

**SUPREME COURT OF PENNSYLVANIA
APPELLATE COURT PROCEDURAL RULES COMMITTEE
CIVIL PROCEDURAL RULES COMMITTEE
DOMESTIC RELATIONS PROCEDURAL RULES COMMITTEE
ORPHANS' COURT PROCEDURAL RULES COMMITTEE
CRIMINAL PROCEDURAL RULES COMMITTEE
JUVENILE COURT PROCEDURAL RULES COMMITTEE
MINOR COURT RULES COMMITTEE**

PUBLICATION REPORT

A proposal is being considered for the amendment of Pennsylvania Rules of Appellate Procedure 1517, 1732, 1781, 3307, and 3309; adoption of Pennsylvania Rules of Civil Procedure 243 and 1930.10, rescission of Rule 1920.46, and amendment of Rules 216, 237.1, 1037, 1303, 1901.6, 1910.11, 1910.12, 1915.4-2, 1915.4-3, 1915.17, 1920.42, 1920.51, 1930.6, 1956, and 2955; adoption of Pennsylvania Rules of Orphans' Court Procedure 2.12, 3.16, and 15.23, and amendment of Rules 14.1, 15.7, 15.8, 15.9, 15.10, and 15.13; amendment of Pennsylvania Rules of Criminal Procedure 150, 430, 431, and 515; adoption of Pennsylvania Rule of Juvenile Court Procedure 1206, and amendment of Rules 1122, 1242, and 1406; and amendment of Pennsylvania Rules of Civil Procedure before Magisterial District Judges 209, 304, 308, 403, 405, 410, 503, 506, 515, and 516. The intent of this proposal is to establish uniform procedures for the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. §§ 3901 *et seq.* and the Military and Veterans Code ("Code"), 51 Pa.C.S. §§ 101 *et seq.*

The Rules of Civil Procedure Before Magisterial District Judges and the Rules of Civil Procedure both recognized portions of an earlier version of the SCRA. See Pa.R.Civ.P.M.D.J. 209(E); 403, Comment; Pa.R.Civ.P. 237.1, Comment; 1920.46; 2955, Comment; and 3031, Comment. The Minor Court Rules Committee published proposed amendments to update citations to the SCRA and codify the affidavit requirement of 50 U.S.C. § 3931(b)(1). See 49 Pa.B. 1900 (April 20, 2019). Thereafter, effective September 1, 2020, Pa.R.Civ.P.M.D.J. 209, 304, 403, 410, 503, 515, and 516 were amended. See 50 Pa.B. 2252 (May 2, 2020). Afterward, the Civil Procedural Rules Committee at 51 Pa.B. 1003 (February 27, 2021), and the Domestic Relations Procedural Rules Committee at 51 Pa.B. 1014 (February 27, 2021), published similar proposals. After publication, further rulemaking was halted so that the other Committees could consider whether similar amendments implementing the SCRA, as well as the Code, were advisable.

The Appellate Court Procedural Rules Committee, the Civil Procedural Rules Committee, the Domestic Relations Procedural Rules Committee, the Orphans' Court Procedural Rules Committee, the Criminal Procedural Rules Committee, the Juvenile Court Procedural Rules Committee, and the Minor Court Rules Committee jointly

consulted to maintain a consistent approach to rulemaking on these topics. The Committees encountered a dearth of case law in Pennsylvania applying the SCRA and Code to certain proceedings governed by the various bodies of rules. For some types of proceedings, applicability could be readily determined by the plain language of the SCRA and Code, but for other types of proceedings, applicability was less clear. A common concern was whether rulemaking to implement procedures or to recognize authority may operate to determine the applicability of the substantive protections provided by the SCRA and Code. To this end, the Committees consulted case law in other jurisdictions applying the SCRA and statutory interpretation of the Code.

Background

During the course of service and for reasons that should be obvious, military servicemembers may not be able to assert their legal rights. Both Congress and Pennsylvania's General Assembly have long provided protection to servicemembers from civil proceedings during times of military service. For example, during the Civil War those legislative bodies enacted moratoriums on civil actions brought against servicemembers. See Act of April 18, 1861, P.L. 409; Act of June 11, 1864, ch. 118, 13 Stat. 123.¹ During World War I, Congress enacted the Soldiers' and Sailors' Civil Relief Act of 1918 directing trial courts to take equitable action when a servicemember's rights were involved in a controversy. See Act of March 8, 1918, ch. 20, 40 Stat. 440; Judge Advocate General's School, U.S. Army, JA 260, *Soldiers' and Sailors' Civil Relief Act Guide*, 1-1 (April 1998); Chandler, Maj. Garth K., *The Impact of a Request for a Stay of Proceedings Under the Soldiers' and Sailors' Civil Relief Act*, 102 Mil. L. Rev. 169, 169-70 (1983). The Soldiers' and Sailors' Civil Relief Act of 1940 ("SSCRA") was a substantial reenactment of the 1918 Act. See Act of October 17, 1940, ch. 888, 54 Stat. 1178; *Boone v. Lightner*, 319 U.S. 561, 568 (1943). The 1940 Act was significantly amended in 1942 to provide further protections to servicemembers. See Act of October 6, 1942, Ch. 581, 56 Stat. 769. Subsequent conflicts necessitated further amendments to modernize the provisions, including changing the name of the act to the "Servicemembers Civil Relief Act." See, e.g., Act of December 19, 2003, 17 Stat. 2835.² The purpose of the SCRA is:

[T]o provide for, strengthen, and expedite the national defense through protection extended by this chapter to servicemembers of the

¹ The various Pennsylvania statutes providing servicemember protections through the years are described in *Fister v. Bollinger*, 51 Pa. D.&C. 621 (Berks 1944).

² The SCRA was previously codified at 50 U.S.C. App. §§ 501-597b. Effective December 1, 2015, the SCRA was reclassified and is now found at 50 U.S.C. §§ 3901-4043. See <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra> (last visited September 15, 2022).

United States to enable such persons to devote their entire energy to the defense needs of the Nation; and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

50 U.S.C. § 3902.

The SCRA covers servicemembers in “military service,” which is defined as:

- (A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard –
 - (i) active duty, as defined in section 101(d)(1) of Title 10, and
 - (ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of Title 32 for purposes of responding to a national emergency declared by the President and supported by Federal funds;
- (B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service; and
- (C) any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.

Id. § 3911(2)(A); see also 10 U.S.C. § 101(d) (defining “active duty” and “active service”). If a servicemember, including a member of the National Guard, does not meet this definition of “military service,” then the servicemember is not covered by the SCRA.

