



THE ARMY LAWYER

ARTICLES

Parenthood Requires Love, Not DNA

Major Shawn L. Atkins

**It Ain't Over Till It's Over:
The Army Grade Determination Review Board**

Major Jess Rankin & Major John Goodell

TJAGLCS FEATURES

Lore of the Corps

**An Army Lawyer's Canteen:
A Remarkable Relic of Captivity in the Philippines, Formosa and Manchuria in World War II**

Mr. Frederic L. Borch III

PRACTICE NOTE

Beyond the Reach: Understanding When a Civilian Contractor's Income is Excluded From Federal Taxation Due to Residing Abroad

Lieutenant Colonel David Dulaney & Major John Goodell

BOOK REVIEW

At All Costs: The True Story of Vietnam War Hero Dick Etchberger

Reviewed by Major Lori E. Lincoln

Judge Advocate General's Corps Professional Bulletin 27-50-17-09

September 2017

Editor, Captain John Cody Barnes
Contributing Editor, Lieutenant Colonel Michael P. Harry
Legal Editor, Mr. Sean P. Lyons

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities.

The opinions expressed by the authors in the articles do not necessarily reflect the view of the Department of Defense, the Department of the Army, The Judge Advocate General's Corps (JAGC), The Judge Advocate General's Legal Center and School, or any other governmental or non-governmental agency. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editorial Board of *The Army Lawyer* includes the Chair, Administrative and Civil Law Department, and the Director, Professional Communications Program. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army.

Unless expressly noted in an article, all articles are works of the U.S. Government in which no copyright subsists. Where copyright is indicated in an article, all further rights are reserved to the article's author.

The Army Lawyer accepts articles that are useful and informative to Army lawyers. This includes any subset of Army lawyers, from new legal assistance attorneys to staff judge advocates and military judges. *The Army Lawyer* strives to cover topics that come up recurrently and are of interest to the Army JAGC. Prospective authors should search recent issues of *The Army Lawyer* to see if their topics have been covered recently.

Authors should revise their own writing before submitting it for publication, to ensure both accuracy and readability. The style guidance in paragraph 1-36 of Army Regulation 25-50, *Preparing and Managing Correspondence*, is extremely helpful. Good writing for *The Army Lawyer* is concise, organized, and right to the point. It favors short sentences over long and active voice over passive. The proper length of an article for *The Army Lawyer* is "long enough to get the information across to the reader, and not one page longer."

Other useful guidance may be found in Strunk and White, *The Elements of Style*, and the Texas Law Review, *Manual on Usage & Style*. Authors should follow *The Bluebook: A Uniform System of Citation* (20th ed. 2015) and the *Military Citation Guide* (TJAGLCS, 20th ed. 2015). No compensation can be paid for articles.

The Army Lawyer may make necessary revisions or deletions without prior permission of the author. An author is responsible for the accuracy of the author's work, including citations and footnotes.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at <http://www.jagcnet.army.mil/ArmyLawyer> and at the Library of Congress website at http://www.loc.gov/tr/frd/MilitaryLaw/Army_Lawyer.html.

Articles may be cited as: [author's name], [article title in italics], ARMY LAW., [date], at [first page of article], [pincite].

Lore of the Corps

An Army Lawyer's Cnateen: A Remarkable Relic of Captivity in the Philippines, Formosa, and Manchuria in World War II <i>Mr. Frederic L. Borch III</i>	1
---	---

Articles

Parenthood Requires Love, Not DNA <i>Major Shawn L. Atkins</i>	5
--	---

It Ain't Over Till It's Over: The Army Grade Determination Board <i>Major Jess R. Rankin & Major John Goodell</i>	36
---	----

TJAGLCS Features

Practice Note

Beyond the Reach: Understanding When a Civilian Contractor's Income is Excluded From Federal Taxation Due to Residing Abroad <i>Lieutenant Colonel David Dulaney & Major John Goodell</i>	45
---	----

Book Review

At All Costs: The True Story of Vietnam War Hero Dick Etchberger Reviewed by <i>Major Lori E. Lincoln</i>	47
---	----

Lore of the Corps:

An Army Lawyer's Canteen:

A Remarkable Relic of Captivity in the Philippines, Formosa, and Manchuria in World War II

Fred L. Borch
Regimental Historian & Archivist

One of the most interesting items on display in the Legal Center and School is a canteen that belonged to Colonel (COL) Thomas A. Lynch, a Philippine Division judge advocate who was taken prisoner by the Japanese in 1942.

The canteen is a remarkable piece of our Regiment's history. Lynch carried it from the time he was captured until he was liberated from a prisoner of war (POW) camp in August 1945. There is little doubt that the canteen was critical to Tom Lynch's survival as a POW and arguably was his most valuable possession since nothing was more important in a POW camp than having readily available clean water to drink. But what makes the canteen so interesting is that Lynch (or more likely a fellow POW with some artistic talent) engraved it with the names and dates of every location in which Lynch spent any time from December 1941 through June 1943, including POW camps in which he been held captive. This Lore of the Corps article is about that canteen, and the details engraved upon its surface.

As an article about COL Lynch has already appeared in the pages of *The Army Lawyer*, only a very brief recap of his career is necessary.¹ Born in Chicago, Illinois on March 2, 1882, Thomas Austin "Tom"

Lynch graduated from high school at age 19. He seems to have worked in Chicago as an office clerk for the Chicago and New Hampshire Railroad before enlisting in the 17th Infantry Regiment on March 28, 1904. After a short period of service in Cuba, he sailed with his unit to the Philippines. Lynch subsequently served as a private, corporal, sergeant and first sergeant in Company "F" of that Regular Army unit.



Tom Lynch was a talented Soldier of proven ability. He not only participated in campaigns against Filipino insurgents on Mindanao in 1904-1905 (his records reflect one year, seven months of "combat" duty)² but his superiors were sufficiently impressed with Lynch that he was offered a commission in the Philippine Scouts.³ After slightly more than seven years in the ranks, Lynch took his oath of office as a second lieutenant on February 16, 1912. A year later, he was serving as the "Presidente of Parang and Deputy District Governor" of Cabato, Mindanao.⁴

After being promoted to major (MAJ) on July 1, 1920, Lynch continued to work as an Army lawyer. He wore the crossed quill-and-sword insignia on his collar and served as a "Law Member"⁵ at general courts-martial convened in the Philippines. Lynch also performed duties as a trial counsel

¹ Fred L. Borch, *The Life and Career of Thomas A. Lynch: Army Judge Advocate in the Philippines and Japanese Prisoner of War*, *THE ARMY LAWYER*. (Mar. 2016), 40-45.

² War Department Adjutant General's Corps Form No. 66-1, Officer's and Warrant Officer's Qualification Card, Lynch, Thomas A. (9 Sep. 1945).

³ Created by the Army in 1899, the Philippine Scouts were recruited from the indigenous population of the Islands and used to suppress the increasingly vicious insurgency led by Emilio Aguinaldo against the new American colonial regime. In 1901, Congress made the Scouts part of the Regular Army, and assumed responsibility for their pay and entitlements. The Scouts were now a "military necessity" as congressional authorization for the U.S. volunteer army had expired, leaving only U.S. Regular troops and the fifty companies of Scouts (about 5,000 men) to maintain law and order in the Philippines. PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT* 113-14 (2006). By the time 2d Lt. Lynch accepted a commission in the Scouts in 1912, the Scouts were an important military force the Philippines. While Soldiers enlisting in the Scouts were exclusively native-born recruits, many Scout officers also were Filipino—in contrast to Lynch. A significant number also were U.S. Military Academy graduates, as West Point had begun admitting Filipinos in 1908; by 1941, 16 of 38 native Scout officers were USMA graduates. See JEROLD E. BROWN, *HISTORICAL DICTIONARY OF THE UNITED STATES ARMY* 366-67 (2001).

⁴ Lynch was stationed on Mindanao because guerilla activity persisted on that island—and the Islands of Samar, Cebu and Jolo—until 1913, when then Brigadier General John J. Pershing and troops of the 8th Infantry finally defeated Moro insurgents at the battle of Bud Bagsak on Jolo Island. JERRY KEENAN, *ENCYCLOPEDIA OF THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS* 52 (2001).

⁵ While the law member was the forerunner of today's military judge, his role and authority were markedly different in the 1920s. The law member was tasked with ruling "in open court" on all "interlocutory questions." These were defined by the 1921 *Manual for Courts-Martial* as "all questions of any kind arising at any time during the trial" except those relating to challenges, findings and sentence. But the law member's rulings were only binding on the court when the interlocutory question concerned admissibility of evidence. On all other interlocutory questions, the law member's decision could be overturned by a majority vote of the members. Interestingly, the law member also participated in all votes taken by the members, including findings and sentencing. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* pt. 89a(2),(3),(6) (1921).

at general courts,⁶ reviewed court-martial records and prepared legal opinions. But this was not a full-time position, as his military records show that MAJ Lynch also served as an “Athletic officer,” “Salvage officer,” “Assistant to the Post Quartermaster” and “Regimental Adjutant” between 1920 and 1922.⁷

By 1925, MAJ Lynch was devoting his time exclusively to legal matters as Assistant Department Judge Advocate in Manila. His duties included “preparation of opinions, examinations of G.C.M. records, writing reviews, giving advice on legal questions, and [serving] as trial judge advocate.”

After returning to U.S. soil in 1926, Lynch served a four year tour of duty at the Office of the Judge Advocate General in Washington, D.C. He worked in the Military Affairs Section, which is akin to today’s Administrative and Civil Law Division. According to his military records, he did well in the War Department. “He demonstrated resourcefulness and power of close analysis” and was “a very helpful assistant in the solution of a variety of legal questions.”⁸

In November 1930, MAJ Lynch returned to the Philippine islands, and resumed his work as the Assistant Department Judge Advocate. Slightly less than four years later, in August 1934, he retired from active duty. But he liked living in the Philippines and decided to remain there. Having moved out of Army housing, Lynch and his family acquired a home in Manila, and he established a private law practice in downtown Manila.⁹

Six years later, with war on the horizon after the German attacks on Poland in 1939, and the Low Countries and France in 1940, Lynch was recalled to active duty in the Philippine Department Judge Advocate’s office. He was now 58 years old, well beyond the normal age for soldiering, but a war was coming and his services as a lawyer in uniform were needed. The good news for Lynch was that he had been recalled as a lieutenant colonel (LTC), and now wore silver oak leaves.

When the Japanese invaded the Philippines on December 8, 1941, LTC Lynch was in Manila and, as the American-Filipino defense of the islands got underway, took on a number of non-legal duties. He also saw combat and, on December 29, 1941, was wounded in action by bomb fragments (lower left leg and left hand) from Japanese artillery fire. He was later awarded the Purple Heart for these combat injuries.¹⁰

Corregidor, a rocky, two-mile-square Island that sits astride the entrance to Manila Bay, was the final defensive position for American and Filipino forces. As units began moving onto the island, Lynch was placed in command of Cabcaban Pier, which was the major off-loading point for materiel coming onto the island. He handled “all unloadings” between December 31, 1941, and January 4, 1942.

Lynch had been promoted to colonel on March 28, 1942, and re-assigned as Staff Judge Advocate, U.S. Forces in the Philippine Islands. In this position he provided the full range of legal advice to Lieutenant General Jonathan “Skinny” Wainwright, the senior most Army officer in the Philippines after General Douglas MacArthur left for Australia in March 1942.¹¹ When Wainwright surrendered all U.S. forces on Corregidor on May 6, 1942, he and Tom Lynch went into Japanese captivity.¹²

Lynch almost certainly did not start the engraving process on his canteen until after he was a POW. In fact, it is likely that the engraver was not Lynch, as a crudely lettered LYNCH on the reverse (concave side) of the canteen was probably done by him. After all, the lettering done on the convex part of the canteen shows a certain artistic flair and, since the last entry on the canteen is dated June 8, 1943, it is likely that the engraving was done in mid-1943.



In any event, Lynch remembered exactly where he had been prior to the surrender of all U.S. and Philippine armed forces on May 6, 1942. As the accompanying photograph shows, Tom Lynch’s canteen identifies him by name, and then traces his location in the Philippines with the following details, including his identity. Note that H.P.D.—U.S.F.I.P. is an abbreviation for “Headquarters, Philippine Department—U.S. Forces in [the] Philippines.” The engraver used a nail or other similar sharp

⁶ U.S. War Department, Form No. 711, Efficiency Report, Lynch, Thomas A. (1 Feb. 1922).

⁷ U.S. War Department, Form No. 711, Efficiency Report, Lynch, Thomas A. (7 Sep. 1921).

⁸ U.S. War Department, Adjutant General’s Office (AGO) Form No. 67, Efficiency Report, Lynch, Thomas A. (1 Jul. 1928).

⁹ Borch, *supra* note 1.

¹⁰ Headquarters, U.S. Forces in the Philippines, Gen. Order No. 26 (13 Apr 1942).

¹¹ Jonathan Mayhew Wainwright “was a tough, professional soldier” whose heroic defense of the Philippines “became a symbol of defiance at a time of national calamity.” He was awarded the Medal of Honor after his release from captivity in 1946. His nickname, “Skinny,” came from his gaunt, gangly physique. JOHN C. FREDRIKSEN, AMERICAN MILITARY LEADERS VOL. II 842 (1999)

¹² Lynch avoided the so-called Bataan Death March, as he was on Corregidor; the Bataan Death March had occurred a month earlier, on 9 April 1942.

object to place the following on the convex portion of the canteen:

COLONEL
THOMAS A. LYNCH
JUDGE ADVOCATE
H.P.D.—U.S.F.I.P.

CORREGIDOR, DEC. 24-26.
MANILA DEC. 27 28.
CORREGIDOR, DEC. 28-29
BATAAN, DEC. 30.
CABCABAN PIER, DEC.
31, '42- JAN. 4, '42. H.P.D.
BATAAN, JAN.4- MAR. 20.
CORREGIDOR MAR 20 - MAY6.

After Wainwright surrendered on May 6, Lynch's canteen records where he was held as a POW:

92ND GARAGE MAY 11-18.
HOSPITAL MAY 18-JULY 2.
BILIBID JULY 2-11
TARLAC JULY.11-AUG. 11 [1942]

The "92nd Garage" was "a flat ten-acre area" that "got its name because it was a motor pool for the 92nd Coast Artillery." As Lynch and his fellow POWs marched to the area, "they saw the bodies of Americans and Filipinos along the way." Eventually, some 12,000 men would be held in the area.¹³

On May 23, 1942, the Japanese began moving POWs from the 92nd Garage to Bilibid prison. But Lynch's canteen shows that he was in the "hospital" from May 18 to July 2, so he did not go to Bilibid until July 2. Nine days later, he was transferred to a POW camp for senior officers (generals and colonels) in the old cadre barracks of the Philippine Army at Tarlac, near Manila. This explains why the canteen is engraved "TARLAC JULY 11-AUG 11."

Lynch left the Philippines for Formosa (today's Taiwan) in August 1942, where he was confined in a POW camp in Karenko. That explains why the canteen is engraved:

TAIWAN <FORMOSA> AUG. 14 –
KARENKO PRISON CAMP AUG. 17- '42 JUN 7 '43

While a POW on Formosa, "Judge" Lynch (as he was known to his comrades-in-arms), rescued a fellow officer, COL Abe Garfinkle, who "slipped and almost fell into the forbidden

pool."¹⁴ According to a book of cartoons about daily life as a POW life drawn by a fellow POW, COL Malcolm Fortier, and miraculously preserved throughout his captivity, Judge Lynch saved Garfinkle by grabbing his foot, thereby preventing his fall into the liquid. It is not clear what was "forbidden" about the pool but it seems to have been a place to be avoided.

In June 1943, COL Lynch and his fellow POWs were moved to a new camp near Shirakawa, Formosa, and the canteen is engraved:

SHIRAKAWA CAMP JUNE 8 '43

This is the last engraved entry on the canteen. But Lynch's military personnel records show where he was held captive after Shirakawa. He remained on Formosa until October 1944, when he and other POWs were transported by ship to Manchuria. The prisoners then travelled by railway to a camp in Mukden. This was a tough experience for Lynch and his fellow POWs, as they had been living in a tropical climate on Formosa and were now in "sub-Arctic weather (47 degrees)" below zero Fahrenheit.¹⁵

During his captivity, COL Lynch—like his fellow POWs—was chiefly concerned with survival. There was never enough food to eat, although the men did begin to receive Red Cross food parcels at some point and this no doubt helped. Nonetheless, at the end of the captivity, the POWs were eating anything they could find, including "green" sunflower seeds and tree snails. Some men lost 20 lbs. in the last month of their imprisonment; when COL Lynch was liberated by advancing Soviet troops on August 20, 1945, he weighed 116 lbs.¹⁶

Tom Lynch was a lucky man; many Americans had not survived captivity. Additionally, the Japanese High Command had given orders that all POWs in various camps in the Mukden area—including the camp where Lynch was imprisoned—were to be killed. This explains why a small team of Office of Strategic Services (OSS) agents parachuted from a low-flying bomber on August 15, 1945, and moved to the Mukden camp area to prevent the massacre of American and Allied POWs.¹⁷

Repatriated to the United States in early September 1945, COL Lynch had a period of "rest and recuperation" before appearing before an "Army retiring board" on January 26, 1946. A medical examination had previously "found [Lynch] to be permanently incapacitated" as a result of severe arteriosclerosis. As the board concluded that this physical infirmity was the direct result of his captivity as a POW, the board directed that Lynch

¹³ Defenders of the Philippine, http://philippine-defenders.lib.wv.us/html/92nd_garage.html (last visited August 17, 2017)

¹⁴ MALCOLM VAUGHN FORTIER, THE LIFE OF A P.O.W. UNDER THE JAPANESE 46 (1946).

