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**Recent Developments in Military Family Law**

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# Recent Developments in Military Family Law

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### **About Face: The Gradual Turnaround of the Military & Federal Retirement Systems**

The single biggest asset in a military divorce case typically is the military retirement and/or the entitlements to the survivor benefit plan (“SBP”). While other assets are present in those cases (such as the Thrift Savings Plan, marital residences, etc.), the military retirement and SBP will have the greatest value in equitable distribution, especially if the marriage overlaps a significant period of creditable service.

#### **The Good Ole’ Days: The Legacy Retirement System**

The legacy retirement system for the uniformed services is a defined benefit system. An active duty servicemember (SM) will become entitled to a longevity retirement upon achieving a minimum of twenty years of active duty service. Upon retirement, the retiree begins to receive an immediate benefit in the form of monthly pension payments. Servicemembers (SMs) with 20 creditable years of service may apply for retired pay. When active-duty SMs retire, they receive a monthly pension calculated by multiplying the average of the SM’s highest three years of continuous pay (the retired pay base) by 2.5% times the years of service (the retired pay multiplier). For example, assume that John Doe is an E-7 who served for at least three years as an E-7 and has a total of 21 creditable years. He retires in 2016 and his “high-3” (retired pay base) is \$4,423.80. John’s retired pay multiplier is 21 years of service x 2.5 = 52.5%. This means that he would receive retired pay based on 52.5% of his high three basic pay, or \$2,322.50 per month.

The current Reserve Component (RC) retirement is based on a combination of satisfactory years and points achieved each year. An RC member (that is, a member of the National Guard or Reserves) earns 15 points each year for participation, one point each day for two weeks of annual training and any other active-duty time served, and points for weekend drills, performing funeral honors, and completing correspondence courses, depending on how many hours of work are performed. RC members must earn 50 points annually to have a satisfactory year. A member of the National Guard or Reserve will become entitled to retired pay upon achieving 20 “satisfactory years” of service. Unlike the immediate benefit collected by the active-duty retiree, a Reservist or a member of the National Guard will not usually begin receiving retired pay until they have reached the age of 60.

The calculation of RC retired pay is a bit more complicated than that used for a “regular retirement,” that is, one from active duty. Assume that Roberta Roe is an E-7 who has served for at least three years as an E-7 and served a total of 21 satisfactory years. She applies for discharge in 2016 and she has a “high-3” pay rate of \$4,423.80 for her retired pay base. Her retired pay multiplier is the number of points she earned during her career divided by 360, multiplied by 2.5%. In this case, assume that Roberta earned 365 points during her first year of service – attending recruit training and her Military Occupational Specialty (MOS) school while

on active duty – and then she earned the minimum 50 points each year thereafter for 20 years. Accordingly Roberta has 365 + 1,000 points or 1,365 retirement points. The number of points divided by 360 equals 3.79 – this is the equivalent of active-duty time. This number is then multiplied by 2.5% to get the retired pay multiplier, that is, the percentage of her base pay that will establish the amount of the pension. In this case it’s  $3.79 \times 2.5 = 9.475\%$ . The last step is to determine the monthly pension payment. This is the product of the retired pay base (shown above) and the retired pay multiplier just established:  $\$4,423.80 \times 9.475\% = \$419.16$  per month retired pay.

### The New Blended Retirement System (BRS)

In the National Defense Authorization Act for 2016, Congress passed legislation to modernize the retirement systems for the uniformed services. This involved implementing a “blended” retirement system which combines a “defined contribution” component with a “defined benefit” program. The new Blended Retirement System (BRS), effective January 1, 2018, applies to everyone who enters service on or after that date. Certain members who entered the uniformed forces before January 1, 2018 will have a choice: to opt-in to the new system or to remain “grandfathered” in the “legacy system” (i.e., the current military retirement system).

There are two elements in the BRS – a defined benefit program and a defined contribution component. The first of these is the same as the current retirement system except that the percentage contained in the retired pay multiplier will change from 2.5% to 2.0%. The defined contribution portion will allow the member to participate in the Thrift Savings Plan (TSP), which is similar to a civilian 401(k) plan, and the SM will receive matching contributions from the government. Starting at 60 days of service, the government will create a TSP account for every SM who participates in the BRS, depositing 1% of the SM’s base pay into the account. Service members will be automatically enrolled in the TSP at the rate of 3% of their base pay, but they will have the option to change this amount. At two years of service, the government will match member contributions as follows:

<b>SM Contributes</b>	<b>DoD Contributes</b>	<b>Auto DoD Matches</b>	<b>SM+DoD Total</b>
<b>0%</b>	<b>1%</b>	<b>0%</b>	<b>1%</b>
<b>1%</b>	<b>1%</b>	<b>1%</b>	<b>3%</b>
<b>2%</b>	<b>1%</b>	<b>2%</b>	<b>5%</b>
<b>3%</b>	<b>1%</b>	<b>3%</b>	<b>7%</b>
<b>4%</b>	<b>1%</b>	<b>3.5%</b>	<b>8.5%</b>
<b>5%</b>	<b>1%</b>	<b>4%</b>	<b>10%</b>

From two years of service forward, members are vested in the BRS and can keep their DoD automatic contributions and matching amounts if they choose to separate from their uniformed service.

