

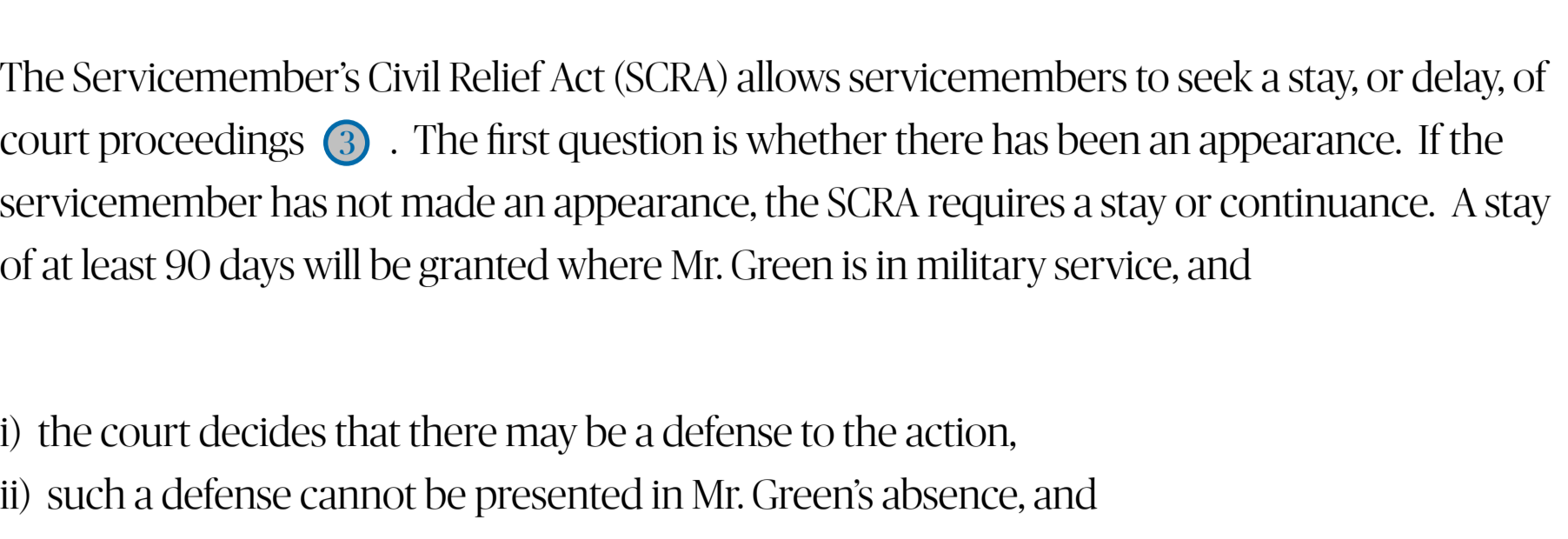
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Military Divorce: Four Common Questions Answered

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Tim Green, a potential new client, walks in for his scheduled appointment. The consultation starts normally for a family law case. The two of you go through the basics of the family dynamics – children, income, assets and debts, and more. At some point, the hypothetical client relays that he has just retired from military service. Stop the presses – a military divorce is different. To appropriately and competently [1](#) handle the case, there will be questions. How many have you handled before? What about the pension? What happens if someone dies? How do I calculate the pension share, and how much pension share is divided? The paragraphs below will address some of the major questions that arise. Be aware that this topic is much too large for an article of this scope. [2](#) . Let's dive into some common questions.



1. Mr. Green is going to deploy. Will the case be delayed?

The Servicemember's Civil Relief Act (SCRA) allows servicemembers to seek a stay, or delay, of court proceedings [3](#) . The first question is whether there has been an appearance. If the servicemember has not made an appearance, the SCRA requires a stay or continuance. A stay of at least 90 days will be granted where Mr. Green is in military service, and

- i) the court decides that there may be a defense to the action,
- ii) such a defense cannot be presented in Mr. Green's absence, and
- iii) with the exercise of due diligence, counsel has been unable to contact Mr. Green or determine if a meritorious defense exists [4](#) .

If Mr. Green has notice of the proceedings, he may request a stay. The stay may suspend the lawsuit entirely, or some portion of it. The SCRA is not limited to any one phase or stage of the case. Can Mr. Green simply write "I am away on military assignment" on the back of his cocktail napkin and obtain a stay? No, Mr. Green's request must comply with specific requirements. To obtain a stay, Mr. Green's stay request should include

- i) a communication from Mr. Green that states:
 - a. the manner in which Mr. Green's current military requirements affect his ability to appear, and
 - b. provides dates when he will be available to appear.

ii) a communication from Mr. Green's commanding officer stating:

- a. Mr. Green's military duty prevents his appearance, and
- b. Leave is not authorized for Mr. Green at the time of the communication [5](#) .

