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SEPTEMBER 2009

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ANNOUNCEMENTS

WE ARE PLEASED TO ANNOUNCE

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2009 NEW YORK SUPER LAWYERS UPSTATE EDITION

(See page 3)

NEW TAX CREDIT AVAILABLE FOR ELIGIBLE FIRST TIME HOMEBUYERS

On August 10, 2009, Governor David A. Paterson announced the New York State Mortgage Credit Certificate Program. In addition to the \$8,000.00 Federal First Time Homebuyer Tax Credit, the Mortgage Credit Certificate (MCC) allows eligible New York first time homebuyers to receive a dollar-for-dollar tax credit equal to 20% of the amount of their mortgage interest for each year of the loan. Borrowers can continue to deduct the remainder of their mortgage interest on their income tax returns. The program is designed to encourage low and moderate-income families to obtain affordable homes.

Borrowers must qualify as first time homebuyers and meet all of the program requirements, including income and purchase price requirements. A first time homebuyer is defined as a person who has not owned a principal residence within the last three years, and who does not currently own investment property or a vacation home. In addition to these borrower requirements, the property must also meet several requirements to be eligible under the program. Eligible properties include one- and two-family homes, condos and co-ops and existing three- and four-family homes. (Two-family new construction must be located in a SONYMA Target Area.) Additional requirements can be found on the MCC Program Term Sheet at: www.nyhomes.org.

The income and purchase price limitations vary depending on the type of loan, type of home, and area where the home is located. The income and the fix purchase price limitations are detailed at: www.nyhomes.org.

MCC applications will be available at participating lenders commencing in September. Although SONYMA is issuing the MCC, the certificate cannot be used with SONYMA loans. First Time Homebuyers should consult their lender at the time of loan application to determine if they are eligible for this credit.

To read the complete press release for the New York State Mortgage Credit Certificate Program, please go to: http://www.ny.gov/governor/press/press_0810092.html

Article written by Megan E. Curinga, Esq. For more information, Ms. Curinga can be reached at (607) 231-6929 or via email at mcuringa@hbh.com.

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"EN-JOIE THE DAY ON HHK" WAS A GREAT SUCCESS!

Thank you to all those who came and enjoyed the day with us.



Left to Right (top) Paul Sheppard, Stacy Axtell, John Jones, and Gary Tyler (bottom) Tina Fernandez, Jennifer Donlan, Laurie Ceparano, and Megan Curinga.

THE LOGIC OF SOLAR ENERGY ECONOMICS

In the original *Star Trek* television series, as they boldly traversed the Universe in search of strange new worlds, Captain Kirk and Mr. Spock occasionally engaged in a friendly game of three-dimensional chess. The complexities of that futuristic pastime provide an apt analogy for the overlapping government initiatives regarding solar energy. At the federal, state and local levels, there are incentives for the production of clean, renewable energy sources, designed to decrease dependence on foreign oil and to reduce carbon emissions and global warming.

The sun produces an inexhaustible source of power consisting of 50% heat and 45% photovoltaic (PV) energy. While solar energy itself is provided free of charge, the catch is that the tools needed to capture this source of energy are relatively expensive. Therefore, the only way to achieve “grid parity” for solar power (compared to coal, nuclear, hydro power etc.) is for government to provide economic subsidies until technology drives the cost of solar energy into parity with its competition. The Obama administration also believes that improvements in solar technology will create new jobs as part of its economic stimulus plan, which brings us to the first level of the solar chess game:

Level 1: Federal. In October 2008, the Federal government extended the 30% renewable energy income tax credit (ITC) to 2016. Basically, for every \$1.00 spent on qualified renewable energy projects, taxpayers are given a 30¢ credit against their income tax liability. Like all tax credits, however, the taxpayer had to wait until a tax return is filed to realize the economic benefit of the program. To enhance the ITC, in February 2009, the American Recovery and Reinvestment Act converted the ITC into a 60 day grant program for targeted projects. The Recovery Act ITC/grant program went live on Friday, July 31, 2009, with streamlined guidance.¹ However, in order to take advantage of this incentive, the taxpayer needs to know the rules of the game (including: five year clawback; annual reporting; basis reduction; production credits integration; prevailing wage and buy American compliance; eligibility restrictions; avoidance of AMT; and bonus depreciation shelters) so that a strategy of compliance can be plotted.



