

SILENT PARTNER

Military Pension Division Order: “REJECTED”

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).

Introduction

Aspiring writers expect a large number of rejection slips in their early efforts to obtain publication. Some even plaster their walls with these *turn-down* emblems.

Not so, however, in the field of drafting and submitting military pension division orders. The rejected order is a major problem for the judge, the drafting attorney and the client. For the judge, this means wasted judicial resources. The time spent on trying the case or approving the consent order will now need to be repeated. The attorney for the applicant knows that this “rejection slip” means more work on a case which by now should be completed. It means that he or she has failed the client and will need to search around to find out what the problem is, how to fix it, and whether the other side will cooperate.

For the client, a rejection letter means that more money needs to be spent “getting it right,” and that the lawyer failed in obtaining what is usually the last step in a divorce case. When the other party has already retired, the client also realizes that the rightful share of the pension is being diverted and that more time and money must be expended in trying to retrieve these often-dissipated funds.

This article will cover the primary reasons for rejection of the military pension division order, or MPDO. It will also explain what remedies – if any – exist to fix the flaw in the order.

The subject of this writing is pension division, not the survivor annuity associated with military retired pay, the Survivor Benefit Plan (SBP). SBP is a program that allows the military member or retiree to elect the former spouse as beneficiary for a continued stream of payments after the servicemember/retiree dies.¹ Pension orders, divorce decrees and incorporated property settlements may contain terms for SBP coverage for a former spouse. These documents may be also rejected by the retired pay center for flaws that are barred by statute.²

Military Pension Division: Boot Camp

Military retirement benefits are not handled in the same manner as private pension plans that are governed by ERISA, the Employee Retirement Income Security Act.³ The division of military retired

¹ 10 U.S.C. § 1447-1455.

² The problems with SBP clauses, how to write an acceptable one, and what language is unacceptable may be found in the Silent Partner info-letter, “Guidance for Lawyers: The Survivor Benefit Plan,” at www.nclamp.gov, the website of the military committee, North Carolina State Bar.

³ ERISA is found at Title 29 U.S. Code, Chapter 18.

pay requires specialized knowledge of Titles 10 and 38 of the U.S. Code, federal rules stating how and when military retired pay may be divided, and state laws and cases about division of pensions.

Federal law allows states to divide military retired pay under the Uniformed Services Former Spouses Protection Act (USFSPA).⁴ USFSPA is an enabling act which lets each U.S. jurisdiction divide (or prohibit division of) military retired pay; it leaves the specifics of how to do it up to the jurisdiction involved, so long as there is compliance with federal rules.⁵ The order dividing retired pay must specifically provide “for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.”⁶

Rules of the Game

The rules for military pension division are promulgated by the retired pay centers.⁷ Following the rules means that there is no likelihood of rejection for a pension division order. The basic information on what a military pension is, what is exempt from division, and how to go about the division or retired pay may be found in the Department of Defense Financial Management Regulation (DoDFMR), DoD 7000.14-R. Volume 7B of the DoDFMR covers retired pay. The DoDFMR expands upon the federal statutes to provide detailed guidance as to the division of military retirement benefits. The retired pay center of the U.S. Coast Guard, the Coast Guard Pay and Personnel Center, generally follows the rules in the DoDFMR.

Chapter 1 of Volume 7B of the DoDFMR gives an excellent explanation of what military retired pay is. Chapter 29 of the same volume covers division of military retired pay. A series of Silent Partner info-letters, published by the military committees of the ABA Family Law Section and the North Carolina State Bar, provides extensive explanations for how military pensions are divided and how to write an acceptable MPDO.⁸ The use of these resources is the best way of avoiding a letter rejecting the MPDO.

The Rejection Letter

When the retired pay center rejects a military pension division order, it always states the reason for rejection on the rejection letter. The letter is issued and signed by a paralegal, and it has a section at the top which states the reason in words such as this:

Your application for division of retired pay cannot be approved for the following reason: The order provides the former spouse with 50% of the marital share of the military retired pay, but the numerator of the marital fraction is not stated. Instead, the order refers to the *Bangs* case and its rule for division of retired pay in Maryland. The Defense Finance and

⁴ 10 U.S.C. § 1408.

⁵ See 10 U.S.C. § 1408 (c)(1) (“Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.”)

⁶ 10 U.S.C. 1408 (a)(2)(C).

