What’s All the Hubbub, Bub?

The National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) contained a major revision of how military pension division orders are written and will operate. Instead of allowing the states to decide how to divide military retired pay and what formula or methodology to use, Congress imposed a single uniform method of pension division on all the states, a hypothetical scenario in which the military member retires on the date of divorce. Despite the fact that more than forty states employ the “time rule” to divide a defined benefit plan, all states – as of December 23, 2016, the date the law was enacted – will have to use this new method for dividing a military pension.

The new rule applies to those still serving – the servicemember (SM) who goes through divorce and property division while still on active duty in the uniformed services (Army, Navy, Air Force, Marine Corps and Coast Guard, plus the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration). It also applies to those in the National Guard and Reserves who are not yet receiving retired pay. It has no impact on those who obtain a divorce and property division after retirement.

How the Frozen Benefit Rule Works

The new military pension division rule is a “rewrite” of the terms for military pension division found in the Uniformed Services Former Spouses’ Protection Act, or USFSPA. The rewrite requires that the military retired pay to be divided will be that attributable to the rank and years of service of the military member at the time of the parties’ divorce. This is so even though the servicemember may rise in rank and years of service afterwards, resulting in a larger pension to be divided, which would then be discounted by using the “marital fraction” to apply pension division to only the benefit which was

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2 Although the statutory language refers to “the time of the order,” the Defense Finance and Accounting Service has interpreted this as the date of the decree of divorce, dissolution, annulment or legal separation, as explained below. See DoD 7000.14-R, Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay, Vol. 7B, ch. 29, ¶ 290204.
acquired during the marriage. The only adjustment will be cost-of-living adjustments that occur under 10 U.S.C. § 1401a (b) between the time of the court order and the time of retirement.3

The NDAA 17 rewrite makes 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 Can This Be?

“Frozen benefit division” is known as a hypothetical clause at the retired pay centers.4 It is the most difficult to draft of the pension division clauses available. 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.”

But now everyone will have to know how to do it. Since few lawyers know how to write such an order without a handful of Excedrin, this means the cost of military divorce will go up once again, with

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3 According to Lexis Advance (last checked 3-26-17), here is new text for 10 U.S.C. § 1408 (a)(4) [additions/changes in italics]: (A) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled (as determined pursuant to subparagraph (B) less amounts which--
   (i) 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;
   (ii) 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;
   (iii) in the case of a member entitled to retired pay under chapter 61 of this title [10 USCS §§ 1201 et seq.], 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
   (iv) are deducted because of an election under chapter 73 of this title [10 USCS §§ 1431 et seq.] 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.
   (B) For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be--
      (i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by
      (ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title [10 USCS § 1401a] between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.

[Note the error in the language at (B)(i) above. It says that, for purposes of this section, a member’s retired pay is his or her basic pay according to pay grade and years of service at the time of the court order. In reality, retired pay is never one’s basic pay; by law it is his “High Three” pay (average of highest three years of continuous compensation) times years of creditable service times 2.5% in most cases. Presumably this will be corrected in a forthcoming amendment.]

4 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.
rivers of rejection letters flowing back to attorneys who submit their pension orders to the retired pay center in the hope of approval.  

Then it’s back to the drawing board for another attempt, or else the local attorney will have to farm it out to some expert who can do it properly – if there’s enough information available to figure it out. The required data include the servicemember’s rank and years of creditable service, as well as his or her “High Three” figure (i.e., the average of the highest 36 months of continuous compensation). An expert will need to be located, assuming there is enough money is left to pay this draftsman for the work.

**Past Efforts, Future Promotions**

Most courts already give consideration to how the efforts of the SM and the spouse during the marriage should be apportioned in regard to future promotions. The *time rule* is based on the “marital foundation theory,” which recognizes that the individual’s final retired pay is based on a foundation of marital effort (e.g., a servicemember would never have attained the rank of sergeant major, with 30 years of service, if it hadn’t been for the efforts expended during the marriage up to the rank of sergeant first class over 20 years, when the parties divorced). The reason why a large majority of states have adopted the time rule for dividing every type of pension – it provides the fairest approach to division of this asset, whether the pension is state or federal, private or public. And it accounts for the postponement of the benefit (i.e., the spouse’s inability to obtain immediate payments in most states) by allowing for the growth in the pension over time.