For the purpose of this discussion, the National Guard may operate in three statuses: 1) on full-time federal active duty in military service of the United States pursuant to Title 10 of the United States Code, *i.e.*, “federalized”; 2) on full-time National Guard duty when the Governor, with the approval of the President or Secretary of Defense, orders members to duty for Homeland Defense activities pursuant to Title 32 of the United States Code; and 3) on state active duty when activated by the Governor on the basis of a state statute and state funding. See Congressional Research Service, *Reserve Component Personnel Issues: Questions and Answers*, pp. 19-21 (Nov. 2, 2021) at <https://sgp.fas.org/crs/natsec/RL30802.pdf> (last visited November 18, 2022). Through the definition of “servicemember,” the SCRA will cover National Guard members in Title

10 service and under certain, but not all, Title 32 service. The SCRA does not cover National Guard members on state active duty.

Pennsylvania's analogue to the SCRA is the Military and Veterans Code, which contains substantive protections from court proceedings when a member of the National Guard is "going to, remaining at, or returning from, a place where [the member] is ordered to attend for military duty" or "in the active service of the Commonwealth." See 51 Pa.C.S. § 4104 (exemption from arrest), § 4105 (exemption from civil process).

In addition, the Code contains specific provisions for child custody proceedings "while the eligible servicemember is deployed in support of a contingency operation." See 51 Pa.C.S. § 4109(a), § 4110. An "eligible servicemember" includes a member of the Pennsylvania National Guard "serving on active duty, other than active duty for training, for at least 30 consecutive days in support of a contingency operation." 51 Pa.C.S. § 4109(f) (Definitions). One might argue that the use of "active duty" in § 4109(f) is intended to mean "active duty," as used in the definition of "military service" in 10 U.S.C. § 3911(2)(A)(i). Thus, § 4109 is an adjunct to § 3938 of the SCRA, protecting Pennsylvania National Guard members also protected by the SCRA. See *also id.* § 3938(d) (permitting state law preemption if the state law provides a high standard of protection for the servicemember). However, it is not clear from the statute whether "active duty" in § 4109(f) means "state active duty" or "federal active duty."

Turning to whether a National Guard member on "active duty" deployed in support of a contingency operation" is in "military service" under the SCRA, the definitions of "contingency operation" in Title 10 of the United States Code and § 4109(f) of Pennsylvania's Military and Veterans Code are nearly identical. Compare 10 U.S.C. § 101(a)(13) with 51 Pa. Code. § 4109(f).³ Title 10 states:

The term "contingency operation" means a military operation that –

- (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
- (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title,

³ The definition within 51 Pa.C.S. § 4109(f) ostensibly omits references to 10 U.S.C. § 12304a pertaining to reservists and 14 U.S.C. § 3713 pertaining to the Coast Guard because Pennsylvania's Code governs National Guard members.

section 3713 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.

10 U.S.C. § 101(a)(13). Army Regulation 135-200, *Active Duty for Missions, Projects, and Training for Reserve Component Soldiers* (October 20, 2020) is instructive. Within the discussion of “Active Duty for Operational Support,” the regulation describes “contingency operations” as including individual Army National Guard members voluntarily serving in support of contingency operations. See *id.* § 6-19(b). An order issued under this regulation is required to state, *inter alia*, its authority pursuant to 10 U.S.C. § 12301(d). See *id.* § 6-25(a)(1). While this citation of authority is not one included in the definition of “contingency operation,” see *infra*, § 12301(d) would be included in the “catch all” language of 10 U.S.C. § 101(a)(13)(B) (“any other provision of law”) and 51 Pa.C.S. § 4109(f) (“or any other provision of 10 U.S.C.”).⁴ Accordingly, a member of the National Guard supporting a contingency operation, as defined by 10 U.S.C. § 101(a)(13), would be on “active duty” pursuant to 10 U.S.C. § 12301(d), as that term is defined by 10 U.S.C. § 101(d)(1), and, therefore, within the definition of “military service” pursuant to 10 U.S.C. § 3911(2)(A)(i) of the SCRA. See also 32 U.S.C. § 101(12) (defining “active duty” as full-time duty in the active military service of the United States).

Concerning Title 32 status, not all active service, *i.e.*, full-time duty, of National Guard members is covered by the SCRA. See also 10 U.S.C. § 101(d)(3) (defining “active service” to include “full-time National Guard duty”). Pursuant to 10 U.S.C. § 101(d)(5), full-time National Guard duty is authorized by Sections 316 and 502-505 of Title 32. Coverage by the SCRA vis-à-vis the definition of “military service” of full-time National Guard duty is limited to a call to active service by the President or Secretary of Defense pursuant to 32 U.S.C. § 502(f) for a period of 30 or more consecutive days. See 50 U.S.C. § 3911(2)(A)(ii). See, e.g., 84 F.R. 48545 (September 12, 2019) (presidential notice of the continuation of the national emergency with respect to certain terrorist attacks); 85 F.R. 19639 (April 2, 2020) (presidential memorandum invoking 32 U.S.C. § 502(f) for COVID-19 response with 30 days of federal funding); 86 F.R. 7481 (January 21, 2021) (secretary memorandum invoking 32 U.S.C. § 502(f) for COVID-19 response with funding through September 30, 2021). Hence, a National Guard member may serve full-time under multiple Sections of Title 32, but only full-time service under the aforementioned circumstance pursuant to § 502(f) will receive the protection of the SCRA.

⁴ There exists case law interpreting the “catch all” language of 10 U.S.C. § 101(a)(13) with application to other federal statutes that have required a “connection” between service pursuant to 10 U.S.C. § 12301(d) and the emergency at hand. See *O’Farrell v. Department of Defense*, 882 F.3d 1080 (Fed. Cir. 2018); *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021).

Servicemembers Civil Relief Act

The purpose of the SCRA is to provide for the temporary suspension of judicial proceedings that may adversely affect the civil rights of servicemembers during their military service so that they are able to devote their entire energy to the defense needs of the Nation. 50 U.S.C. § 3902. The SCRA contains procedural requirements that “appl[y] to any civil action or proceeding, including any child custody proceeding.” *Id.* § 3931(a), § 3932(a). These requirements include: 1) the required use of an affidavit of military service prior to the entry of a judgment against a servicemember in a civil proceeding when the servicemember does not appear, *id.* § 3931; and 2) the ability of a servicemember to seek a stay of a civil proceeding, *id.* § 3932. The SCRA also contains provisions for child custody proceedings if a servicemember’s unavailability is due to deployment. *See id.* § 3938. In construing the SCRA’s predecessor, the Supreme Court of the United States has held:

The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.

Boone, 319 U.S. at 575.

Affidavit of Military Service, 50 U.S.C. § 3931.