Note that the state court may have a different standard for a continuance or delay. A continuance or other delay may be granted in the court's discretion even if the official requirements of a stay under the SCRA are not met. Many courts have a kneejerk reaction to hearing one party is in military service, and may grant multiple continuances. If faced with this issue, there may be remedies [6](#) , but it can be complex and involve multiple, expensive hearings for the client.

2. If Mr. Green is required to live on base or is deployed, but the spouse and children reside in the marital residence in another state, what is considered to be the state of residence of the military spouse?

Both marital partners must comply with state law regarding two matters that often present problems in a military divorce case – domicile and residence. The basis for the exercise of jurisdiction in family law is typically the domicile [7](#) . Due to mobility which is often not by choice, domicile and residence of servicemembers and their spouses is often a critical issue. The SCRA allows Mr. Green and his spouse to retain their domiciles for tax purposes despite a military move [8](#) .

The military term "home of record" should not be confused with domicile. They are two entirely different things. The home of record is a military administrative term. Upon separation from the service, the Defense Department will transport Mr. Green and his goods to his home of record. The home of record is not meant to have legal implications, unlike domicile [9](#) .

Ultimately, to determine the residence as asked, the domicile must be examined. If the state in question has particular jurisdictional statutes for divorce (which may be relaxed), that must also be considered. An inquiry should be made into both Mr. Green and his spouse's behaviors regarding domicile, specifically:

- i) In what state has Mr. Green resided?
- ii) Where has he owned real estate? Real property taxes?
- iii) Where has he paid state income taxes?
- iv) Personal property taxes?
- v) In what state did you list your address on your tax return?
- vi) Where are your motor vehicles registered?
- vii) State of driver's license
- viii) In what state are your savings, checking, etc. accounts?
- ix) In what state did Mr. Green vote?
- x) Children – schools, in state tuition, etc.

The above is not an exhaustive list, but often provides a picture of the true state of domicile [10](#) .

3. How did the frozen benefit rule change retirement benefits for the military spouse? Can the parties agree to utilize another methodology by agreement?

The Frozen Benefit Rule, codified at 10 USC § 1408, fixes or "freezes" the spouse's share as of the date of divorce. But what does that mean for Mr. Green and his spouse? First, a practitioner must determine if the rule applies. "You are either in or out. There's no in between" – Pat Riley.

To determine whether the rule applies, two questions must be answered:

- i) Was the divorce finalized before December 23, 2016?
- ii) Was Mr. Green, the servicemember, receiving retired pay on the date of divorce?

If the answer is "yes" to either of these questions, stop there. The rule does not apply. The second question is the most important as time marches farther and farther from 2016.

If the rule does not apply, the spouse's share should be divided under state law. Most states use a "time rule" or a "coverage fraction" with the numerator represented by months of service during the marriage, and the denominator represented by the total creditable service.

If the rule does apply, data points are required by the retired pay center and the share is frozen on date of divorce [11](#) . Any attorney facing this situation must pay careful attention to the marital share and/or coverage fraction. As the retired pay is frozen on date of divorce by federal statute, a typical denominator of "total pension service" or similar will have negative effects for the military spouse. Her share will be doubly divided, once by the frozen benefit rule, and again because the denominator will continue to stretch out beyond the "freeze". Check your state's rules – some states have enacted legislation that also freezes the denominator in these situations [12](#) . Stopping the denominator is the only way to provide for a fair division of a benefit that is, by federal law, fixed on the divorce date. A denominator which continues to grow as Mr. Green serves will result in a diluted share for his spouse. This is the primary impact of the frozen benefit rule.

There is some debate about whether the parties can agree on another result. For example, could the parties enter into a contract with a different division? Could the parties agree that Mr. Green will make a direct payment to Ms. Green for the difference between the frozen benefit rule amount and the "non-frozen" amount? Could the parties increase Ms. Green's share from, for example, 30% to 35% to offset this result? It is clear that the retired pay center [13](#) (who handles direct payment for a spouse) will apply the rule unless the couple divorced before December 23, 2016 or Mr. Green is receiving retired pay on the date of divorce. However, this is an esoteric and complex area, and must be addressed on a case-by-case basis. When in doubt, don't go it alone. Seek the assistance of a qualified professional such as a former JAG officer or an attorney who handles these cases day in and day out.

4. How do I best protect my client in the event of death of the military spouse before payout of the pension benefits? Can the benefit be based on the non-military spouse's lifetime, thus paying out for the duration of the non-military spouse's life?

The simplest answer is to start by thinking about death. Yes, that sounds a bit morbid, but it is essential for the competent divorce practitioner. Does Ms. Green want a death benefit from the government, life insurance, a present value offset, an annuity? For most military spouses, the best medicine will be to request former spouse Survivor Benefit Plan (SBP) coverage. Why? A present value payout for the pension is only available if there are sufficient assets, which is often not the case. Even if the parties possess adequate resources, it would usually involve calculations that are expensive and time consuming. What about insurance or an annuity? Unlike insurance and annuities, SBP never runs out. Ms. Green can be 102, and still receive her SBP payments. It also has no health exams, and the premiums do not go up with age. The major downside is the cost – it usually is 65% of Mr. Green's retired pay [14](#) .