That approach goes out the window under this new NDAA 17 rule. The share of the former spouse (FS) is *artificially fixed*, frozen like a fly in amber. And then the payments are postponed until the SM chooses to put in for retirement, so a second shrinkage is imposed on the pension share of the FS.

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 plenty of problems applying it in most state courts. And the harmful impact won’t be limited to spouses; members and retirees will feel the pain as well. Consider this example:

- Husband and Wife agree to divide the husband’s retired pay exactly according to the frozen benefit rule. At the time Husband is a major in the Marine Corps with over 16 years of service.

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5 A guide for attorneys on how to write acceptable military pension clauses may be found at the Silent Partner, “Guidance for Lawyers: Military Pension Division,” and it includes the necessary elements and language for a proper hypothetical clause.

6 The majority rule provides for a fair share by dividing the *actual* retired pay of the member/retiree, not some hypothetical number, and then it reduces it to give the member/retiree credit for the final years of military service after the divorce.
• Their property settlement language tracks the new statute by stating that the disposable retired pay to be divided by court order is that of Husband, based on his years of service and rank at the time of the court order, that is, “major over 16.” It even calculates the hypothetical retired pay.

• Both sign it, and they have their signatures notarized.

• They do not, however get divorced immediately. Due to a deployment and an overseas assignment for Husband, filing for divorce does not take top priority for him. As for Wife, she needs to maintain medical coverage as a dependent spouse so she is not eager to pursue the dissolution either. Five years pass before one of them files. By that time Husband is a lieutenant colonel over 20, not a major over 16.

• When the divorce is granted, with the settlement incorporated into it, it is submitted to the retired pay center. And the center rejects it, since the rank and years of service at the time of the divorce is not “major over 16” but “lieutenant colonel over 20.” The latter is what must be stated in the order or decree, not the agreed terms.7

Breathing Room and Time to Adjust

How much time was allowed for states to revise their laws to accommodate this new rule? None. There was no “breathing room” allowed, no decent interval set out to let the majority of the states write up, propose and enact laws consistent with the “new rule.” Counsel for the FS will need to alert the court to this problem and show that a warped formula will occur if the denominator of the marital fraction is not revised, to avoid imposition of a double discount on the FS.

Here’s how the double discount works: First of all, the benefit to be divided with the FS is frozen at the rank, years of service and retired pay base at the date of divorce. In addition, since state laws have not been rewritten to revise the “marital fraction,” the fraction will still be calculated in 90% of the states based on years of marital pension service divided by total pension service years (marital service years ÷ total service years), rather than years of marital pension service years divided by service years up to the date of the divorce.

It is essential to stop the clock for the denominator at divorce since the benefit is also fixed at that date. Anything else would doubly dilute the pension benefit granted to the spouse. This was recognized

7 The same result would obtain if the parties didn’t specify exactly the components required for a hypothetical clause, including the years of creditable service, rank, and retired pay base of the member based on his “High Three” years of pay (see text below); the order would be rejected by the center, which would withhold acceptance until the proper information was inserted.
in a 2014 Texas case, *Douglas v. Douglas*, which held that the denominator in a “hypothetical clause” is the months of creditable service during marriage up to the date of divorce, rather than the date of retirement. The Texas Court of Appeals stated that accepting the husband’s proposition – that the denominator should be total years of service – would impermissibly dilute the ex-wife’s share acquired during the parties’ marriage.

The new law is effective and binding on the states upon enactment (i.e., 12/23/2016). 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 the military case. 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.

**Setting up the Example**

An illustration may help to paint the problems and suggest solutions more clearly. We’ll use in these examples a divorce case involving the civilian former spouse, John Doe, and his ex-wife, Navy Commander Mary Doe. They are litigating in a *time rule* state, one which has not made any changes regarding the marital fraction used in dividing a military pension.

**Strategy for the Servicemember**

There’s no easy day for attorneys handling either side of the pension division case under these new rules. But the SM’s lawyer will always have the less difficult task. The new law was tailor-made for the servicemember, by freezing his or her retirement benefit. In addition, the SM has control over all the evidence and testimony needed for court or in settlement.

The active-duty SM needs to provide her attorney with proof of the “High Three” figure (i.e., the average of her highest 36 months of continuous compensation) at the time of the divorce. That will

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9 For example, in New York, the valuation and classification date is the date of commencement of the divorce case. In California, a spouse’s share of community property stops accruing at the “final separation.” See, e.g., *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661(Cal. Ct. App. 1985). The date of final separation is also the classification and valuation date in North Carolina. N.C. Gen. Stat. § 50-20 (b)(1). In Nevada, community property stops accruing on the divorce date. See, e.g., *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983). In other states it may be the date of divorce, the date of irretrievable breakdown of the marriage, or a date in the discretion of the judge.

