SILENT PARTNER

Military Pension Division: The Servicemember's Strategy

Introduction: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many* ***SILENT PARTNER*** *infoletters on military pension division, the Survivor Benefit Plan and other aspects of military divorce. Just go to www.abanet.org/family/military (the website of the above committee) or www.nclamp.gov (the website of the military committee, N.C. State Bar).*

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Introduction

The battlefield in military divorces is often military pension division. An overview of the battlefield is contained in "Military Pension Division: Scouting the Terrain," and the topics below expand that advice to help the pension recipient (SM or retiree) to cut corners, save money, and reduce or eliminate benefits for his (or her) spouse or ex-spouse.

While many SMs are vociferous in their resistance to division of the military pension, it is important to remember and remind the client of the cost of an aggressive and unyielding defense. Once they know the odds and the costs, few clients have the will or the pocketbook for diehard resistance. Few want to risk what's at stake in 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 U.S. jurisdictions limit military pension division based on years of service or years of marriage. The job of a good attorney is to guide the client with sage advice and serious judgment, rather than to be pulled along blindly by a client who wants to "set a precedent" – usually (as clients state it) "for the principle of the matter." Is it worth it? Will it help the client with the rest of his (or her) case? Advice and guidance for the "big picture" along these lines is the task of the lawyer who is truly serious about helping his or her military pension division clients.

Roadblocks and Minefields

Our client in this example is Army Colonel Bill Roberts. He's been in the Army 20 years and now he's going through a divorce. He wants to know how to stop Mrs. Roberts from getting the courts to divide his military pension rights. He also wants to know, in the event she succeeds, what his maximum exposure is.

To advise him fully, we need to first look at the roadblocks and minefields that may be placed in Mrs. Roberts' way, blocking the division of her husband's military retirement rights. Here are the obstacles that may be discussed with COL Roberts:

Constitutionality. If COL Roberts says, "They can't do that -- it's unconstitutional," don't get your hopes up. 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*.[1]

Retroactivity. According to federal law, there is a limit as to how far back one can go to divide military retired pay. A 1990 amendment to USFSPA limits pension division to decrees entered after June 25, 1981 (the date of *McCarty v. McCarty*[2]). It states that decrees entered before this date which did not treat (or reserve for later treatment) military retired pay as marital or community property cannot be modified to reopen the issue.[3]

Timeliness. The next point of analysis for COL Roberts' case is whether the claim was filed *procedurally in a timely manner*. This is a 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; 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 an equitable distribution of marital property are deemed to 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 of the parties. In addition, the right to equitable distribution must be asserted in North Carolina 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. If such parameters exist under state law and the claim of Mrs. Roberts for equitable distribution falls outside these limits, the court will have no jurisdiction to entertain her request for an equitable distribution of marital property. This defense involves complex procedural research that is best left to the expert; consult a good civilian family law attorney or refer this kind of case to a family law specialist.

Minimum Contacts. A state court will often require more than just the residence of the spouse, servicemember, retiree or former spouse within its borders. In a 1991 California case, the husband objected at the outset to the division of his military retired pay in that state, claiming that he was not domiciled there and the marriage had never existed there, thus depriving the court of the power to divide the pension. Finding that the husband had not consented to the court's division of military pension, the court refused to make the division. Marriage of Tucker, 226 Cal. App.3d 1249 (1991). See also Marriage of Hattis, 196 Cal. App. 3d 1162, 1168 n.6, 242 Cal. Rptr. 410 (1987).

Waiver. Mrs. Roberts' rights may have been waived. Did she sign a separation agreement or property settlement agreement? A premarital 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. In those states, 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 non-contributory pension plan.

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.[4] A service member 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 a vested retirement benefit.

There are two states, Indiana and Arkansas, which clearly limit court jurisdiction over pension division to those pensions which are "vested." The Arkansas Court of Appeals held in *Holaway v. Holaway* that an unvested pension is non-divisible separate property of the party who earned it.[5] In Indiana the right to receive retired pay must be vested as of the date of 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.[6]

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.[7] The benefit must also be vested and must be valued to be divided.

