Military Family Law: Once Over the World

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Overview

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Gaining Uniform Services Former Spouses Protection Act Jurisdiction

• No USFSPA jurisdiction = No military pension
  – Also known as §1408(c)(4) jurisdiction
• Must have jurisdiction statement in pleadings
• Valid USFSPA jurisdiction is based on:
  – Domicile
  – Residence: not by virtue of military service
  – Consent
• Long Arm Statute is not applicable
To Stay or Not to Stay: Handling the SCRA

The SCRA: 50 USC App. §§ 501-596:

- Provides for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of Servicemembers during their military service.
- The SCRA applies to “. . . any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this Act.” §511, Subd.(b).
- SCRA does not apply to criminal proceedings.
To Stay or Not to Stay:
Handling the SCRA in Family Cases

• What does the SCRA do in Family Cases?
  − Stay of proceedings
  − Default protections
  − Tolling of Statute of Limitation

• Effect for the client?
  − Bifurcating
To Stay or Not to Stay: Handling the SCRA

The Rules

• Automatically entitled to a 90 day stay if SM or SM’s attorney requests the stay.
  – Court *shall* grant a 90 day stay - §522
  – If SM does not request the stay a stay may still be granted under the Court’s discretion.
  – Any additional stay beyond 90 days is within the Court’s discretion.
To Stay or Not to Stay: Handling the SCRA

How to request a Stay

• Motion must include at least two statements:
  − A statement on how the current military duties materially affect ability to appear and a date when the Servicemember will be available to appear.
  − A statement from the commanding officer that the current military duty prevents appearance and military leave is not authorized at the time of the statement.

• If not available after initial 90 day stay combined with additional stay request
To Stay or Not to Stay: Handling the SCRA Work Arounmds

• §519 - Recognizes a SM’s legal representative
  – An attorney or individual possessing a POA acting on the SM’s behalf with SM’s express permission
  – Legal representative can take same actions as SM

• §517 - Waiver of SCRA Protection
  – Can waive for only portion of a proceeding e.g. MTA
  – Must be in a separate writing from that of the obligation- not less then 12 point type
  – Must be waivered during or after period of qualifying service
Dissecting Military Retired Pay and Disability

3. Find \( x \).

Here it is.

SIMPLICITY

The simplest solutions are often the cleverest.
They are also usually wrong.
Dissecting Military Retired Pay and Disability: Retirement Eligibility

- **Active Duty Service (AD)**
  - Begins at retirement regardless of age
  - Minimum 20 years
  - Formula award expressed in terms of marital fraction

- **Reserve/Guard (RC)**
  - Begins at age 60 (could be down to age 55 if combat vet)
  - Must have 20 years of “creditable” service
  - Amount of retired pay depends on amount of points earned – maybe…
  - Must obtain a current points statement
USFSPA gives state courts authority to treat military retirement pay as marital property and divide it per state law:
- Pension divided by “marital share”
- No specific required share for former spouse
- Limits amount of retired pay to be paid to former spouse to 50% of Disposable Retired Pay

No minimum number of years for divisibility:
- 10/10 year rule: Only means that DFAS will pay spouse directly for the marital share
Dissecting Military Retired Pay and Disability: Disability Pay

MALPRACTICE MINE FIELD WARNING

- Many different types and programs
- Disability = Non martial divisibility and non-reallocation of assets
- Impact of disability after division
- Indemnity Waivers
- Disability = source of income for child support
Property Division: MPDO not a QDRO

The Basics

- Military pay is a Federal entitlement - not a qualified pension plan under ERISA
  - No requirement for QDRO
  - If there are any issues DFAS will ask for a clarifying order or affidavit from both parties
    - Do not rely on decree only - You should have a MPDO

Considerations

- To value or not to value
- When to trade for the pension
- Role of an expert in military pensions division
Military Retirement - Lessons from Kenny

"You got to know when to hold 'em,
know when to fold 'em.
Know when to walk away,
know when to run.
You never count your money
when you're sittin' at the table.
There'll be time
enough for countin'
when the dealin's done."
Property Division: Show me the MPDO
Awarding the Marital Share

