

ROLL CALL



SECTION OF
FAMILY LAW



KNOWLEDGE EXPERTISE NETWORKING

SERVING AS THE NATIONAL LEADER IN THE FIELD OF MARITAL AND FAMILY LAW

Vol. 2016-1, Spring 2016 Newsletter of the Military Law Committee, ABA Family Law Section

GREETINGS FROM THE CHAIR



Steve Shewmaker has previously served in the Army, where he served in Iraq, Kuwait and Afghanistan. Steve now is a founding partner of Shewmaker & Shewmaker, located in Atlanta, Georgia. Steve is licensed to practice in Georgia.

Steve Shewmaker
Shewmaker and Shewmaker
Phone: (770) 939-1939
Email: sshewmaker@shewmakerandshewmaker.com
Licensed in: Georgia

This is an exciting time for us. There may have been decades in our nation's past where the military had a lull in activity, where there was not so much going on. We are fortunate not to live in such times. The military continues to stretch and grow, and those of us who practice alongside it do as well. In the past few years we have seen the nation rise above its past and cast away its age-old feelings about gay marriage. As it was with the Civil rights movement in America, securing the rights of gay citizens was

Introduction from the Editor

Chris Barondeau currently serves as a Captain in the Nebraska Army National Guard, and he has previously deployed to Iraq.

Chris practices law in Sioux City, Iowa focusing his practice on divorce and family law. Chris is licensed to practice in Iowa and Nebraska.

Roll Call has been on a bit of a hiatus and I am pleased to have worked with the dedicated members of the Military Committee to re-launch this great publication. Hopefully you find the information contained herein helpful.

This edition focuses largely on the recent, and significant, changes to the military re-

led by the Department of Defense lifting its ban against gay service members. Lo and behold, the nation followed mere months later in doing the same with respect to marriage. But that is not all. We have recently seen the last of the gender barriers come down, as women have now attended and graduated from the Army's Ranger School and some prepare to now serve in the Infantry.

And just when you thought it was safe to practice military domestic law, it is about to get a lot more complicated as the DoD ushers in the most sweeping change to its retirement system since its inception. In 2018, the military retirement system will see radical changes. These changes and the "grandfathering" of the old system, will see a hybrid or hodgepodge of the old and new system for at least a decade. It will require those of us who represent service members to know it better and more thoroughly than we did before.

Finally, let us not forget that Americans still serve in Afghanistan, and many more have recently returned to Iraq. They serve in many other dangerous places as well. Please join me in saying a prayer for them every night.

This section continues to be challenged and to grow from such changes in such interesting times.

Thank you.

irement system, to include a discussion on the impact of these changes.

As always, contributions from committee members make this newsletter possible. If you are interested in providing an article, please contact me, my hope is to publish our Fall Edition in early October.

Inside this issue:

"THE WARE KEEPS GOING: LAWYERS' ETHICAL DUTIES WHEN REPRESENTING VETERANS WHO HAVE EXPERIENCED TRAUMA"	2
SURVIVOR BENEFIT PLAN UPDATE: SPECIAL NEEDS, NEW SPOUSES	5
"ABOUT FACE - CONGRESS ALTERS THE AGE OLD MILITARY RETIREMENT SYSTEM"	7
"TO HAVE AND TO HOLD: RETIREMENT CONSIDERATIONS IN MILITARY DIVORCE"	11
MILITARY FAMILY LAW RESOURCE CORNER	22



Chris Barondeau
Goosmann Law Firm
Phone: (712) 226-4000
BarondeauC@goosmannlaw.com
Licensed in: Iowa and Nebraska

Roll Call

“The War Keeps Going: Lawyers’ Ethical Duties When Representing Veterans Who Have Experienced Trauma”



Author: Mariah Hanley, Class of 2016
University of Washington School of Law

Mariah Hanley will graduate from the University of Washington School of Law this June. She has interned at Seattle’s Northwest Justice Project since summer of her 1L year, including more than 18 months with NJP’s Veterans Project. During her time at the

Mariah Hanley
University of Washing School of Law
Class of 2016
Email: mhanley92@gmail.com

Veterans Project, Mariah primarily advocated for incarcerated and justice-involved veterans; she also assisted in the creation of RepWAVets.org.

Mariah also interned with Northwest Justice Project’s Medical-Legal Partnership, and NJP’s RISE Project, which represents incarcerated and recently released mothers in family law matters. Mariah looks forward to a career of serving low-income veterans and expanding her knowledge of poverty law, medical-legal partnership, and civil legal aid.

“When I first came back from Afghanistan, I thought that if you make it back from conflict, then the dangers were all over. I thought that if you made it back from a conflict zone that somehow you could kind of wipe the sweat off your brow and say, “Whew, I’m glad I dodged that one,” without understanding that for so many people, as they come back home, the war keeps going. It keeps playing out in all of our minds. It plays out in all of our memories. It plays out in all of our emotions.” Wes Moore, *How to Talk to Veterans About the War*

I. Introduction

Wes Moore is a decorated Army veteran, author, and social entrepreneur. In his 2014 TED Talk, *How to Talk to Veterans About the War*, he discussed the need for a dialogue with returning veterans, rather than the conversation consisting only of a mere “Thank you for your service.”¹ He also touched on how returning from combat is often disorienting; civilians didn’t know how to have a conversation with him. “I wanted people to ask me about my experiences....And the only questions I got from people was, “Did you shoot anybody?”² Society did not meet him or his fellow veterans where they were at in their re-entry. It did not realize that for some veterans, the war keeps going long after

they depart the battlefield.

For some veterans, this continuation of battle manifests itself as PTSD or another trauma-related disorder. The Department of Veterans Affairs states that between eleven and twenty percent of OIF/OEF veterans have PTSD in a given year, twelve percent of Gulf War veterans have PTSD in a given year, and a staggering thirty percent of Vietnam veterans experience PTSD in their lifetime.³ Attorneys who work with veterans who have experienced trauma have the ethical obligations, under the American Bar Association’s Model Rules of Professional Conduct, to understand trauma’s effects and to represent and engage trauma-exposed clients accordingly. Three rules in particular (Rule 1.1, Competence; Rule 1.14, Advising Clients with Diminished Capacity, and Rule 2.1, Advisor) establish these obligations.

II. Rule 1.1: Competence

Rule 1.1, Competence, requires attorneys have the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Although the Comments to the rule focus on the “legal knowledge and skill” necessary, it is mentioned that an attorney must also utilize “methods and procedures meeting the standards of competent practitioners.”⁴ For veteran clients who experienced trauma or live with post-traumatic stress disorder or another trauma-related condition, these “methods and procedures” may include becoming familiar with potential effects trauma or the trauma-related has on communication, decision-making, and other interpersonal and social skills that affect representation.⁵ Trauma survivors and individuals with PTSD and other trauma-related conditions may struggle with detachment, estrangement, trust, and maintaining relationships with others,⁶ and trauma-informed representation can aid in building trust and reducing the client’s possible feelings of distrust. Competent attorneys may also need to integrate the client’s experience with trauma into the course of representation, whether through a defense or as a mitigating factor to an administrative or criminal outcome or sanction.

In one noteworthy example, attorneys can integrate their veteran client’s trauma into the client’s representation by discussing with the client the possibility of entering into a Veterans Treatment Court. These courts, originally established by a veteran-judge in Buffalo New York in 2008,⁷ are hybrids of drug and mental health treatment courts,⁸ and generally require evidence of a mental health or addiction disorder (including PTSD) for veterans to be eligible.⁹ These courts keep veterans in their communities, strongly encourage veterans suffering from PTSD and other mental illnesses to access treatment, and work with local healthcare and social providers so that veterans can “receive the medical and/or psychological care

Roll Call

they require and other assistance they need to stay out of trouble and lead productive lives.”¹⁰ When counseling clients about these courts, attorneys must also note to their clients the burdens the court places on defendants; treatment courts often require pharmacological or psychological treatment, and non-compliance can result in dismissal from the court, sanctions, or fines and fees.¹¹

The recent *Monk v. Mabus* suit, filed by Yale Law School on behalf of Vietnam veteran Conley Monk, is a prime example of how attorneys who comprehend trauma’s effects can use it to provide zealous representation for their clients in administrative proceedings. Mr. Monk and Yale’s Veterans Legal Services Clinic alleged that the respective branches of the military had unjustly separated thousands of Vietnam-era service members with less-than-Honorable characterizations of service when the misconduct they were separated for was likely due to undiagnosed PTSD or another trauma-related condition.¹² The resulting September 2014 memorandum from the Secretary of Defense required administrative bodies to give “liberal” and “special” consideration to service members who displayed symptoms of a trauma-related condition while in service or who were diagnosed with a service-connected trauma-related condition post-release.¹³ Trauma exposure and PTSD are now used as supporting factors in discharge upgrade requests filed by attorneys across the nation on behalf of service members separated with a less-than-Honorable characterization of service.

III. Rule 1.14: Advising Clients with Diminished Capacity

Rule 1.14, Advising Clients with Diminished Capacity, may not be applicable to all, or even most, trauma-exposed veteran-clients. However, for clients whose trauma affects their capacity or creates challenges to a client’s full participation in the representation but does not reach the level of capacity concerns, it is crucial that attorneys know how to, “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”¹⁴

“An attorney who does not understand how PTSD affects a client is helpless to prevent its symptoms from infecting the attorney-client relationship....It would behoove lawyers to understand basic psychological concepts, not so that we may become therapists, but so that we might be better legal counselors.”¹⁵ Major Evan Seamone, an Army Reserve Component JAG and professor at the Mississippi College of Law who has written extensively about service members and veterans and the duties of attorneys who represent them, details many of the ways trauma can affect representation: self-defeating or self-destructive behaviors such as not showing up for court or appointments with the attorney, or agreeing to a damaging settlement request, failing to consider the benefits and draw-

backs of testifying, keeping information from attorneys, or refusal to discuss a traumatic event that’s crucial to adequate representation.¹⁶

Ethical, trauma-informed attorneys must modify their representation to mitigate or prevent these possibly harmful effects on a client, or correct the misapprehensions or unrealistic expectations of a client. For example, a service member-client with PTSD who is being separated from the military for a civilian criminal conviction may be in denial that the military will actually separate him, or believe that his potential less-than-Honorable characterization of service will be automatically upgraded in six months.¹⁷ An attorney’s role may be to assist the client in identifying his “cognitive blind-spots”¹⁸ affecting his representation (that the military, which has initiated separation proceedings, will keep him), and to manage the client’s “unrealistic or distorted”¹⁹ expectations (that his characterization of service will be upgraded automatically). When an attorney realizes that a client’s trauma is interfering with the attorney-client relationship, he or she can change how they interact with the client to ensure ethical representation of the client, and engage with the client to ease the mental health impacts of representation on the client.