A third jurisdiction, Puerto Rico, does not allow the division of noncontributory pensions at all. Puerto Rico treats these pension rights as separate property.[8] Thus a military pension would not be divisible there although the Thrift Savings Plan, being contributory, would be divisible by the courts.

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 the rules in an individual state, contact a lawyer there who specializes in family law and divorce.

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.

Type of Pension

The pension rights contemplated by USFSPA involve non-disability "longevity retirement" under 10 U.S.C. 1401-12, not retirement for disability under Title 10, Chapter 61, or disability compensation under Title 38. In *Mansell v. Mansell*[9] the U.S. Supreme Court in 1989 held that a pension, to the extent it is based on disability compensation, is not divisible under USFSPA. At the time of divorce, a court may divide only "disposable retired pay" as that term is defined in USFSPA, and that is what the retired pay center (usually DFAS, the Defense Finance and Accounting Service) will allocate in a pension garnishment for property division. Disability pay is a complicated issue. A member of the military can take advantage of two different systems for disability benefits.

Military Disability Retired Pay. Military disability retired pay is available for those members who are sufficiently disabled that they cannot perform their assigned duties. If a member has enough creditable service, he or she may be placed on the "disability retired list" and may begin to draw disability retired pay. If a SM is able to retire with military disability pay – if he has been rated as disabled by the military – his amount of disability retired pay would be based on the higher of two different amounts of pay. There are three steps to this process. For the purposes of this example, assume that he has an active duty base pay of $3,000 per month, 20 years of creditable service and a disability rating of forty percent (40%).

- The first step is to calculate the SM's normal retired pay based on his years of service, which we will assume for this example is 2.5% times his years of service times his high-3 base pay. The "high-3" is the average of the three highest years of continuous compensation. Here we'll just assume that his "high-3" is $3,000 a month. In this case, it comes to 2.5% X 20 years X $3000, or $1500.
- The next step is to multiply his base pay times his disability rating. This is achieved by multiplying $3,000 by 40%, or $1,200.
- The SM would then receive the higher of these two amounts ($1500 per month in military disability retired pay in this example).

USFSPA makes divisible only the amount of pay that is the difference between the two above amounts, that is, the difference between his gross retired pay and his disability pay based solely on the disability rating. In this example, the difference is $1,500 minus $1,200, or only $300 as divisible military retired pay. Thus although the SM's wife might be entitled to half of $1,500, or $750 per month as her spousal share of military pension rights, a disability retirement would yield her only half of $300, or $150 per month. Her attorney should consider a provision for the agreement -- whether consent order

or separation agreement -- that protects her interest in her husband's pension against a possible disability retirement in the future. This is discussed in the SILENT PARTNER, *Military Pension Division: The Spouse's Strategy*.

VA Disability Benefits. A second system of disability retirement benefits is administered by the Department of Veteran's Affairs (VA). If the extent of disability is not such as to qualify a SM for military disability retired pay, he might still elect to receive monthly payments from the VA. He can even elect VA disability pay when he's receiving military disability retired pay! To qualify for disability compensation from the VA, he would have to waive an equivalent amount of his military retired pay. Almost all retirees who can make this election do so. Why? There are two distinct benefits for the military client who is contemplating a divorce:

- While taking this option doesn't provide an increase in gross income, it does yield a net increase in pay since the VA portion of the SM's compensation is tax-free. Thus if the SM's pension (without disability) were $1,500 per month and his disability were evaluated as equivalent to $1,000 per month in VA benefits, he could waive the same amount of taxable longevity pension in order to receive this amount with no taxes on it. His monthly benefits would still total $1,500, but only $500 of this would be subject to taxes if he makes this choice.
- In addition, the VA benefit is not subject to division. Only the longevity-based portion of the pension is divisible in divorce court.

