Military Pension Division: Pitfalls & Problems

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Know the Law; Explain It to the Client

• Three types of military retirement
• USFSPA - 10 USC 1408
• 10/10 overlap = garnishment
• LEGAL EAGLE handouts for clients

"The Bounty after the Mutiny"

3 military retirement systems – KNOW them!

Final Retired Pay
High-3
REDUX

CSB = Career Status Bonus

$30,000

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"Pre-Retirement Counseling Guide" –
www.armyg1.army.mil/rsr/preretirement.asp

“Which Retired Pay Plan Are You Under?”
– same website as above

“Which System Applies to You?”
http://militarypay.defense.gov/retirement/ad/01_whichsystem.html

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Know the Basics

- Regulations
- Federal jurisdiction – three tests (domicile, consent, residence not due to military assignment), 10 U.S.C. 1408(c)(4)
- Wording of the pension division clause
- Four acceptable division methods

FORGET LONG-ARM STATUTES...
THROW AWAY INTERNATIONAL SHOE

FEDERAL JURISDICTIONAL LIMITS:
10 USC 1408(c)(4)

PENSION JURISDICTION IS LIMITED TO:
1. Domicile
2. Consent
3. Residence not due to military assignment

Residence test: SM resides in State A not due to military orders

Example: Airman Smith assigned to Eglin AFB, FL – but lives in Gulf Shores, AL to be near his parents

DOMICILE

- PHYSICAL PRESENCE (excluding temporary absences)
- INTENT AS SHOWN BY...
  - state income taxes
  - car title, registration
  - driver’s license
  - voting
  - home ownership
  - in-state tuition
  - voting
  - bank accounts
"YOU CAN'T SUE ME HERE - I'M FROM KANSAS!"

**Domicile of servicemembers...**
- Servicemembers Civil Relief Act – protects domicile for voting, tax purposes
- False domicile claims
- Costly to litigate in 2 states!

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**Leave-and-Earnings Statement**

> Filing the lawsuit... or
> Responding to it

**C O N S E N T**

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**Safe havens?**
- Unvested pension is *Sep. Prop.* in ARK., IND., ALA.
- Rest of states don't require "vesting"
- Puerto Rico doesn’t divide non-contributory pensions

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**What is Spouse's Share?**
- 50% of Pension?

"Wife shall receive 50% of the military retirement benefits of Husband."

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What is Spouse’s Share?

• 50% of Pension?
• ONLY if married during SM’s entire career…
• Otherwise- 50% of marital share of pension

Wording the pension division clause – the marital fraction

• Majority rule
• Minority rule

Pension division formulas

• Majority of states: 50% X “marital fraction” X final retired pay

Majority Marital Fraction:
(When COL Roberts is still on active duty…)

\[
\frac{\text{Yrs. Marital Military Svc}}{\text{Yrs. Total Military Svc.}} = \frac{20}{X}
\]

Pension division formulas

• Minority of states: 50% X “marital fraction” X retired pay earned as of divorce date

Minority Marital Fraction:
(When COL Roberts is still on active duty…)

\[
\frac{\text{Yrs. Marital Military Svc. till divorce}}{\text{Yrs. Total Military Svc. till divorce}}
\]
“All Clauses Considered”
- SET DOLLAR AMOUNT
  (favors SM - no COLA),
- or-
- % OF DISPOSABLE RETIRED PAY
  - or-
- FORMULA CLAUSE (when SM is not yet ret’d)
  - or-
- HYPOTHETICAL
  (favors SM - freezes grade/ years)

RULES FOR DIRECT PAY ORDERS
- NOT MORE THAN 50% OF DISPOSABLE RETIRED PAY
- STARTING NO LATER THAN 90 DAYS AFTER SERVICE ON DFAS
- PMTS END AT DEATH OF RETIREE OR SPOUSE, WHICHEVER OCCURS FIRST
- PROSPECTIVE ONLY-- NO ARREARS

RULES FOR DIRECT PAY ORDERS
- SERVE ON DFAS CERTIFIED MAIL [RET. RECEIPT REQUESTED]
- DEGREE TO BE CERTIFIED WITHIN 90 DAYS OF SERVICE
- APPLICATION LETTER SIGNED BY SPOUSE [DD Form 2293, www.dfas.mil]

Know the Basics
- Wording, logistics
- Documents
  - LES [Leave and Earnings Statement]
  - RAS [Retiree Account Statement]
**Know the Basics - Resources**

- SILENT PARTNER infoletters re military pension division
  
  [www.abanet.org/family/military](http://www.abanet.org/family/military)

- DFAS guide for attorneys as to military pension division, “Dividing Military Retired Pay”
  

**Disability Details**

- Waiver of ret’d pay for VA disability $  
- VA is tax-free, AND…

**V.A. DISABILITY PAY = NOT DIVISIBLE!**

(ditto for most of Military Disability Retired Pay)

**How to protect the non-military spouse from VA waivers**

- Indemnification Clause
- DON’T SAY “John will take no action…”
- DO SAY “John will compensate Mary…”

**Post-Divorce VA Elections: How the states are responding**

- Go to great lengths to help former spouse
  - Indemnification
  - Damage award
  - Re-open the property division
  - Compensatory alimony

**Indemnification Clause**

- State facts, assumptions [“John is COL with over 18 years’ service in Army, will receive pension based on longevity after at least 20 years of service.”]
Indemnification Clause

- State facts, assumptions ["John is COL with over 18 years’ service in Army, will receive pension based on longevity after at least 20 years of service"]
- State intent [“Mary to get unreduced share of pension based on years of service”]

Indemnification Clause

- State duty of SM/retiree [“John will compensate Mary if there is any reduction in her share of the longevity pension.”]
- Include interest on unpaid amount [“The breaching party will also pay interest at the statutory rate on all unpaid amounts and damages.”]

