

# SILENT PARTNER

## MILITARY PENSION DIVISION: THE SPOUSE'S STRATEGY

*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*.

### Introduction

The battlefield in military divorces is often military pension division. It is essential to learn and understand the unique set of rules in military pension division. The basic issues for the military spouse (usually the wife) in the divorce battlefield are the first topics covered below. An overview of the battlefield is contained in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*, and the topics below expand that advice to help protect the spouse and ensure that she receives her benefits from her marriage to the servicemember (SM). It is essential for the spouse and her counsel to understand the law, to know the rules and to be alert for minefields.

It is also essential to keep records to help the spouse make the case. This includes records of taxes (state income taxes, personal and real property taxes), voting registration, home ownership, copies of the SM's Leave and Earnings Statements, bank records and motor vehicle documents. These can help with the first part of the battle, which is the issue of domicile and residency.

Remember to help the client with costs, time and research. A fully contested equitable distribution trial or pension division trial can be costly indeed. Few clients have the will or the pocketbook for diehard resistance. Fortunately for the spouse, not many servicemembers or retirees want to risk battles over visitation, child support, alimony and other matters in a case that could be settled, just to engage in "nuclear warfare" regarding the pension. All states allow military pension division. As will be outlined below, only a few bar the division of pensions that are not vested. The job of a good lawyer

is to guide the client with sage advice and serious judgment. Advice and guidance for the “big picture” along these lines is essential for those who are truly serious about helping these clients.

### **Roadblocks and Minefields**

Our client in this example is Mrs. Roberts, the wife of Army Colonel Bill Roberts. He’s been in the Army 20 years and now they’re going through a divorce. Mrs. Roberts wants her share of the military pension. Here are the arguments he’ll probably use, and her responses:

Constitutionality. If COL Roberts says, "They can't do that- it's unconstitutional," don't worry. The constitutional attack on pension division will fail. This issue has been rejected in all state courts that have considered it. The same argument was also rejected by the Court of Appeals for the Federal Circuit in 1990 in *Fern v. United States*.<sup>1</sup>

Retroactivity. In general, the claim for military pension division must be made at a time when *both federal and state statutes* allow for such division. Thus the first real inquiry is to decide whether Mrs. Roberts is *too late* to claim pension division. This would be the case if her divorce decree or equitable distribution judgment (without military pension division) was filed on or before June 25, 1981 or before the equivalent implementing legislation at the state level (if it was filed after this date). If she’s asking *now* for the pension, rather than trying to amend a prior decree, she should prevail on this issue.

Timeliness. The next point of analysis for COL Roberts' case is whether the claim was filed *procedurally in a timely manner*. This is a very technical question of state law. Some states limit the filing of equitable distribution claims to the period up to the granting of a divorce or dissolution; if you wait till after that, you’re “too late.” Others require the filing to occur after the separation of the parties and before the divorce or dissolution occurs; you can’t just file suit for property division while you’re still living together. Under North Carolina law, for example, the rights of the spouses to marital property division vest at the time of the parties' separation the right to equitable distribution does not exist if the claim for it is filed before the separation. In addition, the right to equitable distribution must be asserted before the final divorce judgment; a divorce judgment destroys the right to equitable distribution unless that right is asserted prior to the granting of a judgment of divorce. Be watchful for such limitations in the state where Mrs. Roberts files suit (or responds to the suit filed by COL Roberts). This defense involves complex procedural research that is best left to the expert; it is wise to consult a good family law attorney or refer this kind of case to a family law specialist.

Waiver. Be sure that Mrs. Roberts hasn’t waived her rights. Did she sign a separation agreement or property settlement agreement? An antenuptial agreement can also waive property division rights. In some jurisdictions, such an agreement does not have to define specifically the property that is involved or that is exempted from division. Even if there is no mention of the pension, a general clause in the agreement which waives the marital rights of the parties can be construed as barring a claim for equitable distribution.

Nonvested Pension Benefit. There are only a few jurisdictions which provide that, by law, a military pension may not be divided. These fall into the following categories: states where there is a “vesting requirement,” one state where ten years of marital military service is required (Alabama) and one jurisdiction (Puerto Rico) which bars division of any noncontributory retirement pay.

A pension is vested when the employee is entitled to receive something upon termination of employment, whether that is in the form of a return of contributions or an early (and reduced) retirement benefit.<sup>2</sup> A SM with 11 years of service, for example, would not have a vested pension because there is

no right to retire after 11 years' service. A member with 25 years of service, on the other hand, would clearly have vested retirement rights.