As mentioned, the § 3931 affidavit of military service requirement “applies to any civil action or proceeding, including any child custody proceeding.” 50 U.S.C. § 3931. Implicitly, this application includes proceedings governed by the Pennsylvania Rules of Civil Procedure, including “family court proceedings” under Chapter 1900, and civil proceedings governed by the Pennsylvania Rules of Civil Procedure before Magisterial District Judges. *See also* 50 U.S.C. § 3911(5) (defining “court” to include non-record courts).

Less obvious is whether § 3931 applies to dependency proceedings governed by 42 Pa.C.S. §§ 6301 *et seq.* and Pa.R.J.C.P. 1101 *et seq.*, and termination of parental rights proceedings governed by 23 Pa.C.S. §§ 2501 *et seq.* and Pa.R.O.C.P. 15.7, 15.8, 15.9, and 15.10. A “child custody proceeding,” in terms of the Uniform Child Custody Jurisdiction and Enforcement Act, is defined to include a dependency proceeding. *See*

23 Pa.C.S. § 5402. Further, the Juvenile Act provides for the award of custody by the dependency court. Insofar as termination proceedings adjudicate a parent's legal custody of a child, these types of proceeding appear to fit within the notion of a "child custody" proceeding.

A question arose whether adoption proceedings may be included in the scope of this analysis given that parental rights are typically determined prior to adoption. Pa.R.O.C.P. 15.13(c)(1) (notice and decree) contemplates a scenario when parental rights are terminated as part of the adoption proceeding rather than prior to the adoption proceeding. The Comment to this rule states: "[subdivision] (c)(1) of this Rule applies if a parent's parental rights are being terminated as part of the hearing on the adoption petition." This scenario may arise when an agency is not involved in the filing of a termination petition and the petitioner files either a Report of Intention to Adopt or an adoption petition. See Pa.R.O.C.P. 15.6. Arguably, if the parent received notice of a hearing in which a termination determination will also be made, then the court should be apprised whether that person is in military service as in other termination matters. Accordingly, adoption proceedings appear to be a "child custody" proceeding under the SCRA.

Case law from other jurisdictions was considered. In California, the courts have held that the SCRA was applicable to dependency proceedings. See *In re Amber*, 184 Cal.App.4th 1223 (2010); *In re A.R.*, 170 Cal.App.4th 733 (2009); *George v. Superior Court*, 127 Cal.App.4th 216 (2005). Those cases, however, concerned stays under the SCRA and not the use of affidavits of military service. In *In re C.K.*, No. 12-1279, 2013 WL 5788570, at *1 (W. Va. Oct. 28, 2013) (unpublished opinion), the West Virginia Supreme Court reversed a trial court's involuntary termination of parental rights, citing the SCRA and the uncertain determination of the father's military status. These cases, while not binding in Pennsylvania, informed that provisions of the SCRA apply to dependency proceedings governed by the Pennsylvania Rules of Juvenile Court Procedure, and adoption and termination of parental rights proceedings governed by Chapter XV of the Pennsylvania Rules of Orphans' Court Procedure.

In determining whether § 3931 applied to orphans' court proceedings involving proceedings governed by Chapter II, Pa.R.O.C.P. 2.1-2.11, and Chapter III, Pa.R.O.C.P. 3.1-3.15, of the Pennsylvania Rules of Orphans' Court Procedure, the general applicability of the SCRA was first considered. In *McCoy v. Atlantic Coast Line R. Co.*, 47 S.E. 2d 532 (N.C. 1948), a servicemember and his two siblings were heirs to their father's estate, which also had a cause of action for wrongful death. The servicemember was not appointed administrator of his father's estate until the servicemember was discharged from military service. Thereafter, the estate commenced the wrongful death action. The defendant asserted that the wrongful action was barred by a one-year statute of limitations. The servicemember contended that the statute of limitations was tolled by the Soldiers' and Sailors' Civil Relief Act of 1942 ("SSCRA"), 50 U.S.C. app. § 525, a

precursor of 50 U.S.C. § 3936 within the SCRA. The Supreme Court of North Carolina deferred to the liberal construction of the SCCRA but held that the SSCRA was not intended to hold up estate administration when other heirs were eligible to serve as administrators. Further, the wrongful death action was on behalf of the estate and not personal to the servicemember. The court held that the SSCRA did not apply in these circumstances even with most liberal construction of the SSCRA.⁵

In *Perry v. Perry*, 168 S.W.3d 577 (Mo. App. W.D. 2005), a decedent's son, a servicemember, sought to probate the decedent's will after the one-year statute of limitations had passed. The son claimed the statute of limitations was tolled by the SCRA, 50 U.S.C. app. § 525. The appellate court observed that the presentment of a will is significantly different than a tort or contract action, but it nonetheless involved a judicial proceeding that may adversely affect the right of a servicemember to administer the estate and receive an inheritance. Additionally, the resultant letter of administration is part of an *in rem* proceeding that continues until final distribution and discharge of the personal representative. Accordingly, the SCRA and its tolling provision applied to the probate action.

As one commentator stated about the applicability of the SSCRA to probate proceedings:

While some informality exists in probate pleadings and procedure, and frequently no specific defendants are named in proceedings with reference to the probating of wills or the filing of claims, yet it must be conceded that the rights of certain persons are sought to be adjudicated in cases of this type. The so-called "defendants" include all persons who may be interested in the estate of the decedent and are brought into court by institution of probate proceedings and the publication of notices addressed to persons variously described as "All persons interested in the estate of John Doe, deceased," or "To Whom It May Concern." Some persons interested in the estate may be in the service. If so, and if the order or decree of the probate court has the effect of being a final determination of adjudication of the rights of such persons, then I see no escape from the conclusion that such persons who may be in the service are entitled to the protection of the Act.

Harold J. Reed, *Soldiers' and Sailors' Civil Relief Act of 1940*, 28 Iowa Law Review 14, 29 (1943).

⁵ The statute of limitations for a wrongful death action may be tolled under § 525 of the SSCRA when the sole surviving heir is in military service. See, e.g., *Worlow v. Mississippi River Fuel Corp.*, 444 S.W.2d 461 (Mo. 1969).

McCoy and Perry, supra, are but two examples of the courts applying the SCRA and its predecessor, the SSCRA, to subject matters that would be under the purview of the orphans' court if commenced in Pennsylvania. However, these cases concerned the tolling provision, which might arguably be broader in scope than the affidavit requirement. Compare 50 U.S.C. § 3936(a) ("The period of a servicemember's military service may not be included in computing any period limited by law ... for the bringing of *any action* or proceeding in a court.") (emphasis added) with 50 U.S.C. § 3931(a) ("This section applies to *any civil action* or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.") (emphasis added). However, the phrase may also be a distinction without a difference with regard to orphans' court proceedings.