IV. Rule 2.1: Advisor

The last Rule that creates an ethical obligation for attorneys working with traumatized clients or clients experiencing mental health issues is Rule 2.1, Advisor. This rule reads, in part, that in rendering advice, an attorney may refer “not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”²⁰ For many clients experiencing trauma or with a trauma-related condition, an attorney is not the only service they need. They may need mental health therapy, domestic violence services or batterer’s treatment, or assistance obtaining VA Pension, Disability Compensation, or a HUD-VASH voucher. The law provides “few real solutions” for many issues, and so “attorneys must be able identify and access a range of other professional services for their clients to provide effective representation.”²¹

An attorney may be the first person a client discloses trauma to, or the first individual who identifies the impact prior trauma is having on a client, either generally or in regards to the representation. This makes attorneys possible “first- responders” for trauma-related conditions or the effects of trauma.²² Since trauma can affect a client’s ability to participate in representation, a competent attorney must have the ability to conduct a surface assessment of whether a client’s experience with trauma is affecting the representation, by asking the client if they’ve experienced trauma or have been diagnosed with a trauma-related condition, using tools developed to assist attorneys in the ethical representation of clients with PTSD,²³ or by collaboration with a mental health professional (keeping in mind the attorney’s duties of confidentiality to their client).²⁴ The attorney may need to assist the client in identifying services that are available in the community if the client wishes. This obligation to

Roll Call

recognize indicators of trauma, PTSD, etc. in no way creates the obligation to provide mental health treatment; attorneys are not usually trained to provide social work or psychological services (although many state laws allow attorneys to provide limited psychological services to clients “when...carrying out the functions of his or her employment”²⁵). It merely asks the attorney to serve their role: a zealous advocate for the client.

Attorneys working with veteran clients who have experienced trauma must also prepare themselves for an eventual discussion about suicidal ideation; trauma or PTSD increases the risk of suicidality.²⁶ Northwest Justice Project’s Veterans Project’s statement that “encountering a suicidal veteran is a question of ‘when’ and not ‘if’” applies to all low-income, legal aid clients, as does the directive that “advocates must have a plan—and rehearse that plan—for what they should do when they encounter a suicidal veteran.”²⁷ When working with trauma-exposed veterans, or veterans who live with PTSD, attorneys can be first-responders, but also can be the connection to services a veteran desperately needs. They can be the first person who has listened to the client, or the first person the client trusts to tell their story. They are, truly, an “advisor.”

V. Conclusion

Attorneys working with clients who have experienced trauma often wear many hats, and there is no question that many attorneys already go above and beyond for clients with mental health issues, especially in the veterans advocacy community. The ethical obligations established by the Model Rules of Professional Conduct meet clients where they are at; they acknowledge that for some clients, the war doesn’t stop. As advocates, we have the duty to engage with our clients accordingly. They deserve no less.

Footnotes:

¹ Wes Moore, *How to Talk to Veterans About the War*, TED Talk (May 13, 2014), available at https://www.ted.com/talks/wes_moore_how_to_talk_to_veterans_about_the_war/transcript?language=en#t-571579

² *Id.*

³ National Center for PTSD, *How Common is PTSD?*, Department of Veterans Affairs (May 29, 2015, 7:30 PM), <http://www.ptsd.va.gov/PTSD/public/PTSD-overview/basics/how-common-is-ptsd.asp>

⁴ American Bar Association, Model Rules of Professional Conduct, Rule 1.1: Competence (Comment 5) (2015)

⁵ Mary Seighman, Erika Sussman, and Olga Trojillo, *Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys*, National Center on Domestic Violence, Trauma & Mental Health (December 2011), at 6

⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition (2013).

⁷ Jeffrey Lewis Wieand Jr., *Continuing Combat at Home: How Judges and Attorneys Can Improve Their Handling of Combat Veterans with PTSD In Criminal Courts*, 19 Wash & Lee J. Civil Rts & Soc. Just. 227, 237 (Fall 2012)

⁸ *Id.*

⁹ *Id.* at 239

¹⁰ Judge Robert T. Russell, Jr., *Veterans Treatment Courts* (2014), in Brockton D. Hunter and Ryan C. Else (Eds.), *The Attorney’s Guide to Defending Veterans in Criminal Court*, Veterans Defense Project, Minneapolis, MN (523-535, at 531)

¹¹ Bazelon Center for Mental Health Law, *The Role of Mental Health Courts in System Reform*, in Patricia C. Kuszler and Christy Thompson Ibrahim (Eds.), *Discussion 16: Mental Health Courts, Discussions on Disability Law and Policy*, Carolina Academic Press, Durham, NC (2014) (253-267, at 258)

¹² *Monk v. Mabus*, No. 3:14-cv-260-WWE (D. Conn.) (2014)

¹³ Sec. Chuck Hagel, *Memorandum for Secretaries of the Military Departments: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests My Veterans Claiming Post Traumatic Stress Disorder*, Department of Defense (September 3, 2014)

¹⁴ American Bar Association Model Rules of Professional Conduct, Rule 1.14: Client with Diminished Capacity (2015)

¹⁵ Maj. Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 Mil. L. Rev. 144, 165 (2009)

¹⁶ *Id.* at 166

¹⁷ Northwest Justice Project, *Representing Washington Veterans: Discharge Upgrades and Records Corrections* (2016), available at <http://www.repwavets.org/discharge-upgrades--records-corrections.html#Basic>

¹⁸ Seamone, *The Veterans’ Lawyer as Counselor*, at 224

¹⁹ *Id.* at 223

²⁰ American Bar Association Model Rules of Professional Conduct, Rule 2.1: Advisor (2015)

²¹ Barbara Glesner Fines and Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. Rev. 965, 969 (Summer 2007)

²² Maj. Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 Mil. L. Rev. 144, 145 (2009)

²³ Maj. Evan Seamone, *The Veterans’ Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 Mil. L. Rev. 185, 223 (Winter 2009)

²⁴ Maj. Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 Mil. L. Rev. 144, 178 (2009). An attorney who chooses to collaborate with a mental health professional must ensure that they fully understand the ethical and legal obligations of the professional they are working with, including issues of mandatory reporting for child abuse, Tarasoff duties if a client is at risk

Roll Call

of harming themselves or others, and the confidentiality obligations that apply to the professional.

²⁵ RCW 18.83.200; See also Maj. Evan Seamone, The Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder, 202 Mil. L. Rev. 185, 201 (2009), at FNs 75-76

²⁶ National Center for PTSD, PTSD and Suicide, Department of Veterans Affairs, available at <http://www.ptsd.va.gov/professional/co-occurring/ptsd-suicide.asp>

²⁷ Northwest Justice Project, Representing Washington Veterans: Cultural Competence Tips for Veterans" (2016), available at Northwest Justice Project, Representing Washington Veterans: Discharge Upgrades and Records Corrections (2016), available at <http://www.repwavets.org/discharge-upgrades--records-corrections.html#Basic>

Survivor Benefit Plan Update: Special Needs, New Spouses

Author: Mark E. Sullivan*



*Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders.

Mark E. Sullivan
Sullivan & Tanner
Phone - 919-832-8507
Email - mark.sullivan@ncfamily.com
Licensed in: Ohio, District of Columbia and North Carolina

Introduction

Congress made two important revisions to the military Survivor Benefit Plan (SBP) in the last days of 2015. The first dealt with SBP payments to a Special Needs Trust for children who are incapable of self-support.

Special Needs Trust and SBP Payments

The National Defense Authorization Act (NDAA) of 2015 amended Title 10, U.S. Code, §§ 1448, 1450 and 1455 to allow a person who has established a Special Needs Trust (SNT) to specify payment of a dependent-child SBP annuity directly to the Trust. An active-duty servicemember (or a military retiree) may, during his or hers life,

irrevocably substitute a self-settled SNT created for the benefit of a child with a disability as the SBP beneficiary rather than having the SBP annuity payments made directly to the disabled dependent child.¹ Since generally a member entitled to receive military retired pay makes an election as to SBP beneficiaries which is irrevocable, the Defense Department describes this as "an add-on election" to the election of a servicemember or retiree regarding SBP coverage for a dependent child.

Previously servicemembers and military retirees could not designate a Special Needs Trust as the beneficiary for the SBP. Retirees have been hesitant to elect a disabled adult child as SBP beneficiary out of concern that additional income would disqualify the child from receiving other government benefits, assistance and subsidies for disabled adults, such as housing assistance and Medicaid.

SNT Rules

There are specific terms about the Trust which must be followed. Here are the primary points for eligibility to elect the SNT option:

- First of all, the member or retiree must have previously elected Spouse and Child or Child Only coverage for a disabled child under the SBP.
- Second, the SNT must be in compliance with certain provisions of federal law.²
- Next, according to the Department of Defense (DoD) guidance memorandum of 12/31/2015, such an election must be made by the member's or retiree's written statement which clearly says that future SBP annuity payments are to be made to the SNT instead of being made to the disabled dependent child directly.³
- A "dependent child" is defined in 10 U.S.C. § 1447(11). The dependent child must also be "disabled"⁴ (that is, unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months). Thus a "disabled dependent child" means a child is who is a dependent child pursuant to 10 U.S.C. 1447(11) and "disabled" pursuant 42 U.S.C. § 1382c(a)(3).
- For the SNT to qualify as an SBP recipient, the DoD memorandum requires that the election statement include (i) the name of the trust, (ii) its Tax Identification Number and (iii) a licensed attorney's statement that the trust satisfies the requirements of a self-settled special needs trust pursuant to federal and state law. As an alternative, there can be submitted a certification from the Social Security Administration that the trust qualifies as a Special Needs Trust pursuant to Title 42, U.S. Code.
- This decision may be made ordinarily during the life of the servicemember or retiree through a written statement that

Roll Call

designates future SBP payments to the SNT. The decision must be irrevocable, and this also applies to the trust.

- However, when a servicemember dies in the line of duty or at any time prior to assigning the SBP benefits to a qualifying SNT, the surviving parent, a grandparent, or a court-appointed guardian may file the election in certain circumstances.
- Terms for setting up the Special Needs Trust are specified at Sections 2.a.-c. in the DoD memorandum with regard to establishment upon the death of the retiree, the death of a member on active duty (in the line of duty), and the death of a servicemember during "inactive duty training" (that is, as a member of the National Guard or Reserves).