This latter "benefit" for the SM was the issue involved in the *Mansell* case.[10] The Supreme Court, after reviewing the history of *McCarty* and USFSPA, proceeded to define the problem as one of statutory interpretation of 10 U.S.C. § 1408(c)(1), which allowed the division of military pensions, and Section 1408(a)(4), which exempted VA disability benefits from inclusion in the term, "disposable retired pay." While the courts are allowed to treat disposable retired pay as community or marital property, the Court stated that – at the time of divorce – they were not allowed to treat all retired pay as such, only disposable retired pay. Thus the Supreme Court ruled that states are preempted from dividing at divorce the retired pay that a retired military member waives in order to receive VA disability pay. As 10 U.S.C. § 1408(a)(4) now reads, both these types of benefits are exempted from division to the extent stated above:

> "Disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which... (C) in the case of a member entitled to retired pay under chapter 61 of this title [10 USC 1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list) or... (D) are deducted because of an election under chapter 73 of this title [10 USC 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

Practitioners should be aware that Congress has recently taken steps to modify the VA waiver requirement. In 2003 Congress passed legislation taking effect January 1, 2004 to allow concurrent receipt of both forms of payments – retired pay and VA disability compensation – for certain retirees. The statute is a 10 U.S.C. 1414, and the restoration of retired pay is known as Concurrent Retirement and Disability Pay, or CRDP.

For those who have at least 20 years of qualifying military service and a VA disability rating of at least 50%, CRDP authorizes (as of January 1, 2014) the elimination of the VA offset to retired pay. The disability does not have to be combat-related. Thus these retirees are now getting full retired pay and full VA payments.

Combat-Related Special Compensation (CRSC) is another form of disability pay. It's found at 10 U.S.C. 1413a, and it includes those who have a disability of at least 10% directly related to the award of

the Purple Heart decoration or related to combat, operations, instrumentalities of war or hazardous duty. CRSC is non-taxable; retired pay is taxed.

The rules are is more complicated than the brief overview given here. For further information, click on "Search" at www.dfas.mil or at www.military.com. There is also a SILENT PARTNER on CRSC and CRDP.

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 are over and above the traditional state 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 the SM use these to his advantage? The primary way is not to allow "jurisdiction by consent" to pave the way to an easy division of his pension if he has truly decided on a course of complete resistance. This involves two possible situations:

Meritorious Issue. Assume that the SM is domiciled in a state where division of the pension is limited or barred (see above), and his wife has sued him in a state that has no such limits on pension division. In this situation, his not consenting to military pension division could save his pension.

- The first step, due to the complexity of this subject, is to be sure he has skilled counsel in both jurisdictions. Don't even try to make a request for a continuance (or for a stay of proceedings under the Servicemembers Civil Relief Act) while he's "out in the field" without advice from your co-counsel. This area's too complicated.
- Even then, don't assume you're "out of the woods" with the pension being defined as non-divisible. The court 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 the nonmilitary spouse in order to compensate for this inequity.[11]
- And finally, DON'T be tempted to try to handle this without outside help. This is too difficult for the average (or above-average) judge advocate or civilian attorney, and it isn't worth your professional reputation (or malpractice liability) to try to disprove this. Seek out competent co-counsel, as your state rules of professional require. Contact a consultant or an expert witness who can provide the due diligence and the extra margin of safety.

Bluff. COL Roberts may want to make sure that his wife has to expend the maximum amount of money to get a piece of his pension. He wants 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 else he's sure that she won't spend the time or money to try to get counsel in State #2 to ask for a share of the pension, which means that you may have to do some hard bargaining to adjust the property division in light of his pension not being divided. Counsel for Mrs. Roberts would certainly want some concessions on other matters in exchange for not pursuing the military pension.

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, which refers to shared payments when the retired SM starts receiving his pension. This is the most common way of allocating

the pension between the spouse and SM. In the usual situation, a share of the SM's pension is paid to the former spouse. This can be done by DFAS through garnishment if the marriage and the length of service overlap by at least 10 years; otherwise the payment must be made by the SM.

The second involves a *present-value offset*, 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 make the division that DFAS will accept for direct payments to Mrs. Roberts. These four methods are set out in the pension division regulations.[12] They are explained in detail in the SILENT PARTNER, *Getting Military Pension Division Orders Honored by DFAS.*

Fixed dollar amount. A fixed dollar clause might 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 an award expressed as a fraction or a ratio, and it typically used when a SM is on active duty (or a Reservist is still drilling). It might read: *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. In Guard/Reserve cases, when the member is still drilling, this fraction must be expressed in terms of retirement points, not time.

