

Servicemembers' Civil Relief Act Applies to Family Cases Too

In January we were reminded by the North Carolina Supreme Court in [In Re J.B.](#) that:

- 1) We have military personnel living throughout our state, not just in districts with military facilities, and
- 2) The federal [Servicemember's Civil Relief Act, 50 U.S.C. app. sec. 501, et. seq.](#), (SCRA) applies to **all non-criminal judicial and administrative proceedings** involving service personnel, including domestic and juvenile cases.

The Act contains *no exception* for any civil proceeding. So it covers custody, divorce, support, equitable distribution, 50B and 50C cases, abuse, neglect and dependency proceedings and termination of parental rights.

So what does the SCRA Require?

First: An Affidavit from Plaintiff

If a defendant has not made an appearance, no judgment can be entered until plaintiff files an affidavit stating whether defendant is in the military. 50 U.S.C. app. sec. 521. The term 'judgment' is defined as "any judgment, decree, order, or ruling, final **or temporary**." 50 U.S.C. app. sec. 511(9). The Act states: "[T]he court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit –

(A) Stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) If the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service."

The Act places responsibility for making sure the Affidavit is filed on the court. For an example of a court form created to help comply with this requirement, see the form adopted in [Wake County](#).

If plaintiff's affidavit does not establish that defendant is in the military, the court can proceed with the case. However, the court may require a bond to compensate a defendant later allowed to set aside a judgment because he or she actually was in military service. In addition, the court can enter any other order "the court determines necessary to protect the rights of the defendant under this Act." 50 U.S.C. app. sec. 521(b)(3).

Second: Appointment of Attorney for Servicemember

If plaintiff's affidavit or other information before the court shows that a defendant who has not made an appearance is in the military, "the court may not enter judgment until after the court appoints an attorney to represent the defendant." 50 U.S.C. app. sec. 521(b)(2). As previously stated, the term 'judgment' is defined by the SCRA to include all orders, including temporary orders. This means the court cannot enter any order – temporary or permanent – before appointing an attorney when defendant has not made an appearance. The SCRA does not define the role of the attorney, but it does require that the attorney attempt to contact the service member and consider requesting a stay of the proceedings. 50 U.S.C. app. sec. 521(d)

Third: Stay of Proceedings

After counsel has been appointed for a servicemember who has not made an appearance, the court must stay the case for *at least* 90 days either "upon motion by the appointed counsel, or on the court's own motion, if the court determines that:

1. There may be a defense to the action and a defense cannot be presented without the presence of the defendant; or
2. After due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists."

50 U.S.C. app. sec. 521(d).

The Act does not define 'stay of proceedings.' The term certainly means the trial court cannot enter final judgment, but does it prohibit the court from entering temporary orders, such as temporary custody or emergency domestic violence protective orders? North Carolina courts have not addressed the issue but at least one state supreme court has held the stay does not mean a court loses jurisdiction to act so it does not prohibit a court from entering temporary orders in custody cases, noting that a child's life does not go into "suspended animation" while a service member is on duty. *Lenser v. McGowan*, 191 S.W.3rd 506 (Arkansas, 2010). See also [N.C. Gen. Stat. 1-75.12](#)(stay pursuant to that statute does not terminate jurisdiction of trial court until 5 years after it is granted).

Fourth: When the Servicemember Has Notice of the Proceeding

A servicemember who has notice of the proceedings may request a stay pursuant to Section 522 of the Act. The SCRA specifies that a request for a section 522 stay does not constitute an appearance "for jurisdictional purposes," 50 U.S.C. app. sec. 522(c), but does not say that the request does not constitute an appearance for other purposes. This indicates that a servicemember who requests this stay is *not* entitled to a court-appointed attorney, pursuant to 50 U.S.C. app. sec. 521(b)(2) discussed above, because the request is an appearance.

Section 522 provides that, at any stage of the proceeding before final judgment the court may upon its own motion, and shall upon motion of the service member, stay the proceeding for *not less than* 90 days if:

1. A letter or other communication establishes that a servicemember's military duty requirements materially affect the servicemember's ability to appear and gives a date when the servicemember will be available to appear; and
2. A letter or other communication from the servicemember's commanding officer shows that the servicemember's military duty prevents appearance and that leave is not authorized for the servicemember at the time of the letter.

The court is not required to grant the stay unless the court concludes, based on this information provided, that the servicemember's current military duty requirements materially affect the servicemember's ability to appear.

If the initial Section 522 stay is granted, a servicemember can request an additional stay "based on continuing material effect of military duty on the servicemember's ability to appear." 50 U.S.C. app. sec. 522(d)(1). In support of the request for additional time, the court must receive letters or communications containing the same information required for the first stay request. If the court refuses the additional time, the court must appoint an attorney for the servicemember before proceeding with the case. 50 U.S.C. app. sec. 522(d)(2).

How is the Court-Appointed Attorney Paid?

SCRA does not answer this question. This appears to be a wonderful opportunity for pro bono service.

There's definitely more to be said about the SCRA, but this covers the basics.

