

SILENT PARTNER

“LOST” MILITARY PENSIONS: THE TEN COMMANDMENTS

INTRODUCTION: SILENT PARTNER is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.

Overview of the Military Pension Division Series

There are five SILENT PARTNERS in this series.

- *Military Pension Division: Scouting the Terrain* is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses' Protection Act), what the Act does (and doesn't do), and how the question of "federal jurisdiction" is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember's Strategy* contains information on how to assist the servicemember (hereafter "SM") in this area, and
- *Military Pension Division: The Spouse's Strategy* covers how to help the SM's spouse.
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS*. It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- Retrieving an apparently "lost" pension benefit for the spouse/former spouse is covered in *"Lost" Military Pensions: The Ten Commandments*.

The military legal assistance attorney (as well as his civilian practitioner counterpart) sometimes comes across one of the most serious family law problems there is: retrieving a "lost" military pension. In a typical case, Mrs. Smith might explain to Lieutenant Jones that she was served with divorce papers some time ago and she had not responded or filed an answer. At first glance, it would seem there was no way that she could now get a share of the military pension that had been earned over a 25-year period while she was married. Can anything be done to get back the lost pension rights? What do you do when confronted with a case involving "lost pension rights" after the divorce? Here is a ten-point checklist for possible inquiries and corrective measures that might help; print it and have a copy by your desk whenever you run into one of these cases:

CHECKLIST:

___ 1. **Is Your File Complete?** Get copies of all documents-- summons, petition or complaint, proof of service, judgment. Make sure your client has absolutely everything. If she doesn't, write to the court and obtain the entire court file so you can pull out your microscope when looking over the divorce papers. Close examination may reveal one or more of the following flaws.

___ 2. **Proper Service?** First check out service of the summons and complaint or petition. How were the papers served... Sheriff? Process-server? Certified mail? Was the client served properly? Did Mrs. Smith receive the papers, or was it a roommate, a friend, a co-worker or a child? Check the state rules of civil procedure to see if service was proper [Example: North Carolina allows a roommate to be served at the residence of defendant, but doesn't allow a co-worker to be served at her/his place of employment, or a child to be served at the residence! Tacking a summons and complaint on the residence door is "legal service" in Florida but not in North Carolina -- you have to serve a person or else do it by publication. And service by publication can't be effected simply because you don't know your wife's address -- you must swear in an affidavit that you've made diligent efforts to obtain it without success!] If she was served overseas, did the plaintiff follow any applicable requirements of the Hague Convention on the Service of Process Abroad?

___ 3. **Check for Domicile.** Read the allegations in the divorce complaint/petition closely. First of all, was one of the parties domiciled in the state in question when the complaint was filed? The U.S. Supreme Court in the *Williams v. North Carolina*, 325 U.S. 226 (1945), stated that domicile is the essential component of divorce. Unless a party to the lawsuit is domiciled in the state where the action is filed, there's no jurisdiction. And don't believe it just because the plaintiff says he's domiciled there. Ask detailed questions. Check with your client. Where did Sergeant Smith vote last year? Pay taxes? Have his car registered and titled? Own a home? Be especially careful if Sgt. Smith decided to get a "quickie divorce" in Mexico or the Dominican Republic. It's probably a sham if neither party was a resident of that country and the dependant-spouse didn't consent to the divorce or subsequently rely on it (e.g., by remarrying or filing an unmarried tax return).

___ 4. **Grounds and Residency.**

a. Were the grounds properly stated? Sometimes there's a flaw in this area. [Example: In North Carolina the grounds for divorce are *separation for at least one year with the intent that the separation be permanent*. Sometimes the plaintiff fails to allege the "permanent intent" part of this claim. And sometimes the plaintiff just can't wait and files before the "one-year-and-a-day" has passed. The courts in NC have held that you cannot file on the anniversary of the separation-- you must wait to file till at least *1 year + 1 day after the separation*, assuming the "intent" component is there.]

b. Was there a "residence" requirement? Was there compliance with it? Typically a state requires one of the parties to be a citizen and resident of the state for six months (or a year) before the divorce case is filed.

___ 5. **Answer or Response.** Did Mrs. Smith file an answer? Did she request reservation of equitable distribution? Did the court receive her answer and file it? Did the other side wait for an answer? Usually there's a 20- or 30-day waiting period from service of the summons before one can apply to the court for divorce by default. Check the rules of civil procedure! If you're a legal assistant attorney (LAA) overseas, call a military base in that state and ask the legal assistance office to "crack the books" for you!