Hypothetical clause. This is an award based on a rank or status which is different from that which exists when the servicemember retires. For example, the order might say: *Wife is granted 40% of what a major would earn if he were to retire on January 31, 2015 with 18 years of military service and a hypothetical retired pay base of $2,200 per month.* 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, such as the date of divorce or of separation (see below). This is the most complicated of the four, and the attorney must pay careful attention to the tips and terms set out by DFAS in its "Attorney Guidance" info-letter, found at www.dfas.mil > Garnishment > Former Spouses' Protection Act.

For COL Roberts, there is really only one advantageous way to allocate the pension: *fixed dollar amount*. That's because this does not grant Mrs. Roberts a COLA (cost-of-living adjustment) each year. The fixed dollar amount simply excludes a COLA – it's outside the definition of *fixed dollar amount*, in other words. All other clauses automatically include COLAs.

The Marital Fraction.

Assume that COL Roberts is on active duty and has 20 years of creditable service. He has been married for all 20 years. He tells his lawyer, who is inexperienced in military pension division, that he is willing to give his wife half of his pension, either because that seems fair to him or it appears to be inevitable under state law. The lawyer, taking him at his word, proceeds to draft a clause for pension division which is worded as follows:

> *Husband shall pay to Wife fifty percent (50%) of the disposable retired pay he receives from the Defense Finance and Accounting Service at retirement.*

Are there any problems with this wording?

At least from COL Roberts' point of view, the answer is yes. The clause fails to take into account the marital fraction. Defined by state law, this is usually the number of years of marital pension service divided by the years of total pension service.[13] This fraction reflects the fact that COL Roberts will

probably continue on active duty and acquire additional retired pay due to those years. These are not "marital years"—they are years after the separation or divorce. There also may be years of military service before COL Roberts married, and these non-marital years must also be taken into account.

The way to do this is with the marital fraction. In reality, Mrs. Roberts is not entitled to half of the pension; she is only entitled to half of the marital share of the pension. The above clause gives Mrs. Roberts too great a share.

Doing a Double-Dip

Assume, however, that the drafting lawyer is aware of the above issue and proceeds to include reference to the marital fraction in the clause, which now reads as follows:

> *Husband shall pay to wife fifty percent (50%) of his disposable retired pay times 20 divided by his total years of military pension service.*

While this may be an improvement for COL Roberts over the first example, there is a way to further "improve" the clause (from COL Roberts' viewpoint). This is by "fixing" the benefit to be divided with Mrs. Roberts to that which exists, based on his grade and years of service, at the "valuation date."

Each state has a "valuation date." This is the date specified in state law for the classification of assets (as marital or community property or as separate property) and the determination of the fair market value of the property for purposes of division or allocation between the spouses. It may be the date of separation, date of divorce, date of irretrievable breakdown of the marriage, date of summons issuance, or some other date set by statute or by case law.

As explained above, in states where the *date of divorce* is the valuation date, nonmilitary spouses are limited to pension division based on the benefit accrued at that date, that is, the rank and years of service of the service member at the date of divorce.[14] They do not share in any increase in pension benefits due to further promotions or additional years of service. For example, in *Grier v. Grier*, the Texas Supreme Court held that the wife of a major who was on the promotion list for lieutenant colonel at the time of divorce could only share in the retired pay of a major.[15]

Drafting a pension division clause (as above) without reference to COL Roberts' grade and years of service at the valuation date will result in DFAS dividing his pension according to his grade and years of service at retirement. This is the approach used by the majority of the states, which employ the *date of retirement* method of deferred division of retirement benefits, often called the "time rule."

