

ON THE MARCH:

Military Issues Update

2009 Bench & Bar Family Law Institute

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I. **2007 PRESENTATION.** Outline at Enclosure A. For complete copy and attachments, see: www.blackgraham.com/sites/default/files/docs/outline-2007-08-11-military_family_law.pdf

II. **MILITARY RETIREMENT / SBP**

A. **75% Cap Abolished.**

1. Previously, servicemembers received 50% of base pay after 20 years of creditable service, with an additional 2.5% per year of service, up to a maximum of 75% at 30 years.
2. Changed with FY 2007 National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364), so effective 1/1/2007 servicemembers continue accruing 2.5% per year beyond 30 years of service, with no cap!! Codified at 10 U.S.C. §1409.
3. Only applies to regular retirement, not retirement based upon disability. So if retire after 30 years, even with VA Disability, then can receive over 75%. But if medically retired due to disability, capped at 75%.

4. Army/Air Force Enlisted who were cited for Extraordinary Heroism receive a 10% increase in retirement, but that increase not apply to extent it increases retirement over 75% threshold.

5. **More Information:** www.dfas.mil/retiredpay/retiredpaycap.html

B. New DOD “Bible” on Division of Retired Pay.

1. DoD 7000.14-R, Vol. 7B, Chapter 29 “Former Spouse Payments from Retired Pay”, available here:

www.defenselink.mil/comptroller/fmr/07b/07b_29.pdf. (Please note that DOD links change frequently).

2. Easy-to-read 20-page publication, intended for the practitioner.

3. If order contains a numerator, but servicemember is still on active duty at time of retirement, DFAS will now calculate the denominator rather than needing a clarifying order. Section 290607, “Acceptable Formula Awards.”

C. Deemed Election for Survivor Benefit Plan. Instead of a letter to DFAS for Deemed election, have official DD Form 2656-10. (Enclosure C). Still have just one year from date of order requiring former spouse coverage.

D. Sample Retirement Language for Order/Separation Agreement. See Enclosure D.

III. DISABILITY / INJURY

A. Temporary/Permanent Disability Retired List (TDRL/PDRL).

1. Colorado requires indemnification for post-dissolution conversion of retirement into disability pay. IRM Warkocz, 141 P.3d 926 (Colo. App. 2006).

2. However, servicemember with fewer than 20 years of service may be retired due to disability if (1) unfit for service, and (2) has 30% or greater disability rating.

3. **TDRL**, if condition is temporary. 10 U.S.C. §§1202 & 1205. Can remain in TDRL for up to 5 years, with medical evaluations every 18 months to determine whether (1) disability has stabilized and become permanent, or (2) servicemember fit to return to active

duty. After five years of TDRL, if unfit for active duty then (1) retire for longevity if eligible, (2) PDRL if under 20 years of service, or (3) medical separation.

4. **PDRL**, if condition is permanent. 10 U.S.C. §§1201 & 1204.
5. IRM Williamson, 205 P.3d 538 (Colo. App. 2009) (Enclosure B).
 - a) Decree gave spouse half of marital share of retirement.
 - b) Husband diagnosed with multiple sclerosis, placed on TDRL after just 16 years of service.
 - c) TDRL benefits not divisible.
 - d) PDRL benefits not divisible if servicemember has fewer than 20 years of service so would be ineligible for retirement but for payments based upon disability.
6. **More Information on TDRL/PDRL.**
 - a) www.dfas.mil/rna-news/may2007/disabilityretirement.html.
 - b) DOD 7000.14-R, Vol. 7B, Chapter 11 “Removal from the Temporary Disability Retired List.”
www.defenselink.mil/comptroller/fmr/07b/07b_11.pdf

B. Traumatic Injury Protection under Servicemembers Group Life Insurance (TSGLI).

1. Rider to SGLI policy which pays servicemembers for severe injuries as result of traumatic event.
2. Intended to assist with financial burdens associated with recovering from a severe injury.
3. Costs \$1 per month for servicemembers who have SGLI, cannot be declined unless decline SGLI.
4. Pays out \$25,000 to \$100,000 depending upon injury.
5. **More Information:**
www.insurance.va.gov/sgliSite/TSGLI/TSGLIFAQ.htm

IV. **MILITARY PAY ISSUES.** Military pay now governed by two regulations instead of one:

- A. **DOD Financial Management Regulation**, chapter 7A, DOD Instruction 7000.14-R. All pay issues except for housing allowances, COLA & Per Diem. www.defenselink.mil/comptroller/fmr/07b.
- B. **Joint Federal Travel Regulations**, Volume 1 (Uniformed Service Members) for housing allowances, COLA & Per Diem. www.defensetravel.dod.mil/perdiem/trvlregs.html

V. **PARENTING.**

- A. **IRM DePalma**, 176 P.3d 829 (Colo. App. 2007). (Enclosure E). Reserve father with equal parenting time sought to delegate parenting time to stepmother while deployed, despite first right of refusal provision.
 - 1. Parent has presumptive right to control children's upbringing, including making decisions on who cares for children during his/her time.
 - 2. Court determines best interests if dispute, but fit parent presumed to act in best interests of children.
 - 3. Stepmother had no independent right to children, but analogy was to other third parties providing care to children, such as teachers, day care, etc.
 - 4. Stepmother has no right to made decisions, so Mother makes day-to-day decisions.
 - 5. First right of refusal essentially set aside in that case.
- B. **Colorado Protection for Reservist Parents**. HB 08-1176 (Enclosure F), applies to parenting changes due to a reserve parent being activated / deployed, effective August 5, 2008.
 - 1. **Creates CRS 14-10-131.3.**
 - a) Parenting time modification based solely upon deployment or active federal service is temporary, and any orders entered based solely upon deployment are interim.
 - b) Interim order vacated automatically and previous parenting plan immediately reinstated upon servicemember filing written notice of return to Colorado.

- c) Not prevent modification based upon reasons other than deployment (but Servicemembers Civil Relief Act).
- d) Servicemember agreement to temporary modification while deployed not constitute consent to integration of child into household of other for purposes of motion to modify primary residential parent or decision-making.

2. Modifies UCCJEA. CRS 14-13-102(7) home state jurisdiction excludes state where child lived temporarily due to interim order entered pursuant to CRS 14-10-131.3.

FAMILY LAW & THE MILITARY: What Every Practitioner Should Know

2007 Bench & Bar Family Law Institute

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I. JURISDICTION.

A. Subject Matter Jurisdiction to Grant Dissolution.

1. C.R.S. 14-10-106(1)(a)(I) requires one party be CO domiciliary for 90 days before filing.
2. Being stationed in CO pursuant to military orders, without more, insufficient for jurisdiction. Viernes v. District Court, 509 P.2d 306 (Colo. 1973).
3. State Taxes section of LES (Attachment A) shows state of residence as reported to military.
4. Civilian spouse residing in CO generally means jurisdiction.

B. Personal Jurisdiction over Servicemember. Jurisdiction to grant dissolution not imply jurisdiction to resolve all issues:

1. Children. UCCJEA, C.R.S. 14-13-101, *et seq*, confers jurisdiction if CO is child's home state, or emergency, regardless of where respondent served.
2. Child Support.

- a. Long-Arm Statute, C.R.S. 13-1-124(1)(e), requires obligee maintain CO matrimonial domicile after obligor leaves.
- b. UIFSA, C.R.S. 14-5-201, *et seq*, confers jurisdiction if:
 - i. Personal service in CO
 - ii. Consent
 - iii. Previously lived in CO with child
 - iv. Previously lived in CO & paid support or prenatal expenses
 - v. Child lives in CO as result of obligor's acts
 - vi. Child conceived as result of intercourse in CO.
- 3. Maintenance. If no personal jurisdiction, must satisfy Long-Arm Statute.
- 4. Property outside of CO. Personal jurisdiction required.
- 5. Military Retirement. More restrictive jurisdiction requirement.

II. DIVISION OF MILITARY RETIREMENT

A. Authority

- 1. Federal Law. Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(c)(4). Requires:
 - a. Residence not due to military orders,
 - b. Domicile, or
 - c. Consent (can be broadly interpreted!)
- 2. USFSPA preempts state law, and CO lacks subject-matter jurisdiction to divide retirement absent domicile or affirmative conduct of servicemember demonstrating express or implied consent. Marriage of Akins, 932 P.2d 863 (Colo. App. 1997).
- 3. Colorado. Marriage of Gallo, 752 P.2d 47 (Colo. 1988). Retirement is property interest, so survives remarriage.

B. Retirement Pay Subject to Division. Per 10 U.S.C. §1408(a)(4), Disposable Retired Pay ("Taxable Pay") is total retired pay minus:

- 1. Owed to U.S. due to previous retired pay overpayments.
- 2. Deducted from retired pay as result of court-martial forfeiture.
- 3. Waived to receive VA Disability.
- 4. Survivor Benefit Plan (SBP) premiums.

