



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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WASHINGTON NAVY YARD DC 20374-5066

IN REPLY REFER TO:

JAGINST 5801.3A
Code 16

MAY 23 2012

JAG INSTRUCTION 5801.3A

From: Judge Advocate General

Subj: NAVY LEGAL ASSISTANCE PRACTICE GUIDE CHECKLISTS

Ref: (a) 10 U.S.C. § 1044
(b) JAGINST 5800.7 (series)
(c) JAGINST 5801.2A

Encl: (1) Legal Assistance Practice Guide Checklists

- Purpose. To promulgate policy for and prescribe standardized legal assistance practice guide checklists for use by Navy legal assistance providers in assisting customers and clients per the Navy's Legal Assistance Program.
- Cancellation. JAGINST 5801.3 dated 29 June 2005 is hereby cancelled and replaced in whole by JAGINST 5801.3A.
- Applicability. This instruction applies to all personnel providing legal assistance services in the Navy; including all Navy judge advocates, other military judge advocates, civilian attorneys, volunteer attorneys; legalmen; legal services specialists; civilian paralegals; civilian legal assistants; and any other personnel who provide legal assistance to authorized beneficiaries under the auspices of the Navy Legal Assistance Program and authority of the Judge Advocate General of the Navy.
- Policy. The provision of effective legal assistance by the Navy legal community provides key contributions to the welfare, morale, and readiness of individual service members, their dependents, other eligible beneficiaries and to the larger mission readiness of the Fleet. Given the significant impact this support provides, legal assistance providers will make every effort to satisfy the legal assistance needs of clients consistent with this instruction.

MAY 23 2012

5. Action. All Navy legal assistance providers will familiarize themselves with and utilize enclosure (1) when providing legal assistance support to service members, their family member dependents, and other eligible beneficiaries.


JAMES W. HOUCK

Distribution:

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LEGAL ASSISTANCE TIERS OF SERVICES PRACTICE GUIDE CHECKLISTS

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LEGAL ASSISTANCE TIERS OF SERVICES PRACTICE GUIDE **CHECKLISTS**

TIER I SERVICES

CAR CONTRACTS

OBTAIN BASIC INFORMATION

- What is the nature of the client's complaint?
- Obtain a (written) detailed description of event. When did it happen, how did client get to the dealership, who was salesperson, how long was client there, what promises were extended, etc...?
- Is the car new or used? How many miles?
- Has the client attempted to have the damage repaired or corrected?
- If client's credit was rejected, was client provided written notice of the rejection?
- Have client provide and review **ALL** associated paperwork (financing, warranty, purchase, bill or sale, titling/registration, insurance, etc...).
- Have client obtain a CARFAX report to identify any pre-existing damage (if applicable).

CONSIDER AND DISCUSS AS APPROPRIATE

- Bait and Switch
- Buyers Guide Regulations
- Contract law pertaining to contract
- Equal Credit Opportunity Act
- Fair Credit Reporting Act
- Federal Odometer Act
- Financing Issues
- Federal Trade Commission Holder Rule
- Holder in due course rule
- Lemon laws
- Repossession (voluntary/involuntary, expenses)
- Salvaged or prior wreck status not disclosed as required by law
- State laws (Unfair and Deceptive Acts and Practices (UDAP), other vehicle/consumer laws)
- Truth in Lending Act issues
- Uniform Commercial Code options[fitness, warranties, acceptance, delivery, etc]
- Used vehicle sold as New vehicle
- Warranty issues (including Magnuson-Moss)
- Yo-yo sales (a.k.a. spot sales)

TAKE ACTION AS APPROPRIATE

- Contact seller/dealership (and/or automaker district office)
- Contact state consumer protection division

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- Contact state board of motor vehicle dealers
- Contact state DMV
- Refer client to ABA Pro Bono panel; private attorney

LOCAL NLSO ITEMS (*add as appropriate*)

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CHILD CUSTODY, VISITATION, AND SUPPORT

VERIFY THAT A CONFLICT CHECK HAS BEEN COMPLETED

JURISDICTIONAL INFORMATION

- Are the minor children of the marriage subject to the subject matter jurisdiction of this judicial district based upon the UCCJEA/UIFSA or any similar statutes?
- Are there any state court rules or local rules of court that require filing in a particular location?
- Do the parties satisfy the subject matter jurisdiction and personal jurisdiction requirements for this judicial district such that the court has personal jurisdiction over the alleged obligor?
- Is there an interim need for a dependent support letter to a Commanding Officer? If so, obtain the facts and draft the letter. Proceed to next inquiry.
- If no subject matter or personal jurisdiction exists; refer the client to the proper NLSO or make the appropriate civilian referral and terminate the discussions.
- Discuss impact of a settlement agreement without a court making a factual determination of the best interests of the child as the initial order from which modification will occur in the future (initial custody and visitation determination compared to material change of circumstances determination).

OBTAIN BASIC INFORMATION

- What is the basis for action (divorce, non-marital child via paternity action, modification of an existing order, independent action for custody/visitation/support no underlying divorce or paternity action-parties still married but alleged obligor refusing to provide adequate support)?
- What are the ages and gender of the children?
- Are any of the children special needs? Exceptional family member qualified?
- Determine whether paternity needs to be/has been established and the procedure for doing so in this judicial district (see Paternity checklist).
- What is client's legal relationship to children (natural, step-parent, adopted, guardian)?
- Where do the children live, where have they lived for the requisite jurisdiction period in this judicial district, and where are they expected to reside in the future, what is their home state for UCCJEA purposes; what is the state with which they have the most contacts under UCCJEA; is there a reason the jurisdiction might exercise vacuum jurisdiction or emergency jurisdiction?
- How long will the client be available in this judicial district?
- How long will the alleged obligor be available in the jurisdiction?
- Determine the current situation of each parent (married to each other; married to someone else; divorced and remarried to someone else, employed, unemployed deployed, delinquent on support payments).

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DISCUSS CUSTODY AND VISITATION BASICS

- **Judicial considerations:**
 - Parental rights and well-being of the child
 - Best interests of child
 - Parent most likely to ensure that child will have frequent and continuing contact with other parent
 - Can the parents put aside their personal differences for the benefit of the child?
 - Has there been any domestic violence?
 - Has there been any child abuse?
 - Is the child old enough to state a preference?
 - Does the child have exceptional psychological or physical needs?
 - Will the child be in the placement of a non-biological parent for any sustained period of time if primary custody is awarded to a particular parent?
 - What are the practical considerations (geographic proximity, living arrangements of each parent, work/deployment schedule of each parent)?
- **Custody options:** Define legal custody; physical custody; shared (joint) custody and the corresponding responsibilities and divisions of labor.
- **Procedural issues:** Discuss application process, procedural requirements in this jurisdiction, hearing process, level of testimony or evidence that may be presented; process for expert testimony or to rebut an evaluator's opinion.
- **Best interest of the child standard.** Discuss best interest standard and factors typically considered for custody and modification in this judicial district based upon statute and case law.
- Discuss penalties for intentional interference with custodial rights.
- Discuss impact of conviction for domestic violence, Lautenberg Act, military career if matters concerning children are not maturely handled. Discuss whether there is any history of juvenile delinquency when in the care, custody and control of either parent.
- **Draft pleadings:** If authorized by CO, provide custody pleadings, application, order to show cause, motion and settlement agreement worksheet, if appropriate.
- **Considerations for custody and visitation agreements:**
 - The ambiguity of terms such as "reasonable visitation" and "visitation by mutual consent or agreement" and the need to give detailed parameters of what each means by including a non-exhaustive list leading with "...including but not limited to..."
 - Discuss using a sitter of first choice when parents are local and a first right of refusal of a parent rather than sending the kids to a sitter.
 - Ensure client knows that there is no such thing as an oral modification of a settlement agreement, a custody agreement or a support agreement.
 - Consider including specific language about neither parent making or allowing others to make disparaging or derogatory comments about the other parent in the presence or hearing range of the child.
 - Explain the benefits and consequences of supervised visitation; costs; mechanics, duration, reasonableness; necessity.
 - Discuss having a visitation schedule for the non-custodial parent and children that is based upon the non-custodial living or residing within 25 miles of the child's primary residence and creating a different schedule when the non-custodial parent resides

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- more than 25 miles from the child's primary residence.
- Discuss including OCONUS visitation or custody including the terms for notification to the other parent and cost sharing of transportation for visitation OCONUS.
- Discuss logistics for every pick-up/drop-off.
- Discuss including a provision for the non-custodial to maintain weekly telephone or electronic contact with the minor(s) and the requirements of the custodial parent to maintain the equipment to so or for the parties to equally share the costs for such equipment
- Discuss make-up clauses for non-custodial parent who is deployed.
- Discuss grand-parent other biological extended family member visitation sharing.
- Specifically discuss holiday schedules, rotations, whether they include or exclude prior Friday or following Mondays when child is scheduled to be off from school due to the holiday.
- Discuss notice to be given when going to miss or be late for a visitation and whether it is to be made-up or not.
- Discuss responsibility and procedures for medical, dental , or other care related to child's physical and emotional needs.
- Detail schedules for children's birthdays and father's day, mother's day and sharing.
- **Modification of custody:** Explain standard rule of law regarding an initial custody determination by a judge as being modifiable only upon a material change of circumstances that was not anticipated by the first determination and/or is contrary to the best interests of the child vice a stipulated or agreed to determination that may be changed using only a best interests of the child determination.

DISCUSS MILITARY-SPECIFIC ISSUES

- Need for any settlement agreement or court orders to specifically address custody and visitation during periods of deployment, TAD, and PCS
- Need for any family care plan details to be worked into the custody and visitation court orders or settlement agreement
- Page 2 (or equivalent) for military couples
- Servicemember's rights and protections under SCRA concerning custody orders and child support orders including the right to ask for anticipatory relief from current child support obligation. (Confirm whether jurisdiction has a more expansive state statute than SCRA for servicemember)

DISCUSS CHILD SUPPORT

- Obligation under state law (include marital presumption/state guideline/state add-ons) and duration
- Probable amount based upon state calculators (by law each state that is a recipient of federal funds must have a state child support calculator available online for the public).
- Discuss the inadequacy of private agreements; dangers of a court ordering past support; disallowing voluntary payments
- Discuss continuing jurisdiction until child ages out; discuss procedure to modify; discuss procedure to terminate; discuss garnishment and ability for waiver only if both parties agree.
- Military guidelines; identify what the amount would be under military guidelines; discuss

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benefits of military guideline compared to state guideline; discuss potential impact on Servicemember's career

- Discuss procedure to obtain DFAS enforcement via involuntary allotment/garnishment under court order
- Discuss availability of State child support agency assistance and possible delay for self cases vice public assistance cases
- Has the jurisdiction provided state assistance for which there will be a mandatory reimbursement?
- Does either party qualify for a financial hardship in the support calculation?
- Are the parties going to agree to certain add-ons like tuition, private school; college? Does the jurisdiction require such contributions or is it discretionary?
- Is a party carrying a disproportionate portion of the parties' debt qualifying for a hardship?
- Has BAH been considered in the formula?
- Have other entitlements or special pays been included in the income of a parent when it should have been excluded?
- Does a parent have children not of this relationship for whom there is a court ordered support obligation that should be considered when calculating this support order?
- Does either parent have an alimony or spousal support obligation for which there is a court order which should be factored into the equation?
- Consider reducing child support during extended visitation by negotiating a reasonable reduction but get the step-down firmly in the written settlement agreement with firm parameters that are not ambiguous
- If the parties live a significant distance from each other who will pay/how will costs be shared for transportation to and from visitation

LOCAL NLSO ITEMS (*add as appropriate*)

WORKSHEETS:

Custody and support application; settlement worksheet/custody and support and visitation application/modification.

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CONSUMER FRAUD **(including Pay-Day Loans, Door-to-Door Sales & Title Loans)**

OBTAIN BASIC INFORMATION

- What is the nature of the fraud?
- Does the client know the identity of the perpetrator?
- Has the client filed a complaint, police report, or affidavit of fraud?
- Determine the basics of the complaint (what, when, where, how).
- Has client obtained **ALL** supporting documentation (contracts, credit reports, letters, notifications)?

DISCUSS PROTECTIONS UNDER FDCPA, EFTA, FCRA, FCBA AND RECOMMEND/TAKE ACTION

- Contract law
- State-specific consumer and contract law protections
 - Look to consumer protection statutes
 - Many states have anti-payday loan regulations
 - Many states impose significant limitations and rights to cancel on in-home solicitations; payday loans; title loans

RECOMMEND/TAKE ACTION

- File a police report
- Obtain credit report from 3 major reporting agencies
- File a complaint with the Armed Forces Disciplinary Control Board
- File a complaint with FTC and the Military Sentinel
- File a complaint with the BBB
- File a complaint with the Consumer Financial Protection Bureau

CONSIDER AND DISCUSS STATE LAWS REGARDING PAYDAY LOANS, PREDATORY LENDERS, OTHER CONSUMER SCAMS

DISCUSS CREDIT COLLECTION PROTECTIONS AND TAKE ACTION (SEE CREDIT AND DEBT COLLECTION AND ID THEFT CHECKLIST)

LOCAL NLSO ITEMS *(add as appropriate)*

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CREDIT AND DEBT COLLECTION

OBTAIN BASIC INFORMATION

- To whom is the debt owed?
- What is the total amount of debt?
- What is the nature of debt (secured, unsecured, joint, cosigners)?
- What is the status of debt (past due, post-judgment, etc.)?
- Is there a defect in the notice that was provided by the third party collector?
- If post-judgment, did the client or a representative participate in any judicial hearings? If not, why not?
- What actions has the debt collector or creditor taken to collect the debt?
- Obtain a copy of and review all relevant paperwork (court document, correspondence, underlying contracts and court orders)
- Have client obtain and provide his or her credit report(s) for review
- Discuss contacting Consumer Financial Protection Bureau, Better Business Bureau, Military Sentinal, FTC
- Is the conduct so egregious it rises to the criminal level warranting discussion with local prosecutors or State's AG?

DISCUSS FAIR DEBT COLLECTION PRACTICES ACT (FDCPA) RIGHTS

- Verification of the debt
- Must be consumer debt
- Creditor must not be the original creditor
- Abusive and unfair practices
 - false, deceptive, misleading representations
 - hours of calling; whom called; threats made
- Disputing the debt

DISCUSS FAIR CREDIT REPORTING ACT (FCRA) RIGHTS

- Dispute the entry
- Obligation to verify debt
- Timeframes for action
- Submitting a statement

DISCUSS CREDIT SCAMS

- Credit repair
- Debt consolidation

DISCUSS COMMAND INVOLVEMENT IN COLLECTION PROCESS

- Debt collectors are permitted to contact employer only to confirm location of debtor
- Debt collectors are prohibited from informing Command that client is alleged to be in

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default/indebted

- Client must inform attorney of any perceived illegal communications from debt collector to Command or other third parties
- Discuss whether the client appears to be at a point of no return; might have to file bankruptcy
- Discuss security clearance issues

CONSIDER, DISCUSS, AND TAKE ACTION AS APPROPRIATE

- SCRA rights and violations (default judgment, affidavit of military service)
- FDCPA debt dispute and verification compared to potential State law protections
 - Actual damages, statutory damages of up to \$1,000, court costs, attorneys fees under federal law
- FCRA dispute and verification
- State statutory protections
- Identity theft and consumer fraud issues (see Consumer Fraud and Identity Theft checklist)
- Bankruptcy counseling (see Bankruptcy checklist)
- Provide FTC web address (<http://www.ftc.gov/ftc/consumer.htm>)
- Negotiate with creditor on behalf of client (if appropriate)
- Creditor garnishment/lien options (see involuntary allotment, garnishment checklist)

LOCAL NLSO ITEMS (*add as appropriate*)

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DEMOBILIZATION

OBTAIN BASIC INFORMATION

- How long was the member activated and does member's cumulative total activated reserve service exceed 5 years (not including monthly and annual AT)?
- Does the client plan to return to his or her job, and does he or she anticipate any problems?
- Does the client have any outstanding legal issues?