10 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.
usually be the most recent three years. The *High Three* amount can be calculated from Mary’s pay records. The document showing her pay is called the LES, or Leave and Earnings Statement. She can get help in obtaining the data through her finance office, and she should be able to retrieve about a year’s worth of LES’s from the Defense Finance and Accounting service (DFAS) secure pay portal (https://mypay.dfas.mil)\(^1\) or from her own secure portal online for pay and personnel information (e.g., “My Navy Portal” for sailors, “Army Knowledge Online” for soldiers). Mary can also obtain a pay transcript from DFAS summarizing the last three years of base pay.

Mary’s attorney will place the numbers for these 36 months of base pay on a spreadsheet, and Mary will authenticate the pay in her trial testimony. The spreadsheet should be offered to the court as a summary of the written records which have been verified by Mary, and Mary must also be able to testify that the spreadsheet is indeed an accurate transcription of her pay records, even if she did not prepare the spreadsheet. If the records were obtained from the pay center (DFAS in this case), then Mary may need to obtain a declaration from the business records custodian.\(^1^2\)

Once the evidence has been admitted, the court will require a court order for dividing the pension. The attorney for the prevailing party is often tagged with the task of preparing the military pension division order, or MPDO, unless all the necessary language is placed in the divorce decree, or in a property settlement incorporated into the decree.\(^1^3\) If “outside assistance” from a lawyer experienced in writing such pension orders is needed, this should be done as early as possible, preferably at the start of the case.

Whenever possible, the SM needs to request bifurcation of the divorce from the claim for equitable distribution or division of community property.\(^1^4\) 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**

When operating under the new rules, the former spouse needs to realize that, in the words of the

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\(^1^1\) Members of the Army, Navy, Air Force and Marine Corps have access to the DFAS secure website mentioned above; Coast Guard members have access to the USCG on-line pay portal, “Global Pay.”

\(^1^2\) Under federal law, notary seals are not required for instruments which must be verified for federal purposes; instead, the federal government uses an unsworn declaration, made under penalty of perjury. 28 U.S.C. § 1746.

\(^1^3\) For the necessary terms for the MPDO, see the Silent Partner, “Getting Military Pension Orders Honored by the Retired Pay Center.” See Note 5 *supra* for guidance on how to write the specific pension division clause.

\(^1^4\) 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.
Rolling Stones’ 1964 hit, “Time Is on My Side.” The longer it takes to obtain the divorce, the higher the
servicemember’s rank, years of service and “High Three” will be. Should the SM move to bifurcate the
hearing into “divorce now, property division later,” the FS should oppose the request by arguing that
judicial economy and efficiency will be impaired, state law frowns upon severance of the issues and a
multiplicity of hearings (if that is accurate) and 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.15

Discovery and Documents

Once the divorce case has started, the FS ought to propound discovery immediately, asking – among
other things – for verification of when the highest three years of continuous compensation were for the
SM, and for information on what the “High Three” is so that the court can calculate this essential
element of military pension division. The latter inquiry can be posed in interrogatories and also in
document requests. If the SM is less than forthcoming in the responses, the FS can argue for putting off
the divorce until the SM begins to cooperate in responding to discovery. Counsel for the FS, John Doe,
may be able to use principles of equity and the “clean hands doctrine” to argue that the SM must be in
compliance with the rules and orders of the court – including full, prompt and honest answers to
discovery – to be able to move for affirmative relief herself, in the form of a hearing on the application
for a divorce judgment.

As to documents and evidence in trial, the above approach for Mary Doe’s case would also be what
John and his attorney would use most of the time. For an effective trial presentation, John’s lawyer will
need to get and submit the above information if the court is to do a proper hypothetical clause for the
Doe case in light of the new frozen benefit rule. While the records might be obtained from Mary
through discovery, a written consent signed by Mary (for transmission to the retired pay center) may be
necessary if she won’t produce the data on her own, or perhaps a court order or a judge-signed subpoena
sent to DFAS if she is obstinate. It could take weeks or months to obtain this information from the
source.