C. Retiree Account Statement (Attachment B) issued annually or if change in circumstances.

D. Calculating Marital Share.

1. Marriage of Hunt, 909 P.2d 525 (Colo. 1995). “Time Rule” formula, or “coverture” fraction. Spouse’s share is one-half of months of marriage overlapping military service, divided by total months of creditable service at time of retirement.
2. Servicemember Still on Active Duty. Hunt authorizes three methods:
 - a. Net Present Value. Immediately distribute spouse’s share, based upon coverture formula, actuarial tables, risks, possible promotions, etc. Authorized even when retirement not yet vested. Marriage of Riley-Cunningham, 7 P.3d 992 (Colo. App. 1999).
 - b. Deferred Distribution. Share calculated at dissolution, receipt deferred until retirement matured and vested.
 - c. Reserve Jurisdiction. Share calculation deferred until retirement vested and matured. Most common method.
3. Reserves/National Guard.
 - a. Similar formula applies – marital share is reserve retirement points acquired during marriage divided by total reserve retirement points upon retirement. See this page for information on getting statement of retirement points: www.military-divorce-guide.com/reserve-family-law.htm
 - b. Retirement requires 20 years of creditable service (at least 50 points during year)
 - c. Retirement paid when retiree reaches 60.

E. Direct Payment from DFAS

1. More than 10 years of marriage overlapping military service (10/10 rule). Requirement likely to be relaxed in future.
2. Order must contain following:

- a. Indication that rights under Servicemembers Civil Relief Act were respected.
 - b. Indication of jurisdiction over servicemember (residence, domicile, or consent).
 - c. Marriage date, and indication that 10/10 rule met, and
 - d. Percentage (or dollar amount) awarded to former spouse.
3. No QDRO necessary, just the following:
 - a. Certified copy of decree & order dividing retirement.
 - b. DD Form 2293 (Attachment C). See: www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2293.pdf
 4. Maximum amount DFAS pays is 50% of disposable retired pay.
 5. Sample Language for Order (Attachment D).

F. Receipts in Lieu of Retirement.

1. VA Disability. See below.
2. Career Status Bonus (lump sum \$30,000). See February 2005 *Army Lawyer* discussion (URL is impossible, so Google “Army Lawyer”).
3. VSI/SSB. Divisible asset. Marriage of Heupel, 936 P.2d 561 (Colo. 1997).
4. Administrative Separation. Full or partial separation pay may be available.

G. More Information: www.dfas.mil/retiredpay.html

III. TYPES OF MILITARY RETIREMENT

A. Final Pay

1. Service commenced before 9/8/1980.
2. Each year of service worth 2.5% of final base pay up to 100%.
3. Annual COLA based upon CPI.

B. High 3

1. Service commenced 9/8/1980 or later.
2. Each year of service worth 2.5% of average of highest 36 months of base pay, up to 100%
3. Annual COLA based upon CPI.

C. Redux

1. Service commenced 8/1/1986 or later AND servicemember selected Career Status Bonus.
2. 1st 20 years of service worth 2% of average of highest 36 months of base pay.
3. Each year of service between 20 and 30 worth 3.5%, up to 100%.
4. Annual COLA 1% below CPI, with “catch-up” recalculation at age 62.

D. Cap on Retired Pay. Previously, only 30 years of creditable service counted towards retirement, which was capped at 75% of based pay. This 75% cap eliminated, effective 2007.

E. Retirement Calculators. www.armyg1.army.mil/rso/abt.asp

F. Thrift Savings Plan

1. 401(k) style plan. See LES blocks 63 – 75 for current year contribution information.
2. More Information: www.tsp.gov/index.html

IV. VA DISABILITY

A. Concept. Servicemember with service-connected disability entitled to receive VA disability payments.

B. Waiver. Retired Pay is waived, dollar for dollar, by receipt of VA disability, except for:

1. At least 50% disability rating – Servicemember receives CRDP, phased in over 10-year period starting 2004. 10 U.S.C. §1414. Restoration rate is not linear. No LES – see bank statement for “VA Benefits.”

2. Combat-related disability rating of at least 10%. (Combat-Related Special Compensation, or CRSC). Has LES.
3. More on Concurrent Retirement & Disability Pay (CRDP): www.dfas.mil/retiredpay/concurrentretirementanddisabilitypay/crdppaymentrates.html

C. Pre-Dissolution Disability – Not Divisible.

1. Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 657 (1989).
2. Marriage of Franz, 831 P.2d 917 (Colo. App. 1992)

D. Post-Dissolution Disability – Must Indemnify to extent of Waiver.

1. Marriage of Lodeski, 107 P.3d 1097 (Colo. App. 2004).
2. Marriage of Warkocz, 141 P.3d 926 (Colo. App. 2006). Retiree required to indemnify former spouse for reduction in retirement due to VA waiver, even without specific indemnity clause.
3. Majority rule in jurisdictions which have considered issue. For information on other states, see July 2006 *Army Lawyer*, or call me.

E. VA Disability Tables: www.vba.va.gov/bln/21/Rates/comp01.htm

V. SURVIVOR BENEFIT PLAN (SBP)

A. “Insurance policy” on retirement.

1. If retiree dies, pays surviving beneficiaries monthly amount equal to 55% of “designated base amount”.
2. Maximum “designated base amount” is base pay.
3. Required to elect maximum spousal coverage if married, unless spouse consents. 10 U.S.C. §1448(a)(3)(A).
4. Annual COLA.

B. Potential Beneficiaries:

1. Spouse/former spouse (if under 55, must be unmarried), as long as at least one year of marriage or a child. 10 U.S.C. § 1447.
2. Children if under 18 or in college and under 22,
3. Disabled children, if disability happened while under 18 or in college under 22.

C. Premiums (Spouse coverage only – children more complicated).

1. 6.5% of designated base amount (Spouse only – children cheaper, but more complicated)
2. Potential alternative if base amount \$1320 or less could be cheaper.
3. Premium Calculator:
<https://w11.afpc.randolph.af.mil/RetSepCalcNET/default.aspx>
4. Premiums stop once retiree is 70 and has paid 360 months of premiums, effective 10/1/2008.
5. Premium payments in discretion of court. Marriage of Payne, 897 P.2d 888 (Colo. App. 1995). Typically divided equally.

D. Deemed Election.

1. As protection in case servicemember fails to opt for former spouse SBP coverage, former spouse can request coverage directly from DFAS.
2. Deemed election must be made within one year of order requiring SBP coverage.
3. Sample letter (Attachment E).

E. More Information: www.afpc.randolph.af.mil/SBP/.

VI. MILITARY PAY

- A. DOD Financial Management Regulation (FMR)** (DOD 7000.14-R, Volume 7A). Everything you ever wanted to know about military pay. See: www.defenselink.mil/COMPROLLER/FMR/07a/

B. Leave & Earnings Statement (LES) (Attachment A, Entitlements Section).

1. Base Pay. Affected by pay grade (i.e. rank) & years of service. FMR, Chapter 1. See pay tables (Attachment F) at: www.dfas.mil/militarypay/2006militarypaytables.html
2. BAH (Basic Allowance for Housing). Eligible if not in military housing. FMR § 260101(C). Affected by pay grade, marital status, and locality. See BAH Lookup at: <https://secureapp2.hqda.pentagon.mil/perdiem/bah.html>. Types of BAH:
 - a. BAH-With. When married or custody of child. FMR § 260301(4).
 - b. BAH-Without. Single and no child.
 - c. BAH-Diff. When paying court-ordered child support. FMR § 260416(C).
3. BAS (Basic Allowance for Subsistence). 2007 Rates: Officers \$192.74, Enlisted \$279.88. FMR, Chapter 25.
4. Overseas (“OCONUS”) Allowances (Includes AK & HI)
 - a. COLA. See: <https://secureapp2.hqda.pentagon.mil/perdiem/ocform.html>
 - b. Overseas Housing Allowance (OHA). See: <https://secureapp2.hqda.pentagon.mil/perdiem/ohaform.html>
 - c. Hardship Duty Pay (HDP). FMR, Chapter 17. Typically \$50 - \$150, depending upon location.
5. Deployments.
 - a. Hostile Fire Pay \$225.
 - b. Family Separation Allowance. FMR, Chapter 27. \$250 if away from family at least 30 days.
 - c. HDP. \$100 Iraq/Afghanistan
 - d. Per Diem
6. Other. Jump pay, flight pay, professional pay, annual bonuses, reenlistment bonuses, etc.

- C. **Colorado Law.** Gross income child support statute includes all pay & allowances. If servicemember lives in family housing, BAH imputed. Marriage of Long, 921 P.2d 67 (Colo. 1996).

VII. **SERVICEMEMBERS CIVIL RELIEF ACT OF 2003** (Formerly SSCRA of 1940).

A. **Stay of Proceedings When Notice. 50 U.S.C. App. § 202.**

1. Court **may**, on own motion, and **shall**, upon application by a servicemember which meets these criteria, stay the proceedings for at least 90 days:
 - a. Applicant is in military service, or within 90 days after it ended,
 - b. Applicant has actual notice of the proceeding,
 - c. Application is written, and includes facts stating (i) how service materially affects ability to appear, and (ii) date when servicemember may appear, and
 - d. Application includes communication from commander that military duty prevents appearance, and military leave not authorized.
2. Initial 90-day stay is mandatory. Thereafter, servicemember may apply for additional stay, using same criteria. Court must grant application unless appoints attorney to represent servicemember.
3. Simply being stationed overseas, thereby making it harder to appear, does not materially affect ability to appear. Telephonic testimony, 30 days annual leave, cooperative military.
4. If request for stay denied, servicemember cannot then invoke §201 to set aside default judgment.
5. Sample Motion for Stay (Attachment G).