All of this is very important for a dependent child with a disability. If military SBP benefits are paid directly to a dependent child with a disability, whether the child is an adult or a minor at the time, those payments may have a negative impact regarding that dependent's access to public benefits. Note that Medicaid is the key benefit required in order to access many services needed for any level of independence as an adult.

SNT: Final Notes

The federal statute does not authorize the use of special needs trusts for disabled spouses. More information can be found at the DFAS (Defense Finance and Accounting Service) website, www.dfas.mil > Provide for Loved Ones > Survivor Benefit Plan > Special Needs Trust. Customer Service at DFAS can answer specific questions about the SBP/SNT issue: <http://www.dfas.mil/retiredmilitary/about/aboutus/customer-service.html>.

SBP – New Spouse, Former Spouse

The second change in SBP rules dealt with the issue of a new spouse, with the SBP already assigned to a former spouse who is now deceased. This is what the author calls the "Harold Brown exception."

Flashback - World War II and the Tuskegee Airmen

A client of the author, Dr. Harold H. Brown, LtCol, USAF (Ret.), was one of the Tuskegee Airmen from World War II. As of 2015 he was 89 years old and was trying to obtain coverage for his wife, Marsha Bordner, under the Survivor Benefit Plan. His former wife, to whom SBP was awarded with his consent under a court order, had died. However,

DFAS refused to grant new-spouse coverage, citing a DFAS legal opinion.

Dr. Brown was no late-comer to the SBP claim. He had entered flight training in January of 1943, and was graduated from the Tuskegee Institute in May 1944. He was assigned to the 332nd Fighter Group, also known as the "Red Tails." One of the original Tuskegee pilots of World War II, he was stationed in Italy in September 1944. He was shot down twice over enemy territory, the first after being attacked by a squadron of ME 262's, the first jet fighter. After his second shoot-down, he was interned at the notorious Moosburg POW camp, which was originally planned for 10,000 prisoners; it contained 80,000 by the end of the war. He stayed at the camp until it was liberated, when he returned to the United States and continued his service. He retired from the Air Force in May of 1965 as a lieutenant colonel. In 2007, he was part of the group of Tuskegee Airmen awarded the Congressional Gold Medal.

New Legislation

Congress was contacted about the problem Brown and others faced regarding deceased former spouses who had been awarded SBP, and the DFAS position that this prevented a current spouse from receiving SBP coverage. Section 641 of the FY 16 NDAA fixes this problem, and the law is retroactive for retirees affected by the 2013 DFAS legal opinion. Under the current legislation an individual who previously elected former-spouse coverage which is now discontinued may elect coverage for a current spouse during the limited "open season" which started 11/25/15. These would be members who are married at the time of the death of a FS (former spouse) beneficiary, and they may choose to give coverage to their current spouse if the election is received by the retired pay center⁵ within one year after the death of the FS beneficiary. In addition, a person who is not married at the time of the death of the FS beneficiary – and who later married – may elect to provide spouse SBP coverage.

Except as stated above, this open season does not apply if the member is not currently married or if the former spouse SBP coverage was discontinued for any reason other than the death of a covered former spouse. This election must be received within one year after the date on which the individual marries (or remarries).

Regardless of whether an individual's remarriage occurred before or after the death of the FS, a military retiree whose FS dies before the effective date of the new legislation may elect coverage for his or her current spouse. Once made, this election is irrevocable. Coverage may only be established at the level of coverage previously elected for the former spouse.

A member who believes that the open season may apply to him or her should contact Customer Service (see **SNT: Final Notes** above) and enclose these documents along with an expression of interest:

- Certificate of Death for the Former Spouse
- Marriage Certificate for Current Spouse
- Birth Certificate for Current Spouse

Roll Call

- Expression of Interest Form (get copy from Customer Service or from the DFAS website)

Once DFAS receives the inquiry with the necessary supporting documents, it will prepare an estimate of the costs associated with the coverage, and any retroactive premiums due from the effective date of the coverage. It will provide this estimate along with a blank "Final Election" form. If the member, after review of the figures, decides to elect the coverage, then he or she must complete and sign the "Final Election" form and return it. The election must be made with the form provided or in writing. For those whose retired pay is serviced by DFAS, it must be received by the Defense Finance and Accounting Service-Cleveland with a postmark on or before November 24, 2016.

When is the election effective? If the member had been married for at least one year on the former spouse's date of death, the effective date is the first day of the first month after the date of death of the former spouse. For those who were married after the former spouse's date of death (or in the one-year period preceding the date of death of the former spouse), the effective date is the first day of the first month after the first anniversary of the marriage. Retroactive premiums will be effective on the date of the election, and the member is responsible for all premiums for this time period.

The retired pay center will provide an estimate of premiums and payment options after receipt of the member's inquiry, and the member will be required to pay the premiums in either a lump-sum amount or over a period of months. All premiums must be paid within 24 months of the date of final election.

The date of enactment of this section is November 25, 2015. Further information is available through Customer Service at DFAS (see **SNT: Final Notes** above).

Footnotes:

¹ The SNT is a document specifically designed for the benefit of a person with a disability by providing a set of instructions for managing money set aside to help the one with a disability. Trusts are generally drafted and implemented pursuant to state law.

² The relevant statute is 42 U.S.C. §1396p(d)(4)(A) or (C).

³ The memo is titled "SUBJECT: Enabling Payment of Survivor Benefit Plan Annuities to a Special Needs Trust," and this document is available at: www.moaa.org/uploadedFiles/Content/Take_Action/Top_Issues/Spouse_and_Family/SNTPolicyFinal31Dec15.pdf. Note that the memorandum does not create a new form for making the election. Instead the memo refers members and retirees to DD Form 2656 and it's Section X (Remarks). Separate statements, though, attached to DD Form 2656, will likely be the better practice because of the information that the election statement must contain (see below).

⁴ This is defined in 42 U.S.C. § 1382c(a)(3)

⁵ The Defense Finance and Accounting Service in Cleveland, Ohio processes pension division orders for Army, Navy, Air Force and Marine Corps cases, while the Coast Guard Pay and Personnel Office in Topeka, Kansas processes them for that service, and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration.

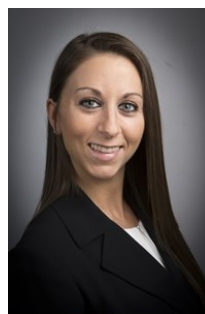
"About Face - Congress Alters the Age Old Military Retirement System"



Authors: Steven P. Shewmaker, Esq. and Alexa N. Lewis, Esq., Attorneys at law

Steve Shewmaker has previously served in the Army, where he served in Iraq, Kuwait and Afghanistan. Steve now is a founding partner of Shewmaker & Shewmaker, located in Atlanta, Georgia. Steve is licensed to practice in Georgia.

Steve Shewmaker
Shewmaker and Shewmaker
Phone: (770) 939-1939
Email: sshewmaker@shewmakerandshewmaker.com
Licensed in: Georgia



Alexa Lewis received her J.D. from Georgia State University College of Law. She practices family law, military law and criminal defense at Shewmaker & Shewmaker. Alexa is licensed to practice in Georgia.

Many family law attorneys recognize military divorce as a unique sub-specialty of family law. This is because military divorce blends state domestic law with several federal statutes applica-

Alexa Lewis
Shewmaker and Shewmaker
Phone:(770) 939-1939
Licensed in: Georgia

ble only to military service members.^{1 2} If you have handled several military divorces, you probably have become attuned to the major

pitfalls and can spot these issues.³ Nevertheless, if you don't surf the Congressional Record (or don't have an office right outside Fort Benning) you may not realize that 2015 will go down as a watershed year for the Department of Defense, particularly in terms of Congress' overhaul of the military retirement program. On November 25, 2015, President Barack Obama signed the 2016 National Defense Authorization Act (NDAA) ushering in a new military retirement system beginning in January 2018.⁴ Here's what family law attorneys need to know

Roll Call

about the new military retirement plan, also known as the “Modernized Retirement Plan”. Background: Congress has funded military retirement programs in various forms dating back to 1855.⁵ From the beginning, military retirement programs have been “defined benefit” programs.⁶ Congress’ original intent was to provide security to senior officers to motivate retirement in order to create vacancies for junior officers to progress.⁷ Over time, the retirement system expanded to include enlisted soldiers, and it began to add other enhancements, evolving into the system we have today.⁸ The current military retirement plan, which has been in effect since 1948, is an “all or nothing” plan wherein a service member receives a retirement only if she serves twenty years (or more) on active duty or serves for a period of twenty years in the reserves or national guard that are deemed qualifying for retirement.⁹ This is often referred to as a “cliff vesting” plan.¹⁰ Military retirement is frequently referred to as “half your pay” in retirement after twenty years of service. While this is an oversimplification of a more complex formula, it is quite often close to half the service member’s pay in retirement. The current system is a non-contributory defined benefit system. Service members make no monetary contribution to their retirement.¹¹ They receive a retirement based upon a “retirement multiplier”; this multiplier is the product of 2.5% (0.025) and the service member’s total years of qualifying service. The service member’s final retirement is then determined by the product of the multiplier and the average of the service member’s highest three years of base salary.¹²

The Problem:

For many years, critics have claimed that the current military retirement system is too expensive to maintain.¹³ Today, the cost of the military retirement system exceeds 111 billion dollars annually.¹⁴ Military retirement funding and other military spending is a significant and growing portion of the U.S. annual budget.¹⁵ Also, as a cliff vesting plan, the service member must serve a full 20 years to receive any retirement.¹⁶ It is estimated that only 17% of all enlisted service members and 49% of all officers serve long enough to qualify for retirement.¹⁷ Most leave voluntarily before 20 years. Others are not promoted and discharged. Still, others may be administratively separated for misconduct or they may be criminally prosecuted by the military and lose all retirement benefits. One of the current plan’s major criticisms is that over 80% of all who serve the country - including thousands who actually serve in combat - leave the military without any retirement benefit.¹⁸ Consequently, critics call the current system an impediment to attracting competitive recruits;¹⁹ they also point out that the mediocre mid-career service members are motivated to remain in service under the current plan. As a result of these and other criticisms, many members of Con-

gress considered the current retirement program too costly and antiquated.²⁰ Ultimately, in the 2013 NDAA, Congress established the “Military Compensation & Retirement Modernization Commission” to review the current system, consider some of these criticisms, and recommend changes.²¹ On January 29, 2015, the Commission released its final report, recommending an overhaul to the current retirement plan, including establishing an enhanced defined contribution plan.²² In the 2016 NDAA, Congress adopted many of the Commission’s proposals.