Restoring the Balance

To attempt to find the flaws and wiggle through the loopholes in the new rule, the lawyer for John
Doe (the ex-husband of CDR Mary Doe) faces a daunting task, and it doesn’t simply involve the

15 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.
assembly of numbers for the court to use in ruling on a hypothetical award. The strategy for John is more of a global approach to the entire process, and it might involve half a dozen possibilities, depending on the state court rules for pension division, opposing counsel (or pro se litigant), the particular judge involved, the phase of the moon and other factors!

The goal of the FS, John Doe, is to “restore the equilibrium” in pension division. He needs what he would have received before the new rule was passed: a division of the amount of retired pay which Mary gets at retirement. At best, he wants to employ an approach which will yield a result that is numerically the same as that produced by the time rule if that were still available. His “Plan B” would be to obtain other payments or benefits which would help him obtain what he sees as a fairer division of Mary’s retired pay and benefits, or of the marital or community property in general.

As to John’s possible strategies, note that these are not labelled “One Size Fits All.” While some states may prohibit or restrict a particular approach, the summary below is written to set out the entire spectrum of possible strategies, not to advocate one specific method for a particular case or state.

The Pension Division Rules from DFAS

The new rules were just published at the end of June 2017 in Volume 7B, Chapter 29 of the Department of Defense Financial Management Regulation (DoDFMR).16 It is clear that DFAS has settled on the “date of divorce” as the target for when the High Three must be fixed. Under 10 U.S.C. § 1408 (a)(2),

…”court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree)....

DFAS removed everything from this sentence except “final decree of divorce, dissolution, annulment, or legal separation issued by a court” and used that to specify the High Three date. Regardless of what potential pension benefit is earned later in the servicemember’s career, it is the High Three as of the date of divorce which DFAS interprets as being “the time of the order” as specified in Section 641 of NDAA 17. For those military members who entered service on or after September 8, 1980, the following information must be provided to the retired pay center in the decree, order or incorporated settlement:

1. A fixed amount, a percentage, a formula or a hypothetical which is awarded to the FS;

16 See ¶ 290204 for the definition of “court order,” ¶ 2908 for an entire revised section as to the new rules, and Figure 29-2 for a sample court order with language to meet the requirements of the Frozen Benefit Rule.
2. The SM’s High Three amount at the time of divorce (i.e., the actual dollar figure); and

3. The SM’s years of creditable service at divorce or, for a member of the Guard or Reserves, the creditable retirement points at divorce.

Outline of Time-Rule Strategies

Spousal Support Settlement. When the parties are in agreement, a consent order for alimony, maintenance or spousal support is one way to obtain time-rule payments from the military pension without the limitations of the frozen benefit rule. An alimony garnishment is based on “remuneration from employment.” It is not tied to DRP, or disposable retired pay; thus the new rule and its definition of DRP do not apply to permanent alimony payments which start at retirement and function as a division of retired pay.\textsuperscript{17}

Here are a few other pointers about the use of permanent spousal support to mimic pension division as property:

- Note that there is no “10/10 rule” for alimony payments from the retired pay center, as is the requirement when the pension is divided as property (i.e., property division payments from the retired pay center may only be made if there are at least 10 years of creditable service concurrent with at least 10 years of marriage).\textsuperscript{18}

- Make sure that the FS payments do not end at remarriage or cohabitation (since pension-share payments would not end at either of these two events) and are not subject to modification.

- Admittedly, spousal support is usually effective immediately (not at a future date). In addition it usually consists of a fixed dollar amount, not a formula such as:

\[
50\% \times \frac{120 \text{ months of marital pension service}}{\text{total months of creditable service}} \times \text{final retired pay.}
\]

There is no reason, however, why the retired pay center should refuse to accept a formula for the spousal support, rather than a specific set dollar figure.\textsuperscript{19}

- A consent order for permanent spousal support should suffice to obtain the payments to the FS

\textsuperscript{17} The rules for collecting alimony, child support or both from an individual’s military retired pay are found at 42 U.S.C. § 659 and 5 C.F.R. Part 581. The money from which family support may be withheld is termed “remuneration for employment.” This includes military retired pay (5 C.F.R. 581.103(c)), and even military disability retired pay (5 C.F.R. 581.103 (b)(13)); see also DoDFMR Vol. 7B, ch. 27, para. 270101.A. It is advisable to mention the above citations to the DoDFMR in the permanent alimony order so as to avoid confusion by those who are processing the order. Counsel may also want to include these citations in the order itself.