DISCUSS USERRA (<http://www.dol.gov/vets/whatsnew/userraguide0704.rtf>)

- Prompt return to work place (appropriate notice of intent to return)
- Rights (escalator position, prompt re-employment, employment health benefits, protection from dismissal)
- Limitation on cumulative total activated reserve service (not including monthly and annual AT)
- Disqualifying character of service to preserve USERRA rights
- Exceptions for disability

DISCUSS SCRA PROTECTIONS

- Vacate (Set Aside) Default judgments
- Insurance coverage (malpractice for professionally insured individuals (doctors, lawyers) and health insurance).
- Protection from mortgage/trust deed default duration post active duty

DISCUSS DEMOBILIZATION NOTICE TO CREDITORS OF TERMINATION OF 6% BENEFITS AND POSSIBLE NEGATIVE CONSEQUENCES OF CLAIMING WHEN NOT ELIGIBLE

DISCUSS INCOME TAX ISSUES

- Deadline for filing past year returns and requests for refunds

DISCUSS HEALTH INSURANCE COVERAGE ISSUES

- Duration of TRI-CARE both individual and family
- Insurance coverage continuation and premiums
- Malpractice insurance coverage for professionally insured individuals (doctors, lawyers)

DISCUSS ESTATE PLANNING AND DRAFT NECESSARY DOCUMENTS

- POA revocation if needed

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DISCUSS FAMILY CARE PLAN

- Termination of temporary guardianship, if necessary

DISCUSS CONSUMER LAW ISSUES

- Check credit report/discuss negative credit entries and removal of negative entries
- Remove active duty fraud alert
- Remove credit bureau report security freeze

ADVISE OF THE CONTINUING RIGHT TO RECEIVE LEGAL ASSISTANCE AND DURATION

- If called up for a period in excess of 30 days then eligible for a period of time that begins on the release and is not less than twice the length of the period served on active duty under that call or order to active duty
- If called up for a period of less than 30 days, ineligible for continuing Legal Assistance

DISCUSS ANY OUTSTANDING LEGAL ISSUES

LOCAL NLSO ITEMS (*add as appropriate*)

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DIVORCE

VERIFY THAT A CONFLICT CHECK BEEN COMPLETED

JURISDICTIONAL INFORMATION

- Do the parties satisfy the subject matter jurisdiction requirements for this judicial district?
- Does either party satisfy the personal jurisdiction requirements for this judicial district?
- Are the minor children of the marriage subject to the subject matter jurisdiction of this judicial district based upon the UCCJEA or any similar statutes?
- Is there an interim need for a dependent support letter to a Commanding Officer? If so, obtain the facts and draft the letter. Proceed to next inquiry.
- If no subject matter or personal jurisdiction exists; refer the client to the proper NLSO or make the appropriate civilian referral and terminate the discussions.

DISCUSS DIVORCE BASICS AND PROCEDURES

- Availability of interim and *pendente lite* orders
- Fault/No-fault
- Judicial district prerequisites (e.g. residency following filing of the petition/complaint, period of time living separate and apart, marital counseling, mediation, best interests of the child philosophy of judicial district)
- Jurisdiction: (Subject matter and personal jurisdiction over the parties; the marital res; the minors)
- Possible bases for divorce: (Joint petition, Summary Dissolution, separate and apart periods required for jurisdiction, waiting period between filing and entry of judgment, whether a party must make a personal appearance)
- Potential costs (contested and uncontested)
- Status only reserve on property issues or is this a jurisdiction where all property and custody and support issues must be addressed before status is terminated

OBTAIN BASIC INFORMATION

- When were the parties married?
- Where were the parties married?
- When did/will the parties separate?
- How long do each of the parties expect to remain in the area? (needed to determine whether case can be completed in time frame of if other arrangements need to be made).
- Ages of the parties.
- Where is each party employed and what is his or her income?
- Special needs spouse. (may prompt discussion about Continuing Health Care Benefits (CHCB); spousal support (alimony))
- What is the cause for the breakup? (May result in need to explain potential career impact.)

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EXISTENCE OF WRITTEN AGREEMENTS, COURT ORDERS/HEARINGS

- Is there any domestic violence? Have any Temporary Restraining Orders (TROs) or Military Protective Orders (MPOs) been issued?
- Are there any existing agreements or court orders or future court hearings on calendar?
- Are there any pre/post nuptial agreements?
- Are the agreements or orders clear or ambiguously drafted leaving a door open to litigation
- Do the agreements address issues the client wants to discuss or was the agreement silent allowing re-opening of litigation?

INFORMATION ABOUT CHILDREN OF THE MARRIAGE

- Are there any minor or adult disabled children of the marriage involved?
- Parentage (Are there any children of this relationship who were not born during the marriage?)
- See **Child Custody, Visitation, and Support checklist**

INFORMATION ABOUT ASSETS AND DEBTS

- Were there any prior divorces for which there is an existing support obligation or third party co-ownership of an asset?
- If military, determine the length of military service; military service concurrent with marriage; divisibility of retirement; probable formula; percent allocated to community; UFSPA discussion; effect of disability election/waiver; direct payment if married at least 10 years concurrent with active duty.
- Is there a possibility that the non-member will accept a commercial life insurance policy or some other assets in return for a full waiver of his or her share of the military retirement and survivor's benefits?
- Identify all assets of husband; all assets of wife; all assets of the marital estate or community estate? (Ask sufficient questions to ascertain whether any assets or debts were acquired or incurred in a community property jurisdiction)
- Identify form of title on all bank accounts, savings accounts, investment accounts, real estate and all vehicles and all timeshares
- Were any assets or debts acquired while living in a community property state?
- Discuss the dangers of retaining real estate that is upside down or which is in a depressed market; joint dealings following the divorce; difficulty of handling, managing, responsibilities
- Are there any existing joint liability agreements (lease, mortgage, auto loans, etc.)?
- Community property and equitable distribution schemes (AZ, CA, ID, LA, NV, NM, TX, WA, WI)
- Marital waste
- Obligation to creditor despite agreement or court order
- Possibility and effect of bankruptcy pre and post-divorce
- Discuss eligibility to maintain military benefits post-divorce (spouse, kids, stepkids)
- Discuss income tax issues (filing status, exemptions, deductions, credits)

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- Discuss estate planning issues and recommend changes
- Discuss SGLI/insurance benefits/Survivor Benefit Plan/unpaid pay and allowances beneficiary designations (if appropriate)
- Discuss the pros and cons to a non-modifiability clause

DISCUSS SUPPORT

- General Issues
 - Military guidelines (MILPERSMAN 1754-030; LEGADMINMAN Chapter 15)
 - DFAS enforcement; procedure to obtain enforcement
- Child support for children of this marriage
 - Obligation (include state guideline discussion) and duration
 - Discuss military guidelines/duration until court orders entered; voluntary allotment; can be terminated by member; not the most effective method in most circumstances
 - Probable amount, and effectiveness of private agreements
 - Lifetime overall impact if support were ordered from other jurisdiction for which parties could obtain judgment, if applicable
 - State child support agency assistance; automatic garnishment; waivers of automatic garnishment
 - Continuing jurisdiction; how and when to seek modification; how to terminate when child attains majority
 - Impact of arrears on drivers license, passport, tax intercept
- Spousal support
 - Judicial perspective; Obligation and duration
 - Mitigating factors, age, health, education of spouse seeking support; imputed income; domestic violence affecting ability to work; long term vice short term marriage, etc
 - Military guidelines/duration until court orders are entered; voluntary allotment; can be terminated by member; not the most effective method in most circumstances
 - Lifetime overall impact if support were ordered from other jurisdiction for which parties could obtain judgment, if applicable
 - Problems with tax consequences of lump sum payments
 - Pending entry of judgment or interim spousal support orders
 - Impact of remarriage of supported spouse
 - Will cohabitation with another in romantic relationship affect or permit request for modification?
 - Post divorce or permanent spousal support orders
 - Ineffectiveness of private agreements
 - Reasons to make the orders final and non-modifiable; reasons to make the orders subject to continuing review

DISCUSS CHILD CUSTODY (see Child Custody, Visitation, and Support checklist)

DISCUSS THE BENEFITS OF A MARITAL SEPARATION AGREEMENT (MSA)

- Describe MSAs, benefits and limitations; necessity to be specific and address all assets, all

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debts; all custody, all visitation; all support; or retain jurisdiction to do so.

- Consider and discuss MSA applicability/weight in jurisdiction
- Explain negotiation process and/or mediation
- Provide MSA worksheet (if appropriate)
- If drafting agreement address every possible issue. Silence will not preserve your client's rights!
- Make sure the words you choose have the intended meaning; research before you commit
- The agreement has little utility unless made an order by a court of competent jurisdiction
- Research whether your agreement should merge and incorporate any non-warranty provisions; what is the practical effect on the enforcement provisions and protection from collateral attack

LOCAL NLSO ITEMS (*add as appropriate*)

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ESTATE PLANNING

HAS THE CLIENT COMPLETED A WILL WORKSHEET?

DO CLIENTS NEED A DUAL REPRESENTATION WAIVER LETTER?

BASIC ESTATE PLANNING QUESTIONS/INFORMATION TO OBTAIN OR DISCUSS

- Does client own real property in a state other than their state of domicile? If yes, advise client regarding ancillary probate.
- Inform the member that delivery of his or her personal effects if death occurs while on active duty is controlled strictly by the page-2/DD-93 and not by the will if the person nominated under a will or POA is different than the person listed in the page/2 DD-93. Resolve all conflicts of this issue.
- Is this a blended family that presents potential issues for any surviving children; conflicts of interest with current spouse? Ensure client understands implications that can result in leaving children from prior marriage without inheritance such as a will contest; minor children having a right to adequate support.
- Existing Pre-Nuptial or Community Property Agreements? If yes, advise client of impact of these agreements on their Will.
- Explain difference between probate and non-probate property including beneficiary designated insurance, survivorship owned property, beneficiary designated financial accounts such as IRAs, 401Ks, joint bank accounts.
- Regarding insurance, if client owns policy on his/her life explain that entire death benefit is counted as an asset and not just the cash value.
- Review with client the duties of their Personal Representative/Executor, guardian for minor children and/or their property (if applicable), and Trustee (if applicable).
- Discuss the importance of the client making sure the proposed PR/Executor/Trustee/Guardian is willing to accept the duties and liabilities
- Discuss the importance of nominating a successor PR/Executor/Trustee/Guardian in each situation in case the nominee declines, cannot be appointed for some legal reason or has predeceased or died with the client.
- Review with client the importance of choosing a PR/Executor, guardian for minor children and/or their property (if applicable), and Trustee (if applicable) whom is capable of completing these duties.

DISCUSS JURISDICTIONAL ISSUES

- Residence (past or present) in a Community Property State? (AZ, CA, ID, LA, NV, NM, TX, WA, WI)?
- Is Homestead protection available?
- Is a Personal Property Memorandum available?
- Effect of marital status on bequests, devises, inheritance and ability to disinherit.
- Effect of legal relationship with child (step, biological, adopted) on bequests, devises, inheritance and ability to disinherit.
- Are there specific qualification requirements for a Guardian (e.g., must proposed Guardian

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be a resident of client's state of domicile or a blood relative in order to serve)?

- Are there specific qualification requirements for Executors (e.g., must proposed Guardian be a resident of client's state of domicile or a blood relative in order to serve)?

EXPLAIN OTHER SOURCES OF INCOME THAT WILL POSSIBLY FLOW TO THE DEPENDENTS OF THE CLIENT AND WHICH ARE NOT PART OF THE CLIENT'S ESTATE UNLESS THE CLIENT DECIDES TO DIRECT OTHERWISE FOR THOSE THAT CAN BE SO DIRECTED AND BENEFITS THAT REDUCE THE NEED FOR IMMEDIATE ACCESS TO SGLI AND DEATH GRATUITY

- Dependency and Indemnity Compensation VA Form 21-534
- IRAs/401K/Thrift Savings Plan and need to properly designate beneficiaries as in SGLI/DD-93 below)
- Necessity to re-title property (e.g. motor vehicles and real estate) and overview of probate issues if decedent is sole owner or if held jointly ("and") rather than jointly with survivor's rights ("or")
- Review the VA website for current regulations and information regarding burial allowances: <http://www.cem.va.gov/cem/index.asp> and <http://www.vba.va.gov/VBA/benefits/factsheets/burials/Burial.pdf> .
- Discuss right to a military funeral/burial in national cemetery; transportation of eligible family members at government expense; possible per diem for attending and traveling to the funeral; reimburseable amounts for preparation, casketing, and burial. Discuss military honors and the fact that Person Authorized to Direct Disposition (PADD), and each child of the decedent will receive a flag, as will the member's parents. Divorced parents will each receive a flag. Specific information about burial honors can be found at: <http://www.militaryfuneralhonors.osd.mil>.
- Social Security Funds (Surviving spouse at age 65 unless blind or disabled then immediately; unmarried children under 18, or up to age 19 if they are attending high school full time; children at any age who were disabled before age 22 and remain disabled. Under certain circumstances, benefits can be paid to stepchildren, grandchildren, or adopted children.

SURVIVOR BENEFITS

- Survivor Benefit Plan
- TRICARE/DEERS
- Veterans Administration (burial and survivor)
- Discuss VA Home Loans and the fact that surviving spouses who have not remarried are eligible for VA home loans which may offer better mortgage rates or terms than traditional home loans.
- Discuss Montgomery GI Bill/Veterans Educational Assistance Program which will pay a refund equal to the amount contributed by the member under Chapter 30 or Chapter 32, less any benefits paid, unless the death was a result of willful misconduct. The refund will be paid to the beneficiary of SGLI proceeds. In cases involving multiple beneficiaries, each beneficiary must submit a separate refund request.
- Discuss Survivor and Dependent's Educational Assistance which provides that surviving spouses are eligible for educational benefits for up to twenty years after the date of the

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service member's death. Children are normally eligible to use their educational benefits between the ages of eighteen and twenty-six. This benefit may be used to pursue an associate's, bachelor's, or graduate degree; courses leading to certification; technical or vocational school; apprenticeships; and various other educational programs. Children over the age of fourteen with physical or mental disabilities may receive benefits for special restorative training to lessen or overcome impairment.

