrees to provide any necessary forms or other information necessary to accomplish this designation. (The military finance center is hereby directed to initiate a direct payment from (husband's)(wife's) retired pay.)

CHAPTER 4

SUMMARIES OF STATE LAWS

All legal assistance offices should have an up to date copy of the Martindale-Hubbell Law Digests. That is the primary resource for individual state research on substantive law. The following state by state guide contains those states that have particular military provisions in the family law area. There is also a more complete substantive law breakdown for American Samoa and Guam because Martindale-Hubbell does not have those territories in its digest.

ALABAMA

STATUTES:

- I. Marriage - ALA. CODE §§ 30-1-3 to 30-1-18 (1989 & Supp. 1994).
- II. Divorce - ALA. CODE §§ 30-2-1 to 30-2-55 (Divorce & Alimony) (1989 & Supp. 1994).
- ALA. CODE §§ 30-3-1 to 30-3-61 (Child Custody & Support) (1989 & Supp. 1994).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Persons in federal service and spouses living in the state are deemed residents for initiating civil actions in the state's courts. § 6-720.

ALASKA

STATUTES:

- I. Marriage - ALASKA STAT. §§ 25.05.011 to 25.05.391 (1995).
- II. Divorce - ALASKA STAT. §§ 25.24.010 to 25.24.910 (1995).

MARRIAGE REQUIREMENTS: Age - 18 without parental consent. Person 16, but under 18, must have written parental consent. Person 14, also must have court approval. § 25.05.171. Person under 18 who is a member of armed forces on active duty does not need parental consent. § 25.05.011.

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Member of armed forces stationed within state for period of at least 30 days is deemed a resident for purpose of divorce. § 25.24.900.

ARIZONA

STATUTES:

- I. Marriage - ARIZ. REV. STAT. ANN. §§ 25-101 to 25-129 (1991 & Supp. 1994).
- II. Divorce - ARIZ. REV. STAT. ANN. §§ 25-301 to 25-381.24 (1991 & Supp. 1994).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed forces satisfies jurisdictional requirements when being stationed in state for 90 days prior to filing the petition for dissolution of marriage. § 25-312.

ARKANSAS

STATUTES:

- I. Marriage - ARK. STAT. ANN. §§ 9-11-101 to 9-11-705 (1987 & Supp. 1993).
- II. Divorce - ARK. STAT. ANN. §§ 9-12-101 to 9-12-320 (1987 & Supp. 1993).

MARRIAGE REQUIREMENTS: Military Provision - Upon the filing of a written petition with the clerk, a county court may waive the requirements of parental consent and the posting of a bond of \$100. § 9-11-211.

COLORADO

STATUTES:

- I. Marriage - COLO. REV. STAT. §§ 14-2-101 to 14-2-113 (Uniform Marriage Act) (1987 & Supp 1994).
- II. Divorce - COLO. REV. STAT. §§ 14-10-101 to 14-10-133 (Uniform Dissolution of Marriage Act) (1987 & Supp 1994).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Caveat: Mere presence of person in Colorado under orders is insufficient for jurisdictional purposes. However, soldiers may establish domicile after 90 days. Viernes v. Dist. Ct., 509 P.2d 306 (Colo. 1973).

CONNECTICUT

STATUTES:

- I. Marriage - CONN. GEN. STAT. ANN. §§ 46b-21 to 46b-37 (1986 & Supp. 1990).
- II. Dissolution of Marriage, Legal Separation and Annulment - CONN. GEN. STAT. ANN. §§ 46b-40 to 46b-87 (1986 & Supp. 1992).

PROCEDURAL REQUIREMENTS FOR DISSOLUTION OF MARRIAGE: Military Provision - A person in the armed forces who was a resident of this state at the time of entry is deemed to have continuously resided in this state during the time served in the armed forces. § 46b-44(d).

DELAWARE

STATUTES:

- I. Marriage - DEL. CODE ANN. tit. 13, §§ 101 to 151 (1993 & Supp. 1994).
- II. Divorce and Annulment - DEL. CODE ANN. tit. 13, §§ 1501 to 1523 (1993 & Supp. 1994).
- III. Desertion and Support - DEL. CODE ANN. tit. 13 §§ 501-524 (1993 & Supp. 1994).
- IV. Child Protection from Domestic Violence - DEL. CODE ANN. tit. 13 §§ 701A to 711A (Supp. 1994)

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed forces who has been stationed 6 months next preceding commencement of action satisfies jurisdictional requirement. Title 13, § 1504.

DISTRICT OF COLUMBIA

STATUTES:

- I. Marriage - D.C. CODE ANN. §§ 30-101 to 30-121 (1993 & Supp. 1994).
- II. Divorce - D.C. CODE ANN. §§ 16-901 to 16-923 (1989 & Supp. 1994).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Member of armed forces qualifies as resident upon residing in District for 6 months prior to commencement of action. § 16-902.

FLORIDA

STATUTES:

- I. Marriage - FLA. STAT. ANN. §§ 741.01 to 741.30 (1986 & Supp. 1995).
- II. Divorce - FLA. STAT. ANN. §§ 61.001 to 61.20 (1985 & Sup. 1995).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Absence from the state solely because of military duty, after residency established, is of no consequence. Any person in any branch of the Armed Forces of the U.S., and their spouse, if living within state, shall be prima facie resident for maintaining any action. § 47.081.

GEORGIA

STATUTES:

- I. Marriage - GA. CODE ANN. §§ 19-3-1 to 19-3-68 (1991 & Supp. 1994).
- II. Divorce - GA. CODE ANN. §§ 19-5-1 to 19-5-17 (1991 & Supp. 1994).
- III. Annulment - GA. CODE ANN. §§ 19-4-1 to 19-4-5 (1991 & Supp. 1994).

PROCEDURAL REQUIREMENTS FOR DIVORCE:

Military Provision - A person who has been a resident of a military reservation in Georgia for 1 year may bring an action for divorce in a county adjacent to that reservation. § 19-5-2.

GUAM

STATUTES:

In 1994, Guam combined many previously widely dispersed laws into Title 19, Personal Relations. This title is current through Pub. L. No. 23-36. In 1990, Guam adopted amendments to conform its rules of civil procedure with the 1987 amendments to the Federal Rules of Civil Procedures.

- I. Marriage - Personal Relations, Ch. 3, §§ 3101 to 3212 (1994).
- II. Divorce - Personal Relations, Ch. 8, §§ 8201 to 8218 (1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Persons between ages of 16 and 18 require written parental consent. Females between ages 14 and 16 must obtain consent of parents and a judicial order. § 3102.

(2) Medical Examination - None required.

(3) License Fee - Fifteen dollars (\$15) for application of marriage license. § 3202.

(4) Waiting Period - License may be issued upon expiration of 5 days after filing of application and is valid for 60 days. § 3202.

(5) Solemnization - Any clergyman, the Governor of Guam or his substitute, or judges of district court or superior court, or Director of Revenue and Taxation or Director of Administration may perform marriage. § 3204.

ALTERNATIVE MARRIAGE FORMS:

- (1) Common Law Marriage - Not recognized.
- (2) Marriage by Proxy - Not recognized.
- (3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants of every degree, brothers and sisters (including half brothers and sisters), uncles and nieces, aunts and nephews, and bigamous marriages. §§ 3104, 3105.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUND FOR ANNULMENT: Party to incestuous or void marriage may have marriage declared void in Superior Court; other grounds include non-age, mental incompetence, previous marriage which is still in force, consent obtained by fraud or force, impotence at time of marriage. §§ 3301, 8101.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must have been a resident in Guam for 90 days preceding commencement of action. § 8318. Physical presence in Guam for 90 days preceding commencement of the action gives rise to a conclusive presumption of required residence. § 8319.

(2) Military Provision - A person assigned with the U.S. military to a unit based on Guam or a ship home ported in Guam for at least 90 days satisfies jurisdictional requirements. Note: McAllister v. McAllister, Dom. Case No. 1263-87 Superior Court (1988) held that §§ 8318-8319 were contrary to the Organic Act of Guam because they were not laws of "Local Application." Rather, they encouraged persons not residents of Guam to seek divorces there.

(3) Service of Process - Nonresident defendant may be served by publication upon showing that defendant resides outside state. Mailing of notice must accompany publication when address known. Guam Civ. Proc. Rule 4.

(4) Answer - The time specified in the summons or such further time as may have been granted. Guam Civ. Proc. Rule 12.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction of felony. § 8203. NOTE: Desertion, neglect or intemperance must continue for 1 year. § 8218.

(2) Defenses - Connivance, collusion, condonation, recrimination, limitation and lapse of time. § 8301.

(3) Period of Separation - See Grounds, supra.

SEPARATION:

(1) Acknowledged Legal Status - A husband and wife may agree in writing to an immediate separation and to make provision for the support of either of them or of their children. § 6105. The mutual consent of the parties is sufficient consideration. § 6106.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: Judgment final 1 year from entry of interlocutory judgment. Thereafter parties free to remarry. §§ 3105, and 8321, 8322.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) When an action for dissolution of marriage is pending, the court, in its discretion, may require the husband or wife to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, or prosecute or defend the action. § 8402.

(2) In actions for dissolution of marriage the court may, during the pendency of the action, at the final hearing, or at any time thereafter during the minority of any of the children of the marriage, make such order for the care, education, maintenance, and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. § 8403.

PROPERTY DISTRIBUTION:

(1) Method - Community property. §§ 8411 and 6110.

(2) Support Awarded - Court may grant support during pendency of action in order to enable spouse to prosecute or defend action. § 8402.

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Only 1954 Act adopted. Guam Civ. Proc. Code §§ 1500 to 1531.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Custody should be awarded to either parent according to the best interest of the child. § 8404.

(2) Judicial Approach - Best interests of child control. Court, on its own motion, may hear evidence concerning child custody issues. § 8404.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights to any interested person when in best interests of child. § 8404.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Not adopted.

CRIMINALIZATION OF CHILD SNATCHING: Title 9, Crimes and Corrections, § 22.40 (1990).

ADOPTIONS: §§ 4201-4221.

GARNISHMENT AND WAGE ASSIGNMENTS: §§ 20401 et seq.

ALIMONY AND CHILD SUPPORT:

(1) When an action for dissolution of marriage is pending, the court, in its discretion, may require the husband or wife to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, or prosecute or defend the action. § 8402.

(2) In actions for dissolution of marriage the court may, during the pendency of the action, at the final hearing, or at any time thereafter during the minority of any of the children of the marriage, make such order for the care, education, maintenance, and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. § 8403.

HAWAII

STATUTES:

- | | | | |
|-----|----------|---|---|
| I. | Marriage | - | HAW. REV. STAT. §§ 572-1 to 572-29 (1993 & Supp. 1994). |
| II. | Divorce | - | HAW. REV. STAT. §§ 580-1 to 580-75 (1993 & Supp. 1994). |

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Person residing on any military base within the state shall not be prohibited from meeting residency requirement. § 580-1.