The analysis from other jurisdictions regarding affidavits has focused on whether the underlying proceeding is adversarial or will result in a judgement. For example, in *In re Cool's Estate*, 18 A.2d 714 (Orphans' Ct. N.J. 1941), an executor presented an account for confirmation. No interested parties made an appearance, and the executor did not file any affidavits of military service pursuant to the SSCRA. The court held that "defendant" included an interested party in the orphans' court and that "judgment" included any final decree of a probate court. Accordingly, the executor was required to file affidavits concerning any non-appearing interested parties. See *id.* at 238; see also *In re Adoption of a Minor*, 136 F.2d 790 (construing "defendant" under the SSCRA to include birth parent in an adoption proceeding); *In re Steingrabe's Estate*, 1 Pa. D&C 3d 164, 167 (Mercer Co. 1976) (holding that a confirmation of an account is the equivalent of a judgement by default).⁶

In *McLaughlin v. McLaughlin*, 46 A.2d 307, 309 (Md. 1946), the probate of a will was not considered an adversarial proceeding so there was no requirement to file an affidavit. A similar holding is found in *Case v. Case*, 124 N.E.2d 856, 860-61 (Prob. Ct. Ohio 1955) with the probate court observing that persons having adverse interests to a will admitted to probate can thereafter contest the will. Please note that "court," as defined in the SCRA, means "a court or an administrative agency of the United States or of any State (including any political subdivision of a State), whether or not a court or administrative agency of record." Arguably, the register of wills is not strictly a "court" although it may function similarly to one.

The purpose of the SCRA is, *inter alia*, "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the *civil rights* of servicemembers during their military service." 50 U.S.C. § 3902(2) (emphasis added). The affidavit requirement of § 3931 is not merely a procedural burden; it is part of a legislative scheme designed to inform the court about whether a servicemember's civil rights in a civil proceeding may be implicated and whether the court

⁶ Please note that *In re Steingrabe's Estate* concerned § 520(4) of the SSCRA and the reopening of judgements, not the affidavit requirement.

should appoint counsel and grant a temporary stay. A liberal construction of § 3931 would apply the affidavit requirement whenever a servicemember's civil rights may be adversely affected and not just when a servicemember is a named defendant in an action.

Relative to the probate rules of other jurisdictions, two states reference the SCRA in their rules governing petition practice in probate proceedings. First, Connecticut requires a petition to include "whether a party is in the active military service of the United States when commencing a proceeding concerning: (1) a decedent's estate; (2) a trust; (3) a children's matter; or (4) any other matter in which adjudication of an interest of a servicemember is sought." Conn. R. Prob. 7.2(c) (Filing Requirements). "Party" is defined to include an executor or administrator of a decedent's estate, a trustee of a trust, a conservator, a guardian of the estate of a minor, a temporary custodian or guardian of the person of a minor, a guardian of an adult with an intellectual disability, a *guardian ad litem*, and certain other fiduciaries. See CT R. Prob Rule 4.2.

Second, Massachusetts requires the filing of a "military affidavit certifying the military status of each defendant, respondent or other interested person who has not appeared or answered" before any subsequent request for a court hearing, the date of the next scheduled court event, or a temporary order in the case. See Mass. R. Prob. Ct. 25. (Military Affidavits). Thus, both the Connecticut and Massachusetts rules require the use of a military service affidavit in petition practice.

Finally, Allegheny County has a local rule relating to the SCRA. Allegheny O.C.R. 3.1(3) provides: "[w]hen any interested party in any proceeding in this court is in the military service of the United States, the procedure shall conform to the provisions of the Servicemembers Civil Relief Act, as amended, 50 U.S.C.A. [§§] 3901 *et seq.*"

Based on this analysis, the Orphans' Court Procedural Rules Committee concluded that the SCRA applied to Chapter II and Chapter III of the Pennsylvania Rules of Orphans' Court Procedure.

Under § 3991 of the SCRA, if a "defendant does not make an appearance," before a court can enter a judgment against a defendant, the plaintiff must file an affidavit indicating whether the defendant is in military service or whether the plaintiff is unable to make such a determination. See 50 U.S.C. § 3931(a), (b)(1). If the defendant is in military service, then counsel is appointed, and a stay may be granted. See *id.* § 3931(b)(2), (d). If the defendant's military status cannot be determined, then the plaintiff may be required to post a bond. See *id.* § 3931(b)(3).

Preliminarily, while the title of § 3931 of the SCRA refers to "default judgments," the statute applies when a defendant does not make an appearance. See 50 U.S.C. § 3931(a). Section 3931(b), which contains the actual affidavit requirement, states: "In any action or proceeding covered by this section, the court, before entering *judgment* for the

plaintiff, shall require the plaintiff to file with the court an affidavit” *Id.* § 3931(b) (emphasis added). “Judgment” is defined broadly by the SCRA to mean any judgment, decree, order, or ruling, final or temporary. See 50 U.S.C. § 3911(9). Thus, the affidavit requirements of § 3931(b) apply to any judgment or orders and are not limited to “default judgments.” Please note that § 3911(g)-(h) specifically addresses default judgments.

This distinction is relevant because, in Pennsylvania civil practice, “default judgments” are often considered judgments in favor of the plaintiff based upon the complaint without the necessity of the plaintiff having to prove the facts alleged in the complaint. See, e.g., Pa.R.Civ.P. 1037. While the title of § 3931 refers to “default judgments,” the statute applies when a defendant does not make an appearance and is without limitation on whether the plaintiff must prove the facts alleged. Consequently, the affidavit requirements of § 3931 appear to also apply in proceedings that do not permit “default judgments,” e.g., custody, see also Pa.R.Civ.P. 1915.9 (no default judgments in child custody proceeding).

When a defendant does not make an appearance in a civil proceeding, there will usually be only one order – a final order granting judgment in favor of the plaintiff. However, when a defendant does not make an appearance in a child custody proceeding, there may be serial orders granting temporary relief and then final relief. With the broad definition of “judgment,” the need to file an affidavit of military service may arise prior to the final judgment. Indeed, given the intent of the SCRA, § 3931 would apply to any order that would “adversely affect the civil rights of servicemembers during their military service.” 50 U.S.C. § 3902.

The pre-condition of § 3931(a) that the “defendant does not make an appearance” cannot precisely mesh with Pennsylvania procedures insofar as an appearance is “entered” rather than “made.” See, e.g., Pa.R.Civ.P. 1012; Pa.R.Civ.P. 1930.8; Pa.R.O.C.P. 1.7; Pa.R.A.P. 120. However, there exists a permissible practice in certain circumstances wherein a party may simply appear and participate in a proceeding without entering an appearance or filing a responsive pleading. In those circumstances, it is believed the defendant “makes” an appearance in that it demonstrates the defendant received notice of the proceeding. Cf. 50 U.S.C. § 3932 (availability of a stay when a servicemember has notice of an action or proceeding). The phrase, “make an appearance” has been incorporated into this proposal and it is intended to encompass when a defendant either enters an appearance, files a responsive pleading, or physically appears at a proceeding. If a defendant does not make an appearance by these means, then the plaintiff must file an affidavit of military service.