B. **Protection Against Default Judgment. 50 U.S.C. App. § 201.**

1. Provides servicemember in civil action with relief against default judgment.
2. Petitioner seeking default judgment must first submit affidavit stating whether Respondent is in military, or whether Petitioner does not know. Judgment obtained without affidavit is voidable if

servicemember later shows that military service prejudiced the presentation of a defense.

3. If cannot determine status of military service from affidavit, Court may require bond to indemnify Respondent against any loss.
4. Court shall reopen default judgment and allow servicemember to defend when:
 - a. Judgment entered during military service or within 60 days thereafter,
 - b. Servicemember's ability to defend materially affected by service,
 - c. Servicemember has meritorious or legal defense, and
 - d. Application to reopen is made during the military service, or within 90 days after it ended. Technically, this means total military service, not just the specific contingency which prevented servicemember from appearing.

VIII. TEMPORARY FAMILY SUPPORT.

A. Applicability. Physical separation without court order or agreement. Important if servicemember deploys before support order enters.

B. Army

1. AR 608-99. www.usapa.army.mil/pdffiles/r608_99.pdf
2. Amount equal to BAH-II-WITH (page 2 of pay chart) to civilian spouse not in military housing. Pro-rated if family divided, other rules if dual military. Para. 2-6.
3. No in-kind payments, with limited exceptions (e.g. rent/mortgage or essential utilities). Para. 2-9.
4. Relief. Battalion/Squadron commander may relieve soldier of spousal obligation (not children) if civilian spouse has higher income, is in jail, has committed physical abuse against soldier, or soldier has already paid support per regulation for 18 months. Para. 2-14.

C. Air Force:

1. AFI 36-2906, section 3-2. See: www.e-publishing.af.mil/pubfiles/af/36/afi36-2906/afi36-2906.pdf.
2. Servicemember must "provide adequate financial support of a spouse or child or any other relative for which the member receives additional allowances for support. Members will also comply with the financial support provisions of a court order or written support agreement."
3. In-kind payments are allowed.

D. Navy

1. MILPERSMAN 1754-030, chapter 4.
http://buperscd.technology.navy.mil/bup_updt/upd_CD/BUPERS/MILPERS/Articles/1754-030.PDF
2. Support is fraction of sailor's "gross pay" (defined as base pay plus BAH, if entitled, but excludes all other allowances, such as BAS, hostile fire pay, etc).
3. Sample Amounts: Spouse only: 1/3. Spouse & 1 minor child: 1/2. Spouse & 2 or more children: 3/5.
4. Relief. Servicemember may request waiver of spousal portion only (not children) on grounds of desertion without cause, physical abuse or adultery – submit through chain of command to the Director, Navy Family Allowance Activity.

E. Marine Corps.

1. LEGADMINMAN, Chapter 15.
<http://sja.hqmc.usmc.mil/Pubs/P5800/15.pdf>.
2. Amounts depend upon no. of dependents, and are greater of a specific dollar amount or a pro rata share of BAH, up to maximum of 1/3 full gross pay.
3. Relief: Commanding officer may relieve marine of obligation where marine cannot determine "whereabouts and welfare of the child concerned", civilian spouse committed documented physical abuse against marine, or is in jail.

F. Enforcement

1. Violation of Lawful General Regulation is UCMJ Article 92 offense.
2. No ability to divert money, just disgorge it.
3. Fort Carson
 - a. Legal Assistance: 526-0490
 - b. Inspector General: 526-3900
4. Peterson AFB
 - a. Legal Assistance: 556-4500
 - b. Inspector General: 556-2104
5. Air Force Academy
 - a. Legal Assistance: 333-3940
 - b. Inspector General: 333-3490

IX. GARNISHMENT FOR CHILD SUPPORT/MAINTENANCE

- A. Active Duty.** Send court order via certified mail to:
DFAS-GAG/CL
PO Box 998002
Cleveland, Ohio 44199-8002
- B. Retiree.** Utilize DD Form 2293 & certified copy of support order.
- C. VA Disability.**
 1. Subject to garnishment for support/maintenance. 42 U.S.C. § 659(h)(1)(A)(v), Rose v. Rose, 107 S.Ct. 2029 (1987).
 2. Contact VA Regional Office – call (800) 527-1000 to determine appropriate office.
 3. In Colorado, the VA contact information is:
VA Regional Office
155 Van Gordon St.
Lakewood CO 80228
Tel. (800) 827-1000
Fax (303) 914-5879

(Mailing Address)
VA Regional Office
Box 25126
Denver CO 80225

D. Percentage subject to garnishment. 5 CFR § 581.402

1. 50% if providing support to dependents not covered by order.
2. 55% if providing support to other dependents, but has arrearage.
3. 60% if not providing support to other dependents.
4. 65% if no support to other dependents and arrearage.

X. FORMER SPOUSE MILITARY BENEFITS

A. During separation or legal separation– all benefits.

B. 20/20/20 Rule

1. 20 years of marriage, 20 years of service, 20 years of overlap.
2. Full benefits.
3. Exceptions:
 - a. Medical suspended while covered by employee plan.
 - b. Medical terminated upon remarriage.
 - c. Installation privileges (PX, Commissary) suspended during remarriage.

C. 20/20/15 Rule

1. 20 years of marriage, 20 years of service, 15 years of overlap.
2. Transitional medical benefits for up to one year.
3. Exceptions:
 - a. Not apply if covered by employee plan.
 - b. Terminated upon remarriage.

D. COBRA. Available for Tricare, but not cheap.

E. Domestic Violence Victims.

1. Transitional Compensation, and exchange/commissary privileges, when service member separated for domestic violence. 10 U.S.C. § 1059, implemented by DOD Instruction 1342.24.
2. Rates are pegged to Department of Veterans Affairs' Dependency & Indemnity Compensation, established by 38 U.S.C. §1311. As of December 2006, was \$1067 for spouse, \$265 for each child. See: www.vba.va.gov/bln/21/Rates/comp03.htm
3. Duration – minimum 12 months, maximum the lesser of 36 months or servicemember's length of service. Terminate upon remarriage, or if servicemember resides in same household.
4. Eligible for portion of retirement if retirement-eligible when separated for domestic violence. 10 U.S.C. § 1408(h).
5. More information – contact Victim/Witness Coordinator at servicemember's installation.

F. Children/stepchildren. Under 22 and unmarried.

XI. PATERNITY.

- A. Paternity must be judicially-determined before child has access to military benefits. DOD Instruction 1000.13.
- B. No obligation to pay child support absent court order.

XII. MISC. ISSUES

- A. **Adultery.** UCMJ, Article 134.
- B. **Restraining Orders.** Federal law prohibits possession of firearms. 18 U.S.C. § 922(g)(9). Exception for military (§ 925).
- C. **Misdemeanor Domestic Violence conviction.** Lautenberg Amendment prohibits possession of firearms and NO exception for military. 18 U.S.C. § 922(g)(8).

XIII. INDEX TO ATTACHMENTS

- A.** Leave & Earnings Statement (LES)
- B.** Retiree Account Statement
- C.** DD Form 2293 (application for former spouse payments from retired pay)
- D.** Sample Language to Divide Retirement
- E.** Sample Letter for Deemed SBP Election.
- F.** Military Pay Chart
- G.** Sample Motion for SCRA Stay

205 P.3d 538
IN RE MARRIAGE OF WILLIAMSON

IN RE MARRIAGE OF WILLIAMSON
205 P.3d 538 (CO 2009)

In re the MARRIAGE OF Genevieve WILLIAMSON,
n/k/a Genevieve Obremski, Appellant, and

Charles Williamson, Appellee.

No. 07CA2432.

Colorado Court of Appeals, Div. V.

February 19, 2009

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Appeal from the District Court, Adams County, Mark D.
Warner, J.

Mills & Weitzenkorn, P.C., Gina B. Weitzenkorn,
Denver, Colorado, for Appellant.

Gary B. Pulitzer, PC, Gary B. Pulitzer, Wheat Ridge,
Colorado, for Appellee.

Opinion by Judge GRAHAM.

In this post-dissolution matter, Genevieve Williamson, now known as Genevieve Obremski (wife), appeals from the trial court's order denying her request to divide, under a provision of the permanent orders, the military Temporary Disability Retired List benefits being paid to Charles Williamson (husband). We affirm and remand for a determination of husband's request for attorney fees on appeal.

The parties' marriage was dissolved in 2001, and permanent orders were entered

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establishing parental responsibilities and child support for the parties' three children, granting maintenance for wife, and dividing marital property and debts. The orders provided, in relevant part, that husband's "pension/retirement benefits shall be evenly divided (i.e., a 50-50 split) between the parties as set forth as per the time rule formula." At the time permanent orders were entered, husband was, and had been for eleven years, an active member of the United States Armed Forces.