IDAHO

STATUTES:

- I. Marriage - IDAHO CODE §§ 32-201 to 32-209 (1983 & Supp. 1992).
- II. Annulment - IDAHO CODE § 32-204 (1983).
- III. Divorce - IDAHO CODE §§ 32-601 to 32-616 (1983).
- IV. Community Property - IDAHO CODE §§ 32-712, 713 (1949).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military application - A member of armed forces who has lived in the state for more than six weeks prior to filing the divorce action satisfies this residency requirement, even though he was subject to transfer during that time. See Bezold v. Bezold, 95 Idaho 131, 504 P.2d 404 (1972).

ILLINOIS

STATUTES:

Illinois Marriage and Dissolution of Marriage Act--Illinois Compiled Statutes, 750 ILCS 5/101 to 5/802 (1994 & Supp. 1995).

- I. Marriage--750 ILCS 5/201 to 5/306 (1994 & Supp. 1995).
- II. Dissolution and Legal Separation--750 ILCS 5/401 to 5/413 (1994 & Supp. 1995).
- III. Property, Support, and Attorney Fees--750 ILCS 5/501 to 5/516 (1994 & Supp. 1995).

PROCEDURAL REQUIREMENTS FOR DISSOLUTION: Military Provision - Member of armed forces stationed in state for 90 days next preceding commencement of action also satisfies jurisdictional requirement. 5/401.

INDIANA

STATUTES:

- I. Marriage - IND. CODE ANN. §§ 31-7-1-1 to 31-7-11-7 (1987 & Supp. 1994).
- II. Divorce - IND. CODE ANN. §§ 31-1-11.5-1 to 31-1-11.5-28 (1987 & Supp. 1994).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A party may reside on a military installation within the state for six months next preceding commencement of the action to satisfy the residency requirement. § 31-1-11.5-6.

KANSAS

STATUTES:

- I. Marriage - KAN. STAT. ANN. §§ 23-101 to 23-132 (1988 & Supp. 1994).
- II. Divorce - KAN. STAT. ANN. §§ 60-1601 to 60-1618 (1994).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed forces stationed within state for 60 days satisfies jurisdictional requirement and may file a petition for divorce in any county adjacent to their duty station. § 60-1603(b).

KENTUCKY

STATUTES:

- I. Marriage - KY. REV. STAT. ANN. §§ 402.010 to 402.270 (1984 & Supp. 1994).
- II. Divorce - KY. REV. STAT. ANN. §§ 403.010 to 403.630 (1984 & Supp. 1994).
- III. Domestic Violence and Abuse - KY. REV. STAT. ANN. §§ 403.710 to 403.785 (1984 & Supp. 1994).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed forces stationed in state for 180 days next preceding filing of petition also satisfies jurisdictional requirement. § 403.140(1)(a).

LOUISIANA

STATUTES:

- I. Marriage - LA. CIV. CODE ANN. arts. 86 to 100 (1952 & Supp. 1993).
- II. Marriage (General Principals) - LA. REV. STAT. ANN. §§ 9:201-245 and LA. REV. STAT. § 40:40 (1993 & Supp. 1995).
- III. Dissolution of Marriage - LA. CIV. CODE ANN. arts. 101 to 161 (1952 & Supp. 1993).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - For status jurisdiction see LA. CODE CIV. PROC. art. 10. See also LA. CIV. CODE art. 40.1. A person not domiciled elsewhere in this state who is serving in the armed forces of the U.S. and has been stationed in this state for at least six (6) months and has resided in the parish where action has been filed, for at least 90 days preceding filing of such action, is considered to be a domiciliary of the state. LA. CIV. CODE art. 40.1.

MAINE

STATUTES:

- I. Marriage - ME. REV. STAT. ANN. tit. 19, §§ 1 to 122 (1964 & Supp. 1994).
- II. Divorce - ME. REV. STAT. ANN. tit. 19, §§ 661-752 (1964 & Supp. 1994).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of the armed forces and spouse stationed for 6 months prior to commencement of action satisfies jurisdictional requirements. § 691(2)(D).

MINNESOTA

STATUTES:

- I. Marriage - MINN. STAT. ANN. §§ 517.01 to 517.21 (1990 & Supp. 1995).
- II. Marriage Dissolution - MINN. STAT. ANN. §§ 518.002 to 518.68 (1990 & Supp. 1995).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed force stationed in this state for 180 days immediately preceding commencement of action satisfies jurisdictional requirement. § 518.07.

MISSISSIPPI

STATUTES:

- I. Marriage - MISS. CODE ANN. §§ 93-1-1 to 93-1-25 (1972 & Supp. 1992).
- II. Divorce - MISS. CODE ANN. §§ 93-5-1 to 93-5-33 (1972 & Supp. 1992).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed forces stationed in state for 6 months and residing within the state with his spouse satisfies jurisdictional requirement, provided that member and spouse were residing in Mississippi at time of separation. § 93-5-5.

MISSOURI

STATUTES:

- I. Marriage - MO. REV. STAT. §§ 451.010 to 451 (1986 & Supp. 1995).
- II. Divorce - MO. REV. STAT. §§ 452.075 to 452.420 (1986 & Supp. 1995).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of the armed forces who has been stationed in this state for 90 days next preceding commencement of action (30 days must have elapsed since the filing of the petition) satisfies jurisdictional requirement. § 452.305(1).

MONTANA

Unless specifically stated otherwise, all citations are to the Montana Code Annotated (MCA).

STATUTES:

- I. Marriage - MONT. CODE ANN. §§ 40-1-101 to 40-1-404 (1991).
- II. Dissolution (Divorce) - §§ 40-4-101 to 40-4-225 (1991).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Member of armed forces who has been stationed in state for 90 days preceding the making of findings meets requirement, without inquiry into domicile. § 40-4-104(1).

NEBRASKA

STATUTES:

- I. Marriage - NEB. REV. STAT. §§ 42-101 to 42-121 (1993).
- II. Divorce - NEB. REV. STAT. §§ 42-341 to 42-381 (1993).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of the armed forces stationed within state for 1 year next preceding commencement of action satisfies jurisdictional requirement. Also, if the marriage was solemnized in this state and parties have resided in state from marriage until filing of the petition. § 42-349.

NEW MEXICO

Unless otherwise indicated, citations are to chapters, articles and sections of New Mexico Statutes Annotated, 1978. *Cf.* Uniform Interstate Family Support Act, §§ 40-6A-101 to 40-6A-903 NMSA 1978 (1994 Repl.)(effective 1 July 95); *see also* New Mexico Supreme Court Rules Annotated 1986 (SCRA. 1986).

STATUTES:

1. Marriage - §§ 40-1-1 to 40-1-20.
2. Divorce - §§ 40-4-1 to 40-4-20.

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Anyone who resided in New Mexico for six months before his or his spouse's entry into the armed forces is deemed a domicile of the state, so long as he has a present intention to return and reside in the state. A member of the armed forces continuously stationed in New Mexico for six months also satisfies the jurisdictional requirement of domicile. § 40-4-5(C and D).

NORTH CAROLINA

STATUTES:

- I. Marriage - N.C. GEN. STAT. §§ 51-1 to 51-21.
 - II. Divorce, Custody, Alimony, and Child Support - N.C. GEN. STAT. §§ 50-2 to 50-21.
- See also §§ 50-30 to 50-39.

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed forces who has been stationed in state for 6 months next preceding filing of complaint satisfies jurisdictional requirement. § 50-18. Court may order plaintiff to pay travel expenses of defendant from home to court site to defend in action.

NORTH DAKOTA

STATUTES:

- I. Marriage - N.D. CENT. CODE §§ 14-03-01 to 14-03-28 (1991 & Supp. 1993).
- II. Divorce - N.D. CENT. CODE §§ 14-05-01 to 14-05-26 (1981 & Supp. 1993).
- III. Uniform Premarital Agreement Act - N.D. CENT. CODE §§ 14-03.1-01 to 14-03.1-09 (1981 & Supp. 1993).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed forces or his spouse who has been stationed in state for 6 months next preceding commencement of

action satisfies jurisdictional requirement. §§ 14-03-01.1 and 14-05.17.

OKLAHOMA

STATUTES:

- I. Marriage - OKLA. STAT. ANN. tit. 43, §§ 1 to 37 (1990 & Supp. 1996).
- II. Divorce - OKLA. STAT. ANN. tit. 43, §§ 101 to 137 (1990 & Supp. 1996).
- III. Civil Procedure - OKLA. STAT. ANN. tit. 12, §§ 1151 to 1284 (1988 & Supp. 1996).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed forces stationed in state for 6 months next preceding filing of petition satisfies jurisdictional requirement. Tit. 43, § 102.

RHODE ISLAND

STATUTES:

- I. Marriage - R.I. GEN. LAWS §§ 15-1-1 to 15-4-1 (1988 through 1995 Cum. Supp.).
- II. Divorce - R.I. GEN. LAWS §§ 15-5-1 to 15-5-29 (1988 through 1995 Cum. Supp.).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Residency and domicile of person immediately prior to commencement of service in armed forces or immediately prior to his absence from state in connection with performance of duty remains his residency and domicile for purposes of this section until 30 days after termination of service. § 15-5-12.

SOUTH CAROLINA

STATUTES:

- I. Marriage - S.C. CODE §§ 20-1-10 to 20-1-380 (1976 & Supp. 1995).
- II. Divorce - S.C. CODE §§ 20-3-10 to 20-3-230 (1976 & Supp. 1995).

PROCEDURAL REQUIREMENTS FOR DIVORCE:

- (1) Jurisdiction (Residency) - Either party must have resided in state at least 1 year prior

to commencement of action. Caveat: When both parties are residents of state, plaintiff need only have resided in state 3 months prior to commencement of action. § 20-3-30. Physical presence for the appropriate amount of time as a result of military service will satisfy the residency requirement.

- (2) Military Provision - § 20-3-100 Attempt at Reconciliation when one party is in armed forces overseas. When either of the parties is a member of the armed forces and is serving outside the continental limits of the United States, an affidavit by such party, taken before any officer of the armed forces authorized to administer an oath, to the effect that . . . a reconciliation is impossible, shall be accepted by the court that an unsuccessful attempt to reconcile the parties has been made.

SOUTH DAKOTA

STATUTES:

- | | | | |
|-----|----------|---|---|
| I. | Marriage | - | S.D. CODIFIED LAWS ANN. §§ 25-1-1 to 25-1-40 (1992 & 1995 Supp.). |
| II. | Divorce | - | S.D. CODIFIED LAWS ANN. §§ 25-4-1 to 25-4-55 (1992). |

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Plaintiff who is stationed in state at time action is commenced and who is still within state at time of decree satisfies jurisdictional requirements. § 25-4-30.

