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Well 2017 is well underway. Next week the ABA Spring Seminar kicks off in Savannah, Georgia, with a full day of military family law topics. I am happy to say that we have an even mix of local Savannah attorneys coupled with ABA speakers from around the county, like Mark Sullivan (of North Carolina) and James Higdon (of Texas). Together they will discuss topics like domestic violence in military divorce cases as well as basic and advanced topics such as division of military pensions under the 2017 National Defense Authorization Act. These are very interesting times for the military as well as members of the bar who represent service members and their families. Last year, Congress ushered in a sweeping new change to the way active military retirements may be divided in divorce cases. Also, we are bracing ourselves for 2018, when the Department of Defense will usher in a whole new military retirement system. These and other topics are the focus of the May 3rd seminar. Once again, I am happy to see the Military Committee provide a lead into the ABA Spring Seminar.
The New Pension Division Rule

Without advance notice to individual states or their bar associations, Congress enacted the National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) on December 23, 2016 and overrode the pension division rules in a majority of states as to military retired pay. This means that many lawyers need to know how to present testimony and evidence in contested pension division cases, as well as how to prepare a properly worded military pension division order (MPDO). This new rule will require a new set of skills for such lawyers.

The new statute contains a major revision of how military pension division orders are written and will operate throughout the nation. Instead of allowing the states to decide how to divide military retired pay and what approach to use, Congress imposed a rigid uniform method of pension division on all the states, a fictional scenario in which the military member retires on the day that the pension division order is filed. Effective December 23, 2016, the new rule up-ends the law regarding military pension division in almost every other state.

The new rule applies to those still serving (active-duty, National Guard or Reserves). It is a rewrite of the terms for military pension division found in the Uniformed Services Former Spouses’ Protection Act, or USFSPA. From now on, what is divided will be the hypothetical retired pay attributable to the rank and years of service of the military member at the date of the decree of divorce, dissolution, annulment or legal separation. The only adjustment will be cost-of-living adjustments under 10 U.S.C. § 1401a (b) between the time of the court order and the time of retirement.

There are no exceptions for the parties’ agreement to vary from the new federal rule. Everyone must do it one way, regardless of what the husband and wife decide they want the settlement to say.

How Hard Is This, Anyway?

Known as a hypothetical clause at the retired pay centers, “frozen benefit division” is the most difficult pension division clause to draft. A government lawyer familiar with the processing of military pension orders put it this way: “…over 90% of the hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of military retired pay. This legislative change will geometrically compound the problem.”

Due to the difficulty of such orders, more expenses will be involved in the military divorce case and a whole new team of experts will appear to help ordinary divorce attorneys comprehend and implement the new frozen benefit rule. Without the right help and the proper wording, rivers of rejection letters will flow back to attorneys who submit their pension orders to the retired pay center in the hope of approval. Since the new frozen benefit rule was written by Congress, which knows next to nothing about the division of property and pensions in divorce, there will be numerous problems in applying it in the courts of most states.

Although the method of dividing pensions, as well as the date of valuation and classification of marital or community property, has always been a matter of state law, that will change in military cases. Since no time has been allowed for state legislatures to adjust to the change and rewrite state laws, lawyers will need to make adjustments “on the fly” to deal with military pension division cases which are presently on the docket or which come to trial before the state legislature can act.

Strategy for the Servicemember

The attorney for the SM (servicemember) will have an easier time than the lawyer for the FS (former spouse) in getting through a trial or settlement. The SM has control over all the evidence and testimony needed for either procedure.
The active-duty SM needs to provide proof of the “High Three” retired pay base (i.e., average of the highest 36 months of continuous compensation) at the date of divorce. That will usually be the most recent three years, and the data will be found in the pay records of the SM. The court also needs to know the rank and years of creditable service of the SM.

Once the evidence has been admitted, the court will require an order to divide the pension. The attorney for the prevailing party is often tagged with the task of preparing the MPDO, unless all the necessary language is placed in the divorce decree or in a property settlement incorporated into the decree. It will help immensely if counsel obtains “outside assistance” from a lawyer experienced in writing such pension orders, and not at the last minute.