- Discuss the availability of government housing or the equivalent value thereof if the survivor leaves government housing for a year from the date of the member's death at the then current rate of BAH for the servicemember's pay grade. If the surviving spouse is also active duty he or she is also eligible for the housing allowance as an authorized dependent.
- Discuss the right to one relocation move at the government expense upon the member's death while on active duty. The movement of household goods must be completed within three years following the death of the service member.
- Discuss the tax implications when death of the member occurred while in active service in a combat zone or directly resulted from injury or disease received in a combat zone. The decedent's income tax liability is forgiven for the tax year in which the death occurred and for an earlier tax year ending on or after the first day the member served in a combat zone in active service. Forgiven tax is tax that does not have to be paid. Any forgiven tax liability that has already been paid will be refunded, and any tax liability at the date of death will be forgiven. In addition, any unpaid taxes for prior years will be forgiven and any prior year taxes paid after the date of death will be refunded. This provision also applies to members serving outside the combat zone if the service was in direct support of military operations in the zone, and qualified the member for military pay for duty subject to hostile fire or imminent danger

SGLI/INSURANCE: ADVISE AND DRAFT NEW DESIGNATION FORM

- Discuss effective dates of SGLI (Different for reservists returning to AD)
- Discuss level of coverage, whether member might consider increasing
- Explain significance of insurance payout as non-probate property vice having the asset potentially pass through probate if the client is using a contingent minor's pre-residuary trust or residuary trust
- Explain that insurance is tax free to the beneficiary; includable in the client's estate for estate tax purposes if over the estate tax limit at the time of death
- Discuss who client has named as beneficiary; discuss contingents; discuss necessity to place minor's proceeds in UGMA/UTMA or pre-residuary or residuary testamentary trust
- Discuss creditor protection available with pre-residuary minor's trust vice no creditor protection in residuary trust
- Draft a new beneficiary designation form for the SGLI unless specifically directed not to by client who does not wish to update SGLI; prepare the new beneficiary designation, selecting the appropriate language based upon the client's selection of trust or of UGMA/UTMA account
- Discuss the low interest rate received by the beneficiary via the Prudential Alliance Account vice the beneficiary or trustee or custodian being able to receive one lump sum payment and invest at a higher interest rate in the private sector

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- Discuss the problems with 26 monthly payments in terms of the loss of possible interest to the adult beneficiary under the Prudential Alliance account

DEATH GRATUITY FORM DD-93 AND DRAFT NEW DESIGNATION FORM

- Discuss the Form DD-93 and its purposes:
 - Identify Primary Next of Kin and Secondary Next of Kin (PNOK/SNOK)
 - Identify Dependents or others potentially eligible for dependent derivative benefits
 - Identify primary and secondary beneficiaries who receive death gratuity. Need not be a relative; can give up to 100% away in shares of no more than 10 shares; can place in pre-residuary trust for contingent minors trust
 - Identify primary and secondary beneficiaries who will receive member's unpaid pay and allowances thus potentially avoiding probate court
 - Identify person authorized to direct disposition of member's remains.
- CAUTION: Discuss the need to NOT create a conflict between the estate planning documents and the Designation of Person Authorized to Direct Disposition (PADD) at line 13. If the client wants to name an agent for health care or an executor or personal representative that is different from the eligible persons for the PADD of an Active Duty person, then the attorney must carefully craft the authority of the agent/personal representative/executor to not include disposition of the client's remains when on active duty.
- AUTHORITY: Under 10 U.S.C. § 1482 - Only the following persons may be designated to direct disposition of the remains of an Active Duty decedent covered by this chapter:
 - (1) The surviving spouse of the decedent OR (2) Blood relatives of the decedent.
 - (3) Adoptive relatives of the decedent. (4) If no person covered by clauses (1)–(3) can be found, a person standing in loco parentis to the decedent.

TESTAMENTARY PRE-RESIDUARY, RESIDUARY, AND CREDIT SHELTER AND DISCLAIMER CREDIT SHELTER TRUSTS AND COMMON DL-ISSUES TO DISCUSS WITH THE CLIENT

- Explain that the trust is dormant until the client passes away at which time it becomes effective and irrevocable.
- Explain that a pre-residuary trust as well as the residuary trust can be created but funded only if a preferred beneficiary, e.g., spouse, has predeceased or died simultaneously with the client. In essence this is a contingent trust that is contingent upon some preferred beneficiary disclaiming or failing to survive the client.
- Explain that probate of the will is required to make the testamentary trust operational because the written instructions specifying the handling, management and other terms of the trust are contained within the Will.
- Explain purpose of Credit Shelter (Disclaimer Credit Shelter trust). Outright gift to surviving spouse with an express provision that if properly disclaimed within 9 months after the death of the transferor decedent under a written irrevocable and unqualified refusal to accept the property, then the property will pass to the younger generation and potentially minimize estate taxes for both spouses' estates; also used for blended families where there is a concern that children of a former relationship might be disinherited by the surviving spouse
- The trustee should have a range of powers from limited to anything otherwise authorized by statute in the jurisdiction in which the trust will be administered. The range of powers should be predicated on the sophistication of the nominated trustee and the goals of the client but

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also broad enough to permit the client and an attorney to efficiently, effectively and economically wind up the estate in the future.

- Does the proposed nominee have the experience and specialized knowledge necessary to handle investments and administrative requirements and income tax issues or will he or she have to retain an accounting firm or attorney at an expense to the estate?
- Explain the significance of “spendthrift” provisions, which are used primarily to prohibit a beneficiary from assigning or otherwise anticipating an inheritance and thus shielding the trust assets from the creditors of the beneficiary.
- Explain the meaning of “bond” and the purpose. Usually this creates a situation where the person who is placed in the fiduciary position has to post independent bond to guarantee the faithful performance of his or her duties. Research the jurisdiction's statutes to determine whether the jurisdiction requires bond unless the nominated fiduciary is a blood relative and whether the fiduciary must be resident in the jurisdiction to be appointed.
- Explain that fiduciaries (PR/Executor/Trustee/Guardian) are all eligible to receive fees paid to them for their services. Discuss the implications of requesting that such persons waive the right to these fees and explain that the fees are income that is taxable to the recipient.
- Explain the rule of law that beneficiaries under the legal age of emancipation are prohibited from receiving their monetary inheritances outright and the client must decide whether to place the assets in trust; create an UGMA or an UTMA account or delay the probate process by requiring the PR/Executor/other nominated person to file a special proceeding with the court requesting appointment so that the funds can be dispersed to the nominee for proper handling under the terms of the will.
- Explain that any age of distribution beyond the legal age of attaining adulthood requires a trust unless the jurisdiction permits UGMA or UTMA accounts to be held until a later age.
- Explain the difference between a “single” trust for all beneficiaries and “separate” trusts for each beneficiary. A single trust permits the Trustee to use any amount of the trust for any one or more children at the risk that other children will not receive their full intended share and it is more manageable and perhaps less expensive to maintain than separate trusts for each beneficiary. A series of separate trusts may create more expense because there are individual accounts to be maintained for each child once the trust is approved by the court; each child is guaranteed to receive only his or her intended share of the estate. While some would argue that the separate trusts also may deprive a young child because his or her money is used for basic needs this may be misguided due to the DIC, VA benefits and Social Security benefits that may also be available to the child as a result of the parent(s) employment.

DISCUSS HEALTH CARE SURROGATE/LIVING WILL

- Legal standing conferred upon agent by medical power of attorney is required to be honored; however there is usually no statutory duty to permit Next of Kin (NOK) to make decision to remove/terminate life support
- Differences between power of attorney for health care and living will
- Ability of client to expand/limit/restrict procedures to be performed or not be performed on him or her
- Necessity for contingent or secondary nominations of agents
- Procedures for delivery of copies of medical power of attorney and living will to medical

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professionals; keeping available on person at all times; travel with documents, etc.

DISCUSS POWERS OF ATTORNEY (See POAs in this Guide)

DISCUSS PROBATE AVOIDANCE (See Probate in this Guide)

- Pros/Cons
- Alternatives (Joint Ownership/Pay on Death Designation/Tenants by Entirety)

DISCUSS GENERAL ESTATE TAX IMPLICATIONS

FOR WILL EXECUTION, USE THE STANDARDIZED WILL EXECUTION SCRIPT, LOCATED ON NKO AT THE LEGAL ASSISTANCE COMMUNITY OF PRACTICE PAGE.

LOCAL NLSO ITEMS (add as appropriate)

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HAGUE ABDUCTION, PARENTAL KIDNAPPING ISSUES, AND CUSTODY IN NON-HAGUE CONVENTION COUNTRIES (JAPAN)

GENERAL DISCUSSION

- Advise client that he or she must consult with a family law specialist who is familiar with the laws of the jurisdiction that is or may become relevant and who can take action in state court where the child last was habitually resident
- Indicate that you can try to refer the case to the ABA pro bono panel but this may not be fast enough for the client

INTERNATIONAL CHILD CUSTODY LITIGATION

- Discuss threat of removal or retention of the child across borders
- Discuss difficulty affecting a return of a child wrongfully retained or abducted
- Verify whether a client's child could potentially be taken to a non-Hague Convention country and warn of the dangers and difficulties of no comity and no full faith and credit to existing court orders
- Inform client of State department involvement and limitations in countries who have refused to sign to the convention
- Review State department's Office of Overseas Citizen Services site with client at <http://travel.state.gov> for country specific information
- Explain that bringing a petition under the Abduction Convention does not mean the child will be returned. It is only a petition to seek the remedy of return and it must be filed in the country to which the child has been taken.
- The DoS Office of Children's Issues serves as the Central Authority for all applications made to seek return of a child abducted from the United States
- The Central Authority in the United States for these cases once the petition has been filed is the national center for Missing and Exploited Children located in Alexandria, Virginia
- Neither agency is ever authorized to determine whether the petition or allegations have merit; that is left to the court with competent jurisdiction
- The petition to return may be brought in either state or federal court [concurrent jurisdiction was granted by statute] under 42 U.S.C. § 11603(a) [International Child Abduction Remedies Act (ICARA)] at the election of the petitioner

THRESHOLD ISSUES

- Habitual residence must be determined and is a very vague and poorly defined term.
- Generally the courts will ask whether:
 1. there is a demonstrated and manifest "settled purpose" to change habitual residence, despite the stated reservations of one of the parents;
 2. the child's initial translocation from an established habitual residence was clearly intended to be only for a specific and delimited purpose;

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3. the child's former habitual residence was mutually abandoned;
4. which parent, if any, was actually exercising a right of custody that entitles him or her to the demanded return.
5. has the petitioning parent waited in excess of a year to bring the action which will likely close the action because the child has settled in the new location;
6. did the petitioning parent authorize the removal in some way;
7. are there allegations of child abuse; domestic violence; are there records of the same that can be used to defeat a request to return the child

FOREIGN CUSTODY ORDERS FROM NON-SIGNATORY COUNTRIES (JAPAN)

- Foreign custody orders from non-signatory countries, such as Japan, can be very dangerous. Terminology that one might ordinarily believe is advantageous to the client turns out to be devastating because the foreign nation shows preference to its nationals and not to foreigners
- Japan does not take into account child abuse, spousal abuse, nor whether a parent is facing criminal charges in his or her home country
- Japan's current system does not recognize shared custody, even among the country's own citizens who reside in Japan
- The general practice in Japan is to award custody to the mother unless there is an overriding reason to award custody to the father. Nationality of the child is not considered crucial in the determination of which parent will assume custody
- A foreign child custody agreement cannot be automatically enforced in Japan, although the court can order enforcement.
- In the case of parental kidnapping from the U.S. to Japan, the custodial parent can [but should see an attorney in the United States before making this decision] apply through the court in Japan to require the return of the child to the United States

LOCAL NLSO ITEMS *(add as appropriate)*

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IDENTITY THEFT

See (<http://www.consumer.gov/idtheft/>)

OBTAIN BASIC INFORMATION

- What is the nature of the fraud?
- Does the client know the identity of the perpetrator?
- Has the client filed a complaint, police report, or affidavit of fraud?
- Determine the basics of the complaint (what, when, where, how)
- Have client obtain any supporting documentation (contracts, credit reports, letters, notifications)

DISCUSS PROTECTIONS UNDER VARIOUS ACTS AFFECTING CREDIT AND ACCOUNTS

- Electronic Funds transfer Act (EFTA)
- Fair Credit Reporting Act (FCRA)
- Fair Debt Collection practice Act (FDCPA)
- Fair Credit Billing Act (FCBA)

RECOMMEND/TAKE ACTION

- Request 90-day fraud alert; explain possible consequences in terms of opening own credit
- Contact all credit card companies as needed
- Contact Social Security Administration Office of the Inspector General
- Contact bank as needed
- Investigate whether state has identity theft section with AG office to lodge complaint
- Request a freeze on all bureau reports; same consequences possible as above
- File Identity Theft Affidavit or Complaint with the FTC (<http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/know-before-filling.html>)
- File a police report. Explain that the report may be difficult to file if the theft occurred outside this jurisdiction but the client must insist that the police take the report in order to have the protection he or she may need in the future to obtain a court order changing his or her social security number
- Consider Identity Theft Resource center at www.idtheftcenter.org/index.html
- Consider <http://www.uspsoidg.gov/contact.htm> to report mail theft
- Obtain credit report from 3 major reporting agencies
- Consider <https://www.annualcreditreport.com/cra/index.jsp> which is the ONLY authorized source for the free annual credit report by law. The Fair Credit Reporting Act guarantees access to a credit report for free from each of the three nationwide credit reporting companies — Experian, Equifax, and TransUnion — every 12 months.
- Explain that the client should stagger the reports from the above site to be able to monitor quarterly throughout the year
- Report the incident to the FTC (see website) ([https://rn.ftc.gov/pls/dod/widtpubl\\$.startup?Z_ORG_CODE=PU03](https://rn.ftc.gov/pls/dod/widtpubl$.startup?Z_ORG_CODE=PU03)) and state consumer protection division

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- File a complaint with the AFDCB if business related
- Alert chain of command

**CONSIDER AND DISCUSS STATE LAWS REGARDING PAYDAY LOANS,
PREDATORY LENDERS, OTHER CONSUMER SCAMS**

**DISCUSS CREDIT COLLECTION PROTECTIONS AND TAKE ACTION (See Credit
and Debt Collection Checklist)**

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INVOLUNTARY ALLOTMENT/GARNISHMENT/DFAS ISSUES

FOR CREDITOR SPOUSE, CREDITOR PARENT, OR DEBTOR

OBTAIN BASIC INFORMATION

- Is client a creditor spouse, creditor parent, or a debtor?
- To whom is the debt owed (NEX, government, creditor, debt collector, ex-spouse for alimony, child support)?
- What is the nature of the debt (commercial, spousal/child support, repayment, NEX)?
- Has the debt been reduced to judgment?
- Did the client or a representative participate in any judicial hearings? If not, why not?
- Has the client received notice from DFAS yet regarding the proposed garnishment?
- Obtain a copy of and review all relevant paperwork (courts document, DFAS notice, correspondence, underlying contracts and court orders).