The Modernized Retirement Plan:

The 2016 NDAA amends the military retirement plan and launches the Modernized Retirement Plan on January 1, 2018. This plan creates three distinct categories of service members: (1) those serving on (and before) December 31, 2017 with more than twelve years of service at that time; (2) those serving on (and before) December 31, 2017 with less than twelve years of service at that time; and (3) those who join on or after January 1, 2018.²³ Those in the first category (> 12 years of service) will remain under the current retirement system, without exception. Those in the second category (< 12 years of service) may opt into the new system or remain under the current system.²⁴ Those in the third category may not choose; they will only be eligible for the new retirement system.²⁵ This is a standard “grandfather” plan established for the sake of equity. Congress estimates that those with more than twelve years of service by January 1, 2018 are strongly vested in the current retirement system and should not be disturbed. Those with less than twelve years of service may do better under either system depending upon how much service they have, how much (if any) “continuation pay” they receive (see below), and how much they desire to remain in the military. But, what are those in the middle category choosing? And what are our new recruits getting? The new retirement system includes: (1) an enhanced Thrift Savings Plan (TSP), (2) a reduced defined benefit plan, (3) an interim “continuation” bonus, and (4) an option to receive an immediate partial lump sum payment against the defined benefit upon retirement. First, a TSP account will be established for all new service members.²⁶ After the service member’s first sixty (60) days of service, the Government will automatically begin contributing 1% of the service member’s base pay into this account every month. The Government will match, dollar-for-dollar, the service member’s contributions up to 3% of base pay. Finally, if a service member contributes above 3%, the Government will contribute \$0.50 towards every dollar the service member contributes above 3%, up to 5%. Therefore, if the service member makes a 5% contribution, the Government

Roll Call

will match it (with a 5% maximum contribution). These contributions continue until the service member leaves service, retires, or reaches 26 years of service.²⁷ The TSP becomes the service member's property after two (2) years of service. These contributions are invested under the direction of the TSP Board in a variety of U.S. Government securities and stock index funds.²⁸ Second, the military's defined benefit program remains intact. However, the 2.5% constant (addressed above), that couples with the service member's total years of service to create the retirement multiplier is reduced to 2% in exchange for the Government's TSP contribution. Since the 2.5% constant had the practical effect of yielding a retirement of 50% of the service member's base pay in retirement over a twenty year career, the lower constant yields 40% of the service member's base pay in retirement.²⁹ Third, for those service members who achieve twelve (12) years of service on or after January 1, 2018, the Modernized Retirement System requires that the active duty service member be paid not less than 2.5 times their monthly base pay (and the Reserve/National Guard service member receive not less than 0.5 times the monthly base pay of an active duty service member of equivalent rank and years of service). At the discretion of the Secretary of the particular service, the active duty service member may also be paid as much as thirteen (13) times the monthly base pay (and the Reserve/ National Guard member may be paid as much as six (6) times the monthly base pay of his active duty equivalent). The ultimate size of such continuation bonuses are unclear at this time. Congress' intent was to allow the service secretaries discretion in order to "shape" the force.³⁰ Finally, the 2016 NDAA allows retirees (under the new system) who are entitled to begin receiving retirement to receive certain immediate "lump sum" payments against the defined benefit portion of their pension.³¹

The plan allows for a retiree to receive either 25% or 50% of the annuity in a discounted present value lump-sum payment. The retiree receives the remainder of the annuity each month, and the annuity returns to the full annuity amount upon the retiree's 62nd birthday. The Defense Finance and Accounting Service (DFAS) administers the military retirement system through its implementing regulation, the DoD Financial Management Regulation. This regulation has not yet been updated to reflect the Modernized Retirement System. Several aspects of the Modernized Retirement System are still uncertain.³² What is clear, is that the Modernized Retirement System places many important choices into the hands of the service member. Because many service members may be financially naive, Congress mandates that DoD implement financial counseling, beginning in 2018. Only time will tell whether the Modernized Retirement System will benefit the De-

partment of Defense or its 2.1 million members.³³ For the military family law attorney, the Modernized Retirement System will require her to keep an ear to the ground as the details evolve. It will also require continued competency in division of the military defined benefit annuity, TSP divisions and other ancillary military benefits (e.g. Survivor Benefit Plan and military medical benefits), because none of these programs are going away. Most important, it will require the practitioner to be cognizant of the different classes of service member the Modernized Retirement System creates in 2018 and how their choices and resulting benefits will effect property division in marital dissolution.

Footnotes:

¹ E.g. 10 U.S.C. §1408 (2015) - Payment of retired or retainer pay in compliance with court orders (This statute is more commonly referred to as the "Uniformed Services Former Spouse Protection Act") See *Mansell v. Mansell*, 490 U.S. 581 (1989); *Powell v. Powell*, 80 F.3d 464 (11 Cir. 1996); *Holler v. Holler*, 257 Ga. 27 (1987).

² Most of the statutes and corresponding regulations regarding "military divorce" apply to uniformed members of the Department of Defense as well as members of the U.S. Coast Guard, members of the National Oceanic and Atmospheric Administration Commissioned Officer Corps and the U.S. Public Health Service Commissioned Corps.

³ For example: (1) The jurisdiction to divide a military pension (incident to a divorce) follows independent jurisdictional requirements over the service member, as defined by 10 U.S.C. §1408, which may be perilously lost if not preserved; (2) The military has regulations regarding interim family support which range from mandating such support to merely encouraging it (e.g. Army Regulation 608-99); (3) TRICARE health benefits granted to a former spouse may be lost if the former spouse remarries; (4) the Survivor Benefit Plan annuity may be lost if the beneficiary remarries; and (5) special residency and stay of proceedings procedures under 50 U.S.C. § 3901, et seq. (The Servicemembers Civil Relief Act), just to name a few.

⁴ The NDAA is federal law passed each year consecutively since 1963. The NDAA specifies annual budget and expenditures for the Department of Defense. It also fine tunes the operations and business of the Defense Department.

⁵ U.S. Department of Defense, Military Compen-

Roll Call

sation Background Papers 685 (6th Ed. May 2005). Act of February 28, 1855, Ch. 127, § 1, 10 Stat. 616 (1855).

⁶ A defined-benefit plan is a retirement plan where the employee, upon retirement, is entitled to a fixed periodic payment. See “Definitions,” Internal Revenue Service, accessed December 10, 2014, <http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/Definitions>; See also *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152 (1993). This is in contrast to a “defined contribution plan” in which a certain amount or percentage of money is set aside each year by a company (or the employee) for the benefit of the employee.

⁷ Advisory Commission on Service Pay, Career Compensation for the Uniformed Forces a Report and Recommendation for the Secretary of Defense (Dec. 1948).

⁸ Major Wener Vieux, *The Military Retirement System: A Proposal for Change*, Military Law Review, Volume 218, Winter 2013, U.S. Department of Army Pamphlet 27-100-218, available at https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/218-winter-2013.pdf.

⁹ The Army and Air Force Vitalization and Retirement Equalization Act of 1948, Pub. L. No. 80-810, 62 Stat. 1081 (1948).

¹⁰ Katie Adams, *What is Cliff vesting?* Investopedia, available at <http://www.investopedia.com/ask/answers/09/what-is-cliff-vesting.asp>.

¹¹ Kristy N. Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service, December 10, 2015, available at, <https://www.fas.org/sgp/crs/misc/RL34751.pdf>.

¹² The product of the multiplier and the average of the service member’s highest three years of base pay applies to all service members whose service began on or after September 8, 1980. 10 U.S.C. 1407. For service members who began service prior to September 8, 1980, the multiplier was applied to the service member’s final base pay. 10 U.S.C. 1406.

¹³ Tim Kane, *Military Retirement: Too Sweet a Deal?*, Charlie Mike, available at, <http://warontherocks.com/2015/03/military-retirement-too-sweet-a-deal/>; Lawrence J. Korb, Alex Rothman, and Max Hoffman, *Reforming Military Compensation Addressing Runaway Personnel Costs Is a National Imperative*, Center for American Progress, May 2012, available at, https://cdn.americanprogress.org/wp-content/uploads/issues/2012/05/pdf/military_compensation.pdf.

¹⁴ Kristy N. Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service, December 10, 2015, available at, from, <https://www.fas.org/sgp/crs/misc/RL34751.pdf>.

www.fas.org/sgp/crs/misc/RL34751.pdf; Major Wener Vieux, *The Military Retirement System: A Proposal for Change*, Military Law Review, Volume 218, Winter 2013, U.S. Department of Army Pamphlet 27-100-218. Retrieved from, https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/218winter-2013.pdf.

¹⁵ Office of the Under Secretary of Defense (Comptroller)/ Chief Financial Officer, *Department of Defense Fiscal Year 2015 Budget Request*, March 2014, available at, http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2015/fy2015_Budget_Request_Overview_Book.pdf.

¹⁶ Service members may qualify for retirement by serving not less than twenty years on active duty, which may be consecutive service or accumulated service; or they may serve not less than twenty years of qualifying reserve service, meaning that they must earn not less than fifty (50) retirement “points” in a year.

¹⁷ Department of Defense, *Valuation of the Military Retirement System*; September 30, 2012, 24, available at, http://actuary.defense.gov/Portals/15/Documents/MRF_ValRpt2_2012.pdf.

¹⁸ Report of the Military Compensation and Retirement Modernization Commission, January 2015, available at, <http://mldc.whs.mil/public/docs/report/MCRMC-FinalReport-29JAN15-HI.pdf>; Department of Defense, *Report of the Tenth Quadrennial Review of Military Compensation, Volume II Deferred and Noncash Compensation*, July 2008, 12-16, available at, <http://www.defense.gov/news/qrmcreport.pdf>; Defense Business Board, *Report to the Secretary of Defense: Modernizing the Military Retirement System*, November 10, 2014, available at, <http://dbb.defense.gov/Portals/35/Documents/Reports> (Cont. Page 5)

¹⁹ As the Commission indicates in its Report, the Department of Defense has not kept pace with private sector employers where the Internal Revenue Service requires vesting of retirement plans under much shorter time frames. As a result, with an ever younger, “millennial” generation, “research has shown members of this generation change jobs frequently and tend to favor flexible retirement options, rather than the defined benefit pension plans preferred by previous generations.” Report of the Military Compensation and Retirement Modernization Commission, January 2015, available at <http://mldc.whs.mil/public/docs/report/MCRMC-FinalReport-29JAN15-HI.pdf>.