The BRS will also provide SMs with mid-career Continuation Pay between the beginning of the eighth and the start of the twelfth year of service. The amount of Continuation Pay will range from 2.5 to 13 times the amount of monthly base pay for active duty SMs and .5 to 6 times the amount of monthly base pay for RC SMs. Members who accept Continuation Pay will be required to serve for at least an additional three years.

The final new component of the BRS is a provision which allows SMs to take a lump-sum payment upon becoming eligible to receive retired pay. SMs will have the option to take either 25% or 50% of their monthly pension payments between the date of retired pay eligibility (upon retirement from active duty and, for RC members, usually at age 60) and the age of Social Security payment eligibility when they retire from military service; as of this writing (2017), this is at age 67. The lump sum will be adjusted by a "Discount Rate," which will be determined by combining the 10-year average of the Department of the Treasury High-Quality Market Corporate Bond Spot Rate Yield Curve at a 23-year maturity plus an adjustment factor intended to account for unique aspects of the military retirement program. The rate will be published annually on June 1 and go into effect on the following January 1. When the SM reaches the age for collection of Social Security, the pension payments will return to the full amount.

Those who enter the uniformed services on or after January 1, 2018 will be enrolled in the BRS. Active-duty members entering service after January 1, 2006 but before January 1, 2018 and RC members with fewer than 4,320 points on December 31, 2017 can choose between opting in to the new system and remaining in the legacy retirement system. Members with 12 years of service (for RC members this is calculated as 4,320 points or more on December 31, 2017) will remain in the legacy system. Those SMs who are eligible to opt-in to the BRS have all of calendar year 2018 to decide whether to enroll in the new system. Anyone may access the on-line training about the BRS through Military OneSource, <http://www.militaryonesource.mil/>. Additional BRS information may be found at

<http://militarypay.defense.gov/BlendedRetirement/>.

#### Impact of the BRS on Family Law

Enrollment in the new retirement system is a significant change in retirement planning. It will not only affect a member's family; it also could affect, when applicable, the SM's former spouse. One reason is because, under the new system, the percentage in the retired pay multiplier is reduced from 2.5% to 2.0%; thus for those who serve 20 years the pension is reduced from 50% of the "high-3" base pay to 40%. For members who have already signed a separation agreement or received a divorce decree, dissolution of marriage, property division

judgment or court-ordered property settlement providing a percentage of retired pay to a former spouse, the choice to opt-in to the new retirement system will directly impact the amount of retired pay which the former spouse receives. Additionally, members or military spouses who file for divorce in cases where the SM is eligible to opt-in to the BRS will need to include provisions in their separation agreements and settlements to address how this choice affects the distribution of the marital or community-property share of the SM's military retired pay. The same issues will be present when the case is tried, not settled; the judge will need to be educated on the options and their impact.

Another impact of the BRS on family law is the option to receive Continuation Pay at 8-12 years of service. If the member receives, say, \$10,000 in Continuation Pay, is that marital or community property? Part of the answer will depend on when it was received – before or after the date of classification according to state law (e.g., the date of divorce, date of filing or date of separation). But the bonus (for that's what it really is) must also be analyzed through a different lens as well, namely, the nature of the payment. Assume that the classification date is the date of divorce. If the payment arrives at approximately the time of divorce, will it be considered marital or community property because of its marital foundation (i.e., the years of marital military service which were a necessary foundation for the bonus), or will it be seen as non-marital property, since it is granted in exchange for a promise of future service?

Finally one has to analyze the lump-sum option for a cash amount of retired pay, taken upon becoming eligible to receive retired pay. This option will lower the funds payable to the former spouse. Can a court order bar the retiree from taking a lump sum? Probably not. Will the lump sum be considered "disposable retired pay" under USFSPA, thus making it divisible through a court order? No one knows – the rules have not been written yet. If the retiree takes this lump-sum option, the use of an indemnification clause will be essential to try to recoup for the spouse those funds which are lost (through reduced retired pay) when the member, upon retirement, decides on some "cash in hand" at the rate of 25% or 50% of the present value of the retirement.

Keep in mind that the spouse or former spouse will not receive notice from the government of election into the BRS by the military member. He or she won't be notified about the choice of a 25% or 50% lump sum payment upon retirement. How will the former spouse know about the critical – but unilateral – choices which the member makes?

The impact of the two choices (i.e., opting into the BRS and electing to receive a lump sum) will only become discoverable in most cases when the member retires. How will the former spouse know when that occurs? If a pension division order has been submitted to the retired pay center, then it is likely that the former spouse will know because of receipt of a share of retired pay. That is not true, however, if there is a VA waiver equal to or greater than the amount of retired pay. In that situation, the former spouse receives nothing, and there is

no pension-share payment sent to him or her. Nothing is received, as well, by the former spouse who has not yet submitted an order to the retired pay center, perhaps thinking that the property settlement, in and of itself, accomplished the division of retired pay.

This will also need to be specifically addressed in divorce decrees and property settlements for SMs participating in the BRS. For advice on drafting divorce settlements for members and their spouses who participate in the BRS, consult the upcoming Silent Partner, “Distribution of Property Under the Blended Retirement System.”