___6. **Attacking a Judgment.** Also you should check the rules of civil procedure for the method of setting aside, or amending, a judgment. Arguably this same procedure, and these same grounds, should apply to divorce judgments. What's the basis of a motion to set aside? What are the grounds needed? How long do you have to file the motion -- 30 days from entry of the judgment in question? One year? Check the state statutes on the Internet (or have someone stateside help) and look up the answers!

___7. **Separation Agreement?** If there's a separation agreement which waives pension division, ask how Mrs. Smith came to sign it. Why did she agree to this... or did she know what it was she was agreeing to?

a. Examine the document closely -- was it executed with the proper formalities? For an example of a separation agreement that was set aside because it didn't comply with state law regarding the formalities of execution, read *Dejaager v. Dejaager*.¹ This was the first recorded legal malpractice claim against the Marine Corps. In *Dejaager*, the agreement was supposed to be executed by the wife before the clerk, but it was merely notarized. And so, later on, the wife was able to get it set aside, which opened up the USMC husband to claims for alimony, etc. Lesson: formalities matter!

b. Was there full disclosure? Were the parties' assets set out somewhere in the document (as opposed to a mere recitation that the parties had fully revealed to each other the nature and extent of their estates, etc.)? Was there any fraud or misstatement in the other party's claims or recitations? This can sometimes be the basis for setting the agreement aside and opening up equitable distribution.²

c. Was there coercion or duress in the execution of the agreement?

d. Has there been any breach by the other side of the promises and covenants? Were these meant or stated to be interdependent and reciprocal? Sometimes you can get the court to set aside promises in a separation agreement when the other side has substantially breached the agreements in bad faith and these promises were mutually interdependent.

___8. **Is It Really Too Late?** Make sure that state law bars Mrs. Smith's pension division claim.

Some states allow equitable distribution to be requested even after the divorce is granted (without a claim being asserted before the divorce). Is the state of divorce one of these? Louisiana, for example, allows the filing of a petition to divide omitted community property that was undivided in a property settlement or divorce.³ Maine's statutes also allow the division of omitted marital property by means of a post-divorce motion:

*If a final divorce decree fails to set apart or divide marital property over which the court had jurisdiction, the omitted property is deemed held by both parties as tenants in common. On the motion of either party, the court may set aside or divide the omitted property between the parties, as justice may require.*⁴

A similar statute exists in Florida.⁵ South Carolina has case law that allows the division of a military pension after the divorce, even though no such claim preceded the divorce.⁶ Texas allows the partition of

undivided community property assets after a divorce has been granted.⁷ The author once retrieved what appeared to be a “lost military pension” in Texas because the husband had abandoned the wife at his retirement, obtained a Mexican divorce (which stated that issues of property division were left to the U.S. courts) and resettled in Texas, which allows the remedy of partition. Suffice it to say that he was *genuinely surprised* when the summons and petition for partition were served on him.

The state of North Carolina, however, is not so favorable toward late pension division lawsuits. The claim for equitable distribution must be filed before divorce to be reserved for adjudication afterwards.⁸ Likewise in Wyoming a decree of divorce precludes a later determination of property rights.⁹

The best practice is to contact a lawyer in the state of divorce and ask if a preceding divorce terminated military pension division. One should also check the statute books for a “savings statute” -- one that allows the defendant to claim equitable distribution subsequent to the divorce under certain circumstances. A good example of this is North Carolina’s statute, which allows a late claim for equitable distribution if the defendant was served by publication.¹⁰ A late claim is also allowed when the divorce was granted in another jurisdiction.^{11]}

___9. **Sue Elsewhere.** Maybe you can file for pension division in another state due to the soldier’s domicile being there, pursuant to 10 USC 1408(c)(4). This part of USFSPA allows the division of a military pension in the member’s domicile, in any state where he or she consents to the court’s jurisdiction, and in any state where he or she is presently residing (but not due to military orders). Can you use STATE 2’s laws to obtain the benefits that were omitted in STATE 1’ s divorce decree?