\textsuperscript{18} 10 U.S.C. § 1408 (d)(2).

\textsuperscript{19} The application form for payments from military retired pay is DD Form 2293.
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.

A Spoonful of Alimony. John’s attorney could argue for division of the pension under the new rule, with the remaining amount made up by alimony to be decided upon Mary Doe’s retirement, in order to get the equivalent of a “time rule” order. If John is awarded alimony while Mary is still serving, the alimony should not end automatically upon Mary’s retirement; John’s attorney needs to review carefully the results of dividing Mary’s retired pay to decide whether some alimony should be continued to equalize the parties’ positions. The terms of the alimony order might make the amount adjustable depending on economic and financial factors at the time of Mary’s retirement, including any reduction of the retired pay to which John would be entitled under the time rule due to the “frozen benefit rule,” or any reduction because Mary elects VA disability compensation and that reduces John’s amount due to a “VA waiver” under 10 U.S.C. § 1408 (a)(4) and 38 U.S.C. § 5304-5305. Note that the order regarding spousal support as a “stand-in” for pension division must clearly state that the support does not end at the remarriage or cohabitation of the recipient spouse, since true pension division orders do not change upon either event.

Using the Time Rule Formula Anyway. The revised law doesn’t say that a court may not enter a time-rule order. It merely states that the retired pay center (DFAS or the Coast Guard Pay and Personnel Center) will only honor “date-of-divorce division” for those still serving. Recognizing this limitation on payments from the pay center, the court may still enter a time rule order, noting that at Mary’s retirement only a portion of the pension-share payment for John Doe will come from DFAS. The court’s order would provide that Mary will still be responsible for the rest and will indemnify John for any difference between the two amounts.

There is a parallel to the remedy often used in “VA waiver” cases in which the FS gets less than intended. When the retiree elects VA disability compensation, the result is often a dollar-for-dollar reduction in retired pay. The duty to indemnify is a common solution for this “VA waiver” and the former spouse’s receipt of a lower amount due to operation of the law.20 Why shouldn’t it work for cases in which the “operation of law” involves an amendment to USFSPA, the “frozen benefit rule”? As will be explained below, 10 U.S.C. § 1408 (e)(6), the “savings clause” in USFSPA, allows the courts to employ state enforcement remedies for any amounts which may not be payable through the retired

20 But see Howell v. Howell, 137 S.Ct. 1400 (2017) on the issue of indemnification by court order, and also the Silent Partner, “The Death of Indemnification.”
Be sure not to use “disposable retired pay” in the order to describe what is divided. Disposable retired pay, or 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 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.”

Put Off the Divorce. Delay of the divorce will gain time for the FS, and time is money. The longer the divorce is postponed, the higher the retired pay base (i.e., the “High Three”) of the SM. Intervening months and years will yield “step increases” (i.e., pay increases which occur every two years), Congressional pay raises and possibly promotions. Who could object to this approach? The expected naysayers for this strategy are two types of attorneys whom we’ll call “Naïve Ned” and “Ethical Ethyl.”

Naïve Ned says, “It can’t be done! How can you postpone the divorce for more than a couple of weeks on the outside, once the case has been filed?” Sadly, Ned hasn’t had much experience in the big, wide world outside his office walls.

Many legitimate tactics exist for slowing down the wheels of litigation. Rather than accepting service of process, Ned could politely tell his opponent that the client will not allow him to sign an acceptance, and that regular service of process must be employed. When the client is finally served, Ned can ask for an extension of time for filing an answer. If there is a flaw in the pleadings, Ned may file a motion to dismiss. If there are questions regarding grounds for the divorce or the validity of the plaintiff’s claim of domicile, then Ned can initiate discovery. With these and other tactics, an attorney in Syracuse, New York (for whom the author was a consultant) was able to drag out and delay a divorce decree from 2010 (when the case was filed) until 2014. And all the while the client, a retired Army colonel, was begging him to speed it up and get the divorce granted!

Ethical Ethyl takes a different approach. “While it may be possible to postpone the divorce, there are serious concerns under the Rules of Professional Conduct. It’s never right to delay the litigation. Counsel has an ethical duty to move forward toward completion, not drag his feet. Slowing down the process with the goal of delay is simply unethical!” Unfortunately, Ethyl hasn’t read the Rules very

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21 See also Brett R. Turner, EQUITABLE DISTRIBUTION OF PROPERTY (3rd Ed. & 2016-2017 Supp.), Sec. 6.4.
22 DoDFMR, Vol. 7B, ch. 29, Sec. 290601.
closely.