In March 2007, when husband had sixteen years, seven months service in the military, he was placed on the Temporary Disability Retired List (TDRL) with a thirty percent disability rating because of a diagnosis of multiple sclerosis. When he was on active duty, his pay

was \$5400 per month, and, as of his placement on TDRL, he began receiving only \$1629 per month in TDRL benefits.

Because of this reduction in resources, husband filed a motion for modification of child support. Wife responded, opposing the modification and further requesting that husband's TDRL benefits be divided pursuant to the permanent orders provision relating to pension/retirement benefits. After a hearing, the trial court granted husband's motion to reduce child support and issued a subsequent written order denying wife's request to divide his TDRL benefits. Wife appeals from the order concerning husband's TDRL benefits.

I. Standard of Review

The classification of property as marital or nonmarital is a legal determination that is dependent on the resolution of factual disputes. *In re Marriage of Footitt*, 903 P.2d 1209, 1212 (Colo.App.1995). When there is a mixed question of law and fact, an appellate court gives deference to the trial court's factual findings, absent abuse of discretion, and independently reviews its resolution of questions of law. *See Sheridan Redevelopment Agency v. Knightsbridge Land Co.*, 166 P.3d 259, 262 (Colo.App.2007).

Here, we review for abuse of discretion the trial court's factual findings as to husband's TDRL benefits, but review de novo the legal issue of whether the benefits are divisible under the permanent orders.

II. Military Retirement Benefits as Marital Property

Military retirement benefits are generally distributable as marital property in dissolution of marriage cases pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (2008). *See In re Marriage of Hunt*, 909 P.2d 525, 530 (Colo.1995). Distributable benefits are limited, however, to "disposable retired pay," which is defined at 10 U.S.C. § 1408(a)(4) (2008), to exclude disability pay. *See Mansell v. Mansell*, 490 U.S. 581, 588-89, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989); *In re Marriage of Warkocz*, 141 P.3d 926, 928-29 (Colo.App.2006); *In re Marriage of Franz*, 831 P.2d 917, 918 (Colo.App.1992) ("The court is thus precluded from dividing a veteran's disability retirement pay as marital property.").

This exclusion covers retirement benefits that a veteran may elect to waive in order to collect Veterans Administration (VA) disability benefits. *See* 10 U.S.C. § 1408(a)(4)(B) (2008); *Mansell*, 490 U.S. at 589, 109 S.Ct. 2023 ("disposable retired pay" excludes pay waived in order to receive veterans' disability benefits); *Warkocz*,

141 P.3d at 929 (same); *In re Marriage of Lodeski*, 107 P.3d 1097, 1100 (Colo.App.2004) (same). The exclusion also applies to that part of a veteran's retirement pay that is computed using the percentage of disability on the date the veteran is placed on TDRL. *See* 10 U.S.C. § 1408(a)(4)(C) (2008).

III. The Nature of TDRL Benefits

A member of the armed forces may be placed on TDRL pursuant to 10 U.S.C. § 1202 (2008), if the member has a disability rating of at least thirty percent and the disability is not then "determined to be of a permanent nature and stable," but "accepted medical principles indicate that the disability may be of a permanent nature." A member may remain on TDRL for five years, during which time the member must submit to a medical evaluation every eighteen months to determine whether the disability has either

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stabilized to a degree that permanent disability retirement is appropriate, or whether the disability has stabilized or lessened to the point where the member is fit and can return to active duty. 10 U.S.C. § 1210 (2008). After five years on the TDRL, the member must be either returned to active duty, if the member has become fit for service; permanently retired for longevity, if the member has attained at least twenty years of service; or permanently retired for disability under 10 U.S.C. § 1201 (2008), if the member is at least thirty percent disabled and the disability is permanent and stable. 10 U.S.C. § 1210(b)-(f) (2008).

Because at the time husband was placed on TDRL, he did not yet have twenty years service with the military, he was not eligible for a regular retirement based on longevity. *See* 10 U.S.C. § 3914 (2008) (requires an enlisted member of the armed services to have at least twenty years of service to be retired); *Hunt*, 909 P.2d at 530 (there is no partial vesting of a military pension and a member of the military must attain twenty years of service or forfeit the entire pension). In addition, the time husband is on TDRL does not count toward his twenty-year longevity requirement. Thus, given the evidence in the record concerning husband's condition and prognosis, it is likely that he will never attain twenty years of service and thereby become eligible for a longevity retirement.

Wife contends, however, that husband's current TDRL benefits are retirement benefits and are distributable under the provision of the permanent orders relating to pension/retirement benefits. We disagree.

Initially, and as the trial court did, we reject wife's argument that whether husband's TDRL benefits are divisible as marital property turns on whether he is considered "retired" and whether his TDRL benefits are termed "retirement benefits" by the military. Rather, if

husband's TDRL benefits are "disability retirement benefits," they are not subject to division as marital property pursuant to 10 U.S.C. § 1408(a)(4)(C), regardless of whether he is technically considered temporarily "retired" in accordance with military terminology and regardless of whether his TDRL benefits are termed "retirement benefits." *See Franz*, 831 P.2d at 918 (trial court is precluded from dividing a veteran's "disability retirement pay" as marital property).

Although wife is correct that there is no Colorado law on the precise issue presented here, the *Franz* case involved a similar situation and is therefore helpful to our analysis. In *Franz*, the husband was on TDRL status at the time the parties' marriage was dissolved, and the permanent orders provided that if the husband should in the future receive "regular" retirement pay "that would be considered marital property" and the wife would receive half of that pay. *Id.* This provision of the permanent orders in *Franz* implies that the parties there did not consider TDRL benefits to be retirement pay subject to division but only considered regular retirement pay based upon the required years of service to be divisible. In any case, however, the husband in *Franz* was thereafter placed on permanent disability retirement and began receiving \$790 a month in benefits, including \$267 of VA disability benefits. *Id.*

The wife contended that the husband's permanent disability retirement benefits should be divided pursuant to the permanent orders, and the trial court agreed with her, at least in part, and awarded her \$255 per month of the husband's benefits, which was approximately half of the non-VA portion of the benefits. *Id.* A division of this court reversed, however, and remanded for a determination of whether the non-VA benefits were "based and computed on [the] husband's disability." *Id.* at 919. The division stated that while the trial court correctly excluded the husband's VA disability benefits from division as marital property, it did not properly determine whether the remainder of his pay was also disability pay and thus not divisible as marital property. *Id.* at 918.

In accordance with *Franz*, 831 P.2d at 918, and 10 U.S.C. § 1408(a)(4)(C), when a member of the military is placed on disability, not only are that member's specific VA benefits excluded from division as marital property, but all of the member's pay that is "based

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and computed on" the member's disability is also excluded.

Here, in contrast to *Franz*, the trial court specifically addressed whether husband's military benefits were based and computed on his disability. The military benefits expert who testified at the hearing described husband's benefits as disability benefits. He further explained how those benefits were calculated based on husband's

percentage of disability, and then, in accordance with the rules pertaining to TDRL status, husband's percentage of disability, if lower than fifty percent, was raised to fifty percent to calculate his TDRL benefit. *See* 10 U.S.C. § 1401(a) (2008). This evidence, which is the type of evidence that was missing in *Franz*, supports the trial court's order denying divisibility of husband's benefits.

It is significant that husband here, like the husband in *Franz*, did not have twenty years service with the military such that he was eligible for a regular longevity retirement. *See Franz*, 831 P.2d at 918 ("The uncontradicted evidence at trial was that husband was retired with a thirty percent disability after eight years' service."). In this situation, since husband is completely ineligible for any military retirement benefits *but for his disability*, we conclude that all of his benefits are based on his disability, and therefore, are not divisible as marital property pursuant to 10 U.S.C. § 1408(a)(4)(C). *See In re Marriage of Wherrell*, 274 Kan. 984, 58 P.3d 734, 741 (2002).

In *Wherrell*, although the husband was two years short of serving twenty years in the military, there was an unresolved factual issue as to whether he would be eligible for early retirement under a special program that was in effect prior to 2001 to allow a drawdown of military forces. *Id.* at 738-39. Thus, although the Kansas court recognized that for veterans who are eligible for retirement, disability retirement benefits under 10 U.S.C. §§ 1201 (permanent disability) and 1202 (temporary disability) may include both disability and retirement benefits:

If the member is not entitled to retired pay, however, it would not be appropriate to allow only a portion of his severance pay to be excluded from division under USFSPA. *Under that circumstance, the entire [10 U.S.C. §§ 1201 or 1202] benefit would be excluded from the definition of "disposable retired pay."*

Wherrell, 58 P.3d at 740-41 (emphasis added).

Here, husband is in the position described in *Wherrell* in that, because he does not have twenty years of service, he is not eligible for any retired pay other than that based on his disability. Therefore, it would not be appropriate to exclude only a portion of his disability benefits under 10 U.S.C. § 1408(a)(4)(C); rather, his entire benefit is due to his disability and should be excluded as such. *See Wherrell*, 58 P.3d at 741.