___10. **Sue the Lawyer.** If Mrs. Smith had a lawyer, you may want to recommend that she look into suing him or her for legal malpractice. The threat of malpractice in the area of military pension division is a very real one.

a. In *Smith v. Lewis*, 590 P.2d 589 (Cal. 1978), an attorney was found to have a legal duty to perform a reasonable amount of research even when a question of law was unsettled. In this particular case, the husband’s retirement benefit (National Guard retirement) was the only significant asset in the marriage. Although nominally the husband’ s, it was deemed to be community property. The wife’ s attorney failed to assert a claim on this potential asset, believing that it was not divisible. In fact, the asset was *not divisible at that time* but later became so under a change in state statutes. Due to this failure on the attorney’s part, the wife only received alimony in the amount of \$400 a month and a minimal amount of divided community property. The California appellate court affirmed a jury award against the attorney for \$100,000.

b. A similar situation occurred in *Bross v. Denny*, 791 S.W.2d 416 (Mo. App. 1990), a case in which the lawyer originally gave his client, the wife, correct advice about the pre-USFSPA rule that barred military pension division. He did not, apparently, stay on top of current developments in Congress, and the USFSPA was passed several days before the separation agreement was signed and the dissolution hearing scheduled. The jury verdict, which assessed 25% of the blame to the wife, was reversed on appeal and judgment for the wife was ordered in the amount of \$108,000.

c. In an unreported case, Buffalo (NY) practitioner, Glenn E. Murray reports the filing of a malpractice case involving the Survivor Benefit Plan. A brief chronology of the case, involving a malpractice claim against the military spouse's attorney, is as follows:

AUGUST 1989: The parties entered into a consent order stating their agreement for Survivor Benefit Plan coverage for their son and stating that, upon application to the court, an order would be entered requiring SBP coverage payable to the mother in trust for the son.

NOVEMBER 1989: The husband (by now "ex-husband") remarried and then designated his new wife as his SBP beneficiary.

AUGUST 1990: The first wife contacted her lawyer to request help in getting the SBP designation in her son's name, and the attorney drafted a petition which the wife signed. There is no record of submission of the petition or a ruling on it.

MARCH 1991: The ex-husband died, leaving the SBP solely to his second wife (by now "widow").

JULY 1992: The first wife brought an action against her domestic attorney for negligence, breach of contract and negligent infliction of emotional harm. The complaint requested for her and her son \$900,000 in compensatory and \$250,000 in punitive damages. Mr. Murray reports settlement of this case with the lawyer's malpractice insurance carrier for \$100,000.

BOTTOM LINE -- when you get one of these cases, watch out. The value of the omitted asset is probably very large if there's more than 20 years of marital pension service. Call a Reservist or civilian attorney who knows the law. Try to get a specialist in family law or a Fellow of the American Academy of Matrimonial Lawyers (go to <http://www.aaml.org>). Use the ABA Family Law Section home page (<http://www.abanet.org/family/>) to find a referral. Contact a family law specialist in the state where the client's lawyer practices. You can really make the difference for your client in this area by doing the right thing!

ENDNOTES:

¹ *Dejaager v. Dejaager*, 267 S.E.2d 399 (N.C. App 1980).

¹ *See, e.g., Harroff v. Harroff*, 398 S.E.2d 340 (N.C. App. 1990) (former wife was allowed to reopen equitable distribution because of the misrepresentation of her ex-husband concerning marital property).

¹ *Heggins v. Heggins*, 590 So. 2d 647, 649 (La. App. 1991), *citing Moon v. Moon*, 345 So.2d 168 (La. App. 3rd Cir.), *writ denied* 347 So.2d 250 (La. 1977).

¹ Maine Rev. Stat. Ann., Title 19-A, § 953(a).

¹ Fla. Stat. 61.075 ("In ... a proceeding for disposition of assets following a dissolution of marriage by a court which lacked jurisdiction over the absent spouse or lacked jurisdiction to dispose of the assets, the court shall set apart to each spouse that spouse's nonmarital assets and liabilities, and in distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors....")

¹ *Eckhardt v. Eckhardt*, 309 S.C. 225, 420 S.E.2d 875 (S.C.App. 1992).

¹ Texas Family Code § 9.201-204.

¹ N.C. Gen. Stat. 50-11(e).

¹ *Cassas v. Cassas*, 73 Wyo. 147, 276 P.2d 456 (Wyo. 1954).

¹ N.C. Gen. Stat. 50-11(e).

¹ N.C. Gen. Stat. 50-11(f).

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