

Incompetency Proceedings and the SCRA (Yes, You Read that Right)

We've now posted a handful of times about the Servicemembers Civil Relief Act (SCRA) on this blog. In particular, we've posted on the SCRA's application to [non-judicial foreclosures](#), [juvenile proceedings](#), and [family law cases](#). At the risk of being told that the blog should be renamed "The SCRA and Other Civil Stuff," I'm going to add another SCRA post to the list. In my defense, over the course of the past few months I've received a number of questions regarding the applicability of the SCRA to proceedings before the clerk of superior court. In particular, I've been asked whether the SCRA applies to incompetency proceedings filed under [G.S. Chapter 35A](#) for the purpose of obtaining a guardian for an alleged incompetent adult. Here's how I've answered the questions I've received:

#1: The SCRA applies to incompetency proceedings filed before the clerk.

The SCRA applies to any judicial or administrative proceeding commenced in any court or agency. [50 U.S.C. App. sec. 512](#). The **only** proceedings excluded from the SCRA are criminal proceedings. *Id.* This means the SCRA applies to incompetency proceedings (as well as other proceedings before the clerk, including estates, partitions, legitimations, name changes, and the list goes on – remember, it applies to anything that is not criminal).

#2: The SCRA applies to more than just servicemembers serving abroad.

It is easy to fall into the trap of thinking that the SCRA is only applicable to servicemembers on active duty in a foreign country. But, it applies to more than just them. It applies to servicemembers in **military service**, including those:

1. On active duty (as defined in 10 U.S.C. App. sec. 101(d)(1)) who are a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard;
2. In the National Guard under a call to active service authorized by the President or Secretary of Defense for a period of more than 30 consecutive days for the purpose of responding to a national emergency;
3. On active service who are commissioned officers of the Public Health Service or the National Oceanic and Atmospheric Administration; and
4. During any period in which the servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.

[50 U.S.C. App. sec. 511\(2\)](#). This means the SCRA applies to the full-time army officer stationed at Fort Bragg, the Marine home from Afghanistan on leave, and the Air Force pilot recovering from injuries at a hospital. It may seem far-fetched that the SCRA and an incompetency proceeding would collide, but it could happen. If the Army officer is off the base and in a terrible car accident

leaving her in a coma, she may need a guardian appointed. If the Marine home on leave suffers from severe depression or post-traumatic stress disorder and is not able to manage his own affairs or make or communicate important decisions about his life, then he may need a guardian to act on his behalf. [G.S. 35A-1101\(7\)](#). The SCRA protects a broad range of servicemembers who may also need the assistance of a court-appointed guardian.

#3: The SCRA imposes an obligation on the clerk if the respondent has not made an appearance.

Under G.S. 35A-1109, copies of the petition for the adjudication of incompetence and notice of hearing must be personally served on the respondent. The petitioner may not rely on publication or other means of service on the respondent in an incompetency proceeding.

1. **Respondent Not Personally Served.** If the respondent is not personally served, then under Chapter 35A, the clerk may not go forward with the incompetency proceeding. [G.S. 35A-1109](#).
2. **Respondent Personally Served and Present at the Hearing.** If the respondent is personally served and present at the incompetency hearing, the clerk does not need to require an affidavit but a respondent who is in military service may assert other rights under the SCRA, such as the right to apply for a stay. [50 U.S.C. App. sec. 521\(a\)](#); [50 U.S.C. App. sec. 522](#).
3. **Respondent Personally Served and Does Not Make an Appearance.** If the respondent is personally served but does not make an appearance at the hearing or otherwise, the SCRA applies. The SCRA states that the clerk must require the petitioner to file an affidavit with the court regarding the respondent's military service *prior to entering an order* adjudicating the respondent incompetent. [50 U.S.C. App. 521\(b\)\(1\)](#) (stating that the court must require the affidavit "before entering a judgment for the plaintiff.") However, as a practical matter and to ensure the rights of the respondent who may be a servicemember are protected, the clerk should require the SCRA affidavit to be filed prior to commencing the hearing on incompetency. [50 U.S.C. App. sec. 521\(b\)\(1\)](#).