¹⁵ *Id.*, at 110.

¹⁶ *Id.* at 124.

¹⁷ For more on this Office of Strategic Services mission, see HAL LEITH, POWS OF JAPANESE: RESCUED! (2004). While the intent of the OSS was to rescue high-ranking officers like Lieutenant General Wainwright, COL Tom Lynch and his fellow POWs also were beneficiaries of this rescue mission.

“be relieved from active duty . . . at the expiration of his rest and recuperation leave” and retired as a colonel.¹⁸

When Tom Lynch died in 1962, at the age of 80, he still had the canteen that had kept him alive as a POW. Thanks to the generosity of his son, Tom Lynch, and his daughter, Susan Lynch, this remarkable relic is on loan to the Corps and is on display for all in the Regiment to see.



¹⁸ Memorandum for the Secretary of War's Personnel Board, subj: Benefits under Public Law 101-78th Congress, Lynch, Thomas A. (26 Feb. 1946).

Parenthood Requires Love, Not DNA

Major Shawn I. Atkins*

I. Introduction

Suzy Soldier is a married mother of a four-year-old son named Gabriel. Her husband, Reliable Joe, is not Gabriel's biological father. Reliable Joe came into their lives three years ago and is the only father figure Gabriel has ever known. Gabriel's biological father, Deadbeat Dad, has not provided financial or emotional support to Gabriel since his birth and is presently nowhere to be found. Reliable Joe has stepped in and cares for Gabriel while Suzy Soldier is performing temporary duty trips, staff duty, and multiple field exercises. But Suzy is now facing her longest absence from Gabriel: Suzy is facing her first deployment to Iraq.

The deployment is a game changer for this young family. For the first time, they realize that there is a real possibility of something tragic happening to Suzy Soldier. This leads them to question what will happen to Gabriel, both during the deployment or, worse, should Suzy not return. State law may award custody of Gabriel back to his biological father should Suzy not return from the battlefield.¹ Although Reliable Joe has been Gabriel's father in all but law, there are no documents detailing what his rights are.

Suzy just completed her unit Soldier Readiness Program (SRP), and the paralegal that she spoke with suggested that she talk to a lawyer.² This is an opportunity to excel for a newly commissioned legal assistance attorney. You are that new but brilliant legal-assistance attorney at Fort Buffalo, Kansas.

Your new client, Suzy Soldier, is seeking advice on how she and Reliable Joe can start the stepparent adoption process of Gabriel.

This article will provide legal-assistance practitioners with a background on the stepparent adoption process and a step-by-step approach to begin it. This article will focus on the laws of the State of Kansas, your current location. To understand the issues and to properly advise your client, you will need to know the basics of adoption law. To build that understanding, this article will first provide background information regarding divorce and adoption. Next, the article will discuss the different types of adoption, to include a few of the benefits and drawbacks of each type. Finally, the article will guide the reader through the stepparent adoption process under the laws of Kansas, a state with a large military presence with both Fort Riley and Fort Leavenworth located within its borders. Templates of a stepparent adoption petition and allied filings are included in appendices for your reference and use.

II. Background

Military service is hard on families. Long separations, difficulty with communication, frequent moves, and long work hours compound the common stressors found in all types of relationships, to include parenthood and managing household finances.³ These factors weigh down relationships within military families. Consequently, as in the civilian world, many marriages in the military end in divorce.⁴

* Judge Advocate, United States Army. Presently assigned as Deputy, Military and Civil Law Division, United States Army Europe. LLM – Military Law, 2017, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, VA; Juris Doctor, 2005, Washburn University School of Law, Topeka, Kansas; Bachelors of Business Administration, 2002, Fort Hays State University, Hays, Kansas. Previous assignments include Trial Counsel and Special Assistant United States Attorney, 101st Airborne Division (Air Assault), Fort Campbell, Kentucky, 2015-2016; Deputy Regiment Judge Advocate, 160th Special Operations Aviation Regiment (Airborne), Fort Campbell, Kentucky, 2013-2015; Trial Defense Counsel, Fort Campbell Field Office, Fort Campbell, Kentucky, 2011-2013; Afghan Prosecution Liaison, Combined Joint Interagency Task Force 435, Bagram, Afghanistan, 2010-2011; Deputy Command Judge Advocate, United States Disciplinary Barracks, Fort Leavenworth, Kansas, 2009-2010; and Legal Assistance Attorney, Office of the Staff Judge Advocate, Fort Leavenworth, Kansas, 2008-2009. Member of the bars of Kansas and the U.S. Supreme Court. This paper was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

¹ In re Adoption of A.J.W., No. 112259, 2015 WL 569444 (Kan. Ct. App. Jan. 30, 2015) (dismissing a stepparent adoption proceeding for lacking the consent of the biological father after he was killed during a motorcycle accident). The court ruled that the stepmother was precluded from continuing with the adoption proceeding without the written consent from the then-deceased biological father. *Id.*

² This scenario is loosely based on the author's personal and professional experiences as a Legal Assistance Attorney for the Office of the Staff Judge Advocate, Fort Leavenworth, Kansas, from 20 November 2008 to 10 May 2010. The author was once the single father of a young daughter. *Id.* The biological mother had no decision-making authority and no visitation with the child. *Id.* The author remarried and initiated stepparent adoption proceedings to solidify the legal standing of his new wife due to his pending deployment to Afghanistan. *Id.*

³ Erin Prater, *Military Marriage Killers and Stressors*, FOCUS ON THE FAMILY, <http://www.focusonthefamily.com/marriage/military-marriage/coping-with-deployment/killers-and-stressors> (last visited Mar. 15, 2017).

⁴ The divorce rate in the military in 2015 was 3%. Amy Bushatz, *Military Divorce Rate Continues Slow But Steady Decline*, MILITARY.COM (June. 13, 2016), <http://www.military.com/daily-news/2016/04/22/military-divorce-rate-continues-slow-but-steady-decline.html>. To the uninformed reader, that number does not seem troubling. That 3.0%, however, is per year. *Id.* Multiply that percentage over the course of a 20 or 30 year career, and the military family is not only at risk for divorce; it is likely to end in divorce. Compare that with the most recent data on civilian divorce rates, which indicate that 3.2% of marriages ended in divorce, slightly higher than the military rate. *Marriage and Divorce*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/marriage-divorce.htm> (last visited Mar. 15, 2017).

These divorces leave thousands of families in the patchwork environment of blended families, stepparents, and stepchildren. Blended families are family units that have children from prior relationships and are combined to form one new family.⁵ Those families create unique legal challenges for servicemembers.⁶ Custody arrangements, visitation rights, and the enforcement of child-support orders are but a few of the legal issues facing many such families. Some separated biological parents have no trouble coordinating visitation and keeping the best interest of the child at the forefront of their decision-making. However, other parents are not able to do so. This problem is heightened by non-custodial parents not meeting their parental responsibilities, either by not financially supporting the child or by being an absentee parent altogether.

In situations in which a biological parent fails to meet his or her legal and/or moral responsibilities, a stepparent relationship can make a world of difference.⁷ The child benefits from a parental relationship with the spouse of one of their biological parents through the stability, financial assistance, love, and support provided by the stepparent, which the child is not getting from one of their own biological parents.⁸ Facilitating this type of family is what stepparent adoption is all about. While this article's primary focus is on the stepparent adoption process, to advise in the area, a brief overview of adoption in general is essential.⁹

A. Adoption in General

Adoption is the legal process by which a child acquires a parent or parents other than the child's biological parents, and those parents establish, in turn, a legal relationship with a child other than a biological child.¹⁰ Upon issuance of the adoption decree, the legal rights that formerly existed between the child and his natural parents are terminated and are

replaced by the rights and obligations between that child and his or her new adoptive parents.¹¹ Adoption can be broken up into several different categories, each with its own unique circumstances.

1. Open and Closed Adoptions

In open adoptions, the child grows up with some understanding that he or she is not the biological child of the adoptive parents. As a consequence, the child may have a relationship with both the adoptive parents and biological parents.¹² In essence, these adoptive families choose to have contact with the biological parents.¹³

Closed adoptions are when no identifying information about the birth family or the adoptive family is shared, and there is no contact, between the families.¹⁴ This allows the child to grow up without the additional complexity of knowing that she has been adopted, but that can also cause an avalanche of emotions later in life, should she discover that she was adopted and was never told.¹⁵

2. Agency and Private Adoptions

Adoption agencies are either private or government entities that specialize in the complete adoption process, not just the legal process. Agencies typically provide all-inclusive services, such as background checks, legal and psychological counseling, parental evaluations, and home studies.¹⁶ Agencies can even take care of advertising an adoptive parent's interest in adoption to prospective birth parents.¹⁷ Prospective parents may find this option appealing due to the all-inclusive nature of the service. However, because of all of the services offered, agency adoptions are often more expensive than private adoptions.¹⁸

different process than a stepparent adoption.

⁵ Melissa Mayntz, *Definition of a Blended Family*, LOVETOKNOW, <http://family.lovetoknow.com/definition-blended-family> (last visited Mar. 15, 2017).

⁶ Nansook Park, *Military Children and Families*, AM. PSYCHOL., vol. 66(1), Jan. 2011, at 65-72. For example, with the military moving servicemembers and their families from one duty assignment to the next, blended families have to adjust visitation schedules much more often than the non-military family. *Id.* The routine shared custody arrangement must be modified to accommodate the moves. *Id.*

⁷ Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, THE FUTURE OF CHILDREN, vol. 15, no. 2, Fall 2005, at 75-96.

⁸ However, the benefits of the stepparent relationship are not without complications. Foremost, the relationship is on shaky legal ground. See *supra* note 2 and accompanying text (discussing stepparent parents when the biological parent dies). If not properly navigated, an absentee parent can disrupt the relationship between the stepparent and the child and possibly obtain custody. Personal experience, *supra* note 3.

⁹ Stepparent adoption is one of several types of adoption. *Types of Adoption*, Nat'l Adoption Ctr., <http://www.adopt.org/types-adoptions> (last visited Mar. 15, 2017). The following description of adoption involves situations in which two parents are both adopting a child. This is an entirely

¹⁰ HOMER H. CLARK JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 565 (2d Ed. 1988).

¹¹ *Id.*

¹² *Types of Adoption, supra* note 10.

¹³ Benefits to this type of adoption include an open relationship without secrets and access to otherwise unavailable medical information. *Id.*

¹⁴ *Types of Adoption, supra* note 10.

¹⁵ Many children deal with a variety of emotions after discovering they were adopted, including excitement, anger, curiosity, worry, and rejection. *Finding Out You're Adopted*, REACH OUT, <http://us.reachout.com/facts/factsheet/adoption-how-you-feel-emotionally-about-it1> (last visited Mar. 15, 2017).

¹⁶ *Private vs. Agency Adoption*, MY ADOPTION ADVISOR, http://www.myadoptionadvisor.com/th_gallery/private-vs-agency-adoption/ (last visited Mar. 15, 2017).

¹⁷ *Id.*

¹⁸ Total agency costs typically range from \$15,000 to \$40,000. Child Welfare Info. Gateway, *Planning for Adoption: Knowing the Costs and*

Private adoptions are different from agency adoptions in that they usually result in birth parents relinquishing their rights directly to the adopting parents without the assistance of an agency.¹⁹ They are accomplished with the assistance of an attorney who has experience in the adoption process.²⁰ Private adoptions often occur when one family member is adopting the biological child of another family member.²¹ These adoptions are generally less expensive than agency adoptions, but the services provided are also often more limited. Further, unlike adoption agencies, although attorneys can be qualified to walk prospective parents through the process, they typically do not—and should not—provide counseling and after-care.²²

B. Stepparent Adoption

A stepparent adoption is an adoption in which a biological parent's spouse, who is not the other biological parent, seeks to adopt the child.²³ Stepparent adoption is the most common type of adoption.²⁴ This has the effect of terminating the natural parent's legal rights and obligations.²⁵ The single most significant advantage of stepparent adoption is peace of mind. The law will recognize the existing relationship between the former-stepparent, now parent, and the child, and provide insurance of a continuity of care in the event something happens to the biological parent.²⁶

Notwithstanding the great advantages for the child, there are also a few real, or perceived, disadvantages to stepparent adoption. Most seriously, if a court previously ordered child support from the parent whose rights are terminated, this obligation will cease upon the issuance of the decree of adoption.²⁷ The new legal parent then has the moral and legal obligation to step in and provide financially for the child.²⁸

Another consideration that families must consider is the possible disinheritance of the child by the biological parent. When adopted, the adopted child is entitled to the same

personal and property rights as a birth child of the adoptive parents. Further, upon adoption, the now-severed birth parent's rights to the adopted child, including the right to inherit from or through the child, also cease. However, as a matter of law, the adoption does not terminate the child's right to inherit from or through the birth parent.²⁹ Thus, the child may still inherit through the birth parent if that parent should die intestate.³⁰ Therefore, it may be beneficial to counsel clients to review the monetary concerns, in addition to the emotional aspects, when considering whether to move forward.

Under Kansas law, there are two methods by which a stepparent may proceed with stepparent adoption proceedings. They are characterized by whether the adoption occurs with or without the consent of the non-custodial biological parent. Both scenarios will be discussed below.

1. Consent

The first and easiest way a proceeding may move forward is to have the non-custodial parent voluntarily consent to the stepparent adoption. This can be accomplished by the non-custodial parent simply signing the consent form in front of a notary.³¹ This method is the most efficient and least complicated for the termination of that non-custodial parent's parental rights and the subsequent establishment of a stepparent adoption. A knowing and voluntary relinquishment of rights ensures that the biological parent is aware of what his or her rights and of the consequences and finality of an adoption decree.³²

2. Non-consent

The second method is more difficult. If the non-custodial parent is not willing to consent to the adoption, a court must have grounds to terminate the rights of the biological parent

Resources, U.S. DEP'T OF HEALTH & HUMAN SERVICES (Nov. 2016), https://www.childwelfare.gov/pubpdfs/s_costs.pdf.

¹⁹ *Private vs. Agency Adoption*, *supra* note 16.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Child Welfare Info. Gateway, *Stepparent Adoption*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (May 2013), https://www.childwelfare.gov/pubpdfs/f_step.pdf.

²⁴ *Id.*

²⁵ Severing the legal rights of the biological parent is essential: if not done, a stepparent will most likely lose custody of a child upon the absence or death of the spouse, reverting custody back to the noncustodial biological parent with whom the child may have no relationship at all. Personal experience, *supra* note 3.

²⁶ Einhorn Harris, *The Pros and Cons of Stepparent Adoption*, EINHORN HARRIS (Mar. 11, 2014), <http://www.einhornharris.com/familylawblog/pros-cons-stepparent-adoption/>.

²⁷ Kan. Stat. Ann. § 59-2118(b) (2014) (detailing all the rights and liabilities of the new adoptive parents).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Kan. Stat. Ann. § 59-2114(a) (2014). "Consent shall be in writing and shall be acknowledged before a judge or a court or record or before an officer authorized by law to take acknowledgments." *Id.*

³² This preferred method is similar to a guilty plea in the criminal law field. When an accused pleads guilty during his court martial, the military judge advises the accused that "(a) plea of guilty is equivalent to a conviction and is the strongest form of proof known to the law." U.S. DEPT OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-2-1 (10 Sept. 2014).

or find that consent is not necessary.³³ A non-custodial parent can challenge the adoption proceeding or choose not to participate in the proceedings. Just as disagreements are common regarding parental roles and responsibilities, so too are disagreements regarding adoption. There are many reasons for this.³⁴

Foremost, the right of a parent to direct the care, custody, and control of that parent's children is a well-established liberty interest protected by due process.³⁵ As a consequence, courts apply a very high standard regarding the termination of parental rights.³⁶ This was spelled out by the Supreme Court when it recognized the importance of parental rights and the protections of those rights.³⁷ Rights regarding raising one's children have been deemed "essential,"³⁸ "basic civil rights of man,"³⁹ and "[r]ights far more precious . . . than property rights."⁴⁰ Further, the Court has said, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁴¹

Consistent with Supreme Court case law, state courts similarly protect a parent's right to raise his or her children. In Kansas, for instance, "a natural parent who has assumed his or her parental responsibilities has a fundamental right, protected by the United States Constitution and the Kansas Constitution, to raise his or her child."⁴² It is clear that courts at all levels are justifiably reluctant to terminate parent/child relationships. Thus, when the biological parent does not consent, the adoption process is a more thorough and most likely, a more contentious proceeding.

Courts look at a variety of factors in determining whether it is appropriate to grant the petition for stepparent adoption and terminate the rights of the noncustodial biological parent. One important factor, criminal nonsupport, describes a scenario in which the biological parent affirmatively chooses to not support his or her child and faces criminal sanctions.⁴³ Courts will not only look at the fact that the parent has not provided support, but whether the parent had the ability to support.⁴⁴ Kansas law states that consent is not required when the non-custodial parent has not assumed the responsibilities of a parent for the two years preceding the filing.⁴⁵ Choosing

³³ Kan. Stat. Ann. § 59-2136(d) (2014) (providing that the consent of the biological parent is not required in circumstances where the parent has only incidental contacts with the child).