#### Suggested Clauses

1. If Defendant elects to participate in the Blended Retirement System (BRS) at or after January 1, 2018, which would decrease the Plaintiff’s share of the military pension, the Defendant will indemnify and reimburse the Plaintiff for any financial loss incurred. The Defendant shall not elect a cash payout at retirement from the BRS, which would reduce Plaintiff’s share of the pension, without her consent or approval of the court. The same terms above for indemnification and reimbursement apply to this election.
2. If the Defendant opts in to the Blended Retirement System (BRS) and that causes a loss or reduction for the Plaintiff as to his/her share or amount of retirement benefits, then the Defendant will indemnify the Plaintiff for any reduction(s) associated with this decision, including any reductions in Plaintiff’s share of the retired pay caused by that election as well as any present value offsets paid by the U.S. Government. If DFAS is unable to pay Plaintiff the full portion of the marital share as set out above, then the Defendant shall pay the Plaintiff directly any shortfall between what Plaintiff gets from DFAS and the full share of her payments as if Defendant had not opted into the BRS.

### **The Frozen Benefit Rule**

The National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) contained a major revision of how military pension division orders are written and will operate. Instead of allowing the states to decide how to divide military retired pay and what formula or methodology to use, Congress imposed a single uniform method of pension division on all the states, a hypothetical scenario in which the military member retires on the date of divorce. Despite the fact that more than forty states employ the “time rule” to divide a defined benefit plan, all states – as of December 23, 2016, the date the law was enacted – will have to use this new method for dividing a military pension.

The new rule applies to those still serving – the servicemember (SM) who goes through divorce and property division while still on active duty in the uniformed services (Army, Navy, Air Force, Marine Corps and Coast Guard, plus the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration). It also applies to those in the National Guard and Reserves who are not yet receiving retired pay. It has no impact on those who obtain a divorce and property division after retirement.

The new military pension division rule is a “rewrite” of the terms for military pension division found in the Uniformed Services Former Spouses’ Protection Act, or USFSPA. The rewrite requires that the military retired pay to be divided will be that attributable to the rank and years of service of the military member at the time of the parties’ divorce. This is so even though the servicemember may rise in rank and years of service afterwards, resulting in a larger pension to be divided, which would then be discounted by using the “marital fraction” to apply pension division to only the benefit which was acquired during the marriage. The only adjustment will be cost-of-living adjustments that occur under 10 U.S.C. § 1401a (b) between the time of the court order and the time of retirement.

“Frozen benefit division” is known as a hypothetical clause at the retired pay centers. It is the most difficult to draft of the pension division clauses available. A government lawyer familiar with the processing of military pension orders put it this way: “... over 90% of the hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of ... military retired pay. This legislative change will geometrically compound the problem.” As a result of the new rule, DFAS has also added to its list of required content for military pension division orders. The required content now includes the servicemember’s rank and years of creditable service, as well as his or her “High Three” figure (i.e., the average of the highest 36 months of continuous compensation).

### **Rationale Behind the Rule**

The new frozen benefit rule was passed with the goal of protecting servicemember by preventing a former spouse from receiving the benefit of the servicemember's post-divorce increased in rank and pay. Most courts, however, already give consideration to how the efforts of the SM and the spouse during the marriage should be apportioned in regard to future promotions. The time rule is based on the "marital foundation theory," which recognizes that the individual's final retired pay is based on a foundation of marital effort (e.g., a servicemember would never have attained the rank of sergeant major, with 30 years of service, if it hadn't been for the efforts expended during the marriage up to the rank of sergeant first class over 20 years, when the parties divorced). That's one reason why a large majority of states have adopted the time rule for dividing every type of pension – it provides the fairest approach to division of this asset, whether the pension is state or federal, private or public. And it accounts for the postponement of the benefit (i.e., the spouse's inability to obtain immediate payments in most states) by allowing for the growth in the pension over time.

That approach goes out the window under this new NDAA 17 rule. The share of the former spouse (FS) is artificially fixed, frozen like a fly in amber. And then the payments are postponed until the SM chooses to put in for retirement, so a second shrinkage is imposed on the pension share of the FS.

Here's how the double discount works: First of all, the benefit to be divided with the FS is frozen at the rank, years of service and retired pay base at the date of divorce. In addition, since state laws have not been rewritten to revise the "marital fraction," the fraction will still be calculated in 90% of the states based on years of marital pension service divided by total pension service years (marital service years ÷ total service years), rather than years of marital pension service years divided by service years up to the date of the divorce.

#### Strategy for the Servicemember

There's no easy day for attorneys handling either side of the pension division case under these new rules. But the SM's lawyer will always have the less difficult task. The new law was tailor-made for the servicemember, by freezing his or her retirement benefit. In addition, the SM has control over all the evidence and testimony needed for court or in settlement.

The active-duty SM needs to provide her attorney with proof of the "High Three" figure (i.e., the average of her highest 36 months of continuous compensation) at the time of the divorce. That will usually be the most recent three years. The High Three amount can be calculated from Mary's pay records. The document showing her pay is called the LES, or Leave and Earnings Statement. She can get help in obtaining the data through her finance office, and she should be able to retrieve about a year's worth of LES's from the Defense Finance and Accounting service (DFAS) secure pay portal (<https://mypay.dfas.mil>) or from her own secure portal online for pay and personnel information (e.g., "My Navy Portal" for sailors, "Army

Knowledge Online” for soldiers). Mary can also obtain a pay transcript from DFAS summarizing the last three years of base pay.

Mary’s attorney will place the numbers for these 36 months of base pay on a spreadsheet, and Mary will authenticate the pay in her trial testimony. The spreadsheet should be offered to the court as a summary of the written records which have been verified by Mary, and Mary must also be able to testify that the spreadsheet is indeed an accurate transcription of her pay records, even if she did not prepare the spreadsheet. If the records were obtained from the pay center (DFAS in this case), then Mary may need to obtain a declaration from the business records custodian.