TENNESSEE

STATUTES:

- | | | | |
|-----|----------|---|---|
| I. | Marriage | - | TENN. CODE ANN. §§ 36-3-101 to 36-3-308 (1994 Supp.). |
| II. | Divorce | - | TENN. CODE ANN. §§ 36-4-101 to 36-4-128 (1994 Supp.). |

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of armed forces or spouse who has been living in state for 1 year presumed to be domiciliary of this state for purposes of this Chapter. § 36-4-104. In addition, any person who is in the United States Military Full Time, or is called from the Reserves to active duty and maintains a domicile in Tennessee may also file for divorce in Tennessee in the county in which he was domiciled before entering the service.

TEXAS

STATUTES:

I. Marriage - TEX. FAM. CODE Ch. 1 and 2.2.2.

II. Divorce - TEX. FAM. CODE Ch. 3.

MARRIAGE REQUIREMENTS: The marriage ceremony may not take place during a 72-hour period immediately following the issuance of the marriage license unless an applicant is a member of the U.S. Armed Forces on active duty or obtains a court order waiving the waiting period. TEX. FAM. CODE ANN. § 1.82. If the marriage is not conducted within 30 days after issuance of the license, the license becomes invalid. TEX. FAM. CODE ANN. § 1.81.

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Time spent by a Texas domiciliary in the Armed Forces of the United States outside the state and his or her county of residence is considered to be residence in the state and county for purposes of divorce jurisdiction. A person serving in the Armed Forces of the United States, who has been stationed in Texas for at least the last six (6) months, and in the county for the last 90 days, is considered to be a domiciliary of the state and a resident of the county for divorce purposes (even though such person was not previously a Texas resident). TEX. FAM. CODE ANN. § 3.21-.24.

UTAH

STATUTES:

I. Marriage - UTAH CODE ANN. §§ 30-1-1 to 30-1-39 (1989 & Supp. 1993).

II. Divorce - UTAH CODE ANN. §§ 30-3-1 to 30-3-18 (1989 & Supp. 1993).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of the armed forces may bring an action in divorce when he or she has been stationed in this state for 3 months prior to the commencement of the action. § 30-3-1.

VERMONT

STATUTES:

I. Marriage - VT. STAT. ANN. tit. 15, §§ 1 to 7 (1989 & Supp. 1995), tit. 18, §§ 5131 to 5149

- II. Divorce - VT. STAT. ANN. tit. 15, §§ 511 to 758 (1989 & Supp. 1995).

MARRIAGE REQUIREMENTS: Waiting Period - License may be issued upon expiration of 3 days after date of application. NOTE: This requirement does not apply to persons enlisted in the armed forces; they may have the 3 day requirement waived. Tit. 18, § 5145.

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Temporary absence from state due to military service does not affect the 6 months or 1 year period above, provided the persons has otherwise retained his residence in this state. Tit. 15, § 592.

VIRGIN ISLANDS

STATUTES:

- I. Marriage - V.I. CODE ANN. tit. 16, §§ 1 to 86 (1964 through 1994 Cum. Supp.).
II. Divorce - V.I. CODE ANN. tit. 16, §§ 101 to 111 (1964 through 1994 Cum. Supp.).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Any person in the armed forces and who is a resident of the Virgin Islands at time of entry into the service shall be deemed to have continuously resided in the Virgin Islands. 16 § 106(b).

VIRGINIA

STATUTES:

- I. Marriage - VA. CODE ANN. §§ 20-1 to 20-49 (1983 & 1994 Cum. Supp.).
II. Divorce - VA. CODE ANN. §§ 20-61 to 20-146 (1983 & 1994 Cum. Supp.).
III. Custody & Support of Children - VA. CODE ANN. §§ 20-103, 20-107.2, 20-108.1, and 20-108.2 (1994 Cum. Supp.).
IV. Alimony - VA. CODE ANN. §§ 20-103, 20-107.1 (1983 & 1994 Cum. Supp.).
V. Property Division - VA. CODE ANN. § 20-107.3 (1994 Cum. Supp.).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - Servicemember will be deemed to be a domiciliary if resided in Virginia with spouse for 6 months next preceding separation and either spouse lives in Virginia at time of filing. Will be deemed to be an actual bona fide resident if stationed or residing at a ship with a home port in Virginia, or at a military base in Virginia. Any member of the armed forces of the U.S. who (i) at the time the suit is commenced is stationed in any territory or foreign country and (ii) was domiciled in the commonwealth for the six-month period immediately preceding his being stationed in such territory or country, shall be

deemed to have been domiciled in and to have been a bona fide resident of the commonwealth during the six months preceding commencement of a suit for annulment or divorce. § 20-97.

WASHINGTON

STATUTES:

- I. Marriage - WASH. REV. CODE §§ 26.04.010 to 26.04.250 (1986 through 1995 Cum. Pocket Part).
- II. Divorce - WASH. REV. CODE §§ 26.09.002 to 26.09.913 (1986 through 1995 Cum. Pocket Part).

PROCEDURAL REQUIREMENTS FOR DIVORCE: Military Provision - A member of the armed forces stationed in the state may petition court for decree of dissolution. § 26.09.030.

AMERICAN SAMOA

STATUTES:

- I. Marriage - 42 AM. SAMOA CODE ANN. §§ 42.0101 to 42.0108 (1981 & Supp. 1988).
- II. Divorce and Annulment - 42 AM. SAMOA CODE ANN. §§ 42.0201 to 42.0211 (1981 & Supp. 1988).

NOTE - Information on American Samoan laws, statutes, etc., may be obtained from Bock Publishing Company, 2518 Western Avenue, Seattle, WA 98121, the current American Samoa Code Annotated codifier, indexer, and publisher. Before 1981, the American Samoan Code was published by Equity Publishing Corporation, Orford, New Hampshire. Equity Publishing used a different code system. The citations used by Equity which correspond to those now used by Bock Publishing are: tit. 17, § 1-8 (Marriage) and tit. 17, §§ 401-408 (Divorce and Annulment).

MARRIAGE REQUIREMENTS:

- (1) Age - Male must be at least 18 and the female at least 14. If female is less than 18, parental consent is required. § 42.0101.
- (2) Neither of the parties may have a lawful spouse living. § 42.0101.
- (3) Medical Examination - None required.
- (4) License Fee - \$10.00 for application and issuance of license. § 42.0103 and § 42.0107(a). Clergymen may not charge more than \$10 to perform ceremony. § 42-0107(b).

(5) Waiting Period - 30 days after license issued, but marriage must take place within 90 days after license issued.

(6) Solemnization - Minister of Christian religion who has registered a letter of identity with the Registrar of Vital Statistics. (Marriage performed by an unregistered minister is valid, but minister is subject to a fine.) § 42-0102(a); marriages performed by an Associate Judge or the Associate Justice or Chief Justice, American Samoa.

ALTERNATIVE MARRIAGE FORMS:

- (1) Common Law Marriage - No statutory provision.
- (2) Marriage by Proxy - No statutory provision.
- (3) Marriage by Contract - No statutory provision.

PROHIBITED MARRIAGES: Marriages between those related nearer than the fourth degree of consanguinity; marriages between parties having a lawful spouse living. § 42.0101. Also, under Samoan custom, women do not marry men from their families. Families may include persons who are not related by blood. Lolo v. Heirs of Sekio, (H.C.T.D. 1964) 4 A.S.R. 477.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUND FOR ANNULMENT: Any marriage illegally contracted may be annulled (non-age, prohibited degrees of relationship). § 42.0203.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Either petitioner or respondent must have been a bona fide and continuous resident of American Samoa for 1 year next proceeding commencement of the action. § 42.0206(1).

(2) Application by petition to court stating ground in either § 42.0202 or § 42.0203.

(3) Military Provision - None.

(4) Service of Process - Divorce statute specifies only "as required by law." § 42.0204(b). § 43.0501(4), Civil Remedies and Procedures, permits service by publication in a divorce or annulment action, or in a modification to such an action, where the defendant is a nonresident of Samoa or his residence is unknown. Such notice must be published once each month for 2 consecutive months, posted in front of the courthouse in the village of Fagatoga for the same period and mailed to the defendant by registered U.S. mail at his last known address.

Publication is not necessary when service is personal. § 43.0504. Otherwise, § 43.0201 requires compliance as nearly as possible with the Federal Rules of Civil Procedures, which would include F.R.C.P. 4.

(5) Answer - Within 2 months and 10 days from date of first publication. § 43.0502(3).

(6) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds:

- (a) Adultery;
- (b) habitual cruelty or ill usage;
- (c) desertion for 6 months or more;
- (d) sentence to imprisonment for a term of 10 or more years or for life;
- (e) voluntary continuous separation for a period of 5 years or more. § 42.0202.

(2) Defenses:

- (a) Connivance or collusion in procurement of divorce. § 42.0205; § 42.0206(3) and (4).
- (b) That the petitioner is guilty of any of the grounds for divorce. § 42.0206(5).
- (c) Condonation. § 42.0206(6).

However, if the ground sued for is voluntary separation for 5 years or more, the defenses above are not available. § 42.0206(b).

(3) Period of Separation: No statutory provision.

SEPARATION:

(1) Acknowledged Legal Status - Status of legal separation without absolute divorce is recognized. §§ 42.0204(a) and 42.0208.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision; no case law found.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provision.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Alimony. "When the divorce, separation, or annulment is granted, the court may make an order for the maintenance of either party it deems proper and just under the circumstances." § 42.0209.

(2) Child Support. The court may make any order it deems just and property for the maintenance and support of the minor children. § 42.0210.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution ("[T]he court may make a division of, or order with respect to, the property of either or both of the parties as it deems fair and proper . . ."). § 42.0210.

(2) Fees awarded - No statutory provision.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 42.0401 to 42.0454.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory method: "[T]he court may make . . . an order for the custody (and) care . . . of the minor parties . . ." as it deems fair and proper. § 42.0210.

(2) Judicial approach: See above.

GRANDPARENTS VISITATION RIGHTS: No statutory provision.

UNIFORM CHILD CUSTODY JURISDICTION ACT: No statutory provision.

CRIMINALIZATION OF CHILD SNATCHING: A person commits the crime of interference with custody, if, knowing that he has no legal right to do so, takes or entices from lawful custody any person entrusted by order of a court to the custody of another person or institution. Interference with custody is a Class A misdemeanor (§ 46.3535(a)), unless the person taken or enticed away from legal custody is removed from the territory, then it is a Class D felony (§ 46.3535(b)).

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: No statutory provisions found.