³⁴ Personal experiences, *supra* note 3. Different familial backgrounds, different economic backgrounds, different hopes and dreams for their children, and parents' own expectations and failures can all play a large role in leading toward a stepparent adoption pleading. *Id.* When the relationship between the two biological parents ends, it is often difficult for the two to think and act solely in the best interest of the child. *Id.* Oftentimes, the non-custodial parent cannot come to terms with the thought that one may have failed as a parent and that the child will be better off with someone else raising him or her. *Id.*

³⁵ Liisa Speaker, *Comparative Analysis for the Parent Seeking to Terminate the Parental Rights of the Other Parent*, 31 T.M. COOLEY L. REV. 351 (2014) (citing *Hunter v. Hunter*, 771 N.W.2d 694, 701 (Mich. 2009)).

³⁶ *Id.*

³⁷ *Stanley v. State of Illinois*, 405 U.S. 645, 651 (1972) (overturning an Illinois law that presumed that the unwed father of three children was unfit to care for the children after the death of their mother because he was unmarried).

³⁸ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Supreme Court struck down a Nebraska state law criminalizing the teaching of German to students who had not attained an eighth-grade education. *Id.* The Court stated, "no state shall deprive any person of liberty without due process of law 'liberty' denotes, not merely freedom from bodily restraint, but also the right of the individual to contract to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.*

³⁹ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The Supreme Court again struck down an Oklahoma criminal statute defining a "habitual criminal" as someone being convicted two or more times for crimes "amount to felonies involving moral turpitude." *Id.* The statute called for the sexual sterilization of the accused. *Id.* at 537. The Court stated, "We are dealing here with legislation which involves one of the basic civil rights of man." *Id.* at 541.

⁴⁰ *May v. Anderson*, 345 U.S. 528, 533 (1953) (overruling the Ohio Supreme Court giving full faith and credit to a Wisconsin divorce decree awarding custody of minor children to their father where that decree was obtained in *ex parte* divorce action in Wisconsin court that had no personal jurisdiction over the mother). In *May v. Anderson*, the Court noted that "[r]ights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody." *Id.* at 533.

⁴¹ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (upholding the Massachusetts Supreme Judicial Court's order restricting the sale or distribution of material by boys under the age of 12 and girls under the age of 18). In *Prince*, the custodians of a minor child, both practicing Jehovah Witnesses, were passing out religious literature on the street corner. *Id.* at 159. The adult was convicted of violation of state employment laws prohibiting said conduct. *Id.*

⁴² *In re Adoption of G.L.V.*, 286 Kan. 1034, 1057 (2008) (finding that father who had provided substantial financial support for two children in the preceding two years prevented a court from granting stepfather's petition for adoption without father's consent and that the evidence was sufficient to support finding that court considered the best interests of the child and the fitness of the nonconsenting parent in denying petition).

⁴³ *Criminal Nonsupport and Child Support*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/criminal-nonsupport-and-child-support.aspx> (last visited Mar. 9, 2017).

⁴⁴ *In re J.M.D.*, 293 Kan. 153, 155 (2011) (overturning Kansas Court of Appeals ruling and affirming the district court order granting the stepparent adoption of two minor children under Kan. Stat. Ann. § 59-2136(d)). In *J.M.D.*, the court held that the best interest of the child is one factor that the court should consider, but that the standard does not override the requirement that the natural born parent must consent to the proceeding if the court finds that a parent has assumed minimal parental responsibilities. *Id.* The biological father in that case was incarcerated but had met his judicially decreed child support payment of \$5.00 per month for the ten months prior to filing of the petition. *Id.* The court ruled that him meeting the minimum payment, while having the ability to pay more, did not rise to the standard of assuming his parental responsibilities. *Id.* Further, the court ruled that financial support is but one of many duties that may be considered. *Id.*

⁴⁵ Kan. Stat. Ann. § 59-2136(d) (2014) (relinquishment and adoption; proceedings to terminate parental rights). "In a stepparent adoption, if a mother consents to the adoption of a child who has a presumed father under subsection (a)(1), (2) or (3) of K.S.A. 38-1114 and amendments thereto, or

not to support your child, while having the ability to do so, will negatively impact the ability of natural parents who seek to avoid termination of parental rights and block stepparent adoptions.⁴⁶ With all states having criminal nonsupport statutes, this could potentially land a parent in jail.⁴⁷ It is a powerful piece of evidence in support of allowing the stepparent adoption.⁴⁸

III. Putting It All Together

As a legal assistance attorney, you are generally not going to represent your clients in the civilian court system. Some exceptions exist, but rarely do military attorneys appear in state courts on behalf of legal assistance clients.⁴⁹ The differences among each state's law and civil procedure make it nearly impossible for legal assistance attorneys to obtain the requisite legal experience required to deal with complicated issues, and in any event, advice on adoption and family law matters should only be offered if the attorney has the necessary expertise.⁵⁰

You may not be able to appear in court with your client, but should your clients wish to proceed on their own, you can still be of valuable assistance, and potentially help save thousands of dollars. Providing your clients the templates for many of the documents or reviewing documents that they may have already prepared can provide your clients peace of mind during the stepparent-adoption process. Indeed, simply explaining the basic process, identifying the required filings and illustrating the evidence necessary to support those filings can be helpful. Always bear in mind that the multitude of documents necessary to petition a court for an adoption might be extraordinarily confusing to clients.

To provide legal assistance attorneys a roadmap, Kansas can be used as a model to identify and discuss the necessary stapes.

who has a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the consent of such father must be given to the adoption unless such father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption or is incapable of giving such consent." *Id.* "In determining whether a father's consent is required under this subsection, the court may disregard incidental visitations, contacts, communications, or contributions." *Id.*

⁴⁶ In re J.M.D., 293 Kan. 153, 155 (2011).

⁴⁷ *Criminal Nonsupport and Child Support*, *supra* note 49.

⁴⁸ In re J.M.D., 293 Kan. 153, 155 (2011).

⁴⁹ U.S. DEP'T OF ARMY, REG. 27-3, THE LEGAL ASSISTANCE PROGRAM para 3-7(g)(2)(d) (21 Feb. 1996) [hereinafter AR 27-3] (providing limited exceptions when military legal assistance attorneys may represent clients in civil proceedings).

Using Kansas as a model, the steps in stepparent adoption are identified and discussed below.⁵¹

A. Petition for Adoption

The first step in helping Suzy Soldier is determining if the adoption of Gabriel by Reliable Joe is even legally possible. Any adult married couple, jointly, may adopt any minor or adult as that couple's child except that one spouse cannot do so without the consent of the other.⁵² Provided Suzy has given her written consent within the last six months, Reliable Joe may proceed in petitioning the court to adopt Gabriel.⁵³

Drafting the petition for adoption is not a difficult process. Kansas state law requires certain mandatory provisions be included in the petition, however.⁵⁴ If the mandatory information is not provided, a party, or the court *sua sponte*, will likely move to stay the proceeding until the information is provided.⁵⁵

B. Notice of Hearing

After filing the petition and any required evidence, the court must then set the time and place for the hearing. This must be at least sixty days from the date the petition is filed.⁵⁶ Notice to the biological parent is generally required, but not in circumstances where the biological parent has not performed parental duties for two years before the date on which the petition is filed.⁵⁷ Specifically, unless notice has been waived, the child has been abandoned, or parental rights have been previously terminated, notice is required.⁵⁸ A copy of the petition must be provided with the notice of hearing.⁵⁹

C. Notice of Suit

⁵⁰ *Id.* para. 3-6(a); *see also* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 1.1 (1 May 1992) [hereinafter AR 27-26].

⁵¹ Each document is provided in the Appendices.

⁵² Kan. Stat. Ann. § 59-2113 (2014).

⁵³ Kan. Stat. Ann. § 59-2114(b) (2014).

⁵⁴ Kan. Stat. Ann. § 59-2128(a) (2014) (listing eleven different requirements for the petition for adoption).

⁵⁵ Kan. Stat. Ann. § 59-2128(b) (2014).

⁵⁶ Kan. Stat. Ann. § 59-2133(a) (2014).

⁵⁷ Kan. Stat. Ann. § 59-2133(b) (2014).

⁵⁸ *Id.*

⁵⁹ *Id.*

If notice is required, locating the non-custodial biological parent is the next step, which may prove difficult. There are times when non-custodial parents do not want to be found and have failed to update the other parent of his or her whereabouts. This can occur, for instance, when the parent does not wish to be found in fear that his or her wages will be garnished to pay child-support obligations in arrears or face criminal nonsupport charges. To address these situations, Kansas law allows for income withholding orders “to enhance the enforcement of all support obligations by providing a quick and effective procedure for withholding income”⁶⁰ Under the Kansas Income Withholding Act, a child-support obligor may have up to 50% of his or her disposable income withheld by employers to cover current amounts due and any arrearages.⁶¹

Regardless of the difficulty, however, finding the non-custodial biological parent is vitally important. Should the non-custodial biological parent simply consent, the process moves much quicker because, in that case, there are no requirements to serve notice of the proceeding, no requirement to publish the proceeding in a local periodical, and no requirement for the biological parent to be present.⁶² Additionally, if not present, the law provides a mechanism to protect the rights of the absent parent through a guardian ad litem.

D. Motion to Appoint Guardian Ad Litem for Natural Parent

In general, a guardian ad litem is appointed for a “party the court deems responsible for an incapacitated, handicapped, or minor in court.”⁶³ In the event that you cannot obtain the biological parent’s consent and that parent also declines to participate in the proceeding, it may be advisable to have a guardian ad litem appointed to represent the interests of the absent parent.

E. Summons

If Deadbeat Dad refuses to send you back the signed consent form, or refuses to come into the office to sign it, you must serve him.⁶⁴ Service may be accomplished in a variety of ways. These include return-receipt delivery, personal and residence service, or acknowledgment and appearance.⁶⁵ In Kansas, the sheriff of the county in which the action is filed

may serve the petition and notice of the hearing on the party.⁶⁶ If Deadbeat Dad is located in another state, you must determine how to achieve proper service within that state.

F. Consent of Father

A biological parent who properly consents to an adoption in writing and files that consent with the court has essentially guaranteed that the adoption will be upheld if later challenged. For example, Kansas law provides that consent is final when it is given unless before the final decree of adoption, the revoking party is able to prove by clear and convincing evidence that the consent was not freely and voluntarily given.⁶⁷ If, later in your legal assistance role you next find yourself on the other side of the equation, advising a non-custodial biological parent, it is imperative that you fully explain what rights will be terminated with the submission of the consent.

With the younger population in the military, it is also important to remember to ask whether the non-custodial parent is above the age of 18, however unlikely. Minor parents may still relinquish custody and consent to the adoption, but they must be advised by independent legal counsel as to the consequences of the consent to the adoption and relinquishment of parental rights before its execution.⁶⁸ If Deadbeat Dad is a minor, and has not retained independent legal counsel, Reliable Joe will be responsible for providing that counsel at his sole expense.⁶⁹

The non-custodial biological parent’s consent may be executed anywhere, but if outside Kansas, different standards must be met.⁷⁰ For example, if Deadbeat Dad lives in Missouri, the consent must be executed in conformity with Missouri state law.⁷¹ If he resides in a foreign country, the consent must be acknowledged or affirmed in accordance with the law and procedure of the foreign country.⁷² Of obvious importance, if Deadbeat Dad is also a servicemember, the consent may be signed before a commissioned officer and the “signature of the officer shall be verified by a notary public or by such other procedure as is then in effect for that branch.”⁷³ In this case, judge advocates,

⁶⁰ Kan. Stat. Ann. § 23-3101(b) (2014) (known as the Income Withholding Act).

⁶¹ Kan. Stat. Ann. § 23-3104(f) (2014).

⁶² See Kan. Stat. Ann. § 59-2129 (2014).

⁶³ *Guardian Ad Litem*, THE LAW DICTIONARY, <http://thelawdictionary.org/guardian-ad-litem/> (last visited Mar. 9, 2017).

⁶⁴ Kan. Stat. Ann. § 60-303 (2014) (methods of service).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Kan. Stat. Ann. § 59-2114(a) (2014).

⁶⁸ Kan. Stat. Ann. § 59-2115 (2014) (describing parental consent as a minor).

⁶⁹ *Id.*

⁷⁰ Kan. Stat. Ann. § 59-2117 (2014) (describing consent execution outside the state, in a foreign country or when in military service).

⁷¹ Kan. Stat. Ann. § 59-2117(a) (2014).

⁷² Kan. Stat. Ann. § 59-2117(b) (2014).

⁷³ Kan. Stat. Ann. § 59-2118(c) (2014).

adjutants, civilian attorneys and others designated by service regulations may serve as a notary for Deadbeat Dad.⁷⁴

If you are able to find the non-custodial biological parent, simply mailing the consent form to their residence and asking for a signature may be appropriate. A letter detailing the nature of the proceeding and instructions on how to properly complete the form may suffice. Hopefully, you will receive a completed consent form signed by the parent and notarized by an appropriate official. If he is entitled to legal assistance, your military or civilian paralegal will be able to execute the consent.⁷⁵ However, as with any contact with an adverse party in the legal context, attorneys must be careful to avoid any professional responsibility or ethics violations.⁷⁶ In this case, with Deadbeat Dad not represented by counsel, attorneys must ensure that he understands that you are not a disinterested party, and always take steps to ensure that your communication cannot be misinterpreted.⁷⁷

Additionally, in some cases, the consent of the parents may not be the only consent that must be obtained. Children over the age of 14 and of sound intellect must also consent to being adopted by a stepparent.⁷⁸ For this scenario, these are not issues: Deadbeat Dad is over the age of eighteen, and Gabriel is only four.

G. Affidavit Concerning Genetic, Medical, and Social History

Background information required at the time of filing includes a variety of topics, including medical and social history of the child and parents, addresses of interested parties, hospital records of the child's biological parents, and birth records.⁷⁹ Again, this information must be provided at the time the petition is filed. If the required information is not available, the adopting party must submit affidavits explaining the reasons why it is not available, which must be filed with the petition for adoption.⁸⁰ Typically, psychological assessments are also required in both independent and agency adoptions; however, this requirement

may be waived either by request of a relative of the child, or upon motion of the court.⁸¹ Psychological assessments are estimated to cost between \$250.00 and \$400.00.⁸²

H. Affidavit of Accounting

An affidavit of accounting must be provided to the court to account for any consideration exchanging hands in connection with a placement for adoption.⁸³ Only certain consideration is appropriate in adoption proceedings.⁸⁴ Reasonable fees are allowed, including fees for legal, professional services, actual medical expenses for the mother that are attributable to pregnancy, actual medical expenses of the child, and reasonable living expenses as a result of pregnancy.⁸⁵ Most of these types of expenses will not be incurred with a stepparent adoption. After a review of the accounting by the court, a judge may order the reimbursement of any consideration in violation of the law.⁸⁶ Qualified adoption expenses may be offset by a nonrefundable tax credit limited to any tax liability for the year.⁸⁷

I. Affidavit of Publication

If you are unable to obtain service on the non-custodial biological parent through one of the methods listed above, service by publication may be another option.⁸⁸ Kansas law states that service by publication is permissible if a party, with due diligence, is unable to serve summons on the defendant in the state.⁸⁹ Service by publication is available by sending a copy of the petition for adoption and a notice to appear to a local news publication of the non-custodial biological parent's last known address.⁹⁰ However, the attorney must ensure that due diligence has first been completed. The Kansas Supreme Court has said "it must be affirmatively shown that the party seeking such service exercised due diligence in attempting to identify and locate the parent upon whom such service is desired."⁹¹ Therefore, it is wise to document all attempts to identify and locate the parent in order to provide the court evidence it may rely on to allow the

⁷⁴ 10 U.S. Code § 1044a (2001).

⁷⁵ *Id.*

⁷⁶ AR 27-26, rule 4.3.

⁷⁷ *Id.*

⁷⁸ Kan. Stat. Ann. § 59-2129(a)(6) (2014).

⁷⁹ Kan. Stat. Ann. § 59-2130(a) (2014) (listing background information required for different types of adoptions).

⁸⁰ Kan. Stat. Ann. § 59-2130(c) (2014).

⁸¹ Kan. Stat. Ann. § 59-2132(h) (2014).

⁸² *Adoption Costs (Statistics)*, ADOPTION.COM, [http://adoption.com/wiki/Adoption_Costs_\(Statistics\)](http://adoption.com/wiki/Adoption_Costs_(Statistics)) (last visited Mar. 15, 2017) (listing approximate costs incurred during the adoption process).

⁸³ Kan. Stat. Ann. § 59-2121 (2014).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Topic 607 – Adoption Credit and Adoption Assistance Programs*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/taxtopics/tc607.html> (last updated Feb. 17, 2017).

⁸⁸ Kan. Stat. Ann. § 60-307 (2014) (service by publication).

⁸⁹ Kan. Stat. Ann. § 60-307(a)(3) (2014).

⁹⁰ *Id.*

⁹¹ *In Interest of Woodard*, 231 Kan. 544 (1982) (holding no factual basis of due diligence in seeking personal service on a biological father).

adoption.

Requirements for the length of time that the notice must appear in the publication vary by state, but Kansas law requires that the party being served by publication must reply on or before forty-one days of the first date of the notice's publication.⁹² If after the minimum time has passed and there is still no response from the birth parent, the court may proceed without either consent or appearance of the party.⁹³

J. Affidavit of Custodial Parent

In Kansas stepparent adoptions, written consent is required by one of the biological parents — for instance, the stepparent's spouse — if the other biological parent's consent is not necessary.⁹⁴ This written consent is straight-forward and easy to complete.