DISCUSS BASIC GARNISHMENT/REPAYMENT PROCESS

- DFAS procedures (consumer, support) – see <http://www.dfas.mil/money>
 - There are two procedures, garnishment and involuntary allotment, under which the Defense and Finance Accounting Service (DFAS) can involuntarily withhold a service member's pay in order to satisfy court ordered child and/or spousal support
 - Garnishment is a statutory proceeding (42 U.S.C. section 659) under which a service member's disposable pay is reduced by an amount that is applied to the payment of a debt, usually child and/or spousal support.
 - An involuntary allotment is a statutory proceeding (42 U.S.C. section 665) that may be initiated when a service member is at least two months behind in court-ordered payments of child or spousal support.
- Time frames
- Limitations of amount of garnishment/involuntary allotment (consumer, support)
 - The Consumer Credit Protection Act (15 U.S.C. § 1673) limits the amount that can be deducted as child support or alimony from earnings. The limit ranges from 50 percent to 65 percent of disposable earnings. The full ordered amount of child support or alimony will be deducted as long as that amount does not exceed the maximum percentage allowable
 - All types of pay (basic pay, hazardous duty pay, severance pay, pensions, retirement, etc) can be garnished, but allowances (BAH, subsistence, etc) cannot be garnished.
 - Certain types of pay, including basic pay and incentive pay, are subject to involuntary allotment, but allowances and other reimbursements for expenses incurred in connection with military duty are NOT subject to involuntary allotment. *See* 32 CFR part 112 for a complete listing of pay subject to involuntary allotment.
- Waivers (military overpayment)

DISCUSS POTENTIAL ACTIONS

- If client is creditor spouse or creditor parent or eligible judgment creditor client for other reasons garnishment from DFAS is possible after client first:
 - Obtains a court order requiring the military member to pay support

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- Obtains a corresponding garnishment order for the support.
- Orders must contain information about the member and include: full name, date of birth, Social Security number, governmental entity for which the soldier works, official duty station, and status of the service member.
- Address of debtor member may be obtained from a Federal Parent Locate Request through a state child support office or possibly via the World Wide Locator Service.
- Serve the court order for support and the garnishment order for support on DFAS. DFAS income withholding customer service number is 1-888-332-7411 or go to the DFAS website at <http://www.dod.mil/dfas/militarypay/garnishment.html>

INVOLUNTARY ALLOTMENT PROCESS FOR SUPPORT AND REQUIREMENTS

- DFAS must receive notice from an authorized person, agent or court that states that the service member is two or more months behind in support payments
- Must provide DFAS with a certified copy of the underlying court order establishing the support requirement
- Notice can be from a child support enforcement agency, department of social services or the court, in the form of a court order, letter, statement, certificate or other document issued by the agency, department or court.
- DFAS must provide notice to the servicemember and his or her commander.
- The commander sends the servicemember to a Judge Advocate for consultation to discuss the legal and other factors involved with respect to the support obligation and the failure to make payments under the obligation. The allotment takes effect 30 days after the notice is given

ISSUES AS A BAR TO ENFORCEMENT

- SCRA compliance
- Negotiate debt
- Reopen default judgment (SCRA)
- Potential DD Form 2654 action/defenses
- Challenge directly with creditor/debt collector but understand that an involuntary allotment can only be adjusted or terminated by the authorized state official or court and not by the member
- Challenge in court: The only way a service member can stop, correct, or reduce a garnishment is to go to the court that issued it and file a motion to stop, correct, or reduce the garnishment.
 - Member must demonstrate a change of circumstances since the last court order that required the garnishment in order for the court to stop or reduce the garnishment; or
 - Member must demonstrate financial hardship due to a reduction in pay
- Amount sought violates law
 - The full ordered amount of child or spousal support will be deducted as long as the amount does not exceed the limits set by 15 U.S.C. section 1673, which is between 50 to 65 percent of the servicemember's disposable earnings depending on the circumstances. 50% of disposable earnings can be deducted if the obligor provides proof that he or she is providing more than half the support of dependents other than those for whom the support is to be deducted, and if there is no accrued arrearage
 - Maximum of 55% of disposable earnings can be deducted if the obligor is providing more than half the support of dependents other than those for whom the support is to be deducted, but there is an arrearage

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- Maximum of 60% of disposable earnings can be deducted if the obligor does not prove he or she supports other dependents
 - Maximum of 65% of disposable earnings can be deducted if the obligor does not prove he or she supports other dependents, but there is an arrearage
- See also Child Custody, Visitation, and Support Checklist

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LANDLORD ADVICE/ASSISTANCE FOR MEMBERS **FORCED TO LEASE PRIMARY RESIDENCE DUE TO PCS/ORDERS**

OBTAIN BASIC INFORMATION

- What is the nature of the rental (condominium, single-family home, town-home, etc.) and who is the tenant/prospective tenant?
- Is there a property management contract that is the heart of the dispute instead of the lease? If so, who is the property manager? Obtain a copy of the contract between tenant client owner and property management firm.
- If the matter concerns a current or prospective tenant, is there a military clause? Does the clause fall under a state law or the federal law under SCRA? Explain benefits/consequences to landlord as well as the concept of federal preemption if there is a weak state law listed in the agreement.
- Has any legal or judicial action already been instituted? If so, get copies of all documents. If copies are lost or misplaced or were never given to client obtain permission from client to contact landlord/property management and make the call to get the lease before you take any further action
- What is the law of the jurisdiction in which the contract is to be performed?
- Have any demands been made by the management company? If so, what were they? Are they reasonable? Explain to client. If unreasonable proceed in evaluation of strengths of case with an eye toward informal resolution.
- What non-performance issues does client have with the property management team? If these issues might be resolved by a demand letter, draft the letter if you are competent to do so, otherwise refer to ABA Pro Bono panel, civilian attorney; or refer client to jurisdiction's local bar association for a lawyer referral.
- Are there issues relating to an accounting of rents collected? Was there a breach of fiduciary duty?
- Are there allegations that the management company was acting outside the scope of employment; failed to perform due diligence in obtaining creditworthy tenants?
- Is this a matter that will require litigation whether in small claims or otherwise? If so, make the referral to ABA Pro Bono panel, civilian attorney; or refer client to jurisdiction's local bar association for a lawyer referral.
- What is the lease term? Is this lease term legal in the jurisdiction in which the property is located?

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MILITARY NATURALIZATION

PROVISIONS EXPEDITING NATURALIZATION OF MEMBERS OF THE UNITED STATES ARMED FORCES

Special provisions of the Immigration and Nationality Act (INA) authorize U.S. Citizenship and Immigration Services (USCIS) to expedite the application and naturalization process for current members of the U.S. armed forces and recently discharged members. Generally, qualifying military service includes service with one of the following branches: Army, Navy, Air Force, Marine Corps, Coast Guard, certain components of the National Guard and the Selected Reserve of the Ready Reserve. In addition, spouses of members of the U.S. armed forces who are or will be deployed may be eligible for expedited naturalization. Other provisions of the law also allow certain spouses to complete the naturalization process abroad.

SERVICE IN PEACETIME

Section 328 of the INA applies to all members of the U.S. armed forces and those already discharged from service. An individual may qualify for naturalization if he or she has:

- Served honorably in the U.S. armed forces for at least one year,
- Obtained lawful permanent resident status, and
- Filed an application while still in the service or within six months of separation.

SERVICE DURING PERIODS OF HOSTILITIES

Under special provisions in Section 329 of the INA, the President signed an executive order on July 3, 2002, authorizing all noncitizens who have served honorably in the U.S. armed forces on or after Sept. 11, 2001, to immediately file for citizenship. This order also covers veterans of certain designated past wars and conflicts. The authorization will remain in effect until a date designated by a future presidential executive order.

NATURALIZATION AT BASIC TRAINING

USCIS and the Army established the Naturalization at Basic Training Initiative in August 2009 to give noncitizen enlistees the opportunity to naturalize when they graduate from basic training. (The Navy joined the initiative in 2010.) Under this initiative, USCIS conducts all naturalization processing, including the capture of biometrics, the naturalization interview, and administration of the Oath of Allegiance on the military base so that, in most cases, the recruit is able to graduate from basic training as a U.S. citizen.

POSTHUMOUS BENEFITS

Section 329A of the INA provides for grants of posthumous citizenship to certain members of the U.S. armed forces. A member of the U.S. armed forces who served honorably during a designated period of hostility and died as a result of injury or disease incurred in or aggravated by that service (including death in combat) may be eligible to receive posthumous citizenship, as

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long as the next-of-kin applies for posthumous citizenship within two years of the service member's death. Other provisions of the law extend immigration benefits to the service member's surviving spouses, children and parents.

INTERVIEW QUESTIONS

- What is the client's basis for eligibility?
- Where is the client in the process? Has the client previously filed for naturalization? Review the file on the USCIS Website or the client's paperwork if there is a previous or existing filing.
- Does the client know who his command representative or command point of contact is, and has the client consulted with the POC?
- Has the client ever been discharged, and what was the characterization of that discharge?
- Does the client have any pending disciplinary issues with the command that may result in discharge? (Conviction of crime of moral turpitude may result in ineligibility for citizenship, see 8 U.S.C. 1182(a)(2)(A)(i)(I))
- Is the client pending deployment or PCS out of the area that requires immediate action before the deployment or PCS? If so the attorney should consider contacting Customer Service to Assist the Military. The USCIS has several customer service channels exclusively to assist members of the military and their families. Contact USCIS via the following channels:
 - Online at <http://www.uscis.gov/military>
 - Toll-free telephone help line -- 1-877-CIS-4MIL (1-877-247-4645)
 - Via email at militaryinfo.nsc@dhs.gov
 - Via Code 16 at (202) 685-4643

QUALIFICATIONS

- **General requirements.** Client must meet the requirements and qualifications to become a citizen of the United States. He or she must demonstrate:
 - Good moral character,
 - Knowledge of the English language,
 - Knowledge of U.S. government and history (civics), and
 - Attachment to the United States by taking an Oath of Allegiance to the U.S. Constitution.
- **Exemptions for qualified military personnel.** Qualified members of the U.S. armed forces **are exempt** from other naturalization requirements, **including residence and physical presence in the United States**. These exceptions are listed in Sections 328 and 329 of the INA. All aspects of the naturalization process, including applications, interviews and ceremonies are available overseas to members of the U.S. armed forces and certain "command-sponsored" spouses.
- **Caution:** A person who obtains U.S. citizenship through his or her military service and separates from the military under "other than honorable conditions" before completing five years of honorable service may have his or her citizenship revoked.

HOW TO APPLY

Every command should have a Naturalization Command Representative; if not then generally every military installation has a designated point-of-contact, usually in the personnel division or

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the Staff Judge Advocate's office, to assist members of the military prepare and file their naturalization application packet. That packet includes:

- Application for Naturalization, USCIS Form N-400 (Members of the military are not charged a fee to file Form N-400.)
- Request for Certification of Military or Naval Service, USCIS Form N-426 (The military must certify this form before sending it to USCIS. Individuals separated from the military may submit an uncertified Form N-426 with their DD Form 214.)

Once the packet is complete, send it to the specialized military naturalization unit at the USCIS Nebraska Service Center for expedited processing.

MILITARY NON-SUPPORT

OBTAIN BASIC INFORMATION

- What is the branch of service and what is the relevant regulation?
- **Navy Support Guidelines:** In the case where no court orders or separation agreements exist, the legal assistance attorney should send written correspondence to the commanding officer of the non-supporting service member highlighting the support obligations under MPM 1754-030 as well as the commander's responsibility under section 11 of MPM 1754-030. The letter should also request a reply from the command.
- **Army Support Guidelines:** Army Regulation 608-99 prescribes the commander's responsibilities in detail, primarily in Chapters 1 and 3. The commander's actions when presented with a request for family support include, but are not limited to, reviewing the inquiry, counseling the Soldier, and responding to the complainant within 14 days in writing.
- **Marine Corps Support Regulation:** U.S. MARINE CORPS, ORDER P5800.16a MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, ch. 15, (Dependent Support and Paternity) 2003, para. § 15001 controls. The chapter is punitive in nature, and violations of this order are punishable under the UCMJ, and may subject the violator to adverse administrative action. All complaints alleging inadequate support of family members shall be directed to the commanding officer of the Marine concerned. All Marines who receive complaints of inadequate support shall immediately forward the complaint to the commanding officer, and advise the party making the complaint that the commanding officer is the appropriate authority to take action in the matter. In the absence of extraordinary circumstances, the commanding officer will meet with the Marine and take appropriate action under this chapter within 10 working days of receiving the complaint. If the Marine who is the subject of the complaint is not assigned to the command receiving the request for support, the commanding officer will forward it to the commanding officer having authority to take action, and will inform the complaining party of the action taken as soon as possible. If the commanding officer is unable to initiate action within 10 working days, the commanding officer shall so advise the party seeking support.
- **United States Coast Guard Regulation:** U.S. DEP'T OF HOMELAND SECURITY, U.S. COAST GUARD COMMANDANT INSTR. M1000.6A, ch. 8M (Supporting Dependents) (3 May 2001) is the controlling document and may be accessed at http://www.uscg.mil/directives/cim1000_1999/CIM_1000_6A.pdf. The Coast Guard policy provides that if, after counseling, the servicemember demonstrates a pattern of non-support and/or failure to obey civil court support orders, he or she is subject to administrative discharge for unfitness. Non-support that is "notorious" and discrediting to the Coast Guard can result in a court-martial or other disciplinary proceedings. Court orders for support are normally binding on members. If, however, a "member acting on good faith and on the express advice of qualified legal counsel disputes such a claim, the commanding officer may withhold disciplinary/administrative action against the member for a reasonable length of time. Defenses to non-support of a spouse include infidelity or desertion. Defenses to non-support of a child are inability of the servicemember to ascertain the whereabouts and

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welfare of the child, or facts demonstrating that the person seeking support does not have physical custody of the child

- **United States Air Force Support Guideline:** Air Force Instruction 36-2906 Personal Financial Responsibility requires servicemembers, in the absence of an agreement or court order, to "provide adequate financial support to family members." Para. 3.2.1. however it fails to define the level of support and requires the aggrieved party to file in the civilian courts if the parties cannot privately agree to an amount. Commanders may require that the member prove he or she is paying "some" support but it appears that the "adequacy" of the amount is left to the Commander and the member.

DISCUSS SERVICE-SPECIFIC MILITARY SUPPORT OBLIGATION

- Effect of court order or agreement
- To whom obligation is owed and not owed
- Amount of support
- Punitive/non-punitive instruction - Direct and in-kind
- Repercussions of non-support
- Exceptions and availability of waiver

DISCUSS PROPOSED COURSE OF ACTION

- What is the member's duty station; paygrade; time in service?
- What is the member's projected rotation (PRD) date and expiration of active obligated service (EAOS); occasionally the claimant will also know the name of supervisor; telephone number of supervisor?
- If this claim only involves child support has paternity been established?
- What is the identity and relationship to the obligor of the persons seeking support?
- What is the support history of the obligor (arrearages, in-kind support, duration of support)?
- Is there a court order or agreement regarding support?
- Does the obligor have any dependents other than those seeking support?
- Is there any pending legal action regarding support?
- Is there any document related to support such as court orders, divorce decrees and separation agreements; the attorney must see these documents before writing any non-support letter.
- In the case where no court orders or separation agreements exist, the legal assistance attorney, if the client so agrees, should send written correspondence to the commanding officer of the non-supporting service member highlighting the support obligations under the relevant service guideline/regulation as well as the commander's responsibility under such guideline/regulation. . The letter should also request a reply from the command.
 - If appropriate, provide information on household expenses, rent, debts, and employment of the dependent family member to the commanding officer in order to better demonstrate the need or exigency.
- In the case where there is a valid court order or separation agreement, the legal assistance attorney should send written correspondence to the commanding officer of the non-supporting service member highlighting the language in the guideline/regulation that states a member must comply with a court order or separation agreement or be subject to

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administrative or disciplinary action. The legal assistance attorney should also state the service member can suffer garnishment of his pay under Public Law 93-647. The letter should request a reply from the command.