ADOPTION: American Samoan adoption laws were substantially revised in 1980 and are based largely on provisions of the Colorado Revised Statutes. See Research Guide note, AM. SAMOA CODE ANN., § 45, Chapter 04, Juvenile Justice, at 45-26. Adoption law is codified at §§ 45.0401 to 45.0431. See also, C.R.S. 19-4-101 to 19-4-116 (1973).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: Attachment - AM. SAMOA CODE ANN. §§ 43.0901 to 43.0920 (Book Pub. Co.).
Garnishment - AM. SAMOA CODE ANN. §§ 13.1801 to 43.1815 (Book Pub. Co.).

NOTE -

- (1) Property of a defendant in the possession of another, or debts due him, may be garnished. § 43.1801.
- (2) No provision found for wage assignments.

PROCEDURES:

- (1) Effected by serving a written notice on the garnishee forbidding him to pay any debt owing to the principle defendant. § 43.1802(b).
- (2) Garnishee is to appear and answer on the second Tuesday following the date of service of notice. § 43.1802(b).
- (3) The U.S. may be garnished for enforcement of alimony and child support obligations of federal employees, including members of the armed forces, but the American Samoan government or any other public bodies and agencies may not be garnished without prior approval of the Governor. § 43.1803.
- (4) Three statutory interrogatories are specified and the court may permit any others that the court thinks proper. § 43.1805.
- (5) Garnishee may exonerate himself at any time after answer, by paying over to the clerk of the court any amount owing by him to the defendant. § 43.1809.
- (6) Judgment against garnishee may not be taken until the principal defendant has had 7 days written notice of the garnishment proceedings. A return by the marshal of notice is required. § 43.1812.

TERRITORIAL EXEMPTIONS:

- (1) No territorial wage, personal or real property exemptions are found within either the Garnishment or Attachments chapters.
- (2) The Executions chapter contains only one: Real property of Samoans is not subject to execution, unless it is a judgment foreclosing on a valid mortgage. § 43.1528.
- (3) The federal wage exemptions of 16 U.S.C. § 1673 apparently apply.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

- (1) See PROCEDURES, generally.
- (2) The garnishee is liable to the plaintiff on any judgment to the full amount of the

indebtedness of defendant held by the garnishee, unless before judgment the garnishee has delivered it to the clerk of court. § 43.1811.

(3) If the debt of the garnishee to the defendant is not due, execution is suspended until it's maturity. § 43.1814.

ALIMONY AND CHILD SUPPORT:

(1) Alimony and child support obligations are expressly considered garnishable debts. See PROCEDURES, para. (3).

(2) American Samoa also recognizes the offense of criminal nonsupport for knowingly failing to provide support, without good cause, for a child under age 18 (legitimate or illegitimate). It is misdemeanor if the accused has not left the territory, otherwise, a Class D felony.

APPENDIX A

SEPARATION AGREEMENT CHECKLIST

Edward I. Stein, a Chicago, Ill., family law practitioner, argues that separation agreements are a critical and indispensable part of most marriage dissolutions. Given increased court workloads, he notes that separation agreements provide courts with a roadmap to delineate the respective rights and obligations of the parties. Following is an edited version of a checklist he developed for his private practice, which has been expanded to incorporate questions which should also be considered by military attorneys.

A. Custody of Children.

1. Which parent is to have custody of the children?
2. Will it be joint custody?
3. If joint custody, will it be joint legal custody or joint physical custody?
4. Will there be limitations on the non-custodial parent in making decisions governing:
 - (a) Education (choice of schools, etc.).
 - (b) Health (choice of doctors, dentists, surgeons).
 - (c) Summer Plans (camps, trips).
 - (d) General welfare?
5. In the event of a dispute, is there to be arbitration or court decision.
6. If not, which parent has the final say?

B. Removal of Children.

1. May the children be permanently moved to another jurisdiction?
2. Must the custodial parent first obtain leave of court before moving the child?
3. Is there to be any notice to the non-custodial parent?

4. What will be the form and time of the notice?
5. How are visitation provisions to be adjusted?
6. Are the parties to share in the transportation expense of children incident to long distance visitation?
7. What will be the frequency of the telephone contact with the children?

C. General Concerns.

1. Is there to be any notice to the non-custodial parent in the event a child becomes seriously ill or injured?
2. Will the non-custodial parent be entitled to receive all information from the treating physician which is available to the custodial parent?
3. Will the non-custodial parent be authorized to pick the children up from school on non-visitation days?

D. Visitation With Children.

1. When and under what circumstances is visitation to be conducted.
2. With whom are the children to spend their winter, spring and summer vacations?
3. With whom are the children to spend other school vacations, holidays and birthdays?
4. Who pays for the transportation expenses associated with these vacations?
5. Are the visitation and vacation provisions to be changed when the children reach a certain age? In what respect?
6. Are trips and vacations to be limited in length of time or geographic location?
7. Are the children to be given any of their personal clothing and effects to take along during visitation?

8. Is there to be any notice of intent to exercise visitation rights by the non-custodial parent? What will be the form and time of the notice?

9. Is the custodial parent to have a veto power over visitation if timely notice is not given.

E. Support of Children and Related Matters.

1. What provision is to be made for the support of each child?

2. How often and on what dates are the support payments to be made?

3. Are support payments to abate in whole or in part when the children are visiting with the non-custodial parent? When living away at school? At summer camp?

4. Are child support provisions to be designated as such in the separation agreement or are they to be unallocated and lumped together with the support allowance for the wife? Tax consequences?

5. Is there a specific amount from the total to be allocated to each child?

6. Who claims which of the children as dependents for income tax purposes? Under what terms and conditions?

7. Are the payments to continue in whole or in part when the children become emancipated? Under what terms and conditions? What is defined as the emancipation event?

8. Can the custodial spouse obtain income from employment or some other source without it affecting the amount of child support she is to receive? If so, is there to be any limitation?

9. Is the custodial spouse to receive any supplemental support for such expenses as summer camp? Religious training? Music lessons? Other special expenses?

10. Does the local jurisdiction have child support guidelines? Do the parties have the authority to deviate from the guidelines or are they mandatory?

11. Will the military parent be required to initiate an allotment for the support of the children?

F. Medical, Dental, Optical and Related Expenses of Children.

1. Who pays for the ordinary medical, dental, optical and related expenses for the children?
2. Who pays for the extraordinary medical, dental, optical and related expenses of the children? Which hospital, optical, orthodontial, dental, medical, surgical, counseling or psychiatric expenses should be classified as extraordinary? Family counseling expenses?
3. Is there any notice to be given to the non-custodial parent before extraordinary medical, dental or optical expenses are incurred?
4. Who chooses the doctor, dentist or other specialist?
5. Will the non-custodial parent be authorized access to medical, dental or other records?
6. Is a major medical or other type of insurance such as Blue Cross/Blue Shield to be maintained? At whose expense? What is the minimum extent of coverage to be given?
7. Are any medical, dental, optical or related payments to be continued by the non-custodial parent beyond the time a child reaches majority? During the time a child attends trade school, college or professional school?

Military Considerations

8. If any children are more than 10 years old, do they have identification cards?
9. If the custodial non-military spouse fails to use available military medical facilities in a non-emergency, will the non-custodial military spouse be relieved of the responsibility for such expenses?
10. What type of military medical coverage will be required, TRICARE Standard, TRICARE , or TRICARE Prime?
11. Who will be responsible for paying the TRICARE Standard annual deductible?
12. Who will be responsible for paying any amount that TRICARE fails to pay for either out-patient or in-patient care?
13. Who will file the TRICARE forms? To whom will the TRICARE reimbursement checks be sent?

G. Education of Children and Related Expenses.

1. Who pays the trade school or college tuition fees for the children? Graduate school? Professional school? Other special school?
2. Who decides what school the children are to attend? Location of the school? Accreditation of the school?
3. What scholastic requirements must the children maintain?
4. Is there a time limit in which the trade school or college education must be attained? Graduate school? Professional school?
5. Who pays for room, board, fraternity or sorority, money allowance, and other expenses incident to the children's education?
6. Who pays for travel expenses to and from school? Is there any limit to the number of trips per school year?
7. Must children apply for loans, scholarships or school employment?
8. Must children carry a full academic program? Are grade records to be made available to the non-custodial parent?
9. Is there an effect on allowances if children have income from employment?
10. May college expenses be paid directly to the children or must they be paid through the custodial spouse?

H. Allowance and Support For Wife.

1. What provision is to be made for the wife's allowance and support?
2. Is there to be a lump sum settlement or periodic payments?
3. If a lump sum settlement, is it to be paid in installments?
4. If periodic payments, are they fixed in amount or subject to fluctuation? Depending upon what factors?
5. How often are the support payments to be made? What dates?

6. Can the wife obtain income from employment or some other source without affecting the amount of her support allowance? If so, is there to be any limitation on the amount she can earn?

7. When does the allowance terminate?

8. How are the wife's social security rights to be handled? Does she get any benefits?

9. Tax consequences of payments and receipts.

10. Security provision for allowances in the event husband fails to pay?

I. Details of Insurance.

1. What life insurance is there on the husband's life? On the wife's? Who owns each policy?

2. Is there any loan on the insurance? If so, how and when will the loan be repaid? Will the husband have the right to borrow on the policies in the future?

3. What is the approximate total amount of obligations the husband will be required to pay to the wife and children pursuant to the terms and provisions of the separation agreement? Over what length of time? What is the present value of those payments? Is there enough life insurance to equal the present value of those payments?

4. Is the husband to bind himself to keep the insurance in force for the benefit of the wife and children? In what amounts and for how long?

5. Is the husband to assign all his rights in the insurance to the wife? Can any of the insurance be released to the husband? How much? When?

6. Are the policies to be deposited with the wife? Is the wife to be sent duplicate premium notices and receipts?

7. If there is no existing insurance, is the husband to obtain some?

8. Must the husband submit to a medical examination or otherwise cooperate with the wife to allow her to purchase more insurance on his life?

9. Are there any annuities or proceeds of insurance on deposit with any companies? What disposition is to be made of them?

10. Tax consequences related to premium payments and ownership of policies?

11. Must the husband maintain any other insurance with regard to himself such as major medical or income protection?

12. Is an insurance trust to be created? What provisions should the trust contained?

Military Considerations

13. Will the husband be required to name the wife as beneficiary of the Serviceman's Group Life Insurance? Will he be required to provide her with a copy of the beneficiary designation form?

14. Does the SGLI beneficiary designation form contain the words "by law" or is the wife specifically designated as beneficiary? Effect of divorce?

15. If the husband is eligible to participate in the Survivor Benefit Plan, will the wife be designated as the beneficiary? Effect of divorce?

J. Property Settlement Matters.

1. Which property is marital property? (Community property or property subject to equitable distribution). Non-marital property (separate property).