As a result of this drafting, all post-separation service and promotions will be "tacked on" to the marital estate for pension division purposes. This gives (in COL Roberts' view) his former wife a "free ride" on the rest of his career and future promotions. Even though Mrs. Roberts may be married to a colonel (pay grade 0-6) with 20 years of service at their date of separation, Bill Roberts may be a brigadier general (pay grade 0-7) with 30 years of service by the time he retires. At the time of his 0-7 retirement with 30 years of service, Mrs. Roberts (under the above clause) would then begin to receive her marital fractional share of his pay *at a higher grade* and with more creditable service than that which COL Roberts had attained when they separated or divorced.

In COL Roberts' view, the above wording would be acceptable only in the unlikely event that he stayed in the same pay grade that he held at the valuation date and retired in that same rate of pay. When deferred division of the pension is involved, COL Roberts' settlement should contain a hypothetical division based on his rank and years of service at the valuation date contained in state law.

Fixing the grade and years of service is not the majority rule, as explained above. Most jurisdictions mandate the deferred division of pension benefits based on "a fixed percentage of the benefits actually received by the employee spouse at retirement" because under this method "the non-employee spouse is permitted to share in the increases in retirement benefits due to post-separation efforts *which were built on the foundation of marital effort*."[16] This has the effect of letting the wife of a colonel (at separation) share

in the pension pay of a general (at retirement) because she helped him to attain the rank of colonel in the first place.

But even in those states this does not limit COL Roberts and his attorney in negotiations. When negotiating, almost anything is fair game. In this case, because Bill Roberts was a colonel with 20 years of active duty upon the parties' separation, he will want to negotiate with the other side to give Mrs. Roberts her share of his pay in the grade of colonel with 20 years of service, not a future grade with future years of service.

What is the better wording for COL Roberts? Assuming that state law allows for the fixing of grade and years of service at a specified date or that the other side (regardless of state law) will agree to this division, the proper wording for COL Roberts might be as follows:

> *Husband shall pay to Wife fifty 50% of the disposable retired pay of a colonel (O-6) with 20 years of creditable service, a retired pay base of $7,000 a month and a hypothetical retirement date of June 1, 2009, divided by his total years of military pension service as of 6/1/09.*

Another way of reducing the payments from COL Roberts is to specify that the pay tables to be used by the retired pay center are those in effect on 6/1/09, the effective date of the hypothetical division and rank. This double-dip approach will not only fix the rank and years of service (and thus his retired pay base), but it will also fix the pay tables which are employed. To do this, add the following sentence to the above clause: *The retired pay will be based on the pay tables in effect on June 1, 2009.*

A final attempt to reduce the former spouse's share of retired pay would be to convert the denominator in the marital fraction into COL Roberts' full term of service, rather than stopping it as of the date specified in state law. Thus the applicable wording would be:

> *Husband shall pay to Wife fifty 50% of the disposable retired pay of a colonel (O-6) with 20 years of creditable service, a retired pay base of $7,000 a month and a hypothetical retirement date of June 1, 2009, divided by his total years of military pension service.*

Dividing Disposable Retired Pay

What is it that the courts divide – gross pay or net pay? USFSPA specifies that the court at the time of divorce can only divide *disposable retired pay*.[17] 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.

Note that disability benefits are deducted from gross pay in order to arrive at "disposable retired pay." Thus a retired SM 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 SM from taking disability pay! This topic is covered more fully above at VA Disability Benefits and in the SILENT PARTNER on CRSC and CRDP.

Reserve and National Guard Pension Rights

There are *three key considerations* in dividing Guard/Reserve retirement rights.

- First, Guard and Reserve personnel generally do not begin to get paid until age 60 (regardless of when they apply for retirement); therefore this deferral of payment must be taken into account in the negotiations and the present value calculations.
- Second, when the SM has stopped drilling and the total number of credited retirement points are known, the pension should be calculated in two ways to determine the best outcome for the client – using months of military service and then again using retirement points.
- The third point involves Guard/Reserve personnel who are still drilling. A pension division clause for these SMs usually involves a formula to determine what the marital share of the pension is, which is then divided with the former spouse. Such a formula must be expressed in terms of retirement points, not months or years, to be acceptable to the retired pay center.

A fuller explanation of Guard/Reserve retired pay is found in the SILENT PARTNER, *Military Pension Division: The Spouse's Strategy*.