- The legal assistance attorney should then show the client how the client can get a certified copy of the court order and send it to DFAS to start an involuntary allotment or wage garnishment.

DISCUSS ALTERNATE/CONCURRENT COURSES OF ACTION

- Negotiating agreement
- Judicial/administrative action (child support enforcement, private action)
- Draft non-support letter and contact command (if appropriate)

LOCAL NLSO ITEMS (add as appropriate)

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MOBILIZATION/PRE-DEPLOYMENT/LEGAL OUTREACH BRIEFS AND OVERSEAS ASSIGNMENTS (See This Guide for Specific Guidance on Each Area of law)

OBTAIN BASIC INFORMATION

- Does the client have any pending potential legal issues?
- Does the client have children? If so is there any potential for a child custody conflict?
- Is the client currently employed?
- What is the anticipated duration of activation and location of duty station?

DISCUSS SCRA PROTECTIONS

- Anticipatory relief
- Car lease termination
- Child custody stays of proceedings and protection from default custody judgments
- Default judgment protection and relief
- Department of Justice enforcement options
- Eviction protections
- Extension of certain protections to eligible dependents
- Foreclosure protection
- Inappropriate use of SCRA to defraud creditors on behalf of self or non-servicemember
- Income tax filing
- Installment contract protection from repossession of assets without a court order
- Insurance coverage for professionals
- Interest rate cap; how to request
- Potential for recovery of damages under a private right of action
- Pre-service mortgage protection
- Residential lease termination
- Stays (vacations) of proceedings including judgment, attachment, and garnishment
- Storage lien protections
- Termination of telephone service contracts
- Tolling of the statute of limitations
- Waiver of SCRA rights; potential consequences

DISCUSS INCOME TAX ISSUES

- Armed Forces Tax Guide (IRS Pub.3)
- Automatic extension for deployers
- Combat zone income tax exemptions
- Discuss OCONUS filing options e.g. Military One Source and VITA for Stateside filing
- IRS Form 2848 and corresponding POA for State income tax filing
- MSRRA Protection
- Residency for tax purpose

DISCUSS ESTATE PLANNING AND DRAFT NECESSARY DOCUMENTS (See Estate

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Planning Interview and Practice Guide Checklist in the following pages)

- Simple Will (including recommended minors trusts or UGMA/UTMA per client needs and disclaimer credit shelter trusts per client's needs)
- Health Care Power of Attorney and Living Will (Advance Medical Directives)
- SGLI beneficiary designations
- DD-93 Designations
- Discuss the need to NOT create a conflict between the Estate planning documents and the Designation of PADD at line 13. If the client wants to name an agent for Health Care or an executor or personal representative that is different from the eligible persons for the PADD of an Active Duty person, then the attorney must carefully craft the authority of the agent/personal representative/executor to not include disposition of the client's remains when on active duty. AUTHORITY: Under 10 U.S.C. § 1482 - Only the following persons may be designated to direct disposition of the remains of an Active Duty decedent covered by this chapter: (1) The surviving spouse of the decedent OR (2) Blood relatives of the decedent. (3) Adoptive relatives of the decedent. (4) If no person covered by clauses (1)–(3) can be found, a person standing in loco parentis to the decedent.

DISCUSS POAs

- Alternative to powers of attorney, e.g. allotment, automatic bill pay, etc.
- Business's own generated power of attorney vice military POA
- Dangers/limitations (not everyone must accept, real property/auto transactions, shipment of household goods, shipment of auto, enter into PPV housing, etc., may require special)
- In loco parentis; authorization to travel OCONUS with minor (necessary/satisfy needs)
- Necessity for specific HIPPA language regarding medical treatment & care authorizations
- Need for a General vs. Special
- Revocation

DISCUSS DEPENDENTS

- Child care arrangements under Family Care Plan via NAVPERS 1740/6 while required by the Navy are not judicially enforceable
- Child custody issues including dangers of informal arrangements and non-recognition of custody power of attorney compared to court orders; potential dangers and, where appropriate discuss consequences of having minor children become subject to International Child Custody Litigation; Hague Convention signatories
- Dependent identification cards
- Deers enrollment
- Dependent support; service regulations; court orders
- Early return of dependents including "must be in the government's interest" to receive transportation; must consider BAH, OHA and COLA consequences; and service requirements for dependent support, arrangement of dependent housing, possible limitations of member's ability to live off base. Every base has a base specific instruction that must be followed.
- Guardianship (temporary) of minor for deployment purposes
- Health insurance/TRICARE issues

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- Potential or actual family court or divorce court proceedings and consequences if deployed and not properly resolved

CREDIT PROTECTION UNDER FACTA and FCRA

- ID theft issues and free credit reports at www.AnnualCreditReport.com.
- Active Duty Alert
- Security freeze to lock credit file from potential creditors, insurance companies or employers doing background checks.

SPECIFICALLY INQUIRE WHETHER ANY PENDING LEGAL ISSUES, (INCLUDING TRAFFIC CITATIONS) EXIST; DISCUSS/REFER TO CIVILIAN SECTOR AS APPROPRIATE.

*******FOR RESERVISTS ONLY:*******

DISCUSS DEMOBILIZATION ELIGIBILITY FOR LEGAL SERVICES

DISCUSS DEMOBILIZATION NOTICE TO CREDITORS OF TERMINATION OF 6% BENEFITS AND POSSIBLE NEGATIVE CONSEQUENCES OF CLAIMING WHEN NOT ELIGIBLE

DISCUSS USERRA (<http://www.dol.gov/vets/whatsnew/userraguide0704.rtf>)

- Uniformed Services Employment and reemployment Rights Act (USERRA), P.L. 103-353, 108 Stat. 3149 (1994), as amended and codified at 38 U.S.C. §§ 4301-4334

RESTORATION TO DUTY FROM UNIFORMED SERVICES, 5 C.F.R. PART 353 (2004)

- Notice (written not required by statute but advisable) to employer from the employee or a responsible officer from the service member's unit and prompt return. Notice may be waived if "military necessity" is established but burden is difficult to overcome by the member
- Period of service limited to 5 years cumulative in most, but not all circumstances; not all types of military service count; clock restarts with a new civilian employer
- Service must have been under honorable conditions with no punitive discharge, no OTH, no DFR and is provable with DD Form 214
- Note USERRA applies across the board to virtually all employers.
- Rights: escalator position, prompt re-employment, health benefits, seniority, pension plans, training and re-training, reasonable accommodations under the Americans With Disabilities Act, protection from dismissal, may object to offered re-employment if not identical status to that when left, can challenge shift change; location change)
- Limitation on cumulative total activated reserve service (not including monthly and annual AT): The following applies with extensions available if member can show that it was impossible or unreasonable through no fault of the member to report or reapply:
 - If service up to 30 days must report back at next shift following safe travel plus 8 hours
 - Service of 31 to 180 days must report back or reapply within 14 days
 - Service of 181 or more days must report back or reapply within 90 days

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- Reapplication need not be in writing but is preferred for proof of compliance
- Failure to comply with USERRA requirements is not a total bar to re-employment
- Failure of employer to comply may provide liquidated damages, costs and attorneys fees; burden of proof on employer to show no unlawful discrimination; permissible reason for termination once employee presents prima facia case of improper termination or that discrimination was at least one of the motivating factors
- Employer defenses in 38 U.S.C. C 4312(d)(10); change in circumstances making reemployment impossible or unreasonable; re-employment of disabled person will create undue hardship on employer; others who were/are not disabled treated similarly to aggrieved member
- Discuss health insurance coverage. If on active duty for more than 30 days, member and dependents should be covered by military health care. Proper contact is military unit.
- Discuss the two laws that protect member's right to continued health coverage under an employment-based group health plan. The Consolidated Omnibus Budget Reconciliation Act (COBRA) provides health coverage continuation rights to employees and their families after an event such as a reduction in employment hours. USERRA is intended to minimize the disadvantages that occur when a person needs to be absent from civilian employment to serve in the uniformed services.
 - Both COBRA and USERRA generally allow individuals who leave work for military service to continue coverage for themselves and their dependents under an employment-based group health plan.
 - COBRA provides for 18 months of coverage, with further extensions for certain events. COBRA applies to group health plans maintained by employers with 20 or more employees. USERRA, which applies to all employers, provides for 24 months of coverage.
 - If military service is for 30 or fewer days, member and dependents can continue coverage at the same cost as before this short service. If military service is longer, member and dependents may be required to pay as much as 102 percent of the full premium for coverage.
 - If member's plan is covered by COBRA, member should receive a notice from the plan explaining member's rights.
- Discuss how the Health Insurance Portability and Accountability Act (HIPAA) may give member and dependents rights to enroll in other group health plan coverage if it is available to the member or the member's spouse via an employer sponsored group health plan.
 - Member and dependents have this opportunity to enroll regardless of the plan's otherwise applicable enrollment periods.
 - However, to qualify, the member must request enrollment in the other plan (for example, the member's spouse's plan) within 30 days of losing eligibility for coverage under the member's employer's plan.
 - After special enrollment is requested, coverage is required to be made effective no later than the first day of the first month following the member's request for enrollment.
 - If the member is on active duty more than 30 days, coverage in another plan through special enrollment is often cheaper than continuation coverage because the employer often pays a part of the premium.
- Advise client to examine the scope of the coverage (including benefit coverage and limitations, visit limits, and dollar limits), premiums, cost-sharing (including co-payments and deductibles), and waiting periods for coverage.

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PATERNITY

OBTAIN BASIC INFORMATION

- What is the basis for alleging paternity?
- Has there been any paperwork (affidavit) or court action yet? If so when, where, what was decided, get a copy.
- Does the alleged father know about the child? If by e-mail get copies of the emails; by letter get copies of the letters.
- Has the client attempted to contact the alleged father? If so how and when? Result?
- How old is the child?
- What is the marital status of the parties? If they were married for how long; when did they separate; was the divorce finalized; if so where and when? Get a copy.
- Has putative father reviewed birth certificate?
- What is the name, rank, branch of service and social security and date of birth of the alleged father?
- Has the client considered using the Department of Child Support Services to open a self-help case?

DISCUSS BASIC PROCEDURES AND METHODS OF DETERMINATION

- Administrative and judicial proceedings; if already occurred, find out when and where and what was decided; get a copy.
- Costs and who pays
- Time periods
- Right to DNA test and inadmissibility of extra-judicial DNA tests
- Effect of affidavit of paternity
- Marital presumption
- SCRA issues (stay, waiver, default judgment)

DISCUSS THE RIGHTS & RESPONSIBILITIES OF PARENT

- Duration, amount, and retroactivity of child support (see Child Custody, Visitation, and Support Checklist)
- Enrollment in DEERS, military identification card for minor
- Effect of a paternity proceeding on the active duty biological mother's ability to get adequate family care plan and custody/visitation orders over the objection of the adjudicated father
- Arrearage amounts determined per each state (check state law)
- Visitation/Custody (see Child Custody, Visitation, and Support Checklist)
- Page 2 /TRICARE

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PERSONAL CONTRACT REVIEW

NOT REAL ESTATE OR MORTGAGE RELATED

OBTAIN BASIC INFORMATION

- Review the contract
- Has the contract been signed?
- Does the contract concern a personal legal matter or a business? If this is a business concern, the only business advice you are permitted to give is to member who is asking for landlord advice due to PCS orders or a dependent who is operating a base-approved day care facility in her or his personal residence.
- Is this a loan agreement between family members or friends; discuss reality of non-payment.
- Is this an agreement to co-sign a consumer or other obligation of a third party? If so explain the consequences and problems if the primary account holder defaults and the difficulty of obtaining repayment from the defaulting individual.

DISCUSS CONTRACT PROVISIONS

- Basic terms
- Choice of law clauses
- Penalty clauses
- Ability and procedure to terminate
- SCRA waivers?
- Total cost of contract
- Effect of oral agreements/promises
- General contract law/UCC
- Revocation of contracts

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POWERS OF ATTORNEY

OBTAIN BASIC INFORMATION

- Why is customer seeking a POA?
- What is the nature of the relationship between the customer and agent?
- Review standard POA worksheet with the customer
- Advise the customer that the military will not issue a power of attorney for child custody because they are not recognized by the courts as valid custody documents. If the client simply needs an in loco parentis to permit another person to handle certain matters concerning the child for limited periods of time, then the in loco parentis may be authorized

EXPLAIN LAW CONCERNING POAs

- Explain that no organization is required to accept a POA
- Inquire whether organization(s) for which POA is desired have their own form they would guarantee acceptance of rather than risking non-acceptance
- Describe the difference between a General POA and Special POA
- Discuss duration and advantages of limiting duration
- Discuss the liability of the principal (grantor) for the acts of the agent (grantee)
- Describe durability
- Discuss state-specific statutory POA (if applicable/available under state law)
- Discuss limitations of *in loco parentis* SPOA (see Family Care Plan checklist if appropriate)
- Discuss extension provisions in SCRA (if appropriate)
- Discuss the process for revocation

DISCUSS POA BASICS

- Recommend alternatives

LOCAL NLSO ITEMS (*add as appropriate*)

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SURVIVOR BENEFITS

This section is a duplicate of the benefits section discussed with estate planning clients. This section is appropriate for instances where a Command CACO has brought a client to the office as a result of a death of a member on active duty or when an otherwise eligible client is inquiring about survivor's benefits as a result of the death or impending death of a third party in which he or she may have an interest.

BENEFITS

- Dependency and Indemnity Compensation VA Form 21-534
- IRAs/401K/Thrift Savings Plan and need to properly designate beneficiaries as in SGLI/DD-93 below)
- Necessity to re-title property (e.g. motor vehicles, real estate & overview of probate issues) if decedent is sole owner or if held jointly (“and”) rather than jointly with survivor’s rights (“or”)
- Review the VA website for current regulations and information regarding burial allowances: <http://www.cem.va.gov/cem/index.asp> and <http://www.vba.va.gov/VBA/benefits/factsheets/burials/Burial.pdf> .
- Discuss right to a military funeral/burial in national cemetery; transportation of eligible family members at government expense; possible per diem for attending and traveling to the funeral; reimbursable amounts for preparation, casketing, and burial. Military honors and the fact that PADD, and each child of the decedent will receive a flag, as will the member’s parents. Divorced parents will each receive a flag. Specific information about burial honors can be found at: <http://www.militaryfuneralhonors.osd.mil>.
- Social Security Funds (Surviving spouse at age 65 unless blind or disabled then immediately; Unmarried children under 18, or up to age 19 if they are attending high school full time. Under certain circumstances, benefits can be paid to stepchildren, grandchildren, or adopted children. Children at any age who were disabled before age 22 and remain disabled
- Survivor Benefit Plan
- TRICARE/DEERS
- Veterans Administration (burial and survivor)
- Discuss VA Home Loans and the fact that a surviving spouses who have not remarried are eligible for VA home loans which may offer better mortgage rates or terms than traditional home loans.
- Discuss Montgomery GI Bill/Veterans Educational Assistance Program which will pay a refund equal to the amount contributed by the member under Chapter 30 or Chapter 32, less any benefits paid, unless the death was a result of willful misconduct. The refund will be paid to the beneficiary of SGLI proceeds. In cases involving multiple beneficiaries, each beneficiary must submit a separate refund request.
- Survivor and Dependent’s Educational Assistance which provides that surviving spouses are eligible for educational benefits for up to twenty years after the date of the service member’s death. Children are normally eligible to use their educational benefits between the ages of eighteen and twenty-six. This benefit may be used to pursue an associate’s, bachelor’s, or graduate degree; courses leading to certification; technical or vocational school; apprenticeships; and various other educational programs. Children over the age of fourteen

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with physical or mental disabilities may receive benefits for special restorative training to lessen or overcome impairment.