2. Do the parties own a home? How is title held? Are there any other parcels of real property? Title status? Are there any mortgages, liens or encumbrances thereon? Who will assume which obligations? Have taxes been paid? Who is to get these properties? What tax consequences will result from any transfer of interest in real estate to be sold? For what price? When? Will an appraiser be required? Who will be the appraiser? Who will pay for the cost of the appraisal?

3. Are the parties living in an apartment? Is there a lease? In whose name? When does it expire? Who is to continue to occupy the apartment? Who is to pay the rent? Is the lease assignable? Is it to be assigned?

4. Has either party an interest in an on-going business. Is the business to be appraised? Is the business a partnership? Is either party a partner? Is the business incorporated? Is either party an officer in the corporation? Is either party to resign? Is either party a stockholder, and if so, what disposition is to be made of respective holdings? What tax consequences will result from any transfer of business or partnership assets?

5. Is the wife holding in her name any property belonging to the husband, or vice versa. If so, is she or he to retain it?

6. Has the wife any real estate of her own? Is the husband to quitclaim to her any interest he has in it? What tax consequences result?

7. Have the parties already made a division of their personal property? If not, what is to be the disposition? Consideration should be given to:

a. Household goods, furniture and furnishings such as rugs, draperies, etc.

b. Household appliances and equipment such as refrigerators, washing machines, deep-freeze units, air conditioning units, etc.

c. Television sets, radios, musical instruments, stereo sets, phonograph records, VCRs, and furniture units to hold these items.

d. Silverware, glassware, china and linens.

e. Books, works of art (paintings, prints, statuary), bric-a-brac and ornaments, special collections such as a stamp and coins and objects related to any other kind of hobby.

f. Stocks and bonds.

g. Promissory notes.

h. Bank accounts.

i. Club memberships.

j. Merchandise credits, charge accounts.

k. Automobiles and boats.

l. Goods in storage.

m. Jewelry and furs.

n. Cameras, camera equipment, projectors, screens, etc.

- o. Sporting equipment.
- p. Power tools and lawn and gardening equipment.
- q. Pets.

8. Is there any insurance on these items of personalty? In whose name? Any premiums due? Are there any policies to be transferred?

9. Are schedules listing and describing any property to be prepared? By whom?

10. Do either of the parties have any interest in any profit sharing plans or other pension plans? Are these benefits fully vested? Partially vested? What disposition is to be made of these interests? When?

11. Do either of the parties have an Individual Retirement Account? What will be the disposition of any IRA's? Will the parties split any penalties occasioned by early termination of the IRA's or will one party bear these expenses?

Military Considerations

12. Is the military member qualified to retire? Will the nonmilitary spouse seek an interest in the military member's retired pay?

13. Are the parties living on a military installation? If so, who will pay the expenses of moving the non-military spouses' household goods and other effects off the installation?

14. If the non-military spouse is moving to another geographic location, who will pay the moving expenses? If the move is at government expense, which party will be liable for any sums due the government for shipments which exceed the household goods weight allowance?

15. Will the non-military spouse be eligible to file a government claim for damages done during the move, if at government expense? Will the military spouse be responsible for filing the claim? Who will receive the claim check?

16. If the non-military spouse is ineligible to file a government claim for damages done during the move, will the military spouse be required to obtain commercial insurance to cover the move?

K. Debts and Obligations.

1. Do either of the parties owe each other any money? Is there an outstanding note or other evidence of the obligation? How is the indebtedness to be treated?
2. Are the husband and wife jointly liable on any obligation? If so, what disposition is to be made when the obligation matures? Is the husband to assume it? Is he to indemnify the wife thereon?
3. Is there any litigation pending between the parties in addition to the marital litigation?
4. Is there any litigation pending in which both parties are involved, either as co-plaintiffs or co-defendants?
5. Are there any outstanding bills or obligations incurred by the wife for which the husband is or may be liable? Who is to discharge them? When? Indemnification?
6. Cancellation and surrender of charge cards and credit accounts?
7. Are schedules to be prepared listing exact debts each party is to assume and pay? By whom?

L. Tax Matters.

1. Have the parties filed any joint income tax returns in the past? If there is a refund, who gets it? If there is a deficiency assessment, who is to pay it? Is the husband to indemnify the wife as to any liability regarding prior returns?
2. Is the wife to be obligated to file joint tax returns with the husband for any year prior to the year in which the marriage may be dissolved? Amended returns? Refunds? Assessments?
3. What about other tax returns and tax matters, such as estate taxes, corporation and partnership returns?
4. Are authenticated copies of future tax returns of the parties to be provided to each other?

M. Wills, Trusts, Estates and Security Provisions.

1. Is each party to waive his or her rights in the estate of the other?

2. Has either party an existing will in which the other is named as executor or executrix? Devisee or legatee? Is this to be changed?
3. Is the husband to bind himself to leave the wife or the children a specific sum or sums by his will, or a specified portion of his net estate? Are there to be any provisions to prevent the husband from willfully depleting his estate?
4. Are there revocable inter vivos trusts that should be changed because of the altered marital relationship?
5. Are the children beneficiaries under any existing inter vivos or testamentary trusts? Which parent is to receive the income on the children's behalf?
6. Is the husband's obligation (assuming there are continuing payments) to survive his death and be binding on the estate? If so, may the obligation be capitalized so that the estate may be promptly closed?
7. Is the husband to furnish any security for the performance of his obligations under the agreement? If so, what form will the security be?

N. Counsel Fees, Costs and Expenses.

1. Who is to pay the parties' respective counsel fees and costs of suit? How much? When?
2. Can the tax laws properly be applied to make counsel fees legally deductible? Can the form of billing assist in tax savings?
3. Who pays for audits, costs of transferring real estate and other expenses incident to dissolution of the marriage?
4. Is one party to pay the other party's counsel fees and costs arising out of any post-judgment litigation? Under what terms and conditions?

APPENDIX B

SEPARATION AGREEMENT WORKSHEET

INFORMATION ABOUT YOU:

1. Name: _____ SSN: _____
Grade: (if military) _____
2. Current Address: _____

Phone No: _____
3. Occupation and Place of Employment: _____

Phone Number: _____
4. City And State Of Legal Residence: _____

5. Date and Place of Entry Onto Active Duty: _____

INFORMATION ABOUT YOUR SPOUSE:

6. Name: _____ SSN: _____
Grade: (if military) _____
7. Current Address: _____

Phone No: _____
8. Occupation and Place of Employment: _____

Phone Number: _____
9. City And State Of Legal Residence: _____

10. Date and Place of Entry Onto Active Duty: _____

INFORMATION ABOUT YOUR CHILDREN

11. Children Full name(s)	Date Of Birth	Custody At Present	Natural, Adopted, or Stepchild?
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_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

INFORMATION ABOUT YOUR MARRIAGE(S)

12. Date And Place of Marriage: _____

13. Date of Separation: _____

14. Have You Previously Been Married?: Yes No

If Yes List The Name(s) of Prior Spouse(s), Date(s) Of Prior Marriage(s), Dates of Divorce(s), and Place(s) Where The Divorce(s) Was/Were Granted:

15. Has Your Spouse Previously Been Married? Yes No

If Yes List The Name(s) of Prior Spouse(s), Date(s) Of Prior Marriage(s), Dates of Divorce(s), and Place(s) Where The Divorce(s) Was/Were Granted:

16. List Names And Ages Of Any Children Of Prior Marriage And Indicate The Parents Of Child And With Whom They Live:

17. Amount Of Support Furnished To Former Spouse(s) And Children Of Prior Marriage(s):

18. Other Dependents (Name, Relationship, Amount Of Support Furnished):

19. Profession Or Occupation Specialty (Including Non-Service Employment And Years So Engaged):

20. Average Earnings (Annually, Past 3 To 5 Years)

_____ Gross

- a. Present Monthly Income From Employment

_____ Gross

- b. Present Monthly Income From Investments (Stocks, Bonds, Interest, Business Ventures)

- c. Present Monthly Income From Part Time Employment

- d. Total Average Monthly Income

e. Mandatory Employment Deductions (Itemized)

21.	Your Monthly Expenses	Before Separation	After Separation
a.	Shelter (Rent or Mortgage Payment):	\$_____	\$_____
b.	Household Expenses: Utilities, Taxes, Food, Repairs, Household Assistance, Automobile, Cleaning, etc.....:	_____	_____
c.	Clothes:	_____	_____
d.	Medical:	_____	_____
e.	Insurance Premiums:	_____	_____
f.	Installment Payments:	_____	_____
	TOTAL DUE:	_____	_____
g.	Children's Educational Expense:	_____	_____
h.	Gifts (Charity, etc.)	_____	_____
	TOTAL:	\$_____	\$_____

22. Value Of Assets:

a. Real Estate (Home, Summer Place, Investment):

- b. Investments (Stocks, Bonds, Partnerships):

- c. Savings Bank Accounts Balance:

- d. Average Monthly Checking Account Balance (After Payment Of Expenses):

- e. Autos, Boats, House Trailers, Aircraft, Large Appliances (Freezers, TV's, etc.):

- f. Furniture Value:

- g. Monies Owed You (Amount, Name, Address Of Debtor):

- h. (1) Life Insurance Policies: Company, Amount, Type Of Policy, And To Whom Payable:

(2) Property Insurance, Type Of Policy, Item Insured, Company And Amounts:

- i. Educational Endowment Policies:

j. Other Assets (Jewelry, Collections, etc.):

23. Liabilities:

a. Installment Contract and Revolving Credit Account Liabilities:

Creditor Or Item Purchased	Monthly Payment/ Amount Past Due Or Joint?	Whose Debt? Husband, Wife, Or Joint?
1. _____		
2. _____		
	Creditor Or Item Purchased	Monthly Payment/ Amount Past Due Or Joint?
		Whose Debt? Husband, Wife, Or Joint?
3. _____		
4. _____		
5. _____		
6. _____		
7. _____		

Total Amount of Installment Liabilities: \$ _____

b. Debts Owed Others (Amount, Name And Address Of Creditor, And Due Date):

c. Litigation Pending Against You, Your Spouse, Or Both Of You Jointly:

d. Other Liabilities:

24. Income Tax

a. Have The Parties Filed Joint Returns Before? Yes No

b. If There Is A Refund, Who Is Entitled To It?

Husband Wife Split

c. If There Is A Deficiency, Who Will Pay It?

Husband Wife Split

d. Prior To divorce, Will The Parties Yes No
Be Required To File Separate Returns?

25. Do The Parties Release All Claims Against Yes No
The Estate Of The Other?

26. Who Will Pay The Attorneys' Fees And Court Costs?

Husband Wife Each Pays Own Other
Arrangements

27. Miscellaneous:

APPENDIX C

ETHICAL CONSIDERATIONS IN FAMILY LAW PRACTICE

1. Representing both parties. Rule 1.7 of the Rules of Professional Conduct for Lawyers, AR 27-26, generally prohibits a lawyer from representing a client in a matter adversely affecting the interests of another client. Moreover, legal assistance providers should not represent both spouses in a separation or divorce action, even when there is full disclosure and agreement between the parties.