Once the evidence has been admitted, the court will require a court order for dividing the pension. The attorney for the prevailing party is often tagged with the task of preparing the military pension division order, or MPDO, unless all the necessary language is placed in the divorce decree, or in a property settlement incorporated into the decree. If “outside assistance” from a lawyer experienced in writing such pension orders is needed, this should be done as early as possible, preferably at the start of the case.

Whenever possible, the SM needs to request bifurcation of the divorce from the claim for equitable distribution or division of community property. The earlier that the SM gets the court to pronounce the dissolution of the marriage, the lower his or her “High Three” figure base will be, which means the lower the dollar amount for pension division with the spouse.

#### Strategy for the Former Spouse

When operating under the new rules, the former spouse needs to realize that, in the words of the Rolling Stones’ 1964 hit, “Time Is on My Side.” The longer it takes to obtain the divorce, the higher the servicemember’s rank, years of service and “High Three” will be. Should the SM move to bifurcate the hearing into “divorce now, property division later,” the FS should oppose the request by arguing that judicial economy and efficiency will be impaired, state law frowns upon severance of the issues and a multiplicity of hearings (if that is accurate) and that Congress has joined inextricably the divorce and the division of a military pension by requiring the setting of the retired pay base (the “High Three”) at the time of divorce.

The goal of the FS, John Doe, is to “restore the equilibrium” in pension division. He needs what he would have received before the new rule was passed: a division of the amount of retired pay which Mary gets at retirement. At best, he wants to employ an approach which will yield a result that is numerically the same as that produced by the time rule if that were still available. His “Plan B” would be to obtain other payments or benefits which would help him obtain what he sees as a fairer division of Mary’s retired pay and benefits, or of the marital or community property in general.

As to John's possible strategies, note that these are not labelled "One Size Fits All." While some states may prohibit or restrict a particular approach, the summary below is written to set out the entire spectrum of possible strategies, not to advocate one specific method for a particular case or state.

### The Pension Division Rules from DFAS

The new rules were just published at the end of June 2017 in Volume 7B, Chapter 29 of the Department of Defense Financial Management Regulation (DoDFMR). It is clear that DFAS has settled on the "date of divorce" as the target for when the High Three must be fixed. Under 10 U.S.C. § 1408 (a)(2),

..."court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree)....

DFAS removed everything from this sentence except "final decree of divorce, dissolution, annulment, or legal separation issued by a court" and used that to specify the High Three date. Regardless of what potential pension benefit is earned later in the servicemember's career, it is the High Three as of the date of divorce which DFAS interprets as being "the time of the order" as specified in Section 641 of NDAA 17. For those military members who entered service on or after September 8, 1980, the following information must be provided to the retired pay center in the decree, order or incorporated settlement:

1. A fixed amount, a percentage, a formula or a hypothetical which is awarded to the FS;
2. The SM's High Three amount at the time of divorce (i.e., the actual dollar figure); and
3. The SM's years of creditable service at divorce or, for a member of the Guard or Reserves, the creditable retirement points at divorce.

### Outline of Time-Rule Strategies

Spousal Support Settlement. When the parties are in agreement, a consent order for alimony, maintenance or spousal support is one way to obtain time-rule payments from the military pension without the limitations of the frozen benefit rule. An alimony garnishment is based on "remuneration from employment." It is not tied to DRP, or disposable retired pay; thus the new rule and its definition of DRP do not apply to permanent alimony payments which start at retirement and function as a division of retired pay.

Here are a few other pointers about the use of permanent spousal support to mimic pension division as property:

- Note that there is no “10/10 rule” for alimony payments from the retired pay center, as is the requirement when the pension is divided as property (i.e., property division payments from the retired pay center may only be made if there are at least 10 years of creditable service concurrent with at least 10 years of marriage).
- Make sure that the FS payments do not end at remarriage or cohabitation (since pension-share payments would not end at either of these two events) and are not subject to modification.
- Admittedly, spousal support is usually effective immediately (not at a future date). In addition it usually consists of a fixed dollar amount, not a formula such as:

$$50\% \times \frac{120 \text{ months of marital pension service}}{\text{total months of creditable service}} \times \text{final retired pay}$$

There is no reason, however, why the retired pay center should refuse to accept a formula for the spousal support, rather than a specific set dollar figure.

- A consent order for permanent spousal support should suffice to obtain the payments to the FS upon retirement of the SM, and the tax consequences will be the same, namely, the FS is taxed on the payments and they are excluded from the income of the payor/retiree.

A Spoonful of Alimony. John’s attorney could argue for division of the pension under the new rule, with the remaining amount made up by alimony to be decided upon Mary Doe’s retirement, in order to get the equivalent of a “time rule” order. If John is awarded alimony while Mary is still serving, the alimony should not end automatically upon Mary’s retirement; John’s attorney needs to review carefully the results of dividing Mary’s retired pay to decide whether some alimony should be continued to equalize the parties’ positions. The terms of the alimony order might make the amount adjustable depending on economic and financial factors at the time of Mary’s retirement, including any reduction of the retired pay to which John would be entitled under the time rule due to the “frozen benefit rule,” or any reduction because Mary elects VA disability compensation and that reduces John’s amount due to a “VA waiver” under 10 U.S.C. § 1408 (a)(4) and 38 U.S.C. § 5304-5305. Note that the order regarding spousal support as a “stand-in” for pension division must clearly state that the support does not end at the remarriage or cohabitation of the recipient spouse, since true pension division orders do not change upon either event.

