

**Testimony before the Senate Veterans and Emergency
Preparedness Committee
on behalf of the OSB Family Law Section
in opposition to SB 1505**

Dear Chair Boquist and Members of the Committee:

My name is Ryan Carty. I am an attorney in private practice limited to family law. I am the legislative liaison for the Family Law Section of the Oregon State Bar for the current legislative session. I also serve as Chair of the Family Law Section's Legislative Subcommittee. I appear today in that capacity. The Family Law Section was originally formed in 1978, and today is made of up of over 1,000 attorneys who practice family law in Oregon. We have members from 30 different Oregon counties, representing a wide variety of clients each with their own unique problems and concerns. Our membership includes attorneys in both public and private practice. Our executive committee is comprised of 12 members from 8 different counties, from the coast, to the Willamette Valley, to Central Oregon, and includes Deputy District Attorneys from both Multnomah and Lincoln Counties. We come from very different backgrounds, and represent a wide variety of viewpoints on family law issues, but are in agreement that the proposed reform relating to the interaction between veteran's disability benefits and spousal support would be a step in the wrong direction.

What the Bill Does

The proposed legislation would exclude veterans' disability benefits from any calculation of earnings, income and resources available to a party for the purpose of paying spousal support. As written, the law would entirely remove the court's discretion to determine whether an inclusion of such benefits is appropriate when awarding, modifying or terminating spousal support.

Veterans' Disability Benefits and Support, generally

The issue of whether courts may properly consider veterans' disability benefits in making a determination of an appropriate amount of support most often arises in the context of child support obligations. The United States Supreme Court discussed the interplay between veterans' disability benefits and child support at great length in *Rose v. Rose*, 107 S Ct 2029 (1987), and determined that a state may, without being in conflict with federal law, consider veterans' benefits as a source of income for purposes of establishing child support.

In reaching its decision in *Rose*, the United State Supreme Court reviewed relevant federal legislation, including 38 U.S.C. § 5301(a), which provides that veterans' benefits payments made to, or on account of, a beneficiary (i.e., the veteran) shall not be subject to attachment, levy or seizure. Notwithstanding these specific restrictions, the legislative history behind this federal legislation makes clear that veterans' disability benefits are intended to provide compensation for disabled veterans *and their families*, which includes payment of spousal and child support.¹

A proposal similar to SB 1505 was submitted to the Oregon Uniform Trial Court Rules (UTCRC) Committee in 2011 that would have excluded veterans benefits from the definition of "income" for purposes of establishing child support.² That proposal ultimately went nowhere in the face of opposition from the Oregon Department of Justice Child Support Program and the Oregon State Bar Family Law Section.

Judicial Discretion

Oregon courts are granted broad discretion to take particular factors in individual cases in to consideration when awarding, modifying or terminating spousal support. This is a positive aspect of spousal support law in Oregon because many of these cases present factual scenarios without an obvious answer. Oregon courts have historically considered veterans' disability benefits in considering whether spousal support is appropriate.³ This approach is consistent with the treatment given such benefits by other states faced with this issue.⁴

¹ See *Wissner v. Wissner*, U.S. 338 US 655, 70 S Ct 398 (1950), *Hisquierdo v. Hisquierdo*, 439 US 572, 99 S Ct 802 (1979), and *Ridgway v. Ridgway*, 454 US 46, 102 S Ct 49 (1981).

² See attached Exhibits 1-3.

³ See, for example, *McKinnon and McKinnon*, 256 Or App 184, 300 P 3d 257 (2013), *Morales and Morales*, 230 Or App 132, 214 P 3d 81 (2009) and *Murphy and Murphy*, 151 Or App 649, 950 P 2d 377 (1997).

⁴ Vermont – Federal legislation does not preclude state courts from considering veteran's disability benefits as a source of income upon which an award of spousal support may be based. *Repash v. Repash*, 148 Vt. 70, 528 A 2d 744 (1987).

Pennsylvania – It is appropriate to consider veteran's disability benefits in determining an appropriate amount of spousal support to be awarded in the parties' divorce. *Parker v. Parker*, 335 Pa Super 348, 484 A 2d 168 (1984).