K. Affidavit of Venue

Venue and jurisdiction are next on your list of research topics. If a court has already presided over the matter, it may have retained jurisdiction of the matter. If not, Kansas courts may be the appropriate venue. Kansas has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which details what court has jurisdiction for child custody matters.⁹⁵ Specifically, Kansas law states that a Kansas court

May not exercise jurisdiction over a proceeding for adoption of a minor if at the time the petition for adoption is filed a proceeding concerning the custody or adoption of the minor is pending in a court of another state exercising jurisdiction substantially in conformity with the uniform child custody jurisdiction act, or the uniform child custody jurisdiction and enforcement act, or this act unless the preceding is stayed by the court of the other state.⁹⁶

In stepparent adoptions, the venue is the county in which the petitioner or the child resides.⁹⁷ In adoption cases, residence of a child can be defined several ways under state law.⁹⁸ For our scenario, Gabriel's residence will be the same as his mother's.

⁹² Kan. Stat. Ann. § 60-307(d)(2)(b) (2014).

⁹³ *Id.*

⁹⁴ Kan. Stat. Ann. § 59-2129(a)(2) (2014).

⁹⁵ Kan. Stat. Ann. §§ 38-1336-1377 (2014) (Uniform Child-Custody Jurisdiction and Enforcement Act).

⁹⁶ Kan. Stat. Ann. § 59-2127 (2014) (jurisdiction).

⁹⁷ Kan. Stat. Ann. § 59-2126 (2014) (venue).

L. Decree of Adoption

Once service has been accomplished, either through personal service or publication, the court may proceed with the hearing. At the hearing, the court will hear all evidence relating to the adoption, to include any additional filings, to determine whether the petition should be granted and allow the adoption.⁹⁹ If the court grants the adoption, the court will then issue a final decree of adoption.¹⁰⁰ Once the final decree of adoption is issued, it may be advisable to provide copies to the child's school, insurance provider, and Suzy Soldier's unit for Soldier readiness.

IV. Conclusion

The decision to adopt a child is nothing to be taken lightly. Assuming the role of a parent is difficult enough for a biological parent. An emotional roller coaster can be expected by new parents. Few things change your life like the birth of a child.

With a stepparent adoption, this new child may be a few weeks old, may be Gabriel's age, or may be older. When a stepparent raises someone else's biological child as that person's own, the stepparent chooses to accept the financial and moral responsibility that all courts recognize as one of a person's most sacred rights, a right that is also worthy of the strictest protection and scrutiny when threatened. Yet, in many ways, the process of stepparent adoption is simple: it is a step-by-step legal process that results in legally recognizing and, hopefully, strengthening the parental relationship that already exists between the stepparent and the child.

The stepparent adoption process is not difficult, provided that either the non-custodial biological parent consents to the adoption or when that parent has failed to assume the duties of a parent for the previous two years. Once the required background information is obtained, it is a simple matter of filing the petition, obtaining service, attending the hearing, and receiving the decree of adoption.

After taking the steps listed above, Suzy Soldier can now rest easy knowing that Gabriel will be taken care when she deploys. The risk of Deadbeat Dad attempting to gain visitation or a custody modification is gone. The risk of Gabriel being forced to go back to him should something tragic happen to Suzy are also gone. Reliable Joe is now the

⁹⁸ Kan. Stat. Ann. § 59-2112 (2014) (Kansas adoption definitions). "[R]esidence of a child" and "place where a child reside" means: (1) The residence of the child's mother if the child's parents are not married; (2) the residence of the child's father, if the father has custody and the child's parents are not married; (3) the residence of the child's father if the child's parents are married; or (4) the residence of the child's mother if the child's parents are married, but the child's mother has established separate, legal residence and the child resides with the mother. *Id.*

⁹⁹ Kan. Stat. Ann. § 59-2134(a) (2014).

¹⁰⁰ *Id.*

father of Gabriel, both legally and in his heart.

For the legal-assistance attorney, understand that all states provide a mechanism based on a road map similar to Kansas.¹⁰¹ Armed with this knowledge, legal assistance attorneys can provide sage counsel as well as cost-saving legal counsel.

¹⁰¹ *State-Specific Adoption Information*, CHILDREN'S HOPE INT'L, http://childrenshope.net/adoption-services/state-specific-information/?gclid=CjwKEAiAi-_FBRCZyPm_14CjoyASJACIUigOLDApTnxCs5ZEtSG4RS1XenTFpuHr3Tra8N1I1DT7cxoCCmvw_wcB

(last visited Mar. 5, 2017). *See also Child Adoption Laws*, CHILD ADOPTION LAWS, <http://www.childadoptionlaws.com/index.htm> (last visited Mar. 9, 2017).

Appendix A. Petition for Adoption

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

PETITION FOR ADOPTION

COMES NOW Petitioner, Reliable Joe, and alleges as follows:

1. Petitioner's name is Reliable Joe; he resides at and his legal address is 380 Dogwood Circle, Fort Buffalo, Buffalo County, KS 98765.
2. The name of the child he seeks to adopt is Gabriel Soldier, born February 28, 2013.
3. Said child is the son of Suzy Soldier and child resides with his mother and Petitioner, at 380 Dogwood Circle, Fort Buffalo, Buffalo County, KS 98765.
4. The Petitioner and Reliable Joe were married on September 17, 2010, in Killeen, Texas.
5. Petitioner is a suitable person to assume the relationship of the father of this child.
6. The natural father of the child is Deadbeat Dad, whose last known address is 985 E. Ridgeway Court #245, Dodge City, KS 34567.
7. Suzy Soldier was divorced from Deadbeat Dad in the District Court of Lonestar County, KS in Case No. 09-D-10, and the Court placed the child in the sole legal custody of Suzy Soldier.
8. The Indian Child Welfare Act, 25 U.S.C. 1901 *et. seq.* is not applicable in these proceedings.
9. That the consent of the natural father, Deadbeat Dad, is not necessary pursuant to K.S.A. 59-2136(d) as he has neither contacted nor supplied support for the minor child in the two years preceding the filing of this Petition. The last contact between Deadbeat Dad and the child was April 8, 2009.
10. The consent of the child's mother is filed herewith.
11. That the minor child is currently in the care and custody of the natural mother, and Petitioner further states:
 - a. The child's present address is 380 Dogwood Circle, Fort Buffalo, KS 98765.

b. The places where the child has lived within the last five years are as follows:
5 Campus Drive, Fort Buffalo, KS 98765;
935 Carrera Hwy, Tucker, KS 78456;
420 E. Trout Street, Sandy City, KS 83946;
1492 SW Columbus Pkwy, Santa Maria, KS 77387;
and present address.

c. The names and present addresses of persons with whom the child has lived within the last five years are as follows:
Suzy Soldier (Mother) 187 Carlson Road, Fort Buffalo, KS 98765.

Reliable Joe (Petitioner) 187 Carlson Road, Fort Buffalo, KS 98765.

d. That Suzy Soldier and Reliable Joe have not participated as a party, witness or in any other capacity in any other litigation concerning the custody of the child in this or in any other state, except as set forth above.

e. That Suzy Soldier and Reliable Joe have no information of any custody proceeding concerning the children in this or in any other state, except as set forth above.

f. That Suzy Soldier and Reliable Joe know of no person not a party to the proceeding who has physical custody of the child or claims to have custody or visitation rights with respect to the child, except as set forth above.

WHEREFORE, Petitioner prays that a decree of adoption be granted allowing the Petitioner to adopt Gabriel Soldier.

Reliable Joe

STATE OF KANSAS, COUNTY OF BUFFALO, ss:

Reliable Joe, of lawful age, being first duly sworn sown on his oath, states: That he is the Petitioner above named; that he has read the above and foregoing Petition for Adoption and knows the contents thereof to be true and correct.

Reliable Joe

Subscribed and sworn to before me this _____ day of _____, 2017, by Reliable Joe.

Notary Public

Appointment

Appendix B. Notice of Hearing

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS
PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

NOTICE OF HEARING ON
PETITION FOR ADOPTION

To: The State of Kansas and All Persons Concerned

YOU ARE HEREBY NOTIFIED that a Petition has been filed on November 1, 2017, in said court by Reliable Joe praying for adoption of Gabriel Soldier. You are hereby required to file your written defenses thereto on or before January 15, 2018, at 9:00 a.m., on said day, in the Buffalo County District Court, 678 S. Fourth Street, Buffalo County Courthouse, Buffalo, Kansas, at which time and place said cause will be heard. Should you fail therein, judgment and decree will be entered in due course upon said Petition.

James P. Attorney, #8675309
Attorney for Petitioner

Appendix C. Notice of Suit

(First published in the Dodge City Beacon on _____, 2017)

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

NOTICE OF SUIT

(Filed Pursuant to K.S.A. Chapter 60)

THE STATE OF KANSAS TO Deadbeat Dad, and all other persons who are or may be concerned:

You are hereby notified that a Petition has been filed in Buffalo County District Court Probate Division by Reliable Joe, praying for the adoption of Gabriel Soldier, a minor child.

You are hereby required to plead to the Petition on or before _____, 2017 at 10:00 a.m. in the District Court, Buffalo County Courthouse, Buffalo, Kansas. If you fail to plead, judgment and decree will be entered in due course upon the Petition.

Reliable Joe

Petitioner

(Last published in the Dodge City Beacon on _____, 2017)

Appendix D. Motion to Appoint GAL for Natural Father

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

MOTION TO APPOINT GUARDIAN AD LITEM TO REPRESENT
THE INTERESTS OF THE NATURAL FATHER

COMES NOW the petitioner, Reliable Joe, by and through his attorney, James P. Attorney, and moves the Court for an order appointing a guardian ad litem to represent the interests of the natural father, Deadbeat Dad.

In support of said motion the petitioner states as follows:

1. Deadbeat Dad is the natural father of Reliable Joe, born in Fort Buffalo, Kansas.
2. The whereabouts of the natural mother, Deadbeat Dad, are unknown to the petitioner and the natural mother, and a guardian ad litem should be appointed to attempt to locate said natural father and to represent his interests.
3. Sally Counselor is a practicing attorney in Buffalo County, Kansas, is a fit and proper person to be appointed guardian ad litem for the natural father, Deadbeat Dad.

WHEREFORE, the petitioner prays that the Court order appoint Sally Counselor, attorney at law, as guardian ad litem to represent the interests of the natural father herein, and for such other and further relief as the Court may deem just and proper.

James P. Attorney, #8675309

Attorney for Petitioner

Appendix E. Summons

PERSONAL SERVICE REQUESTED

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

CHAPTER 59 - SUMMONS

To: Reliable Joe, 985 E. Ridgeway Court #245, Dodge City, KS 34567.

You are hereby notified that an action has been commenced praying for the adoption of Gabriel Soldier. You are required to file your written defenses thereto with the court and to serve a copy upon **James P. Attorney**, petitioner's attorney, at **The Law Office, 123 Main Street - P.O. Box 456, Buffalo, Kansas 98765**, within twenty (20) days after the service of this summons upon you.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the Petition. Any related claim which you may have against the petitioner must be stated as a counterclaim in your Answer, or you will thereafter be barred from making such claim in any other action.

CLERK OF THE DISTRICT COURT

Dated: _____ By _____ Deputy

TO THE SHERIFF OR PROCESS SERVER. This summons must be served by _____ and your return made within _____ days thereafter.

RETURN OF SERVICE OF SUMMONS

I hereby certify that on the _____ day of _____, 2017, I served the foregoing summons, and notification to _____ at _____ .m.

- personal service
- residential service
- certified mail, residential & 1st class mailing (KSA 60-269)
- no service

(Signature)

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____

Non Legal Document

Appendix F. Consent of Father

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

CONSENT OF ADOPTION OF MINOR CHILD

NOTICE TO PARENT OR LEGAL GUARDIAN:

This is an important legal document and by signing it you are permanently giving up all custody and other parental rights to the child named herein, so as to permit the child's adoption. You are to receive a copy of this document.

I, Deadbeat Dad, natural father of Gabriel Soldier, date of birth February 28, 2013, state:

1. That the above child was born at Fort Buffalo, Buffalo County, Kansas.
2. That I reside at _____.
3. That I am of the age of 31 years and was born on November 8, 1986.
4. That I do hereby consent and agree to the adoption of Gabriel Soldier by Reliable Joe..
5. That I hereby waive notice of any and all hearings with respect to this adoption and request the adoption be heard without further notice to me.
6. That I have read and understand the above and I am signing it as my free and voluntary act.

Dated this ____ day of _____, 2017, at _____ o'clock __.m.

Deadbeat Dad, Natural Father

ACKNOWLEDGMENT

STATE OF KANSAS, COUNTY OF _____, ss:

I, a notarial officer in and of the county and state aforesaid, certify that Deadbeat Dad, known to me to be the same person whose name is subscribed to the foregoing consent, appeared before me in person and acknowledged that the statements made in the foregoing consent are true.

Dated this ____ day of _____, 2017, at _____ o'clock __.m.

NOTARY PUBLIC

Non Legal Document

Appendix G. Affidavit Genetic List

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

AFFIDAVIT PURSUANT TO K.S.A. 59-2130

The information attached to this Affidavit concerning the genetic, medical, and social history of Gabriel Soldier and his natural parents is true and correct.

James P. Attorney, #
Attorney for Petitioner

GENETIC AND MEDICAL HISTORY OF MOTHER

1. Personal Description: Blue eyes, Blonde hair, 5'3", 110 pounds
2. Dental History: Regular Checkups
3. Sensory Disorders: None
4. Psychological/Emotional Disorders: None
5. Mental Retardation/Learning Disabilities: None
6. Metabolic/Endocrine Disorders: None
7. Allergies: None
8. Contagious/Infectious Diseases: None
9. Digestive Disorders: None
10. Respiratory Disorders: None
11. Cardiovascular Disease: None
12. Hematopoietic Disease: None
13. Kidney Disease: None
14. Neuromuscular Disease: None
15. Substance Abuse: None
16. Cancer: None
17. Date of Birth and Sex of any Sibling of Child: None
18. Age and Cause of Death of:

Parents: Mother 52, Father 55
Grandparents: Maternal Grandmother 78, Maternal Grandfather 82
Paternal Grandmother 82, Paternal Grandfather is deceased (natural causes)
Aunts: Numerous – All Alive and Well
Uncles: Numerous – All Alive and Well

GENETIC AND MEDICAL HISTORY OF FATHER

1. Personal Description: Blue eyes, Brown hair, 5'8", 180 pounds
2. Dental History: Unknown
3. Sensory Disorders: Unknown
4. Psychological/Emotional Disorders: Unknown

5. Mental Retardation/Learning Disabilities: Unknown
6. Metabolic/Endocrine Disorders: Unknown
7. Allergies: Unknown
8. Contagious/Infectious Diseases: Unknown
9. Digestive Disorders: Unknown
10. Respiratory Disorders: Unknown
11. Cardiovascular Disease: Unknown
12. Hematopoietic Disease: Unknown
13. Kidney Disease: Unknown
14. Neuromuscular Disease: Unknown
15. Substance Abuse: Unknown
16. Cancer: Unknown
17. Date of Birth and Sex of any Sibling of Child: Unknown
18. Age and Cause of Death of:

Parents:	Unknown
Grandparents:	Unknown
Aunts:	Unknown
Uncles:	Unknown

SOCIAL HISTORY OF PARENTS

1. RELIGIOUS BACKGROUND

Mother:	Christian
Father:	Unknown

2. EDUCATIONAL BACKGROUND

Mother:	Associates Degree
Father:	Unknown

3. ETHNIC BACKGROUND

Mother:	Caucasian
Father:	Caucasian

4. DESCRIPTION OF PERSONALITY

Mother:	Professional, confident, upstanding member of the community and United States Army.
Father:	Unknown

5. SIGNIFICANT LIFE EVENTS:

Mother:	Military Service, Education, and Family
---------	---

Father: Unknown

MEDICAL HISTORY OF CHILD

1. Date, Time and Place of Birth:

February 28, 2013, 12:30 AM, Fort Buffalo Community Hospital, Fort Buffalo, KS

2. Name of Physician:

Various due to TriCare system.

3. Full-Term/Premature:

Full-Term

4. Weight/Length at Birth:

7 lbs, 3 oz., 19 inches

5. Type of Delivery:

Natural

6. Any Complications During Pregnancy or at Birth:

None

7. History of Immunizations and Tests:

All scheduled immunizations given at appropriate age.

8. History of Childhood Diseases:

None

9. History of Any Significant Illnesses or Hospitalizations since Birth:

None

10. History of any Chronic Health Problems, Diseases or Disabilities Affecting Child:

None

11. Record of Child's Developmental Milestone:

Pre - K student currently enrolled at Washington Elementary School, Fort Buffalo, Kansas 98765.

Appendix H. Affidavit of Non-Military Personnel

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

AFFIDAVIT OF NON-MILITARY SERVICE

STATE OF KANSAS, COUNTY OF BUFFALO, ss:

Suzy Soldier, of lawful age, being first duly sworn, upon oath states:

Affiant is enlisted in the United States Army. I have no knowledge that any other persons interested in the adoption of Gabriel Soldier, are or have been, within the past thirty days, in the military service of the United States as defined in the Service Members Civil Relief Act as amended.

Suzy Soldier

SUBSCRIBED AND SWORN to before me this ____ day of _____, 2017.