Using the Time Rule Formula Anyway. The revised law doesn’t say that a court may not enter a time-rule order. It merely states that the retired pay center (DFAS or the Coast Guard Pay and Personnel Center) will only honor “date-of-divorce division” for those still serving. Recognizing

this limitation on payments from the pay center, the court may still enter a time rule order, noting that at Mary's retirement only a portion of the pension-share payment for John Doe will come from DFAS. The court's order would provide that Mary will still be responsible for the rest and will indemnify John for any difference between the two amounts.

There is a parallel to the remedy often used in "VA waiver" cases in which the FS gets less than intended. When the retiree elects VA disability compensation, the result is often a dollar-for-dollar reduction in retired pay. The duty to indemnify is a common solution for this "VA waiver" and the former spouse's receipt of a lower amount due to operation of the law. Why shouldn't it work for cases in which the "operation of law" involves an amendment to USFSPA, the "frozen benefit rule"? As will be explained below, 10 U.S.C. § 1408 (e)(6), the "savings clause" in USFSPA, allows the courts to employ state enforcement remedies for any amounts which may not be payable through the retired pay center.

Be sure not to use "disposable retired pay" in the order to describe what is divided. Disposable retired pay, or DRP, means the restrictive definition in the frozen benefit rule (i.e., the retired pay base at the date of divorce) less all of the other specified deductions, such as the VA waiver and moneys owed to the federal government. The best way to word a pension clause is to provide for division of total retired pay less only the SBP premium attributable to coverage of the former spouse. Regardless of the language used, DFAS will construe orders dividing retired pay as dividing "disposable retired pay."

Put Off the Divorce. Delay of the divorce will gain time for the FS, and time is money. The longer the divorce is postponed, the higher the retired pay base (i.e., the "High Three") of the SM. Intervening months and years will yield "step increases" (i.e., pay increases which occur every two years), Congressional pay raises and possibly promotions. Who could object to this approach? The expected naysayers for this strategy are two types of attorneys whom we'll call "Naïve Ned" and "Ethical Ethyl."

Naïve Ned says, "It can't be done! How can you postpone the divorce for more than a couple of weeks on the outside, once the case has been filed?" Sadly, Ned hasn't had much experience in the big, wide world outside his office walls.

Many legitimate tactics exist for slowing down the wheels of litigation. Rather than accepting service of process, Ned could politely tell his opponent that the client will not allow him to sign an acceptance, and that regular service of process must be employed. When the client is finally served, Ned can ask for an extension of time for filing an answer. If there is a flaw in the pleadings, Ned may file a motion to dismiss. If there are questions regarding grounds for the divorce or the validity of the plaintiff's claim of domicile, then Ned can initiate discovery. With these and other tactics, an attorney in Syracuse, New York (for whom the author was a consultant) was able to drag out and delay a divorce decree from 2010 (when the

case was filed) until 2014. And all the while the client, a retired Army colonel, was begging him to speed it up and get the divorce granted!

Ethical Ethyl takes a different approach. “While it may be possible to postpone the divorce, there are serious concerns under the Rules of Professional Conduct. It’s never right to delay the litigation. Counsel has an ethical duty to move forward toward completion, not drag his feet. Slowing down the process with the goal of delay is simply unethical!” Unfortunately, Ethyl hasn’t read the Rules very closely.

While delay for its own sake is improper, delay which results from the legitimate use of objections, discovery, motions and other tactics is not inappropriate or a violation of the Rules of Professional Conduct. The Rules prohibit “unreasonable delay” or “improper delay.” They do not bar the use of legitimate devices, such as discovery, to obtain needed information, even though the employment of discovery and the unresponsiveness of the other side may lead to lengthy delays in the legal process.

In a 1998 divorce and property division case, the author’s firm embarked on a campaign of discovery to ascertain whether the plaintiff, a soldier, was a legitimate resident of North Carolina. Domicile is an essential element of divorce, and the defendant was a maid at a motel in coastal Georgia, so it could not be her domicile which was at stake. The plaintiff was in New York. Using sequential discovery (i.e., interrogatories followed some weeks later by document requests, and then followed by requests for admissions, rather than simultaneous service of all of these on the plaintiff), the author beamed in amusement when the plaintiff – instead of answering the discovery immediately – decided to obtain an extension of time for response by 30 days, following that with his objections and motion for protective order. In due course the author filed a motion to compel. A hearing was eventually calendared on the objections, motion for protective order and motion to compel. The latter motion was granted, and the clock just kept on ticking. The plaintiff eventually fired his first lawyer and hired a new one to get the case moving faster. Legitimately using these discovery tactics, the author was able to get the granting of a divorce postponed for 18 months, thus allowing the client to obtain a share of the SM-husband’s retired pay (which otherwise would have been lost due to a change in state law).

If you get the file when the divorce has already been granted (after 12/23/16), don’t give up. Check to see if the divorce is valid. A faulty dissolution might be set aside by the court, giving the FS a larger potential pension to divide. Imitating Sherlock Holmes may pay dividends in terms of flushing out a flawed divorce, so get out that magnifying glass!

### How to “Even Out” the Pension Division

The next five methods are not true adjustments to the pension division to make it numerically the same as that which results from the time rule. They will, however, help in ameliorating the result of the “frozen benefit division” for John Doe (the ex-husband of Commander Mary Doe).