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

Strategy for the Former Spouse

The former spouse would oppose such a request for severance of the divorce and the property division, arguing that this would double the hearings involved and detract from judicial efficiency. The FS would also argue that that Congress has joined inextricably the divorce and the division of a military pension by requiring the setting of the retired pay base (the “High Three”) at the time of divorce. As soon as appropriate, counsel for the FS should begin discovery, seeking to determine when the member’s “High Three” years were, what the figure for that period is, and how many years of creditable service the member has (or, in the case of a Guard/Reserve member, how many retirement points).

As to documents and data, the strategy of the FS will be similar to that stated above for the SM for settlement or trial. If the SM is obstinate, it can take weeks or months to obtain this information from the source (that is, the pay center) with a court order or judge-signed subpoena. There are several ways to try to get around the division of a frozen benefit for the FS. No single approach is best, and the rules have not been written yet. The slogan is NOT “One Size Fits All.” Some states may restrict or prohibit one or more of these strategies. The FS’s attorney may try out the following to “even the scales” in trial or settlement:

When the parties are in agreement, spousal support is one way to obtain payments not restricted to a retirement based on rank and years of service (and the High Three) at the time of the order. An alimony order – which can be used by skilled attorneys to mimic a pension division – gives much more flexibility in dealing with the retired pay center, so long as the payments do not end at remarriage or cohabitation of the FS. There is, for example, no requirement for 10 years of marriage overlapping 10 years of creditable service. A consent order for spousal support should suffice to obtain the payments to the FS upon retirement of the SM, and the tax consequences will be the same, namely, the FS is taxed on the payments and they are excluded from the income of the payor/retiree.

The FS can ask the court for an award of spousal support to make up the difference, that is, the money which would be lost to the FS by division of the hypothetical retired pay of the SM. If the FS is awarded alimony while the member is still serving, the FS may try to argue that it should not end automatically at the SM’s retirement, since some amount might be needed to equalize the pension division for the FS.

The FS can always ask the court for an unequal division of the property acquired during the marriage in an attempt to even out the entire property division scheme due to the division of a truncated asset of the SM, not the final retired pay. Or the FS can ask for a greater share of the pension to make up for the smaller amount which will be divided.

The FS can also argue for a present-value division of the pension, with an expert witness setting the likely value of the retired pay, so that it can be offset by other assets given to the FS in exchange for a full or partial release of pension division. Evaluating a pension is a complex task. These complicated computations generally demand the evaluation report and testimony of an expert.

Another approach is to delay the divorce. The longer this is put off, the larger the High Three amount will be. More time means possible promotions and pay increases.

The FS can still use the standard time-rule clauses. The new law limits the “disposable retired pay” (DRP) which the retired pay center (DFAS or the Coast Guard Pay and Personnel Center) will honor, limiting DRP to “date-of-divorce” dollars in the High Three (for those still serving). The court may still enter a time rule order if it complies with the interim guidance or, when published, the rules
implementing the frozen benefit law. The court should state that at the SM's retirement only a portion of the pension-share payment for the FS will come from the retired pay center. The order would provide that the member will still be responsible for the rest and will indemnify the FS for any difference between the two amounts. The duty to indemnify is a potential remedy for the reduction in payments to the FS and there is statutory support in 10 U.S.C. § 1408 (e)(6), the “savings clause” in USFSPA, which allows the courts to employ state enforcement remedies for any amounts which may not be payable through the retired pay center.8

As a final note, be sure not to use “disposable retired pay” in the order to describe what is apportioned to the FS. DRP means the restrictive definition in the frozen benefit rule (i.e., the retired pay base at the date of divorce) less all of the other specified deductions, such as the VA waiver and moneys owed to the federal government. The best way to word a pension clause for the FS is to provide for division of total retired pay less only the SBP premium attributable to coverage of the former spouse. Regardless of the language used, DFAS will construe orders dividing retired pay as dividing “disposable retired pay.”9

Resources

The final rules have yet to be published by DFAS, the Defense Finance and Accounting Service. Until there are revisions to Volume 7B, Chapter 29 of the Department of Defense Financial Management Regulation, no one will be completely sure how the division of uniformed services retired pay shakes out. The only information presently available from DFAS is a “Notice of Statutory Change” and a sample order.10