NOTARY PUBLIC

Appendix I. Affidavit of Accounting

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

ACCOUNTING AFFIDAVIT

(Pursuant to K.S.A. 59-2121)

STATE OF KANSAS, COUNTY OF BUFFALO, ss:

I, Reliable Joe, of lawful age, being first duly sworn, states as follows:

1. That I am the Petitioner for the adoption of the following minor child:
Gabriel Soldier DOB – February 28, 2013
2. That my petition for adoption of the above child is pending in the case in the District Court of Buffalo, Kansas.
3. That I have not paid or offered any consideration to any person in connection with the above adoption.
4. That I have agreed to pay reasonable attorney fees in the approximate amount of \$500.00 in addition to the court filing fee to my attorney for legal and professional services performed and that it is my belief that such fees do not exceed the customary fees for similar services performed within the state of Kansas.

FURTHER AFFIANT SAITH NOT.

Affiant, Reliable Joe

ACKNOWLEDGEMENT

STATE OF KANSAS, BUFFALO COUNTY, ss:

I, a notarial officer in and for the county and state aforementioned, certify that Reliable Joe, known to me be the same person whose name is subscribed to the foregoing consent, appeared before me in person and acknowledged that the statements made in the foregoing affidavit are true.

Dated _____, at _____, m.

NOTARY PUBLIC

My Appt. Exp.:

Non Legal Document

Appendix J. Affidavit of Publication

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS
PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

AFFIDAVIT

(Filed Pursuant to K.S.A. Chapter 60)

STATE OF KANSAS, COUNTY OF BUFFALO, ss:

James P. Attorney, of lawful age, being first duly sworn, alleges and states as follows:

1. The affiant is the attorney for Petitioner in the above action and makes this Affidavit for purposes of obtaining service by publication upon Deadbeat Dad.
2. Deadbeat Dad, on whom notice by publication is sought last known address is as follows: 985 E. Ridgeway Court #245, Dodge City, KS 34567.
3. The affiant is unable to procure service of summons on Deadbeat Dad within this state.
4. This action is one of those mention in K.S.A. 60-307 Subsections (a)(1) through (4) and amendments thereto.

James P. Attorney

Subscribed and sworn to before me this _____ day of February, 2017, by James P. Attorney.

Notary

Public

Appointment Expires

Appendix K. Affidavit of Parent

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

AFFIDAVIT

STATE OF KANSAS, COUNTY OF BUFFALO, ss:

I, Suzy Soldier, of lawful age, being first duly sworn upon oath, depose and state:

1. That I am one of the parents of Gabriel Soldier, date of birth being February 28, 2013, which child lives at the following address:

187 Carlson Road, Fort Buffalo, KS 98765

2. That other than the above address, the child has lived at the following addresses during the past five years:

5 Campus Drive, Fort Buffalo, KS 98765

935 Carrera Hwy, Tucker, KS 78456

420 E. Trout Street, Sandy City, KS 83946

1492 SW Columbus Pkwy, Santa Maria, KS 77387

3. The names and present addresses of the persons with whom the child has lived during that period:

Suzy Soldier, Natural Mother

Reliable Joe, Husband of Natural Mother

4. The affiant gives his consent to the adoption of Gabriel Soldier by Reliable Joe.

5. That affiant has not participated as a party or a witness or in any other capacity in any other litigation concerning the custody of said child in this or in any other state, that there is no other custody proceeding pending concerning said child in a court of this or any other state; and that this affiant does not know of any person not a party to the proceedings who has physical custody of said child or who claims to have custody or visitation rights with respect to said child.

Suzy Soldier, Natural Mother

ACKNOWLEDGEMENT

STATE OF KANSAS, BUFFALO COUNTY, ss:

I, a notarial officer in and for the county and state aforementioned, certify that Suzy Soldier, known to me be the same person whose name is subscribed to the foregoing affidavit, appeared before me in person and acknowledged that the statements made in the foregoing consent are true.

Dated _____, at _____ .m.

NOTARY PUBLIC

My Appt. Exp.:

Non Legal Document

Appendix L. Affidavit of Venue

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS
PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

AFFIDAVIT PURSUANT TO K.S.A. 59-2126

STATE OF KANSAS, COUNTY OF BUFFALO, ss:

I, Reliable Joe, state as follows:

1. That Gabriel Soldier and I reside at Fort Buffalo, Buffalo County, Kansas 98765.
2. That the last known address of Deadbeat Dad is 985 E. Ridgeway Court #245, Dodge City, KS 34567.
3. That Buffalo County, Kansas, is the proper jurisdiction and venue for this adoption.

FURTHER AFFIANT SAITH NOT.

Affiant, Reliable Joe

ACKNOWLEDGEMENT

STATE OF KANSAS, BUFFALO COUNTY, ss:

I, a notarial officer in and for the county and state aforementioned, certify that Reliable Joe, known to me be the same person whose name is subscribed to the foregoing consent, appeared before me in person and acknowledged that the statements made in the foregoing affidavit are true.

Dated _____, at _____ .m.

NOTARY PUBLIC

My Appt. Exp.:

Appendix M. Decree of Adoption

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS

PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,

Case No. _____

DECREE OF ADOPTION

NOW ON THIS ____ day of _____, 2017, the above-entitled matter comes on for hearing before the Court upon the Petition of Reliable Joe, and for an order and decree of this Court permitting Petitioner to adopt Gabriel Soldier. The Petitioner, Reliable Joe, appears by and through his attorney, James P. Attorney.

THEREUPON, after examining the files and pleadings, hearing all evidence, and listening to statements of counsel, the court makes the following findings and orders:

JUDGE OF THE DISTRICT COURT

Approved By:

James P. Attorney
Attorney for Petitioner

Reliable Joe

Appendix N. Order Appointing GAL for Natural Father

James P. Attorney
Attorney at Law
123 Main Street
PO Box 456
Buffalo, KS 98765
(123) 456-7890

IN THE DISTRICT COURT OF BUFFALO COUNTY, KANSAS
PROBATE DIVISION

IN THE MATTER OF THE ADOPTION OF:

Gabriel Soldier, a minor child,
Case No. _____

ORDER APPOINTING GUARDIAN AD LITEM TO REPRESENT

THE INTERESTS OF THE NATURAL FATHER

Now on this _____ day of _____, 2017, comes on for hearing the motion of the petitioner for the appointment of a guardian ad litem for the natural father herein. The Petitioner appears by in person or through his attorney, James P. Attorney.

Thereupon, after hearing the evidence adduced and the statements of counsel, the Court finds as follows:

1. A guardian ad litem should be appointed to represent the interests of the natural father herein, Deadbeat Dad.
2. Sally Counselor, a qualified practicing attorney of _____
Buffalo County, Kansas, should be appointed as
such guardian ad litem for the natural father.
3. Said guardian ad litem is directed to determine the whereabouts of said natural father prior to the hearing, to appear at said hearing, and to file an answer in said proceeding.

IT IS SO ORDERED.

DISTRICT COURT JUDGE

**It Ain't Over Till It's Over:
The Army Grade Determination Review Board**

Major Jess R. Rankin and Major John Goodell***

Don't count your chickens before they are hatched.¹

I. Introduction

Retirement and its prospects of a guaranteed pension are critically important to every career Soldier. The current military retirement system of twenty years' active duty service vesting in a guaranteed pension of half a Soldier's base pay is a vital tool for retaining quality mid-career Soldiers and ensuring a youthful force.² The Army grade determination board (AGDRB) plays an important role in ensuring a fair retirement system by serving a dual function.³ The AGDRB has the ability to advance enlisted Soldiers' rank or reduce officers' rank at the time of retirement. Thus, the AGDRB can counterbalance the numerous ways an enlisted Soldier can be demoted while also providing the Army a way to address either misconduct or poor performance by officers.⁴

The AGDRB determines the highest grade at which a Soldier has served satisfactorily before retiring. For officers, the AGDRB can reduce the rank at retirement for criminal or administrative misconduct. In criminal matters, even when clients avoid a jail sentence, criminal convictions act like a General Officer Memorandum of Reprimand (GOMOR) or a referred Officer Evaluation Report (OER) in that they constitute derogatory information in your personnel file.⁵ Any serious misstep in an officer's twenty-year career, including a GOMOR or even a court-martial that ends in a conviction but not a punitive discharge, could mean retirement at a rank lower than their current rank. That is

because once an officer requests retirement, that adverse information requires Human Resources Command (HRC) to refer the officer's file to the AGDRB to determine the highest rank at which he or she served honorably — and therefore the proper rank at which they may retire.⁶

The AGDRB also applies to Soldiers facing mandatory retirement after non-selection or those potentially seeking early retirement. These Soldiers will often be senior leaders who have served for many years, and their cases may command high levels of public interest.⁷

This primer will explain how the AGDRB works as well as its impact on Army separations and retirements. First, the primer will briefly explore the history of military retirement and the AGDRB's role. Second, it will explain the scope of the AGDRB and its potential impact in a downsizing Army. Third, the primer outlines the process of the AGDRB, using case studies to illustrate the differences between enlisted and officer situations. Finally, this primer provides recommendations for TDS and legal assistance attorneys on how to best represent their clients to maximize their rank at retirement.

* Judge Advocate, United States Army. Presently assigned as Associate Professor, Contract and Fiscal Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

** Judge Advocate, United States Army. Presently assigned as Associate Professor, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

*** Both authors would like to thank the mentorship and advice provided on this paper by Lieutenant Colonel Sally McDonald. She will be missed.

¹ AESOP, AESOP'S FABLES 22, (Kessinger Publishing, LLC 2004) (570 BC).

² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO Report B-275254, at 3 (Nov. 1996). This Government Accountability Office report responds directly to a query by Congressman Douglas Peterson on potential changes to the military retirement system. The report advocating making changes to the military retirement system due to cost but acknowledged it served as powerful tool for keeping the force young and retaining quality service members for twenty years. On January 1, 2018, the military will begin implementing a new retirement system, called the Blended Retirement System, which reduces the amount of retirement earned at twenty years of service from 2.5% to 2% per year. National Defense Authorization Act of 2016 and 10 U.S.C. §12733. For a comprehensive look at the new Blended Retirement System (BRS), the Department of Defense (DoD) has set up a website to provide Soldiers and Families with information regarding the new proposal scheduled to take effect on January 1, 2017. This website is located at <http://militarypay.defense.gov/BlendedRetirement/>.

³ U.S. DEP'T OF ARMY, REG. 15-80, ARMY GRADE DETERMINATION REVIEW BOARD AND GRADE DETERMINATIONS (12 July 2002) [hereinafter AR 15-80].

⁴ Article 15 and Article 58a, Uniform Code of Military Justice (UCMJ). U.S. DEP'T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS para. 10-1 (27 Dec. 2011). Officers cannot be reduced in rank either by non-judicial punishment, courts-martial, or through an administrative reduction. Enlisted Soldiers can be reduced by all three with the limited exception for E-7 and above undergoing non-judicial punishment.

⁵ The Army also could pursue officer elimination as a result of a conviction by court-martial. U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-2(c)(2) (12 Apr. 2006) [hereinafter AR 600-8-24]. However, the command's appetite for a Board of Inquiry after a contested court-martial will probably be minimal if the convicted officer indicates he will retire or resign.

⁶ AR 15-80, *supra* note 3, para. 2-2.

⁷ While there are several examples of senior leader misconduct resulting in retirement at lower rank, perhaps the most famous is Lieutenant Colonel (Ret.) Jeffrey Sinclair. See <http://www.latimes.com/nation/nationnow/la-na-nn-army-sinclair-demoted-20140620-story.html> [hereinafter Sinclair].

II. Background

A. Retirement in the U.S. Army Before 1916

The U.S. Army did not always have either a large standing military or a generous retirement system. American historical practice dating back to the Revolution relied on a small standing Army during peacetime and mobilization of citizen Soldiers for the conduct of war.⁸ This reliance on citizen volunteers was due in part to the limited and provisional separation benefits for regular Army Soldiers. Until the advent of the Civil War, the U.S. Army did not have an actual retirement system authorized.⁹ Congress authorized small amounts of severance pay for officers separated in the reductions of 1796, 1800, 1802, and 1815.¹⁰ Although not a pension, Congress provided survivor benefits to families of officers who died from combat; this benefit consisted of half-pay for five years during the period between the Revolutionary War and the War of 1812.¹¹ This benefit was rarely available, however, as there was little combat activity during this time.¹²

One informal measure during the early national period for providing retirement for Army officers was to appoint them to civil offices after leaving the Army.¹³ Before 1861, aging officers either remained in service until they died or resigned without pension benefits.

The impact that a lack of a retirement system had on unit effectiveness went further than just simply employing geriatric senior officers. Seniority was the foundation of the Army's promotion system, which meant a senior officer had to leave his billet either by death or resignation before the next most senior subordinate could be promoted to take the position. With officers staying on active duty until death, wait times for promotions were stultifying long. West Point graduates in 1824 had to serve on average of thirteen years before selection to Captain.¹⁴ This lethargic promotion timeline led to many officers leaving the Army at the first opportunity.¹⁵

Congress failed to establish a retirement system for officers until 1861 and the initiation of the Civil War. Officers in the Army and Navy who served forty consecutive years after 1861 could be placed on the retirement list at their request with basic pay at their current rank and four rations a day.¹⁶ Also, a military board could recommend to the President officers for mandatory retirements. In 1862, Congress authorized the President to retire at his own discretion officers who had forty-five years of service or those who had reached age sixty-two.¹⁷ Enlisted Soldiers had to wait until 1885 before Congress authorized voluntary retirement for them.¹⁸

B. Development of the Modern Army Retirement

As the Army increased in size and sophistication, the military retirement system underwent further modification so that immediately prior to American intervention in World War I, the retirement system began to resemble today's system. Retirement pay by 1916 employed a system where a service member's years of service would be multiplied by two - and - one-half percent.¹⁹ In 1948, the modern retirement system utilized the adoption of twenty years of active service for a service member to vest.²⁰ The reduction of active service time required before retirement was intended to ensure a youthful and vigorous force by allowing mid-level leaders the opportunity to retire early.²¹ These early retirements would create regular vacancies and ensure steady promotion for junior Soldiers, preventing some of the challenges of the previously described seniority system and lack of secure retirement.²²

C. Development of Personnel Review for Retirement

A rise in military personnel regulations simultaneously paralleled the increasing sophistication of the military retirement system. After World War I, the U.S. Army intermittently used a board of review for demotion and elimination to reduce and restructure the Army for peacetime,

⁸ ANDREW BACEVICH, *BREACH OF TRUST* 48-50 (2013).

⁹ WILLIAM SKELTON, *AN AMERICAN PROFESSION OF ARMS: THE ARMY OFFICER CORPS, 1784-1861*, 197 (1992).

¹⁰ *Id.* Additionally, the War Department would sometimes allow a disabled officer to remain on the Army rolls to draw pay but with no military duty. *Id.* at 63.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 63-64. One commander of the 4th Artillery Regiment was still nominally in charge of the regiment, until the age of ninety-one when he passed away. *Id.* at 215. The Army now imposes mandatory retirement based on either age or a combination of years of service and rank. U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM para. 3-8(a) (31 Jan. 2006) requires mandatory retirement at age 55, with an exception up to age 60 possible.

¹⁴ SKELTON, *supra* note 9, at 47.

¹⁵ *Id.* at 193.

¹⁶ U.S. DEP'T OF DEF., *MILITARY COMPENSATION BACKGROUND PAPERS* 685-86 (6th ed. May 2005) [hereinafter *MILITARY COMPENSATION*]. In 1871, the pay plus rations formula converted to a system based on a combination of base and longevity pay. *Id.*

¹⁷ SKELTON, *supra* note 9, at 216.

¹⁸ *MILITARY COMPENSATION*, *supra* note 16, at 695.

¹⁹ JOHN CHRISTIAN, *AN OVERVIEW OF PAST PROPOSALS FOR MILITARY RETIREMENT REFORM*, RAND NAT'L DEF. RESEARCH INST. 3 (2006).

²⁰ The Army and Air Force Vitalization and Retirement Equalization Act of 1948, Pub. L. No. 80-810 (1948).

²¹ ADVISORY COMM'N ON SERV. PAY, *CAREER COMPENSATION FOR THE UNIFORMED FORCES A REPORT AND RECOMMENDATION FOR THE SECRETARY OF DEFENSE* 40 (Dec. 1948).

²² *Id.*

which continued until 1969.²³ An example of a precursor to the AGDRB was the demotion of General Koster on May 18, 1971, by the Secretary of the Army, upon advice of the General Westmoreland, the Army Chief of Staff, from Major General (MG) to Brigadier General (BG).²⁴ The reduction was part of an administrative process in response to allegations that General Koster, as commander of the Americal Division, had covered up allegations of the My Lai Massacre in 1968.²⁵ General Koster retired from the Army in 1973 at the reduced rank of Brigadier General.²⁶

The Office of the Secretary of the Army established The Army Grade Determination Review Board (AGDRB) on July 9, 1985.²⁷ The AGDRB's purpose then and now is to determine the appropriate retirement grade for Soldiers based on service at the highest grade held satisfactorily.²⁸ In 2002, the AGDRB implementing regulation changed from its original publication to ensure that the AGDRB systemically addressed officer misconduct and poor performance instead of responding *ad hoc* to media reports.²⁹ Partly as a result of this revision, and in combination with prior downsizing, AGDRB cases have increased steadily since 2002.³⁰

III. Analysis

²³ Headquarters, U.S. Dep't of Army, Gen. Order no. 1969-9 (5 Feb.1969).