²⁰ Kristy N. Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service, December 10, 2015, available at <https://www.fas.org/sgp/crs/misc/RL34751.pdf>.

²¹ National Defense Authorization Act for Fiscal Year

Roll Call

2013, GovTrack.us., available at www.govtrack.us/congress/bills/112/hr4310/text.

²² Military Compensation and Retirement Modernization Commission, January 2015, available at <http://mldc.whs.mil/reports#final>.

²³ National Defense Authorization Act for Fiscal Year 2016, available at <https://www.gpo.gov/fdsys/pkg/BILLS-114s1356enr/pdf/BILLS-114s1356enr.pdf>.

²⁴ The 2016 NDAA establishes the period from January 1, 2018 through December 31, 2018 as the election period. *Id.*

²⁵ *Id.*

²⁶ Currently, the TSP is optional for members of the Department of Defense (since 2000), and the Government does not contribute or match contributions. The TSP is not a 401(k) but does bear many similarities. See generally, Mark Sullivan, A Teaspoon of TSP, *The Family Law Rev.*, 6 (Winter 2016).

²⁷ The 2016 NDAA states that the Government will cease making TSP contributions for service members after they have served for 26 years, though the service member may continue to serve.

²⁸ National Defense Authorization Act for Fiscal Year 2016, available at <https://www.gpo.gov/fdsys/pkg/BILLS-114s1356enr/pdf/BILLS114s1356enr.pdf>.

²⁹ For example, today a Lieutenant Colonel retiring after 20 years with a base pay of \$8,000.00 (average of previous three years) would compute her retirement as follows: $0.025 \times 20 \times 8,000 = \$4,000.00$, whereas under the new retirement system, she would compute it as follows: $0.02 \times 20 \times 8,000 = \$3,200$.

³⁰ "Shaping the force" is a term meaning that this continuation bonus may be greater for certain military ranks or occupational specialties (e.g. pilots) where the service may be short qualified personnel; its use is intended to motivate people to remain in service; Kristy N. Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service, December 10, 2015, available at <https://www.fas.org/sgp/crs/misc/RL34751.pdf>.

³¹ This new lump-sum aspect harkens back to an earlier plan, called the Career Status Bonus Redux (CSB Redux). Under CSB Redux, service members who entered the service after July 31, 1986 could elect the "high three" retirement plan or the CSB Redux plan in their 15th year of service. If CSB Redux were elected, the service member received a \$30,000 lump sum payment at that time in exchange for a lower retired pay multiplier and a lower annual cost of living adjustment. 10 U.S.C. §1409; See Defense Finance and Accounting Service website, available at <http://www.dfas.mil/retiredmilitary/plan/estimate/csbredux.html>.

³² E.g. Will the service member's spouse be required to concur to elect the Modernized Retirement System for members with less than twelve years of service? How will the Modernized Retirement System account for disability payments such as Combat Related Special Compensation? How much continuation pay will the difference Service Secretaries allot for service members and will they do so based upon military occupational specialty?

³³ Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer, Department of Defense Fiscal Year 2016 Budget Request, February 2015, available at http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2016/FY2016_Budget_Request_Overview_Book.pdf

"To Have and to Hold: Retirement Considerations in Military Divorce"

Author: Brentley Tanner



Mr. Tanner is a partner at Sullivan & Tanner, P.A., in Raleigh, North Carolina. He is a North Carolina Board Certified Specialist in Family Law.

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 time.

I. The Traditional Military Retirement - Walking Through the Pension Minefield

The first major marital asset, the military retirement, is an available asset to a servicemember and his/her spouse upon the completion of twenty creditable years of service. Once the servicemember reaches that milestone, there will be either an immediate or deferred payment from that annuity depending on whether the servicemember retires active duty or as a reservist. For the family law practitioner, there should be a myriad of considerations in the initial meeting with the servicemember. Those considerations include

Roll Call

the jurisdictional parameters, the retirement eligibility and computations of the servicemember, issues with divisibility of the military retirement, and the procurement of direct retirement payments to the former spouse.

The first consideration, jurisdiction over the military retirement, is not a creature of subject matter or personal jurisdiction. Rather, it is a matter of federal law. Specifically, the Uniform Former Spouses Protection Act ("UFSPA") as codified in 10 U.S.C. 1408 sets out the three, and only three, basis in which a state court may exercise jurisdiction over a military retirement in a domestic relations case. The three available manners to exercise jurisdiction over the military retirement include when 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."²

Domicile is the state in which the servicemember/retiree intends to remain indefinitely on a permanent basis. While there is not a bright-line test set out in the UFSPA, each state sets out a standard for determining domicile. The standard components include evidence on where the individual physically lives, votes, claims for tax purposes, has property titled and/or registered in the state, has a driver's license, possesses occupational licensing, and/or has financial accounts and dealings within the state.

Residence other than because of military assignment is when you have a servicemember/retiree who lives in one state but then typically serves on a military installation at another location. For example, if you had a servicemember voluntarily resided in South Carolina but who worked at Ft. Bragg in Fayetteville, North Carolina, you would have a suitable basis to seek the pension division in South Carolina.

The last prong, consents to the jurisdiction, typically occurs when either the servicemember invokes the powers of the court to do some affirmative act within the domestic relations laws by commencing a lawsuit and/or when the servicemember counterclaims in response to a former spouse's lawsuit, thereby making a general appearance. Each state has nuances as to what qualifies as a general appearance versus special and/or limited appearances. The quagmire for the family law attorney is deciphering whether invoking any claims outside of property division creates an appearance to land the servicemember in the state for pension division. For instance, does the filing of an absolute divorce claim (separate from a

petition for property division) give the former spouse sufficient grounds to counterclaim for property division and assert that the lawsuit for the divorce submits the servicemember to the overarching power of the state tribunal. Again, aside from the arguments of in rem versus in personam jurisdiction, it is a matter that state courts treat differently.

The consideration of which location the pension should be divided is important because different jurisdictions have variable laws as to if, and how, a military retirement should be divided. For instance, some states freeze the valuation dates at the moment the parties separate, some states freeze the valuation date at the date of divorce and/or distribution, some states do not divide non-vested retirements (which would be applicable if the military retirement is being divided before the 20 year creditable service mark), and some places will not divide military retirements at all.

Assuming that the state court has jurisdiction over the military retirement under UFSPA, the next consideration is figuring out the servicemember's eligibility for a military retirement. An active duty servicemember who receives a longevity retirement must have a minimum of 20 years of active duty service.³ Upon retirement, the active duty retiree would be immediately vested with the retirement and would receive the immediate benefit. If you have a servicemember who is, or has, worked as a reservist or National Guard member, then he/she will only collect military retirement upon reaching the age of 60 if he/she has 20 "qualifying years" of creditable service. A qualifying year that counts towards retirement is one in which the reservist or National Guard member gets at least 50 retirement points within the service period.⁴

The only exception to the age 60 requirement for reservists and/or National Guard is if the member is active duty in the reserve component serving as an active guard reserve status or the eligibility age will be "below 60 years of age by three months for each aggregate of 90 days on which such person serves on such active duty or performs such active service in any fiscal year after January 28, 2008, or in any two consecutive fiscal years after September 30, 2014."⁵ The reservist or National Guard member must also apply for the retirement, perform the last six years of qualifying service with the Active Reserve, and have other entitlement to retired pay for other armed forces.

It is important for the family law attorney to make sure that he/she obtains the essential documents when figuring out the retirement points earned during the marriage. Some of the most vital documents (although not an exhaustive list) include the DD-214(s), the DA Form 1383, AHRC Form 249-2-E, DARC Form

Roll Call

249, or AGUZ Form 115, NGB Form 22 and 23, AF Form 526, NAVPERS Form 1070-611, NAVMC Form 768, CG HQ Form 4973 and any DA Form 1380 or DA Form 1379. These forms would provide a comprehensive viewing of the servicemember's military career in determining which parts are subject to division.

As to the calculation of the actual gross retired pay received, it is determined by the years of service and the grade/rank at the time of retirement. However, the computation in determining the longevity retired pay depends on the Date of Initial Entry to Military Service (DIEMS) as to which method is utilized in that computation. If the DIEMS for the retiree is before September 8, 1980, then the final retired pay is used in the calculation. Under this method, the formula is 2.5 percent times the years of creditable service times the final basic pay at retirement.⁶ As we become more removed from that date, it is less likely that any cases will include such retirees. If the DIEMS for the retiree is after September 8, 1980 but before August 1, 1986, then the computation is done based on the average of the highest 36 months of base pay. In this computation, the retired pay is 2.5 percent times the years of creditable service times the average of the highest 36 months of base pay. This is the most common method. The last possibility is when you have a retiree whose DIEMS is on or after August 1, 1986. In that scenario, a retiree can either do nothing and be defaulted into the 36-month highest base pay retirement system or a retiree may elect the Career Status Bonus (CSB) at his/her 14 to 15 years of service mark. If this is chosen, the servicemember obligates him or herself to a minimum of 20 years active duty and receives a mid-career bonus.⁷ By choosing this option, the retiree is in what is denoted as the REDUX retirement. The gross retired pay for the REDUX retirement is computed at 40 percent of the average of the highest three years of basic pay when the member has completed 20 years of creditable service.⁸ Moreover, this computation is done by subtracting one percent for each full year that the servicemember's total creditable years of service is less than 30 years. At the 30 year creditable service mark, the servicemember would get a three and one-half percent increase per year for each additional year served up to 30 creditable years of service.⁹ There are also cost of living adjustment calculations that differ between the default high-three retirement and the REDUX retirement.¹⁰ Moreover, the current traditional military retirement system does not require the servicemember to contribute any premiums and/or funds towards the actual retirement. Instead, only the passage of the minimum 20 creditable years is required to vest in the

retirement plan.

