

CHAPTER X

“You Can't Do That” Family Law Issues

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CHAPTER X
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CHAPTER X
"You Can't Do That" Family Law Issues

I. Custody Issues

A. Single Parent Enlistment

- I. **Department of Defense Instruction 1304.26:** The Military Services may not enlist... unmarried individuals with custody of any dependents under the age of 18 [without a waiver]
- II. Army – AR (Army Regulation) 601-210;
- III. Navy – COMNAVCRUITCOMINST (Navy Recruiting Manual – Enlisted) 1130.8F;
- IV. Air Force – AFRS (Air Force Recruiting Service) Instruction 36-2001;
- V. Marine Corps – Marine Corps Order P 1100.72C, Chapter 3, Section 2; and
- VI. Coast Guard – COMDTINST (Commandant Instruction) M1100.2E.

B. Winning Custody AFTER Enlistment

- I. N.C. Gen. Stat. § 50-13.2(f): In a proceeding for custody of a minor child of a service member, a court **may not** consider a parent's past deployment or possible future deployment as the **only basis** in determining the best interest of the child. The court may consider any significant impact on the best interest of the child regarding the parent's past or possible future deployment.

C. Family Care Plans/Custody Orders

- I. Be careful about giving custody to a non-parent!
- II. Plan Ahead by Including a Plan A/Plan B in Custody Orders

II. Military Family Support

- A. All SM's are expected to provide regular and adequate support for their family members
- B. Each service will publish its own rules for support
 - I. Army
 - II. Air Force
 - III. Marine Corps
 - IV. Navy
 - V. Coast Guard
- C. Nonsupport Letter
- D. Use for interim relief ONLY

III. Military Pension Division

A. Jurisdiction to Divide the Pension - Domicile, Consent and Residence

- I. USFSPA 10 U.S.C. 1408(c)(4)
- II. Federal Jurisdictional Tests: A state may only exercise jurisdiction over a military SM's pension rights if:
 1. That state is his or her domicile, OR
 - I. What is it?
 - I. Physical Presence
 - II. Intent to Remain
 - II. How to Find?
 - I. LES – State Taxes
 - II. Contacts – taxes, voting, vehicle registration, drivers license, bank accounts
 - III. DD Form 2058
 2. The SM consents to the exercise of the jurisdiction, OR
 3. The SM resides there (for reasons other than military assignment in that state or territory)

B. The SCRA

- I. Protections Against Default
 1. SCRA Affidavit
 2. When must the court appoint an attorney?
- II. Stay of Civil Proceedings
 1. 90 Day MANDATORY stay of proceedings if the SM files a proper request:
 - I. A statement as to how the SM's current military duties materially affect his or her ability to appear;
 - II. A statement of a date when the SM will be available to appear;
 - III. A statement from the SM's commanding officer that the SM's current military duty prevents his or her appearance; and
 - IV. A statement that military leave is not authorized for the SM at the time of the statement.
 2. Additional Stay: DISCRETIONARY

C. The "10/10 Case" and DFAS

- I. Remember that the "10-year test" is *not a jurisdictional requirement* for dividing military pensions. Rather, it is an "enforcement requirement," meaning that pension division cannot be enforced by direct pay from DFAS unless this test is met.
- II. 10 Year Test: There must be 10 years of marriage which overlap 10 years of service creditable toward retirement
- III. Direct payments from DFAS to a non-SM spouse are available when:
 1. The retired pay is divided by a court order;
 2. There is a statement in the order that the SM's rights under the Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) were observed;

3. The amount directly payable to the former spouse as pension division is not more than 50% of the retiree's disposable retired pay;
4. The "10 year test" has been met;
5. The court order must provide for payment from military retired pay, and the amount must be in an acceptable format (using one of the four methods of pension division allowed by DFAS); and
6. The order must show that the court has jurisdiction over the SM in accordance with USFSPA provisions.

D. Forgetting to Value the Pension

- I. *Washburn v. Washburn*, NC COA 2013 (unpublished)
- II. *Johnson v. Johnson*, 230 NC App 280 (2013)

E. Rules for Pension Division

I. Rule #1: Use the right document!

1. USFSPA only allows direct pension payments pursuant to a “final decree of divorce, dissolution, annulment, or legal separation issued by a court” or a property settlement that is ratified or approved by the court and issued incident to such a final decree.