There are two states, Indiana and Arkansas, which limit court jurisdiction over pension division to those pensions which are "vested." Arkansas held in *Holaway v. Holaway*<sup>3</sup> that an unvested pension is non-divisible and thus the separate property of the party who earned it. In Indiana the right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share, and the burden is on the non-employee spouse to prove that the pension is vested.<sup>4</sup>

The law on the issue of division of unvested pension benefits is confused in Ohio and Michigan. In Ohio, the law appears to be that unvested benefits are not divisible by the courts,<sup>5</sup> even though the leading case holding this, *Lemon v. Lemon*,<sup>6</sup> has been overruled in an unreported case.<sup>7</sup> By statute, Ohio considers all retirement benefits to be marital property.<sup>8</sup> In Michigan, pensions are considered divisible marital property only if they have an ascertainable present value, and ordinarily only vested pensions are deemed to have such a present value, leading to the conclusion that unvested pensions are not divisible by the courts.

Alabama law provides a unique limitation on pension division jurisdiction. The law specifically states that retirement benefits are not divisible as marital property unless the employee or "owning spouse" has ten years of pension service during the marriage.<sup>9</sup>

Finally, Puerto Rico refuses to allow the division of noncontributory pensions at all. Puerto Rico treats these pension rights as separate property.<sup>10</sup> The military pension is noncontributory, and so it would not be divisible there. The Thrift Savings Plan, however, is divisible in Puerto Rico because it is based on marital contributions.

There may be several states which could divide COL Roberts' military pension. To minimize his exposure, COL Roberts will want to "shop around" for a jurisdiction that will either limit pension division (as with a vesting requirement), bar pension division entirely (Puerto Rico) or will otherwise allow military pension division on the best terms for him. COL Roberts can employ these divisibility provisions to his advantage in the pension division litigation. If he is stationed in Indiana, for example, he might decide to become domiciled there and then file for divorce in that jurisdiction so as to exclude his pension benefit from division. In like manner, Mrs. Roberts and her attorney will want to examine each state or territory which may have jurisdiction where she may file for division of COL Robert's pension to see whether the laws there allow such division. It is impossible for any individual attorney to know each of these state rules. To find out which states have vesting requirements, examine the Army JAG School's guide to the Uniformed Services Former Spouses' Protection Act, publication JA 274, which contains a "State -by-State Analysis of Divisibility," at Appendix B.<sup>11</sup> The importance of this point for Mrs. Roberts' attorney is that it is vital to *shop around* for the jurisdiction that will allow military pension division on the best terms for Mrs. Roberts. For COL Roberts, the opposite approach would apply; he needs to find a jurisdiction which can hear his case but will deny the division of his pension. How to go about this forum-shopping, which is implicitly allowed by the triple jurisdictional approach of 10 U.S.C. 1408(c)(4), is found below.

### **Federal Jurisdiction.**

If a state does not have jurisdiction *under federal law*, then that state may not divide COL Roberts' pension, regardless of his wife' s wishes. As set out in the USFSPA, 10 U.S.C. 1408 (c)(4), a state may only exercise jurisdiction over a military member' s pension rights if

- That state is his or her domicile; or
- The member consents to the exercise of jurisdiction; or
- The member resides there (for reasons other than military assignment in that state or territory).

These statutory provisions override the more traditional long-arm statutes which allow the exercise of jurisdiction consistent with due process if there are sufficient minimum contacts with a state. These are explained in detail in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*.

How can Mrs. Roberts use these to her advantage? Here are the key points for the nonmilitary spouse's attorney to remember in the jurisdiction arena:

Find the Right Place to File Suit. If COL Roberts is domiciled in Alaska, then sue him there. Bringing the suit in Virginia, where Mrs. Roberts is now residing, ensures that there will be a jurisdictional battle unless COL Roberts' attorney is asleep at the wheel or else COL Roberts doesn't care.

Consider the "Vesting" Issue. If vesting of the pension (or some other limitation on pension division) is required in the *state of suit*, and also in the *state of domicile*, then it probably would not make any difference where he's sued. Likewise if neither her state nor his domicile state has a pension division limitation, it probably won't make any difference. But if COL Roberts is domiciled in a state or territory which has a limitation on pension division (such as "vesting"), then the choice of a forum for the lawsuit could be critical if he is not vested in his pension (usually 18 or 20 years of service, depending on state law). Don't sue him in a jurisdiction that has a limitation on pension division, such as vesting, if he isn't vested. Find a way to sue him in a state that has no such pension division limitation. Here's how:

- Just because domicile is required for one of the tests above doesn't mean that you cannot sue COL Roberts in another place and acquire jurisdiction *if he consents*. So you will need to find a jurisdiction where you can sue him that doesn't have a pension division limitation. If he's domiciled in such a limiting state, consider suing him where Mrs. Roberts lives (which, hopefully, is not such a jurisdiction). If she's in such a state, consider suing him in his domicile (hopefully not a state that limits pension division).
- What is the next step? Because of the complexity of this area, get on the phone to associate competent co-counsel right away. You'll need a good attorney to go to court for Mrs. Roberts who knows military pension issues and also jurisdiction. In other words, a good military divorce attorney who's also knowledgeable on civil procedure issues.
- One issue to discuss is how to get COL Roberts to file an answer or some other pleading that will be treated as a general appearance and will result in the court's having jurisdiction over him. Consider suing first for custody and alimony, for example, to ensure that he "joins in the fight." By filing motions or responsive pleadings, he'll be calling upon the power of the court to adjudicate his case, which may (under the law of that jurisdiction) amount to *consent to jurisdiction*. Then Mrs. Roberts can amend her pleadings to add a claim for pension division (if that's necessary under the state statutes). The issue of general appearances and specific consent is covered in more depth in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*.
- COL Roberts may make an request for a stay of proceedings under the Servicemember' s Civil Relief Act (SCRA) while he's deployed in Southwest Asia or undergoing training "out in the field." This *would not* subject him to the court's jurisdiction since the SCRA specifically states that a motion for a stay does not waive any defense of the servicemember, including jurisdiction.
- Even if the pension has been defined as non-divisible because it's not vested, (or for some other reason), don't give up. The courts may decide that, because such a large asset is not divisible as marital or community property, the rest of the property should be divided unequally in favor of Mrs. Roberts in order to compensate for this inequity.<sup>12</sup>

Bluff. Be aware that it may be COL Roberts' strategy to make sure that his wife has to expend the maximum amount of money to get a piece of his pension. He may want to ensure a fight in two states – the *state of suit* and the *state of his domicile* -- to try to get her to back down. Or perhaps he's sure that she won't spend the time or money to try to get counsel in State #2 to ask for a piece of the pension. If this is the case, then her attorney may have to do some hard bargaining to adjust the property division in

light of his pension not being divided. As counsel for Mrs. Roberts, you would certainly want substantial concessions on other property or alimony issues in exchange for not pursuing the military pension.

**The Danger of a Default Judgment.** When there is a lawsuit pending for pension division and the SM has not filed an answer, be aware of one important matter regarding entry of a pension division order. Don't be tempted to get a default judgment for pension division when you're not clearly in the state of domicile of COL Roberts. If you do get one, here's what may happen:

- You probably don't have jurisdiction in State #1 (which is not his domicile) over the pension because you do not have his consent. Unless the SM consents to the court's jurisdiction, which does not occur in a default divorce and property division, the judge does not have the power to divide the military pension. The only (rare) exception to this is where the court is in a state where the member resides for reasons other than military assignment.
- DFAS will examine your "perfectly good" military pension division order and then reject it for lack of jurisdiction.
- This will probably make your client very unhappy -- in terms of lost time, lost payments of pension, and wasted attorney's fees.
- You will then probably try to sue COL Roberts in another jurisdiction, State #2, since you can't "fix" this order.
- And this will likely be his state of domicile.
- But you'll have to hire an attorney there and Mrs. Roberts will wind up paying a *second* retainer to a lawyer in order to "do it right" this time (or *you* may wind up paying the retainer if she starts talking about malpractice or a bar grievance).
- And after you've engaged the attorney, you may find out that you *cannot* get pension division there. The opposing attorney will invariably argue that Mrs. Roberts went to court in State #1 where she got the court to assert jurisdiction over the pension and to divide it.
- And therefore State #2 cannot do it over again. Exclusive jurisdiction was acquired earlier by State #1. A second state cannot also assert jurisdiction over the division of the pension after the first state has already divided it. Opposing counsel will probably succeed in her motion to dismiss, and your client will have *lost* any rights to military pension division.

### **Type of Pension**

The pension rights contemplated by USFSPA involve nondisability "longevity retirement" under 10 U.S.C. 1401-12, not retirement for disability under 10 U.S.C. 1201-21. In *Mansell v. Mansell*<sup>13</sup> the U.S. Supreme Court in 1989 held that a pension, to the extent it is based on disability retirement, is not divisible under USFSPA, and that the states may only divide "disposable retired pay" as that term is defined in USFSPA. This means that COL Roberts, by electing disability pay instead of retired pay, may defeat Mrs. Roberts' claim to his pension benefits. A short summary of the system is found in the SILENT PARTNER, *Military Pension Division: The Servicemember's Strategy*.