Survivor Benefit Plan.

After the battle comes caring for the survivors. The equivalent of this in the area of military pension division is deciding what to do about the death of the SM and its impact on the surviving spouse. Since the military pension ends when the SM dies, the Survivor Benefit Plan is the usual issue at stake here. This is a way to continue monthly payments to the former spouse who survives.

The Survivor Benefit Plan is a survivor annuity that pays a specified beneficiary 55% of the selected base amount when the SM dies first. This topic is covered in detail in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*. The cost in active-duty cases is usually 6.5% of the base amount; in Guard/Reserve cases, it's usually 10% if the SM selects immediate coverage for a spouse or former spouse.

The best SBP option for the SM is, of course, *silence*. If no one says anything about SBP and the settlement is worded properly, then COL Roberts won't have to elect SBP coverage. This will save him money and also retain the option for a remarriage and a new wife, if that's in his future. SBP cannot be divided between current and former spouses. There can only be one adult beneficiary. Other options for COL Roberts are:

Life Insurance. If there is a discussion about SBP, then his attorney would 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 the SBP premium, and insurance has the advantage of paying Mrs. Roberts in a lump-sum cash amount at his death, rather than doling out monthly payments to her. Life insurance payments are tax-free, unlike the payments from SBP. If there's a dispute, offer to split the cost with Mrs. Roberts – each will pay half the life insurance premium. Even better, include the premium as alimony which COL Roberts pays; that way, the premium will be deductible for him at tax time each year.

Put a Present Value on the Benefit. Since the former spouse – Mrs. Roberts – is the sole beneficiary of this survivor annuity, it's only fair that she should be charged with the total value of the SBP in dividing marital property. Hiring an expert to value the SBP which Mrs. Roberts gets is the key to this defense.

An example of a survivor annuity evaluation can be found in a 1998 Pennsylvania case, Palladino v. Palladino.[18] In this divorce case, the judge found that the wife had requested that the husband elect survivor annuity coverage to continue payments to her if he died before she did. The expert witness who valued the survivor annuity determined that it had a present value of about $57,000.

The judge found that the survivor annuity, which derived from the husband's civilian pension, had a value independent of the pension's value, the wife had elected to receive the survivor annuity, and therefore she should be charged with the value of the survivor annuity as an asset in equitable distribution. The court decided that $57,000 was the proper value of the survivor annuity which ought to be charged to the wife. The survivor annuity was found to be marital property.

Upon an appeal by the wife, the Superior Court, in an opinion by Judge Patrick R. Tamilla, affirmed the trial court's decision. This meant that the wife did not get any of the pension of the husband. She only received the survivor annuity, which she had requested.

Thus the husband received a fair distribution (not a windfall) regarding his pension; he kept the entire payment, simply because his ex-wife insisted on getting the survivor annuity. His monthly pension was cut by about $80 monthly, but the wife was not entitled to receive any of his pension during his life.

Palladino represents a case in which the trial judge did the right thing – that is, valued the survivor annuity at the equitable distribution hearing. A 2010 case from Oregon, Forney and Forney, represents the opposite situation, a judge who refused to value the survivor annuity and whose ruling was reversed by the appellate court. In this military case, the expert witness valued the Survivor Benefit Plan at $84,855. The trial court refused to place a value the asset.

The Oregon Court of Appeals decided otherwise, stating:

> In addition to the military pension itself, however, there is also wife's survivor annuity on that pension. That annuity, acquired by the parties during the marriage, is a marital asset. As we held in Miller and Garren, 208 Ore. App. 619, 623, 145 P3d 285 (2006), a survivor's annuity is analogous to an unvested pension and is subject to valuation and the court's disposition on dissolution. Although it is possible that wife could die before husband and never see the benefits from the annuity, in light of the 18-year disparity in their ages, it is likely that wife will survive husband. As in Miller, the parties' expert in this case took into account the contingency of wife's survival when valuing annuity. Wife is the only beneficiary of the survivor annuity, and it will provide her with income for many years. We conclude that it is appropriate to take wife's survivor annuity into account in the property distribution and that the trial court erred in failing to do so. As we have noted, the present value of wife's survivor annuity is $84,855. That value should be assigned to wife in the property division.[19]

The Court reversed and remanded for a new judgment allocating the entire value of the Survivor Benefit Plan to the wife.