Unequal Share of Pension. In states where the court has a degree of flexibility in how much of a marital or community property asset to award the non-employee spouse, John’s attorney can ask the court to award a share to him that is larger than the usual “50% of the marital share” portion. Thus the order could be framed in terms of “70% of the marital share of Mary Doe’s military retired pay,” which would leave John with a larger share than he could receive through frozen benefit analysis. Have a financial expert help to estimate the monetary loss for the FS, so that a set-off can be calculated. Note, however, that it would be impossible to compare the two results at the time of the pension division order. Only in hindsight – at the time of Mary Doe’s retirement – would it be possible to measure one against the other.

Fixed Percentage Award. Another alternative, when the laws of a state have not been adjusted to provide for a denominator of the marital fraction which ends on the date of the divorce (since that is how DFAS is interpreting “court order” in Sec. 641 of NDAA 17) is to have the court award to John Doe, the non-military spouse, a fixed percentage of the military retired pay while Mary is still serving. After all, if John is forced to receive only a share of a frozen benefit at the time of divorce, why shouldn’t he get a fixed percentage of that frozen benefit? In this situation, the amount of the frozen benefit would remain relatively stable, instead of losing value over time (as would occur if the denominator of the marital fraction remains the total amount of Mary Doe’s creditable service). So, for example, if the property division order occurred when the parties had been married for 10 years of the 20 that Mary had already served, John would be awarded half of 50% (i.e.,  $\frac{1}{2} \times 10/20$ ), or 25% of the frozen benefit. If the fixed percentage approach were not employed and Mary served for a total of 30 years, then John would still receive 50% of the frozen benefit times the marital fraction. However, at that time the marital fraction would be 10/30, or 33%, and John’s share would be 16.5%, rather than 25%. Fixing the percentage at the same time as the benefit is fixed is one way of “retaining value” for John’s pension-share award.

Present Value. In addition to the future division of retired pay, state laws also recognize a second method of dividing pensions, the “present value offset.” This analyzes the present value of a series of money payments over the course of the SM’s life; these are, of course, her retired pay. The present value of this retired pay is the amount that can be used for a trade or an offset, allowing the SM to keep her pension intact. This is beneficial for the parties since it results in a complete present accounting and division, not the postponement of property division until retirement. In addition, it provides the spouse with property “in hand” when it is

unknown whether the SM will live for few or many years after retirement, or even survive to apply for retirement.

Evaluating a pension is a complex task. It is not for the faint-hearted, the unprepared, or the amateur. These complicated computations generally demand an evaluation report and the testimony of an expert. The steps to be taken include these:

- Counsel must locate the appropriate state statute or cases which describe the methodology to use in ascertaining the present value of periodic payments.
- The FS needs to find and hire an expert (e.g., CPA, economist or actuary).
- The FS needs to get a “wingman” to educate the expert in understanding the military retirement system; this advisor might be a senior lawyer with lots of experience in handling military pension cases, a retired JAG officer, or a judge advocate who is a member of the National Guard or Reserves with experience in this area.
- The expert needs to read the cases, apply the methodology and placed a value on the pension. In an ideal world, counsel may even have one or two examples of pension present-value reports to give the expert to help out in regard to what must be done, what discounts need to be applied, what mortality table should be used, and so on.
- Then the hunt is on for some property or asset which matches the pension value and can be given to the FS in exchange for the division of the pension, or which can be awarded to the FS by the judge in a contested case so that the SM may retain the military pension.

Present Value and Payments. The present value of a military pension can be a pretty large figure in some cases. When this happens, the court may need to do a partial setoff for the marital value of another asset awarded to the FS, with the remainder to be made up in periodic payments. Thus, if the present value of CDR Mary Doe’s retired pay were \$400,000 and the marital component were \$300,000 (that is, the parties were married for 15 of the 20 years used by the expert in the pension value report), then the court might set off the pension, awarded to Mary, by granting sole ownership to John of marital assets worth \$200,000. To complete the equation, the court could order Mary to pay \$100,000 to John by making annual payments of \$20,000 for five years. This could be done by requiring Mary to set up an allotment immediately for the monthly payment of \$1,666.67 ( $\$20,000 \div 12$  months) to John. Or the court could enter a military pension division order requiring monthly payments of \$1,667.67 from Mary’s retired pay. The retired pay center will honor these “set dollar amount” payments so long as they do not exceed the allowable percent of disposable retired pay which may be garnished as property division, that is, 50%.

The Western Gambit. In several jurisdictions (mostly western states), the court may order the SM to begin present payments to the nonmilitary spouse as soon as the SM is eligible to retire and receive monthly payments. This is so whether the military member has actually retired or not.

The seminal case is *In re Marriage of Luciano*, in which the judge ordered pension-share payments for the wife to begin when the SM-husband retired from the Air Force. The California Court of Appeals reversed, stating that it would be unfair to postpone payment to the ex-wife since that would give the SM the power to determine when she received her own property. The Court went on to say that the employee spouse cannot defeat the nonemployee spouse's interest in community property by relying on a condition solely within his control. The proper order for the judge to issue would state that the former wife is the one who has the choice as to when to start receiving her share of the pension. This election may be made at any time after the pension is matured, through a motion filed by the nonemployee spouse. The Court stated that, if the motion is made before retired pay starts, this constitutes an irrevocable election to give up increased payments in the future which might accrue due to increased age, longer service and a higher salary.