Legal assistance providers should also exercise caution when counseling or drafting wills for both spouses, particularly if the spouses propose conflicting property dispositions or desire to name different guardians. Of course, legal assistance providers should discuss such estate planning considerations only with the client seeking domestic relations advice or assistance and not the opposing client. The represented client may desire to change his will, power of attorney, or other estate planning document when contemplating a separation or divorce. The legal assistance attorney should provide the client appropriate advice and assistance on such matters. If the parties reconcile and subsequently desire assistance in preparing new estate planning documents, the legal assistance provider should review Rules 1.6 and 1.7 before proceeding to assist both spouses. Instead of representing both spouses, another legal assistance provider should assist the other spouse.

Occasionally, lawyers serve as intermediaries, such as mediators or arbitrators. Rule 2.2 recognizes that lawyers may act as mediators. When conducting mediation, lawyers do not have an attorney-client relationship with either side. Thus, there is no attorney-client privilege and the legal assistance provider must be impartial. Furthermore, legal assistance providers should not attempt to mediate where they previously have formed an attorney-client relationship with one side or the other.

2. Representation of opposing parties by two members of the same legal office. Imputed disqualification does not automatically apply to Army lawyers (*see e.g., United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987)) (accused formed attorney-client relationship and discussed facts with a legal assistance attorney who subsequently became a trial counsel; this trial counsel did not discuss accused's case with other trial counsel in office--no disqualification) and *United States v. Reynolds*, 24 M.J. 261 (C.M.A. 1987)) (legal assistance officer served as investigating officer of charges originating from claims office--social relationship with other attorneys in office, including trial counsel, did not prejudice accused--no disqualification of trial counsel). Two legal assistance providers working in the same legal assistance office are not automatically disqualified from representing conflicting parties to a dispute. Rule 1.10 recognizes that military service may require representation of opposing sides by Army lawyers working in the same legal office. This rule further provides that "[s]uch representation is permissible so long as conflicts of interest are avoided and independent judgment, zealous representation, and protection of confidences are not compromised." Nevertheless, AR 27-3, para 4-9c, provides that "Army policy discourages attorneys from the same legal office from providing legal assistance to both spouses involved in a domestic dispute . . ." AR 27-3, para 4-9 provides guidance for supervisory attorneys for authorizing exceptions to this policy as a last resort.

3. Conferring with adverse party. Although Army attorneys may communicate with unrepresented adverse parties, they should exercise caution when doing so. Rule 4.3 prohibits an attorney from giving advice to unrepresented third parties, and it also prohibits creating an implication that the attorney is disinterested.

An attorney should not communicate with an adverse party whom the lawyer knows to be represented by counsel in the matter unless the opposing party's counsel has consented to the communication or the communication is otherwise authorized by law. (Rule 4.2).

4. Relationships with clients and former clients. Legal assistance providers are well-advised to refrain from social and sexual relations with clients and former clients (at least during the pendency of divorce actions). ABA Formal Opinion 92-364, Sexual Relations with Clients, notes that "a sexual relationship between lawyer and client may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently, and therefore may violate both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility." Professional Responsibility Opinion 92-6 further highlights professional responsibility concerns when a social and/or sexual relationship occurs after termination of the representation. In that case, a Professional Responsibility Committee determined that a legal assistance provider violated AR 600-50, by obtaining his former client's telephone number from the client card. The committee determined that the legal assistance attorney, having engaged in a sexual relationship with a former client in that case, exhibited "extremely poor judgment. . . . As a lawyer, he should have known that his conduct could complicate the clients' domestic relations matter or reduce the likelihood of reconciliation." As a precaution, counsel should consult their supervisors for guidance before entering into social relationships with clients and former clients.

APPENDIX D

SUMMARY OF TRICARE FINAL RULE PROVISIONS

(From: Department of Defense Health Affairs)

(www.ha.osd.mil/hmtrifr2.html)

I. Introduction

The TRICARE final rule establishes requirements and procedures for implementation of the TRICARE Program, the purpose of which is to implement a comprehensive managed health care delivery system composed of military medical treatment facilities and CHAMPUS. Principal components of the final rule include:

- establishment of a comprehensive enrollment system;
- creation of a triple option benefit, including a Uniform HMO Benefit required by law;
- a series of initiatives to coordinate care between military and civilian delivery systems, including Resource Sharing Agreements, Health Care Finders, PRIMUS and NAVCARE Clinics, and new prescription pharmacy services;
- a consolidated schedule of charges, incorporating steps to reduce differences in charges between military and civilian services.

The TRICARE Program is a major reform of the MHSS that will improve services to beneficiaries while helping to contain costs.

Effective Date: October 1, 1995.

For Further Information Contact: Steve Lillie, Office of the Assistant Secretary of Defense (Health Affairs): slillie@ha.osd.mil

II. Overview Of Tricare

The medical mission of the Department of Defense is to provide and maintain readiness to provide, medical services and support to the armed forces during military operations, and to provide medical services and support to members of the armed forces, their family members, and others entitled to DoD medical care.

Under the current Military Health Services System (MHSS), all care for active duty members is provided or arranged by military medical treatment facilities (MTFs). CHAMPUS-eligible beneficiaries may receive care in the direct care system (that is, care provided in military hospitals or clinics) on a space-available basis, or seek care from civilian health care providers; the government shares in the cost of such civilian care under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). Medicare eligible military beneficiaries also are eligible for care in the direct care system on a space-available basis, and may be reimbursed for civilian care under the Medicare program. The majority of care for military beneficiaries is provided within catchment areas of MTFs, a catchment area being roughly defined as the area within a 40-mile radius around an MTF.

Recently DoD has embarked on a new program, called TRICARE, which will improve the quality, cost, and accessibility of services for its beneficiaries. Because of the size and complexity of the MHSS, TRICARE implementation is being phased in over a period of several years. The principal mechanisms for the implementation of TRICARE are the designation of the commanders of selected MTFs as Lead Agents for 12 TRICARE regions across the country, operational enhancements to the MHSS, and the procurement of managed care support contracts for the provision of civilian health care services within those regions.

Sound management of the MHSS requires a great degree of coordination between the direct care system and CHAMPUS-funded civilian care. The TRICARE Program recognizes that "step one" of any process aimed at improving management is to identify the beneficiaries for whom the health program is responsible. Indeed, the dominant feature in some private sector health plans, enrollment of beneficiaries in their respective health care plans, is an essential element. This final rule moves toward establishment of a basic structure of health care enrollment for the MHSS. Under this structure, all health care beneficiaries become participants in TRICARE and classified into one of four categories:

1. Active duty members, all of whom are automatically enrolled in TRICARE Prime, an HMO-type option;
2. TRICARE Prime enrollees, who (except for active duty members) must be CHAMPUS eligible;
3. TRICARE Standard participants, which includes all CHAMPUS-eligible beneficiaries who do not enroll in TRICARE Prime; or
4. Medicare-eligible beneficiaries and other non-CHAMPUS-eligible DoD beneficiaries, who, although not eligible for TRICARE Prime, may participate in many features of TRICARE.

Eventually, we anticipate that there will be a fifth category: participants in other managed care programs affiliated with TRICARE. However, no such affiliations have yet been made.

The second major feature of the TRICARE Program will be the establishment of a triple option benefit. CHAMPUS-eligible beneficiaries will be offered three options: they may (1) enroll to receive health care in an HMO-type program called "TRICARE Prime;" (2) use the civilian preferred provider network on a case-by-case basis, under "TRICARE Extra;" or (3) choose to receive care from non-network providers and have the services reimbursed under "TRICARE Standard." (TRICARE Standard is the same as standard CHAMPUS.) CHAMPUS-eligible enrollees in Prime will obtain most of their care within the network, and pay substantially reduced CHAMPUS cost shares when they receive care from civilian network providers. Enrollees in Prime will retain freedom to utilize non-network civilian providers, but they will have to pay cost sharing considerably higher than under TRICARE Standard if they do so. Beneficiaries who choose not to enroll in TRICARE Prime will preserve their freedom of choice of provider for the most part by remaining in TRICARE Standard. These beneficiaries will face standard CHAMPUS cost sharing requirements, except that their coinsurance percentage

will be lower when they opt to use the preferred provider network under TRICARE Extra. All beneficiaries continue to be eligible to receive care in MTFs, but active duty family members who enroll in TRICARE Prime will have priority over other beneficiaries.

A third major feature of the TRICARE program is a series of initiatives, affecting all beneficiary categories, designed to coordinate care between military and civilian health care systems. Among these is a program of resource sharing agreements, under which a Managed Care Support contractor provides personnel and other resources to an MTF in order to increase the availability of services. It is our expectation that the Partnership Program, an existing mechanism for increasing the availability of services in MTFs, will be phased out as TRICARE managed care support contracts are implemented. Another TRICARE initiative is establishment of Health Care Finders, which facilitate referrals to appropriate services in the MTF or civilian provider network. In addition, integrated quality and utilization management services for military and civilian sector providers will be instituted. Still another initiative is establishment of special pharmacy programs for areas affected by base realignment and closure actions. These pharmacy programs will include special eligibility for some Medicare-eligible beneficiaries. TRICARE also will feature TRICARE Outpatient Clinics, which will be direct care system resources serving as primary care managers and providing related services. (This final rule also provides a transitional authority for continued operation of PRIMUS and NAVCARE Clinics, which are dedicated contractor-owned and operated clinics, until TRICARE is implemented.) These initiatives will have a major impact on military health care delivery systems, improving services for all beneficiary categories.

The fourth major component of TRICARE is the implementation of a consolidated schedule of charges, incorporating steps to reduce differences in charges between military and civilian services. In general, the TRICARE Program reduces beneficiaries' out-of-pocket costs for civilian sector care. For example, the current CHAMPUS cost sharing requirements for outpatient care for active duty family members include a deductible of \$150 per person or \$300 per family (\$50/\$100 for family members of active duty sponsors in pay grades E-4 and below) and a copayment of 20 percent of the allowable cost of the services.

Under TRICARE Prime, which incorporates the "Uniform HMO Benefit," these cost sharing requirements will be replaced, for CHAMPUS beneficiaries who enroll, by a standard charge for most civilian provider network outpatient visits of \$12.00 per visit, or \$6.00 per visit for family members of E-4 and below sponsors. For CHAMPUS-eligible retirees, their family members and survivors, the current deductible of \$150 per person or \$300 per family and 25 percent cost sharing for outpatient services will also be replaced by a standard charge, which is likewise \$12.00 for most outpatient visits. Retirees, their family members and survivors will also be charged a \$230/\$460 annual individual/family enrollment fee. Active duty members will face no cost sharing under TRICARE Prime.