Lower Base Amount. When you can't dissuade the other side from SBP, then consider the selection by COL Roberts of a base amount that's lower than his retired pay – say 20% or 30% of it – when he's not been married to Mrs. Roberts the entire term of his service. After all, it might not make sense to him that she should get 55% of his full retired pay when he dies if she was only married to him 10 of the 20 years he served; under these circumstances, she should only get half of 50% of his retired pay during her life (or 25%), and she should get the same dollar amount at his death, not 55% of his full retired pay. This is a "mirror award"; the death benefit mirrors the life benefit. Reduce the base amount selected so that her SBP benefit reflects the same percentage as her share of the military pension.[20] You'll also be saving COL Roberts money because the premium will be lower. Note that there are only limited time when the match can be made, however. The problems that exist in trying to establish a mirror award are set out in the SILENT PARTNER infoletter (for lawyers) and the LEGAL EAGLE handout (for clients) on this subject.

Who Pays the Premium? 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 the retired pay center. You can submit as many orders as you want – signed by judges, certified by clerks and approved by the highest court you can find – and they'll still pay no attention if you try to shift the premium payment to Mrs. Roberts by telling the pay center to take the premium out of her share. In fact, your order – if it contains this language – will be rejected and you'll have to start all over. The retired pay center will refuse to do it 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 their share of the military pension is divided.

But the same thing can be accomplished by adjusting the percent that Mrs. Roberts receives. Here's how:

- Figure out what dollar amount Mrs. Roberts would get each month as pension division, multiplying her spousal percentage times the gross retired pay of the member.
- Then figure out the dollar amount for the SBP premium (for spouse or former spouse coverage, use 6.5% of COL Roberts' selected base amount, unless a lower amount has been – or will be - selected).
- Then subtract this from Mrs. Roberts' dollar amount (or anticipated dollar amount). This yields her spousal share less the SBP premium.
- Next divide this figure by the disposable retired pay (gross pay less SBP premium) of COL Roberts and multiply it by 100.

The result is the percentage of his retired pay that she would get with *her* paying for SBP. You've effectively shifted the premium payment to her by reducing the percentage of COL Roberts' retired pay that she receives, assuming there are no other deductions from gross pay, such as a disability pay waiver or money owed to the federal government.

If you're at the narrow point in time when you can select the base amount and make it match the life share of the pension for the former spouse, then you can shift the premium payment AND create a "mirror award" by following these steps:

- Figure out what dollar amount Mrs. Roberts would get each month as pension division, multiplying her spousal percentage times the gross retired pay of the member.
- Next divide that amount by .55, since SBP is always 55% of the base amount chosen, and we're trying to figure out the correct amount for that base.
- Then figure out the dollar amount for the SBP premium (for spouse or former spouse coverage, use 6.5% of COL Roberts' selected base amount, which is found in the previous step).
- Then subtract this from Mrs. Roberts' dollar amount (or anticipated dollar amount). This yields her spousal share less the SBP premium.
- Next divide this figure by the disposable retired pay (gross pay less SBP premium) of COL Roberts and multiply it by 100.

Just remember that this can be done only at the time that an active-duty SM is retiring. If the client is a Guard/Reserve member, this can be done only when the member is about to attain "pay status" and has reserved the decision on SBP, with the consent of his spouse, to that point in time by electing Option A on DD Form 2656-5 when he reaches the 20-year point of Guard/Reserve service. All of this is spelled out in the LEGAL EAGLE handout and the SILENT PARTNER infoletter mentioned above.

Early Out Options.

If your client has taken early retirement through VSI (Voluntary Separation Incentive), SSB (Special Separation Bonus) or a similar program, you should argue that this is not divisible as marital property under the *McCarty* decision. The analysis is set out (along with counter-arguments) in the SILENT PARTNER, "Military Pension Division: Scouting the Terrain."

