

N.D.A.G. Letter to Slorby (Oct. 4, 1990)

October 4, 1990

Mr. Tom P. Slorby
State's Attorney
Ward County
Minot, ND 58701

Dear Mr. Slorby:

Thank you for your September 11, 1990, letter concerning the compensation of court appointed attorneys under the Soldiers' and Sailors' Civil Relief Act of 1940 (the Act) codified as 50 U.S.C. § 501 et seq. I agree with you that under section 520(1) it is mandatory that the court appoint an attorney to protect an enlisted person's interest when in any action or proceeding commenced in any court the plaintiff is seeking a default judgment against a nonappearing defendant who is in the military service.

The Act was enacted in 1940 to protect service persons from having their absences taken advantage of by creditors and to enable them to devote their full time and energy to the nation's defense. Keefe v. Spangenberg, 533 F.Supp. 49, 50 (W.D. Okla. 1981). It is, and should be, construed liberally for the benefit of the service person; however, it does not provide an automatic stay in every case. Id. Where the proceedings can proceed without prejudicing the civil rights of the service person, and where the conduct of his defense is not materially affected by reason of the person's military service, the Act cannot be used for delay. 50 U.S.C. §§ 510, 521.

Your question specifically concerns the compensation of court appointed attorneys under the Act. It is generally accepted that in times of war the services rendered by counsel to protect the interests of absent active service persons are to be regarded as a patriotic duty for which no compensation may be expected. In re. Cool's Estate, 18 A.2d 714 (N.J. 1941); Weynberg v. Downey, 25 N.Y. S.2d 600 (N.Y. Sup. Ct. 1941).

However, in times of peace, the prevailing view is that a court appointed attorney under section 520(1) should be compensated in a manner analogous to the compensation of court appointed attorneys as guardian ad litem. United States v. Henagen, 552 F.Supp. 350, 351 (M.D. Ala. 1982); Weynberg, 25 N.W.S.2d at 601; In re. Elkie's Estate, 27 N.W.2d 754, 759, modified 28 N.W.2d 884 (Wi. 1947).

Please note that the utmost service of an attorney appointed to protect the interest of the nonappearing service person is toward procuring a temporary stay of the proceedings when necessary to protect the service person's interest. In re. Eikers Estate, 27 N.W.2d 757. Thus, the court appointed attorney's obligation is to move for a stay of the proceeding as provided under 521 unless "the defendant's ability to conduct his defense is not materially affected by reason of his military service." Id. See generally Boone v.

Lightner, 319 U.S. 561 (1943).

I hope that this information will be helpful.

Sincerely,

Nicholas J. Spaeth

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