Beneficiaries who are not enrolled in TRICARE Prime will also have significant opportunities to reduce expected out-of-pocket costs under CHAMPUS. These opportunities include the new special pharmacy programs, and access to network providers and to TRICARE Outpatient Clinics, on a space-available basis.

One design consideration for TRICARE is the mobile nature of our beneficiary population. Some features of TRICARE, such as the uniformity of the benefit and the consistency of program rules across the country, are crafted with this factor in mind. In the future, we hope to increase the "portability" of the TRICARE benefit, by making TRICARE more accessible to beneficiaries who have multiple residences, have family members in several locations, and so forth.

With respect to military hospitals, in the future consideration will be given to establishment of nominal per-visit fees, for some or all retirees, their family members, and survivors, and for some or all types of services for those beneficiaries. Fees would be considered to help control demand for MTF care, to free up capacity and reduce waiting times, and lower the costs of health care.

A user fee can be structured in many different ways, for example, exempting lower income segments of the covered population. Most importantly, the motivation for a fee is to encourage the more efficient use of health care services. When this issue is considered for possible implementation in fiscal year 1998, if the Department decides to establish a nominal fee for some or all outpatient services provided to some or all retirees, their family members, and survivors, a proposed rule will then be issued for public comment.

The TRICARE Program is a major reform of the MHSS -- one that will accomplish the transition to a comprehensive managed health care system that will help to achieve DoD's medical mission into the next century.

III. Provisions of the TRICARE Final Rule

New Chapter 17 -- TRICARE Program

A. Establishment of the TRICARE Program (section 199.17(a)).

This paragraph introduces the TRICARE Program, and describes its purpose, statutory authority, and scope. It is explained that certain usual CHAMPUS and MHSS rules do not apply under the TRICARE Program, and that implementation of the Program occurs in a specific geographic area, such as a local catchment area or a region. Public notice of initiation of a Program will include a notice published in the Federal Register.

With respect to statutory authority, major statutory provisions are title 10, U.S.C. sections 1099 (which calls for a health care enrollment system), 1097 (which authorizes alternative contracts for health care delivery and financing), and 1096 (which allows for resource sharing agreements). Significantly, the National Defense Authorization Act for Fiscal Year 1995 amended section 1097 to authorize the Secretary of Defense to provide for the coordination of health care services provided pursuant to any contract or agreement with a civilian managed care contractor with those services provided in MTFs. This amendment set the stage for many features of TRICARE, including initiatives to improve coordination between military and civilian health care delivery components and the consolidated schedule of beneficiary charges.

B. Triple option (section 199.17(b)).

This paragraph presents an overview of the triple option feature of the TRICARE Program. Most beneficiaries are offered enrollment in the TRICARE Prime Plan, or

"Prime." They are free to choose to enroll to obtain the benefits of Prime, or not to enroll and remain in the TRICARE Standard Plan, or "Standard," with the option of using the preferred provider network under the TRICARE Extra Plan, or "Extra." When the TRICARE Program is implemented in an area, active duty members will be enrolled automatically in Prime.

C. Eligibility for Enrollment in Prime (section 199.17(c)).

This paragraph describes who may enroll in the Program. All active duty members are automatically enrolled in Prime; all CHAMPUS-eligible beneficiaries who live in areas covered by TRICARE Prime are eligible to enroll. Since it is likely that priorities for enrollment will be necessary owing to limited availability of Prime, the order of priority for enrollment will be as follows: first priority will be active duty members; second priority will be active duty family members; and third priority will be CHAMPUS-eligible retirees, family members of retirees, and survivors. At this time, TRICARE Prime does not offer enrollment to non-CHAMPUS-eligible beneficiaries.

D. Health benefits under Prime (section 199.17(d)).

This paragraph states that the benefits established for the Uniform HMO Benefit option (see section 199.18, Uniform HMO Benefit option) are applicable to CHAMPUS eligible enrollees in TRICARE Prime.

Under TRICARE, all enrollees in Prime and all beneficiaries who do not enroll remain eligible for care in MTFs, subject to the availability of space, equipment, and staff. Regarding civilian sector care, active duty member care will continue to be arranged as needed and paid for through the supplemental care program.

Priorities for access to care in MTFs will be as follows: (1) active duty members; (2) active duty family members enrolled in TRICARE Prime; (3) active duty family members not enrolled in TRICARE Prime; and, (4) all other beneficiaries, including retirees and their family members and survivors.

Granting preference to MTFs based on enrollment in TRICARE Prime would be an incentive to enroll. In the case of active duty family members, this preference is being granted. However, other considerations must be taken into account when granting such preference for retirees. In particular, because Medicare beneficiaries are not eligible for enrollment in TRICARE Prime, granting such preference would necessarily limit access to MTFs and increase out-of-pocket costs for this large group of DoD beneficiaries. Several options are under consideration to ensure fair and equitable treatment of Medicare-eligible retirees under TRICARE Prime, and we will revisit the issue of access priority as we have more information about these options. In the meantime, we believe that the appropriate course of action is not to base retiree preference for MTFs on enrollment in TRICARE Prime.

E. Health benefits under Extra (section 199.17(e)).

This paragraph describes the availability of the civilian preferred provider network under Extra. When Extra is used, CHAMPUS cost sharing requirements will be reduced. (See Table 2 following the preamble for a comparison of TRICARE Standard, TRICARE Extra, and TRICARE Prime cost sharing requirements.)

F. Health benefits under Standard (section 199.17(f)).

This paragraph describes health benefits for beneficiaries who opt to remain in Standard. Broadly, participants in Standard maintain their freedom of choice of civilian provider under CHAMPUS (subject to nonavailability statement requirements), and face standard CHAMPUS cost sharing requirements, except when they take advantage of the preferred provider network under Extra. The CHAMPUS benefit package applies to Standard participants.

G. Coordination with other health care programs (section 199.17(g)).

This paragraph of the proposed rule provided that, for beneficiaries enrolled in managed health care programs not operated by DoD, DoD may establish a contract or agreement with the other managed health care programs for the purpose of coordinating beneficiary entitlements under the other programs and the MHSS. This potentially includes any private sector health maintenance organization (HMO) or competitive medical plan, and any Medicare HMO. Any contract or agreement entered into under this paragraph may integrate health care benefits, delivery, financing, and administrative features of the other managed care plan with some or all of the features of the TRICARE Program. This paragraph is based on 10 U.S.C. section 1097(d), as amended by section 714 of the National Defense Authorization Act for Fiscal Year 1995.

The final rule does not include provisions relating to coordination with other health plans. Action is **reserved**, pending further development.

H. Resource sharing agreements (section 199.17(h)).

This paragraph provides that MTFs may establish resource sharing agreements with the applicable managed care support contractors for the purpose of providing for the sharing of resources between the two parties. Internal and external resource sharing agreements are authorized. Under internal resource sharing agreements, beneficiary cost sharing requirements are the same as in MTFs. Under external resource sharing agreements, an MTF commander may authorize provision of services pursuant to the agreement to Medicare-eligible beneficiaries, if this will promote the most cost-effective provision of services under the TRICARE Program.

I. Health Care Finder (section 199.17(i)).

This paragraph establishes procedures for the Health Care Finder, an administrative office that assists beneficiaries in being referred to appropriate health care providers, especially the MTF and civilian network providers. Health Care Finder services are available to all beneficiaries.

J. General quality assurance, utilization review, and preauthorization requirements (section 199.17(j)).

This paragraph emphasizes that all requirements of the CHAMPUS basic program relating to quality assurance, utilization review, and preauthorization of care apply to the CHAMPUS component of Prime, Extra and Standard. These requirements and procedures may also be made applicable to MTF services.

K. Pharmacy services, including special services in base realignment and closure sites (section 199.17(k)).

This paragraph establishes two special pharmacy programs, a retail pharmacy network program and a mail service pharmacy program.

An important aspect of the mail service and retail pharmacy programs is that, under the authority of section 702 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, there is a special rule regarding eligibility for prescription services. The special rule is that Medicare-eligible beneficiaries, who are normally ineligible for CHAMPUS, are under certain special circumstances eligible for the pharmacy programs. The special circumstances are that they live in an area adversely affected by the closure of an MTF. A provision of the National Defense Authorization Act for Fiscal Year 1995 additionally provides eligibility for Medicare eligible beneficiaries who demonstrate that they had been reliant on a former MTF for pharmacy services.

Under the rule, the area adversely affected by the closure of a facility is established as the catchment area of the treatment facility that closed. The catchment area is the existing statutory designation of the geographical area primarily served by an MTF. The catchment area is defined in law as "the area within approximately 40 miles of a medical facility of the uniformed services." Pub. L. 100-180, sec. 721(f)(1), 10 U.S.C.A. 1092 note. This is also the geographical basis in the law for nonavailability statements that authorize CHAMPUS beneficiaries who live within areas served by military hospitals to obtain care outside the military facility. 10 U.S.C. 1079(a)(7). Because the purpose of the special eligibility rule for Medicare-eligible beneficiaries is to replace the pharmacy services lost as a consequence of the base closure, and because the 40-mile catchment area is the only geographical area designation established by law to describe the beneficiaries primarily served by a military medical facility, we believe it most appropriate to adopt the established 40-mile catchment area for purposes of the applicability of the special eligibility rule for pharmacy services. Thus, under the rule, Medicare-eligible beneficiaries who live within the established 40-mile catchment area of a closed medical treatment facility are eligible to use the pharmacy programs if available in that area.

This paragraph also establishes the procedures for establishing eligibility for Medicare beneficiaries who live outside the former catchment area of a closed facility, but relied on it for pharmacy services. Medicare beneficiaries who obtained pharmacy services at a facility in its last 12 months of operation (or the last twelve months during which pharmacy services were available to non-active duty beneficiaries) will be deemed to have been reliant on the facility; they can establish their reliance through a written statement to that effect.

There are several noteworthy special rules regarding the area that will be considered adversely affected by the closure of an MTF. First, a 40-mile catchment area generally will apply in the case of the closure of a military clinic, as it does in the case of the closure of a hospital. Recognizing that there may be clinic closure cases involving very small clinics that were not providing any significant amount of pharmacy services to retirees, their family members and survivors, these cases will not be considered to be areas adversely affected by the closure of an MTF. The reason for this is simply that if the facility was not providing a significant amount of services, its closure will not have a noteworthy adverse affect in the area.

The Director, Office of CHAMPUS, may establish other procedures for the effective operation of the pharmacy programs, dealing with issues such as encouragement of the use of generic drugs for prescriptions and of appropriate drug formularies, as well as establishment of requirements for demonstration of past reliance on an MTF for pharmacy services.

The pharmacy provisions of the rule are part of the Department's efforts to consolidate its pharmacy programs, and move towards a uniform pharmacy component for TRICARE.