New Jersey – Consideration of military retirement payments is appropriate in determining an equitable distribution of property in a divorce proceeding, notwithstanding the federal exemption of these benefits from attachment, levy or seizure (similar to the restrictions in place concerning disability benefits). *Kruger v. Kruger*, 73 NJ 464, 375 A 2d 659 (1977).

Conclusion

Members of the Family Law Section of the Oregon State Bar represent service members (current and former) and their spouses, and are neither pro-spousal support nor anti-spousal support. The section's focus is on achieving fair results in difficult cases. SB 1505 does not support those goals.

The Family Law Section supports judicial discretion in family law cases and recommends *against* trying to exclude veterans' disability benefits from calculations of spousal support. Such a change would be inconsistent with well-settled Oregon law and could lead to unfair results. As the law currently stands, judges have the flexibility to determine whether inclusion of a particular source of income, disability or otherwise, is appropriate to consider in crafting an award of spousal support. We deal in a fact-specific area of the law and ask that the legislature continue providing courts with the tools to approach these unique cases uniquely.

On behalf of the Family Law Section of the Oregon State Bar, I thank the members of the committee for their consideration and urge the committee to not move the bill forward.

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OSCA

February 14, 2011

Bruce C Miller
State Court Administrator Office
Supreme Court Bldg
1163 State St
Salem OR 97301

Re: UTCR Form 8.010.5—Uniform Support Declaration and Veterans' Benefit Issues

Dear Mr. Miller,

Thank you for the opportunity to respond to the issues raised by Peter J. Barclay. As you know the Child Support Program has previously determined that Veterans' benefits may be counted as income for purposes of calculating a parent's child support obligations. The Uniform Support Declaration (USD) directs the parties to list all income from every source. This is intended to include Veterans' benefits. In light of your letter I had my policy team and the Division of Child Support's general counsel re-examine the issue and review Mr. Barclay's proposed revisions to the USD¹. We also discussed this matter at the most recent State Family Law Advisory Committee meeting. There was unanimous agreement that including Veterans' benefits as income is proper and that the proposed form changes are unnecessary and not supported by federal or state law.

¹ You may also be interested to know that Tom Hedberg, Policy Section Manager, also had an opportunity to talk to Mr. Barclay, who was apparently unaware of the definition of income under Oregon child support administrative rules and the statutory provision for veteran benefit credit against a child support obligation.

Specifically, the United States Supreme Court has determined that states are allowed to include Veterans' benefits in child support calculations. Rose v. Rose, 107 S.Ct. 2029 (1987). In addition, ORS 25.010(7) defines income for child support purposes; it is more than broad enough to cover Veterans' benefits. ORS 25.275(1) mandates that "All earnings, income and resources of each parent, including real and personal property" shall be included as part of the child support formula. OAR 137-050-0715, the Oregon Child Support Guideline's income rule, specifically provides that disability benefits are considered income for child support purposes.

Mr. Barclay has expressed concerns that including disability benefits is not fair to Veterans. However, our guidelines allow a dollar for dollar credit for any Veterans' benefits paid directly to a child. See, ORS 253275(4)(b) OAR 137-050-0740. In practice this means that a Veteran who is ordered to pay \$300 per month to support two children would be given a credit for every dollar of Veterans' benefits paid to the custodial parent on behalf of the child. As a result, if the child's custodian received \$200 per month in Veterans' benefits, the net monthly child support obligation would be \$100.

The changes proposed for the USD would specifically instruct parties not to include "non-attachable" Veterans' or Social Security benefits when listing income to be used in calculating support. Whether disability benefits can be attached for enforcement purposes is a completely separate issue from counting those benefits as income when establishing a child support order. Instructing parties to exclude certain Veterans' benefits from income is contrary to Oregon law, confusing to self represented litigants and could lead to improper child support amounts.

Thank you again for allowing our program to weigh in on this important subject. Due to the clarity of the law, I do not intend to have a representative at the March UTCR Committee meeting. If you have additional questions or concerns, do not hesitate to contact me.