Image from Fabuloussavers.com

The Recovery Act grant program is the primary federal initiative, but there are also Department of Energy grant programs, guaranteed loan programs, production credits, a residential ITC program and the special depreciation rules.

Level 2: State. At the State level, there at least 50 permutations of solar energy subsidy programs. In general, the state subsidies fall into two categories. Some states advocate “front end” loaded subsidies, such as New York’s \$3.00 per watt subsidy/rebate under the current New York State Energy Research and Development Authority sponsored program. Others have “back end” loaded subsidies based on Performance Based Incentives (PBI) that are paid over a period of years. New Jersey’s solar renewable energy credits (SRECs) and Vermont’s recently enacted feed-in-tariff are examples of PBI. In general the state rebates and PBI payments are taxable. Therefore, taxpayers need to evaluate the tax effect of every option when formulating their solar economic strategy. In addition, taxpayers should look for state income tax credits that may be available.²

There are also state incentives for research and development, manufacturing, training and job creation within the renewable energy sector. The proposed federal Renewable Portfolio Standard (RPS) is 20% renewable energy by the year 2020 but many states also have an RPS. New York’s RPS is 25% by 2013.

Level 3: Local. The further you drill down, the more complicated it gets for solar economics. There are municipal incentives for solar power in the form of real estate tax abatement, municipal bonding, exemptions from sales tax, subsidized loans and exclusion from real estate assessment values. Economic viability is also impacted at this level with the consideration of building permits, zoning restrictions, zoning preferences, utility rates, prevailing wage laws, union issues, cost of labor, installer qualifications and conventional financing. In fact, financing transcends the 3D subsidy model as it cuts across the federal, state and local incentive programs.

An example is New York City’s real estate tax abatement of 8.75% per year for

up to four years, a calculation based on the Gross Installation of the system. This amounts to a 35% nontaxable incentive that approximates the value of the 30% ITC. To illustrate:

A 15KW system in Binghamton will generate around \$2,500 of electrical savings per year based on current rates and average sunshine.³ If installed at \$6.66 per watt, then the cost would be \$100,000. The simple return on investment would be 4.65 years as follows:

Gross Installation	\$	100,000
Recovery Act ITC/Grant	<	30,000>
NYSERDA Rebate	<	45,000>
Net Cost Year 1		25,000
Depreciation Years 2-5<		13,387>
Net Cost after Depreciation		11,613

\$11,613 ÷ \$2,500 of annual electrical savings is 4.65 years. A total return on investment over 25 years is approximately \$300,000 (less \$100,000 cost). Internal rate of return or cash flow models are also viable economic measures of a solar project. Lastly, the increased value of the property benefiting from the solar installation is another economic measure to be considered.

Conclusion: The value proposition for solar renewable energy is subsidized and sanctioned by federal, state and local governments. It is in a very real sense a government endorsed tax shelter. You can do it to be patriotic. You can do it to save the planet. You can do it to save money or taxes. If you play chess (or 3D chess), then you need to plan 10 or 15 moves ahead and anticipate “cap in trade” legislation, feed-in-tariffs and robust RPS rules. “Live long, and prosper.”

¹ Unless further extended, the grant program will sunset on December 31, 2010.

² Such as New York’s \$5,000 maximum residential credit for systems ≤10KW.

³ Obviously, there is more sunshine almost anywhere else on the planet.

Article written by John G. Dowd, Esq. John G. Dowd is Of Counsel to Hinman, Howard & Kattell, LLP and general counsel to Earthspouse, LLC, an alternate energy distributor, located in Kirkwood, New York. For more information, Mr. Dowd can be reached at (607) 231-6720 or via email at jdowd@hbk.com.