This means that COL Roberts can, by his own actions, reduce his disposable retired pay by electing VA disability benefits if he is rated as disabled. For Mrs. Roberts' lawyer, it should be noted that the careful drafting of a marital settlement agreement is the key to indemnifying the nonmilitary spouse when this situation might occur in the future. For a good example of this, see *Owen v. Owen*, a Virginia Court of Appeals case.<sup>14</sup> In that case a settlement agreement provided for a guarantee/indemnification clause which required the retiree to pay the same amount of support to the spouse as was waived by the federal statute due to the retiree's receipt of VA disability pay. This was held not to violate the mandate of the *Mansell* case. Such a clause might state:

*If the husband takes any action (such as accepting disability pay) that reduces the pay the wife receives, then he shall pay her directly the amount by which her share is reduced. In addition, he hereby consents to the deduction of this amount from any periodic payments he receives (such as wages) to allow this payment to wife, and this clause may be used to show said consent when this is necessary for the entry of a garnishment, wage assignment or income withholding order.*

To further protect the nonmilitary spouse, it is advisable to include in the agreement, order or judgment a provision that the division of the military retirement is based on *no waivers* for disability pay and consents to the continuing jurisdiction of the court on the issue of property division (in the event that the military member still elects to apply for a waiver). These are especially important ways to insulate the spouse from conduct of the member which defeats the purpose of the award by reducing the amount of disposable retired pay that is subject to division and direct payment through DFAS.<sup>15</sup>

### **Roadblocks and Minefields - Summary**

The above discussion shows clearly the need for competent and creative lawyering. It is vital to ask questions -- lots of questions -- to make sure that the case for Mrs. Roberts is on a firm factual footing. Was there a prior separation agreement? Was there a previous divorce? Is COL Roberts' domicile elsewhere? Is it in Louisiana or Arkansas? Is his pension vested or not?

It is just as important to think before one acts. If there is a valid jurisdictional objection to a pension division claim filed against COL Roberts, why file the lawsuit? What will be gained? Can Mrs. Roberts draw him out so he'll have to file an answer, which will waive the jurisdictional objection? What if he files a motion to continue instead of an answer? What about a motion to dismiss? The answer to these questions lies in the law of the states involved.

### **Dividing the Military Pension – Crossing the Minefield**

Overview. Once it is understood how to set up obstacles to pension division, the next step should be to understand how to overcome them and divide the pension once the court has acquired jurisdiction over it. There are generally two methods available for pension division.

The first is *deferred division*, often called "if, as and when" payments. This refers to sharing payments received by the retiree. This is the most common way of allocating the pension between the spouses. In the usual situation, a share of the husband's pension is paid to the wife. This can be done by DFAS if the marriage and the length of service overlap by at least 10 years; otherwise the payment must be made by the SM. Note that this "10-year rule" is not a federal rule of divisibility; as a matter of federal law it has nothing to do with the eligibility of Mrs. Roberts for pension division. It's only a method of enforcement. It determines how she gets paid – by DFAS, rather than by COL Roberts. And this can be very important if he's likely to move to another state (or country) after retirement.

The second method of division involves a *present value setoff*, in which property or money is traded against the present value of the pension. In this scenario, the house and other property go to Mrs. Roberts and the pension goes to COL Roberts (if they are approximately equal in value).

Both of these topics are covered in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*.

### **Opening the Attack**

When dividing the military pension on a *deferred division* basis, there are four separate ways to allocate the division that will be accepted by DFAS for direct payments to Mrs. Roberts. These are treated at length in the SILENT PARTNER, *Getting Military Pension Division Orders Honored by DFAS*. According to the regulations on military pension division, published in the Defense Department's

Financial Management regulation (at [www.dod.mil/comptroller/fmr/07b/07b29.pdf](http://www.dod.mil/comptroller/fmr/07b/07b29.pdf)), these four methods are:

Fixed dollar amount. A fixed dollar clause could read: *Wife is awarded \$550 per month, payable from Husband's disposable retired pay.*

Percentage clause. A percentage clause might state: *Wife is granted 50% of Husband's disposable retired pay.*

Formula clause. This is usually used when a SM is on active duty (or a Reservist is still drilling). It is an award expressed as a percentage of a fraction. The percentage is the share Mrs. Roberts gets of the marital portion of the pension. The fraction (in the majority of states) is the period of marital pension service over the total period of pension service. For example, the order could state: *Wife shall receive 50% of the Husband's disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband.* The court must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service.

Hypothetical clause. This is an award based on a rank or status which is different from that which exists when the SM retires. For example, the order might say: *Wife is granted 40% of what a major would earn if he were to retire with 18 years of military service.* This is often used when state law requires that the share of the pension awarded to the spouse be determined according to the grade and years of service of the member at a specific date (see below). A COLA (cost-of-living-adjustment) will automatically be awarded with each of these except the first.

