# SILENT PARTNER

## Military Pension Division: The Spouse's Stategy

*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. It is essential to learn and understand its unique set of rules. 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 "*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. He wants to block her in the division of the pension.

There are only a few jurisdictions which bar pension division or limit it. These fall into the following categories: 1) states where there is a *vesting requirement*; 2) one state where ten years of marital military service is required and the pension must be vested (Alabama); and 3) 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.[1] 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. One with 25 years' 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*[2] 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.[3]

Alabama law provides a unique limitation on pension division jurisdiction. The law specifically states that retirement benefits are not divisible as marital property unless they are vested and the employee or "owning spouse" has ten years of pension service during the marriage.[4]

Finally, Puerto Rico does not allow the division of noncontributory pensions at all; it treats these pension rights as separate property.[5] 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. 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 "*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 "*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.[6]

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 him elsewhere, in 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*[7] the U.S. Supreme Court in 1989 held that VA disability compensation 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 Servicemember's Strategy*."

Thus COL Roberts can, by his own actions, reduce his disposable retired pay by electing VA disability pay if his VA disability rating is les than 50%, due to a dollar-for-dollar setoff under federal law. 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.[8] 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.[9]

Here are some additional pointers on the language needed for "full body armor" to protect the spouse and maximize her chances for recovery:

- State the facts and assumptions behind the settlement or clause ["John is an LTC with over 16 years' service in Army, and he will receive a pension based on longevity after at least 20 years of service."]

- State the intent of the agreement or order ["Mary is to receive an unreduced share of pension based on years of service"]
- Indemnify the spouse as to expenses – this can be a general statement applicable to both parties ["Each party will pay for all expenses and damages incurred because of the other's breach of this agreement."]
- Include interest on any unpaid amount ["The breaching party will also pay interest at the statutory rate on all unpaid amounts and damages."]

**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. Where is COL Roberts' domicile? Is it in Indiana or Arkansas? If so, is his pension vested?

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**

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. Both of these topics are covered in "*Scouting the Terrain."*

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).

**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 "*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), these four methods are:

Fixed dollar amount. This might read: *Jane is awarded $550 per month, payable from Bill's retired pay.*
Percentage clause. This could state: *Jane is granted 50% of Bill's 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: *Jane shall receive 50% of Bill's 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: *Jane is granted 40% of what a major would earn if he were to retire with 18 years of military service in 2001.* 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 Army Reserve retired pay"). The only time when retirement points *must* be used is when a "formula clause" is involved.

**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. The hypothetical date of retirement is October 1, 2001.*

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. The hypothetical date of retirement is October 1, 2001.*

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 (in general) 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.[10] 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.[11]

**Dividing Disposable Retired Pay**

When you represent the spouse, take care in drafting the terms for pension division. What is the basis for Mrs. Roberts' share – retired pay or "disposable retired pay"?

The USFSPA states that disposable retired pay ("DRP") means total military retired pay less certain deductions. One of these – at issue here – is a deduction for VA disability compensation, pursuant to 10 U.S.C. 1408(a)(4). An award phrased in terms of *disposable retired pay*, if he has or gets in the future a VA waiver, may give her 50% of the marital share of something less than his retired pay. It would give her half of the marital share of a *lower number*.

The husband's lawyer might argue, "But wait – what's the basis for the objection? Isn't it clear that the retired pay center (DFAS or the pay centers for the Coast Guard, Public Health Service or National Oceanographic and Atmospheric Administration) will only divide *disposable retired pay*?"

It is true that USFSPA states that -

> (d) Payments by Secretary concerned to (or for benefit of) spouse or former spouse.
> (1) After effective service on the Secretary concerned of a court order… with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse… with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order.

10 U.S.C. 1408(d)(1) [emphasis added].

Doesn't this mandate that the order state that "disposable retired pay" is what the court is dividing?

Here is where the confusion arises. It's true that the uniformed services retired pay centers will only divide *disposable retired pay*. But that doesn't mean that the retired pay center must have an order *phrased in terms of DRP*. So long as the order is otherwise clear and subject to calculation of a monetary amount, the pension division order can say just about anything regarding the money that it's dividing. This is because the rules, at least for DFAS, state that percentage awards are construed as a share of "disposable retired pay," regardless of how they are worded:

> The designated agent will construe all percentage awards (such as a percentage of gross retired pay) as a percentage of disposable retired pay, regardless of the language in the order.

Department of Defense Financial Management Regulations, DoD 7000.14-R, Volume 7B, Chapter 29, "Former Spouse Payments from Retired Pay" ¶290601.D. (rev. February 2009). In general, the pay centers for the Coast Guard, PHS and NOAA follow DFAS regulations.

Under this rule, the order for pension division is not bound to state the benefit divided as *a percentage of DRP*. It can award the former spouse a percentage of the member's retired pay using any one of several phrasings. It can describe this as *military retirement benefits*, *pension* or *total military retired pay*. The decree can be stated in terms of *longevity deferred compensation benefits upon retirement*, or it can divide *gross retired pay*. Conceivably the award can call for the spouse to share in the SM's "chocolate and vanilla retired pay" and DFAS will interpret it as DRP!

But here's the rub. If counsel for the spouse believes that the pension division order must be *written in terms of DRP* - whether from reading the DFAS rules or a rejection letter received from DFAS- and drafts it accordingly, then the result will torpedo the spouse's future payments if -

1. the member/retiree has a condition, injury or illness which results in disability payments through the Department of Veterans Affairs with a rating of less than 50%, or
2. the member/retiree has a rating of 50%-90% and elects compensation for certain conditions through Combat-Related Special Compensation (CRSC).

Either of these will reduce pension share payments. And such a pension reduction will reduce the money that the spouse/former spouse receives.