CAN YOU AFFORD TO NOT BUY WORKERS' COMPENSATION INSURANCE

Obtaining workers' compensation insurance coverage is a significant cost of doing business in New York State. For small or new businesses, it can be tempting to try to avoid this expense altogether and operate without a workers' compensation insurance policy in place. While this is possible in some circumstances, assuming that your business does not need workers' compensation coverage can be a costly mistake.

Put simply, the general rule in New York is that a business must provide insurance for workers' compensation benefits if it has any employees. The Workers' Compensation Board has the authority to determine what workers will be considered employees of a business, and can assess severe penalties for failure to secure coverage for someone that it considers your employee, even if you do not. For example, "independent contractors" hired to perform work by a business will frequently be treated as employees by the Workers' Compensation Board. The Board aggressively pursues uninsured businesses that it believes should have coverage, and will assess penalties of \$1,000 for each 10-day period of non-coverage.

Additionally, failure to carry workers' compensation insurance is considered a felony where there are more than five employees in a business, and is a misdemeanor for five employees or less. Workers injured while employed by an uninsured employer can also choose to sue the employer for damages instead of pursuing workers' compensation benefits, which is not an option when the employer is insured. If workers' compensation benefits are pursued and the injured worker is determined by the Workers' Compensation Board to be an employee for whom there is no coverage, the business owner is liable for lost wages and medical care related to the injury in addition to criminal and civil penalties. These costs can be financially devastating to business owners, and are certainly not worth the risk of going without coverage where it is required by law.

So, who needs workers' compensation insurance? It may be easier to say who does not, because the list of businesses for which workers' compensation insurance is not necessary is a short one. Under Section 54 of the Workers' Compensation Law, a self-

employed person, partners of a partnership or a registered limited liability partnership, and members of a limited liability company do not need to have workers' compensation insurance if there are no other persons considered to be employees of the company. Also, a corporation consisting of two or less executive officers, owning all of the issued and outstanding stock of the corporation, is not required to have workers' compensation insurance. All of these types of businesses can elect to provide workers' compensation coverage if desired.

If your business does not fit into any of these categories, chances are it will be necessary to obtain workers' compensation insurance. The expense of doing so will primarily depend on the nature of the work performed by and for the business and the number of employees. Even if your business would not require coverage under Section 54 of the Workers' Compensation Law, there are several things to be aware of to avoid being penalized by the Workers' Compensation Board for a lack of coverage.

As noted above, businesses engaging the services of "independent contractors" remain at risk for being penalized for a lack of coverage because the Workers' Compensation Board can consider these contractors to be employees regardless of their tax status. If your business hires independent contractors to do work, it is strongly recommended that you confirm that the contractors have their own workers' compensation policies. If they do not have coverage, your business will likely be liable for workers' compensation benefits for any injuries that occur.

The only way to guarantee that your business will not be penalized for failure to provide coverage is to have a policy in place. The Workers' Compensation Board has assessed penalties in cases where coverage was ultimately not necessary, and though the Board may retroactively rescind the penalties, it takes time and effort to convince them to do so.

In order to adequately protect your business, you need to be certain that you do not need workers' compensation insurance if you are operating a business in New York State and do not have a policy in place. If you receive a notice from the



Photographed from www.workercompensations.net

Workers' Compensation Board indicating that you are being penalized for failure to secure coverage for your business, do not ignore it because you believe it is incorrect. A prompt response will be more likely to result in a reduction or rescission of the penalty.

*Article written by Gary C. Tyler, Esq.
For more information, Mr. Tyler can be reached at (607) 231-6833 or via email at gtyler@bhk.com*

2009 NEW YORK SUPER LAWYERS

The following Hinman, Howard & Kattell, LLP attorneys have been voted and listed as 2009 New York Super Lawyers—Upstate Edition.



Banking:
James W. Orband, Esq.



Business Litigation:
Albert J. Millus, Jr., Esq.



Business Litigation:
Paul T. Sheppard, Esq.



Employment and Labor:
James S. Gleason, Esq.



Family Law:
Katherine A. Fitzgerald, Esq.



Family Law:
Michael S. Sinicki, Esq.



Worker's Compensation:
Eugene D. Faughnan, Esq.