The fact that husband is not eligible for retired pay apart from his disability materially distinguishes the present case from case law relied on by wife wherein the military retiree husband had entered into an agreement that the wife was entitled to half his pension/retirement benefits, but then retired on disability after more than thirty years of service. *See Allen v. Allen*, 178 Md.App. 145, 941 A.2d 510, 516 (Spec.App.2008) (husband could

not prevent wife from receiving her bargained-for share of the benefits he accrued as a result of his years of service); *see also In re Marriage of Marshall*, 166 Ill.App.3d 954, 117 Ill.Dec. 863, 520 N.E.2d 1214, 1215-19 (1988) (the amount of military retirement benefits owing to wife from husband, who after twenty years of service went on the TDRL with a diagnosis of lymphoma, was based on what husband's retirement benefits would have been if he had not been placed on the TDRL).

Because, unlike the retirees in these cases, husband had no retirement benefits from his years of service and would have received nothing if he had been separated from the military without a disability, all of his benefits under TDRL are necessarily disability benefits. Wife is not entitled to such benefits as a matter of law pursuant to 10 U.S.C. § 1408(a)(4)(C), and the trial court properly denied her motion to divide the TDRL benefits under the permanent orders.

The fact that husband waived a portion of his benefits in order to receive VA disability

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benefits does not alter our holding because we agree with husband that the benefits he waived are also disability benefits. Thus, it is immaterial whether husband is receiving VA disability benefits or other military disability benefits, because no such benefits are available for distribution as marital property under 10 U.S.C. § 1408(a)(4). *See Franz*, 831 P.2d at 918-19 (division remanded for determination of whether husband's non-VA disability benefits were based and computed on his disability such that they were not divisible as marital property); *Wherrell*, 58 P.3d at 741 (district court erred in assuming that all non-VA benefits were divisible retirement benefits rather than applying 10 U.S.C. § 1408(a)(4)(C) to determine whether such non-VA benefits were also received and computed based on husband's disability).

We are aware that the Kansas court in *Wherrell* indicates that whether the benefits are marital may turn on whether such benefits are taxable. *See Wherrell*, 58 P.3d at 741. We disagree with this statement in *Wherrell*, however, because whether disability benefits are taxable is a different, and much narrower, determination than whether disability benefits are divisible as marital property under the USFSPA.

After 1976, to be exempt from taxation, disability benefits must be received due to a combat-related disability or directly from the VA. *See* 26 U.S.C. § 104(a), (b)(2)(3) (2008); H.R.Rep. No. 94-1515, at 432-33 (1976) (Conf.Rep.), *as reprinted in* 1976 U.S.C.C.A.N. 4117, 4141-42; *see also Reimels v. Comm'r*, 123 T.C. 245, 252-53, 2004 WL 1902973 (2004), *aff'd*, 436 F.3d 344 (2d Cir. 2006). There is no similar restriction in the USFSPA, however. Thus, the

nature of husband's disability retirement benefits as marital or nonmarital does not depend on whether the benefits are subject to taxation. *See Franz*, 831 P.2d at 918-19 (portion of husband's military disability retirement benefits subject to division depended on whether such benefits, even though taxable, were based and computed on husband's disability).

Because we affirm the trial court's order on the basis that husband's TDRL benefits are disability benefits and are not divisible as marital property pursuant to 10 U.S.C. § 1408(a)(4)(C), we do not reach husband's alternative argument analogizing to case law involving nonmilitary disability benefits.

IV. Husband's Request for Attorney Fees on Appeal

Husband requests his attorney fees on appeal pursuant to C.A.R. 38(d) and section 14-10-119, C.R.S.2008. We deny the first request and remand for a determination of the second.

We agree with wife that there is no controlling Colorado law on the issue of whether TDRL benefits are divisible as marital property. Thus, although wife has not prevailed on appeal, we do not conclude that her arguments are frivolous and we deny husband's request for fees under C.A.R. 38(d).

However, we reject wife's argument that husband is not entitled to fees under section 14-10-119 because he did not request them in the trial court. A party may seek appellate fees under section 14-10-119, but, because the trial court is better equipped to determine issues of fact regarding the current financial resources of the parties, we remand this issue to the trial court. *See C.A.R. 39.5; In re Marriage of Jorgenson*, 143 P.3d 1169, 1174 (Colo.App.2006).

The order is affirmed, and the case is remanded for a determination of husband's request for attorney fees on appeal.

Judge BERNARD and Judge BOORAS concur.

CO

P.3d

**SURVIVOR BENEFIT PLAN (SBP)/RESERVE COMPONENT (RC)
SBP REQUEST FOR DEEMED ELECTION**

OMB No. 0704-0448
OMB approval expires
Apr 30, 2011

The public reporting burden for this collection of information is estimated to average 20 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, Executive Services Directorate, Information Management Division, 1155 Defense Pentagon, Washington, DC 20301-1155 (0704-0448). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. Chapter 73, subchapters II and III; DoD Instruction 1332.42, Survivor Annuity Program Administration; DoD Financial Management Regulation, Volume 7B, Chapter 43; and E.O. 9397 (SSN).

PRINCIPAL PURPOSE(S): Used by a former spouse to deem an election for Former Spouse SBP coverage.

ROUTINE USE(S): To former spouses for purposes of providing information, consistent with the requirements of 10 U.S.C. Section 1450(f)(3), regarding Survivor Benefit Plan coverage.

DISCLOSURE: Voluntary; however, failure to provide requested information within the first year following filing of the court order or filing which requires former spouse SBP coverage will result in delays in initiating, or denial of, former spouse SBP coverage.

INSTRUCTIONS

GENERAL.

1. Read these instructions carefully before completing the form. Please print legibly.
2. Ensure that you advise the finance center (see Item 3 below for address) of your marital status, correspondence and check address changes, at all times. Reserve Component former spouses must notify their personnel center (see Item 4 below for address) of their marital status and correspondence address at all times.
3. For those who are deeming an SBP election against a member who is currently serving on active duty or receiving retired pay, mail your election (certified or registered mail with return receipt requested is strongly recommended) to the appropriate Uniformed Service designated agent. The Uniformed Services' designated agents are:
 - (a) ARMY, NAVY, AIR FORCE and MARINE CORPS: Defense Finance and Accounting Service, U.S. Military Retirement Pay, P.O. Box 7130, London, KY 40742-7130;
 - (b) COAST GUARD: Commanding Officer (LGL), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;
 - (c) PUBLIC HEALTH SERVICE: Office of Commissioned Corps Support Services, Compensation Branch, 5600 Fishers Lane, Room 4-50, Rockville, MD 20857;
 - (d) NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: Same as U.S. Coast Guard.
4. For those who are deeming an SBP election against a Reserve Component member who is not yet receiving retired pay (under age 60), mail your election (certified or registered mail with return receipt attached is strongly recommended) to the appropriate Branch of Service as follows:
 - (a) ARMY: Commander, Human Resources Command - St. Louis, ATTN: AHRC-PAP-T, 1 Reserve Way, St. Louis, MO 63132-5200;
 - (b) NAVY: Navy Reserve Personnel Center (PERS 912), 5722 Integrity Drive, Millington, TN 38054;
 - (c) AIR FORCE: Headquarters, ARPC/DPSSE, 6760 E. Irvington Place, Denver, CO 80250-4020;
 - (d) MARINE CORPS: Headquarters, U.S. Marine Corps, Separation & Retirement Branch (MMSR-6), 3280 Russell Road, Quantico, VA 22134-5103;
 - (e) COAST GUARD: Commanding Officer (LGL), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591.

SECTION I - MEMBER IDENTIFICATION

1. MEMBER NAME <i>(Last, First, Middle Initial)</i>	2. SSN	3.a. BRANCH OF SERVICE	b. (X one) <input type="checkbox"/> ACTIVE <input type="checkbox"/> RESERVE <input type="checkbox"/> NATIONAL GUARD
4. IS MEMBER RETIRED? <input type="checkbox"/> YES <input type="checkbox"/> NO		5. IF YES, DATE OF RETIREMENT <i>(YYYYMMDD)</i>	

SECTION II - FORMER SPOUSE IDENTIFICATION

6. FORMER SPOUSE NAME <i>(Last, First, Middle Initial)</i>	7. SSN	8. ADDRESS <i>(Include ZIP Code)</i>	9. DATE OF BIRTH <i>(YYYYMMDD)</i>
10. MARRIAGE HISTORY			
a. DATE MARRIED TO MEMBER <i>(Listed in Item 1 above) (YYYYMMDD)</i>	b. DATE OF DIVORCE <i>(YYYYMMDD)</i>	c. ARE YOU CURRENTLY MARRIED? <input type="checkbox"/> YES <input type="checkbox"/> NO	d. IF YES, DATE OF CURRENT MARRIAGE <i>(YYYYMMDD)</i>

MEMBER NAME <i>(Last, First, Middle Initial)</i>	SSN
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SECTION III - AUTHORITY TO REQUEST DEEMED SBP ELECTION

11. IS ELECTION MADE PURSUANT TO REQUIREMENTS OF COURT ORDER? *(If "Yes, attach a copy of the document.)* YES NO

12. IS ELECTION BEING MADE PURSUANT TO WRITTEN AGREEMENT PREVIOUSLY ENTERED INTO VOLUNTARILY AS PART OF OR INCIDENT TO A PROCEEDING OF DIVORCE, DISSOLUTION OR ANNULMENT? YES NO

NOTE: If you answered "No" to both 11 and 12, above, STOP. You are NOT eligible to request a Deemed SBP election.