Section 3931 uses the term “affidavit,” which “may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.” 50 U.S.C. § 3931(b)(4). Similarly, Pennsylvania authority defines “affidavit” in judicial matters to also include an unsworn statement

pursuant to 18 Pa.C.S. § 4904. See 42 Pa.C.S. § 102; Pa.R.Civ.P. 76. However, the Revised Uniform Law on Notarial Acts indicates that an affidavit is “a declaration, made by an individual on oath or affirmation before a notarial officer, that a statement in a record is true.” 57 Pa.C.S. § 302.

The term “affidavit” was retained in this proposal to maintain a linkage to the SCRA’s requirements. But to resolve any confusion whether “affidavit,” as used in this proposal, requires a notarial act, the Comments accompanying the proposed rules indicate that only a verified statement is necessary.

A one-page statewide form affidavit already exists and is available on the UJS website at <https://www.pacourts.us/forms/for-the-public>. Contained within the form is a reference to a Department of Defense website where the status of servicemembers under the SCRA can be determined: <https://scra.dmdc.osd.mil/scra/#/home>. The form and information solicited is relatively uncomplicated. It also contains a response option indicating that the affiant is unable to determine the non-appearing party’s military status.

Stay of Proceedings, 50 U.S.C. § 3932.

Another procedural protection for a servicemember under the SCRA is the availability of a stay of proceedings when the servicemember has notice of the proceeding or action. See 50 U.S.C. § 3932(a). A court may *sua sponte* grant a stay or the servicemember may apply for a stay. A stay sought by a servicemember pursuant to § 3932 is mutually exclusive of the protections afforded by § 3931. See *id.* § 3932(e).

The applicability of § 3932 to certain types of proceedings would be identical to that of § 3931. Therefore, the analysis and conclusions regarding §3931 are apropos of § 3932. Yet, the stay provisions of § 3932 do not appear to require codification in the procedural rules. A party or their counsel can file a motion or application and cite that authority as the basis for a stay. Notably, a stay under § 3932 is available to either a plaintiff or a defendant in military service. Thereafter, the court can decide whether to grant a stay based upon the facts and law. For the purpose of this proposal and to implement the SCRA, a “stay” is considered synonymous with a “continuance” insofar as both operate to suspend the immediate proceeding for a finite period of time. To aid readers, § 3932 would be referenced in the commentary to existing rules generally governing stays or continuances, if those rules exist.

Child Custody Protections, 50 U.S.C. § 3938.

In addition to the affidavit requirement of § 3931 and the availability of a stay pursuant to § 3932, the SCRA provides specific limitations on the duration of temporary child custody orders when a servicemember is deployed and the consideration of the servicemember’s deployment in determining a child’s best interest. See 50 U.S.C. §

3938(a), (b). Further, when a state law involving temporary child custody provides a higher standard of protection to a servicemember than the SCRA, the court shall apply the higher state standard. See *id.* § 3938(d).

Pennsylvania Military and Veterans Code

As mentioned, the Pennsylvania's Military and Veterans Code contains protections from criminal and civil court proceedings when a member of the National Guard is on active state service, and child custody proceedings when an "eligible servicemember" is deployed or about to be deployed.

Exemption from Arrest, 51 Pa.C.S. § 4104.

Concerning criminal proceedings, the Code provides that no National Guard member "shall be arrested on any warrant, except for treason or felony, while going to, remaining at, or returning from, a place where he is ordered to attend for military duty." 51 Pa.C.S. § 4104; see also *Commonwealth v. Arcelay*, 190 A.3d 609, 616 (Pa. Super. 2018) (§ 4104 applies only to members of the Pennsylvania National Guard, Pennsylvania Guard, and Militia). This provision, while ostensibly broader than state "active service," see § 4105, *infra*, appears to be substantive and self-executing. There are no additional procedures necessary to assert this servicemember right. Section 4104 does not appear to specifically restrain the issuance of an arrest warrant; rather, it prohibits execution of the arrest warrant until the servicemember concludes his or her military duty. Should the servicemember be arrested pursuant to a warrant while on duty, the servicemember's right may be then asserted by motion.

Exemption from Civil Process, 51 Pa.C.S. § 4105.

Concerning civil proceedings, the Code provides:

No civil process shall issue or be enforced against any officer or enlisted person of the Pennsylvania National Guard in the active service of the Commonwealth during so much of the term as he shall be engaged in active service under orders nor until 30 days after he shall have been relieved therefrom. The operation of all statutes of limitations and presumptions arising from lapse of time shall be suspended upon all claims by or against such officer or enlisted person during the aforesaid period.

51 Pa.C.S. § 4105. This provision contains two components. The first component is a stay on the issuance or enforcement of civil process until 30 days after the defendant's

return from state active service. See *Breitenbach v. Bush*, 44 Pa. 313, 317 (1863).⁷ The second component tolls “all statutes of limitations and presumptions arising from lapse of time” during the stay. Unlike the SCRA, § 4105 does not contain procedures for the defendant to invoke this protection or recognize any exceptions to its operation.

Notably, the phrase, “active service of the Commonwealth,” is undefined by the Code. Previous versions of § 4105 included the active service of the United States but presumably the scope has since narrowed given the coverage of the SSCRA and then the SCRA when National Guard members are “federalized.” The phrase arguably encompasses state active duty pursuant to 51 Pa.C.S. § 508 (active duty for emergency), and, perhaps, 51 Pa.C.S. § 506.1 (use of Pennsylvania National Guard for special state duty). It is unclear whether “active service of the Commonwealth” is intended to include “full-time National Guard duty,” as that phrase is defined by 32 U.S.C. § 101(19), so as to extend the protection of § 4105 to members serving in a Title 32 status. Notably, 51 Pa.C.S. § 508(b) only mentions Title 32 in the context of assisting another state. At this juncture, the precise reach of § 4105 is better resolved by the legislature or case law, rather than by procedural rule.