Note that when a Guard or Reserve pension is involved, DFAS will not only honor orders specifying division according to retirement points earned during marriage divided by total points, but it will also honor a percentage award (such as "John will pay Mary 35% of his disposable Army Reserve retired pay"). It will also accept any decree in which all the variables are filled in by the court (such as "John will pay Mary 50% of his final retired pay times a fraction, the numerator of which is 240 months of marital pension service up to the parties' date of separation, and the denominator is 280 months of total creditable military service, both active duty and National Guard").

### **Fixed Rank Division**

Sometimes the SM's attorney will try to structure a pension division that "fixes" the rank and years of service of COL Roberts at the date of divorce or separation. Let's see what the alternatives are. With a 20-year marriage during military service, the clause Mrs. Roberts would want usually looks like this (when COL Roberts is still on active duty):

*Husband shall pay to wife, at such time as he retires, one-half of his disposable retired pay times a fraction, the numerator of which is 20 years of marital pension service and the denominator of which is his total years of military pension service.*

But the one proposed by the SM's attorney will probably look like this:

*Husband shall pay to wife, at such time as he retires, one-half of the disposable retired pay of a colonel with 20 years of creditable service, times a fraction, the numerator of which is 20 years of marital pension service and the denominator of which is his total years of military pension service.*

Avoid a division of pension that excludes future promotions and years of service (while retaining a denominator of total years of service for the marital fraction) unless your state law demands it. Always argue that the division should include future promotions and years of service. Why shouldn't you accept such a clause? There are two reasons:

- First of all, the husband's post-divorce promotions and continued service are based on the foundation of marital efforts in most cases. In other words, COL Roberts might never have made it to the rank of brigadier general were it not for the marital efforts of Mrs. Roberts during those years when he was a captain, a major, a lieutenant colonel and a colonel.
- The second reason is that, while we have "frozen" the rank and years of service of COL Roberts (so that Mrs. Roberts is excluded from any portion of his pay if he gets promoted to general), we have not frozen the denominator in the marital fraction. Thus the bottom part of the fraction keeps on growing, but the grade and years of service of COL Roberts are frozen, and that's not fair. To be logical, consistent and fair about this, either the grade and years of service should go up with the total years of military service (which is the denominator in the marital fraction), or else the denominator should be frozen along with the grade and years of service. Don't mix apples and oranges!

### **Reserve and National Guard Pension Rights**

There are *two key considerations* in dividing retirement rights for members of the Reserve or National Guard. First, since Guard and Reserve personnel do not begin to get paid until age 60 (regardless of when they retire), this deferral of payment must be taken into account in the negotiations and the present value calculations.

The second consideration concerns the marital fraction. In those cases where the marriage and the service career do not exactly overlap, the nonmilitary spouse usually receives one-half of the marital fraction times the SM's pension benefit. This marital fraction should be computed twice -- once using marital years of service over total years of service, and then again using marital retirement points over total retirement points -- to determine which computation will best benefit the client.

To see what a difference this might make, let's take an example. Major Bill Smith has five years of Army active duty and 15 years of Army Reserve service. He married when he left active duty.

When dealing with Reserve or National Guard issues, be sure to ask the SM for a copy of his most recent "points statement" to see how many points have been acquired and how many were during the marriage.<sup>16</sup> To calculate the marital fraction using points, calculate the points he acquired during active duty by multiplying 5 times 365 to get 1825 points. Then count his Reserve points. Assume that he acquired 60 points a year (for weekend drill, "summer camp" and membership) for 15 years, or 900 points. Thus his total points at 20 years are 2725 [1825 + 900], of which 900 (or about 33%) are marital. This should mean that 33% of his retirement pay (assuming retirement and date of separation both occur at year 20) is marital.

If we apply the marital fraction *using years* to his retirement pay, however, then his pension is 75% marital (15 years/20 years = 75%).

What a difference! Recognition of these two ways of calculating the marital benefit, and the difference when Major Smith's pension is calculated, is essential to competent representation in the Guard/Reserve pension case. Once again, the federal statutes do not tell us what to do, what fraction to use or what results to expect. This is state-law territory, not something set out in the USFSPA.<sup>17</sup>

### **Dividing Disposable Retired Pay**

What is it that the courts divide? Is it gross pay or net pay of the servicemember? The federal statute specifies that the court can only divide *disposable retired pay*.<sup>18</sup> The U.S. Supreme Court upheld



this requirement in the *Mansell* decision. According to 10 U.S.C. § 1408(a)(4), "disposable retired pay" means gross retired pay minus:

- Recoupments or repayments to the federal government, such as for overpayment of retired pay;
- Deductions from retired pay for court-martial fines or forfeitures;
- Disability pay benefits; and
- Survivor Benefit Plan premiums.