II. Rule #2: Use the Right Language

1. The pension division clauses must include:

- I. The names and addresses of the parties, as well as their SSN’s;
- II. The years of marriage and of military service;
- III. The military member’s grade or rank;
- IV. A statement that the SCRA rights of the member have been honored;
- V. Jurisdictional findings (domicile, consent or residence) under 10 U.S.C. 1408(c)(4);
- VI. A statement that DFAS should pay the spouse at his/her address as shown therein
- VII. A statement as to what DFAS will pay the spouse
 - I. Percentage
 - II. Fixed Dollar
 - III. Formula
 - IV. Hypothetical
 - V. Guard/Reserve
 - I. Marital Points / Total Points
 - II. Time (all variables must be filled)

III. Rule #3: Send the Right Documents

1. Certified copy of the divorce judgment
2. Certified copy of the MPDO
3. DD Form 2293

IV. Rule #4: Send to the Right Place

1. For service on DFAS, the addresses of the military finance centers are:
 - I. **ARMY, NAVY, AIR FORCE, MARINES:** Defense Finance and Accounting Service - Cleveland, ATTN: DFAS-GAL/CL, P.O. Box 998002, Cleveland, OH 44199-8002; (216) 522-5301.
 - II. **COAST GUARD:** Commanding Officer (LGL), United States Coast Guard, Human Resources Service and Information Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591; (785) 339-3415.

III. **PUBLIC HEALTH SERVICE:** ATTN: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001; (800) 638-8744.

- V. Helpful Tips:
1. Send via certified mail, return receipt requested
 2. Payments begin 90 days after service of the decree on DFAS or the start of retired pay
 3. Provide for direct payments in the interim

F. The Frozen Benefit Rule

- I. Benefit to be divided with the former spouse is frozen as if the servicemember retired on the date of divorce
- II. Applies:
 1. when divorce occurs AFTER 12/23/2016 &
 2. SM is NOT in pay status
- III. MPDO Now Must Contain
 1. HI-3 as of date of divorce
 2. Years of service [or, for Guard/Reserve members, # of retirement points] at divorce

G. Forgetting About Disability

- I. Concurrent Retirement and Disability Pay, Combat-Related Special Compensation, Military Disability Retired Pay
- II. Under USFSPA, the court can only divide *disposable retired pay*.¹ According to USFSPA, “disposable retired pay” means gross retired pay minus:
 1. most disability compensation; and
 2. Survivor Benefit Plan premiums.
- III. 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
- IV. The retiree should eventually receive the full amount of retired pay with a VA rating of 50-90% through CRDP
- V. Electing CRSC wipes out CRDP
- VI. *“The parties have agreed upon a set level of payments to Plaintiff to guarantee income to her based upon Defendant’s military retired pay without any deductions for disability payments or any other reason. Defendant shall indemnify Plaintiff as to any reduction in her payments from what they would have been based solely on length of service. The parties consent to the court’s retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if Defendant’s actions or acquiescence results in the waiver of military retired pay in favor of disability payments or if he should take any other action which reduces Plaintiff’s share or amount herein. This retention of jurisdiction is to allow the court to adjust Plaintiff’s share or amount to*

¹ 10 U.S.C. ' 1408(c)(1).

the pre-reduction level, to reconfigure the property division or to award compensatory alimony or damages so as to carry out the original intent of the court.”

VII. Howell v. Howell

1. USFSPA exempted VA disability compensation from division
2. Mansell case barred division of waived military retired pay as marital property upon divorce
3. This case involves, in effect, division of waived military retired pay = INDEMNIFICATION BARRED

H. Survivor Benefit Plan

I. Strategies for FS

1. Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992)
2. Unique Benefits
3. Premiums already paid

II. Strategies for the SM

1. Silence
2. Disadvantages
3. Value
4. Life Insurance
5. Educate your judge

I. The Blended Retirement System

- I. Enhanced Thrift Savings Plan (TSP)
- II. Reduced defined benefit plan
- III. Mid-career incentive bonus (or continuation pay)
- IV. Option to receive immediate partial lump sum payment against the defined benefit upon retirement.

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