Unresolved is whether “civil process,” as used in § 4105, would include “child custody proceedings” in the absence of such a phrase contained therein. A broad interpretation of “civil” should be tempered by the result of applying § 4105 to stay “child custody proceedings” for the duration of the servicemember’s state active service plus 30 days. If a § 4105 stay was applicable, there remains a concern about how the child’s safety and needs would be addressed during the interim. The application of § 4109 during state active service may seem intuitive because it governs “child custody proceedings,” but § 4109 is applicable when a servicemember is deployed in support of a contingency operation, not state active service. Rather than straining the interpretation of “civil” in § 4105 to include “child custody proceedings,” the Committees believed the better course is for case law or legislation to clarify the application of § 4105 to those types of proceedings, before adopting any procedural rule.

Child Custody Proceedings During Military Deployment, 51 Pa.C.S. § 4109.

The Code contains within § 4109 specific parameters concerning temporary custody orders, assignments of custody to family members, terms of custody orders, and best interest determinations applicable to child custody proceedings when “an eligible servicemember is deployed in support of a contingency operation.” 51 Pa.C.S. § 4109.

⁷ In *Breitenbach*, the Court considered a prior, similarly worded version of § 4105 found in the Act of April 18, 1861, P.L. 409. The Court described the effect of the law as a stay of all legal process for the term in which the servicemember is engaged. 44 Pa. at 317.

Notably, “eligible servicemember” is defined to include “a member of the Pennsylvania National Guard or a member of an active or reserve component of the Armed Forces of the United States who is serving on active duty, other than active duty for training, for a period of 30 or more consecutive days, in support of a contingency operation.” *Id.* § 4109(f). The Code also provides for expedited hearings and use of advanced communication technology for child custody proceedings subject to § 4109. See 51 Pa.C.S. § 4110.

Within § 4109, subdivision (a) states:

If a petition for change of *custody of a child* of an eligible servicemember is filed with any court in this Commonwealth while the eligible servicemember is deployed in support of a contingency operation, no court may enter an order modifying or amending any previous judgment or order, or issue a new order, that changes the custody arrangement for that child that existed as of the date of the deployment of the eligible servicemember, except that a court may enter a temporary custody order if it is in the best interest of the child.

51 Pa.C.S. § 4109(a) (emphasis added). Arguably, subdivision (a) is limited to child custody proceedings governed by 23 Pa.C.S. Chapter 53 and Pa.R.Civ.P. 1915.1 *et seq.*, and not dependency and termination proceedings. Indeed, when subdivisions (a) and (a.1) are read *in pari materia*, there may be support for that argument given the reference within subdivision (a.1) to Chapter 53 of Title 23. However, the absence of a specific reference to Chapter 53 of Title 23 in subdivision (a) may suggest that “child custody,” as used in that subdivision, was intended to be broadly construed relative to subdivision (a.1) of § 4109. Accordingly, the Committees concluded that dependency and termination of parental rights proceedings are subject to § 4109(a) of the Code. As § 4110(a)-(b) refers to “custody matters instituted under [§] 4109,” the Committees concluded that section of the Code also applies to dependency and termination proceedings. This conclusion would also represent a consistent interpretation and application of the phrase, “child custody,” in both the Code and the SCRA.

Note was taken of House Bill 82 (Reg. Sess. 2023-2024), a form of model legislation crafted by the National Conference on Commissioners on Uniform State Laws, that would repeal § 4109 and § 4110. Those sections would have been replaced with an entirely new chapter governing the same topic but significantly broader in scope. See 51 Pa.C.S. §§ 4601-4652 (proposed). It appears similar legislation was introduced in 2015, 2017, and 2021.

The Bill would have provided for notice of pending deployment, temporary change of residence, custodial agreements together with modification and cancellation of same,

powers of attorney, procedures, and limitations on granting temporary custody while a parent is deployed, child support, termination of custody, and limitation on deployment as a factor in determining a child's best interest. Presumably, the Bill would provide a "higher standard of protection" than the SCRA.

The proposed legislation, insofar as it relates to this proposal, would apply only if a court has jurisdiction under 23 Pa.C.S. Ch. 54 relating to uniform child custody jurisdiction and enforcement. See 51 Pa.C.S. § 4604 (proposed). The change would resolve any ambiguity arising from 51 Pa.C.S. § 4109(a) and whether "child custody" includes dependency matters commenced pursuant to 42 Pa.C.S. § 6321 and voluntary relinquishment, involuntary termination, and adoption proceedings pursuant to 23 Pa.C.S. § 2301. If the Bill was enacted, it would be clear that those provisions of the Code would not apply, for lack of jurisdiction, to dependency and orphans' court proceedings notwithstanding that those proceedings involve child custody.

Rulemaking Proposals

The Committees have attempted to establish uniform rules for each body of procedural rules with slight variations to reflect the applicability of the SCRA and Code to certain types of proceedings. To the extent practicable, the Committees have adopted a "hub and spoke" approach wherein (1) each body of rules would have one rule setting forth the requirements with (2) references back to that rule inserted in the text or commentary of other rules governing proceedings where the requirements may apply. This approach is intended to reduce the need to reiterate the requirements within each applicable rule within a body of rules.

The "hub" rule places the burden of the affidavit requirement of § 3931 on the party filing the action, prior to the entry of judgment, when a party against whom an action has been filed does not "make an appearance." While the party designations are often "plaintiff" and "defendant," those designations may vary depending on the nature of the action. The required content of the affidavit is taken directly from § 3931(b)(1)(A)-(B).

In "child custody" cases and other family court cases where there may be serial orders entered, the rules would require the party commencing the action to file an affidavit when the other party does not make an appearance at the first proceeding that may "adversely affect the civil rights of servicemembers during their military service." 50 U.S.C. § 3902. For example, in a support matter, the first proceeding may be an office conference. See Pa.R.Civ.P. 1910.11, 1910.12. In the dependency context, the first proceeding may be a shelter care hearing. See Pa.R.J.C.P. 1240-1243.

Commentary accompanying the "hub rules" refers the reader to federal legal authority defining "military service" and a website where a person's status of being in

“military service” can be ascertained. Next, there is a statement indicating that, if a defendant is in “military service,” then the SCRA may provide additional protections. Additionally, a reference to § 4105 of the Code is included. For those types of proceedings where the applicability of § 4105 is unresolved, this specific reference will be omitted. For rules applicable to “child custody proceedings,” there will be additional references to § 3938 of the SCRA, and § 4109 and § 4110 of the Code.

The Comments also inform the reader that a verified, unsworn document can satisfy the requirements of the rule. Alternatively, the reader is directed to a website containing a form that can be used or modified for use provided it meets the requirements of the rule.

For those bodies of rules with continuance or stay rules, a statement and citation would be added to the commentary indicating that the SCRA may provide protections for a person in military service, including a stay. A reference to § 4105 of the Code will also be included for those rules governing proceedings subject to § 4105. The rules were not considered an appropriate vehicle to fully advise servicemembers of their all their statutory rights so no further exposition on those rights would be contained in the commentary.