⁷ For the Army, Navy, Air Force and Marine Corps, military pension division is handled by Garnishment Operations at DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

⁸ These info-letters are available at www.abanet.org/family/military, and at www.nclamp.gov. The one dealing with writing and submitting the MPDO is “Getting Military Pension Orders Honored by the Retired Pay Center.” The Silent Partner on what clauses are acceptable at DFAS and how to write them is “Guidance for Lawyers: Military Pension Division.”

Accounting Service cannot implement this order without specific directions on what the marital fraction is.

There are four main reasons for rejection of a court order dividing military retired pay. The first of these is lack of jurisdiction.

Flawed Foundation

A house will not stand without a firm foundation. One of the reasons that MPDO's are rejected is lack of the foundation required by USFSPA. A pension division order can only be used for direct payments if a unique jurisdictional test is met.⁹ Military pension division is allowed only when the retiree/military member:

- is domiciled in the state in which the suit for the divorce or property division occurs; or
- resides in the state in which the lawsuit occurs (other than because of military assignment); or
- consents to the jurisdiction of the court in that state.¹⁰

The order must state the jurisdictional basis for dividing military retired pay.¹¹ When counsel is representing the former spouse, the safest strategy is suit in the defendant's state of legal residence. The courts there will usually be able to divide the pension.¹²

In addition, in property division cases involving the retired pay center's division and distribution of military retired pay incident to a divorce or separation, the parties must have been married for at least 10 years during which time the military member performed at least 10 years of creditable military service.¹³ Sometimes known as the "10/10 rule," this means ten years of active duty during the marriage if John Doe attains an active-duty retirement. If John is in the National Guard or Reserves, then there must be 10 years of Guard/Reserve service concurrent with the marriage. It is always best to do the research first and to wait, if possible, until the *10/10 rule* has been met before going forward with the divorce or dissolution. Without 10/10 compliance, the retired pay center cannot honor an application for the direct payment of any court-ordered division of retired military pay as property. The pension is still divisible, but the former spouse must look to the retiree for payments, not the retired pay center.

Flawed Phrases

The second reason for rejection of the MPDO is faulty wording. There are numerous clauses and phrases which must be included in the MPDO. One example is reference in the order to the Servicemembers Civil Relief Act (SCRA).¹⁴

The SCRA offers protection for military members who are on active duty at the time of the divorce. If John Doe is on active duty, the court may not enter a default judgment against him if he has not entered an appearance.¹⁵ He may want to file a request for a stay of proceedings if his military duties preclude his

⁹ For more detailed information on these jurisdictional tests, see the Silent Partner info-letter, "Military Pension Division: Scouting the Terrain," found at the websites set out at note 8 *supra*.

¹⁰ 10 U.S.C. § 1408(c)(4).

¹¹ DoDFMR § 290605.

¹² It is present domicile that is the jurisdictional basis contemplated by USFSPA, not a previous domicile of the servicemember or retiree. *In re Marriage of Akins*, 932 P. 2d 863 (Colo. App. 1997).

¹³ 10 U.S.C. § 1408(d)(2).

¹⁴ Title 50, U.S. Code, Chapter 50.

¹⁵ 50 U.S.C. § 3931.

active participation in the litigation.¹⁶ Such a request will not subject him to inadvertent acceptance of the court's jurisdiction (or the waiver of any other legal defense), according to the SCRA.¹⁷

USFSPA requires a statement in the pension division order that the military member's rights pursuant to the SCRA have been observed.¹⁸ Although the SCRA does not apply in cases where the member is retired or is not on active duty at the time the decree was entered, USFSPA does not make that distinction; it requires such a statement in all cases. The retired pay center will refuse to honor the order if it is missing this essential reference to the SCRA's protections.

Orders are also rejected for errors in wording such as these:

- Failure to state the number for the numerator of the marital fraction when a "formula clause" is used (such as "50% x $\frac{\text{months of marital pension service}}{\text{months of total pension service}}$ x final retired pay");
- Using a formula clause expressed as time (months or years) instead of retirement points when the servicemember is in the Guard or Reserves and is still drilling;
- Writing a pension division clause without setting out each of the variables which must be included; or
- Trying to award more than 50% of the pension as property division.

Failure to include the right wording may result in rejection of the MPDO at the retired pay center.¹⁹

Not Divisible: Disability Retired Pay

Another "non-starter" in military pension orders is the attempted division of military disability retired pay (MDRP). Before explaining this, however, it is necessary to talk about the various meanings of "disability" in the context of military retired pay.

Those who prepare MPDOs regularly may hear statements from their clients such as, "He's got disability," or "He is being paid for disability." What do these statements mean? There are several possible interpretations.