Worker's Compensation:
Christopher Richmond, Esq.
(Not Pictured)

The American Recovery and Reinvestment Act of 2009 (Recovery Act) became law on February 17, 2009. It is intended to promote economic recovery by preserving and creating jobs. Funding from the Recovery Act has been allocated to a number of federal government departments and agencies (as well as state and local governments) to be spent on technological advances in science and health as well as infrastructure projects. Departments and agencies of the U.S. government are beginning to award contracts funded by the Recovery Act.

Government policy requires that an unprecedented level of transparency and accountability must accompany the spending of funds from the Recovery Act so that citizens can understand how and where these funds are being spent. This requires a significant amount of new government oversight in the awarding, managing and administration of contracts funded under the Recovery Act. One aspect of the administration of the Recovery Act has been the implementation of many new regulations governing the award and performance of commercial contracts funded under the Recovery Act. Private businesses performing their previously awarded U.S. government contracts have been surprised that U.S. government agencies are now requiring that existing government contracts be amended to comply with the new regulations promulgated under the Recovery Act. The reason for this requirement is that U.S. government agencies receiving new funds under the Recovery Act are allocating and commingling these funds to help finance previously awarded and negotiated commercial contracts.

These new regulations have been added to the Federal Acquisition Regulations (FARs) which govern the award and performance of U.S. government contracts. Under the FARs, prime contractors generally are required to “flow down” these FAR provisions to the various levels of subcontractors who manufacture components supplied to the prime contractor under the U.S. government contract. As a result of these procedures, many of the relatively small and medium-sized businesses who act as subcontractors under a U.S. government contract will be required to comply with a series of new, intrusive regulations. Ironically, these new regulations were inspired by the alleged mismanagement and excessively risky

practices of a few mega financial institutions, which triggered the recent global financial crisis. The, (perhaps unintended), consequence of these events is that small and medium-sized businesses who act as subcontractors to U.S. government contracts will now be subject to the same stringent government reporting, disclosure, accountability and auditing burdens as Bank of America and Citicorp. The financial impact of these regulations on small businesses remains to be assessed.

There are several new contractual terms that have been added to the FARs which must be incorporated into all contracts funded under the Recovery Act. This article is intended to make you generally aware of these new provisions. The following sections summarize the contract issues that you may face as a prime or subcontractor to a U. S. government contract:

Fixed-Price Contracts

The Recovery Act requires that fixed-price, competitively awarded contracts be used to the maximum extent possible for the expenditure of Recovery Act funds. Federal agencies will be required to post pre-solicitation and post-award notices on a website for any order or contract which meets certain expenditure thresholds. This process is intended to ensure that the public is aware of the government contracts that are being entered into as well as how and where government funds are being spent. This transparency is meant, in part, to yield more prudent spending of government funds.

Reporting Requirements

Contractors receiving Recovery Act Funds for their work under new and pre-existing contracts must also provide quarterly reports which will include: (a) the dollar amount of contractor invoices; (b) the supplies delivered and services performed; (c) an assessment of the completion status of the work; (d) an estimate of the number of jobs created and the number of jobs retained as a result of the Recovery Act funds; and (e) specific information on first-tier subcontractors. Additionally, if the annual volume of revenue received by a contractor from U.S. government contracts exceeds certain dollar thresholds, the contractor must disclose the total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded. While these reports are required for almost all contracts using Recovery Act funds, the level of detail required in these reports may vary based on the terms of each contract.

Other Required Contract Terms

The Recovery Act requires Government Contracting Officers to add clauses to contracts and subcontracts regulating the purchase of commercial and “off the shelf” items funded under the Recovery Act. These clauses will require compliance with employee “Whistleblower” protections, ethics and proper business policies, equal employment and affirmative action plans, anti-discrimination provisions, and environmental protection provisions. Notably, many contractors are presently subject to most of these provisions. However, the Office of Federal Contract Compliance will establish a more aggressive enforcement program for contractors receiving Recovery Act funds. Procedures to receive and investigate complaints of violations of these contract clauses have already been established.

