Veterans issues come to family law

Military Law,

Family

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Senator Susan Talamantes Eggman was the right person at the right time for veterans in family law matters.

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Eileen C. Moore

Senator Susan Talamantes Eggman's online biography says she was a medic in the United States Army. She later achieved a PhD in social work. Prior to serving as a legislator, she worked as a mental health provider. It seems fitting that she was the author of the new statutory changes involving veteran issues in the Family Code.

It has been a sad state of affairs that active-duty military service members have returned from deployment only to find they lost custody of their children. And veterans in custody battles face opposition arguments that because they have post-traumatic stress disorder or suffer from another mental health illness resulting from their military service, their children won't be safe with them. Veterans who incurred a traumatic brain injury from explosions while serving their country and who act out violently are treated with the same contempt as power and control bullies who commit domestic violence.

Senator Eggman's new laws concern non-veterans with mental health issues as well as veterans. This article will focus on how the new laws pertain to veterans.

Family Code § 211.5, Section 1

Section 1 of newly created Family Code section 211.5, which goes into effect Jan. 1, 2024, has legislative findings and declarations that include:

. . . .

(b) Nearly 1 in 5 veterans lives with a service connected mental health disorder or cognitive disorder.

(c) The rate of major depression among soldiers was five times as high as civilians and the rate of post-traumatic stress disorder was nearly 15 times higher than the general public.

(d) Having a mental health disorder, including a service-linked disorder, does not inherently make you more violent.

(e) A mental health disorder should not be used as a sole predictor of future violence.

. . . .

(h) Service-linked mental health issues come with their own unique barriers, stigma, and complications.

(i) There are existing services for veterans who have a criminal case pending.

(j) Many veterans who find themselves involved in family court proceedings do not have a criminal case and are unable to access many of the wrap-around services provided to veterans that do.

(k) Veterans should not have to break the law to be connected to services designed to support them.

(l) Individuals with mental health issues are fully capable of being loving and supportive parents.

(m) No parent should lose custody of their child due solely to a manageable mental health issue.

Family Code § 211.5, Section 2

It is Section 2 that will require specific action on the part of family law courts and attorneys. That Section states:

211.5. (a) (1) Commencing January 1, 2024, in proceedings under this code, a court shall provide self-identified veterans with a list of resources for veterans, including information about how to contact the local office of the Department of Veterans Affairs.

(2) The veteran may, at their discretion, provide the information about their veteran status on the Judicial Council military service form, file the form with the court, and serve it on the other parties to the action.

(b) (1) When a person files a form identifying the person as a veteran pursuant to paragraph (2) of subdivision (a), the court shall transmit a copy of the form to the Department of Veterans Affairs.

(2) Upon receipt of a copy of the form, the Department of Veterans Affairs shall, within a reasonable time, contact the person using the information provided on the form.

(c) On or before January 1, 2024, the Judicial Council may amend or develop the rules and forms necessary to implement this section.

Family Code § 3040

Family Code § 3040 has been amended as follows. It will also require specific action by family law courts.

(d) (1) Commencing January 1, 2024, if a court finds that the effects of a parent's, legal guardian's, or relative's history of or current mental illness are a factor in determining the best interest of the child under subdivision (a), the court shall do both of the following:

(A) Provide the parent, legal guardian, or relative with a list of local resources for mental health treatment.

(B) State its reasons for the finding in writing or on the record.

Accordingly, should the court determine that a veteran's diagnosis of post-traumatic stress disorder, traumatic brain injury or mental illness are a factor in determining the best interest of a child, certain duties will be triggered. First, the court will be responsible for providing the veteran/parent with a list of local resources for mental health treatment.

Also, should the court determine that a veteran's diagnosis of post-traumatic stress disorder, traumatic brain injury or mental illness are a factor in determining the best interest of a child, the court's reasons must be either in writing or on the record. If there's no court reporter, simply stating the reasons in open court won't be enough.

The MIL-100 form

The Judicial Council MIL-100 form was created by the Judicial Council's Veterans and Military Families subcommittee in 2009. The form explains certain benefits for veterans under California law. It applies to all veterans who appear in any California Superior Court. It is left up to the veteran whether or not to self-identify as a veteran. On the front page of the form, it states: "This form can be filed in any case type." Thus, it is perfectly appropriate to file an MIL-100 form in family law matters.

However, the form has been utilized mainly by criminal courts. Family law courts and practitioners might benefit from knowing what criminal law courts do with the MIL-100 form as well as how they identify veterans.

The Judicial Council optional form MIL-100 is offered to every person arraigned in California pursuant to Penal Code § 858. Should a criminal defendant self-identify as a veteran, the court will send the form to both the county veterans services officer [VSO] and the United States Department of Veterans Affairs.

The MIL-100 form vis-à-vis family law cases

In light of this new legislation, the MIL-100 form will probably have to be updated. Meanwhile, it is essential that courts realize there is both a United States Department of Veterans Affairs, commonly referred to as the VA, and a California Department of Veterans Affairs, commonly referred to as CalVet.

But Family Code § 211.5 does not differentiate between the VA and CalVet where it mandates family courts to forward MIL-100 forms to the Department of Veterans Affairs or that family courts provide information

about local offices of the Department of Veterans Affairs.

