

# CHAPTER X

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## “You Can't Do That” Family Law Issues

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# You Can't Do That!

(Family Law Issues)

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## Single Parent Enlistment



### **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]

## Solutions...

- Check the Regulations
- Custody Order
  - NOT Power of Attorney
  - NOT temporary
  - NOT based solely on enlistment
- What about Joint Custody?
- What about Guardianship?



## Custody After Initial Enlistment



Can a enlisted parent win primary custody?

## 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.

## Military Factors

- Irregular Schedules
- Full-Time Duty
- Permanent Changes of Station
- Mobilizations
- Deployments
- Quality of Schools on Base
- Recreational Programs
- Dependent Youth Activities
- Day Care Facilities
- Travel/Enrichment

## You CAN Plan Ahead!

- **Family Care Plan (FCP)**
  - Designated caregiver
  - POA
- **Intended to cover absence due to**
  - Deployment
  - Mobilization (for Guard/Reserve)
  - TDY

## But Don't Plan Poorly!

- **FCP isn't a court order**
- **Giving custody to a non-parent -**
- **...when the other parent is not disqualified**
  - Abandonment
  - Abuse
  - Neglect
  - Other "unfit" conduct
- **...or hasn't relinquished custody or waived rights**

## Planning Ahead in Custody Orders

- Initial Custody Order should contain:
  - PLAN A [“NOW” plan]
  - PLAN B [if deployed...]
- Electronic Visitation
- Visitation/Custody during leave
- Prompt Return at End of Deployment



## Forgetting Interim Support Regulations

- All SM's are expected to provide regular and adequate support for their family members
- Each service will publish its own rules for support
- Nonsupport Letter
- But don't rely on support regulations forever!

## Military Family Support

### Army

- **Army Regulation 608-99:** Solder must provide support equal to the full BAH (RC/T) at the with-dependents rate.

### Coast Guard

- BAH Diff + % of base pay
- Spouse Only = BAH Diff + 20% of base pay
- One minor child = 1/6 of base pay

## Military Family Support

### Marine Corps

- Set amount PER family member OR fraction of BAH PER family member
- 1 Family Member = \$350 OR  $\frac{1}{2}$  BAH
- 2 Family Members = \$572 OR  $\frac{2}{3}$  BAH

### Navy

- Fraction of gross pay depending on dependents
- Spouse Only =  $\frac{1}{3}$  gross pay
- Spouse and one minor child =  $\frac{1}{2}$  of gross pay
- Minor Child =  $\frac{1}{6}$  gross pay



## Jurisdiction in Pension Division

- A state may only exercise jurisdiction over a servicemember's pension rights if:

- That state is his or her **domicile**, OR
- The SM **consents** to the exercise of the jurisdiction, OR
- The SM **resides** there (for reasons **other than military assignment** in that state or territory)



## The SCRA

- **WHO?**

- All active duty SMs and guard/reserve who are called to active duty for 30 days or more

- **WHEN?**

- Passed 19 DEC 2003

- **WHY?**

- Enable SMs to devote their entire energy to the defense needs of the Nation

- **WHAT?**

- Protect against Default
- Stay of Proceedings

## SCRA: Default Against a Servicemember

- SCRA affidavit swearing the SM is/is not in the military
- Court **MUST** appoint an attorney
  - If the attorney can't reach the SM, mandatory 90 day stay of proceeding

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice
Name And Address Of Plaintiff		
<b>VERSUS</b>		<b>SERVICEMEMBERS CIVIL RELIEF ACT AFFIDAVIT</b>
Name And Address Of Defendant		50 U.S.C. 3901 to 4043
<b>NOTE:</b> This form is not for use in Chapter 45 Foreclosure actions.		
<b>AFFIDAVIT</b>		
I, the undersigned Affiant, under penalty of perjury declare the following to be true:		
1. As of the current date: (check one of the following)		
<input type="checkbox"/> a. I have personal knowledge that the defendant named above is in military service.*		
<input type="checkbox"/> b. I have personal knowledge that the defendant named above is <b>not</b> in military service.*		
<input type="checkbox"/> c. I am unable to determine whether the defendant named above is in military service.*		
2. (check one of the following)		
<input type="checkbox"/> a. I used the Servicemembers Civil Relief Act Website ( <a href="https://scra.dmdc.osd.mil/">https://scra.dmdc.osd.mil/</a> ) to determine the defendant's military status.		
<input type="checkbox"/> The results from my use of that website are attached.		

## SCRA: Stay of Civil Proceedings

- 90 Day **MANDATORY** stay of proceedings if the SM files a proper request:
  - A statement as to how the SM's current military duties materially affect his or her ability to appear;
  - A statement of a date when the SM will be available to appear;
  - A statement from the SM's commanding officer that the SM's current military duty prevents his or her appearance; and
  - A statement that military leave is not authorized for the SM at the time of the statement.
- Additional Stay: **DISCRETIONARY**