- Availability of government housing or the equivalent value thereof if the survivor leaves government housing for a year from the date of the member's death at the then current rate of Basic Allowance for Housing (BAH) for the servicemember's pay grade. If the surviving spouse is also active duty he or she is also eligible for the housing allowance as an authorized dependent.
- Right to one relocation move at the government expense upon the member's death while on active duty. The movement of household goods must be completed within three years following the death of the service member.
- Tax implications when death of the member occurred while in active service in a combat zone or directly resulted from injury or disease received in a combat zone. The decedent's income tax liability is forgiven for the tax year in which the death occurred and for an earlier tax year ending on or after the first day the member served in a combat zone in active service. Forgiven tax is tax that does not have to be paid. Any forgiven tax liability that has already been paid will be refunded, and any tax liability at the date of death will be forgiven. In addition, any unpaid taxes for prior years will be forgiven and any prior year taxes paid after the date of death will be refunded. This provision also applies to members of the Military Services serving outside the combat zone if the service was in direct support of military operations in the zone, and qualified the member for military pay for duty subject to hostile fire or imminent danger

SGLI and DD-93 Death gratuity and Unpaid Pay and Allowances

- Explain significance of insurance payout as non-probate property vice having the asset potentially pass through probate if the client is using a contingent minor's pre-residuary trust or residuary trust
- Explain the insurance is tax free to the beneficiary; includable in the client's estate for estate tax purposes if over the estate tax limit at the time of death
- Discuss who was named as beneficiary; discuss contingents; discuss minor's proceeds and need for court orders
- Discuss the low interest rate received by the beneficiary via the Prudential Alliance Account vice the beneficiary or trustee or custodian being able to receive one lump sum payment and invest at a higher interest rate in the private sector
- Death gratuity designated beneficiary is at sole discretion of decedent or will flow via statutory rules
- Unpaid pay is reportable on income tax form of decedent
- Allowances and unpaid pay will not be taxed if member died in recognized theater

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TENANT ADVICE

OBTAIN BASIC INFORMATION

- Did the member waive his or her rights under the SCRA? Was it a valid waiver?
- Is there a more beneficial military clause in the lease than provided by the SCRA which may allow the client to recover attorney fees and/or press for possible criminal or other civil sanctions?
- Has any client already taken any legal or judicial action? If so, get copies of all documents. Before continuing the discussion.
- What is the lease term?
- What is the amount of rent? What additional expenses are the responsibility of the tenant?
- Does the lease clearly describe the economic responsibilities of the landlord and the tenant or is there an ambiguity?
- How long has the tenant been in the property? Does the jurisdiction limit the damages the client may seek based upon the amount of time a tenant has occupied the premises? E.g. replace carpet; repair apartment with/without fee to tenant?
- In what manner and how often has the subject of the dispute been communicated between the landlord and the tenant (judicial, written, oral, repeat, etc.)?
- Has the client attempted to resolve the issue him or herself?
- Obtain and review all relevant paperwork (lease and addendum, any written correspondence, etc.).

DISCUSS BASIC CONTRACT LAW PERTAINING TO LEASE

CONSIDER AND DISCUSS APPLICABLE STATE LAW

- Landlord obligations (habitability, quiet use and enjoyment, duty to repair within a reasonable period of time, adequate heat, adequate air, mold, sex offenders not disclosed, running water, proper sanitary facilities, etc.)
- Tenant obligations under state law; under the lease? Are they delegable duties? Are they adequately defined?
- Research local statutes and regulations for housing; consider the state or federal agencies such as Fair Employment and Housing; Equal Employment Opportunity Commission; State's Attorney General; State housing statutes and specific local, county, state landlord-tenant acts
- Research the law of the jurisdiction and the terms of the lease and explain self-help and withholding rent
- Discuss landlord's demand for damages; duty to give tenant opportunity to repair; duty to inspect; duty to repair; duty to provide receipts; statutory deadlines
- Local, Municipal, County, State, Federal Ordinances/regulations and housing codes
- Research early termination under law of jurisdiction and compare to lease provisions
- Research law of jurisdiction regarding return of security deposits and duties and responsibilities of parties to the contract concerning the return of a security deposit; terms of lease
- Research law of jurisdiction regarding eviction proceeding; may be on a fast track or pilot

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program for the state or region requiring immediate referral to a civilian attorney or legal aid

CONSIDER AND DISCUSS SCRA ISSUES

- Eviction protection if rent is less than maximum for the year per 50 U.S.C. App. §531. This amount is published in the *federal register* annually and adjusted in December per the Consumer Price Index. Note: Eviction protection is used when there is not already a suit filed but the property manager or owner has notified the tenant that he or she has 3-days or is about to be evicted for failure of some covenant in the lease.
- Stays when member has notice of proceedings (50 U.S.C. App. §522). Draft letter for member stating manner in which member's current military duty requirements materially affect his or her ability to appear and state a date upon which the member will be available to appear and obtain a letter or other communication from the member's commanding officer stating that the member's current military duty prevents the member from appearing and that military leave is not and will not be authorized at the time of this letter. Alternatively, the member and the CO may communicate directly with the court via telephone or email or facsimile as no specific method is outlined in the SCRA. Nonetheless ask for evidence of the communication to assure you can close the file without damage to the member.
- Early termination, requirements and procedures (50 U.S.C. App. §535); Prepare notice and copy of orders and schedule for mailing via certified mail return receipt requested for client if client desires

CONSIDER AND TAKE ACTION AS APPROPRIATE

- Contact tenant, property manager, counsel for tenant/property manager
- Legal action (small claims, ABA Pro Bono panel,)

LOCAL NLSO ITEMS (*add as appropriate*)

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VWAP INFORMATION FOR VICTIMS OF CRIME

INFORM THE VICTIM ABOUT:

- The Victim/Witness Program including the rights and benefits to be afforded to victims
- The role of the Victim/Witness Advocate and what privileges do or do not exist between the victim and the Victim/Witness Advocate
- The nature of the communication made to the Victim/Witness Advocate as opposed to those made to the legal assistance attorney
- The differences between the two types of reporting in sexual assault cases (restricted reporting and unrestricted reporting)
- The military justice system including the roles and responsibilities of trial counsel, defense counsel, and the investigators. This may include the ability of the government to compel cooperation and testimony.
- Services available from appropriate agencies or offices for emotional and mental health counseling and other medical services.
- The availability of and protections offered by civilian and military restraining orders.
- Eligibility for and benefits potentially available as part of the transitional compensation benefits found in 10 U.S.C. § 1059 and in other state and federal victims' compensation programs.
- Traditional forms of legal assistance involving subjects such as leases, taxes, consumer affairs, wills and powers of attorney (where applicable and appropriate).

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TIER II SERVICES

ADOPTION - LIMITED TO STEP-PARENT ADOPTION

DUAL CONFLICTS WAIVER REQUIRED IF BOTH PARTIES WILL BE SEEN BY THE OFFICE. There is an inherent conflict of interest if the matter is a step-parent adoption because the interests of the biological parent are vastly different than those of the proposed adoptive parent. CAREFULLY EXPLAIN PROBLEMS OF DUAL REPRESENTATION AND CONFIDENTIALITY ISSUES AND EXECUTE DUAL REP LETTER (IF APPROPRIATE)

OBTAIN BASIC INFORMATION

- Why is the adoptive parent seeking to adopt?
- What is the relationship between the adoptive parent(s) and the adoptee?
- What is the identity and status of the adoptee's natural parents and are they likely to consent to adoption?
- How old is the person to be adopted?

JURISDICTIONAL ISSUES

- What is the location of the adoptee and the adoptive parent(s)?
- Where has the adoptee resided for the past six months?
- Is the child to be adopted a member of an Indian tribe?
- Is the child already under a placement with any state agency or other agency? Review the state law of the possible jurisdictions; they vary as to where the proceeding must be commenced.
- Review the Association of the Administrators of the Interstate Compact on Adoption and Medical Assistance (AAICAMA) website at <http://aaicama.org/cms/index.php/state-information> before meeting with the client. With the exception of Wyoming, all states and the District of Columbia are signatories to the Interstate Compact on Adoption and Medical Assistance. This program is administered by designated ICAMA contacts. (See <http://aaicama.org/cms/index.php/state-information/state-contacts> for a list of contacts, including contacts for Puerto Rico). . The "Frequently Asked Questions" section on the AAICAMA website also provides valuable information on Medicaid eligibility questions.
- Before a child moves to another State to be adopted, administrators of the Interstate Compact on the Placement of Children will need to grant approval. When a child has been legally adopted, families are free to move to different States.

Indian Child Welfare Act (ICWA) ADOPTION ISSUES

Adoption of a child known or reasonably believed to be of American Indian descent is statutorily driven. There are very strict procedures to ensure that the American Indian tribe with which the child is affiliated has first opportunity and all of the child's due process rights as an American Indian have been satisfied.

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Every attorney must become familiar with ICWA. An ICWA primer is available at the National Indian Child Welfare Association (NICWA) website, http://www.nicwa.org/icwa/section_two/mod6/mod6_01.asp. According to NICWA guidance, "The Indian Child Welfare Act of 1978 (ICWA) requires that notice be sent to the child's tribe(s) and the parent(s) or Indian custodian whenever a child custody proceeding is initiated. No foster care placement or termination of parental rights proceeding may be held until the tribes and parent(s) or Indian custodian have received proper notification. The notice must include certain information, as specified by ICWA. Once notice is sent, parties to the proceeding must be given adequate time to respond before a proceeding can occur. Timelines for responding are specified by ICWA (25 U.S.C. § 1912[a]).

Congress, in enacting ICWA, recognized that the tribe has a direct interest in its children. The tribe is entitled to notice as a party because, from an Indian perspective, a child is a sacred and precious resource that belongs to the entire tribe. The child is also a "citizen" of a sovereign government (the tribe) that has legal interest in its citizens (members). While ICWA requires notice to be sent when a foster care or termination of parental rights proceeding is initiated, the act doesn't require notice for each hearing. State laws may set higher standards, which must be followed. Good social work practice calls for notice for each hearing."

DISCUSS BASIC PROCEDURE AND SERVICES AVAILABLE

- Discuss expected time to complete.
- If consent of adoptee's natural parent is unlikely, discuss consequences of non-consent of natural parent. Discuss court fees, investigative fees; medical fees; immigration fees.
- Discuss in-home study or probationary period requirement. Member may be able to have some home study documents transferred to an agency near the new location or installation. Some agencies may have their own particular protocols that must be followed so it is important to contact the agency.
- Discuss the impact of impending PCS orders or Deployment and the need for the member to keep his or her command fully apprised of the adoption process to make certain that critical legal documents are completed and delivered under the required timelines.
- Remind the member of the need for appropriate special powers of attorney and loco parentis forms.
- Discuss reimbursement of expenses under SECNAVINST 1754.3, DFAS Instruction 1341.1, Adoption Reimbursement Policy U.S. Department of Defense (DoD) Instruction 1341.09, located at www.dtic.mil.
- Discuss DEERS enrollment and medical coverage. For medical coverage, an adopted child or a child who is placed for adoption before the adoption is finalized should be enrolled in the DEERS system immediately upon placement. Patient affairs at the local medical facilities should have information and details to assist the member in gaining this access to medical eligibility. Also check the TRICARE web site.
- Refer the member to the family service center concerning forms for adoption reimbursement and associated familial benefits.
- Discuss leave entitlements. While military service members are not eligible for leave under the Family Medical Leave Act, the servicemember is still entitled to leave for up to 21 days of nonchargeable leave in conjunction with the adoption of a child. If both parents are in the military, only one parent can take advantage of this leave. See DoD Instruction 1327.6.

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- Discuss limitations of NLSO assistance.

Can the member apply for the prospective adoptee to receive "dependent status" for medical benefits and at what stage

DISCUSS THE EFFECTS OF ADOPTION

- Child support obligations (current and future)
- Inheritance
- Parental rights/obligations

DISCUSS ALTERNATIVES

- Is it necessary? Consider Military Requirements for Dependency (10 USCS §1072, DoDINST 1341.1, DoDFMR Vol 7A Chapter 26)
- Name change
- Guardianship

LOCAL NLSO ITEMS (*add as appropriate*)

WORKSHEET:

Adoption questionnaire

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GUARDIANSHIP OR CONSERVATORSHIP

WHAT TYPE OF GUARDIANSHIP/CONSERVATORSHIP IS NEEDED; ALTERNATIVES TO GUARDIANSHIP/CONSERVATORSHIP

- Temporary physical custody of minor
- Full physical custody of minor
- Temporary guardianship of estate of minor
- Plenary guardianship of the minor
- Temporary guardianship (conservatorship) of adult disabled person
- Full Guardianship (Conservatorship) of estate of adult disabled person
- Payment under DFAS rules [See VA payee or Federal Fiduciary account: 38 C.F.R. PART 13—VETERANS BENEFITS ADMINISTRATION, FIDUCIARY ACTIVITIES Title 38 - Pensions, Bonuses, and Veterans' Relief]

WHO IS INCAPACITATED/WHO IS THE FIDUCIARY

- Nature of relationship between proposed ward-guardian/conservator-conservatee
- Wounded Ill Injured (WII) active duty [Make sure to read Safe Harbor Web Site, <http://www.safeharborfoundation.org/>, and point out to client]
- Minor child
- Adult disabled child
- Other disabled adult

MILITARY REQUIREMENTS FOR SECNAV TRUSTEE

- DFAS Representative Payee Application [P. L. 102-190, Sec. 654]
- Adult Servicemember Incapacitation [See 37 USC 602 - Sec. 602. Payments: designation of person to receive amounts due]

STATE STATUTES AND PROCEDURES; SOCIAL SECURITY BENEFITS

- Administrative oversight
- Fiduciary responsibilities
- Judicial oversight: Must petition to be appointed guardian of estate of minor who is awarded funds as result of personal injuries; lawsuit; beneficiary designation; inheritance. Legal standing as custodial parent or sole surviving parent is not dispositive.
- Wise to ask for blocked accounts to limit accounting requirements; consequence is normally having to petition court for permission to make withdrawals
- Social Security benefits are administered by SSA and reporting requirements are pursuant to SSA guidelines. Check SSA website.
- Is social security available to the proposed ward/conservatee?
- Are VA benefits available to the proposed ward/conservatee?
- Does client have health care insurance that will cover the proposed ward/conservatee?
- Is TRICARE available for the proposed ward/conservatee?

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- Should the client apply for DEERS enrollment for the proposed ward/conservatee?

CAUTION CONCERNING DISABLED OR LEGALLY INCOMPETENT MINORS WITH DISABILITIES

- Adult financial/Adult incapacitated: Note, many parents are not aware that once their disabled child attains the age of 18, absent a court order finding the child to be incompetent the child becomes an emancipated adult and the parents are no longer the legal guardians of the child. The parents must institute court proceedings to have their legal standing remain uninterrupted.