Please note that disability benefits are deducted from gross pay in order to arrive at "disposable retired pay." Thus a retired servicemember can waive receipt of retired pay to receive an equivalent amount of VA disability benefits, and these latter benefits will be received tax-free. This tactic can be used by a military member to reduce the portion of retired pay that is divisible. And there's no way to stop a member from taking disability pay! See the prior section on VA disability pay on drafting a clause that indemnifies the spouse if the soldier chooses this option. The SILENT PARTNER, *Military Pension Division: The Servicemember's Strategy*, contains a useful introduction to "concurrent receipt" of retired pay and disability benefits which is mandatory reading.

Another problem arises when a soldier leaves military service for a job with the federal government before he's eligible to retire. Few civilian lawyers (and even fewer spouses!) realize that a member can "roll over" his retirement into a federal civil service job and get a year-for-year credit on civil service retirement based on the time he spent in the military. Even fewer lawyers and spouses have the foresight to anticipate this situation will occur "a few years down the road" and possess a working knowledge of the statute allowing this credit. The way to handle the problem -- by anticipatory drafting - is to include a clause that states:

*If Defendant fails to retire from military service and elects to "roll over" or merge the time of his military service into federal government service in order to get credit for same, then the Plaintiff shall be entitled to her share of any federal retirement pay or annuity he receives based on the parties' period of marriage during Defendant's period of military service. Defendant shall notify Plaintiff immediately upon his termination of military service, through retirement or otherwise, and shall include in said notification a copy of his military discharge certificate, (DD Form 214), and, if applicable, his retirement orders and certificate. Defendant shall also notify Plaintiff immediately if he takes a job with the federal government, and will include in said notification a copy of his employment application and his employment address.*

### **Caring for the Survivors: Survivor Benefit Plan and Life Insurance**

After the battle comes caring for the survivors. Its equivalent in the area of military pension division is deciding on a replacement for the SM's pension at his death.

The Survivor Benefit Plan is the usual issue at stake here. An overview of this survivor annuity is covered in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*. Also found there is a summary of the benefits and disadvantages of SBP coverage.

Especially when deferred division is used, the attorney for the spouse of the servicemember should insist on SBP coverage to allow continued receipt of retirement benefits if the spouse survives the member. This is a valuable tool in planning for continued income for the nonmilitary spouse.

The most likely strategy for the SM in this area is *silence*. If no one says anything about SBP, then COL Roberts won't have to elect coverage, which will save him money and also retain this option for a remarriage and a new wife, if that's in his future. Thus you'll need to *speak up* if you want to protect Mrs. Roberts in this area.

If there is a discussion about SBP, then the SM's attorney will want to deflect the conversation into *death benefits in general*, of which life insurance is the most obvious choice. Life insurance for

Mrs. Roberts would probably be cheaper than SBP (which generally cost 6.5% of the base amount selected), and it has the advantage of paying Mrs. Roberts a lump-sum cash amount at his death, rather than doling out the monthly payments to her. If there's a dispute, they may offer to split the cost with Mrs. Roberts – each will pay half the premium. Even better for him, they may propose to include the premium in the amount of alimony, if any, that COL Roberts would pay Mrs. Roberts; that way, the premium will be deductible for him at tax time each year.

Often the SM says, "Why doesn't my wife have to pay for SBP? After all, she wants it! I'll be dead and gone by the time she gets it. She should have to pay the premium." Unfortunately for the SM, it doesn't work that way with DFAS. They won't shift the premium to Mrs. Roberts since the SBP premium, according to USFSPA, comes off the top before determining disposable retired pay. This results in the parties *both* paying the SBP premium in the same ratio as the pension is divided. But the parties can accomplish the same thing by adjusting the percentage that Mrs. Roberts receives. See the SILENT PARTNER, *Military Pension Division: The Servicemember's Strategy* for information on how to do this.

When the other side tries to avoid the issue or change the subject, here are some suggested responses:

- If you want SBP and do not have any interest in alternatives, then stick to that. Don't engage in discussions about life insurance.
- If you're interested in life insurance, make sure that you don't use Servicemembers Group Life Insurance (SGLI). According to a 1983 Supreme Court decision called *Ridgway v. Ridgway*,<sup>19</sup> you cannot enforce a court order or separation agreement that provides for SGLI to secure the payment of a divorce settlement.
- And if you're interested in life insurance, be sure to transfer ownership of the policy to your client. Such provisions for life insurance are commonly funded or secured by "owned" policies which belong to the premium payor and build up cash value or equity (*e.g.*, whole life, variable life or universal life policies), ones which belong to the payor but build up no cash value (term life insurance), and ones which have no equity/cash value and do not belong to the person who pays the premiums (group life policies).