L. PRIMUS and NAVCARE Clinics (section 199.17(l)).

Under the authority of 10 U.S.C. sections 1074(c) and 1097, this section authorizes PRIMUS and NAVCARE Clinics, which have operated to date under demonstration authority. Operation of a PRIMUS and NAVCARE Clinic will cease upon initiation of a TRICARE program in the location of the PRIMUS or NAVCARE Clinic.

PRIMUS and NAVCARE Clinics will function in a manner similar to MTF clinics, as under the demonstration project. As such, all beneficiaries eligible for care in MTFs (including active duty members, Medicare-eligible beneficiaries, and other non-CHAMPUS eligible beneficiaries) are eligible to use PRIMUS and NAVCARE Clinics. For PRIMUS and NAVCARE Clinics established prior to October 1, 1994, CHAMPUS deductibles and copayments do not apply. Rather, military hospital policy regarding beneficiary charges will apply. For PRIMUS and NAVCARE Clinics established after September 30, 1994, the provisions of the Uniform HMO Benefit regarding outpatient cost sharing apply (see section 199.18(d)(3)). Other CHAMPUS rules and procedures, such as coordination of benefits requirements apply. The Director, OCHAMPUS, may waive or modify CHAMPUS regulatory requirements in connection with the operation of PRIMUS and NAVCARE Clinics.

M. Consolidated schedule of beneficiary charges (section 199.17(m)).

This paragraph establishes a consolidated schedule of beneficiary charges applicable to health care services under TRICARE for Prime enrollees (other than active duty members), Standard participants, and Medicare-eligible beneficiaries. The schedule of charges is summarized at Table 1, following the preamble. As demonstrated by the table, TRICARE provides for reduced beneficiary out-of-pocket costs.

Included in the consolidated schedule of beneficiary charges is the "Uniform HMO Benefit" design required by law (see section 199.18).

N. Additional health care management requirements under Prime (section 199.17(n)).

This paragraph describes additional health care management requirements within Prime, and establishes the point-of-service option, under which CHAMPUS beneficiaries retain the right to obtain services without a referral, albeit with higher cost sharing. Each CHAMPUS-eligible enrollee will select or be assigned a Primary Care Manager who typically will be the enrollee's health care provider for most services, and will serve as a referral agent to authorize more specialized treatment, if needed. Health Care Finder

offices will also assist enrollees in obtaining referrals to appropriate providers. Referrals for care will give first priority to the local MTF; other referral priorities and practices will be specified during the enrollment process.

O. Enrollment Procedures (section 199.17(o)).

This paragraph describes procedures for enrollment of beneficiaries other than active duty members, who must enroll. The Prime plan may feature open season periods during which enrollment is permitted, or may offer continuous open enrollment, wherein beneficiaries may enroll at any time, and each enrollee has an individualized, specific anniversary date.. Prime enrollees will maintain participation in the plan for a 12 month period, with disenrollment only under special circumstances, such as when a beneficiary moves from the area. In addition, provisions regarding installment payment option of enrollment fees are included. A complete explanation of the features, rules and procedures of the Program in the particular locality involved will be available at the time enrollment is offered. These features, rules and procedures may be revised over time, coincident with reenrollment opportunities.

P. Civilian Preferred Provider Networks (section 199.17(p)).

This paragraph sets forth the rules governing civilian preferred provider networks in the TRICARE Program. It includes conformity with utilization management and quality assurance program procedures, provider qualifications, and standards of access for provider networks. In addition, the methods which may be used to establish networks are identified.

DoD beneficiaries who are not CHAMPUS-eligible, such as Medicare beneficiaries, may seek civilian care under the rules and procedures of their existing health insurance program. Providers in the civilian preferred provider network generally will be required to participate in Medicare, so that when Medicare beneficiaries use a network provider they will be assured of a participating provider.

Q. Preferred Provider Network Establishment under Any Qualified Provider Method (section 199.17(q)).

This paragraph describes one process that may be used to establish a preferred provider network (the "any qualified provider method") and establishes the qualifications which providers must demonstrate in order to join the network.

R. General fraud, abuse, and conflict of interest requirements under TRICARE Program (section 199.17(r)).

This paragraph establishes that all fraud, abuse, and conflict of interest requirements for the basic CHAMPUS program are applicable to the TRICARE Program.

S. Partial Implementation of TRICARE (section 199.17(s)).

This paragraph explains that some portions of TRICARE may be implemented separately: a program without the HMO option, or a program covering a subset of health care services, such as mental health services. In addition, partial implementation of TRICARE may include offering TRICARE Prime to limited groups of beneficiaries in remote sites; some of the normal requirements of TRICARE Prime may be waived in this regard.

T. Inclusion of Veterans Hospitals in TRICARE Networks (section 199.17(t)).

This paragraph provides the basis for participation by Department of Veterans Affairs facilities in TRICARE networks, based on agreements between the VA and DoD.

U. Cost sharing of care for family members of active duty members in overseas locations (section 199.17(u)).

This paragraph permits establishment of special CHAMPUS cost sharing rules for family members of active duty members when they accompany the member on a tour of duty outside the United States. A recently initiated demonstration program, described in the Federal Register of September 2, 1994 (59 Federal Register 45668), tests such a program for active duty family members in countries served by OCHAMPUS, Europe. Overseas programs will include networks of providers who have agreed to accept CHAMPUS assignment for all care. Beneficiary cost sharing for care obtained from network providers will be zero.

V. Administrative procedures (section 199.17(v)).

This paragraph authorizes establishment of administrative procedures for the TRICARE Program.

New Chapter 18 – Uniform HMO Benefit Option

A. In general (section 199.18(a)).

This paragraph introduces the Uniform HMO Benefit option. The statutory provision that establishes the parameters for determination of the Uniform HMO Benefit option is section 731 of the National Defense Authorization Act for Fiscal Year 1994. It requires the establishment of a Uniform HMO Benefit option, which shall "to the maximum extent practicable" be included "in all future managed health care initiatives undertaken by" DoD. This option is to provide "reduced out-of-pocket costs and a benefit structure that is as uniform as possible throughout the United States." The statute further requires a determination that, in the managed care initiative that includes the Uniform HMO Benefit, DoD costs "are no greater than the costs that would otherwise be incurred to provide health care to the covered beneficiaries who enroll in the option."

In addition to this provision of the National Defense Authorization Act for Fiscal Year 1994, a similar requirement is established by section 8025 of the DoD Appropriations Act, 1994. As part of an initiative "to implement a nationwide managed health care program for the MHSS," DoD shall establish "a uniform, stabilized benefit structure characterized by a triple option health benefit feature." Our Uniform HMO Benefit also implements this requirement of law.

A new HMO benefit is being presented in this rule as the Uniform HMO Benefit. The principal features of the benefit are displayed in Table 3 following the preamble. Its most significant change from the previous (BRAC) benefit is that inpatient cost sharing for retirees, their family members and survivors is reduced to the levels faced by active duty family members, with concomitant increases in enrollment fees for these beneficiaries. A second important change is that there would be no enrollment fee for family members of active duty members. Finally, fees are set so that if the predicted

costs remain valid, they may be held constant for a five-year period, rather than escalating each year with price inflation.

The development of this Uniform HMO Benefit included painstaking analysis of utilization, cost, and administrative effect of potential cost sharing schedules. This analysis included a series of assumptions regarding most likely ramifications of various components of the benefit and the operation of the TRICARE Program. Based on this exhaustive analysis, the formulation of the Uniform HMO Benefit in the rule is the most generous benefit DoD can offer consistent with the statutory cost-neutrality mandate.

B. Benefits covered under the Uniform HMO Benefit option (section 199.18(b)).

For CHAMPUS-eligible beneficiaries, the HMO Benefit option incorporates the existing CHAMPUS benefit package, with potential additions of preventive services and a case management program to approve coverage of usually noncovered health care services (such as home health services) in special situations.

C. Deductibles, fees, and cost sharing under the HMO Benefit option (sections 199.18(c) through (f)).

Instead of usual CHAMPUS cost sharing requirements, Uniform HMO Benefit option participants will pay special per-service, specific dollar amounts or special reduced cost sharing percentages, which vary by category of beneficiary.

The Uniform HMO Benefit also includes an annual enrollment fee, which would be in lieu of the CHAMPUS deductible. The current CHAMPUS deductible is \$50 per person or \$100 per family for family members of active duty members in pay grades E-1 through E-4; and \$150 per person or \$300 per family for all other beneficiaries. The enrollment fee under the Uniform HMO Benefit option varies by beneficiary category: \$0 for active duty family members, and \$230 individual or \$460 family for retirees, their family members, and survivors.

The amounts of enrollment fees, outpatient charges and inpatient copayment under the uniform HMO benefit are presented in detail in sections 199.18(c) through (f).

Instead of incorporating the standard CHAMPUS catastrophic cap of \$7,500, the Uniform HMO Benefit includes a catastrophic cap of \$3,000 for retirees, survivors, and their family members. Thus retirees, survivors, and their family members who enroll in TRICARE Prime will have a considerably lower limit on their annual out-of-pocket expenses, in addition to the dramatically lower per-service charges features in the Uniform HMO Benefit.

Other Regulatory Changes

The rule makes a number of additional changes to support implementation of TRICARE.

A. Nonavailability Statements (revisions to sections 199.4(a)(9) and 199.15)

The rule revises section 199.4 to require beneficiaries residing near designated military clinics to obtain a nonavailability statement for the selected outpatient services subject to NAS requirements under section 199.4(a)(9)(i)(C).

B. Participating Provider Program (revisions to 199.14).

Revisions to section 199.14 change the Participating Provider Program from a mandatory, nationwide program to a localized, optional program. The initial intent of the program was to increase the availability of participating providers by providing a mechanism for providers to sign up as Participating Providers; a payment differential for Participating Providers was to be added as an inducement. With the advent of the TRICARE Program and its extensive networks of providers, the nationwide implementation of the Participating Provider Program would be redundant. Accordingly, this rule eliminates the nationwide program. Where the need arises, CHAMPUS contractors will act to foster participation, including establishment of a local Participating Provider Program when needed, but not including the payment differential feature.

C. Administrative Linkages of Medical Necessity Determinations and Nonavailability Statement Issuance (revisions to 199.4(a)(9)(vii) and 199.15)

Revisions to section 199.4(a)(9) provide the basis for administrative linkages between a determination of medical necessity and the decision to issue or deny an Nonavailability Statement (NAS). NASs are issued when an MTF lacks the capacity or capability to provide a service, but carry no imprimatur of medical necessity. Revisions to section 199.15 establish ground rules for CHAMPUS PRO review of care in MTFs, and allow for consolidated determinations of medical necessity applicable to both the MTF and civilian contexts when the CHAMPUS PRO performs the review.