If John Doe has served in the military and leaves the service with conditions such as wounds, injuries or ailments which are service-connected, he may obtain tax-free disability compensation from the Department of Veterans Affairs pursuant to Title 38, U.S. Code. He is entitled to this compensation regardless of whether he retired or not. However, if John is receiving retired pay, those payments will be reduced by the amount of VA disability compensation he is receiving when his VA disability rating is

¹⁶ 50 U.S.C. § 3932.

¹⁷ An application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). Previously the recommended practice was to avoid having the military attorney or the member request a stay out of concern that the court might consider the stay request as a general appearance. 50 U.S.C. § 3932(c) eliminates this concern. This provision makes it clear that a stay request "does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense."

¹⁸ 10 U.S.C. § 1408(b)(1)(D).

¹⁹ How to write the proper MPDO – and what clauses are unacceptable – may be found in the Silent Partner info-letters, "Getting Military Pension Orders Honored by the Retired Pay Center" and "Guidance for Lawyers: Military Pension Division." See note 8 *supra*.

below 50%.²⁰ VA disability compensation cannot be divided as property.²¹ This is one meaning of “disability.”

Another meaning is found in Combat-Related Special Compensation (CRSC). CRSC is a tax-free disability payment to military retirees from the Department of Defense pursuant to 10 U.S.C. § 1413a. The receipt of CRSC means that VA disability compensation payments are always deducted from military retired pay regardless of whether the disability percentage is above or below 50%. CRSC payments are not retired pay.²²

A third meaning is disability retirement. This is often called military disability retired pay, or MDRP, to distinguish it from the other two forms of disability payments. MDRP is, in effect, a forced retirement for John Doe when he is found to be unfit to perform the duties of his rank and position. The retirement is based on a physical or mental impairment, as determined by a Physical Evaluation Board. His condition will be rated and – if he has either a rating of 30% or above, or else at least 20 years of creditable service – he will receive monthly payments of disability retired pay.

The pay rules and procedures are set out in Chapter 61 of Title 10, U.S. Code. The pay can be based on *years of service* or *percentage of disability*, whichever yields a higher amount. When the pay is based on *percentage of disability*, no portion of it may be divided by the court.²³

The attorney who attempts to enforce a pension division order when the servicemember has been retired for disability will usually see a rejection letter from the retired pay center. That letter will be brought in by the client; the pay centers normally correspond directly with the party instead of the attorney. A sample reply letter from a paralegal at DFAS rejecting the MPDO might start this way:

Your application cannot be approved for the following reason: The entire amount of the member's retired pay is based on disability; thus there are no funds available for payment under the USFSPA.

In a recent case involving a Congressional inquiry as to why DFAS was not paying any of the military pension to a former spouse, the reply letter which was sent to the Congressman by a supervisor at DFAS began this way:

The Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, provides a former spouse with a means of enforcing a State court order awarding her military retired pay as property. 10 U.S.C. 1408(d)(4) advises that a former spouse qualifying for direct payments under the USFSPA is entitled to receive payments until the death of the member or former spouse, whichever occurs first. A former spouse must have been awarded a portion of a military member's retired pay as property in a qualifying court order. In the case of division of property, the court order must provide for the payment of an amount, as a percentage or dollar amount, of the disposable retired pay of a member to the member's

²⁰ See the Silent Partner info-letter, “Military Pension Division: The ‘Evil Twins’ – CRDP and CRSC” at the websites found at note 8 *supra*.

²¹ 38 U.S.C. § 5301.

²² 10 U.S.C. § 1413a (g).

²³ See 10 U.S.C. § 1408 (a)(4): “The term “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, 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).”

former spouse. Court orders specifying a percentage or fraction of retired pay shall be construed as a percentage or fraction of disposable retired pay.

*Disposable retired pay is defined as gross retired pay minus the following: 1) amounts owed to the United States; 2) fines and forfeitures ordered by a court-martial; 3) any amount waived in order to received disability compensation from the Department of Veterans Affairs (DVA); 4) premiums for former spouse coverage under the Survivor Benefit Plan; and 5) **the amount of retired pay computed using the percentage of disability under Title 10, Chapter 61.***

Major John Doe retired effective October 31, 2015 on the Permanent Disability Retired List with a disability percentage of 60%. Since his military retired pay is based off of his percentage of disability (Chapter 61) and not service time, Major John Doe's military retired pay is not subject to community property division. Therefore his former spouse is not entitled to a portion of his retired pay per Title 10, U.S.C., Section 1408(a)(4)(A).