Accountability Board

Finally, a new Accountability Board will audit and review information such as quarterly reports from all contractors, competition requirements, and how funds from the Recovery Act are spent. The Board can use its investigative power to subpoena documents and witnesses from a contractor to promote compliance with the Recovery Act. New audit provisions will apply to any cost and pricing data that a contractor is required to submit to qualify for a contract award.

Therefore, as they receive opportunities to compete for these contracts, businesses will be required to adopt the necessary internal business and accounting procedures to comply with these new FARs, regardless of whether they hold the prime contract with the U.S. government or are merely a subcontractor performing a small subsection of the contract. These new regulations and procedures are likely to present administrative and financial burdens on small and medium-size businesses that are selected to be subcontractors under a U.S. Government (or agency) prime contract.

Article written by Ralph K. Kessler, Esq. and Mr. Michael R. Capone. For more information, Mr. Kessler can be reached at (914) 694-4102 or via email at rkessler@hbkc.com.

TRANSFERRING OR RESERVING “MINERAL RIGHTS”

Although gas-leasing activity in our area has slowed dramatically from the fever pitch of only a year ago, the ramifications of the gas-leasing boom will be felt in our area for years to come. The potential impacts of gas exploration on the environment and the local economy have been well publicized. Less frequently discussed is how the desire to acquire or reserve mineral rights — as property rights or an investment — is changing our local real estate practice.

Mineral rights can be separated or severed from the remainder of an owner’s land rights by deed or deed reservation to create two separate estates: One estate for the mineral rights; and a separate estate for the remaining interests in the property, including the surface of the land and the surface improvements. Title to the mineral estate can be owned separately and transferred by deed, will or intestate succession, just like any other interest in real property. Severing mineral rights is common in traditional oil and gas producing states like Texas and Oklahoma, but has been almost unheard of in our area.

The practice of severing mineral rights presents challenges to parties on both sides of a real estate transaction. The first problem is that “minerals” and “mineral rights” do not have clear definitions in New York Law. The term “minerals” is derived from “mines” and implies mining and/or hard ores such as gravel or bluestone that have a fixed location and can only be reached by surface or subsurface mining. The term “minerals” does not clearly include gas and oil that are gaseous or liquid by nature and theoretically may migrate beneath the surface.

Whether or not the right to extract oil and gas and/or receive royalties payments is included in a definition of “mineral rights” will depend upon the intent of the parties. Accordingly, if the intent is to convey or retain oil and gas rights, it is advisable to specifically include terminology such as “gas and oil rights and/or the right to receive gas and oil royalties” in any written grant or reservation of mineral rights.

Another issue concerning mineral rights is whether or not the owner of the mineral estate has the right to use the surface of land to acquire the minerals. In many States, owning mineral rights gives the owner the right to use the surface to extract the minerals. Otherwise, the mineral estate could be meaningless. The law in New York State is not clear on this matter, so it is important to clearly describe the intentions of the parties when making a mineral rights reservation or grant.

Horizontal drilling techniques allow gas and oil to be produced from beneath a parcel of land by a well drilled on a neighboring parcel. Because of horizontal drilling, surface access may not be a critical issue for a party reserving or acquiring gas and oil rights. Accordingly, the term “mineral rights” should be either specifically limited or avoided altogether unless it is the parties’ intention to give the mineral rights holder the right to access the surface and/or remove materials through the surface, whether the materials consist of gravel or gas. This can be accomplished by using the terminology “gas and oil rights” instead of “mineral rights”.

Another way to make it clear that no surface rights are being conveyed along with the gas and/or oil rights is to place a specific restriction in the deed creating the gas and oil reservation that no surface rights are being conveyed. A surface access restriction is also important when obtaining a