Assuming that the case is beyond the jurisdictional issues and that the servicemember is receiving some form of gross retired pay for his/her service, the family law attorney needs to ensure that the amounts being received by the military retiree is, in fact, divisible. Under UFSPA, the only portion of retired pay that is divisible in state domestic relations is that which constitutes "disposable retired pay." Disposable retired pay refers to the total month retired pay to which a member is entitled less amounts that:

"(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(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); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section."¹¹

In general terms, the disposable retired pay does not include an award of Veterans Affairs (VA) disability that is offset from the gross retired pay, it does not include the pre-tax deduction for the survivor benefit plan premium, and it does not include any military disability retired pay that is provided to a medical retiree as set out in Chapter 61 of Title 10 in the United States Code. Put differently, the only amounts that are divisible as property to a former spouse are the amounts left after those deductions. There are some exceptions to post-judgment VA disability and the receipt of Concurrent Retirement Disability Pay ("CRDP"), which will be discussed below.

If the United States determines that a servicemember is physically unfit to continue active duty service, then he or she can be placed on the disability retired list, either temporarily or permanently.¹² Under the UFSPA, the portion of military disability retired pay that is equivalent to the disability percentage of the retiree is not included as disposable retired pay. During this calculation, the government calculates an option A and option B scenario (one includes a "what if" regular longevity retirement

Roll Call

calculation and the other considers the disability retirement computation) in which the highest of the two calculations is provided to the retiree. However, the amounts attributable to the disability calculation remain unable to be divided. For the family law attorney, this is a possible heartburn moment if you are a day late and a dollar short in having the right documents to determine if this is the retirement being received. For instance, the nightmare scenario is one where you agree to divide the military retirement and waive alimony based on that waiver, only to find out after the fact that the retirement is not divisible as property. In that situation, a huge bottle of antacid and a speed dial to your malpractice insurer is in order. What can be done to prevent that scenario? First, request through discovery copies of the DD 214 and the retiree account statements (RAS). The DD 214 will designate at the bottom the reason(s) for retirement. If you DD 214 denotes that the reason was for disability, then that is your first obvious sign. On the RAS, if the amounts received are not fully included as taxable income, then that is yet another indicator that the amounts received are disability retired pay since those sums are not subject to taxation. Do not fall into the trap that if the retiree is receiving CRDP, it has to be disposable retired pay. A military disability retiree can receive CRDP for a medical disability retirement. Relying on that alone can again create the problems above. Lastly, it should be noted that the state courts have almost overwhelmingly determined that regardless of when disability retired pay is received (before or after the division of the military retirement), it always remains indivisible. As such, an attorney representing the former spouse should attempt to negotiate indemnification language in the event that an anticipated military retirement agreed upon does not, in fact, turn out to be disability retired pay.

For VA disability, this amount is determined based on the pay tables set out by the Department of Veterans Affairs. It should be noted that VA disability is related to retirees who have a service connected disability and is related to the diminished earning capacity of the retiree. If a retiree has less than 20 years of creditable service, then the servicemember may receive either a disability severance pay¹³ (if he/she has a 20 percent or lower VA rating) or may receive monthly VA disability compensation if his or her VA rating is 30 percent or higher. As to the taxability of VA awards, the disability severance is taxable while the monthly VA disability award is not taxable.

With the monthly VA disability award provided to a re-

tiree with 20 years of creditable service receiving a longevity retirement, it is also very important to consider whether the retiree is receiving CRDP¹⁴ or Combat Related Special Compensation ("CRSC"). If a retiree has a 50 percent VA rating or higher, then he or she will be provided CRDP as a means to fill in the gaps that once were offset from gross retired pay. In other words, the retiree will receive the full VA disability amount as well as the full amount of retired pay instead of having the reduction set out in the UFSPA. The amount received as CRDP for regular retirement is subject to division since it falls within the purview of disposable retired pay. CRSC, on the other hand, is the bane of the former spouse's existence. If a retiree has at least ten percent directly related to the award of the Purple Heart decoration or a disability rated at ten percent or higher related to combat, operations, or hazardous duty, then he or she can apply to receive CRSC.¹⁵ Important considerations for CRSC is that it is not disposable retired pay and as a consequence cannot be divided as property. Moreover, the receipt of CRSC can only be effectuated through the application of the retiree. In addition, a retiree can receive either CRDP or CRSC, but not both. For the family law attorney representing the former spouse, there has to be a consideration of negotiating an indemnification clause in any agreement that allows for a post-agreement recalculation or direct payment in the event that either VA disability and/or CRSC reduces the former spouses share. If the servicemember is unwilling to agree to this, then the former spouse will be stuck with the amounts that are elected at the time of the initial order that divides the military retirement. As a consequence, it may be prudent to use spousal support as a means to restore the share for the former spouse. For the voluntary actions of a retiree after the initial order dividing the military retirement, it may be possible to utilize state case law to seek a post-judgment indemnification and/or reconfiguration of the former spouse's share. Again, much like the jurisdictional inquiry above, this is something that should be considered by all interested parties since some jurisdictions may be more liberal in their indemnification than others. The current trend amongst the states that have decided the issue of remedying the former spouse for voluntary actions by the retiree that reduce the former spouse's share of retired pay after the first order for property division have been that the former spouse can be restored her share but for the elections and/or actions of the retiree so long as the order does not specifically require the retiree to pay from the non-divisible source.

In addition, when it comes to the procurement of the military retirement, it should be factored that direct payment from the applicable government agency (typically Defense Finance and Accounting Service "DFAS") is preferable so long as it is an available option. Initially, for DFAS to pay the former spouse

Roll Call

her share of the disposable retired pay, there has to be a ten year overlap of the marriage and the service creditable for retirement.¹⁶ It should be noted that the 10 year rule does not determine whether the military retirement is divisible. Despite what some servicemember parties will inform an attorney, the 10 year rule only affects the direct payment from DFAS. For the cases in which there is less than 10 years of marriage and service overlap, a trial court may order that the payments be made directly by the servicemember upon his or her retirement, or may take other available options such as doing an offset from the present valuation of the military retirement. The sooner that an attorney dispels that myth with the servicemember client, the easier it should be to settle that part of the case.

Moreover, DFAS will only provide payments to the former spouse up to 50 percent of the available disposable retired pay. It should be noted that this limitation of paying only 50 percent of the disposable retired pay does not prevent a state court from awarding more than 50 percent of the actual military retirement depending on the available laws and remedies in the particular jurisdiction. Furthermore, any amounts provided by a trial court beyond the 50 percent threshold payable by DFAS must be paid directly by the retiree. Lastly, in order for the direct payment to occur from DFAS, there has been a submission of a certified copy of the qualifying order requiring direct pay from DFAS submitted to that agency, along with a fully executed DD Form 2293. The order alone does not create the direct pay setup if the DD Form 2293 is not accompanying the certified order when submitted. If there are subsequent orders regarding the division of military retirement between the parties, a newly executed order and DD Form 2293 can be submitted thereafter.

Lastly, the UFSPA does not automatically entitle a former spouse to any share of the disposable retired pay of a servicemember. It is essentially an enabling statute that permits the state courts to have authority to divide the disposable retired pay subject to the restrictions that cause the federal law to trump the state laws. It is both a fallacy and an almost guaranteed malpractice case for an attorney to agree to divide the military retirement “as allowed under the Uniform Former Spouses Protection Act.”

II. Survivor Benefit Plan – Often Worth More Dead Than Alive

When a servicemember dies, the military retirement dies along with the servicemember. As a consequence, family law practitioners should be familiar with the Survivor Benefit Plan (SBP).¹⁷ SBP is an annuity that allows retired servicemembers to provide continued streams of income to specified beneficiaries at the time of the retiree’s death.¹⁸ The retiree’s gross retired pay is the source of monthly premium payments for SBP coverage, which is taken from gross retired pay as a pre-tax deduction before any amounts of disposable retired pay is established. The retiree routinely decides what benefit amount shall apply and to whom the benefit is paid absent a court order that directs former spouse coverage. The designated survivor will receive a lifetime annuity for 55 percent of the designated base amount.¹⁹ While morbid to discuss with divorcing parties, in the event that the base amount elected is the full retirement base amount, the retiree is worth more dead than alive to a former spouse if he or she receives SBP former spouse coverage. Absent an order, the servicemember may select spouse coverage, coverage for the spouse and qualifying children, coverage for qualifying children only, or coverage for a person with an insurable interest. If the servicemember is married at the time of the election being made, then less than the full base amount for calculating SBP benefits requires the consent of the current spouse. This spousal consent may also include a complete waiver of any SBP benefits. If that situation has occurred in which the former spouse willingly signed away SBP benefits at the servicemember’s retirement, he or she will be unable to receive SBP for former spouse coverage, even if everyone agrees.

The cost for SBP depends on the type of coverage selected and the base amount chosen. In general, the premium rate for spouse or former spouse coverage is 6.5 percent of the selected base amount for those who entered military service after March 1, 1990.

There is also an SBP benefit for Reserve Component servicemembers. There are two election periods for the Reserve Component member. The first one is when the servicemember has attained 20 years of creditable service. At that moment, the servicemember would receive what is denoted as the “20 year letter,” which indicates to the servicemember that he or she is retirement eligible and may elect one of the three available options for SBP coverage. The second election period (assuming that the first election was not made or deferred) becomes when the servicemember reaches age 60. As with the active-duty SBP, any election other than spouse-only at the full-retired-pay base amount requires spousal concurrence. If you are the attorney representing the former spouse, the planning and securing of SBP for the former spouse should be automatic absent other,

Roll Call

more cost effective options, such as life insurance.

For married persons on active duty, the election for SBP has to be made before or at retirement.²⁰ An active duty servicemember who is entitled to retired pay is automatically placed in SBP at the maximum authorized level of coverage unless he or she chooses not to be covered or else chooses coverage at a lower level.

So what happens during the limbo period between the granting of an absolute divorce and the division of marital assets? Unfortunately, a former spouse is in a technical period of having no coverage for SBP. Upon divorce, a spouse loses eligibility as an SBP beneficiary since she or he is no longer a “spouse” but rather a “former spouse,” which is a separate election category under the United States Code. Timing is everything when it comes to securing former spouse coverage for SBP. The attorney who represents the former spouse needs to be sure that the former spouse is covered as the SBP beneficiary or else he or she may lose any potential benefits gained during the marriage if the servicemember dies before an order is established awarding the coverage. As a practical standpoint, it should be a matter of course that the former spouse’s attorney has an order awarded former spouse coverage available for entry at the time that the absolute divorce judgment is granted.

Much like the UFPSA does not automatically provide military retirement benefits to a former spouse, there exists no provision in federal law making former spouse coverage an automatic entitlement. The sole manner in which a former spouse may receive SBP annuity benefits is through election of former spouse coverage.