The requirement for an affidavit may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury. [50 U.S.C. App. sec. 521\(b\)\(4\)](#). A form affidavit ([Form AOC-G-250](#)) that satisfies the SCRA is now available for use in all non-criminal proceedings (with the exception of non-judicial foreclosures under Chapter 45 for the reasons set forth in my post [here](#)). It is not sufficient for the guardian ad litem to make a statement to the court at the hearing regarding the respondent's military status, even if the guardian ad litem has personally met with the respondent prior to the hearing. The petitioner must file a written affidavit with the court and may use Form AOC-G-250 or another writing that satisfies the affidavit requirements described above. [50 U.S.C. App. sec. 521\(b\)\(1\)](#).

The **affidavit** filed by the petitioner should set forth one of three things:

1. **Respondent Not in Military Service.** If the affiant states that the respondent is not in the military, the clerk may proceed with the case and enter an order.
2. **Unable to Determine Military Service.** If the affiant is unable to determine whether the respondent is in the military, the clerk may proceed with the case and enter an order. However, the clerk may require a bond to compensate a respondent in the event the respondent is later found to be in military service and the respondent suffers a loss as a result of the order entered against the respondent. The clerk may also enter any other order the clerk deems necessary to protect the rights of the respondent under the SCRA whose military service is undetermined. [50 U.S.C. App. sec. 521\(b\)\(3\)](#).
3. **Respondent in Military Service.** If the affiant states that the respondent is in the military, the clerk should follow steps two through four outlined in Cheryl's blog post found [here](#). However, the clerk does not need to appoint a new attorney to act on behalf of the respondent. A guardian ad litem appointed pursuant to [G.S. 35A-1107\(a\)](#) in an incompetency proceeding may carry out the responsibilities of SCRA appointed counsel, as discussed below. [50 U.S.C. App. sec. 521](#).

#4: If the respondent is in military service, the guardian ad litem appointed under Chapter 35A should carry out the duties of appointed counsel under the SCRA as part of their representation of the respondent.

In an incompetency proceeding, the respondent is entitled to be represented by counsel of his own choice or an appointed guardian ad litem. [G.S. 35A-1107\(a\)](#). Typically, after the filing of the incompetency petition, the clerk appoints a guardian ad litem to serve as the respondent's counsel in the proceeding and also to report on the respondent's best interests to the court. [G.S. 35A-1107\(b\)](#).

If the affidavit filed by the petitioner shows that the respondent is in military service, the guardian ad litem already appointed by the clerk should ensure that the respondent's rights under the SCRA are also protected. This includes seeking a stay under Section 521 and/or Section 522 of the SCRA, if appropriate.

Section 521 Stay. Prior to the hearing, the guardian ad litem should attempt to contact the servicemember respondent, determine whether a stay of the proceedings would be appropriate, and apply for a stay of the proceedings under [Section 521\(d\)](#) of the SCRA if:

1. there may be a defense to the action and a defense cannot be presented without the presence of the respondent, or
2. after due diligence, the guardian ad litem has not been able to contact the respondent or otherwise determine if a meritorious defense exists.

If the clerk determines that either of the two circumstances above exist, either on the clerk's own motion or upon application of the guardian ad litem, the clerk must grant a stay of the proceeding

for a minimum of 90 days.

Section 522 Stay. The respondent has a separate right to a stay under [Section 522](#) of the SCRA if the respondent has (i) notice of the incompetency proceeding and (ii) is in military service or is within 90 days after termination or release of military service. Prior to the hearing, the guardian ad litem should inform the servicemember of this right. Section 522 states that the clerk may on his or her own motion and shall upon the application of the servicemember grant a stay of the proceeding if:

1. A letter or other communication filed with the court establishes that current military duty requirements materially affect the servicemember's ability to appear and states a date when the servicemember will be available to appear; and
2. A letter or other communication filed with the court from the servicemember's commanding officer establishes that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

In such case, the clerk must order a stay of not less than 90 days. The motion of the clerk or application of the servicemember may be made *at any time* prior to the entry of the order in the incompetency proceeding.

Payment of GAL Fees. The SCRA does not set forth how an attorney appointed under the SCRA is paid. However, Chapter 35A provides for payment of guardian ad litem fees as set forth in [G.S. 35A-1116\(c2\)](#). The guardian ad litem has a duty to represent the respondent in the incompetency proceeding. Where the respondent is also a servicemember, this representation necessarily includes ensuring that the respondent is able to avail himself or herself of the protections and benefits of the SCRA. Therefore, it is appropriate for the guardian ad litem to include any SCRA related fees arising out of the incompetency proceeding in the guardian ad litem's fees payable under [G.S. 35A-1116\(c2\)](#).