13. IF "YES" TO QUESTION 12, WAS SUCH VOLUNTARY WRITTEN AGREEMENT INCORPORATED IN, RATIFIED, OR APPROVED BY A COURT ORDER? *(If "Yes, attach a copy of the document.)* YES NO

SECTION IV - DEPENDENT CHILDREN INFORMATION

14. LIST DEPENDENT CHILDREN *(If required to be covered under court order/agreement) (List only children resulting from the parties' marriage to each other.)*

a. NAME <i>(Last, First, Middle Initial)</i>	b. DATE OF BIRTH <i>(YYYYMMDD)</i>	c. SSN	d. RELATIONSHIP <i>(Son, daughter, stepson, etc.)</i>	e. DISABLED? <i>(Yes/No)</i>

15. REMARKS *(Use this space to further explain any item if necessary. Reference by item number.)*

SECTION V - FORMER SPOUSE SIGNATURE

16. SIGNATURE	17. DATE SIGNED <i>(YYYYMMDD)</i>
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Sample Military Retirement Language

1) The Husband (hereinafter “servicemember” for the purposes of this section) is a member of the U.S. Army, having served on active duty continuously from _____ to the present. This Court has jurisdiction to divide the military retirement because the servicemember consented to jurisdiction **OR resides in and maintains Colorado as ***his/her state of legal domicile. All of the servicemember’s applicable rights under the Servicemembers Civil Relief Act have been adequately protected or waived.

2) Effective the first month in which the servicemember becomes entitled to the receipt of retired pay, and continuing each month thereafter until the death of either party, the Wife (hereinafter “former spouse”, for the purposes of this section) shall receive a share of the disposable military retired pay, including annual COLAs, determined as follows:

$$\begin{array}{r} 1 \quad \quad \quad \underline{\quad\quad} \text{ Months of marriage overlapping military service} \\ \text{---} \quad \times \quad \text{-----} \\ 2 \quad \quad \quad \text{Total months of creditable service upon retirement} \end{array}$$

3) As the share cannot be determined until retirement, the servicemember shall advise the former spouse of a prospective retirement or separation from the military or from active duty at least 90 days in advance. Within 14 days of receipt, the servicemember shall provide the former spouse with a copy of all documents pertaining to the separation or the receipt of any money in lieu of retirement, including retirement orders, memorandum of release from active duty, DD 214, Retiree Account Statement, Statement of Service, chronological statement of retirement points, VA Disability documents, etc. Upon the servicemember’s retirement, DFAS is requested to pay the former spouse’s share of the servicemember’s retired pay based upon the formula set out above, with the denominator being the servicemember’s creditable service as determined by DFAS.

4) In the event the disposable retired pay available for division is reduced for any reason, such as the receipt of VA Disability, merging the retirement with another pension plan, or debts the servicemember owes to the government, servicemember shall indemnify the former spouse for any such reduction. The Court retains jurisdiction to enter any appropriate orders pertaining to the military retirement, including, but not limited to, enforcing the division of retirement, dividing any money received in lieu of retirement, compensating the former spouse for any reduction in the disposable retired pay available for division, etc.

5) The former spouse’s share of the military retirement is reportable as income to the former spouse.

6) Because the parties were married on _____, they have more than 10 years of marriage overlapping the military service and the former spouse shall receive direct payment from DFAS, pursuant to 10 U.S.C. § 1408(d). The former spouse shall apply to the Defense Finance and Accounting Service (DFAS) for direct payment of the former spouse’s share of the retirement, utilizing DD Form 2293, or any other necessary form. If at any time, however, the former spouse has not received direct payment, the servicemember shall pay the

former spouse's share of the disposable retired pay within 5 days of receiving it, and such payments shall be characterized as maintenance for tax purposes.

OR

6) Because the parties do not have more than 10 years of marriage overlapping the servicemember's military service, the servicemember shall pay the former spouse ***his/her share of the disposable retired pay directly, within five days of receipt of each payment.

7) Anytime the disposable retired pay changes, within 14 days of receipt the servicemember shall provide the former spouse with the Retiree Account Statement, VA documents, or any other documents relevant to the change. This does not apply to annual COLAs if DFAS is directly paying the former spouse's share of the retirement.

8) Prior to retirement, the servicemember shall make an irrevocable election to participate in the Survivor Benefit Plan (SBP), designating the former spouse as the "former spouse beneficiary" for an annuity which pays an amount not less than the former spouse's share of the retired pay. The servicemember shall provide the former spouse proof of enrollment, and any other forms pertaining to SBP within 30 days of receiving or filling out the form. The parties shall divide equally the costs of the SBP, and to the extent the servicemember is assessed any greater portion by DFAS, the former spouse shall compensate the servicemember for the difference every six months.

9) The former spouse is authorized to receive information pertaining to the servicemember's retirement, including amounts and dates of service. In the event that DFAS or another agency require a written release for such information, a copy of this Agreement constitutes a written release for that purpose.

176 P.3d 829
IN RE MARRIAGE OF DEPALMA

IN RE MARRIAGE OF DEPALMA
176 P.3d 829 (CO 2008)

In re the MARRIAGE OF P. Jon DEPALMA, Appellee,
and
Melissa Ann DePalma, Appellant.

No. 06CA1478.

Colorado Court of Appeals, Div. IV.

July 26, 2007

Certiorari Denied February 19, 2008.

Appeal from the District Court, El Paso County, Richard
V. Hall, Connie L. Peterson, JJ.

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Willoughby & Eckelberry, L.L.C., Kimberly R.
Willoughby, Denver, Colorado, for Appellee.

Baker & Gaithe, LLC, Carla L. Baker-Sikes, Colorado
Springs, Colorado, for Appellant.

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Opinion by Judge GRAHAM.

In this post-dissolution of marriage proceeding, Melissa Ann DePalma (mother) appeals from orders permitting P. Jon DePalma (father) to exercise his parenting time rights during his military deployment by having his current wife care for the children in his home during his parenting time. We affirm.

Father and mother are the parents of two children. In May 2002, they agreed to a parenting plan providing, among other things, that the children would be in father's care two evenings a week and every other weekend, that they would be in mother's care at all other times, and that if either parent was unavailable during his or her designated parenting time, that parent would offer the other parent the right of first refusal for the care of the children. When their marriage was dissolved in June 2002, the parenting plan was incorporated into the decree.

Father is an airline pilot and an Air Force Reserve pilot. Before he remarried in 2004, he and mother coordinated their parenting time each month to take his schedule into account. When he was deployed by the Air Force, mother exercised all parenting time.

After father remarried, he was again deployed to Iraq. During this deployment, the children spent one night and

one evening per week in the care of father's new wife (stepmother). The remainder of the parenting time was exercised by mother. In January 2006, facing another deployment, father requested that parental responsibilities be modified to allow the children to spend equal time with each parent. He also requested that the parenting time schedule remain in effect when he was stationed in Iraq. He asserted that this would be in the children's best interests because it would allow them to maintain their normal schedule and their bonded relationship with stepmother and their stepbrother. Mother opposed this motion, arguing that father was impermissibly attempting to establish parental rights for his new wife that the new wife could not have obtained in her own right, and that mother should not be required to decrease her parenting time in favor of a nonparent.

An initial hearing was held in April 2006, followed by a second hearing in May. After considering the parties' arguments, the court determined that the presumption that a natural parent has the right to control the upbringing of a child is rebuttable; that the best interests of the children must be considered in determining whether the presumption has been rebutted; and that in the case before the court, the court was required to consider the relationship between the children and the stepparent as well as father's rights.

An additional hearing was held in June 2006. After considering the testimony of both parents, the stepmother, and the child and family investigator, the court determined that father could decide to have stepmother care for the children during his parenting time and that in doing so, he was presumed to be acting in the best interests of the children. The court further found that allowing father to designate stepmother as the children's caregiver during his absence did not modify the parties' parenting plan, as the children would remain in mother's care at all times except during father's parenting time, nor did it grant parenting time to stepmother. The court concluded that the right of first refusal set forth in the parenting plan did not require that father offer the children to mother while he was deployed, and that imposing such a requirement would interfere with father's parenting time. Accordingly, the court ordered that the children should be in the care of stepmother during father's parenting time as he had requested.

Mother now appeals from these orders.

I.

Mother contends that the trial court erred in holding that father could choose to delegate his parenting time to stepmother while he is deployed or otherwise unavailable for extended periods of time. Mother argues that the court

failed to accord her the presumptions to which she was entitled as the children's natural mother; that the court erred in denying her legal objection to father's motion to modify parenting time; that the court erred in failing to require that stepmother petition for parenting time; and

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that the court failed to make the necessary findings regarding the children's best interests before making its decision. We are not persuaded by these arguments.

A.