²⁴ *Koster v. United States*, 685 F.2d 407, XX (1982). Appeal by BG Koster to the U.S. Court of Claims contesting a determination by the Army Board for Correction of Military Records for his reduction from Major General to BG for purpose of claiming his retirement pay. The Court upheld the reduction to BG citing traditional discretion for military decisions. *Id.*

²⁵ *Id.*

²⁶ David Stout, General S.W. Koster, 86 Dies; Was Demoted After My Lai, N.Y. Times, Feb. 11 2006, <http://query.nytimes.com/gst/fullpage.html?res=9901EED9153EF932A25751C0A9609C8B63>.

²⁷ Headquarters, U.S. Dep't of Army, Gen. Order no. 1985-16 (9 July 1985). This General Order required administration by the Army Council of Review Boards. *Id.*

²⁸ AR 15-80, *supra* note 3, at para. 2-3.

²⁹ Interview with Mr. Jan Serene, Senior Legal Advisor, Army Review Boards Agency (ARBA), Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) (Nov. 22, 2013) [hereinafter Serene Interview]. Mr. Serene established the ARBA legal office in 1997 as the first senior legal advisor and has continued in that position to today. He drafted the 2002 revision to AR 15-80 Army Grade Determination Review Board and Grade Determination and retired from the Army JAG Corps in 2005 as a colonel. The revision mandates referral to Assistant Secretary of the Army for officers pending retirement who have adverse information in their personnel file since their last promotion. *See* AR 15-80, *supra* note 23, para. 4-1. Prior to this revision, the Army did not have a structural system in place to address officer misconduct instead responding *ad hoc* to serious cases of officer misconduct that received media coverage. According to Mr. Serene, the regulation was deliberately changed to ensure a systemic response to negative information for officers.

³⁰ E-mail from Jan Serene, Senior Legal Advisor to ARBA (Dec. 2, 2013) (on file with author). Fiscal Year (FY) 2012 Army Grade Determination Review Board (AGDRB) cases: 124 officer cases; 50 thirty-year enlisted or warrant cases; 401 disability separation/retirement grade cases. FY 2013

The AGDRB plays a vital, but little understood, role in something near and dear to every career Soldier's heart: retirement pay. The ADGRB serves as an advisory board to the Secretary of the Army (SA) on officer grade determinations.³¹ Additionally, the AGDRB has authority to make final determinations for enlisted Soldiers at the time of separation and in thirty-year retirement cases for enlisted Soldiers and warrant officers.³² These grade determinations then affect an individual's retirement or separation pay, which over the course of a lifetime can amount to hundreds of thousands — even millions — of dollars depending on the reduction.³³

A. Composition of the Board

The AGDRB is composed of military officers senior in rank to the individual under review and at least equal in grade to the highest grade that individual may have held.³⁴ One member of the AGDRB will be at least one grade higher than the highest rank achieved by the individual under review.³⁵ Typically, these boards consist of colonels and lieutenant colonels.³⁶ The members represent the different backgrounds of the Army from branch to ethnicity and gender.³⁷ For a quorum, the AGDRB must have at least three members sitting.³⁸ Also, the AGDRB has a senior legal

AGDRB cases: 225 officer cases; 68 thirty year Enlisted or Warrant cases; 553 disability separation/retirement grade cases. Each type of case is discussed *infra* Part III Analysis. The nearly doubling of officer cases in one year should indicate to the reader the potential effect of further downsizing in the Army in increasing the exposure of officers to the AGDRB. The most notable increase occurred from FY 2012 to FY 2013 when the number of officer cases nearly doubled. *Id.*

³¹ AR 15-80, *supra* note 3, at para. 4-1.

³² AR 15-80, *supra* note 3, at para. 1-11.

³³ OFFICE OF THE SECRETARY OF DEFENSE – Military Compensation, <http://militarypay.defense.gov/Calculators/Active-Duty-Retirement/High-36-Calculator/> (last visited on Oct. 15 2017). This website provides various military retirement calculators that can show retirement pay for an individual at different ranks over a selected time period. For example, using the calculator for the current high 3 retirement system from the website above, an officer retiring in 2017 with thirty years of service as an O6 could expect to receive a total compensation of \$6,164,326.44 over forty years (assuming annual inflation at 2.1% and annual pay raise of 2.1%). If that same officer were reduced to O5 by the AGDRB and all else held true, that officer could expect \$5,026,710.24. Thus, the reduction to LTC could cost the officer over \$1 million dollars during the course of 40 years.

³⁴ AR 15-80, *supra* note 2, at para. 2-1.

³⁵ *Id.*

³⁶ *See* Serene Interview, *supra* note 29. Majors (MAJ) who are promotable can sit on the board, though this rarely happens. Usually if the officer is a MAJ promotable, they are at the beginning of their assignment to the ARBA and will quickly be promoted to LTC during their assignment to ARBA.

³⁷ *Id.*

³⁸ AR 15-80, *supra* note 3, at para. 2-1.

advisor who will establish the evidence for review, provide legal advice, report recommendations made by the AGDRB, and in cases involving general officers serve as the recorder.³⁹ For general officer cases before the AGDRB, the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA (M&RA)) will appoint general officers in consultation with the Chief of Staff, Army. These general officers will be senior to the officer under consideration for reduction by the board.⁴⁰

The members come from a rotating pool of officers assigned to the Army Review Boards Agency (ARBA), the higher organization for the AGDRB, as their permanent duty station.⁴¹ ARBA serves as the Army's final administrative review of personnel actions and conducts several boards.⁴² Thus, the members participate regularly in significant personnel actions from Army Board for Correction of Military Records to the Discharge Review Board.⁴³ This permanent status and exposure to varied personnel actions gives members of the AGDRB significant institutional knowledge when reviewing individual cases.⁴⁴ Additionally, the decision on enlisted cases does not have to be unanimous, so long as there is a majority support either for advancement or retaining the current grade. Officer grade determinations are advisory, so it is possible there could be as many separate opinions as board members.⁴⁵

B. Enlisted Cases

The majority of grade determinations for Soldiers do not require action by the AGDRB because they are automatic either by operation of law or as established by Army Regulation (AR) 15-80, Army Grade Determination Review Board and Grade Determinations.⁴⁶ Under the U.S. Code, enlisted Soldiers normally will retire at the grade they held on the date of retirement.⁴⁷ Officers have the added requirement

of statutory time in grade (TIG) to serving satisfactorily at their highest grade at time of retirement.⁴⁸

1. Enlisted Disability Retirement or Separation Cases

The AGDRB will make final grade determinations for enlisted Soldiers who are placed on service/physical disability retirement or are separated for physical disability.⁴⁹ In these cases, the AGDRB cannot reduce a Soldier's current grade.⁵⁰ Instead, the board members will either decide on advancing to a higher grade satisfactorily served by the individual or retaining that service member in his or her current grade.⁵¹ There has been a large increase in these types of cases since the initiation of the Global War on Terror in 2001.⁵² When reviewing disability retirement or separation cases, the AGDRB specifically looks for cases where Soldiers have been reduced in rank at some point in their career.⁵³

Typically the rank reduction will be close in time either to the injury causing the disability or during the retirement/separation process.⁵⁴ In these cases the board members will weigh two factors heavily in determining the highest rank satisfactorily held by the Soldier: first, the seriousness of injury suffered by the Soldier, and second, the seriousness of the misconduct committed by the Soldier.⁵⁵ The Board also will consider whether the injury or related medical reasons contributed to a reduction in grade, misconduct, or substandard performance.⁵⁶

2. Example Enlisted Disability Separation Cases

For example, Staff Sergeant (SSG) Jones suffers a serious head injury during his last deployment. During the SSG's recovery, he misses multiple medical appointments. SSG Jones, having wasted the time and resources of medical

³⁹ *Id.* at para. 1-10.

⁴⁰ *Id.* at para. 1-7.

⁴¹ See Serene Interview, *supra* note 29.

⁴² ARMY REVIEW BOARDS AGENCY, <http://arba.army.pentagon.mil> (last visited Aug. 19, 2017).

⁴³ U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (1 May 2006). The Board for Correction of military records will upon applicant's request review military records and possibly remove or correct an error or injustice. The Board's jurisdiction extends to any military record of the Department of the Army; see also U.S. DEP'T OF ARMY, REG. 15-180, ARMY DISCHARGE REVIEW BOARD (20 Mar. 1998). This board will examine an applicant's administrative discharge and potentially change the characterization and or reason for discharge based on equity or propriety.

⁴⁴ See Serene Interview, *supra* note 29.

⁴⁵ AR 15-80, *supra* note 3, at para.1-11. If the officer subject to a grade determination is currently a COL or higher, then each member has a separate voting sheet. For LTC and below the members share the same vote sheet. Serene, Interview, *Supra* note 29.

⁴⁶ AR 15-80, *supra* note 23, at para.2-3.

⁴⁷ 10 U.S.C. § 3961(b) (2011).

⁴⁸ 10 U.S.C. § 1370.

⁴⁹ AR 15-80, *supra* note 3, at para. 3-1.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Serene Interview, *supra* note 29. Mr. Serene noted the increase in disability cases was due to the large-scale increase in combat wounded from operations in Iraq and Afghanistan.

⁵³ See *Id.* The Board's concern is to ensure the Soldier was not unjustly reduced as a result of service-related injuries that contributed to either misconduct or poor performance.

⁵⁴ See Serene Interview, *supra* note 29. The temporal link between the reduction and injury is often strong corroborating evidence of a causal link between the underlying misconduct and injury. *Id.*

⁵⁵ See Serene Interview, *supra* note 29; AR 15-80, *supra* note 23, at para. 2-4f.

⁵⁶ AR 15-80, *supra* note 3, at para. 2-4(a).

professionals and perhaps having a less-than-stellar attitude, receives a Field Grade Article 15, which reduces him to the rank of Sergeant (SGT).⁵⁷ Because of now-SGT Jones's head injury, he is then medically separated. Considering the seriousness of his injury and the relatively minor nature of his misconduct, SGT Jones likely will have his rank advanced back to SSG for purposes of separation pay.⁵⁸ Defense counsel should take note when assisting their clients with mitigation and extenuation matters and appeals of non-judicial punishment. The battle may be lost in the commander's office, but the war could be won later at the AGDRB if a good record has been established.

3. Thirty-Year Review Cases

Additionally, the AGDRB may advance some retired members of the Army who retired before completing thirty years of service once their combined active service and time on the retired list reaches thirty years. These cases arise when the individual initiates the review upon application to the AGDRB instead of automatic review as in the case of disability retirement or separation for officers with adverse information since their last promotion.⁵⁹ In thirty-year cases, the highest grade served must have been as a result of a lawful promotion and does not apply to promotable status or acting leadership positions.⁶⁰ These thirty-year cases can happen generally in one of three ways: (1) reserve retirees, (2) service member who retires at current rank after reduction by Article 15 or courts-martial, or (3) service member commissioned as an officer prior to retirement but did not serve the statutory requirement of ten years.⁶¹

For reserve enlisted Soldiers, their retirements will be based on the positions they held in retirement and the ranks attained. For example, Mr. Smith, a Master Sergeant (MSG/E-8) in the U.S. Army Reserve, moves from New York to California because he is tired of shoveling snow. He is unable to find an E-8 position in the local California Reserve unit and must settle for an E-7 billet in order to drill locally. This is potentially financially disastrous because MSG Smith decides to retire the next year and as a result of holding the E-

7 billet at retirement is forced to retire as a Sergeant First Class (SFC) instead of a MSG.⁶² The AGDRB can address this situation and restore SFC Smith to MSG rank upon his accruing thirty years and applying for redress.

In the second scenario where a Soldier retires after being reduced in rank and has now accrued thirty years, the AGDRB will consider similar factors as in the case of the disability/separation review such as the seriousness of the misconduct as well as any potential medical considerations. The board also will consider any other relevant information typically seen during administrative or criminal proceedings like evaluations, awards, and letters of support.⁶³ Finally, it is possible for a Soldier—after being commissioned as an officer—to be forced to retire at her highest enlisted rank if she does not have ten years of service as a commissioned officer.⁶⁴

In these cases, the AGDRB will review the Soldier's service record and potentially advance the Soldier to the highest commissioned grade if appropriate. However, it is sometimes possible for an individual to apply for advancement on the retired list to a commissioned rank and potentially receive a diminished retirement pay.⁶⁵ For example, an E-7 with over 24 years of service will earn more retirement pay than an O-1E with similar years of service.⁶⁶ When such an anomaly occurs, the AGDRB will notify the individual of the projected loss in pay and allow the applicant to withdraw the application.⁶⁷

C. Officer Cases

Officers, in contrast to enlisted personnel, are not automatically entitled to retire at the highest grade they have reached while on active duty. Instead, the review board will determine the highest grade the officer served *satisfactorily* on active duty. The AGDRB makes advisory recommendations on officers below the rank of Brigadier General to the Deputy Assistant Secretary of the Army (Review Boards) (DASA (RB)).⁶⁸ Secretary of the Army retains sole authority to make discretionary grade

then does a final 4 years as an officer will not be able to retire as officer and instead will revert to their highest enlisted rank.

⁵⁷ Congress created this Article 15 reduction authority under 10 U.S.C. § 815 (b)(2)(D) and (H).

⁵⁸ See Serene Interview, *supra* note 29. This scenario presumes of course that SSG Jones had no other serious misconduct during his career. Another factor for consideration on misconduct was the grade at which it was committed per AR 15-80, para. 2-4(g). Thus, if SSG Jones had minor misconduct as a PFC 6 years prior, it will likely be heavily discounted. Additionally, the board will look favorably on a service member deployment history, especially if the injury occurred during that time.

⁵⁹ AR 15-80, *supra* note 3, at para. 3-2(b).

⁶⁰ *Id.* at para. 3-2(a).

⁶¹ 10 U.S.C. § 3911(a) (2011). However, 10 U.S.C. § 3911(b) permits the Secretary of Defense to reduce the 10 year requirement of active service as a commissioned officer to a period of no less than 8 years. The window for this reduced requirement exists from January 7, 2011, through September 30, 2018. So a Soldier who spends 16 years of active service enlisted and

⁶² See Serene Interview, *supra* note 29.

⁶³ *Id.* AR 15-80, *supra* note 3, at para. 2-8.

⁶⁴ 10 U.S.C. § 3911(a).

⁶⁵ AR 15-80, *supra* note 3, at para. 3-2.

⁶⁶ DEFENSE FINANCE AND ACCOUNTING SERVICE, <http://www.dfas.mil/militarymembers/payentitlements/militarypaytables.html> (last visited on Aug. 19, 2017). Helpfully, DFAS provides official Military Pay Charts from 1949 through 2017. The 2017 military pay chart shows an E-7 with 24 years earning \$4,824.60 in monthly basic pay as compared to an O1E with 24 years making slightly less at \$4,741.20 for monthly base pay.

⁶⁷ AR 15-80, *supra* note 3, at para. 3-2(c).

⁶⁸ *Id.* at para. 4-1.

determinations of general officers retiring.⁶⁹ Officers seeking to retire as Lieutenants General or Generals additionally must have certification from the Secretary of Defense to the President and Congress that they served satisfactorily at that rank.⁷⁰

1. Criteria for Satisfactorily Served

The AGDRB is an administrative tool and is not intended to serve a punitive function.⁷¹ It does, however, address the commander's inability to reduce an officer through military justice mechanisms. This administrative measure ensures some level of balance in the retirement system between enlisted Soldiers, who can suffer rank reductions in a plethora of ways and still retire, and officers, who cannot be reduced through other means. So although not punitive, the AGDRB decision can be based on criminal findings and has significant and long-lasting impact on an individual by determining his or her retirement grade or separation pay. The laundry list enumerates a number of factors that the AGDRB uses to find satisfactory service, to include: compassionate circumstances; length of TIG cannot be waived by the AGDRB, for example, Lieutenant Colonels must have 3 years in grade according to 10 U.S.C. § 1370; performance as indicated by evaluation reports; nature and severity of misconduct; and the grade at which misconduct was committed.⁷² Where service in the highest grade is held to be unsatisfactory, the Soldier will be reduced to the next lower grade held satisfactorily.⁷³

2. Example of a Senior Officer Case

Using an example from the Air Force to illustrate how its version of the AGDRB functions for misconduct by a senior officer is quite instructive because the Army and Air Force systems are generally the same; moreover, the misconduct in this example occurred at the highest level of Air Force legal channels.⁷⁴ Major General (MG) Thomas Fiscus was the Judge Advocate General for the Air Force from February 2002 until September 2004, when he asked to be relieved.⁷⁵ He received a General Officer Article 15 under the Uniform

Code of Military Justice (UCMJ) for conduct unbecoming, fraternization, obstruction of justice, and violating a lawful general regulation.⁷⁶ This occurred after an investigation determined he had multiple inappropriate relationships with female subordinate judge advocates, paralegals, and federal civilians. In accordance with 10 U.S.C. § 1370, the Secretary of the Air Force reduced MG Fiscus to Colonel (O-6) as the last satisfactorily held rank upon retirement in 2005, resulting in potentially up to \$900,000 in lost retirement pay.⁷⁷

IV. Recommendations

There are three primary ways the AGDRB likely will apply to the practice for judge advocates: (1) when the Army has to downsize its force structure, which has occurred throughout the Army's history,⁷⁸ commanders may recommend increasing numbers of show cause boards for officers — even those with fifteen years or more of active service; (2) legal assistance attorneys representing clients for adverse administrative actions like GOMOR; (3) TDS attorneys representing clients in criminal proceedings.