Very truly yours,



Jean Fogarty, Director
Oregon Child Support Program

Cc: Dave Ganett, OSB Family Law Section
Russ Lipetsky, State Family Law Advisory

From: "Russell Lipetzky" <rlipetzky@qwestoffice.net>
To: "MILLER Bruce C" <Bruce.C.MILLER@state.or.us>
Date: 01/24/2011 10:00 AM
Subject: Veterans Benefits and Child Support

Bruce –

I have reviewed Mr. Barclay's concerns about the interaction between veteran's benefits and child support. My analysis follows.

The veteran's benefit issue is not a Uniform Support Declaration or other UTCR issue, nor is it an OAR issue. It is an ORS issue.

The US Supreme Court has determined that a state may, without being in conflict with Federal law, look to veterans benefits as a source of income for purposes of establishing child support. *Rose v Rose*, 107 S.Ct. 2029 (1987).

As authorized by Federal law, Oregon statute does not exclude veterans benefits from the definition of "income" for purposes of establishing child support. ORS 25.010 (7) and 25.275 (1). This is a decision made by the Oregon legislature, and is not the result of any discretionary action or decision by the UTCR Committee, the Family Law Section of the Oregon State Bar, the Division of Child Support, or Oregon judges, all of whom are bound by the applicable statutes.

The child support guideline OARs, consistent with statute, do not exclude veterans benefits from a party's income for purposes of calculating child support. OAR 137.050.0740. Consequently, the Uniform Support Declaration properly includes – or, put another way, fails to exclude – veterans benefits paid to the obligor parent from that parent's income for purposes of calculating support under the support guidelines.

Although there is nothing legally improper about having the USD identify income that is derived from veterans benefits, the USD cannot "back out" veteran's benefits from the party's income for child support purposes and still be in compliance with rule and statute. The danger in having the USD specifically identify veterans benefits as a component of income is that litigants may be lead to believe – incorrectly – that there is some legal significance to segregating that income, when in fact there is not.

OAR 137.050.0740 addresses a separate issue. When veterans benefits that are paid directly to a child, rather than paid to the obligor parent, the support guidelines allow a dollar for dollar reduction in the amount of child support that would otherwise be ordered. That is a distinct issue from the requirement that veteran's benefits received by the veteran be included in the definition of income for purposes of calculating support.

Also note that the issue of whether veterans benefits are included as income for child support calculation purposes is legally distinct from questions about the extent to which child support, once ordered, may be withheld, garnished or otherwise collected from such benefits. That is also not a UTCR issue.

I hope this helps the UTCR committee's understanding.

Regards,

Russ Lipetzky

c. Anthony Wilson, FLS

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February 22nd, 2011

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Salem, Oregon 97301

Re: UTCR Form 8.010.5 - Uniform Support Declaration and Veterans' Benefit Issues

Dear Mr. Miller:

In your January 5th letter to Ms. Fogerty and Mr. Wilson you requested that the Oregon State Bar Family Law Section provide input about Mr. Bruce Barclay's arguments and proposal that the Uniform Support Declaration be modified to differentiate between different types of disability benefits and that veterans' disability benefits should be excluded as income in Oregon child support calculations. I am writing to inform you that the Executive Committee of the Family Law Section met Thursday afternoon, February 17th, and determined that Oregon's current statutes are constitutional in regards to the inclusion of veteran's disability benefits as income for the purposes of child support. Taking this position, the Section does not support a revision of the Uniform Support Declaration as proposed by Mr. Barclay.

The Family Law Section relies on the ruling in Rose and Rose, 107 S. Ct 2029 (1987) which clearly allows states to include such benefits as income for the purpose of determining child support. The Section concurs with the same conclusions in Ms. Fogerty's February 14th to you and in Mr. Lipetzky January 24th e-mail letter and believes that if there is to be a change in the treatment of these benefits, the legislature must address this issue with changes to Oregon's statutes.

We hope our analysis and comments on Mr. Barclay's proposals are helpful and trust that you will contact the Family Law Section if you have any questions or concerns.

Respectfully,


David G. Gannett

cc: Anthony H.B. Wilson, Esq. Chair Oregon State Bar Family Law Section
Laura Rufolo, Esq. Chair-Elect Oregon State Bar Family Law Section
Jean Fogerty, Esq. Director Oregon Child Support Program
Russ Lipetzky, Esq. State Family Law Advisory Committee