## The 10/10 Rule

**10/10 RULE**: 10 YEARS OF MARRIAGE  
OVERLAPPING 10 YEARS OF MILITARY SERVICE

DIRECT PAYMENTS

## Forgetting to Value the Pension

- Steps in Equitable Distribution

- Identify
- Classify
- **VALUE**
- Divide

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

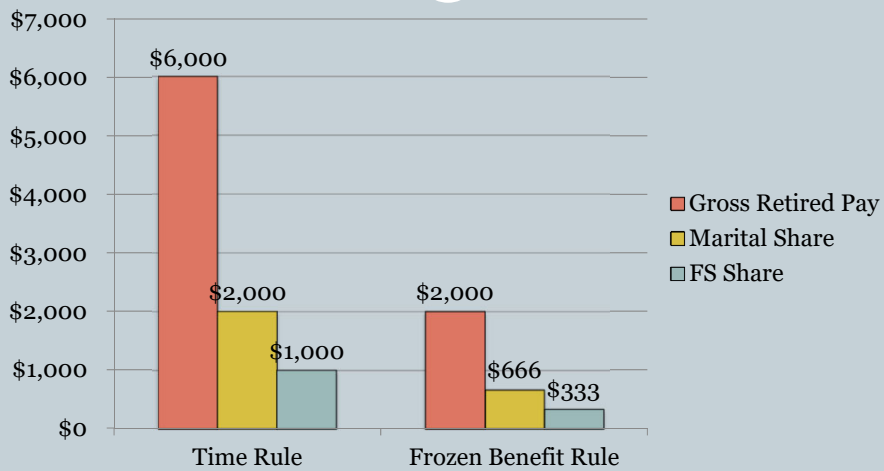
## Problems with MPDOs

- Not using a **Court Order**
- Formula Clause without a **Numerator** (ex: *Husband will receive his share based on length of marriage / total service*)
- Dividing a Reserve Retirement using Months rather than **Points**
- Submission without **Divorce**
- Submission without **DD Forms**
- Submission by means other than **certified mail**

## Forgetting the Frozen Benefit Rule



## FBR Illustrated (10 Year Marriage / 30 Years of Service)



## The Frozen Benefit Rule

### The Rule

- Benefit to be divided with the former spouse is frozen as if the servicemember retired on the date of divorce
- Applies:
  - when divorce occurs AFTER 12/23/2016 &
  - SM is NOT in pay status

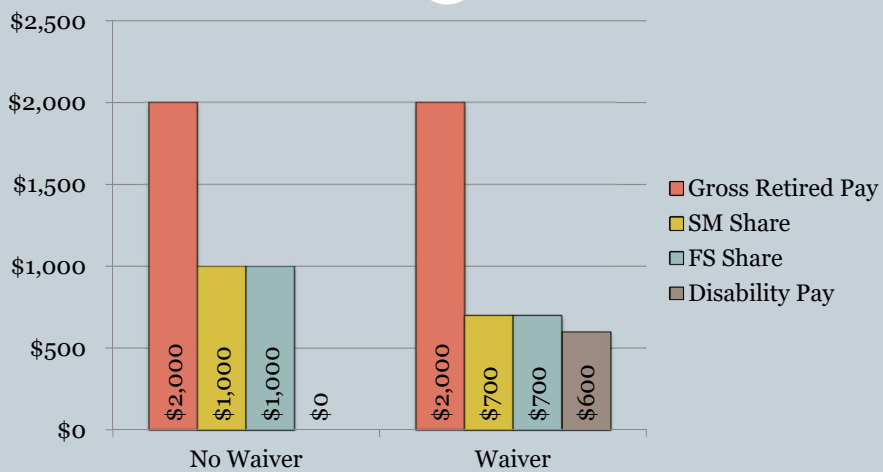
### New MPDO Requirement

- ✦ HI-3 as of date of divorce
- ✦ Years of service [or, for Guard/Reserve members, # of retirement points] at divorce

## Forgetting About Disability

- USFSPA only applies to “longevity retirement”
- Mansell v. Mansell: VA Disability Compensation is NOT divisible – states can only divide disposable retired pay
  - DRP: Gross retired pay MINUS deductions for:
    - ✦ SBP Premiums
    - ✦ Waivers for disability payments

## Impact of Disability Waivers



## Indemnification

*“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 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.”*

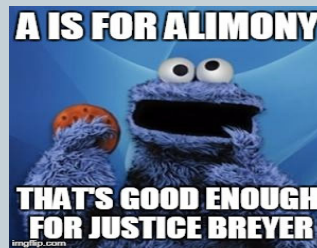
## Howell v. Howell (USSC)

- 1991 – divorce in AZ, 50-50 pens. division
  - 1992 – H retired from USAF
  - 2005 – H applies for VA Disability
    - 20% rating = \$250/mo
  - Military pension = \$1,500/mo
    - Reduction for ex-W = \$125/mo
  - Ex-W moved for enforcement
    - Judge ordered indemnification
    - Upheld in AZ Ct. of App., Supreme Ct.
  - Reversed by US Supreme Court

## Howell: Ruling & Rationale

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

- Justice Breyer:
  - “Take possibility of reduced ret. pay into acct. in valuing the property”
  - “Well, there’s always alimony...”



## Indemnification Options TODAY

- Contractual Indemnification
- *Res Judicata* (Prior Court Order for Indemnification that was not Appealed)
- Present Value Offset
- Alimony



## Forgetting the SBP

- **The Facts:**

- Unitary Benefit
- SBP payments are NOT the same as pension payments
  - ✦ 55% of the selected base amount
  - ✦ Base amount can be anywhere from \$300 to full retired pay
- SBP entitlement suspended upon remarriage before age 55

## Shifting the SBP Premium

- *“The cost of the Survivor Benefit Plan shall be deducted from the Former Spouse’s Share of the Military Pension.”*
- Premiums are paid from the pension
  - ✦ 6.5% of selected base amount for active duty
  - ✦ 10% of selected base amount for reserve/guard
- **Who Pays?**
- If SM is retired, SBP shift calculations
- If SM not retired, reimbursement?

## Fixing the SBP

- **Strict Deadlines:**
  - 1 year from court order for FS,
  - 1 year from date of divorce for SM
- **DD Forms**
- **Missed Deadlines**
  - New Court Order?
  - Application to Board for Correction of Military Records

## Forgetting Other Benefits

- **Accrued Leave**
- **USAA Automobile Insurance**
- **Health Insurance**
- **Thrift Savings Plan (TSP)**

## Forgetting the Blended Retirement System

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

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