A. Adverse Information

All retirements involving officers who have received an adverse finding from an official investigation subsequent to their last promotion automatically will be forwarded to the Assistant Secretary for Manpower and Reserve affairs for a grade determination review.⁷⁹ Accordingly, every officer who receives a GOMOR, an Article 15, a founded Inspector General investigation, or a conviction (court-martial or civilian) in their highest grade before retirement will likely be subject to a potential demotion in rank for retirement. This consequence has significant repercussions when considering the possibility of an increase in show cause boards should the Army attempt to reduce personnel *en masse*. The adverse information thus can start a self-reinforcing cycle, which may cause an officer to fail to be promoted and/or a show cause board initiated either by the Commanding General or HRC after a selection board.⁸⁰

⁶⁹ *Id.* at para. 1-5.

⁷⁰ *Id.* at para. 1-5.

⁷¹ *Id.* at para. 2-4.

⁷² *Id.*

⁷³ *Id.* at para. 2-6. For officers, the AGDRB recommendation is advisory to the SA or the SA's delegate. In the cases of enlisted personnel only, the AGDRB may also consider as an additional factor any medical reasons that may have contributed in a reduction in grade. *Id.*

⁷⁴ U.S. DEP'T OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-3203 SERVICE RETIREMENTS (18 Sept. 2015). The Air Force uses a similar process to review officers final grade for retirement when there is potential adverse information (hereinafter AF instructions).

⁷⁵ Josh White, *General is Sanctioned for 'Unprofessional' Affairs*, WASH. POST, Jan. 11, 2005, at A13. The investigation determined the inappropriate relationships occurred at both the BG and MG rank for COL(R) Fiscus. Consider also the example of 1st LT(R) Michael D

Murphy, who served as a JA in the Air Force and reached the rank of COL despite not having a state bar license during his entire military career. He was thus reduced to the rank of 1st LT as the last rank he satisfactorily held. See Bruce Rolfsen, *Troubled Colonel Busted to O-2 When Booted*, AIR FORCE TIMES, Mar. 13, 2010, <http://www.airforcetimes.com/article/20100313/NEWS/3130330/Troubled-colonel-busted-O-2-when-booted>. See also Sinclair, *supra* note 7.

⁷⁶ White, *supra* note 75, at A13.

⁷⁷ *Id.*; see also *supra* note 29 (describing examples on difference in retirement pay between an O-6 and an O-5).

⁷⁸ <http://historyinpieces.com/research/us-military-personnel-1954-2014#fn-5821-fn1>.

⁷⁹ AR 15-80, *supra* note 3, at para. 4-1(d). This obviously creates a somewhat subject standard that

⁸⁰ U.S. DEP'T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS, para. 1-36(a)(3) (25 Feb. 2005). In an effort to further reduce personnel strength the Army has begun to institute Selective Early Retirement Boards (SERB)

Moreover, considering the increasingly competitive promotion rates for Army officers, derogatory information likely will prevent further promotion.⁸¹ Failure to advance in rank will make a grade review by the AGDRB automatic if the officer is lucky enough to accrue sufficient time to retire.

Additionally, the Temporary Early Retirement Authority (TERA) granted by Congress in the Fiscal Year 2012 National Defense Authorization Act (NDAA) creates further complexity by potentially increasing the total number of eligible retirements for service members. TERA authorizes service members who were non-selected for promotion but have at least fifteen years of active service to be eligible for early retirement so long as they are not facing administrative separation.⁸² This additional retirement authority can create complex fact patterns that can be challenging for judge advocates to provide clear and concise advice for clients and commanders. These early retirement situations also often present difficult and emotional choices for commanders regarding the financial fates of subordinate officers. For those judge advocates who work for the command, understanding and being able to explain to commanders the role and function of the AGDRB can provide these line officers with greater understanding and possibly more options with respect to the decisions they make.

B. Major Adams AGDRB Hypothetical

The following hypothetical provides greater context for the practical application of the law: Army Major Bob Adams has received a GOMOR for an inappropriate relationship with a senior enlisted Soldier in a different unit.⁸³ Major Adams otherwise has earned stellar marks in his evaluations and was held in high regard by the command. Now, MAJ Adams faces the possibility that his Commanding General (CG) will initiate a show cause board.⁸⁴ The CG may want to allow HRC to initiate the show cause board to give MAJ Adams either the possibility of avoiding a board entirely, or more

likely, additional evaluation time to make MAJ Adams more competitive for a selection board or retainable for a subsequent HRC board.⁸⁵ However, there is another consideration for the CG: additional evaluation time could prevent MAJ Adams from demotion to a lower rank by the AGDRB, if MAJ Adams is retirement eligible.⁸⁶ Intuitively, the AGDRB will look more favorably on retaining MAJ Adams's current rank for retirement if he has a strong record of service at that rank to counterbalance his GOMOR for an inappropriate relationship.⁸⁷ Clearly, there is a grade determination benefit for clients in this position to obtain continued, preferably lengthy service post-derogatory information.

1. Command Counsel

Continuing with the hypothetical, MAJ Adams's luck does run out, and now he is facing a show cause board initiated by HRC. Major Adams has over fifteen years of active service and would like to voluntarily retire. To retire under TERA, however, MAJ Adams cannot be facing a show cause board for separation.⁸⁸ MAJ Adams will now almost certainly request to retire early and have HRC terminate the show cause board. This request would appear to force the command into choosing between two disparate options: (1) possible separation through show cause board and no retirement benefits (although potentially separation pay) or (2) stopping the show cause board and allowing early retirement.⁸⁹

Faced with such a stark choice, many commanders are likely to wrestle with this type of decision that will have a major financial impact on their subordinate. Should an otherwise stellar officer be denied retirement benefits for an offense that would not be chargeable in the civilian world such as adultery? On the other hand, should MAJ Adams be allowed to retire early at his current rank and suffer what would appear to be a slap on the wrist, when for the same

and Officer Separation Boards (OSB). These boards will review officers' files who would normally not be reviewed by DA Board as they are not in the zone for either promotion or school consideration. Officers with adverse information will necessarily be less competitive than their peers and more likely to be selected for separation and retirement. The OSB and SERB likely will increase the number of officers who retire at the same rank at which they received adverse information and thus will be reviewed by the AGDRB for potential rank reduction. See Military Personnel Message, Message 13-357, U.S. Army Human Res. Command, subject: FY 14 Officer Separation Boards and Enhanced Selective Early Retirement Boards, Major, Army Competitive Category (6 Dec. 2013).

⁸¹ Jim Tice, *Army Scaling Back Officer Promotion Rates*, ARMY TIMES, Jan. 23, 2012, <http://www.armytimes.com/article/20120123/NEWS/201230322>.

⁸² 10 U.S.C. § 638(c)(2)(e) (2011). This statute provides Temporary Early Retirement (TERA) for officers and NCOs who are forced to leave the military before twenty years due to non-selection for promotion. Authority was given by Congress as part of the FY 2012 National Defense Authorization Act (NDAA), section 504. Section 508 of FY 2017 NDAA has extended TERA until Dec 31, 2025. Soldiers must have at least fifteen years of active service to be eligible for TERA. Officers facing disciplinary action or administrative separation are not eligible for early retirement.

⁸³ U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-14(c)(2) (18 Mar. 2008). This regulation prohibits intimate or sexual relations between officers and enlisted. This fact assumes that Major Adams is neither married to the enlisted Soldier nor began the relationship while also enlisted. Para. 4-14(c)(2)(b) provides for a one-year exception when there is a change in status, and one member of the relationship becomes an officer before the relationship must be terminated or the Soldiers marry each other. *Id.*

⁸⁴ See AR 600-8-24, *supra* note 5, at para. 4-2(c)(5). Officers who receive adverse information in their OMPF should be considered for elimination. The elimination can be initiated by either HRC or a General exercising court-martial convening authority and is advised by a legal officer per para. 4-6. *Id.*

⁸⁵ *Id.*

⁸⁶ MAJ Adams could be retirement eligible starting at 15 years under TERA. See AF Instructions, *Supra* note 74.

⁸⁷ See Serene Interview, *supra* note 29.

⁸⁸ TERA, *supra* note 82.

⁸⁹ See AR 600-8-24, *supra* note 5, at para. 4-11(h)(1).

offense, an enlisted member could likely suffer rank reduction at an Article 15 hearing?⁹⁰

Knowledge of the AGDRB process can prove useful to the chain of command when looking at these sorts of conundrums. The chain of command can recommend termination of the show cause board allowing possible early retirement for MAJ Adams.⁹¹ This recommendation would allow for a balanced approach by ensuring that MAJ Adams still has the chance for retirement benefits after his lengthy service, but in fact is also more likely to have a rank reduction for his previous misconduct at the AGDRB.

2. *Legal Assistance and Trial Defense Service Counsel*

That Major Adams would be more likely to end up retiring as a captain if he voluntarily retires as opposed to going through the separation board is something TDS as well as legal assistance attorneys should consider. The AGDRB will view an officer's grade determination more sympathetically where the officer is forced to retire as the result of a show cause board than if the individual retires shortly after receiving negative information in his Official Management Personnel File (OMPF).⁹² This could be simply because the officer forced to retire after a show cause board presumably has more time for rehabilitation after the negative information than someone who retires immediately after misconduct. There also may be subjective judgments being made by board members on the officer's desire to continue service after receiving negative information.

Thus, clients who received negative information in their OMPF at their current rank should be advised to delay retirement if at all possible to provide the strongest case to the AGDRB.⁹³ Additionally, counsel should contact the authority issuing the negative information to address the possibility of a rank reduction at the AGDRB. A GCMCA authority may have issued a GOMOR for an officer's misconduct or poor performance but would not necessarily want that officer reduced later for the same misconduct. This could be because the GCMCA felt that either the misconduct was addressed sufficiently by the original reprimand or subsequent performance has rehabilitated the individual in the eyes of the issuing authority. Letters from the issuing GCMCA or chain of command supporting retaining an

officer's current rank for retirement carry strong weight with the AGDRB.⁹⁴

Counsel also may want to broach the subject of a grade determination with the GCMCA during the rebuttal phase. This information could be utilized as an additional reason to place a GOMOR in the restricted file or raise the possibility of a subsequent letter of support in future proceedings. In addition to the length of time since misconduct and letters of support, the AGDRB also will consider the officer's evaluations and deployment history.⁹⁵ So counsel, whether in legal assistance or TDS, should focus on their client's performance history and ways to buttress and document that performance before retirement. There is no right to be heard by the AGDRB in person, so providing the strongest possible case file is crucial for officers facing a grade determination by the AGDRB.⁹⁶

V. Conclusion

Development of retirement benefits has been an integral part of the Army's effort over the previous two hundred plus years to modernize and professionalize the force. Retirement benefits serve as an incentive for continued service by qualified Soldiers as well as a tool by the Army to ensure an active and healthy force. The AGDRB is a relatively recent innovation designed to advance the separate but related goals of restoration of rank for enlisted members and reduction of rank for officers. Thus, the AGDRB may significantly impact either positively or negatively on Soldiers within Army units and installations.⁹⁷

The potential impact of the AGDRB depends on whether a Soldier is enlisted or an officer. For enlisted, the AGDRB serves as a forum for potential redress and increase in rank for service members who retired medically, are separated, or have spent a total of thirty years on active duty and the retired list. If the AGDRB deems the Soldier's rank reduction to have been unreasonable, it may restore the Soldier to a higher previously held rank. For officers, the AGDRB serves as a forum to address misconduct or poor performance with the potential to reduce the officers rank to the highest rank

⁹⁰ See Military Corruption, Top Air Force JAG Officer hypocrite and serial sex abuser of women gets "slap on the wrist" (Mar. 19, 2014, 11:06 pm) <http://www.militarycorruption.com/fiscus2.htm>. This website decries the injustice of Maj Gen Fiscus being reduced to O-6 while another lower-ranking officer received jail time for an adultery case. The article alleges higher-ranked officers receive lighter punishment than lower ranking airmen. *Id.*

⁹¹ See AR 600-8-24, *supra* note 5, at para. 4-11(h)(1).

⁹² See Serene Interview, *supra* note 29.

⁹³ Counsel may decide this is not the best tactic if they believe their client will continue to have difficulties either with performance or with military justice concerns.

⁹⁴ See Serene Interview, *supra* note 29.

⁹⁵ *Id.*

⁹⁶ AR 15-80, *supra* note 3, at para. 2-8.

⁹⁷ With the threat of the Army reverting to separating Soldiers at some future point when the Army downsizes again, the scope of the AGDRB is likely to increase in the future, impacting an even larger segment of the military. Robert Burns, *Hagel Proposes Downsizing Army to Smallest Size in Decades*, ASSOCIATED PRESS, Feb. 24, 2014, <http://www.pbs.org/newshour/rundown/hagel-propose-downsizing-army-smallest-size-decades>.

satisfactorily held. This negative function for officers is intended to address the Army's inability to otherwise reduce officers.⁹⁸ By addressing both unfair rank reductions for enlisted and misconduct or poor performance by officers, the AGDRB strengthens the legitimacy of the Army's retirement system, which is the current bedrock of the Army professional volunteer force.

Counsel for commanders and Soldiers would be well-served by delving into the AGDRB process. Such knowledge allows government counsel to give their commanders more options for separating officers as well as a deeper understanding of the Army's separation and administrative remedies. Conversely, understanding the AGDRB process and impact helps TDS and legal assistance counsel mitigate long-term damage caused by reprimands or other adverse information prior to retirement or separation.

⁹⁸ See Serene Interview, *supra* note 29. For officers there is no other mechanism for rank reduction, unlike the enlisted members where the Army has a several mechanisms to achieve reduction.

Beyond The Reach: Understanding When a Civilian Contractor's Income is Excluded From Federal Taxation Due to Residing Abroad

LIEUTENANT COLONEL DAVID DULANEY* and MAJOR John Goodell**

I. INTRODUCTION

Until recently, U.S. civilians deployed in a combat zone, while maintaining a home in the United States, could not exclude their foreign earned income from U.S. federal taxation.¹ As of September, 2017, that understanding of the foreign earned income exclusion has now changed, at least in part. The United States Tax Court finding in *Jesse A. Linde and Dawn Linde v. Commissioner of Internal Revenue* stands for the proposition that certain U.S. civilians, including military contractors, may be able to establish that they are a *bona fide* resident of a foreign country, even if in a combat zone, and thereby qualify to exclude their earned income from taxation.²

Because many defense contractors are otherwise entitled to legal assistance,³ tax center officers-in-charge as well as chiefs of legal assistance should be aware that their contractor clients may be eligible to exclude income earned in a foreign country.⁴ The following synopsis should prove instructive to the military tax practitioner regarding when a contractor would be eligible to exclude their foreign earned income.

II. A Synopsis of *Jesse A. Linde and Dawn Linde v. Commissioner of Internal Revenue*⁵

In 2009, Jesse Linde, who retired from the military in 2005, began working with a government contractor, Blackwater Security Consulting, in Iraq, receiving a residency visa from the Iraqi government.⁶ During 2010, 2011, and 2012, Linde lived in Iraq for 248, 240, and 249 days, respectively.⁷

While in Iraq, Linde established that he was a *bona fide* resident of Iraq. He lived in an unsecured area and mingled with the local community as much as possible. He conducted his grocery shopping at the local market, dined in restaurants, and socialized with Iraqi interpreters he met at work.⁸ He maintained a bank account at the Armed Forces Bank, which provided him funds he could use anywhere in Iraq.⁹

On his tax returns for the period 2010-2012, Linde excluded the wages earned in Iraq under the foreign earned income exclusion of Section 911.¹⁰ While Section 61 of the Internal Revenue Code establishes the general rule that gross income includes "all income from whatever source derived," Section 911 contains one of the many exceptions to that general rule.¹¹ Under that provision, a "qualified individual" may elect to exclude from gross income—subject to annual limitations—his foreign earned income.¹²

To meet the definition of a "qualified individual," the taxpayer must have his tax home in a foreign country and be:

- A. A citizen of the United States and establish that he has been a *bona fide* resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, or
- B. A citizen or resident of the United States and who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days in such period.¹³

* Judge Advocate, U.S. Army. Presently assigned as the Executive Director of the Armed Forces Tax Council, Office of the Under Secretary of Defense, Personnel and Readiness, Department of Defense, Pentagon, Washington D.C.

** Judge Advocate, U.S. Army. Presently assigned as Associate Professor in the Administrative and Civil Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

¹ All earned income must reported absent an exclusion. 26 U.S.C. § 61. One such exclusion is foreign earned income, which may be excluded as long as the taxpayer is a resident of a foreign country or countries for an uninterrupted period during entire taxable year or is present in a foreign country or countries at least 330 full days in a 12-month period. 26 U.S.C. § 911.

² See *Linde v. Comm'r*, 114 T.C.M. (CCH) 134 (2017).

³ Indeed, Jesse Linde retired from the military before beginning his work as a defense contractor in Iraq. *Id.* at 3.

⁴ Army Regulation 27-3 provides for tax services for any eligible client to include military Retirees. U.S. DEP'T OF ARMY REG. 27-3. The Army Legal Assistance Program (21 Feb.1996)(RAR 13 Sept. 2011).

⁵ Tony Nitti, *Helicopter Pilot Lands in Tax Court, Successfully Establishes that Tax Home Is in Iraq*, FORBES; September 19, 2017, <https://www.forbes.com/sites/anthonyнити/2017/09/19/helicopter-pilot-lands-in-tax-court-successfully-establishes-that-tax-home-is-in-iraq/#563b170e784d>. [hereinafter Nitti Article]

⁶ *Linde*, 114 T.C.M. at 3.

⁷ *Linde*, 114 T.C.M. at 4. Linde departed Iraq frequently due to employer rules.

⁸ Nitti Article, *supra* note 5.

⁹ *Linde*, 114 T.C.M. at 6.