We first address mother's argument that the trial court failed to accord her the presumption that she had the first and prior right to parenting time of the children, and the presumption that, as a fit natural parent, she acted in the best interests of the children. We are not persuaded that the court failed to accord mother the benefit of any applicable presumption.

In determining a custodial dispute between a parent and a nonparent, Colorado courts recognize a presumption that a biological parent has a first and prior right to the custody of his or her child. *In re Custody of C.C.R.S.*, 892 P.2d 246, 256 (Colo.1995). Colorado courts also recognize a presumption that a fit parent acts in the best interests of his or her children. *In re Adoption of C.A.*, 137 P.3d 318, 327 (Colo.2006) (citing *Troxel v. Granville*, 530 U.S. 57, 67, 120 S.Ct. 2054, 2061, 147 L.Ed.2d 49 (2000)).

Here, the court expressly recognized that a parent has "a presumptive right to control the upbringing of a child," and that there is a presumption that a natural parent can make the decisions concerning the children. The court ultimately concluded that father could make the decision to have stepmother care for the children during his parenting time, noting that because parental unfitness had not been alleged, father was presumed to act in the best interests of the children.

We are not persuaded that the trial court failed to accord mother the benefit of the presumptions to which she was entitled as one of the children's biological parents.

We note that from the beginning, the trial court treated this matter as a dispute between two fit parents regarding the arrangements for the care of the children during father's parenting time, rather than a dispute between a nonparent seeking parenting time and a parent opposing it. We are not persuaded that the court erred in doing so. Stepmother never requested parenting time in her own right, and we are aware of no authority for the proposition that a parent's request that a stepparent or other nonparent be permitted to provide care for a child should be imputed to the nonparent and treated as a request by the nonparent for parenting time.

Because the dispute was between mother and father, and not between mother and stepmother, the presumption that a parent has a "first and prior" right to the custody of his or her child was not implicated, and there was no need for the court to comment upon the presumption that a parent's right to custody is superior to that of a nonparent.

Because the dispute was between mother and father, the court did not err in according the presumption that a fit parent acts in the best interests of the children to father as well as to mother. As the courts of several other jurisdictions have found, when two fit parents disagree, the court must weigh the wishes of both to determine what is in the child's best interests. *See, e.g., Thomas v. Nichols-Jones*, 909 A.2d 595, 2006 WL 2844525 (Del.2006) (unpublished table decision) (in a dispute between parents regarding visitation by grandmother, father's determination that visitation was in the child's best interests was entitled to the same weight as mother's contrary determination, and the trial court properly considered the wishes of each parent together with the other best interests factors); *In re Marriage of Sullivan*, 342 Ill.App.3d 560, 565, 277 Ill.Dec. 25, 795 N.E.2d 392, 396-97 (2003) (a dispute between mother and father regarding father's petition to allow his parents to visit child while he was on military duty overseas requires the court to weigh the wishes of two fit parents to determine the child's best interests); *Yopp v. Hodges*, 43 Va.App. 427, 438-39, 598 S.E.2d 760, 766 (2004) (where one parent supports grandparents' petition for visitation with child, and the other parent opposes it, and both parents are fit, the trial court must presume that both parents are acting in the best interests of the child; thus, faced with a contest in which one parent's fundamental rights are pitted against the other's fundamental rights, the trial court

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properly resolved the matter by considering the child's best interests).

Because the dispute concerned father's parenting time and father's determination that it would be in the best interests of the children to allow them to maintain their relationship with their stepmother and stepbrother by maintaining the usual parenting time schedule during his deployment, we conclude that the court did not err by considering first the presumption that father was acting in the best interests of the children, and determining that the issue of stepmother's care of the children was resolved when that presumption was not rebutted by mother. The presumption that mother, too, was acting in the best interests of the children, was addressed by the court when it acknowledged mother's concern that parental rights should not be extended to stepmother, and resolved the issue by stating explicitly that the court did not intend to grant parenting time or parenting responsibility to stepmother. By addressing her concern in this manner, the court acknowledged that her concern was reasonable

Enclosure E

and that she also was acting in the best interests of the children in bringing it to the court's attention.

B.

We next consider mother's argument that the trial court erred in denying her legal objection to father's motion to modify parenting time. We construe this as an argument that the trial court effectively granted parenting time to stepmother when it granted father's motion, and, thus, entered an order that violated mother's constitutional right to the care, custody, and control of the children. We do not agree with this argument.

We begin our analysis by observing that the trial court expressly stated in its June 8, 2006, order that "[t]he court is not granting any parenting time or parenting responsibility to [stepmother]." Indeed, the orders entered by the court do not grant stepmother any rights at all. Her "right" to parenting time is in reality only a potential obligation, if she chooses to accept it, to care for the children during father's parenting time. It is father's right to ask her to do so, and if he does not, the orders entered by the court do not grant her the right to see the children or care for them. In addition, stepmother has no right to make decisions for the children, as that authority is shared exclusively by mother and father, with day-to-day decision-making allocated to mother during father's deployments.

Because the orders from which mother appeals do not provide stepmother with any legal rights, this case is distinguishable from cases in which a parent has attempted to delegate his or her parental rights to a nonparent, or has requested that the court do so, without regard to the availability of a fit, natural parent who already possesses parental rights and is prepared to assume the responsibility for the child. *Diffin v. Towne*, 3 Misc.3d 1107(A), 787 N.Y.S.2d 677 (N.Y.Fam.Ct.2004), an unpublished decision cited by mother in support of her argument that the orders from which she appeals improperly granted parental responsibilities to stepmother, is such a case, and we find it unpersuasive for that reason.

C.

Mother's argument that the trial court erred in extending "special rights" to stepmother and that the court should have required stepmother to petition for parenting time is also unpersuasive.

Stepmother did not seek parental rights, and father did not ask that such rights be extended to her. Rather, father requested only that stepmother be permitted to care for the children in his home during his absence. As mother acknowledges, parents routinely entrust their children to the care of teachers, family, and daycare providers during their parenting time. Although mother suggests that there is a substantive difference between leaving a child with a nonparent on a short-term basis and

doing so for an extended period, she has not cited any authority in support of this proposition or explained why she believes this to be true. Nor has she explained why the entrustment of children to the care of a nonparent over a longer period necessarily requires the extension of parental rights to the nonparent.

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The trial court concluded that stepmother could care for the children during father's parenting time without holding parenting time rights in her own name. Mother has cited no authority for the proposition that the court erred in reaching this conclusion, and we are aware of none. Accordingly, we reject it.

D.

Finally, we reject mother's argument that the trial court erred in failing to make specific findings regarding the best interests of the children.

Under § 14-10-129(1)(a)(I), C.R.S.2006, with certain exceptions not applicable here, a court may make or modify an order granting or denying parenting time rights whenever such order or modification would serve the best interests of the child.

Here, mother did not dispute that it was in the children's best interests to maintain a relationship with their stepmother and stepbrother, and she did not contend that the children's visits with them were harmful. She specifically agreed that father was a fit parent and that he should have joint decision-making responsibility for the children. She testified that she thought that it was "very important" that the children continue to spend time with father's family, including stepmother, and that she felt that "[t]he more people who love them, the better." When asked about the reason for her opposition to father's proposal that stepmother be permitted to care for the children during his deployment, mother stated that she felt that it diminished her rights as a parent, and that it was "not anything, against [stepmother] as a person, or as a parent." Thus, the court could reasonably conclude that both parents agreed it was in the best interests of the children to continue their relationship with stepmother and that they disagreed only as to whether father's proposal improperly extended parental rights to stepmother.

While it might have been better practice for the trial court to make explicit findings regarding the best interests of the children, we are not persuaded that the trial court erred in failing to do so where the record indicates that this issue was not disputed. We note that the court found that neither party argued stepmother inadequately cared for the children, and that the parties agreed the children had a good relationship with both stepmother and their stepbrother. In addition, the court acknowledged that it was in the children's best interests to allow stepmother to care for them during father's

parenting time and that because parental unfitness had not been alleged, father was presumed to act in the best interests of the children.

II.

Mother contends that the trial court violated the right of first refusal provision of the parties' parenting plan by allowing father to offer time to stepmother before offering it to mother. We do not agree.

Modification of parenting time is governed by § 14-10-129, C.R.S.2006. A court may modify an order regarding parenting time where such modification serves the best interests of the children. *See In re Marriage of West*,94 P.3d 1248, 1250 (Colo.App.2004).

Here, the parenting plan incorporated into the decree dissolving the parties' marriage provides that "[i]n the event either parent is unavailable during their designated time with the children, they will contact the other parent for First Right of Refusal."

Testimony presented at trial showed that the right of first refusal had not been consistently and routinely offered in every case in which it might have applied.

The court ordered that the right of first refusal should be applied only to the parties, and added that father's decision to have stepmother care for the children during his absence did not require that the children be offered first to mother. The court explained that "[u]nder the circumstances and evidence presented, such a requirement would be inconsistent with the parenting plan as a whole and would interfere with [father's] parenting time."

To the extent that the trial court's ruling operated as a modification of the parenting plan incorporated into the decree, it was within the trial court's discretion to make

such a modification. In light of the evidence in the record that the "parties had operated under a de facto modification of the plan and that the children would be least disrupted by continuing with their current sleepover arrangements, we do not perceive that it was an abuse of discretion to modify the plan to accommodate the best interests of the children.