What is SBP? It is an annuity paid each month to the beneficiary of Mr. Green. The maximum amount would be 55% of Mr. Green's retired pay [15](#) , which typically would result in a "false" for Ms. Green when compared to her pension share.

There are other considerations for SBP. What if Mr. Green was only married to Ms. Green for 3 years? SBP may not make sense. What if Ms. Green is several years older than Mr. Green? As SBP only applies if Ms. Green outlives Mr. Green, Ms. Green may want to consider other options.

SBP is a large topic. It is beyond the scope of this article to cover each and every consideration and nuance. However, this attorney checklist will help to explain the Survivor Benefit Plan and coverage for the non-military spouse.

Action or issue	Comments
SBP is a unitary benefit.	This means that it cannot be divided between current spouse and former spouse.
Election – Active Duty: servicemember (SM) is automatically covered; at retirement an election must be made.	If SM is married, then written consent of spouse is necessary to elect NO SBP, child-only coverage, or base amount less than full retired pay.
Election – Guard/Reserve: After 20 years of creditable Guard/Reserve service, SM can defer decision, opt for coverage at age 60, or elect immediate coverage.	Spouse concurrence as above, except for immediate coverage.
If representing the nonmilitary spouse, be sure to mandate former-spouse coverage with member selecting full retired pay as base amount.	SBP benefit payments equal 55% of the selected base amount, which can be from \$300 up to the full retired pay.
If representing the member/retiree, ensure that base amount selected yields an SBP payment not to exceed the amount of retired pay awarded to the former spouse, so that spouse doesn't profit by retiree's death.	Selection of a base amount lower than full retired pay means that the death benefit payments from SBP can be about the same as the lifetime spousal payment. This "mirror benefit" approach may be difficult to calculate before retirement, depending on the federal and state rules of pension division.
If representing the member/retiree, try to negotiate a reduction of the spouse's share of the military pension to reflect the additional cost of the SBP premium, which is taken out of the retired pay.	For former spouse coverage, SBP premium is 6.5% of selected base amount, payable out of retired pay, and it is "taken off the top" and deducted before division of disposable retired pay, so the default is that both parties pay in same shares as their respective shares of the retired pay. RCSBP is about 7-10% of the SBP base amount. The math for cost-shifting is complicated; don't just share off 6.5% (or 10%) from the former spouse's share. For details, see the Silent Partner infoletter, "Military Pension Division—The Servicemember's Strategy."
SM/retiree must submit former-spouse SBP election to retired pay center within one year of divorce.	Enclose certified copy of divorce decree, order for SBP coverage, and SBP application form, DD Form 2656-1 (signed by both parties).
When the divorce is before start of retired pay, SM sets up SBP for former spouse when applying for retired pay	This is found on DD Form 2656, "Data for Payment of Retired Personnel."
If SM/retiree fails or refuses to make required election, spouse/former spouse may apply, using DD Form 2656-10 for deemed election request.	Transmit to retired pay center the completed and signed form, and certified copies of divorce decree and order for SBP coverage within one year of order requiring SBP coverage [this is different deadline from "one year after divorce" in some cases].
If deadlines above aren't met, apply to the appropriate Board for the Correction of Military Records for relief. Deadline in most cases is 3 years from discovery of problems.	Relief may be available if retiree has not remarried, or if new spouse consents. If current spouse will not consent, then get court to join the spouse as a party and obtain an order finding that the spouse has no interest in the Survivor Benefit Plan which was awarded to the former spouse.
Send SBP documents to address of retired pay center found on any of these SBP forms: DD Form 2656-1, 2656-5, 2656-10. Use any search engine to find these forms.	Send by certified mail, return receipt requested, or by facsimile, or use upload procedures found on the DFAS website.

If Ms. Green is interested in insurance, perhaps because the costs are too high for SBP, Ms. Green may consider life insurance as an alternative to SBP. However, Ms. Green should not seek to be the beneficiary of either Veterans Group Life Insurance (VGLI) or Servicemembers' Group Life Insurance (SGLI). The US Supreme Court held that a state court cannot enforce an order or separation agreement awarding the former spouse beneficiary rights for SGLI or VGLI [16](#) . Mr. Green may select someone else as his beneficiary, and Ms. Green is likely without a remedy.

Conclusion

The intersection of state law and federal law can be complex. Most divorce attorneys have substantial experience with state law and litigation of the same, but rarely encounter federal law and regulations. When Mr. Green (or his spouse) comes to your office, take a moment and ask whether this is a case you can competently handle. It can be done, but a lawyer must devote the time, brainpower, and possibly some (hard)proff, to train themselves up on these complicated issues to properly represent a servicemember or spouse in a military divorce case. When in doubt, seek assistance of someone who knows the subject matter as a co-counsel.

Endnotes

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