While delay for its own sake is improper, delay which results from the legitimate use of objections, discovery, motions and other tactics is not inappropriate or a violation of the Rules of Professional Conduct. The Rules prohibit “unreasonable delay” or “improper delay.” They do not bar the use of legitimate devices, such as discovery, to obtain needed information, even though the employment of discovery and the unresponsiveness of the other side may lead to lengthy delays in the legal process.

In a 1998 divorce and property division case, the author embarked on a campaign of discovery to ascertain whether the plaintiff, a soldier, was a legitimate resident of North Carolina. Domicile is an essential element of divorce, and the defendant was a maid at a motel in coastal Georgia, so it could not be her domicile which was at stake. The plaintiff was in New York. Using sequential discovery (i.e., interrogatories followed some weeks later by document requests, and then followed by requests for admissions, rather than simultaneous service of all of these on the plaintiff), the author beamed in amusement when the plaintiff – instead of answering the discovery immediately – decided to obtain an extension of time for response by 30 days, following that with his objections and motion for protective order. In due course the author filed a motion to compel. A hearing was eventually calendared on the objections, motion for protective order and motion to compel. The latter motion was granted, and the clock just kept on ticking. The plaintiff eventually fired his first lawyer and hired a new one to get the case moving faster. Legitimately using these discovery tactics, the author was able to get the granting of a divorce postponed for 18 months, thus allowing the client to obtain a share of the SM-husband’s retired pay (which otherwise would have been lost due to a change in state law).

If you get the file when the divorce has already been granted (after 12/23/16), don’t give up. Check to see if the divorce is valid. A faulty dissolution might be set aside by the court, giving the FS a larger potential pension to divide. Imitating Sherlock Holmes may pay dividends in terms of flushing out a flawed divorce, so get out that magnifying glass!

How to “Even Out” the Pension Division

The next five methods are not true adjustments to the pension division to make it numerically the same as that which results from the time rule. They will, however, help in ameliorating the result of the “frozen benefit division” for John Doe (the ex-husband of Commander Mary Doe).

Unequal Share of Pension. In states where the court has a degree of flexibility in how much of a marital

23 A guide to scrutinizing the validity of divorces is found at the Silent Partner, “Lost’ Military Pensions: The Ten Commandments.”
or community property asset to award the non-employee spouse, John’s attorney can ask the court to award a share to him that is larger than the usual “50% of the marital share” portion. Thus the order could be framed in terms of “70% of the marital share of Mary Doe’s military retired pay,” which would leave John with a larger share than he could receive through frozen benefit analysis. Have a financial expert help to estimate the monetary loss for the FS, so that a set-off can be calculated. Note, however, that it would be impossible to compare the two results at the time of the pension division order. Only in hindsight – at the time of Mary Doe’s retirement – would it be possible to measure one against the other.

**Fixed Percentage Award.** Another alternative, when the laws of a state have not been adjusted to provide for a denominator of the marital fraction which ends on the date of the divorce (since that is how DFAS is interpreting “court order” in Sec. 641 of NDAA 17) is to have the court award to John Doe, the non-military spouse, a fixed percentage of the military retired pay while Mary is still serving. After all, if John is forced to receive only a share of a frozen benefit at the time of divorce, why shouldn’t he get a fixed percentage of that frozen benefit? In this situation, the amount of the frozen benefit would remain relatively stable, instead of losing value over time (as would occur if the denominator of the marital fraction remains the total amount of Mary Doe’s creditable service). So, for example, if the property division order occurred when the parties had been married for 10 years of the 20 that Mary had already served, John would be awarded half of 50% (i.e., $\frac{1}{2} \times 10/20$), or 25% of the frozen benefit. If the fixed percentage approach were not employed and Mary served for a total of 30 years, then John would still receive 50% of the frozen benefit times the marital fraction. However, at that time the marital fraction would be 10/30, or 33%, and John’s share would be 16.5%, rather than 25%. Fixing the percentage at the same time as the benefit is fixed is one way of “retaining value” for John’s pension-share award.

**Present Value.** In addition to the future division of retired pay, state laws also recognize a second method of dividing pensions, the “present value offset.” This analyzes the present value of a series of money payments over the course of the SM’s life; these are, of course, her retired pay. The present value of this retired pay is the amount that can be used for a trade or an offset, allowing the SM to keep her pension intact. This is beneficial for the parties since it results in a complete present accounting and division, not the postponement of property division until retirement. In addition, it provides the spouse with property “in hand” when it is unknown whether the SM will live for few or many years after retirement.