The lesson is clear. MDRP usually cannot be divided. While it is subject to garnishment for support, it is exempt from division as property if the retired pay is based on percentage of disability (as opposed to years of service).

Running on Empty

Sometimes there are just no funds remaining to divide. When a reply letter regarding this problem arrives, it is usually not a *rejection letter*, strictly speaking. The court order for division of military retired pay can be accepted, honored and implemented. But there is nothing to divide.

And the news for the former spouse is almost always devastating. A “VA waiver” may eliminate part or all of the retired pay by reducing the “disposable retired pay” which is divided by the retired pay center. This wreaks havoc on the payments on which the former spouse is counting for such necessities as housing (i.e., rent or home mortgage), groceries, car expenses and other matters. Few former spouses know how to obtain information from DFAS as to the amount of retired pay and the deductions from it.²⁴

VA disability compensation is exempt from division as property,²⁵ although most states will consider it as income for the purpose of child support or alimony. When a retiree elects to receive VA disability compensation, there is always a dollar-for-dollar waiver of retired pay for the amount received as VA compensation, unless the retiree is receiving CRDP, or Concurrent Retirement and Disability Pay.²⁶

²⁴ The former spouse who is entitled to a share of military retired pay may obtain information on the amount of retired pay and any deductions from it by requesting this information from DFAS. Disclosure of this information is allowed as an exception to the Privacy Act (5 U.S.C. § 552a) pursuant to a notice by DFAS in the Federal Register, found at 65 F.R. 43298. For further information on this exception and how to request such information from DFAS, see the Silent Partner info-letter, “Military Pension Division: The ‘Evil Twins’ – CRDP and CRSC,” found at the websites referenced at note 8 *supra*.

²⁵ See note 21 *supra*.

²⁶ CRDP, found at 10 U.S.C. § 1414, is available for those retirees with a disability rating from the Department of Veterans Affairs of 50% or more. A military retiree who elects to receive Combat-Related Special Compensation (CRSC) under 10 U.S.C. § 1413a, cannot receive CRDP.

Indemnification language, either by agreement or by court order, is essential in this situation. The topic of drafting and advocating for an indemnification clause is beyond the scope of this article.²⁷

Remedies for the “Rejection Slip”

Can anything be done when the letter of rejection arrives from the retired pay center? In many cases, the answer is “Yes.” Both of the retired pay centers will accept *clarifying orders* from the original court that are directed at fixing the problem. Section 290612 of the DoDFMR deals with such orders. It states:

Court Orders Modifying Retired Pay Awards

A. If the designated agent is served with a court order modifying or clarifying a retired pay award, the designated agent will implement the order issued most recently. The order issued most recently supersedes all prior orders.

B. If the designated agent is served with a court order modifying or clarifying a retired pay award that was issued by a court of a State other than the State that issued the prior court order, the designated agent may implement the new order only if the court issuing this order had jurisdiction over both the member and former spouse in the manner specified in subparagraph 290604.A.[i.e., jurisdiction by reason of domicile, consent or residence not due to military orders, according to 10 U.S.C. § 1408(c)(4)].

There are, however, two problems which remain. First of all, while the two retired pay centers will allow a clarifying order to fix a defective MPDO, will state law allow it? Do the state’s case law, statutory law and civil procedure rules allow for clarifying orders? If counsel on the other side opposes entry of a “clarifying order,” will the judge allow it? If such an order – which is unknown under the state equivalent of the federal rules of civil procedure – amounts to a modification order, or an order amending the original order, has it been requested in a timely fashion? Is this order one which was requested under Rule 59 (amendment of an order) or Rule 60 (setting aside an order)? Is it permissible to request such a new or revised order under the heading, “clarifying order”? What does that mean?

In addition to the above problems and questions, there is a second consideration. That issue is, *can* the rejected military pension division order be corrected?

With certain phrasing matters, the answer is *yes*. There are several ways in which to modify the language in the MPDO so that it will match the language set out in the DoDFMR. If opposing counsel agrees, then it’s a “done deal.” If there is opposition, then counsel needs to file a motion, argue the case and point the court in the direction of the applicable rules so as to obtain a result which is either fair, just and equitable or – if otherwise – is appealable.