There are really two ways in which former spouse coverage for SBP can be awarded. First, the servicemember may elect former spouse coverage for a spouse who was a beneficiary under the Plan when divorce occurs after retirement.²¹ In order for the servicemember to make the election for former spouse coverage, it must be elected within one year of the divorce decree. Any attempts by the servicemember to make that election after the one year period will be untimely and essentially worthless. When making that election, the servicemember has to provide a statement setting forth whether the election is being made pursuant to a court order or a written agreement previously entered into voluntarily by the retiree as part of, or incident to, a divorce proceeding and if done as part of a written agreement, state whether that written agreement has been incorporated in, ratified, or ap-

proved by a court order.²² An election filed by the retiree is effective upon being received by DFAS. It is a prudent measure that the attorney for the former spouse receive actual proof of the submission of this election by the retiree if that is being ordered. Otherwise, the former spouse may detrimentally rely on the retiree’s candor in making the purported election while not securing her own election possibilities.

What if the retiree has been ordered to provide the former spouse SBP coverage and has either lately attempted to do so, is unable to do so because of poor timing, or simply refuses to follow the court’s directives? In that situation, if the servicemember is required to provide such coverage and then fails or refuses to make the required election, the former spouse may still obtain the required coverage by serving on the applicable agency (again, typically DFAS) a written request for implementation of the election and a certified copy of the appropriate court decree as well as a certified copy of the divorce decree. This election is described as making a “deemed election.” If the former spouse is making this election, his or her request must be signed by the former spouse and absolutely must be received by DFAS within one year of the first order providing for SBP former spouse coverage.²³ There are several perilous pitfalls here that may give the former spouse some headaches, hiccups, and heartburn. For one, if the servicemember has not been ordered to make his election, it is possible that the order for the former spouse to make his or her deemed election is not sufficient since it is only upon the servicemember’s failure or refusal to make the election after being ordered to make the election. As a practical matter, the attorney representing the former spouse should take a dual approach and have the order that allows a former spouse to make a deemed election also require that the servicemember make his or her former spouse election. Another trouble area is where the order purporting to award SBP coverage to a former spouse states that the former spouse will maintain ‘spouse coverage,” or that he or she shall maintain the “same level of SBP coverage that currently exists.” Those types of provisions can cause DFAS to deny the election if the language is construed as not being an actual award of former spouse coverage.

As indicated above, there are two separate and distinct one-year deadlines that do not always contemporaneously overlap. If the case is being decided in a state where the divorce decree includes all provisions for property division, it lessens the chances that the timing of the SBP coverages will be at issue. However, some states allow for divorce decrees to not contain the provisions of a property division or marital settlement. In those states that bifurcate the issue of the divorce from the other claims, the divorce decree simply recites the facts of

Roll Call

the marriage and enters an order that just solely dissolves the marriage. The second order specified above, the one for SBP former spouse coverage, could either precede or follow the divorce judgment. The attorney representing the former spouse needs to make a habitual practice of putting the deadlines on his or her calendar, office management tools, and/or tickler systems in order to prevent the nightmare scenario in which an otherwise eligible former spouse loses entitlement to SBP coverage. Much like the disability retired pay scenario referenced above, it will be an antacid and speed dial call to the malpractice carrier.

Moreover, just like a court order cannot mandate direct payment absent the applicable submission of the DD Form 2293, a court order cannot in itself create automatic coverage. The servicemember or former spouse must absolutely provide a fully executed election request to DFAS to establish coverage using the DD Form 2656-1 or DD Form 2656-10.

The conversation with a former spouse should not end with how to procure the former spouse SBP designation. The attorney for the former spouse should instinctively discuss the ways in which SBP coverage can be lost. One example is that the receipt of SBP payments ends if the former spouse's remarries before the age of 55. If the former spouse does get remarried before 55, the SBP former spouse coverage can be reinstated if the former spouse's new nuptials terminate due to death, divorce or annulment.²⁴ If the former spouse is 55 years of age or older, he or she can remarry as many times as their common sense and finances will allow.

Receipt of a valid former spouse election terminates any existing SBP coverage of the retiree, including then existing spouse coverage (in the event that the servicemember decides to marry his or her new companion). Unlike the former spouse survivor annuity awardable under the Federal Employee Retirement System, former spouse coverage cannot be combined with coverage for a current spouse in order to provide some measure of coverage to both. Put differently, the designation of SBP is a unitary benefit that is awardable only to one spouse or former spouse. Likewise, if a previous former spouse has been awarded former spouse coverage for SBP, any subsequent former spouse cannot receive that benefit.

Absent an order that terminates SBP former spouse coverage, an election of former spouse coverage is typically irrevocable, meaning that the servicemember may not terminate SBP former spouse coverage once it is duly elected. However, federal law does provide for the servicemember to request a

change in SBP coverage (so long as it is not ordered otherwise) if he or she remarries, or acquires a dependent child, and otherwise meets the requisites for making a valid change. That request should be made within one year from the date of marriage or the child's birth.²⁵

There also needs to be the contemplation of doing a present valuation of SBP. Accordingly, the attorneys must be familiar with the requirements within the forum state in determining whether a valuation of SBP is required, whether that valuation is coupled with, or separate from, the valuation of the military retirement, and whether the methodology for doing the valuation of SBP mirrors the valuation analysis for the military retirement. This is especially important if former spouse coverage was awarded on an interim basis but subsequently lost at the final trial on distribution due to a lack of valuation. In that scenario, it would be possible for the servicemember to submit the new court order terminating SBP former spouse coverage and thereby stripping the former spouse of the previously awarded benefit.

Although counterintuitive, a former spouse has to be divorced in order to be eligible as former spouse beneficiary. Accordingly, DFAS requires a copy of the final decree of divorce or dissolution before making the former spouse designation. It should be noted that sometimes the agencies confuse an absolute divorce from a divorce from bed and board, which essentially provides a judicial separation. The attorney representing the former spouse should be ready to discuss, brief, and appeal (if needed) the agency's determination of untimely election if the agency determines that the decree for divorce from bed and board commences the one year deadline, which is simply not accurate.

If the aforementioned one-year deadlines are not complied with, there is a possible saving grace for the former spouse as to SBP coverage. The Board for the Correction of Military Records ("BCMR").

These Boards have been created for each of the uniformed services, and relief may be obtained, given the right sets of facts and equitable considerations, so long as the servicemember or retiree has not remarried. If the servicemember has remarried, then the new spouse must consent to the application for relief or the new spouse must be joined as a party in the underlying state law matter that promulgated the application.

The applicable form to use is DD Form 149. The application must be served upon the BCMR within three years of discovery of the "error" for the BCMR to give it timely consideration. However, the BCMR may excuse failure to file within the deadline if an extension would be in the interest of justice.²⁶

Roll Call

Upon the completion of the application with all supporting documentation provided, the BCMR will consider the request and may, with or without a hearing, allow the requested relief.

III. The Times They Are a Changing²⁷: The Slow Demise of the Military Defined Benefit Plan

On November 25, 2015²⁸, the United States Congress made some dramatic changes to the military retirement and survivor benefit plan laws. Unbeknownst to most family law attorneys, these changes have systematically altered the manner in which current and future servicemembers and their spouses shall receive retirement compensation.

First, the easiest change to note is in regards to beneficiaries of SBP. The former law provided that if a former spouse who received SBP coverage predeceased the servicemember, the servicemember's new spouse could not subsequently be elected as the SBP beneficiary despite the death of the former spouse. That injustice has now been corrected to allow for the subsequent spouse to be eligible for SBP in the event a previously designed former spouse beneficiary dies before the servicemember. Now, the federal law states that "if a person's participating in the Plan is discontinued by reason of the death of a former spouse beneficiary, the person may elect to resume participating in the Plan and to elect a new spouse beneficiary."²⁹ This election must be received by DFAS no later than one year from the death of the former spouse (if the servicemember is married at the time of the former spouse's death) or within one year after date in which the servicemember remarries after the death of the former spouse (if not married at the time the former spouse dies). Lastly, a person making an election under the new provision "may not reduce the base amount previously elected."³⁰ What the provision does not specify is whether the base amount may be increased.

A greater change has occurred to the entire military retirement system. Effective January 1, 2018, there will be a new retirement system in place for servicemembers that will transition the military retirement system away from the current defined benefit plan and into a hybrid system in which there will be a funded defined contribution plan in exchange for a reduced defined benefit plan. Labeled as the modernized retirement system³¹, it will make individuals who become

members of the uniformed services on or after January 1, 2018, or a member who makes the election into the modernized plan as a "full TSP member" part of the new system, effectively ending any entitlements to the current military retirement annuity computations.³² Under this new setup, any new members from January 1, 2018 are automatically defaulted in the modernized system and will only have that option available.

Moreover, "a member of a uniformed service serving on December 31, 2017, who has served in the uniformed services for fewer than 12 years as of December 31, 2017, may elect, in exchange for the reduced multipliers... to receive Thrift Savings Plan contributions pursuant to section 8440e(e) of title 5."³³ For the individual members who elect to participate in the modernized retirement plan, he or she will have from January 1, 2018 to and including December 31, 2018 to make the election unless he or she is able to receive a hardship extension or if the member returns to service after a break in service that occurs during the election period, in which that member would have 30 days after the date of reentry to make the election.³⁴ The same provisions apply to a member who is serving in non-regular service (reserve component).³⁵ Conversely, if a member has 12 years or more as of January 1, 2018 it would seem that the availability of electing into the modernize retirement system would not be available. If a servicemember becomes a participant in the modernized retirement system, then his or her retirement annuity (military pension) is reduced by having the high three calculation multiplied by two percent instead of two and one-half percent and by having members who retire with more than 30 years of service capped at 60 percent multiplied by two percent times the years of creditable service.³⁶

For individuals who elected to take the Career Status Bonus, such members will have to "repay any bonus payments received...in the same manner as repayments are made under section 373 of title 37."³⁷ Moreover, there will no longer be Career Status Bonuses provided after December 31, 2017 unless you were already participating in that program on or before that date.³⁸ In addition, Congress repealed the cost-of-living adjustment reduction for future military retirees, which previously subjected retirees to a one percent reduction in retirement until it was recalculated at the age of 62.