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24 John’s share of the pension, divided as property, is limited to 50% of disposable retired pay which may be garnished through the retired pay center. 10 U.S.C. § 1408(e)(1).
25 It would also be possible to have the court award other assets to John in view of his loss due to the truncated division set out in the new Frozen Benefit Rule.
retirement, or even survive to apply for retirement.

Evaluating a pension is a complex task. It is not for the faint-hearted, the unprepared, or the amateur. These complicated computations generally demand an evaluation report and the testimony of an expert.26 The steps to be taken include these:

- Counsel must locate the appropriate state statute or cases which describe the methodology to use in ascertaining the present value of periodic payments.27
- The FS needs to find and hire an expert (e.g., CPA, economist or actuary).
- The FS needs to get a “wingman” to educate the expert in understanding the military retirement system; this advisor might be a senior lawyer with lots of experience in handling military pension cases, a retired JAG officer, or a judge advocate who is a member of the National Guard or Reserves with experience in this area.
- The expert needs to read the cases, apply the methodology and placed a value on the pension. In an ideal world, counsel may even have one or two examples of pension present-value reports to give the expert to help out in regard to what must be done, what discounts need to be applied, what mortality table should be used, and so on.
- Then the hunt is on for some property or asset which matches the pension value and can be given to the FS in exchange for the division of the pension, or which can be awarded to the FS by the judge in a contested case so that the SM may retain the military pension.

Present Value and Payments. The present value of a military pension can be a pretty large figure in some cases.28 When this happens, the court may need to do a partial setoff for the marital value of another asset awarded to the FS, with the remainder to be made up in periodic payments. Thus, if the present value of CDR Mary Doe’s retired pay were $400,000 and the marital component were $300,000 (that is, the parties were married for 15 of the 20 years used by the expert in the pension value report), then the court might set off the pension, awarded to Mary, by granting sole ownership to John of marital assets worth $200,000. To complete the equation, the court could order Mary to pay $100,000 to John by

28 See, e.g., Cunningham v. Cunningham, 173 N.C. App. 641, 619 S.E.2d 593 (2005) (remanding case for presentation of husband’s valuation of military pension; wife’s value, without expert, was about $560,000 for a Marine Corps lieutenant colonel).
making annual payments of $20,000 for five years. This could be done by requiring Mary to set up an allotment immediately for the monthly payment of $1,666.67 ($20,000 ÷ 12 months) to John. Or the court could enter a military pension division order requiring monthly payments of $1,667.67 from Mary’s retired pay. The retired pay center will honor these “set dollar amount” payments so long as they do not exceed the allowable percent of disposable retired pay which may be garnished as property division, that is, 50%.29

The Western Gambit. In several jurisdictions (mostly western states), the court may order the SM to begin present payments to the nonmilitary spouse as soon as the SM is eligible to retire and receive monthly payments. This is so whether the military member has actually retired or not.

The seminal case is *In re Marriage of Luciano*,30 in which the judge ordered pension-share payments for the wife to begin when the SM-husband retired from the Air Force. The California Court of Appeals reversed, stating that it would be unfair to postpone payment to the ex-wife since that would give the SM the power to determine when she received her own property. The Court went on to say that the employee spouse cannot defeat the nonemployee spouse’s interest in community property by relying on a condition solely within his control. The proper order for the judge to issue would state that the former wife is the one who has the choice as to when to start receiving her share of the pension. This election may be made at any time after the pension is matured, through a motion filed by the nonemployee spouse. The Court stated that, if the motion is made before retired pay starts, this constitutes an irrevocable election to give up increased payments in the future which might accrue due to increased age, longer service and a higher salary.31

Nothing in the frozen benefit rule blocks or bars this “western gambit,” as illustrated by the *Luciano* case. And the logical approach – nay, the only rational approach – for a nonmilitary spouse in those states which follow *Luciano* is to move immediately for payments, to start as soon as the SM attains sufficient service for retirement (usually after 20 years of active duty). Since there can no longer be an

29 This 50% means half of the disposable retired pay of the SM calculated at the date of the court order. The same limits apply if the court – instead of time payments on a present-value setoff – decides to order the SM to pay the FS a fixed dollar amount upon retirement. See Note 23 supra.
increased payment in the future, as mentioned above, and the benefit to the FS is locked into the rank and years of service at the time of divorce, every nonmilitary spouse should file a motion to elect payments from the SM as soon as the pension matures.