Nothing in the frozen benefit rule blocks or bars this "western gambit," as illustrated by the *Luciano* case. And the logical approach – nay, the only rational approach – for a nonmilitary spouse in those states which follow *Luciano* is to move immediately for payments, to start as soon as the SM attains sufficient service for retirement (usually after 20 years of active duty). Since there can no longer be an increased payment in the future, as mentioned above, and the benefit to the FS is locked into the rank and years of service at the time of divorce, every nonmilitary spouse should file a motion to elect payments from the SM as soon as the pension matures.

### **The Death of Indemnification**

On May 15, 2017 the U.S. Supreme Court announced its unanimous decision in *Howell v. Howell*, a case that arrived at the Court on certiorari from the Arizona Supreme Court. The Court decided that a trial judge may not order a military retiree to reimburse his or her former spouse (FS) for moneys lost when the retiree elects to receive disability compensation from the Department of Veterans Affairs (VA), an action which can result in a dollar-for-dollar decrease in retired pay. Here is a summary of what happened and its impact on the military retiree and the FS.

Q. What did the court decide and how did it arrive at the outcome?

A. To understand what the decision says and does, we need to take a look at the facts. In this case the parties divorced in Arizona in 1991, and the court ordered that Mrs. Howell was to receive 50% of the military retired pay. The husband, John Howell, retired in 1992 from the Air Force.

Thirteen years later – in about 2005 – Mr. Howell was told by the VA that he had a shoulder injury which was service-connected. This meant that he could apply for VA disability compensation for the injury. His VA rating was 20%, and that meant that he would receive about \$250/mo. from the VA.

But that also meant that Mr. Howell, in making the election for VA payments, chose to forfeit the same amount of his pension to get those tax-free VA funds. The waiver is stated clearly on the application for VA disability compensation; it is, in fact, called the “VA waiver.” It requires a forfeiture of an equal amount of retired pay for retirees whose rating is less than 50% and for those who are receiving Combat-Related Special Compensation.

Q. What did Mr. Howell do?

A. He decided to go ahead with the VA waiver. He did so without the permission of the court, and without his ex-wife’s consent.

That resulted in Mrs. Howell’s receiving about \$125 a month less of the pension. The full pension of Mr. Howell was about \$1500 per month.

Mrs. Howell petitioned the trial court in Arizona to order enforcement of the original order for pension division, and to require the ex-husband to make up the payments which were lost due to his VA waiver. The trial court approved and ordered pay-back by Mr. Howell, and this was upheld by the Supreme Court of Arizona. Mr. Howell petitioned for review by the U.S. Supreme Court.

Q. What did the Supreme Court decide about the decision of the Arizona Supreme Court?

A. The U.S. Supreme Court reversed the Arizona decision and held that, under the Uniformed Services Former Spouses' Protection Act, the judge may not order pay-back to a former spouse of funds which she or he loses because the military retiree has elected to receive VA disability compensation and to forfeit an equal amount of his retired pay. In effect, it sounded the death knell for courts requiring reimbursement for former spouses whose share or amount of military retired pay has been decreased due to election of a "VA waiver."

Q. So what's the big deal – was this a surprise?

A. It was indeed. Of the state courts which have ruled on this, all but a handful have held that it is unfair and inequitable for retirees – after the property settlement is done – to make a VA election which causes a reduction of the share or amount of retired pay that the former spouse receives. Even the United States Solicitor General viewed the issue, upon oral argument before the Supreme Court, as one which was properly decided by the Arizona Supreme Court.

It is also surprising since it allows parties to litigation to make unilateral decisions, without the approval of the judge or the consent of the former spouse, which essentially defeat the right of a former spouse to receive the amount of retired pay awarded by the court, and which overrule the judge's considered and sometimes delicate balancing of the interests of the parties in the distribution of property. By making a VA election for disability compensation, the retiree effectively circumvents the ruling by the trial court in setting what the former spouse will receive. And all of this is after the court has either approved the parties' settlement or else held a trial to make a fair, just and equitable division of marital or community property, taking into account all of the facts and factors then present.

Q. Does this decision mean that the former spouse – the one who has been injured – can now go back into court and demand a rehearing and a new division of property? After all, what he/she was awarded is now reduced in value or – in extreme cases – worth nothing at all!

A. We don't know at this point. The answers, when they arrive, will vary from state to state. In virtually all states, the rule is that property division is fixed and final, not subject to revisions and changes "down the road." Will the nation's divorce court judges be able to go back and amend the property division judgments which were rendered months or years ago to set the scales at a fair division once again? Or will res judicata bar the litigation of issues which could have been raised on appeal, when no appeal was taken?

Q. What remedies might be available to a spouse who gets a reduced share of the pension due to a VA waiver?

A. Compensatory spousal support is possible remedial measure which could be used, and it was reviewed and approved in *In re Marriage of Jennings*, a Washington Supreme Court decision. There the wife was awarded \$813 in the property division decree as her share of the husband's military retirement. The husband's subsequent VA waiver brought her payments down to only

\$136 per month. When this occurred, she filed a motion asking the court to vacate the decree, modify it to provide her with spousal support payments equal to half of husband's disability payments, or clarify the decree to require the husband to pay her no less than \$813 per month. Based on the "extraordinary circumstances" presented, the court entered an order providing the wife with compensatory spousal support to make up for the loss caused by the VA waiver. The Supreme Court approved the use of "compensatory spousal maintenance" that would not end if the ex-wife remarried.

