



Best of ListServ

Q: *Situation in which I could use some experiential assistance, please:*

H, a military guy, &W were married and lived together in State A. H moved to state B, leaving W and 2 children ("C") in A. H filed for divorce and "the whole nine yards" in his new state, B; W responded with her own divorce action in A, and a motion to dismiss or for stay in state B, asserting lack of in personam jurisdiction over her for support and eq. dist. issues in H's state B, and asserting that if Court found that it has in rem jurisdiction sufficient to handle H's divorce, then it should stay the proceedings anyway as a matter of judicial discretion, to see if state A's courts proceed and grant full relief.

Issue 1: H's counsel agrees that A has jurisdiction for eq. dist and support issues, EXCEPT that A has no jurisdiction over his military retirement benefits (he currently remains on active duty, and is NOT in pay status, if this makes a difference), citing 10 USC 1408(c)(4). 10 USC 1408 is entitled, and deals with, "Payment of retired or retainer pay in compliance with court orders." Does this statute even apply, given that H is not retired and thus his retirement pay is not yet in pay status?

Issue 2: Said statute says:

(4) A court may not [have jurisdiction over] the disposable retired pay of a member ... unless the court has jurisdiction over the member by reason of

- (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court,*
- (B) his domicile in the territorial jurisdiction of the court, or*
- (C) his consent to the jurisdiction of the court.*

If 1408 DOES apply to all military retired pay, then still it seems that jurisdiction in state A over H is now by long-arm, since he lived there when H&W were together, and that that should comply with the requirements of (4)(A), in that his residence in state A was the basis for the jurisdiction by the court in state A over H. Agree, folks?

Issue 3: If H's counsel is right, and 1408 DOES apply and my above interpretation is not correct, then how does W assert her claims in and to her appropriate share of his military retirement? If she can't do it in her home state, and H's newer home state has no jurisdiction over e.d., this would seem to mean she has no legal right to pursue his military retirement, which makes no sense. Help, please!

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A:

Doug:

I'd make this more succinct if I could, but the short answer to your three questions are:

1. Yes, the statute is fully applicable, whether H is on active duty or retired.
2. No. Has to be specific. Neither regs nor case law will not support the interpretation you propose; federal law overrules normal long-arm "last marital domicile" rules.
3. Very, very carefully. In your action in State A, as a matter of tactics, you must get H to commit to an affirmative statement of the state in which he claims to be a resident, domiciliary (note: some states have exactly contradictory definitions of those two terms), and as a matter of tactics, make sure you have an active action there BEFORE completing state A action.

The danger is that some states, like Virginia (the infamous *Brown v. Harms* case discussed in my book) do not entertain partition actions, leaving W no forum in which the military claim CAN be raised after the divorce is complete.

As unfair as it is, sometimes the best advice to W is to litigate all property issues wherever H claims to have submitted (consented) to the jurisdiction of the court as to retirement matters (in MOST places, a general consent to jurisdiction is sufficient), litigating kiddie issues wherever the applicable statute indicates and litigating alimony in State A (so long as she can get the military retirement addressed in another action if she does so).

From my CLE materials (with footnotes, posted on the website):

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A. The Absolute Necessity of Obtaining "Federal Jurisdiction"

Congress was concerned that a forum-shopping spouse might go to a state to which the member had a very tenuous connection and force defense of a claim to the benefits at such a location.

Accordingly, the USFSPA included special jurisdictional rules that must be satisfied in military cases to get an enforceable order for division of the benefits as property. In other public and private plans, any state court judgment valid under the laws of the state where it was entered is generally enforceable to divide retirement benefits; this is not true for military retirement benefits divided as property. These rules do not restrict alimony or child support orders, which will be honored if the state court had personal and subject matter jurisdiction under its own law.

In a military case, an order dividing retired pay as the property of the member and the former spouse will only be honored by the military if the issuing court exercised personal jurisdiction over the member by reason of: (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court.

These limitations override state long-arm rules, and must be satisfied in addition to any state law jurisdictional requirements. Cases lacking such jurisdiction can go forward, but they will not result in enforceable orders. The statute effectively creates an additional jurisdictional requirement, which for lack of a better title can be called "federal jurisdiction."

In most places, making a general appearance usually constitutes "consent" to trial of the entire action, but a few cases indicates that a service member may "un-consent" to court jurisdiction over the retirement issue alone.

The essential lesson of this jurisdictional point (for the spouse) is to never take a default divorce against an out-of-state military service member if seeking to divide the retirement benefits. The resulting judgment will not be enforceable; if valid jurisdiction under both state and federal law cannot be achieved, then the action may have to be dismissed and re-filed in the state in which the military member resides.

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If you call or write with specific states in question, the military benefits folks on this list might be able to give you specific cites and suggestions for what must be done in which order.

By the way, it is the opinion of the ABA, the AAML, and even the Dept. of Defense, that the jurisdictional rules as now set make no real sense. Congress has displayed zero appetite to correct even such agreed problems, however, seeking to avoid opening the worm can.

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Doug,

When answering your questions I am going to assume, because you have, that H has been in State B for the required period of time to permit him to file.

Issue 1: State B has jurisdiction over H's pension and child support (State A has it as well for CS). Remember that jurisdiction for support is based on personal jurisdiction over the party that is to pay the support not the party that is to receive the support. For the pension division, unless H State A is H's home state (the easy way to find this out is to look at his LES before looking at other contacts with the state) then State A does not have jurisdiction over his pension; state B has jurisdiction. The statute does apply. There is no requirement that the pension be vested in order for the special jurisdiction under the statute to apply. In fact, as most states divide the pension prior to it vesting (or being in payment) it would defeat the purpose of the statute do read it that way.

Issue 2: Ask your self the following question: Was H in State A only pursuant to military orders? in other words does he have another state of residence that he calls home. If the answer to that question is "yes" then State A does not have jurisdiction over H's pension unless he waives jurisdiction. What you are really dealing with under the statute is almost like subject matter jurisdiction except that it can be waived by the military member. Don't confuse yourself by trying to call State A a "newer home state." His home state is probably State C somewhere. Service members, generally, have a home state and a state in which they are stationed pursuant to military orders. Sometimes they are the same. For example, if Mark Sullivan was on active duty and stationed in NC, NC would be both his home state and the state in which he is stationed. However, if he was stationed in Texas then NC would be his home state and TX the state in which he is stationed.

Issue 3: W can waive jurisdiction and allow State B to divide the property if H will not submit to the jurisdiction of State A over his pension. W could, of course, after the divorce try to have the pension divided by H's regular state of residence, if not State B, after the divorce but she runs the risk, under the circumstances, of being accusing of forum shopping.

The other two issues which you did not address; custody and the wife's pension. State B, if W waived personal jurisdiction, could divide all the assets but it cannot decide custody as the children are habitually resident in State A. Please remember that W does not get all of her pension and 1/2 of H's pension as well. If she has a pension you will have to do a pension evaluation to figure out how much of H's pension she will receive.

I hope that helps.

Marion Browning Baker

Doug et al. -

You can find a good summary of this issue in my SILENT PARTNER, "Military Pension Division: Scouting the Terrain," at the Military Committee website, www.abanet.org/family/military. You'll find all of the SILENT PARTNERS there (covering military family law), and 5 of them are on military pension division, including one with a sample MPDO [military pension division order] included.

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