**Continuing Conundrums**

Several questions remain. The answers will likely be provided in case law developments. Below are some examples.

How should the courts write a proper court order to implement the frozen benefit rule? The “hypothetical clause” (as it is called by DFAS) is the most difficult clause to prepare. For those who entered military service after September 1980, the current DoDFMR rule requires that the court order contain detailed information about the SM; this includes the years of creditable service as well as the “retired pay base” calculated according to the “High Three,” the average of the highest three years of continuous compensation before the specified division date.\(^{32}\)

At present, counsel must provide this information to the court. What if a court order specifies the “old definition” of disposable retired pay? Will it be rejected by the retired pay center, as would happen before the frozen benefit rule when an order was found to be unacceptable? Will the center send to counsel or the former spouse directions to specify the required data for a hypothetical clause?

When a retiree doesn’t make payments according to a pension division order which uses the original definition of DRP, will the FS be able to obtain compliance through a show cause hearing? Will the court’s contempt sanction be upheld? Or will an appellate court strike down the punishment on the basis of federal preemption, ruling that the frozen benefit rule cancels all other methods of dividing the future retired pay of a still-serving member?

If an order entered after 12/23/16 sets out terms under the original DRP definition and the SM wants to petition the court to change the order to comply with the present definition, will the court allow a motion to alter or amend under Rule 59 or its equivalent (in states which have not adopted the federal Rules of Civil Procedure)? What about a motion to set side under Rule 60? Or will the existence of a final decision bar that change? Generally speaking, courts refuse to modify final property division judgments or to allow them to be attacked collaterally.\(^{33}\)

What happens if a *time rule* order dividing the pension is final and unappealed, and then the attorney

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\(^{32}\) DoDFMR, Vol. 7B, ch. 29, Sec. 290608.

for the former spouse finds out that it will not be honored by the retired pay center? What if the order will only be honored to the extent that it divides the “frozen benefit,” rather than final retired pay? Can the court still hold the retiree liable for the unpaid portion of the pension under 10 U.S.C. § 1408 (e)(6)? That section of USFSPA, known as the “savings clause,” states:

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) [e.g., 50% of disposable retired pay] has been paid.

Numerous court decisions have held that orders which require the retiree to pay more than 50% of disposable retired pay are not void or invalid; they are simply not enforceable through garnishment from the retired pay center for amounts in excess of 50%. Can counsel for the FS defeat the arguments of the SM/retiree that federal law preempts state court orders, since this section of USFSPA provides an “escape hatch” for the FS in enforcement of the pension division order?

**Final Notes**

Labelled as John Doe’s “Plan B” above under *Strategy for the Former Spouse*, other methods and strategies exist for obtaining a “fair deal” (or perhaps a “fairer deal,” in John’s view) regarding division of military retirement benefits. These would include requiring the SM to pay the full cost of the Survivor Benefit Plan, or valuing the SM’s military medical coverage and placing that as an asset in the SM’s share of marital or community property. These do not involve a larger portion of the pension; rather, they focus on other benefits which may be valued and allocated in the property division process.

All of the above methods should be considered by lawyer for the former spouse. And this should be done in consultation with an expert in dividing military retired pay, so as to choose the best alternatives to the frozen benefit approach imposed by NDAA 17.

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35 Both of these approaches are covered in detail in Chapter 8 of Sullivan, *THE MILITARY DIVORCE HANDBOOK* (American Bar Assn., 2nd Ed. 2011) and both may be employed in any military divorce case, not just one which falls under the frozen benefit rule.
These rules and requirements, strategies and suggestions may not apply to everyone. There are certainly variations among the states as to what may be done in the area of division of retired pay. For example, while some states may allow “make-up alimony” to adjust the equities when a spouse is left short in the pension division, others maintain a strict line of division between spousal support (based on need and the ability to pay) and property division (based on the value of what was acquired during the marriage and how best to divide it). Be sure to understand the law and the cases. Consult an expert in your state (if you’re not one yourself), and contact a specialist in military pension division whenever possible – even if it’s in another state! Review the Silent Partner, “All Clauses Considered: Writing the Frozen Benefit Award.” You can’t ask too many questions or know too much in this area. “One size” does not fit all!

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