Notably, neither the SCRA nor the Code appear to contain evidentiary provisions necessitating amendment of the Pennsylvania Rules of Evidence. Section 4109(c) of the Code states that deployment shall not be considered in determining a child’s best interest and § 3938(b) of the SCRA states that deployment may not be the sole factor. See 51 Pa.C.S. § 4109(c); 50 U.S.C. § 3938(b). Those provisions govern the weight assigned to deployment in determining a child’s best interest, but do not operate to admit or exclude evidence for any other purpose. Arguably, a rule of evidence similar to Pa.R.E. 411 could be fashioned to exclude evidence of deployment for a specific purpose. However, because child custody proceedings are heard by a judge and not a jury, judges are able to hear evidence of deployment and give it the necessary weight for purposes other than the best interest of the child without concern about the judges being unduly prejudiced.

The Civil Procedural Rules Committee previously proposed Pa.R.Civ.P. 243 setting forth the affidavit requirements with revised commentary to the “judgment rules” of Pa.R.Civ.P. 237.1, 1037, 1303, and 2955. That proposal has been revised to reflect the uniform rule language in Pa.R.Civ.P. 243 and to add cross-references within the “judgment rules” to Pa.R.Civ.P. 243. Further, the Committee proposes amending Pa.R.Civ.P. 216 to recognize that a basis for granting a continuance is to comply with state or federal law – this is the approach taken with Pa.R.Civ.P.M.D.J. 209(E). A Comment added to the rule would cite the SCRA as an example of a federal law.

As mentioned, Pa.R.Civ.P.M.D.J. 209, 304, 403, 410, 503, 515, and 516 were previously amended to reference the affidavit requirements of the SCRA, 50 U.S.C. §

3931(b)(1). With actions initiated in the magisterial district courts, the approach adopted was for the plaintiff to file an affidavit with every complaint and not just when the defendant does not make an appearance. The rationale for this approach is Pa.R.Civ.P.M.D.J. 319(B), which requires the magisterial district judge to enter a judgment in the plaintiff's favor when the defendant does not attend the hearing regardless of whether the plaintiff appears. Further, there was a desire for cases to be resolved in one hearing. See 50 Pa.B. 2252 (May 2, 2020) (final report describing rulemaking). To avoid delaying judgment until the plaintiff files an affidavit for a non-appearing defendant, the plaintiff is now required to file an affidavit with all complaints. See Pa.R.Civ.P.M.D.J. 304(D), 503(D). With the present proposal, the Minor Court Rules Committee proposes to further revise the Comments to Pa.R.Civ.P.M.D.J. 209, 403, 410, 515, and 516 to specifically reference § 4105 of the Code.

The Domestic Relations Procedural Rules Committee proposes the rescission of Pa.R.Civ.P. 1920.46 requiring an affidavit of military service pursuant to § 3931 of the SCRA to be filed in divorce proceedings. This rule would be replaced with Pa.R.Civ.P. 1930.10, to require an affidavit of military service to be filed in all proceedings governed by Chapter 1900 of the Pennsylvania Rules of Civil Procedure, including support, divorce, protection from abuse, protection from sexual abuse or intimidation, custody, and paternity actions. The proposed rule would set forth the first proceedings in which the civil rights of non-appearing defendant in military service may be adversely affected. The commentary to this rule would reference § 4105 of the Code for support and divorce proceedings only. In addition, the Comments to Pa.R.Civ.P. 1901.6, 1910.11, 1910.12, 1920.42, 1920.51, 1930.6, and 1956 would contain a reference to Pa.R.Civ.P. 1930.10 and the SCRA generally. The Comments to Pa.R.Civ.P. 1915.4-2, 1915.4-3, and 1915.17 would contain a reference to Pa.R.Civ.P. 1930.10 if the opposing party does not make an appearance and specific reference to § 3938 of the SCRA and § 4109 of the Code because of their applicability to child custody proceedings.

The Juvenile Court Procedural Rules Committee proposes Pa.R.J.C.P. 1206 as a standalone rule setting forth the affidavit requirements. The rule is largely based on the "uniform rule." It would require the party seeking shelter care, *i.e.*, a county agency, for a child or pursuing dependency to complete and file an affidavit of military service when the other party or parties, *i.e.*, parent or guardian, have not made an appearance at the proceeding. The requirement for filing an affidavit at the adjudicatory hearing is conditioned on whether a shelter care hearing was previously conducted. If a shelter care hearing was conducted prior to the adjudicatory hearing, then the county agency would have already filed an affidavit of military service if the parent or guardian did not make an appearance. Obviously, if a parent or guardian did make an appearance at the shelter care hearing, then there would be no need for an affidavit of military service to be filed at the adjudicatory hearing.

In addition to the filing requirement, the county agency would be required to inform the court at the time of the hearing so the presiding judicial officer can receive the information without delaying the proceeding. With proceedings involving persons having a familial relationship, it is presumed the party filing the action likely has a modicum of knowledge whether the other party is in “military service” and be able to accurately inform the court on the record and complete an affidavit at the time of the adjudicatory proceeding in which the parent or guardian does not make an appearance.

The Comments to Pa.R.J.C.P. 1242 and Pa.R.J.C.P. 1406 would be revised to refer readers to Pa.R.J.C.P. 1206. The Comment to Pa.R.J.C.P. 1122 (Continuances) would be revised to include a reference to § 3932 of the SCRA.

The Orphans’ Court Procedural Rules Committee proposes Pa.R.O.C.P. 2.12 and 3.16 to require the filing of an affidavit of military service for every proposed representative identified in Rules 2.4(b)(2)–(3) and 3.4(a)(7)(ii)–(iii) and every interested party not represented pursuant to those rules in matters commenced pursuant to Chapter II and Chapter III, respectively. This approach, similar to that in magisterial district courts, was believed to be the better practice when completed at the beginning of administration or the commencement of an action rather than after deadlines have passed. Further, proceedings would not be delayed for the filing of an affidavit. Moreover, some orphans’ court matters involve multiple orders over the course of a proceeding that may impact a person’s rights, see, e.g., Pa.R.A.P. 342 (Appealable Orphans’ Court Orders), an “early and all” approach was favored without waiting to see if an interested party “makes an appearance.” Finally, this approach was deemed prudent given the dearth of case law to inform practitioners precisely what types of orders would require an affidavit.