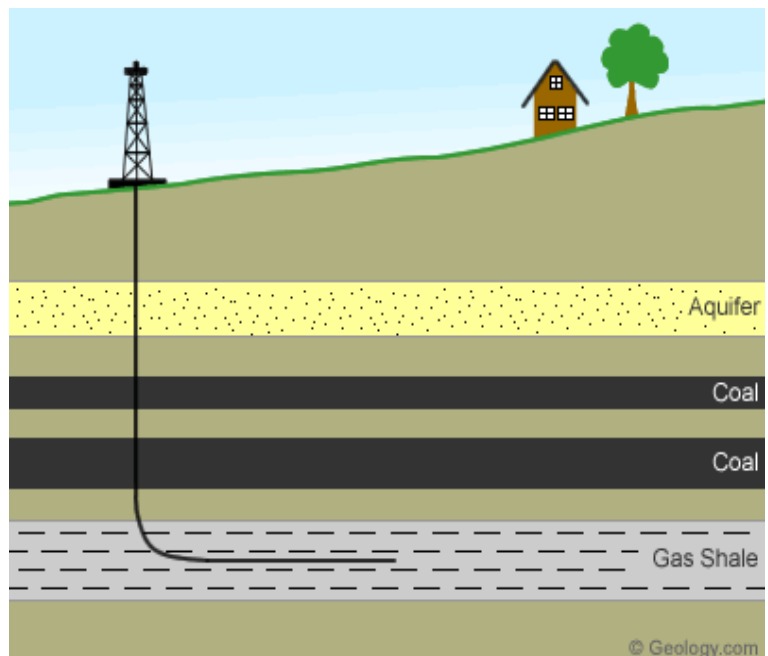
mortgage. Borrowers are required to obtain title insurance to protect their mortgage lender. A title insurance company will not insure a bank — and the bank will not make a loan — if it appears that a gas company can conduct surface operations that will diminish property values. We have been able to obtain title insurance policies acceptable to lenders that adequately insure both a lender and a buyer when surface access is restricted and the rights reserved are limited to “gas and oil rights”, rather than the broader term “mineral rights”.

Depending upon your goal, the term “mineral rights” can be either overly inclusive or not inclusive enough. In the end, foregoing use of the term “mineral rights” altogether and substituting the more specific definition of “oil and gas rights” may prove more beneficial to all parties.

We do not know how widespread the reservation of gas and oil rights will become in the future, but a sign that it is likely here to stay is Broome County’s attempt to retain mineral rights when the County sells property acquired through tax foreclosures. Mineral rights reservations are unlikely in urban areas, but we believe that reservations are inevitable in rural areas where a parcel of land may be more valuable to an owner for the gas royalties than for any surface use.

Our clients have faced numerous issues related to gas exploration activity, including lease terms, compulsory integration and the impact of signing bonuses and royalties on income taxes and estate or Medicaid planning. The attorneys in our Oil and Gas Practice Group have been addressing these issues for our clients since the gas-leasing boom started and welcome the opportunity to assist our clients with these issues and other oil and gas related questions.

Article written by John E. Jones, Esq. For more information, Mr. Jones can be reached at (607) 231-6738 or via email at jjones@bbk.com



"Mineral Rights" entitle a person or organization to explore and produce the rocks, minerals, oil and gas found at or below the surface of a tract of land. The owner of mineral rights can sell, lease, gift or bequest them to others individually or entirely. For example, it is possible to sell or lease rights to all mineral commodities beneath a property and retain rights to the surface. It is also possible to sell the rights to a specific rock unit (such as the Pittsburgh Coal Seam) or sell the rights to a specific mineral commodity (such as limestone).

Image from Geology.com.

AN OVERVIEW OF THE FORMER SPOUSE'S PROTECTION ACT

In the late 1970's and early 1980's, various state divorce courts began to treat military retired pay as "community property," often awarding a portion of a military member's retired pay to the former spouse. One such case from California finally wound its way through the Federal Courts to the Supreme Court. The case of *McCarty v. McCarty*, 453 US 210 (1981) held that Federal law did not allow retired pay to be treated as joint property. In its decision, the Supreme Court was very clear that the division of military retired pay was not necessarily unconstitutional, but that current Federal laws (at that time) prohibited treating military retired pay as joint property.

The Court held that, in the dissolution of a marriage, Federal law precluded the California Court from dividing military non-disability pay pursuant to state community property laws. Since the military retirement laws contained nothing permitting states to divide a military pension in the dissolution of marriage, the California Superior Court was reversed.