A complete guide to problems and pitfalls stemming from the “Frozen Benefit Rule” is in the Silent Partner infoletter, “Fixing the Frozen Benefit Rule.” Writing clauses for the division of military retired pay pursuant to the Frozen Benefit Rule” can be found in the Silent Partner titled, “All Clauses Considered: Writing the Frozen Benefit Award.” General information on how to draft acceptable military pension clauses may be found at the Silent Partner, “Guidance for Lawyers: Military Pension Division.” For the necessary terms for the MPDO, see the Silent Partner, “Getting Military Pension Orders Honored by the Retired Pay Center”; this guide includes the necessary elements and language for a proper hypothetical clause. All these infoletters are located at the military committee websites of the N.C. State Bar, www.nclamp.gov > For Lawyers, and the American Bar Association’s Family Law Section, www.americanbar.org > Family Law Section > Military Committee.

Footnotes

2 For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.
3 The other element for determination of retired pay is the “retired pay multiplier,” which is 2.5% times years of creditable service (in an active-duty case). In a Reserve or National Guard case, the court order must also provide the applicable number of retirement points.
4 See Brett R. Turner, Equitable Distribution of Property (3rd Ed. & 2016-2017 Supp.), Sec. 3.2. In those states which have adopted the Federal Rules of Civil Procedure, the issue of separate trials under Rule 42 (b) deals with bifurcation of claims into separate hearings.
5 For an excellent summary of arguments against bifurcation of the divorce and the property division, along with case citations for state appellate decisions, see Brett R. Turner, Equitable Distribution of Property (3rd Ed. & 2016-2017 Supp.), Sec. 3.2.
6 The anticipated delay, however, may work to the FS’s advantage. The longer the division of retired pay is put off, the better chance the FS will have of dividing a higher amount of retired pay. In general the FS’s case usually will benefit from delay under the new rule.
7 10 U.S.C. § 1408 (d)(2) requires this 10/10 overlap of marriage and military service for garnishment of military retired pay as property division.
8 See also Brett R. Turner, Equitable Distribution of Property (3rd Ed. & 2016-2017 Supp.), Sec. 6.4.
9 DoDFMR, Vol. 7B, ch. 29, Sec. 290601.
10 Type into any search engine, “Notice of Statutory Change” and “DFAS” to locate this. DFAS has placed the Notice at its website, www.dfas.mil > Garnishment Information > Former Spouses’ Protection Act > NDAA-’17 Court Order requirements.
Which Family Court Should Handle My Child Support or Child Custody Issue? Troubleshooting Jurisdictional Issues for Active Military Service Member Parents in Domestic Relations Cases

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Our military service member clients are some of our most mobile, prone to changes in residency and domicile due to the often transitory nature of their service. Their relocation, travel, and station assignments can complicate questions of residency, domicile, and jurisdiction. Particularly in domestic relations cases, military relocations and reassignments tend to cause uncertainty about which family court has jurisdiction over an initial or subsequent child custody, visitation, or child support proceeding.

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was enacted to “[A]void jurisdictional competition and conflict with courts of other States in matters of child custody…[p]romote cooperation with the courts of other States…and [f]acilitate the enforcement of custody decrees of other States.” However, now with 49 of 50 States participating and after nearly two decades of related jurisprudence, it has become apparent that the UCCJEA is not always applied in a continuous fashion, especially in cases involving active military service member families.

The “Home State” Question in the Context of Military Reassignments

Under the UCCJEA, state courts are vested with jurisdiction to make an initial child custody determination where the “home state” requirements are met. The UCCJEA defines home state as “the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.” Under the home state analysis, “[a] period of temporary absence of any of the mentioned persons is part of the period.” Thus, home state credit can accrue while a parent and a child are actually away from a State.

While the home state analysis is more often fairly straightforward, a military service member’s reassignment outside of the home state can cause a great deal of uncertainty.