ADVISE OF GUARDIAN RESPONSIBILITIES

- Common law or statutory fiduciary duties
- Research relevant statutes on both state and federal level

PREVENTATIVE LAW PLANNING FOR UNEXPECTED LOSS IN CONTINUITY OF CARE

- Does client who is seeing you have contingent plan including estate documents in case this client is injured; disabled; dies so that ward or conservatee care can be minimally interrupted

LOCAL NLSO ITEMS *(add as appropriate)*

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IMMIGRATION

FIANCÉ VISA MARRIAGE IN UNITED STATES

DISCUSS THE MEMBER'S NEED TO NOTIFY COMMAND OF INTENT TO MARRY A FOREIGN NATIONAL

PROCESS:

- **To Whom Applicable:** U.S. citizens wishing to bring a foreign national fiancé(e) living abroad to the United States
- **Form:** File Form I-129F, Petition for Alien Fiancé(e). Print for client and include the directions. If the fiancé has any unmarried child under 21 the child may be eligible for a K-2 nonimmigrant visa. If this is desired then it is critical that such children of the fiancé are also listed in the I-129F petition
- **Eligibility Requirements:** Client must show that:
 - Client (the petitioner) is a U.S. citizen.
 - Client intends to marry within 90 days of fiancé(e) entering the United States.
 - Client and fiancé(e) are both free to marry and any previous marriages were previously legally terminated by divorce, death, or annulment.
 - Client and fiancé met each other, in person, at least once within 2 years of filing I-129F petition. There are only two exceptions to this rule,; (1) If the requirement to meet would violate strict and long-established customs of client or the fiancé(e)'s foreign culture or social practice or (2) client can prove that the requirement to meet would result in "extreme hardship" to client.
- **Time Constraints:** Once issued, fiancé visa (or K-1 nonimmigrant visa) requires the marriage to occur within 90 days of fiancé's entry into the United States.
 - This 90 day period cannot be extended and the fiancé must leave the United States or be in violation of federal law and face removal proceedings. Fiancé's future eligibility for immigration could be negatively impacted.
 - However, if the marriage does occur within the mandatory maximum of 90 days after entry upon approval of the I-129F, then immediately thereafter the new spouse can apply for permanent residence (the green card) and remain in the United States. The fiancé may also then apply for permission to work by filing a Form I-765 Application for Employment.
- If USCIS receives a consular returned I-129F for K-1 classification from the Department of State, and the petition has expired under 8 C.F.R. 214(k)(5), USCIS will not reaffirm or reopen the petition; petition will expire in due course of the allowed time period. This simply means that if the petitioner wishes to proceed he or she will have to start the process over again with a new fee and petition.

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TIER III SERVICES

BANKRUPTCY ADVICE AND COUNSELING

OBTAIN BASIC INFORMATION

- What is the total amount of debt?
- What is the nature of debt (secured, unsecured, joint, cosigners)?
- What is the status of debt (already in arrears, postjudgment, etc.)?
- Has the client filed or attempted to file for bankruptcy previously?
- Has the client already explored alternatives?
- Is client filing bankruptcy with spouse? Do spouses need dual representation waiver letter?

DISCUSS CHAPTERS 7 AND 13

- Dischargeable v. non-dischargeable debts
- Exempt property v. non-exempt property
- Liability of 3rd parties (co-signers, joint debtors)
- Property with security interest (reaffirmation, lien-stripping)
- Substantive basics and procedural process for each

DISCUSS POTENTIAL IMPACT

- Effect on co-signers and joint debtors
- Length of time bankruptcy stays on credit report and ability to obtain credit/favorable credit terms in future
- Liquidation of certain property
- Potential security clearance (see SECNAV 5510.30A) and Personal Reliability Program (pilots, etc.) impact
- Prohibition against filing again

DISCUSS ALTERNATIVES

- Active Duty, see Command Financial Specialist
- Attacking the basis of the debt (potential consumer defenses, SCRA, etc.)
- Budgeting
- Consumer credit counseling/consolidation loans (caution)
- Fleet and Family Services Center Counseling and Financial budgeting
- Negotiating the debt down

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TIER IV SERVICES

BANKRUPTCY FILING INFORMATION

For bankruptcy filing questions, please see the Administrative Office of the U.S. Courts on behalf of the Federal Judiciary website for rules, forms. The website also contains a list of bankruptcy administrators who oversee the administration of bankruptcy cases, maintain a panel of private trustees, and monitor the transactions and conduct of parties in bankruptcy.

The website can be accessed at: <http://www.uscourts.gov/FederalCourts/Bankruptcy.aspx>

For an interactive map and list of U.S. District Courts, please visit:
http://www.uscourts.gov/court_locator.aspx

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SPECIAL NEEDS TRUSTS (SNT)

MAY BE PREPARED BY LA ATTORNEY ONLY IF SPECIFICALLY AUTHORIZED BY CO AND LA ATTORNEY IS BARRED IN JURISDICTION IN WHICH TRUST WILL BECOME OPERATIVE

LAWS

- 42 U.S.C. §§ 401-433 Social Security and see www.ssa.gov
- 42 U.S.C. § 1395 Medicare Statute
- 42 CFR parts 405-424 Medicare Regulations
- Foster Care Independence Act of 1999
- Omnibus Budget Reconciliation Act of 1993, Public Law 103-66 (OBRA 93)
- Deficit Reduction Act of 2005, Public Law NO. 109-171
- Relevant State law

OBTAIN BASIC INFORMATION

- What is the nature of the intended beneficiary's disability?
- What public benefits is the potential beneficiary currently receiving or is likely to receive in the future (e.g. Medicaid, Social Security Disability (SSI, not SSDI))?
- Request a copy of and review any benefits paperwork or correspondence
- Who are the beneficiaries of the survivors benefits plans of the member or the civilian dependent who is a civil servant? If a disabled child is already receiving SBP, then he or she will also be eligible for TRICARE

CAUTION: Once an election for military survivor benefits and/or civil service survivor benefits is made it is generally irrevocable and cannot be disclaimed and cannot be assigned to a Special Needs Trust. In fact, receiving these benefits may disqualify the child from receiving Medicaid waiver benefits that provide him or her with the medical care and treatment that he or she needs and which is currently provided courtesy of these government programs.

DISCUSS SNT

- Basic purpose and operation of SNT. Management of assets for a disabled individual such that his or her eligibility for public benefits is undisturbed.
- Effect of inheritance and insurance payout on continued eligibility for benefits. Most states do not include a SNT if the trustee is not required to distribute sums to the disabled beneficiary for the beneficiary's support. However several states will consider the trust to be available as a resource to the beneficiary under these circumstances thus defeating the individual's public benefits eligibility.
- Explain fiduciary duties of trustee and possible need for professional
- Explain difference between inter vivos and testamentary trusts

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- Discuss need for Medicaid reimbursement provision (grantor trust issue)

DISCUSS EFFECT OF NOT HAVING A PROPERLY DRAFTED SNT IF ONE IS NEEDED

- To potentially not defeat the individual's eligibility for public benefits special language must be included in every SNT.
- Must specifically set out the purpose of the trust to be supplemental for emergency needs or needs that are not already met by the public benefits that are available
- Must define the disability and what the individual's unique unmet needs currently are and what they may prospectively become and for which these funds are dedicated
- Must state that the trust is for the recipient's emotional welfare, maintaining contact with family members, ensuring the recipient is able to experience family and other events that would otherwise be impossible on the public benefits alone; without in any way, shape or form reducing the services or financial assistance or medical or dental or other assistance that is provided to the recipient as a result of his or her public benefits whether from federal, state or local organizations and that no part of the SNT is to be used to reimburse the government (federal, state, or local) for these public benefits
- Include a spendthrift clause to prevent the beneficiary from potentially alienating or bartering away any future trust distribution to insulate the trust from claims of creditors
- Consider whether any emergency short fuse discretionary use of funds should be provided for the trustee to consciously decide to reduce the existing public benefits because the beneficiary has poor housing or medical or other unsatisfactorily met needs. This can be dangerous.
- Make sure the trustee's powers to distribute the income and principal or use it for any purpose is purely discretionary and not mandatory and allow the trustee to immediately terminate the trust in favor of other beneficiaries if the trust should ever become liable for services already provided by public benefits.
- Allow the trustee to amend the trust as needed to make sure that the trust will not disqualify the beneficiary for public benefits.
- Make sure that the SNT is solely for the disabled person's benefit
- Be certain to name remainder beneficiaries

DRAFT SNT: May do so only if specifically authorized by CO and Licensed to practice law in Jurisdiction in which trust will become operative. If not, then provide a referral to the civilian sector or the ABA Pro Bono panel.

LOCAL NLSO ITEMS *(add as appropriate)*

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ADDITIONAL INFORMATION FOR ASSISTING LEGAL ASSISTANCE CLIENTS

EARLY RETURN OF DEPENDENTS WHO ARE OVERSEAS INCLUDING EMERGENCY EVACUATION CONCERNS

Early Return of Dependents (ERD) is authorized transportation of a service member's dependents who are stationed overseas; and the transportation of a dependent's household goods shipment at government expense to a designated place in the continental United States, Alaska, Hawaii, Puerto Rico, or a territory or possession of the United States (or if the dependents are foreign nationals, to a place in the country of their origin, because of official or personal situations which justify such authorization).

EARLY RETURN OF DEPENDENTS – REGULATIONS

- Navy regulations govern which members are eligible to bring their dependents with them while stationed overseas, also known as command sponsorship. See OPNAVINST 1300.15.
- Many of the questions that arise about entitlements when discussing ERD can be answered by the Joint Federal Travel Regulations (JFTR).
- Each CNIC Region or Base Installation also has their own local rules governing dependents who are overseas, to include under what circumstances these dependents return to a designated place in the U.S. or if the dependents are foreign nationals, to a place in their country of origin.
- ERD normally must be approved by the member's Commanding Officer or his/her designee based upon a valid reason to remove the dependents.
- ERD is the last resort and should be used to avoid fraud, waste, and hardship to the member.
- If the member is close to PCSing or separating, normally PSD will attempt to negotiate for an early PCS instead of an early return of dependents.

**The legal assistance attorney may want to consider working with the command SJA regarding ERD, as all ERD requests are generally approved by the Commanding Officer.*

CIRCUMSTANCES

- Lost Sponsorship - may be due to misconduct by the dependent
- Evacuation – including voluntary evacuation – see JFTR for specific rules and regulations
- Pending Divorce/Separation
- Custody Change

EFFECT ON SERVICEMEMBER

- Cost-of-Living Allowance entitlement – may change to COLA at the single rate
- Overseas Housing Allowance entitlement – is living off-base or in a house at that rate dependent upon having an accompanied tour with dependents? Will servicemember have to

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move off-base?

SUPPORT (Review Military Non-Support Guidelines)

- Housing – where will dependents live? Do they have a home to return to or must they rent a new place? Will the servicemember also have his/her name on the lease if they intend to follow dependents or not?
- BAH - will dependent start to receive BAH for new location?
- Medical – ensure dependents have access to medical care.
- Court-ordered support – compliance/do court orders need to be modified?
- Immigration concerns – will this move affect any immigration concerns if the dependents are not U.S. citizens? Will visas be required? If temporary evacuation, does the dependent have requisite documents to re-enter the country (valid passport, etc)?

LOCAL NLSO ITEMS (*add as appropriate*)

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EXCEPTIONAL FAMILY MEMBER PROGRAM

The Navy's Exceptional Family Member Program (EFMP) is designed to assist sailors by addressing the special needs of their exceptional family members (EFM) during the assignment process. Special needs include any special medical, dental, mental health, developmental or educational requirement, wheelchair accessibility, adaptive equipment or assistive technology devices and services. EFMP policy and guidance are contained in:

- DOD Instruction 1315.19, 20 Dec 05, Authorizing Special Needs Family Members Travel Overseas at Government Expense
- SECNAV Instruction 1754.5B, 14 Dec 05, Exceptional Family Member Program
- OPNAV Instruction 1754.2B, 16 Jun 03, Exceptional Family Member Program
- BUMEDINST 1300.2A, 23 Jun 06, Suitability Screening, Medical Assignment Screening and Exceptional Family Member Program (EFMP) Identification and Enrollment
- DD Form 2792 (9-03), Exceptional Family Member Medical Summary
- DD Form 2792-1 (9-03), Exceptional Family Member Special Education/Early Intervention Summary, are used for enrollment.

There are six EFMP enrollment categories which include:

- Category I – for monitoring purposes only
- Category II - pinpoint to specific geographic locations
- Category III - no overseas assignments
- Category IV - major medical areas in CONUS
- Category V - homesteading
- Category VI - temporary enrollment - update required in 6-12 months

The Navy Personnel Command (NAVPERSCOM) in Millington, TN is the proponent for EFMP. Contact info for EFMP operations (PERS-451) is: CML 901-874-4390, DSN 882-4390. Contact info for EFMP policy (N151) is: CML 901-874-6770, DSN 882-6670. NAVPERSCOM is responsible for:

- Prescribing EFMP enrollment and disenrollment procedures.
- Coordinating detailing procedures including those for severely disabled EFM.
- Prescribing procedures for expeditious screening and forwarding of EFM forms from the sponsor or MTF via the Central Screening Committee to the EFMP Manager.
- Establishing and maintaining a database of enrolled service members with EFM.
- Establishing and maintaining a current EFM resource database which includes medical, educational, and support agencies, facilities, and services in key fleet concentration areas.
- Developing and periodically conducting training and information campaigns.
- Providing relocation assistance.

Each military component has developed its own program that addresses special needs and assignment coordination.

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Additional information can be found in the following publications (available at each command, Fleet and Family Support Center, or Navy MTF) or websites:

- Exceptional Family Member Program Resource Guide (NAVPERS 15614F)
- Children With Special Needs - A Navy Parent Handbook
- The Navy Exceptional Family Member Program (VCR or DVD - NAVPERS 806683)
- Navy EFMP (<http://www.npc.navy.mil/CommandSupport/ExceptionalFamilyMember/>)
- USMC EFMP (<http://www.usmc-mccs.org/efmp>)
- Military Homefront (<http://www.militaryhomefront.dod.mil>)
- Military OneSource (<http://www.militaryonesource.com>)
- DoD Special Needs Network (www.efmconnections.org)

EFMP forms:

- Medical Summary (ALL dependants) - DD2792
- Education Summary (for all school age children ages 3+)-DD2792-1

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INTERNATIONAL ADOPTIONS

(SOURCE Adoption Proceedings Benchbook—Revised Edition Michigan Judicial Institute © 2011)

- Significant information is available at the United States Citizenship and Immigration Services (USCIS) website at <http://www.uscis.gov/portal/site/uscis>, and the United States Department of State Intercountry Adoption website at <http://adoption.state.gov/index.php>.
- The United States is among several countries that agreed to implement the multilateral Hague Convention of Children and Cooperation in Respect of Intercountry Adoption treaty, to establish uniform standards of practices for intercountry adoptions. See 42 USC 14901(a). The Intercountry Adoption Act (IAA), 42 USC 14901 et seq., was enacted to implement the Convention.
- A list of the Convention countries is accessible at http://adoption.state.gov/hague_convention/countries.php.
- Note: The IAA expanded the Immigration and Nationality Act's definition of a child to include adoptions occurring between Convention countries by adding 8 USC 1101(b)(1)(G). The IAA also incorporated Convention procedures into the immigration process for children falling under 8 USC 1101(b)(1)(G). PL 106–279, § 302, 114 Stat 838.
- Adoptions may also take place between the United States and countries not party to the Hague Convention; the legal requirements that must be satisfied are found in the Immigration and Nationality Act (INA), 8 USC 1101 et seq.