Congress was swift in dealing with the Court decision. In 1982, Congress passed the Uniformed Services Former Spouses Protection Act ("FSPA") (10 U.S.C. §1408). The Act reversed the *McCarty* decision and allowed state Courts to treat military retired pay either as property solely of the military member or as property of the military member and spouse in accordance with the laws of the state. The SFPA has been a source of confusion and controversy at both the several state and federal level.



Photographed by Tetra Images

The Act applies to the uniformed services, defined to include Army, Navy, Air Force, Marines Corps., and Coast Guard. The Act also applies to Reserve and National Guard members whether active duty, inactive duty status or retired. Since the FSPA is a Federal statute, its provisions and the regulations preempt state laws.

A state court order that contradicts the FSPA will not be enforceable. The FSPA, with limitations, allows a state court to treat a military pension either as property solely of the service member or as property of the member and his or her spouse in accordance with the law of the jurisdiction.

The Act sets forth that a state court may not divide a military pension unless the court has jurisdiction over the member by reason of his or her (1) residence other than because of military assignment in the territory or jurisdiction of the court, (2) domicile in the territory or jurisdiction of the court and (3) consent to the jurisdiction of the court. It is entirely possible for divorce, child support and alimony jurisdiction, but not pension jurisdiction, to exist in a case where the service member declines to participate and does not seek affirmative relief.

The ten-year rule precludes a state court from effectively ordering direct payments of the pension benefit from the Defense Finance and Accounting Service unless the former spouse was married to the serviceman for ten years or more, during which time the member performed at least ten years of service credible for retirement purposes. A state court is not prohibited by the FSPA from dividing a military pension in a marriage of less than ten years; however, direct payment of the pension benefit to non-military spouse by the Defense Finance is not permitted. There is no ten-year marriage requirement for garnishment from Defense Finance of child support, alimony or both.

Upon obtaining a final decree dividing a military pension, the decree is then forwarded by certified mail to the Defense Finance Department. A DD Form 2293, "Requests For Former Spouse Payments," for retired pay is completed and included with a certified copy of the final decree. A Qualified Domestic Relations Order is not required.

The Defense Finance Department is allowed ninety (90) days to respond in writing regarding whether the Order will be honored. It is a policy of the Defense Finance Department to honor orders that meet the requirements of the law.

To simplify the statute, the benefits are presented in escalation of years of service that overlap active duty years falling in the categories of: 10/10, 20/20/15, and 20/20/20. 10/10 indicates a marriage of at least ten years that overlaps ten years of active duty service. The FSPA provides no benefits for divorces obtained prior to satisfying the 10/10 years requirement. For divorces after the ten-year period is achieved, the non-military spouse may obtain a state court decree that distributes a portion of the military member's retirement pay and file the decree to obtain involuntary direct payments.

20/20/15 indicates a marriage of at least twenty years coupled with twenty years of creditable service, with at least fifteen years of overlap between marriage and years of service. In addition to the 10/10 benefits, the statute provides medical benefits for the unremarried former spouse.

Finally, 20/20/20 indicates a marriage of at least twenty years with twenty years of creditable service that overlapped each other for at least twenty years. This category allows for the former spouse to retain all the military benefits of the retired military spouse, including a military ID card, commissary and exchange privileges and medical benefits.

Whether to treat the military retirement as property solely of the military member or as property of the spouse, and whether a division should be equal or unequal, still remains within the prerogative of the Court. The intent of Congress in enacting the statute was to protect the former military spouse.

Article written by Joseph E. Lamendola, Esq. Special Counsel, Hinman, Howard & Kattell, LLP, Colonel, HQ NYANG/ Staff Judge Advocate.

For more information, Mr. Lamendola can be reached at (315) 473-9414 or via email at jlamendola@hbkk.com

A CHANGE IS COMING IN CHILD SUPPORT GUIDELINES

In New York, child support is governed by the Child Support Standards Act (CSSA), which took effect on September 15, 1989. The Act is contained in two parallel statutes, Domestic Relations Law § 240(1-b) and Family Court Act § 413. The Domestic Relations Law is used for divorce and separation actions in Supreme Court, while the Family Court Act applies to custody, paternity and support proceedings in Family Court. The purpose of the Act is to remedy deficiencies in enforcing child support obligations by adopting guidelines that permit judicial discretion, but which also establish minimum and meaningful standards of obligations on the premise that both parents share the responsibilities for child support. The focus of the Act was to bring greater uniformity, predictability and equity to child support orders by replacing an almost entirely discretionary determination of child support with a more precisely articulated method for determining support.