Remember this when drafting a clause that attempts to ensure that the premium payor will not inadvertently (or intentionally) change the beneficiary to a new spouse, for example, in lieu of the beneficiary stated in the agreement. How will the other party ever know whether the intended beneficiary remains as such when the policy and all incidents of ownership remain elsewhere--with the payor or his employer? How can one prevent the payor from signing an agreement containing a life insurance clause and then immediately breaching it by designating a new beneficiary?

The answer is through ownership of the policy. Except in the case of group life insurance policies (including SGLI), most insurance companies allow a collateral assignment of ownership of the policy to a person other than the premium payor. The owner of the policy is the one who designates the current beneficiary and who must consent to any proposed change in beneficiary. The owner must be informed by the company of any attempts to cancel the policy, and must also be advised as to nonpayment of premiums that would have the effect of canceling coverage. Finally the owner is the only one who, with life insurance that has cash value, can borrow against the policy. Since these are the very things which ought to be withdrawn from the premium payor--the power to borrow against the policy, cancel it or change the beneficiary--it makes sense to agree on transfer of ownership of the insurance policy.

Ownership of the policies can revert back to the original owner after the support terms have been satisfied. A transfer of ownership has the effect of protecting each party, preserving their promises and putting temptation out of the way.

**Extra Benefits for Consideration.** You'll find overview coverage of early-out options (VSI/SSB), military medical benefits and dividing accrued leave in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*. Here are some specific tips you need to know about representing the military spouse in regard to additional benefits.

Accrued Leave. When it comes time to do the division and distribution of marital property, one often-overlooked asset is accrued leave for the military member. Each person in the military service on active duty accrues 30 days of paid leave each year, regardless of rank. This leave is worth what it' s equivalent would be at the monthly pay rate of the servicemember, and this can be figured out by using the pay tables available at the nearest recruiter' s office or at [www.dfas.mil](http://www.dfas.mil), the DFAS website. Thus if a servicemember is paid \$4,400 gross pay per month and he has 45 days of accrued leave at the point of evaluation (e.g., date of separation, date of filing, date of marital breakdown.), his accrued leave would be worth about \$6,600 [45/30 x \$4,400]. Since senior enlisted members and officers frequently carry as much as 60 days of accrued leave from year to year, this is a significant asset to consider in the division of marital property.

Member's Medical Benefits. A separate issue that bears mentioning is the valuation of the member's medical benefits. If Colonel Roberts retires after 20 years of service, he will receive *free* medical care at any military medical facility on a space-available basis. He also receives military medical insurance, currently called TRICARE, for most medical expenses he incurs. All of this can be evaluated by an expert, and this value can be attributed to COL Roberts as part of the retirement benefits he receives.<sup>20</sup> So many attorneys are concerned solely with the evaluation of retired pay that they forget the valuation of *other retirement benefits* that should be included. Since this medical care for COL Roberts is part of his retirement benefits, so the argument goes, it should be included for valuation purposes, even if the statutory benefit cannot be transferred to Mrs. Roberts. Such an approach may yield a substantially better settlement for Mrs. Roberts than the valuation of only her husband's pension payments. It should also be pointed out that this valuation approach, of course, can also be applied to Mrs. Roberts' own marital medical benefits and entitlements; these can also be valued and added to *her* share of the marital property to the extent they were acquired during marriage.

Spouse's Medical Care. Pub. L. 98-525, the Department of Defense Authorization Act of 1985, expanded the medical (and other) privileges set out in Pub. L. 97-252 to extend certain rights and benefits to unremarried former spouses of military members.

If the former spouse was married to a member or former member for at least 20 years during which he performed at least 20 years of creditable service (also called "20/20/20" spouses, which refers to 20 years of service, 20 years of marriage, and 20 years of overlap), then she is entitled to full military medical care, including TRICARE, if she is not enrolled in an employer-sponsored health plan. She is also entitled to commissary and exchange privileges.<sup>21</sup>

If the former spouse was married to a member or former member for at least 20 years during which he performed at least 15 years of creditable service (also called "20/20/15" spouses, for 20 years of service, 20 years of marriage and 15 years of overlap), and the former spouse is not enrolled in an employer-sponsored health plan, then the length of time that she is entitled to full military medical care, including TRICARE, depends upon the date of the divorce, dissolution or annulment, as set out below. No other benefits or privileges are available for her.