Indemnification Clause

- State facts, assumptions ["John is COL with over 18 years’ service in Army, will receive pension based on longevity after at least 20 years of service"]
- State intent ["Mary to get unreduced share of pension based on years of service”]
- Don’t call it Disposable Retired Pay – that limits her share b/c VA is excluded from DRP

Indemnification Clause

- State duty of SM/retiree [“John will compensate Mary if there is any reduction in her share of the longevity pension.”]
- Indemnify also as to expenses – not just REASONABLE [“Each party will pay for all expenses and damages incurred because of the other’s breach of this agreement.”]

VA with a Vengeance

CRDP and CRSC – “The Evil Twins”
found at...
www.abanet.org/family/military > SILENT PARTNER

CRDP to the Rescue

- CRDP = Concurrent Retirement & Disability Pay
- Available if ≥50% disability rating
- Return of waived military retired pay
CRDP to the Rescue

- Phased in over 10 yrs [2004-2014]
- 100% disabled = immediately vested
- Front-loading of payments

Page 2 of RAS: “Based on information received from the VA, your CRDP amount is $____.”

TSP is Retirement, Too

- Thrift Savings Plan = defined contribution plan: www.tsp.gov
- Participation? Check the LES!

Waiver Wording

- “Mary Doe hereby waives and gives up any claim she may have to the military retired pay [and Survivor Benefit Plan] of John Doe.”
For those left behind -
• S.B.P. [Survivor Benefit Plan…?]  
• or Single Biggest Problem???

SBP – Single Biggest Problem?
• SBP = 10 USC 1447 et seq.
• Benefit at death of retiree/SM = 55% of base amount
• Cost (from retired pay) = 6.5% of base amt for “spouse/former spouse coverage”
• Benefits, disadvantages
• Checklist for judges

SBP DEFINED
• Court can order SBP coverage
• Without it, payments to former spouse end at the retiree’s death
• Unitary – cannot divide, share with your NEW spouse!

SBP DEFINED
• Premiums come “off the top” before DRP (if court-ordered)
• Avoid SGLI as alternative (Ridgway case, U.S. Supreme Ct. 1981)

TYPICAL CLAUSE???
“MARY DOE SHALL RECEIVE 46.5% OF ALL THE MILITARY RETIREMENT BENEFITS OF JOHN DOE, INCLUDING EVERYTHING ATTRIBUTABLE TO HIS SERVICE IN THE MILITARY TOWARDS A PENSION, AND EVERY PENSION BENEFIT OF HIS.”

LIFE & DEATH
If representing SPOUSE –
• Life: SPECIFY SHARE OF PENSION
• Death: IF SM DIES AFTER DIVORCE, SBP COVERAGE TO ‘FORMER SPOUSE’

“JOHN WILL IMMEDIATELY ELECT MARY AS SBP FORMER-SPOUSE BENEFICIARY.”
SBP Strategies

• Shifting the premium to FS...
• SBP suspended if FS remarries before 55

“Timing Is Everything”

• The 10-Year Rule for pension division garnishment
• The TWO SBP deadlines for order submission to DFAS
• Medical care for former spouses

The "10-Year Rule"

COURT ORDER...
+ 10 YRS OF CREDITABLE SERVICE
+ 10 YRS OF MARRIAGE DURING SVC.
= DIRECT PAYMENT FROM DFAS
**NOT a rule of divisibility!**

SURVIVOR BENEFIT PLAN

• One-year deadline
  – From divorce if SM makes the election
  – From date of SBP order if FS sends “deemed election”

“20-20-20 COVERAGE”

20 YRS OF MARRIAGE
+ 20 YRS OF CREDITABLE SVC
+ OVERLAP OF 20 YEARS
= MILITARY MEDICAL COVERAGE

Other Medical Coverage

• CHCBP – 10 USC 1078a
  – Premium-based
  – Normally 36 months after divorce
  – BUT INDEFINITE if:
    • Pension division OR SBP coverage in order
    • Unremarried if under 55
Who ya’ gonna call?

“Who ya’ gonna call?”

• ABA FAMILY LAW SECTION’S MILITARY COMMITTEE:
  www.abanet.org/family/military/

• NC STATE BAR LAMP COMMITTEE:
  www.nclamp.gov

Whoooo Ya Gonna Call????

“Who ya’ gonna call?”

• DFAS WEBSITE: www.dfas.mil

• ARMY RETIREMENT SERVICES:
  www.armyg1.army.mil/rso/rso.asp

The End

“Who ya’ gonna call?”