New York child support has two components: (1) “basic” child support; and (2) contribution toward “add-on” expenses, which are additional items not encompassed in the regular, basic child support payment. “Basic” child support is the regular periodic payment of support made by the non-custodial parent to the custodial parent and is calculated in a two-step process. First, the Court determines the child support based on the first \$80,000 of combined parental income (known as the \$80,000 cap). Second, the Court determines the child support based on the combined parental income over \$80,000. In step one, the Court determines the combined parental income (minus FICA and other deductions), and multiplies that income, up to \$80,000 per year, by a child support percentage, which varies depending upon the number of children involved (17% for 1 child, 25% for 2 children, 29% for 3 children, 31% for 4 children and no less than 35% for 5 or more children). The resulting figure is then apportioned between the parents in the same proportion as each parent’s income is to the combined parental income. The two final figures then represent the “basic” child support obligation of the parents. However, when the combined parental income exceeds \$80,000, the statute provides the Court may apply the child support percentage or it may apply the discretionary factors provided for use in determining whether application of the guidelines to the combined parental income over \$80,000 is unjust or inappropriate (these factors, commonly referred to as “F” Factors, are outlined in FCA § 413(1)(f) and DRL § 240(1-b)). In other words, at \$80,000 of income and below, the statute makes the child support percentages presumptively correct, and at higher levels of income over \$80,000, the Court may apply the statutory percentages, the “F” factors, or a

combination of both. It should be noted, however, that the Court does have some discretion to deviate from the presumptive child support obligation and consider the “F” Factors whenever the basic child support obligation derived from the application of the formula would be “unjust or inappropriate.” That is so whether parental income is above or below \$80,000.

The \$80,000 cap was created in 1989. Since then, there have been both increases in income levels and the cost of living. In response to those changes, and criticisms that the current child support guidelines have caused inconsistent support orders through the State, the Legislature passed the Child Support Modernization Act. The Child Support Modernization Act, which was signed by Governor Paterson on August 11, 2009 and takes effect January 31, 2010, will increase the combined parental income amount (i.e. the maximum dollar value of parental income, or “cap,” to which the CSSA percentages must be applied for calculation of child support) from \$80,000 to \$130,000 beginning January 31, 2010. The new legislation also provides for a mechanism beginning in 2012 for revisiting this threshold every two years to reflect changes in the consumer price index published by the United States Department of Labor. It is believed that these changes will allow the combined parental income amount to keep pace with current economic realities so that proper orders are granted on a consistent and predictable basis through the State, leaving only exceptional income cases to potentially be determined outside the presumptively correct CSSA percentages.

The Child Support Modernization Act, however, will not affect the calculation of parental contribution for “add-on” expenses, which include uncovered health care, child care, and educational expenses. These “add-on” expenses are usually figured out as a percentage of the parent’s income, for which each parent is responsible for a pro rata share. For example, if the mother has \$45,000 in income and the father has \$15,000 in income (for a combined parental income of \$60,000), the mother’s proportion is 45/60, or 3/4, and the father’s proportion is 15/60, or 1/4. The new combined parental income figure or “cap” of \$130,000, which may affect the amount of child support, will have no application to determining pro rata percentages for “add-on” expenses.

Article written by Jennifer M. Donlan, Esq. For more information, Ms. Donlan can be reached at (607) 231-6933 or via email at jdonlan@bhk.com.



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FOR MORE INFORMATION

Hinman, Howard & Kattell, LLP
700 Security Mutual Building
80 Exchange Street
P.O. Box 5250
Binghamton, New York 13902-5250

Phone: (607) 723-5341
Fax: (607) 723-6605
www.hhk.com

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