Proposed Rules 2.12 and 3.16 accommodate the use of “virtual representation,” permitting the representation of certain individuals or classes of individuals by others in accounting and petition practice. See 20 Pa.C.S. §§ 751(6), 7721–7726; Pa.R.O.C.P. 2.4(b)(2)–(3) and 3.4(a)(7)(ii)–(iii). Rather than requiring an affidavit for every interested party, the proposed rules limit the filing of affidavits in orphans’ court matters to proposed representatives identified in Rules 2.4(b)(2)–(3) and 3.4(a)(7)(ii)–(iii), as well as interested parties not so represented. This practice will ensure that the court is advised of the military service status of every interested party actively participating in the matter in order to protect individual and class rights, consistent with the use of virtual representation in the orphans’ courts.

The Committee welcomes input on the most effective time to file the affidavit and whether filing the affidavit early in the proceeding is sufficient to protect the parties. Some proceedings in orphans’ court span many years or decades. Relatedly, the Committee has limited the filing requirement to interested parties and proposed representatives and welcomes feedback relative to requiring affidavits for other parties, insofar as they may

have an interest in the matter that could be threatened should they not receive notice due to military status.

In guardianship practice, the Committee proposes amending Pa.R.O.C.P. 14.1 to require the filing of an affidavit of military service for certain individuals with a petition for adjudication of incapacity and appointment of a guardian. New subdivision (a)(6) limits the affidavit requirement to those individuals identified in Rule 14.2(a)(3), namely “the spouse, parents, and presumptive intestate heirs of the alleged incapacitated person.” The Committee finds this approach consistent with 20 Pa.C.S. § 5511(a), which requires notice of the guardianship petition and hearing to persons who “would be entitled to share in the estate of the alleged incapacitated person if he died intestate at that time.” Advising the court of the military status of such persons is warranted because of their interest in the alleged incapacitated person’s estate. See *In the Matter of Brown*, 507 A.2d 418, 419 (Pa. Super. 1986) (individuals entitled to share in the alleged incapacitated person’s estate have standing in guardianship proceedings).

The Committee also proposes Pa.R.O.C.P. 15.23 to create a “hub rule” for actions governed by Chapter XV. This rule would require an affidavit of military service to be completed and filed for a non-appearing birth parent, putative father, or presumptive father. Arguably, this requirement could be conditioned on whether an affidavit was previously filed in an earlier dependency proceeding but, given that a termination of parental rights or adoption proceeding may be separately docketed from a prior proceeding, the affidavit requirement begins anew. Further, not all proceedings governed by Chapter 15 involve a prior dependency proceeding. Proposed amendments of the Comments to Pa.R.O.C.P. 15.7, 15.8, 15.9, 15.10, and 15.13 are the “spokes” referring readers to Pa.R.O.C.P. 15.23 if the birth parent, putative father, or presumptive father does not make an appearance.

The SCRA, as might be assumed by its title, does not contain protections for a servicemember against state court criminal proceedings. However, the Code provides that “No officer or enlisted person shall be arrested on any warrant, except for treason or felony, while going to, remaining at, or returning from, a place where he is ordered to attend for military duty.” 51 Pa.C.S. § 4104. To ensure that those responsible for the execution of warrants are aware of the prohibition codified at 51 Pa.C.S. § 4104, the Criminal Procedural Rules Committee proposes to amend the Comments to Pa.R.Crim.P. 150 (Bench Warrants), 430 (Issuance of Warrant), 431 (Procedure When Defendant Arrested With Warrant), and 515 (Execution of Arrest Warrant) to include: “With respect to members of the Pennsylvania National Guard, the Pennsylvania Guard, and the Pennsylvania Militia, ‘[n]o officer or enlisted person shall be arrested on any warrant, except for treason or felony, while going to, remaining at, or returning from, a place where he is ordered to attend for military duty.’ 51 Pa.C.S. § 4104 (Exemption from arrest).”

The Appellate Court Procedural Rules Committee considered the applicability of the SCRA and Code in appellate court proceedings and original jurisdiction actions. In the context of appellate court proceedings, if the appellant-servicemember did not make an appearance in the trial court, there would be no appeal. If an appellant-servicemember filed an appeal, then the appellant has made an appearance and § 3931 would not apply.

Possibly, although improbably, a plaintiff could lose in the trial court against a non-appearing defendant-servicemember and then appeal. However, the § 3931 affidavit should have already been filed in the trial court where the defendant servicemember did not make an appearance and the trial court judge would have already provided an appropriate remedy, *e.g.*, appointment of counsel and a stay.

In sum, the Committee concluded there would be no need for an affidavit in appellate proceedings. At this stage of legal proceedings, a servicemember in military service during the pendency of an appeal should seek a stay from the appellate court pursuant to § 3932.

For original jurisdiction actions in the appellate courts, the Committee concluded that the affidavit requirements of § 3931 of the SCRA would apply. Section 4105 of the Code may arguably apply to original jurisdiction actions given its broad mandate that “no civil process shall issue or be enforced against any officer or enlisted person [of the National Guard while in state active service].” Although the prohibitions of § 4105 are applicable to the plaintiff, a defendant-servicemember in state active service obviously could assert them as a shield in court. In those circumstances, the servicemember could raise § 4105 via preliminary objection or seek a dismissal pursuant to Pa.R.A.P. 1972(a)(3) for want of personal jurisdiction.

The Committee proposes amendment of Pa.R.A.P. 1517 (Applicable Rules of Pleading) setting forth the SCRA’s affidavit of military service requirements separately within the rule. Please note, the title of the rule would also be amended because the affidavit requirement is not strictly a “pleading” requirement. Further, the Committee proposes amendments to Pa.R.A.P. 3307 and 3309 to contain an SCRA affidavit requirement for completeness and consistency. Readers should note that the preconditions for not filing an affidavit of military service in Pa.R.A.P. 3307 and 3309 is an “entry of appearance” or a responsive filing by the adverse party, rather than the terminology “make an appearance.”

Similar to the approach of other Committees, the Appellate Court Procedural Rules Committee concluded that the stay provisions of § 3932 of the SCRA do not appear to need specific codification in the procedural rules. A party or their counsel can file a Pa.R.A.P. 123 application and cite that authority as the basis for a stay. In that manner, the appellate courts could determine the applicability of the SCRA in appellate proceedings; there is no need for a separate or additional stay provision.

During the pendency of an appeal, it was observed that a party could also seek relief pursuant to Chapter 17, albeit that Chapter addresses stays of trial court orders and not of appellate proceedings. Also, the SCRA applies to administrative matters. See 50 U.S.C. §§ 3912(b) (applicability to administrative proceeding), 3911(5) (defining “court” to mean administrative agency of any state). To address these scenarios, the Committee proposes adding a reference to the SCRA and the Code to the Comments to Pa.R.A.P. 1732 (stay pending appeal) and 1781 (stay pending action on petition for review or petition for specialized review).

* * *

The Committees invite all comments, concerns, and suggestions regarding this rulemaking proposal.