Compensatory spousal support also was considered in a Missouri case, *Strassner v. Strassner*, which pointed out that the record on appeal did not clearly demonstrate that the pension division and maintenance terms were interdependent; therefore, the issue needed to be remanded to determine what amount of adjusted maintenance was appropriate if these two terms were indeed interdependent. In *Longo v. Longo*, a Nebraska case, the trial court granted the wife alimony of \$1 per year, modifiable only upon a potential reduction to the husband's future military pension because of a future disability offset.

Another remedial approach is to have the court revisit the property distribution in light of the SM's VA election to redetermine what property is allocated to whom. This was approved in *McMahan v. McMahan*, a Florida case in which the trial judge awarded the wife a share of the husband's disability benefits. The Florida Court of Appeals determined that this violated the Mansell rule but held that, because the husband and wife anticipated when they executed their agreement that it would be honored by the courts, the case would be remanded for reconsideration of the entire equitable distribution scheme.

Q. Where can I find some answers to how to protect the former spouse?

A. The clearest answers involve the issues of contractual indemnification and *res judicata* ("the law of the case"); they are in a 2004 article by Brett R. Turner of the National Legal Research Group, *State Court Treatment of Military and Veteran's Disability Benefits: A 2004 Update*, which can be found at Appendix 8-F to Chapter 8 of Sullivan, *THE MILITARY DIVORCE HANDBOOK* (American Bar Association, 2nd Ed. 2011). Turner is also the author of the 3-volume series, *EQUITABLE DISTRIBUTION OF PROPERTY*, which is the nationwide gold standard when it comes to issues of property division.

Q. How will this decision impact retirees and servicemembers from here on?

A. The decision in the Howell case means that retirees may elect VA disability compensation "without a price tag," that is, without fear that a judge may later order a pay-back of moneys lost by the former spouse because of a VA waiver.

Q. Will retirees be flooding the courts with applications for relief and requests to re-open prior indemnification orders which are years or decades old? Are the courts going to be inundated with such requests?

A. That remains to be seen. In general, the “law of the case” is one way in which courts deal with issues that are newly decided but which could be seen as overturning prior principles of law. The doctrine of res judicata generally bars a later attack on the previous order if there was no appeal taken which resulted in reversal of the trial court’s decision. Thus even those decisions which are wrong on the law – if not appealed – can result in valid and binding decisions which are subject to the contempt power of the court. That is exactly what happened to Major Gerald Mansell in the famous Mansell v. Mansell decision cited by Justice Stephen Breyer in the Howell decision. The U.S. Supreme Court held that his pension could not be divided upon divorce because of the language of the Uniformed Services Former Spouses’ Protection Act regarding VA waivers. Upon remand to the California courts, however, the original order was upheld, since the state appellate courts found that the decision against Major Mansell was based on res judicata, not upon a division of the pension at trial in violation of the USFSPA. When Major Mansell took the case back up to the U.S. Supreme Court, the certiorari petition was denied. Thus the doctrine of res judicata (sometimes called “the law of the case”) may be an avenue of relief for the injured former spouse.

Q. What impact will the Howell decision have on former spouses whose pension shares or amounts are reduced by a VA waiver?

A. There are several “take-away” lessons for former spouses and their attorneys.

First of all, the Howell decision magnifies the importance of a reimbursement clause in the property settlement. About 95% of cases involving the division of marital or community property are settled. The Howell case was decided based on an order by the trial court in the absence of a contractual reimbursement clause. It’s one thing to argue about a judge’s power to require, under principles of fairness and equity, a duty to indemnify. It’s another matter entirely to require a litigant to perform what he has promised in a contract. Unless and until the Court makes a different ruling, the indemnification clause in a settlement or a separation agreement ought to provide some protection. It is always a good practice for the former spouse’s attorney to include language for an indemnification clause in the property settlement, language which requires the retiree to pay back or reimburse the former spouse for any reduction in the share or amount of retired pay that is divided.

This indemnification phrasing can be done with a straightforward pay-back requirement, such as: “If the Defendant does anything which reduces the share of amount of retired pay which the Plaintiff receives, he will immediately reimburse and indemnify her for such a reduction.”

In some cases reimbursement requirements might involve a clause specifying alimony, spousal support or maintenance to make up the difference. Such a clause could then be enforced through a garnishment from the retired pay center. But the judge may not order a dollar-for-

dollar make-up with alimony; that is too transparent. It would not be upheld on appeal, since it would clearly be going through the back door when the front door is barred.

In many cases, the attorney may want to hold open or “reserve” the issue of alimony to allow for a possible future VA waiver, and to make sure that the former spouse is protected.

Attorneys who represent the former spouse may also decide to forego sharing the pension in favor of a “present value set-off,” that is, the valuation of the retiree’s pension, the award to him or her of the present value of the marital or community share of the pension, and the award to the former spouse of other property acquired during the marriage – if any exists – of equal value.

Q. Where do we go from here? Is it possible to change this outcome?

A. That doesn’t lie in the hands of the courts. Now that the Supreme Court has spoken, the only course for lower courts is to uphold the ruling. Rather, the future lies in the hands of Congress. Since Congress passed the Uniformed Services Former Spouses’ Protection Act in 1982, which is the statute interpreted by the Supreme Court, only an amendment to the Act by Congress can reverse this outcome.