Accordingly, I contacted both the VA and CalVet to find out how each agency will implement the new law. Here is what each told me:

Should the VA receive an MIL-100 form from a family law court, the VA will do two things. First, its local office will make whatever connections it is able to make to link the veteran with appropriate and available mental health care. Second, the VA will forward the MIL-100 form either by physical mail to CalVet's Veterans Services Division at P.O. Box 942895, Sacramento, CA 94295 or by email to MIL100@calvet.ca.gov.

The VA wants criminal courts and practitioners to be aware that the new legislation regarding veterans in family courts is outside the scope of its Veterans Justice Outreach program, the program that is involved with Veterans Treatment Courts throughout California. Thus, there should be no concern that the VA specialists who service VTCs will be drawn away from criminal courts to family courts.

In CalVet's view, where the newly-enacted Family Code § 211.5 directs family courts to transmit MIL-100 forms to the Department of Veterans Affairs, it means that the forms should be transmitted by physical mail to: The California Department of Veterans Affairs, Veterans Services Division, P.O. Box 942895, Sacramento, CA 94295 or by email to MIL100@calvet.ca.gov.

CalVet is expecting that any forms sent by family courts to the VA will be transmitted by the VA to CalVet. Once CalVet receives an MIL-100 form, either directly from a family court or through the VA, CalVet will link the veteran to appropriate and available services.

Possible changes in family law practices

Family courts might want to inquire at status conferences whether or not any party is a veteran, and counsel might want to ask the question of all clients. Better still, because some veterans believe they have lost the right to call themselves a veteran if they were other than honorably discharged, perhaps the question should be, "Did you ever serve in the military?"

With regard to providing veterans with a list of resources, including information about how to contact the local office of the Department of Veterans Affairs as required under Family Code §§ 211.5 and 3040, each court is going to have to do some homework. As noted above, the Department of Veterans Affairs in this context means CalVet, not the VA. A county by county map of CalVet Local Interagency Network Coordinators may be found at: https://www.calvet.ca.gov/VetServices/Documents/LINC%20Map.pdf

Since World War II, the number of less than honorable discharges has increased fivefold, and the character of a discharge determines whether or not the veteran is eligible for VA benefits. Consequently, the ability of CalVet to link the veteran with services might be affected by whether or not the veteran is eligible for VA benefits. Thus, if the veteran is not eligible for VA benefits, the court will have to provide non-VA resources, perhaps through county mental health departments, for mental health treatment.

How the new changes might interact with Family Code § 3044

Family Code § 3044 creates a rebuttable presumption that if a party seeking custody of a child committed domestic violence within the previous five years, it is not in the best interest of the child to award custody to that person. The statute states in relevant part:

(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings ... there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child ...

It is my belief that experts are slowly coming to the realization that domestic violence is not always committed by power and control bullies. The Council on Criminal Justice reports that veterans with post-traumatic stress disorder have been found to perpetuate intimate partner violence at rates two to three times the national average. Having a traumatic brain injury is correlated with a 44 percent increase in a later post-traumatic stress disorder diagnosis.

The country's domestic violence laws were enacted during and after the Women's Liberation Movement. The results of two class actions filed in the 1970s, one in Oakland and the other in New York City, were that police and prosecutors were required to treat the victims of domestic violence with the same dignity as victims of other crimes. The laws that developed are based on power and control dynamics, and usually require separation of families with protective orders. But our current veterans, especially those who suffered traumatic brain injury after explosions, often commit domestic violence, not as a result of power and control issues, but as a result of their head injuries.

According to the U.S. Department of Health and Human Services and the Centers for Disease Control and Prevention, bombs and explosions can cause unique patterns of injury seldom seen outside combat. Explosions in confined spaces such as large vehicles are associated with greater morbidity. Aggression is one of the most common consequences of traumatic brain injury. Damage to certain parts of the brain can result in severe personality changes.

Under some circumstances, it can be best for the families to be able to work together toward healing, so long as the victims want to do that. But often our laws won't permit such family healing. In that regard, Minnesota's recently enacted veteran statute provides that even in instances of the commission of a felony by a veteran, the veteran defendant's family members, who agree to be involved in the treatment and services provided to the veteran, may also participate in the diversion treatment program. [Minn. Stat. § 609.1056 Subd. 1 (3)(xi)]

A family court might very well have a custody issue involving a parent who is a veteran and who has both a diagnosis of traumatic brain injury and has perpetrated domestic violence within the previous five years. Both the newly created Family Code § 211.5 and the new amendment to § 3040 should probably be considered.

Subdivision (m) of Section 1 of Family Code § 211.5 states that no parent should lose custody of their child due solely to a manageable mental health issue. And Family Code § 3040 states that when a parent's history of mental illness is a factor in determining the best interest of a child, the court shall provide the parent with a

list of local resources for mental health treatment and state its reasons for the finding in writing or on the record.

Conclusion

When family law courts have a party in a case who is a veteran, new requirements will soon be in place. It would be wise to review the newly created Family Code § 211.5 and the recent amendment to § 3040 as well as the MIL-100 form whenever a veteran is a party.

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