But what if the problem cannot be corrected? What if, for example, the court order – entered at a time when John Doe was on active duty and not contemplating retirement – provides for the division of retired pay, which turns out to be non-divisible retired pay? In such a case, the court is faced with a dilemma. When there has been a settlement, which occurs in over 95% of civil case nationwide, the agreement to divide military retired pay falls apart when the retired pay division turns out to be unsupportable because the retirement is based on disability. Compare these results from appellate decision published in 2015:

²⁷ The topic is covered in the Silent Partner info-letter, “Military Pension Division: The ‘Evil Twins’ – CRDP and CRSC.” See note 8 *supra*.

- CASE 1: The parties' divorce judgment was granted in July 2009, noting that the parties recited on the record their agreement on all property division issues, including division of their interests in pension division. In August 2009 the Air Force notified the servicemember-husband that he would be placed on the TDRL (temporary disability retired list) as of October 2009. In January 2010 the court entered a Marital Property Consent Order reflecting the parties' July 2009 agreement and ordering that each party would receive 50% of the marital share of the other party's retirement and pension benefits. The ex-husband was thereafter placed on the PDRL (permanent disability retirement list) in April 2011. The former wife applied for her share of the military pension, but in July 2013 DFAS sent a rejection letter, stating that it could not pay her portion of the military retired pay since the entire amount of such pay was MDRP based on disability. After a hearing in March 2014, the judge issued an order finding that the ex-husband had breached the parties' agreement. The court found that the ex-husband was not prohibited by law from assigning the pension payment. The agreement was not void at the time it was made and the anticipated military retirement benefits were divisible and assignable at the time of the agreement. Citing *Dexter v. Dexter*, 105 Md. App. 678, 661 A.2d 171, the appellate court applied contract principles and stated that each party has a legal obligation to take reasonable steps to bring the agreement to fruition and that the law implies an obligation to act in good faith. In affirming the trial court, the appellate court found that the ex-husband was in receipt of pension payments for three years, these payments had become part of his general assets, and thus he ought to be able to satisfy the judgment against him with any assets that are available to him.²⁸
- CASE 2: The judge refused to issue a military pension order to divide the retired pay of the former husband. The parties (with no attorney on either side) had signed a property division settlement and had requested and obtained its incorporation into the divorce decree. The trial court stated that the former husband was receiving only military disability retired pay and VA disability compensation, neither of which was divisible. The trial court's decision was affirmed by the state supreme court, but the parties' property division was reopened due to exceptional circumstances. The parties' assumption that the wife was entitled to some portion of the husband's retirement was a false assumption; he retired with no disposable retired pay.²⁹

When there is an unsolvable problem, the court may be tempted to “take a pass” on the issue and leave the matter to higher courts, to federal court, or to the parties themselves to come up with a resolution. No number of *clarifying orders* will solve the problem of division of MDRP. When pay is based on *percentage of disability*, it cannot be divided.

Conclusion

There is no doubt that getting a rejection letter from the retired pay center is a serious problem. When faced with such a letter, the responsible attorney needs to promptly review it to determine the nature of the difficulty and to analyze what can be corrected. If the issue – as with MDRP – cannot be fixed, then the lawyer needs to give a truthful and straightforward explanation to the client. The advice might also deal with the issue of alternate remedies, such as alimony or child support, which are available through garnishment of MDRP.³⁰ On the other hand, when the problem is one which can be

²⁸ [Wilson v. Wilson, 223 Md. App. 599, 117 A.3d 138 \(2015\).](#)

²⁹ *Guerrero v. Guerrero*, 362 P.3d 432 (Alaska 2015).

³⁰ See the [Silent Partner](#) info-letter, “Family Support, Garnishment and Military Retired Pay” at the websites shown at note 8 *supra*.

fixed through entry of a clarifying order, then consultation with opposing counsel or a motion before the presiding judge is the next step.

Throughout the process, it is essential for John Doe – the hypothetical retiree – to consult with a lawyer who can help analyze his exposure, his risks, the up-side and the down-side of going forward. The same is true for the spouse or former spouse. The attorney should be a specialist in family law if the case is in a state which recognizes specialization, such as Florida, California and North Carolina. Otherwise the lawyer should be one whose practice is primarily in the field of family law.

And the lawyer should be willing to team up with a consultant on the military side of things, since few attorneys can hold themselves out as experts in military divorce. Each family law attorney facing a military divorce case should associate a “wingman” to help manage the military rules and details. The employment of a skilled and trained attorney who knows the subject matter is the best rule for the retiree or the spouse when faced with a rejection letter. This strategy is also the best way to avoid getting a rejection letter in the first place.

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