If the date of the final decree of divorce, dissolution or annulment of marriage was before April 1, 1985, then the former spouse is authorized full military medical care for life, so long as she does not remarry. If the decree date is on or after April 1, 1985, then she is entitled to full military medical care, including TRICARE, for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, she may purchase a conversion health policy<sup>22</sup> under the DOD Continued Health Care Benefit Program (CHCBP), a health insurance plan negotiated between the Secretary of Defense and a private insurer, within the 60-day period beginning on the later of the date that she ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe.

Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(2)(H) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.<sup>23</sup> Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is not part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse who qualifies for any of these benefits may apply for an ID card at any military ID card facility. She must complete DD Form 1172, "Application for Uniformed Services Identification and Privilege Card." The former spouse should be sure to take along a current and valid picture ID card (such as a driver's license), a copy of the marriage certificate, the court decree, a statement of the member's service (if available) and a statement that he or she has not remarried and is not participating in an employer-sponsored health care plan.

It is important to remember that *these are statutory entitlements*; they belong to the nonmilitary spouse if she or he meets the requirements of federal law set out herein. They are not terms that may be given or withheld by the military member, and thus they should not be part of the "give and take" of pension and property negotiations since the military member has no control over these spousal benefits.

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## **ENDNOTES**

<sup>1</sup> *Fern v. United States*, 908 F.2d 955 (Fed. Cir. 1990).

<sup>2</sup> Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* (McGraw Hill), §6.09, p. 340 (2001 Supp.).

<sup>3</sup> *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000); *see also Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1991).

<sup>4</sup> *Dowden v. Allman*, 696 N.E.2d 456 (Ind. Ct. App. 1998); *see also Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990) and Indiana Code §31-15-7-4.

<sup>5</sup> *McClure v. McClure*, 98 Ohio App. 3d 27, 647 N.E.2d 832 (1994).

<sup>6</sup> *Lemon v. Lemon*, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988).

<sup>7</sup> *Siler v. Siler*, 1994 WL 386106 (Ohio App. 1994).

<sup>8</sup> Ohio Rev. Code Ann. §3105.171(a)(3)(A)(1) (Supp. 1992).

<sup>9</sup> Ala. Code § 30-2-51.

<sup>10</sup> *See Delucca v. Colon*, 119 P.R. Dec. 720 (1987).

<sup>11</sup> This can be found at the Army JAG School's website, [www.jagcnet.army.mil/tjagsa](http://www.jagcnet.army.mil/tjagsa). Click on Other Publications, then scroll down the menu to Legal Assistance, then look for JA 274, which is in Adobe Acrobat format.

<sup>12</sup> *See, e.g., Atkinson v. Chandler*, 130 N.C. App. 561, 504 S.E.2d 94 (1998) (affirming judge's award of larger share of marital estate to wife of servicemember's whose pension was exempt from division because it was not vested, which was a requirement for pension division in North Carolina until October 1, 1997).

<sup>13</sup> *Mansell v. Mansell*, 490 U.S. 581 (1989).

<sup>14</sup> *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).

<sup>15</sup> For cases allowing the reopening of a property division judgment based on a retired member's waiver of retired pay in order to receive VA disability benefits, *see Torwich v. Torwich*, 660 A.2d 1214 (N.J. Super. 1995); *Clausen v. Clausen*, 831 P.2d 1257 (Alaska 1992); and *McMahan v. McMahan*, 567 So.2d 976 (Fla. Dist. Ct. App. 1990).

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<sup>16</sup> The document to request in Army Reserve cases is DARP Form 249. For National Guard cases, ask for NGB Form 23. The Navy Reserve form is NRPCC Form 1070-124; and the Air Force Reserve form is AF Form 526.

<sup>17</sup> For cases holding that classification of the marital part of a Reserve pension could be based on "marital points" divided by "total points," see *In re Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979) and *In re Beckman*, 800 P.2d 1376 (Colo. Ct. App. 1990). Some states, on the other hand, require calculation of the marital fraction based on time, not "points" or so me other factor. See, e.g., N.C. Gen. Stat. 50-20(b), which states, "The award shall be determined using the proportion of time the marriage existed, (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment."

<sup>18</sup> 10 U.S.C. § 1408 (c) (1).

<sup>24</sup> *Ridgway v. Ridgway*, 454 U.S. 46, 102 S. Ct. 49, 70 L.Ed. 2d 39 (1987).

<sup>20</sup> See W. Horbatt and A. Grosman, *Division of Retiree Health Benefits on Divorce: The New Equitable Distribution Frontier*, 28 FAM.L.Q. 327 (Summer 1994).

<sup>21</sup> 10 U.S.C. § 1062.

<sup>22</sup> 10 U.S.C. § 1086 (a).

<sup>23</sup> 10 U.S.C. § 1078 a (g) (1) (C).

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