• Formula used depends on who you represent:
  – Fractions
    • Formula award expressed in terms of marital fraction of months for Active Duty
    • Formula award expressed in terms of points for RC
  – Hypotheticals
  – Straight dollar awards.
Resources for Military Pension Division

• ABA Operation Standby - attorney-to-attorney consultation resource for military attorneys.
  – http://www.militaryprobono.org/about/item.2727-Operation_StandBy

• DFAS Guide

• Silent Partner Series
Property Division: Show me the MPDO
Survivor Benefit Plan (SBP)

- Annuity that pays 55% of base amount selected
  - $300 is the lowest base amount possible ($165 per mo)
- SBP premium:
  - Excluded from taxable portion of retirement pay
  - Expensive: 6.5% of selected base amount plus 3.5% for RC members
  - Cannot assign cost to one party - must adjust percent
  - Cannot split between former spouse and new spouse
- Whether to ask for former spouse SBP is situational
  - Former spouse coverage not an automatic benefit
  - Suspends if former spouse remarries before age 55
  - Very strict time-lines or may be lost
Property Division: Show me the MPDO

Requirements

• Any Decree or Order dividing military retired pay must at minimum contain:
  – 1408 (c)(4) jurisdiction statement
  – SCRA rights were observed statement
  – Formula for division:
    • must provide marital points or months
    • Hypothetical must provide variables e.g. E-5 with 13 years service

• A certified copy of the Judgment and Decree and MPDO must be served upon DFAS within 90 days of certification along with a DD Form 2293
Hindsight is 20/20 or 15/15 or 10/10”

Rules for Continuation of Benefits

- **20/20/20** - twenty years concurrent marriage and service
  - Entitled to full military medical care (TRICARE)
  - Commissary and exchange privileges

- **20/20/15** - twenty years of service, twenty years of marriage, and 15 years of overlap
  - If dissolution after 1 April 1985 authorized medical care for a period of one year from date of dissolution
  - Dental will no longer be available regardless of the 20/20 rule

- **10/10** - Ten years of marriage with ten years of service overlap allows DFAS to pay spouse directly the marital share
Property Division: Thrift Savings Plan (TSP)

• TSP can be:
  − divided in a divorce, annulment or legal separation.
  − garnished to satisfy a participant’s past-due alimony or child support obligations.

• A TSP can be divided by presenting TSP with a “Retirement Benefits Court Order” that complies with 5 U.S.C. §§ 8435(c), 8467 and 5 C.F.R. part 1653 subp. A.

• TSP provides a “model order”
  − From a valid order, TSP will pay out the payee’s present designated entitlement, but will not honor an order for a future payment.
Property Division: Thrift Savings Plan (TSP)

• A court order be issued to freeze the TSP account. That will prevent or limit post-separation loans or withdrawals.
  • Loan as alternative to cash payout (consider tax consequences)

• member should take steps to file a new designation of beneficiary with TSP to ensure that the beneficiary they want to receive benefits is the person currently named. Otherwise, TSP has no option but to pay out to the beneficiary listed, even if that is a former spouse! That is true even if the former spouse waived any interest in the TSP account.
Serving the Children: Custody/Parenting Time Issues

• What is the State law? Where does UCCJEA put your custody? (this may differ from where the divorce is)
  – 49 states have some manner of military custody protections
  – ULC Deployed Parents Visitation and Custody Act

• Considerations?
  – Temporary and ongoing custody
  – Use of electronic “parenting time”
  – Travel - overseas assignments and stateside
  – New station orders and protection of custody agreements
  – Use of Service Against Servicemember
    • Permanency, PTSD, Reintegration periods
Serving the Children: Custody/Parenting Time Issues

Creative Parenting Plans for all possible scenarios:

- PCS
- Weekend Duty: Drill
- Annual Training
- Active Duty for School
- Deployment
  - Environmental Morale Leave (a.k.a. R&R)
  - Holidays/visitation to a family member or significant other
QUESTIONS?

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