This bad outcome is not necessarily due to the negligence of counsel for the former spouse. In fact, it is a problem that is enhanced by the superior knowledge of the former spouse's attorney, reminding us that "A little bit of knowledge is a dangerous thing." The one who appears to know the rules – "DFAS only divides DRP, so phrase your order in those terms" – is the one who is penalized. The savvy attorney (for the former spouse) will write the order in terms of *total pension, gross retired pay*, or *military retirement benefits*. He or she will see the same result in the garnishment from the retired pay center (*i.e.*, it will still be the appropriate share or percentage of DRP), but there will be a *potential remedy* if the retiree elects disability compensation, as mentioned above, instead of straight longevity retired pay. This is because the division of *gross* or *total* military retirement leaves a non-garnishment remedy, such as contempt or indemnification, in the hands of the spouse and the court. USFSPA, at section (e), states -

> (6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of

> paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. §1408(e).

An example might help to explain how this works. In 2010 the author was hired to testify as an expert in a Missouri case. The clause at issue read:

1) PENSION SHARE. Jane Doe, the wife, is to receive 40% of the disposable retired pay of John Doe, the husband.
2) INDEMNIFICATION. John Doe shall do nothing to reduce the share or amount due to Jane Doe from the above-stated 40% of his disposable retired pay.

The indemnification clause was worthless, because there is nothing that John can do – after DRP is calculated – to reduce Jane's share. This is because the mischief, if any, is done "above the line." A reduction due to his election of CRSC or taking a VA waiver (if his rating is 40% or less) occurs before the resulting DRP (thus "above the line") – it is an operation done on total retired pay that results in its reduction, to arrive at disposable retired pay. And disposable retired pay is what DFAS will divide; it cannot pay a distribution based on some other amount.

The initial calculation (ignoring any SBP premium) looks like this:

**Total retired pay – disability deduction = disposable retired pay.**

The "disability deduction" is either a VA waiver, if the retiree has a rating of less than 50%, or the reduction caused by electing CRSC. As is explained in the SILENT PARTNER entitled *Military Pension Division: The "Evil Twins" – CRDP and CRSC*, lost pension money due to the VA waiver is gradually restored through Concurrent Retirement and Disability Pay (CRDP) when the individual has a rating of 50-90% from the Department of Veterans Affairs. Electing CRSC wipes out CRDP. You cannot receive CRDP if you elect CRSC. It not only eliminates *current* CRDP, but it also results in a collect-back action by DFAS for all past CRDP paid, whether to spouse or retiree.

**The "Latent Pension" - Federal Employment and Other Mischief**

Another problem arises when a SM 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.*

A similar problem arises if John Doe has been in the military previously, whether Guard/Reserve or on active duty, but is not in either situation when the divorce settlement occurs. Lulled to sleep by the absence of any present pension benefit, counsel for the spouse may overlook the fact that – just a few months after the case is tried or settled – John may get back into his uniform and return to military status, thus ensuring that he will have a pension down the road which he doesn't have to share with Jane, his by-now ex-wife. If he had anything more than a few years of military service under his belt when the settlement took place, the result for Jane is the loss of many thousands of dollars in potential pension benefits, since John is using "marital years" that were over looked in the settlement as the basis, in part, for his upcoming retirement. The pension benefit is "latent" since it is not obvious at all to the ordinary practitioner. Unless there's a crystal ball in the room, most lawyers would not be aware of this problem.

To provide some safeguard for Jane Doe in this situation, set out terms in the divorce decree or court order that allow the re-opening of the property division clause to let the court inquire into potential pension division rights which did not exist at the time of the settlement or hearing, so that the spouse may claim her marital share of these rights should he become eligible to retire from this service.

**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 '*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 "*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*[12], 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 policy ownership. 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 policy owner 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 an overview of early-out options (VSI/SSB), military medical benefits and dividing accrued leave in "*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, 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.[13] 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.[14]

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[15] 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.[16] 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 may also obtain indefinite medical coverage through CHCBP (under 10 U.S. Code 1078a) if she or he meets certain conditions. The former spouse:

- Must be entitled to a share of the servicemember's pension or SBP coverage;
- May not be remarried if below age 55;
- Must pay quarterly advance premiums; and
- Must meet certain deadlines for initial application.

Details regarding application for this "CHCBP-indefinite" coverage may be found at www.tricare.mil/chcbp/default.cfm. The coverage is the same as that for federal employees, and the cost is the sum of the following: premium for a federal employee, plus premium paid by the federal agency, plus 10%. This amounts to less than $350 per month as of 2010.

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**

[1] Turner, EQUITABLE DISTRIBUTION OF PROPERTY (McGraw Hill), §6.09, p. 340 (2009-2010 Supp.).
[2] *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).
[3] *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.
[4] Ala. Code § 30-2-51.
[5] *See Delucca v. Colon*, 119 P.R. Dec. 720 (1987).
[6] *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).
[7] *Mansell v. Mansell*, 490 U.S. 581 (1989).
[8] *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).
[9] 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).
[10.] The document for the Army Reserve is AHRC Form 249-2E, DARC Form 249, or AGUZ Form 115. For National Guard points, see NGB Forms 22 and 23. The Air Force Reserve document is AF Form 526, and the Navy Reserve document is NAVPERS Form 1070-161. For the Coast Guard Reserve, obtain CG HQ Form 4973.
[11.] 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 some 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."
[12] *Ridgway v. Ridgway*, 454 U.S. 46, 102 S. Ct. 49, 70 L.Ed. 2d 39 (1981)..
[13.] *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).
[14.] 10 U.S.C. § 1062.
[15.] 10 U.S.C. § 1086 (a).
[16.] 10 U.S.C. § 1078 a (g) (1) (C).

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