Take for example the case of Carter v. Carter where this issue was considered by the Supreme Court of Nebraska. Stuart Carter was commissioned into the Navy through the Navy Aviation Officer Candidate School in Pensacola, FL, and served in a variety of locations for more than twenty years of service. All the while, his “home of record” with the military was the State of Michigan. While Stuart was stationed in Japan, he met his wife Nahoko. The couple was married in Japan, moved to San Diego for three years, then Kansas for one year, and then Nebraska for close to three years. Their son Alex was born in Nebraska ten weeks before Stuart was again reassigned, causing the family to move to a Navy base in Yokosuka Japan. The Carters remained in Japan until Stuart retired in May of 2005, at which time Stuart was ordered to complete out-processing in San Diego. Stuart returned to the US with his son Alex in tow and apparently waited to tell Nahoko about the relocation until after he had left Japan with Alex. According to the Nebraska Supreme Court, Stewart’s first notice to Nahoko was a text message that read “ajevx [sic] is ok we are going to our home [sic] in usa more [sic] info later Stu.”

Stewart filed for dissolution of marriage in Nebraska and Nahoko filed a motion to dismiss for lack of jurisdiction. The trial court denied Nahoko’s motion. On appeal, Stuart argued that the two years spent in Japan was only a “temporary absence” under the home state analysis, which vested Nebraska with continuing home state jurisdiction.

The Supreme Court of Nebraska disagreed and found that Nebraska had jurisdiction over an initial or subsequent proceeding.

“MILITARY RELOCATIONS AND ASSIGNMENTS TEND TO CAUSE UNDERTAINCY ABOUT WHICH FAMILY COURT HAS JURISDICTION OVER AN INITIAL OR SUBSEQUENT PROCEEDING.”
lost home state jurisdiction during the parties’ residency in Japan. In support, the Court wrote, “…time spent living in another state or country due to a permanent military duty assignment is not considered a “temporary absence” simply because it was motivated by such assignment.”

Thus, the Nevada Supreme Court reversed and vacated the trial court’s order relating to child custody and directed it to dismiss the child custody proceeding. Nahoko was also awarded $10,000 in attorney fees.

In the Texas case of Lemley v. Miller a similar argument was made, with an entirely different outcome. In that case, a military spouse argued that her residence in Germany with the parties’ minor child was in fact a “temporary absence” necessitated by her new husband’s active military duty. She argued that Texas retained “home state” jurisdiction because the child had lived in Texas for six months prior to moving to Germany and because they returned to Texas after the military assignment in Germany ended. While the trial court disagreed, and dismissed the suit, the Texas appellate court reversed, holding:

“Lemley’s and the child’s absence from Texas was due solely to Lemley’s husband’s active military assignment to Germany. The child’s residence with Lemley in Germany constituted a temporary absence from the state. The time in Germany, therefore, is considered time that Lemley and the child resided in Texas for purposes of establishing home state jurisdiction.”

In 2002, the Texas Court of Appeals again considered the question of military relocations as “temporary absences,” but refrained from pronouncing a bright line rule. Instead, the Court wrote, with a palpable sense of caution: “logic at least supports a conclusion that military absence is a temporary absence.”

In the balance, it would appear that the question of “temporary absences” in the context of a child’s “home state” is best considered a fact intensive inquiry, to be determined under the totality of the circumstances, even in the case of a military service member’s involuntary reassignment with child in tow.

Among the factors that should be considered in the analysis, unique to military clients, are the ties that are created to certain states through The Service Member’s Civil Relief Act (SCRA). In part, the SCRA allows active duty service members to maintain legal residency in one state for tax and income purposes, while being physically stationed in another state or country.

By extension, the Military Spouses Residency Relief Act (MSRRA) provides residency relief to service member spouses. A military client’s continuing legal connection to a forum via the SCRA or MSRRA, while serving in another state or country, can be used to demonstrate that their time away on duty is a mere “temporary absence” for the purpose of considering home state jurisdiction. By referencing tax filings, unchanged driver’s licenses, voter registration and vehicle registration, the argument may be strengthened.

**Different Jurisdictional Results under the UCCJEA and UIFSA**

Another counter intuitive realization for many attorneys advising military clients is that, in some cases, “home state” jurisdiction under the UCCJEA may lie in one state for the purposes of custody and visitation, while jurisdiction under the Uniform Interstate Family Support Act (UIFSA) may lie in another state for the purposes of modifying child support.