III.

In her reply brief, mother makes a number of arguments that were not made in her opening brief, and, apparently, were not made to the trial court. We will not consider these arguments. *See In re Marriage of Atencio*,47 P.3d 718, 722 (Colo.App.2002) (issue not raised before the trial court will not be addressed on appeal); *In re Marriage of Smith*,7 P.3d 1012, 1017 (Colo.App.1999) (issue raised for the first time in

appellant's reply brief will not be considered).

The orders are affirmed.

Judge VOGT and Judge HAWTHORNE concur.

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NOTE: This bill has been prepared for the signature of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.



HOUSE BILL 08-1176

BY REPRESENTATIVE(S) Labuda, Borodkin, Carroll M., Frangas, Gallegos, Gardner B., Lambert, Looper, Lundberg, Marostica, Massey, Middleton, Mitchell V., Rice, Stafford, and Todd;
also SENATOR(S) Ward, Boyd, Brophy, Cadman, Gibbs, Groff, Isgar, Kester, Kopp, Morse, Penry, Renfro, Romer, Sandoval, Schultheis, Schwartz, Shaffer, Spence, Tapia, Taylor, Tochtrop, Tupa, Wiens, and Williams.

CONCERNING THE MODIFICATION OF THE ALLOCATION OF PARENTAL RESPONSIBILITIES OF CERTAIN DEPLOYED SERVICE MEMBERS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 10 of title 14, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

14-10-131.3. Modification of the allocation of parental responsibilities and parenting time based upon military service - legislative declaration - definitions. (1) (a) THE GENERAL ASSEMBLY HEREBY FINDS THAT:

(I) AN ARMED FORCES RESERVES OR STATE NATIONAL GUARD MEMBER WHO IS CALLED TO ACTIVE DUTY FACES UNIQUE CHALLENGES WITH

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

RESPECT TO PARENTING HIS OR HER CHILD WHILE AT THE SAME TIME MEETING HIS OR HER OBLIGATION TO SERVE IN THE MILITARY;

(II) THE ALLOCATION OF PARENTAL RESPONSIBILITIES AND THE PARENTING PLAN FOR A CHILD IS OFTEN MODIFIED AS A RESULT OF A PARENT BEING DEPLOYED OR CALLED TO FEDERAL ACTIVE DUTY. IT IS IMPORTANT THAT SERVICE MEMBERS, CHILDREN, AND OTHER PARENTS SHARE THE SAME EXPECTATION AS TO WHAT THE PARENTAL RESPONSIBILITIES AND PARENTING TIME ORDERS WILL BE WHEN THE SERVICE MEMBER PARENT RETURNS AND THAT THE RELATIONSHIP BETWEEN A SERVICE MEMBER PARENT AND HIS OR HER CHILD WILL NOT BE UNFAIRLY IMPACTED DUE TO MILITARY SERVICE.

(b) THE GENERAL ASSEMBLY THEREFORE FINDS THAT THE INTERESTS OF THE PARENTS AND THE CHILD ARE BEST SERVED WHEN:

(I) MODIFICATIONS OF PARENTAL RESPONSIBILITIES AND PARENTING TIME THAT ARE BASED SOLELY UPON THE DEPLOYMENT OR FEDERAL ACTIVE DUTY OF RESERVE OR NATIONAL GUARD MEMBERS ARE LIMITED IN DURATION; AND

(II) UPON THE SERVICE MEMBER PARENT'S RETURN FROM DEPLOYMENT OR ACTIVE DUTY, THE ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME REVERTS TO THE ORDERS IN PLACE AT THE TIME THE SERVICE MEMBER WAS DEPLOYED OR CALLED TO FEDERAL ACTIVE DUTY.

(2) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "ACTIVE DUTY" MEANS FULL-TIME SERVICE IN:

(I) A RESERVE COMPONENT OF THE ARMED FORCES; OR

(II) THE NATIONAL GUARD FOR A PERIOD THAT EXCEEDS THIRTY CONSECUTIVE DAYS IN A CALENDAR YEAR.

(b) "ARMED FORCES" INCLUDES THE RESERVE COMPONENTS OF THE UNITED STATES ARMY, NAVY, MARINE CORPS, AIR FORCE, AND COAST GUARD.

(c) "PARENT" MEANS PARENT, LEGAL GUARDIAN, OR PERSON AWARDED PARENTAL DECISION-MAKING RESPONSIBILITIES OR PARENTING TIME.

(d) "SERVICE MEMBER" MEANS A MEMBER OF A RESERVE COMPONENT OF THE UNITED STATES ARMED FORCES OR A MEMBER OF A STATE NATIONAL GUARD.

(3) (a) IF A MOTION TO MODIFY AN ORDER CONCERNING THE ALLOCATION OF PARENTAL RESPONSIBILITIES OR PARENTING TIME IS FILED EITHER PRIOR TO OR DURING A SERVICE MEMBER PARENT'S ACTIVE DUTY DEPLOYMENT, AND THE COURT FINDS THAT THE SERVICE MEMBER PARENT'S ACTIVE DUTY DEPLOYMENT IS THE SOLE BASIS FOR THE MODIFICATION, ANY RESULTING ORDER SHALL BE AN INTERIM ORDER.

(b) UPON A SERVICE MEMBER PARENT'S FILING OF WRITTEN NOTICE WITH THE COURT OF HIS OR HER RETURN TO COLORADO FROM ACTIVE DUTY DEPLOYMENT, AND SERVICE OF THE NOTICE ON THE OTHER PARENT, THE INTERIM ORDERS ARE VACATED, AND THE ORDERS CONCERNING THE ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME THAT WERE IN EFFECT AT THE TIME THE INTERIM ORDERS WERE ENTERED SHALL BE IMMEDIATELY REINSTATED WITHOUT THE NEED FOR COURT ACTION.

(4) NOTHING IN THIS SECTION RESTRICTS THE RIGHT OF A PARENT TO:

(a) CONSENT TO A MODIFICATION OF THE ALLOCATION OF PARENTAL RESPONSIBILITIES OR PARENTING TIME THAT CONTINUES BEYOND THE END OF THE SERVICE MEMBER PARENT'S ACTIVE DUTY DEPLOYMENT; OR

(b) FILE A MOTION, PURSUANT TO APPLICABLE LAW, SEEKING A MODIFICATION OF THE ALLOCATION OF PARENTAL RESPONSIBILITIES OR PARENTING TIME AFTER THE INTERIM ORDERS ARE VACATED.

(5) A SERVICE MEMBER PARENT'S AGREEMENT TO A MODIFICATION OF PARENTAL RESPONSIBILITIES OR PARENTING TIME ON AN INTERIM BASIS, DUE TO HIS OR HER ACTIVE DUTY DEPLOYMENT, SHALL NOT BE CONSIDERED AGREEMENT TO A MODIFICATION OR CONSENT TO THE INTEGRATION OF THE CHILD INTO THE OTHER PARENT'S HOUSEHOLD FOR THE PURPOSE OF A MOTION FILED PURSUANT TO SECTION 14-10-129 (2) OR 14-10-131 (2).

(6) MODIFICATION OF CHILD SUPPORT MAY BE APPROPRIATE WHEN AN INTERIM ORDER IS ENTERED BASED UPON A SERVICE MEMBER PARENT'S ACTIVE DUTY DEPLOYMENT. IN ANY MOTION FILED PURSUANT TO THIS SECTION, IT IS THE PARTIES' RESPONSIBILITY TO ADDRESS CHILD SUPPORT AT THAT TIME PURSUANT TO SECTIONS 14-10-115 AND 14-10-122.

(7) MOTIONS FILED PURSUANT TO THIS SECTION SHALL NOT QUALIFY AS MOTIONS FILED FOR PURPOSES OF THE TWO-YEAR LIMITATION ON MOTIONS CONTAINED IN SECTIONS 14-10-129 AND 14-10-131.

SECTION 2. 14-13-102 (7), Colorado Revised Statutes, is amended to read:

14-13-102. Definitions. As used in this article, unless the context otherwise requires:

(7) (a) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(b) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (7), "HOME STATE" DOES NOT MEAN A STATE IN WHICH A CHILD LIVED WITH A PARENT OR A PERSON ACTING AS A PARENT ON A TEMPORARY BASIS AS THE RESULT OF AN INTERIM ORDER ENTERED PURSUANT TO SECTION 14-10-131.3.

SECTION 3. Applicability. This act shall apply to motions filed on or after the effective date of this act.

SECTION 4. Effective date. This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution, (August 6, 2008, if adjournment sine die is on May 7, 2008); except that, if a referendum petition is filed against this act or an item, section, or part of this act within such period, then the act, item, section, or

part, if approved by the people, shall take effect on the date of the official declaration of the vote thereon by proclamation of the governor.

Andrew Romanoff
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Peter C. Groff
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Karen Goldman
SECRETARY OF
THE SENATE

APPROVED _____

Bill Ritter, Jr.
GOVERNOR OF THE STATE OF COLORADO