In addition, for members who participate in the modernized retirement system, the government shall make contributions to the Thrift Savings Fund in an amount equal to 1 percent of the servicemember's base pay each month after the servicemember's first sixty (60) days of service until the servicemember reaches 26 years of service. The government will then offer matching of up to a maximum amount of 5 percent of the servicemember's contributions until he or she reaches 26 years of

Roll Call

service.³⁹ If a servicemember elects to contribute three percent (3%) of his or her base pay into the new TSP, then the government will match up to 4% of the base pay. If the servicemember elects to contribute five percent (5%) of his or her base pay into TSP, the government will match the full 5%. The automatic contributions (mandatory one percent) to be made by the government will commence 60 days after the date the servicemember first enters the uniformed service, or after the servicemember elects into the modernized retirement system.⁴⁰ The matching contributions (contingent on the contributions of the servicemember) shall begin 2 years and a day after the date the member first enters the uniformed service or after the election is made by an current member and ending.⁴¹

One area that has been inequitable is when a servicemember did not obtain 20 creditable years of service, thus divesting him or her of the retirement time accrued up to that point. Absent the award of disability retired pay or a rollover into the Federal Employee Retirement System, the servicemember and his or her spouse essentially lost that benefit. That fundamental flaw has been somewhat remedied by the new vesting rules for the modernized retirement system in that the contributions into the plan are vested after two years of service in the uniformed services.⁴² Moreover, an "eligible person"⁴³ who elected into the modernized retirement system and leaves the service with an entitlement to "covered retired pay"⁴⁴ based on obtaining enough creditable years of service can "cash out" their retired pay buildup. An eligible person entitled to covered retired pay may elect to receive a lump sum payment of the discounted present value at the time of the election in an amount of the covered retired pay that the eligible person is otherwise entitled to receive for the period beginning on the date of retirement and ending on the date the eligible person attains his or her retirement age⁴⁵ equal to either (i) 50 percent of the amount of such covered retired pay during such period; or (ii) 25 percent of the amount of such covered retired pay during such period; and a monthly amount during the period described above equal to either 50 percent of the amount of monthly covered retired pay or equal to 75 percent of the amount of monthly covered retired pay.⁴⁶ Put differently, a retiree can cash out either one-fourth or one-half of his or her covered retired pay and take it in the form of a lump sum payout and then have the remainder paid as the reduced monthly annuity. The retiree has 90 days before his or her retirement to make the election of the lump sum benefit above.⁴⁷

If the servicemember decides to elect the lump sum benefit under 10 U.S.C. 1415, then the discounted present value

used to determine the lump sum is computed by the United States Government.⁴⁸ In the event that the retiree takes the discounted present value lump sum benefit, then there shall not be any subsequent adjustment to the discounted present value even if the retiree determines that government's value is not as beneficial as other actuarial amounts.⁴⁹ The one thing that the federal law fails to clarify is whether or not the retiree will know what the discounted present value amount will be before making the election. If the answer is no, the retiree is seemingly operating in the dark as to what benefit they are receiving, or waiving, depending on the value provided by the government. The benefits of the lump sum buyout may be paid in one lump sum or as installment payments.⁵⁰ The payments will commence not later than 60 days after the date of retirement unless the retiree is a member of the reserve component, in which case the member will receive payment no later than 60 days after the earlier of the date the member reaches age 60 or the date he or she is eligible to covered retired pay.⁵¹

However, there are additional computations and intricacies of the new modernized retirement system associated with the resumption of the full monthly retirement. "The retired pay of an eligible person who makes an election....shall be recomputed, effective on the first day of the first month beginning after the person attains the eligible person's retirement age, so as to be an amount equal to the amount of covered retired pay to which the eligible person would otherwise be entitled on that date if the annual increases, in the retired pay of the eligible person made to reflect changes in the Consumer Price Index, had been made in accordance"⁵² with 10 U.S.C. § 1401a.

Another novel area created for the servicemembers participating in the modernized retirement system is the new continuation bonus.⁵³ For those members who have 12 years of service on or after January 1, 2018, the active duty member will get no less than 2.5 times his or her base pay plus any additional discretionary amounts (equal to the monthly base pay of the member at 12 years of service times by such number of months, not to exceed 13 months as specified in the agreement. For reserve component and National Guard members will get no less than 0.5 times the base pay of an active duty member if the same rank and years of service plus any additional discretionary amounts (equal to the monthly base pay of an active duty member with the same rank and years of service times by such number of months, not to exceed 6 months as specified in the agreement. There is also room for additional discretionary continuation pay in the discretion of the service. The servicemember receiving this continuation pay must not only have the 12 years of service but must also agree to serve another 4 years of obligated service. The payments can be received either in a lump sum manner or in a series of not more than four

Roll Call

installment payments. If the servicemember receives the continuation bonus and does not complete the obligated service, then it will be repaid.

IV. CONCLUSION

The dynamics of the military retirement and survivor benefit plan considerations in a family law case are constantly changing parts that require the practitioner to routinely update him or herself on the nuances involved in both the current system as well as the upcoming modernized retirement system. Starting in 2018, the family law practitioner handling a military divorce case needs to be extra meticulous in the review, analysis, negotiations, and formations of legal strategies in applying the concepts described above. Much like attorneys are charged with knowing the law, it should be surmised that the most prudent approach would be to continuously update oneself with the pending changes and the implementing regulations that will surely come into existence as a result of the new modernized system. By doing so, the family law practitioner will not only be astute on the legal intricacies and provide highly competent legal counsel, but will also serve to prevent the abovementioned malpractice moments.

Footnotes:

²¹ 10 U.S.C. § 1408(c)(4)

³ See 10 U.S.C. § 3911, 10 U.S.C. § 6321, 10 U.S.C. § 8911 et. seq. as to the Army, Navy and Marine Corp, and Air Force, respectively.

⁴ 10 U.S.C. § 12732

⁵ 10 U.S.C. § 12731(f).

⁶ 10 U.S.C. § 1409.

⁷ 37 U.S.C. § 322.

⁸ 10 U.S.C. § 1409(b).

⁹ Id.

¹⁰ See 10 U.S.C. § 1401a and 10 U.S.C. § 1410.

¹¹ 10 U.S.C. § 1408(a)(4).

¹² See 10 U.S.C. § 1201 et. seq. for the provisions related to the determinations for disability retired pay.

¹³ 10 U.S.C. §§ 1203, 1208, and 1212.

¹⁴ 10 U.S.C. § 1414.

¹⁵ 10 U.S.C. § 1413a.

¹⁶ 10 U.S.C. § 1408(d)(2).

¹⁷ 10 U.S.C. §§ 1447-1455.

¹⁸ 10 U.S.C. § 1448.

¹⁹ 10 U.S.C. § 1452.

²⁰ 10 U.S.C. § 1448(a)(2)(A).

²¹ 10 U.S.C. § 1448(b)(3)(A)(i).

²² 10 U.S.C. § 1448(b)(5).

²² 10 U.S.C. § 1450(f)(3)(C).

²⁴ 10 U.S.C. § 1450(b)(2)–(3).

²⁵ 10 U.S.C. § 1448(a)(5).

²⁶ 10 U.S.C. § 1552(b).

²⁷ Cue Bob Dylan's "The Times They Are A Changin'" released in 1964.

²⁸ The 2016 National Defense Authorization Act (NDAA) as signed into law can be found at: <https://www.congress.gov/bill/114th-congress/senate-bill/1356>.

²⁹ 10 U.S.C. § 1448(b)(7)

³⁰ 10 U.S.C. § 1448(b)(7)(D)

³¹ Note: Attempts to find these new provisions on legal research plans can be difficult as the current published version of the United States Code does not currently list them as the updated versions.

³² 10 U.S.C. § 1409(b)(4)(A)

³³ 10 U.S.C. § 1409(b)(4)(B)

³⁴ 10 U.S.C. § 1409(4)©

³⁵ 10 U.S.C. § 12739(f)

³⁶ 10 U.S.C. § 1409(b)(4)(A)

³⁷ 37 U.S.C. § 354.

³⁸ 37 U.S.C. § 354(g).

³⁹ 5 U.S.C. § 8440e(2)

⁴⁰ 5 U.S.C. § 8440e(3)

⁴¹ Id.

⁴² 5 USC § 8432(g). Note that the servicemember gets the same two year vesting period as high grade civilian Executive positions.

Roll Call

⁴³ 10 U.S.C. § 1415(a)(2).

⁴⁴ 10 U.S.C. § 1415(a)(1)

⁴⁵“Retirement age” refers to definition under 42 U.S.C. § 416(l).

⁴⁶10 U.S.C. § 1415(b)(1).

⁴⁷ 10 U.S.C. § 1415(b)(3).

⁴⁸ 10 U.S.C. § 1415(b)(2).

⁴⁹ Id. ⁵⁰ 10 U.S.C. § 1415(b)(4).

⁵¹10 U.S.C. § 1415(b)(5).

⁵² 10 U.S.C. § 1415(c)(2).

⁵³ See Section 634 of the 2016 NDAA et. seq.



American Bar Association

SECTION OF FAMILY LAW

Chicago Headquarters:
321 North Clark Street
Chicago, IL 60654
312-988-5000

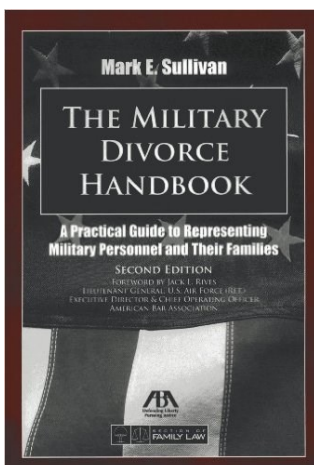
Washington D.C. Office
1050 Connecticut Ave. N.W.
Suite 400
Washington, D.C. 20036
202-662-1000

The Military Committee of the American Bar Association's Family Law Sector studies issues relating to clients in the military and their families, including procedural issues unique to the military, and custody and visitation, divorce, alimony/support, military pension division and Survivor Benefit Plan issues affecting military divorces. Reviews state and federal legislation and initiatives where ABA policy is affected, and teaches lawyers how to deal with military matters affecting state court legal disputes.

Check out our website!

<http://apps.americanbar.org/dch/committee.cfm?>

Military Family Law Resource Corner:



- The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families - Mark E. Sullivan
- The Complete QDRO Handbook, Third Edition: Dividing ERISA, Military, and Civil Service Pensions and Collecting Child Support from Employee Benefit Plans / Edition 3 - David Clayton Carrad
- The American Bar Association Legal Guide for Military Families: Everything You Need to Know about Family Law, Estate Planning, and the Servicemembers Civil Relief Act - American Bar Association
- Veterans Law & Benefits: A Comprehensive Guide to the Process, Laws, & Benefits Available for U.S. Military Veterans, their Dependents, & Survivors - Hal Moroz