ADOPTION PROCESS FOR NON-CONVENTION COUNTRIES

- The two ways of adopting a child not habitually residing in a Convention country are limited to the following:
 1. When the prospective adoptive parent petitions the court after he or she had legal custody of a child under the age of 16, and the child lived with him or her for at least two years. 8 USC 1101(b)(1)(E)(i). See the USCIS form I–130, *Petition for Alien Relative*.
 2. When the prospective adoptive parent adopts or intends to adopt an orphan (orphan adoption). 8 USC 1101(b)(1)(F)(i). A child qualifies as an orphan when he or she is under the age of 16 at the time the adoption petition is filed and the child was orphaned for either of the two following reasons: (1) The child's parents died, disappeared, abandoned, or deserted the child or (2) the child's sole or surviving parent is not capable of caring for the child, and he or she has, in writing, irrevocably released the child for emigration and adoption. 8 USC 1101(b)(1)(F)(i).

ADOPTION PROCESS FOR CONVENTION COUNTRIES VS. NON-CONVENTION COUNTRIES

- Although adopting a child from a Convention country is similar to adopting a child from a non-Convention country, a Convention country adoption provides more protections to the client.
- A chart comparing Convention country adoptions to non-Convention country adoptions is

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accessible at http://adoption.state.gov/hague_convention/hague_vs_nonhague.php.

- **Note:** A Convention country adoption is “an adoption of a child resident in a foreign country party to the Convention by a United States citizen, or an adoption of a child resident in the United States by an individual residing in another Convention country.” 42 USC 14902(10). Both Convention country and non-Convention country adoptions require the United States to make two determinations:
 1. Whether the adoptive parent is suitable.
 2. Whether the child's adoption satisfies the eligibility requirements.

ADOPTIVE PARENT ELIGIBILITY

- A prospective adoptive parent will not be able to adopt a child from another country until the USCIS determines that the adoptive parent is capable of providing a loving, stable home for the child.
- To request eligibility, the prospective adoptive parent must file an application with the USCIS. The application must consist of the following:
 1. The applicable USCIS form.
 - For a Convention adoption, see the USCIS form I-800A, *Application for Determination of Suitability to Adopt a Child from a Convention Country*.
 - For a non-Convention adoption, see the USCIS form I-600A, *Application for Advance Processing of Orphan Petition*.
 2. Proof that the adoptive parent met the preadoption requirements in the State in which he or she resides, if the child is to be adopted in the United States. *See* 8 CFR 204.3(c)(1)(iv); 8 CFR 204.3(f); 8 CFR 204.305.
 3. A home study.
 4. An application fee; and
 5. Any other necessary supporting documentation (including evidence of United States citizenship, marriage certificate, and compliance with preadoption requirements). *See* 8 CFR 204.3; 8 CFR 204.310(a).

HOME STUDY REQUIREMENTS FOR CONVENTION COUNTRY ADOPTION

- The Department of State has designated two accrediting entities to carry out the accreditation and approval of adoption service providers. The accrediting entities are The Council on Accreditation (www.coanet.org) and The Colorado Department of Human Services (www.cdhs.state.co.us).
- The home study must meet the following criteria:
 1. Tailored to the specific prospective adoptive parent's situation (including the adoptive parent's place of residence, marital status, criminal history, and financial resources).
 2. Prepared or updated no more than six months before being submitted to the USCIS.
 3. Includes the home study preparer's assessment of potential problem areas and recommendations for any restrictions on placed children within the home.
 4. States the number of home visits and in-person interviews the home study preparer

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conducted. Includes the names, alien registration numbers, and birthdates of all additional adults living in the adoptive parent's household.

5. Summarizes at least ten hours of the adoptive parent's pre-placement preparation and training, and plans for future preparation and training, and postplacement monitoring.
6. Includes the home study preparer's referrals and follow-up reports.
7. Includes a certified copy of documentation showing final disposition of incidents that resulted in an arrest, indictment, conviction, and/or any other judicial or administrative action for anyone subject to the home study.
8. Contains an evaluation of the home's suitability.
9. Includes a general description of the adoptive parent's physical, mental, and emotional health.
10. Identifies the agencies involved in the home study, the dates on which the home study began and was completed, and whether the home study preparer recommended the adoptive parent for adoption eligibility.
11. Prepared and signed by a home study preparer who is licensed in the prospective adoptive parent's State and is accredited or approved by one of the United States Department of State's designated accrediting entities. *See* 8 CFR 204.301; 8 CFR 204.311(b); 8 CFR 204.311(c)(1)–8 CFR 204.311(c)(16).

HOME STUDY REQUIREMENTS FOR NON-CONVENTION COUNTRY ADOPTION

- For non-Convention adoptions, the prospective adoptive parent must submit a home study that meets the following requirements:
 1. Tailored to the specific prospective adoptive parent's situation (including the adoptive parent's place of residence, marital status, criminal history, and financial resources).
 2. Prepared or updated no more than six months before being submitted to the USCIS.
 3. States the number of home visits and in-person interviews the home study preparer conducted.
 4. Includes the names of all additional adults living in the adoptive parent's household.
 5. Includes the home study preparer's assessment of the prospective adoptive parent's capabilities to properly parent the orphan (including an assessment of the adoptive parent's finances, history of abuse and/or violence, and physical, mental, and emotional health).
 6. Summarizes the prospective adoptive parent's pre-placement counseling and post-placement counseling plans.
 7. Indicates whether the home study preparer is recommending the adoptive parent for adoption eligibility.
 8. Prepared by a home study preparer who is licensed in the prospective adoptive parent's State. *See* 8 USC 1154(d); 8 CFR 204.3(b); 8 CFR 204.3(e).

PROSPECTIVE ADOPTEE ELIGIBILITY

- In order to be adopted across country lines, a prospective adoptee must qualify for adoption under the laws of both his or her country of origin and the United States.
- The United States has different eligibility requirements for prospective adoptees habitually residing in Convention countries and those habitually residing in non-Convention countries.

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Adoption information on a child's country of origin is accessible at http://adoption.state.gov/country_information.php.

- **Convention adoptee eligibility.** A prospective adoptee habitually living in a Convention country must qualify as a Convention adoptee in order to immigrate to the United States. The USCIS determines whether the prospective adoptee qualifies as a Convention adoptee. To request eligibility, the adoptive parent must petition the USCIS to classify the Convention adoptee as an immediate relative. However, the adoptive parent must be approved for adoption eligibility before requesting the USCIS to approve the child's eligibility, and the Central Authority in the selected Convention country must have proposed placing the prospective adoptee with the adoptive parent. **Note:** The United States Department of State serves as the central authority for the United States on intercountry adoptions. *See* 42 USC 14911(a). The Secretary of State must act as the head of the central authority and perform all of the central authority functions for the United States, unless otherwise specified. *See* 42 USC 14911(a), (b)(1); USCIS form I-800, *Petition to Classify Convention Adoptee as an Immediate Relative*.
- **Non-Convention adoptee eligibility.** A prospective adoptee habitually living in a non-Convention country must qualify as an orphan under the INA in order to immigrate to the United States. *See* 8 USC 1101(b)(1)(F)(i). The USCIS determines whether the prospective adoptee qualifies as an orphan. To request eligibility, the adoptive parent must petition the USCIS to classify the orphan as an immediate relative. *See* 8 CFR 204.3(d). The adoptive parent may submit his or her request for adoption eligibility approval before or at the same time as he or she requests the USCIS to approve the child's eligibility. **Note:** An adoptive parent must indicate on the form if he or she is going to adopt the child in the United States.

ADOPTION CERTIFICATION

- Having met all applicable requirements, a prospective adoptee may be adopted abroad or brought to the United States for adoption.
- **Adoption Abroad.** The United States must recognize an adoption order issued in another country. It is presumed that the adoption order was issued in accordance with the laws of that country, and the parties' rights and obligations are treated as if the order was issued by a court within the United States.
 - In *Convention adoptions*, the United States Secretary of State must certify the adoption order before it is recognized in the United States. 42 USC 14931(b). In order to issue the certification, the Secretary of State must receive appropriate notification from the child's country of origin verifying that the federal adoption requirements were met. 42 USC 14931. Once the adoptive parent proves his or her United States citizenship and officially adopts the child, the child automatically becomes a citizen of the United States. 8 USC 1431(a)–8 USC 1431(b). *See* the USCIS form I-600, *Petition to Classify Orphan as an Immediate Relative*.
- **Adoption in the United States.** The United States must recognize a legal custody or guardianship order issued in another country. It is presumed that the order was issued in accordance with the laws of that country, and the parties' rights and obligations are treated as if the order was issued by a court within the United States.

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- In *Convention adoptions*, the state court must not issue a final order of adoption until the Secretary of State certifies that the legal custody of the child has been granted to a prospective adoptive parent for purposes of emigration and adoption. 42 USC 14931(a), (c). In order to issue the certification, the Secretary of State must receive appropriate notification from the child's country of origin that verifies the pre-adoption requirements were met. 42 USC 14931(a). Once the adoptive parent proves his or her United States citizenship and receives legal and physical custody of the child, the child automatically becomes a citizen of the United States. 8 USC 1431(a).
- **Adoptions of Children Emigrating from the United States.** Before a state court enters an adoption or custody order involving a child emigrating from the United States, the court must:
 1. Receive a background report on the child.
 2. Receive evidence that reasonable efforts were made to place the child with an adoptive parent in the United States.
 3. Receive evidence that the placement is in the child's best interests.
 4. Find that:
 - a. The child is adoptable.
 - b. The placement is in the child's best interests.
 - c. The consent process and all of the following have been met:
 - i. The biological parents received counseling, if necessary.
 - ii. The biological parents were informed of the effects of the adoption process, including termination of their parental rights.
 - d. Assurances that no payment was exchanged for the consents.
 - e. The consents were legal and voluntarily given after a child's birth.
 - f. Central Authority approved the adoption, if the Convention applies. *See* 42 USC 14932(b).
- **Note:** When a prospective adoptee is emigrating from the United States to a Convention country, the accredited entity must: (1) Ensure a background study on the child has been done; (2) Make reasonable efforts to place the child with an adoptive parent within the United States; and (3) Find that placement with the prospective adoptive parent is in the child's best interests. *See* 42 USC 14932(a).
- For additional information on emigration from the United States to a Convention country, see *The Hague Convention on Intercountry Adoption: A Guide to Outgoing Cases from the United States*, accessible at <http://adoption.state.gov/content/pdf/OutgoingCasesFAQs.pdf>.

ACCESS TO ADOPTION RECORDS

- The United States Secretary of State and the Attorney General must establish a case registry that contains all adoptions (both Convention and non-Convention) involving both immigration and emigration. The case registry must permit tracking and retrieval of all pending and closed adoptions. *See* 42 USC 14912(d)–42 USC 14912(e). 42 USC 14912(e).
- **Convention adoption.** The Secretary of State or the Attorney General may disclose a Convention adoption record if the record is maintained under the INA and disclosure is

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permitted by federal law. Unlawful disclosure of a Convention adoption record is punishable by federal law. *See* 42 USC 14941(b).

- **Non-Convention adoption.** The Secretary of State or the Attorney General may disclose a non-Convention adoption record if disclosure is permitted by the applicable state law. *See* 42 USC 14941(c).

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PROBATE GENERALITIES

PROBATE PROCEEDINGS ARE STATE SPECIFIC

- Duration of proceeding can be days to months to years depending on whether will was validly executed; whether there is a contest; whether the estate is small or large; how heavy the court's calendar is for the near future. Usually the greatest amount of time required is that used to marshal the assets and notify creditors; claim insurance proceeds and other accounts for which no proper beneficiary designations were made and obtain tax clearance certificates after the proper filing of income tax returns (and if needed, estate tax and gift tax returns), prepare and file accountings
- The biggest problem for military is the possibility of ancillary probate due to real estate or tangible property that is located in a jurisdiction other than the jurisdiction in which the will is primarily being probated
- Probate expenses in almost all instances are tax deductible, including attorney and representative fees
- Priorities of payments/distributions generally/brief overview;
 - Taxes, Costs, Fees and debts
 - Specific Bequests
 - Pre-residuary Trusts
 - General Bequests
 - Compute Residue
 - Create residuary trusts
 - Prove tax clearance; state agency clearance
 - Obtain receipts from beneficiaries and releases from beneficiaries
 - Obtain discharge from court
- Probate fees are ordinarily deemed to be of little significance given the overarching value of the role of the court in supervising the settlement of the estate
- Asset distribution is State specific but usually a prudent rule is to obtain court approval before any distribution to beneficiaries is made because the PR/Executor is personally liable for any erroneous distribution
- All jurisdictions have a statutory time period in which claims of creditors must be presented or face forever being barred. This is a primary reason for opening a probate.
- If a spouse was partially or fully disinherited it is likely that a proceeding could be initiated by the aggrieved surviving spouse to obtain his or her elective share
- If adequate support of dependents is an issue an action for family allowance may be filed

OPENING ACCOUNTS AND REGISTRATION OF CERTAIN ASSETS UPON TRANSFER VIA ESTATE

- Most jurisdictions require that upon official appointment as PR/Executor/Administrator of the Estate, the appointed person must open an interest bearing account in the name of the estate and into which all liquid assets will be placed
- Stringent fiduciary duties are applied in all jurisdictions forbidding co-mingling and distributions without authority

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- Stock certificates, bonds, vehicles, real estate and the like will have to be re-titled to the beneficiary if specifically gifted to a beneficiary rather than aggregated to the residuary

CONCERNS FOR CLIENTS SEEKING PROBATE ADVICE

- Most jurisdictions require that the person who will be appointed identify and make an inventory of all personal effects and property, collect and protect the estate of the decedent from fraud, waste/loss
- Locate the will and deposit the original with the court or city or county office designated to receive them; retain several copies. Note that access to safety deposit boxes is controlled by statute when the person seeking access is not also a box-holder of that box

PR/EXECUTOR/ADMINISTRATOR TO-DO LIST

- Typical concerns are;
 - Locate the will and other estate planning documents and review
 - Determine whether decedent had a pre-paid burial or funeral plan
 - Order death certificates for proof of claims
 - Ensure vehicles are properly insured and protected from misuse
 - Look for computer records or paper files listing assets and debts
 - Look for bank statements, bank books; other financial assets documents such as securities, annuities, life insurance, business ownership interests
 - Collect mail
 - Determine whether utilities are to remain on at the expense of the estate or whether they may be turned off without causing irremediable or great harm to an asset or incurring an additional liability
 - Determine whether there are security deposits for rent, utilities that must be demanded and collected
 - Determine whether the decedent was a recipient of benefits contact social security (month of death payments must be returned to SSA) and any other government agency that was providing benefits
 - Determine if there are any safety deposit boxes/agreements/keys
 - Locate any divorce documents; pre-nuptial/ante-nuptial agreements
 - Locate insurance policies
 - Locate pension and retirement plan documents
 - Locate at least the previous three years of tax returns
 - Locate marriage, death, birth certificates
 - Locate health insurance policies, make claims for final illness
 - Locate all unpaid bills and prepare notices to creditors
 - Notify credit bureaus of death and obtain seal on accounts

LOCAL NLSO ITEMS *(add as appropriate)*