Under §205 of the UIFSA, a Court that issues a child support order retains continuing and exclusive jurisdiction over subsequent child support modification actions, so long as one of the parents or the child remains in the issuing state. Thus, residence becomes the touchstone as opposed to the child’s “home state.”

Temporary absences are also to be taken into account when analyzing residency. The comment to §205 states, “…. temporary absence should be treated in a similar fashion. Temporary employment in another State may not forfeit a claim of residence in the issuing State.”

Another nuance is found in the comment to §205 which states, “[i]f the [child support] order is not modified during this time of absence, a return to reside in the issuing State by a party or child will immediately identify the proper forum at the time of filing a proceeding for modification.”

Under the foregoing statutory scheme, a child may have acquired a new “home state” by relocating with a parent to a new state. Nevertheless, the court sitting in that new home state may only modify child custody and visitation. So long as the other parent remains physically present in the issuing state, temporarily absent from the issuing state, or departs and returns to the issuing state before any child support modification proceedings are initiated, child support may not be modified in the new “home state” without the consent of the parties.

As applies to military families, one could easily imagine the following scenario, which is based in part on the facts of a recent case that was practiced by the authors: A service member spouse is reassigned overseas, prompting the parties to separate or divorce before the service member leaves. A child support order is issued. Thereafter, the service member spouse temporarily relocates overseas with the child, while the non-service member spouse goes to live with friends or family in a new state. The non-service member spouse is unable to find employment in the new...
state and, unable to pay child support, moves for a child support reduction based on a change of circumstances. They file a motion for modification in the new state, but are promptly met with a motion to dismiss, because, under a “temporary absence” analysis and continued residency under the USCRA, the service member spouse has not left the issuing state for the purposes of child support modification under the UIFSA. The non-service member spouse litigates the issue and, ultimately, loses, resulting in a significant expenditure of legal fees that did not result in a reduction of their child support obligation. The non-service member spouse considers filing for modification in the issuing state, but continues to be unemployed and is left without sufficient financial resources to wage a second battle. Even then, if the non-service member spouse moves for modification of the child support order in the issuing state, the modification action could be subject to a stay of proceedings under the SCRA.

As demonstrated in the foregoing scenario and in the case of Carter, an incorrect choice of forum may be disastrous for your client’s finances. Moreover, in the case of military service members, the choice of forum can be difficult to make. For the diligent practitioner, it is imperative to conduct your jurisdictional analysis before filing and identify which standard to apply, whether it is the UCCJEA “home state” analysis or the UIFSA “residency” analysis. In cases of absolute uncertainty, it may be advisable to secure the opposing party’s consent to jurisdiction to mitigate the risk of a costly and avoidable jurisdictional battle that ends in loss.

Resources and Footnotes


3 Id. at § 201. See also § 204, recognizing Temporary Emergency Jurisdiction as limited exception to Home State Jurisdiction.

4 Id. at § 102(7)

5 Id.

6 758 N.W.2d 1 (Neb. 2008).

7 Id. at 4.

8 Id. at 5.

9 Id. at 4.

10 Id.

11 Id.

12 Id.

13 Id. at 5.

14 Id.

15 Id. at 6.

16 Id.

17 Id. at 8.

18 Id. at 8.

19 Id. at 9.

20 Id.

21 Id.


23 Id. at 286.

24 Id.

25 Id. at 287.

26 In Re Brilliant, 86 S.W.3d 680, 688 (Tex. App. 2002)

27 Id.


29 As an aside, § 3931 of the SCRA might also prove useful to the domestic relations practitioner for its mechanism that provides service members with relief from default judgments, including child support judgments. Additionally, in cases where courts render temporary custody orders during deployment, the SCRA requires the temporary order to expire “not later than the period justified by the deployment of the servicemember.” § 3938

30 50 U.S.C. § 4001

31 P.L. 111-97


33 Id. §205 Comment “...keeping in mind that the question is residence, not domicile.”

34 (internal citations omitted)
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.

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Military Family Law Resource Center