Even if this argument is not successful, remind opposing counsel that, in any event, the retired pay center will not garnish VSI or SSB as property division under 10 U.S.C. § 1408(d). Only military retirement pay can be garnished under this statute. Use this argument to attempt to get concessions.

A separate, but related, question is whether the benefit is separate or marital property. If the courts decide in favor of divisibility, how will they treat the property?[21] Some courts have held that severance pay is not marital property since it takes the place of *future* compensation, rather than being payment for *past* services (like retirement pay and other deferred compensation benefits).[22]

If, on the other hand, they are seen as an economic benefit earned during the marriage and attributable to marital work, efforts and labor, they may be seen as damages for an economic loss to the marriage. This is called the "analytic approach" and is most often applied in the personal injury area.[23] In an Arkansas case involving severance pay, the wife was granted one-half of the husband's lump-sum payment because the judge determined that the benefit was earned by *service during the marriage*.[24] Finally, even if the payment is marital property and therefore divisible, one would need to apply the marital fraction (years of marital service over total years of service) to the lump-sum payment to arrive at the portion that is marital. This is necessary to reflect fairly the part of the pension earned during the marriage.

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ENDNOTES

[1] *Fern v. United States*, 908 F.2d 955 (Fed. Cir. 1990).
[2] *McCarty v. McCarty*, 453 U.S. 210 (1981).
[3.] 10 U.S.C. (c) (1).
[4] Turner, EQUITABLE DISTRIBUTION OF PROPERTY (McGraw Hill), §6.09, p. 454 (2003 Supp.)
[5] *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000); s*ee also Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1991).
[6] *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.
[7] Ala. Code § 30-2-51
[8] *Delucca v. Colon*, 119 P.R. Dec. 720 (1987).
[9] *Mansell v. Mansell*, 490 U.S. 581 (1989).
[10] *Id.*
[11] *See, e.g*., *Atkinson v. Chandler*, 130 N.C. App. 561, 504 S.E.2d 94 (1998).
[12] Dep't of Defense, Financial Management Reg. vol. 7B, chap. 29, Former Spouse Payments from Retired Pay (Dec. 2010), *available at* http://comptroller.defense.gov/fmr/07b/07b29.pdf.
[13] In a minority of states, this is years of military pension service until separation (or divorce) divided by that pension service till that date. In these states, the marital fraction is multiplied by the pension benefit earned as of separation or divorce.
[14] *See, e.g*., *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983) (holding that, in Texas, the valuation and apportionment of retirement benefits in divorce is to be based on the value of the community's interest at the time of divorce)
[15] *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987)
[16] *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504, 508 (1986), *aff'd on other grounds*, 319 N.C. 367, 354 S.E.2d 506 (1987)(emphasis added); *see also In re the Marriage of Hunt and Raimer*, 909 P.2d 525 (Colo. 1995).
[17] 10 U.S.C. § 1408 (c) (1).
[18] Palladino v. Palladino, 713 A.2d 676 (Pa. Super. 1998).
[19] Forney and Forney, 239 Ore. App. 406, 412, 244 P. 2d 849 (2010).
[20] For example, assume that the SM's retired pay is $1,000 a month, and that he was married 10 of his 20 years of military service. The pension benefit (during the SM's life) for the former spouse would usually be 50% X 10/20 X $1000, or $250. To make the SBP death benefit the same, divide $250 by .55 to get the proposed base amount, which is $454.
[21] *See, e.g*., *Boger v. Boger*, 103 N.C. App 340, 405 S.E.2d 591 (1991).
[22] *See, e.g*., *In re Marriage of DeShurley*, 255 Cal. Rptr. 150, 207 Cal. App. 3d 992 (1989) and *In re Marriage of Lawson*, 256 Cal. Rptr. 283, 208 Cal. App. 3d 446 (1989).
[23] *See, e.g*., *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).
[24] *Dillard v. Dillard*, 772 S.W.2d 355 (Ark. Ct. App. 1989). *See also Chotiner v. Chotiner*, 829 P.2d 829 (Alaska 1992).

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