¹⁰ *Id.*

¹¹ 26 U.S.C. § 911(a).

¹² *Id.*

¹³ 26 U.S.C. § 911(d).

Linde conceded that he had not physically resided in Iraq for 330 full days test during each of the tax years he claimed the exclusion.¹⁴ However, he reasoned that he had established a *bona fide* residence in Iraq. Predictably, the IRS denied Linde's claim that he maintained his tax home and bona fire residence in Iraq, therefore denying the foreign earned income exclusion.¹⁵ The IRS argued that Linde's containerized housing unit in the Green Zone of Baghdad could not qualify as his tax home and *bona fide* residence because he had maintained his abode in Alabama.

The tax code defines an individual's tax home as the vicinity of the taxpayer's principle place of employment and not where his or her personal residence is located.¹⁶ However, the individual's tax home cannot be considered in a foreign country if his or her abode is in the United States.¹⁷ Notwithstanding the IRS' contention that Linde's abode was in Alabama,¹⁸ the majority of 2010-2012 was clearly spent working and living in Iraq as previously described in this note.

Establishing a tax home in a foreign country is the first step in meeting the definition of a qualified individual. Linde conceded that he did not spend 330 days in Iraq during the years at issue, so in order to meet the second requirement of a qualified individual, he would need to establish that he was a "*bona fide* resident" of Iraq.

Linde was able to do just that, again credibly testifying that he began working in Iraq with the intention of remaining there indefinitely, an intention that was verified by his actions. Linde spent two-thirds of each year in Iraq, and his absences from Iraq were at the behest of his employer. Despite the fact that Linde spent less than 330 days each year in Iraq, he established that he was a *bona fide* resident of the country.¹⁹

Accordingly, the United States Tax Court found that Linde had stronger ties to Iraq than he did to the United States; both his economic and social life was in Iraq.²⁰ Therefore, Linde's unique facts and circumstances made him eligible to exclude his income earned in Iraq.

III. Concluding Thoughts

Many eligible civilian clients of our overseas tax centers will often try to claim the valuable foreign earned income exclusion. Most of those who do qualify for the exclusion, do so because they have established a physical presence in the

foreign country more than 330 full days. Those who do not meet the physical presence test may still be able to provide a *bona fide* residence, even in a combat zone, as Linde did. Military tax practitioners should be aware of this recent change to the law and be able to advise their qualifying clients about this subtle understanding of the foreign earned income exclusion and the *bona fide* residence test.

¹⁴ *Linde*, 114 T.C.M. at 9

¹⁵ *Id.*

¹⁶ 26 U.S.C. § 162(a)(2).

¹⁷ 26 U.S.C. § 911(d)(3); see also *Harrington v. Comm'r*, 93 T.C. 297 (1989).

¹⁸ Linde maintained his family, home, driver's license and voter registration in Alabama. He also visited his family in Alabama frequently. *Linde*, 114 T.C.M. at 16.

¹⁹ Nitti Article, *supra* note 5.

²⁰ *Linde*, 114 T.C.M. at 11.

At All Costs: The True Story of Vietnam War Hero Dick Etchberger¹

Reviewed by Major Lori E. Lincoln*

*We will, of course, continue reports as information comes in. At first glance, however, it appears we may have pushed our luck one day too long in attempting to keep this facility in operation.*²

I. Introduction

Matt Proietti succinctly delivers a 155-page biography about a true American hero, Chief Master Sergeant Dick Etchberger. Through a straight-forward description, Proietti unveils to the reader an unknown, clandestine radar mission in Laos during the Vietnam War. He delivers a chronological description of Chief Master Sergeant Etchberger's life, but begins the book where it ended, the death of Chief Master Sergeant Etchberger. Proietti then transports the reader to the crux of the book, the beginning stages of the operation in Laos. His writing on the collapse of Lima Site 85 captivates the reader. Following its intensity, Proietti details the political fallout and explores the lengthy quest by many to award Chief Master Sergeant Etchberger with the Medal of Honor.³

Proietti's writing style carries substance but eludes flowery distractors. He avoids the temptation of glorifying Chief Master Sergeant Etchberger, and instead, stays simplistic in his factual dissertation of the events in Laos and Chief Master Sergeant Etchberger's life.

While most Americans are most certainly unfamiliar with Chief Master Sergeant Etchberger and his heroism, at the end of the book, the reader will not be able to forget his harrowing tale and will understand why he received the Medal of Honor. Additionally, Proietti details an unknown historical event, which is applicable to many of our modern-day conflicts.⁴

II. Organization and Tone

At All Costs is Matt Proietti's first book.⁵ He has a unique and appropriately-fitted perspective to author the biography: he reached the rank of Chief Master Sergeant in the Air Force Reserves while serving in public affairs.⁶ In addition to his background as a newspaper editor, his writing style avoids overly ornate descriptions and remains factually driven. The climax of the biography is certainly the attack on Lima Site 85.⁷ Proietti does not focus exclusively on Chief Master Sergeant Etchberger, as may be expected, but rather, he neutrally described the chaotic scene from a broader perspective, utilizing the recollections of the surviving members of Project Heavy Green.⁸

Although at times the events seemed cluttered, at the end of the biography, Proietti's approach becomes more apparent. He brilliantly organizes all the accounts of fellow Project Heavy Green members and relays their versions in a manner that provides the reader with a true sense of the urgency likely felt by the men. As Medal of Honor recipient Staff Sergeant Salvatore A. Giunta stated, "If I'm a hero, then every man that stands round me, every woman in the military, everyone who goes into the unknown is a hero."⁹ Chief Master Sergeant Etchberger was not alone in his heroism. Proietti's writing paints a broad, vivid picture of the entire attack on 10 March 1968, but he enhances the impact of Chief Master Sergeant Etchberger's actions through this subtle approach at describing his gallantry.¹⁰

* Judge Advocate, U.S. Army. Presently assigned as Litigation Attorney, Litigation Division, U.S. Army Legal Services Agency, Fort Belvoir, Virginia. LL.M., 2017, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; Juris Doctorate., 2007, West Virginia University College of Law, Morgantown, West Virginia; B.A., 2004, University of Delaware Newark, Delaware. Previous assignments include United States Army Africa Office of the Staff Judge Advocate, Vicenza, Italy, 2008-2011 (Legal Assistance/Administrative Law Attorney, 2008-2009; Trial Counsel, 2009-2010; International/Operational Law Attorney, 2010-2011); Trial Counsel & Operational Law Attorney, 173d Infantry Brigade Combat Team (Airborne), Bamberg, Germany, 2011-2012, Afghanistan, 2012-2013; Chief, Military Justice, United States Army Special Forces Command (Airborne), Fort Bragg, North Carolina, 2013-2015; Deputy Judge Advocate, Joint Task Force, Afghanistan, 2015; Administrative Law Attorney, United States Army North, Joint Base San Antonio, Texas, 2015-2016. Member of the bars of the United States Supreme Court, Court of Appeals for the Armed Forces, West Virginia, the Southern District of West Virginia, and the Western District of Texas.

³ MATT PROIETTI, AT ALL COSTS: THE TRUE STORY OF VIETNAM WAR HERO CHIEF MASTER SGT DICK ETCHBERGER (2015).

² *Id.* at 100.

³ *Id.* at 110-132.

⁴ See generally PROIETTI, *supra* note 1.

⁵ See generally MATT PROIETTI, <http://www.mattproietti.com/> (last visited Sept. 24, 2016).

⁶ *Id.*

⁷ PROIETTI, *supra* note 1, at 87-97.

⁸ *Id.* at 87.

⁹ Staff Sergeant Salvatore A. Giunta, *Medal of Honor Profile*, U.S. ARMY, <https://www.army.mil/medalofhonor/giunta/profile.html> (last visited Sept. 24, 2016).

¹⁰ PROIETTI, *supra* note 1, at 87-97.

III. Political Landscape and Modern-Day Application

Project Heavy Green utilized a radar-guided bombing system, TSQ-81 radar, within 200 nautical miles of its target.¹¹ “The TSQ-81. . . significantly increase[d] bombing capabilities in poor weather conditions (October through April in North Vietnam) in areas of North Vietnam and Laos. It became operational in early November 1967, almost exactly coincidental with the end of the rainy season in Laos.”¹² Strategically located only 140 miles from Hanoi and 12 miles from North Vietnam, Chief Master Sergeant Etchberger’s headquarters was Phou Pha Thi, called Lima Site 85, elevation of 5,800 feet.¹³ But before they reached the peak, the men of Project Heavy Green began their journey at the “special briefing,” offered to 40 of its top radar technicians and electronics officers near Shreveport, Louisiana, that required the chosen ones to leave the Air Force and become Lockheed employees.¹⁴ Although technically reassigned to Detachment 1 of the 1043d Radar Evaluation Squadron at Bolling Air Force Base, they were, for appearances, civilians.¹⁵

Sending these U.S. Airmen into Laos not only violated the Geneva Accords, but it posed a significant policy challenge for the United States.¹⁶

The job of convincing Souvanna to let American GIs operate a radar-guided bomb system in Laos was left mainly to Ambassador Sullivan acting on direction of the White House and State Department with input from the Pentagon. His boss, Secretary of State Dean Rusk, had been the top U.S. diplomat for six years and believed that the military requirement in this case justified accepting potential political liabilities.¹⁷

These “political liabilities” discussed above were a theme throughout the book. Proietti impressively explains the political dynamic in a relatively short page length while maintaining the purpose of the book. His political discussions, particularly in Chapter 5, serve as a necessary and enriching chapter to paint the backdrop of the Vietnam

War.¹⁸ Vietnam altered war methodologies with the use of guerrilla warfare.¹⁹ The new complexities of warfare created a need by the United States to adapt to the newly emerging threat, and Project Heavy Green was part of that effort.²⁰

Although the political climate was quite different from current day, similarities exist between the war in Vietnam and the current conflict against the Islamic State of Iraq and Syria (ISIS). In an opinion-editorial piece in the *New York Times*, Thomas Friedman poses the question, “Obsessed with communism, America intervened in Vietnam’s civil war and took the place of the French colonialists. Obsessed with jihadism and 9/11, are we now doing the bidding of Iran and Syria in Iraq?”²¹ While this comparison may be controversial or fraught with deep subtleties, it certainly provides a springboard into analyzing the modern-day fight. Armed conflicts have increasingly become more complex with the actors involved, the methodologies employed, and the motivations that exist.

IV. Silent Professionals

What stood out from the clandestine mission was the resolve and dedication by the Project Heavy Green members despite their lack of combat training.²² The radar and radio technicians were not “special operators” that the modern-day public has come to know and expect with movies like “Zero Dark Thirty” and “Act of Valor.”²³ These men had a unique skill-set and were placed in a remote “neutral” country, conveniently located in close-proximity to Vietnam, but they were certainly not the modern-day special operators that the public has come to presume.²⁴

Army General Raymond “Tony” Thomas, head of U.S. Special Operations Command, commented about an alarming trend of some operators to write books or star in movies. He stated, “We’re hurting ourselves with this gratuitous release of movies, books and whatnot.”²⁵ Although the Project Heavy Green members were radar technicians and were certainly not the trained operators that General Thomas would have commanded, these men, and particularly Chief Master

¹¹ *Id.* at 23.

¹² See *The Fall of Lima Site 85*, CIA, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/95unclass/Linder.html> (last visited Sept. 24, 2016).

¹³ PROIETTI, *supra* note 1, at 24.

¹⁴ *Id.* at 9.

¹⁵ *Id.*

¹⁶ *Id.* at 21.

¹⁷ *Id.* at 23.

¹⁸ Thomas L. Friedman, Opinion, *ISIS and Vietnam*, N.Y. TIMES (Oct. 28, 2014), <http://www.nytimes.com/2014/10/29/opinion/thomas-friedman-isis-and-vietnam.html>.

¹⁹ *Guerrilla Tactics: An Overview*, [HTTP://WWW.PBS.ORG, http://www.pbs.org/battlefieldvietnam/guerrilla/index.html](http://www.pbs.org/http://www.pbs.org/battlefieldvietnam/guerrilla/index.html) (last visited Sept. 24, 2016).

²⁰ *Id.* See also PROIETTI, *supra* note 1.

²¹ Friedman, *supra* note 18.

²² Timothy N. Castle, *One of the US’ Most Closely Guarded Secrets: What Happened at the Top Secret Site 85?*, YOUTUBE (Mar. 5, 2016), <https://www.youtube.com/watch?v=IJVp1rfRkCE> (last visited Sept. 24, 2016).

²³ Thomas Gibbons-Neff, *Top U.S. Special Operations General: ‘We’re Hurting Ourselves’ with All of These Movies and Books*, WASH. POST (Sept. 15, 2016), <https://www.washingtonpost.com/news/checkpoint/wp/2016/09/15/top-u-s-special-forces-general-were-hurting-ourselves-with-all-these-movies-and-books/>.

²⁴ *Id.*

²⁵ *Id.*

Sergeant Etchberger, were the very type of men General Thomas would want. They were true professionals in every sense of the phrase. It is apparent, through Proietti's description of Chief Master Sergeant Etchberger's upbringing and family life, that he was a modest, hard-working, and humble man. He epitomized the silent professional and would certainly have garnered great admiration by General Thomas with his subtle and professional approach.²⁶

V. One Day Too Long: A Valuable Lesson Learned

As the introductory quote surmises, the U.S. Air Force pushed its luck "one day too long," and on 10 March 1968, commandos ascended the rugged mountain, fired automatic weapons and rocket propelled grenades into the camp, and the U.S. Air Force received its heaviest casualty loss during the Vietnam War.²⁷ Despite heavy fire in an austere environment and an unlikelihood of survival, these men performed their mission with much bravery.²⁸

Therefore, the question remains, were Project Heavy Green's successes outweighed by the losses? Certainly, the families of those lost and captured would argue otherwise, but with a primary shift of focus on targets within Laos rather than in North Vietnam, was this mission within "neutral" Laos a success? As Dr. Tim Castle wrote in *One Day Too Long*, "The advancing North Vietnamese forces, whose very presence should have triggered closure of the radar facilities, had become a reason to maintain it... the opportunity to kill large numbers of North Vietnamese and Pathet Lao soldiers was irresistible."²⁹ Ambassador William Sullivan, and ultimately the U.S. Air Force, pushed the envelope too far, and this almost war-like selfishness proved to be the downfall of Lima Site 85 and the men lost. In Walter Conkrite's strikingly powerful and poignant evening news broadcast, he stated:

To say that we are closer to victory today is to believe, in the face of the evidence, the optimists who have been wrong in the past. To suggest we are on the edge of defeat is to yield to unreasonable pessimism. To say that we are mired in stalemate seems the only realistic, yet unsatisfactory, conclusion³⁰

This mission certainly provides valuable lessons that are still applicable to today's conflicts. The 16 Project Heavy Green men, two CIA representatives, and an Air Force forward air controller located on the mountaintop on 10

March 1968 were essentially sitting ducks.³¹ Although it is near impossible to visualize the scenario and appreciate what these men encountered, in order to learn from our past mistakes, a review of the logistics, fire power, and strategic placement of the site, for instance, are just some of the lessons to learn from and avoid in future operations. Certainly the rugged terrain, lack of initial firepower support, element of surprise, and general lack of training for a ground assault created a perfect combination for disaster.

VI. Fall of Lima Site 85

Proietti artfully articulates how chaotic the Fall of Lima Site 85 was. Through his recount, the reader develops a greater appreciation of the bravery of these men, but most evidently, the grit that these men had. As General William T. Sherman said in a speech in 1880, war is not "glamour and glory, but in reality, War is hell."³² This proposition is apparent during Proietti's most captivating and action-packed chapter within his biography, the Fall of Lima Site 85. It is apparent that General Sherman's statement is entirely accurate, and the men of Project Heavy Green experienced their own hell at 5,800 feet.³³ At the climax, Chief Master Sergeant Etchberger's heroism ends in horrifying irony; he makes it off the peak but is tragically shot and killed as he reaches the UH-1H Huey chopper.³⁴

VII. Conclusion

Proietti exposes the reader to an unknown piece of history during the Vietnam War, a top-secret radar mission in the neutral country of Laos. The Fall of Lima Site 85 was arguably a microcosm within the Vietnam War; despite Project Heavy Green's seeming success, it was eventually overshadowed, as many tactical decisions were by the war as a whole. Even with a great historical lesson, the most striking impact of the book is the grit, determination, and bravery displayed by Chief Master Sergeant Etchberger and many of the Project Heavy Green members. Regardless of political opinion on the decisions made within the Vietnam War, everyone who reads *At All Costs* will agree that Chief Master Sergeant Etchberger was an unassuming, hard-working American. He is a hero, and his "gallantry, self-sacrifice and profound concern for his fellow men at risk of his life, above and beyond the call of duty, reflect the highest credit upon himself and the United States Air Force."³⁵

²⁶ See PROIETTI, *supra* note 1.

²⁷ Castle, *supra* note 23.

²⁸ *Fall of Lima Site 85*, *supra* note 13.

²⁹ PROIETTI, *supra* note 1, at 84.

³⁰ *Id.* at 85.

³¹ *Id.* at 99.

³² *William Tecumseh Sherman Quotes*, [HTTP://WWW.MILITARY-QUOTES.COM](http://www.MILITARY-QUOTES.COM), <http://www.military-quotes.com/william-berman.htm> (last visited Sept. 24, 2016).

³³ PROIETTI, *supra* note 1, at 96.

³⁴ *Id.* at 95.

³⁵ *Id.* at 140.

The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781

