Military Pension Division: Pitfalls & Problems

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Know the Law; Explain It to the Client

• Three types of military retirement
• USFSPA - 10 USC 1408
• 10/10 overlap = garnishment
• LEGAL EAGLE handouts for clients
"The Bounty after the Mutiny"

3 military retirement systems – KNOW them!

Final Retired Pay
High-3
REDUX
3 military retirement systems – KNOW them!

Final Retired Pay
High-3
REDUX

“Pre-Retirement Counseling Guide” –
www.armyg1.army.mil/rso/preretirement.asp

“Which Retired Pay Plan Are You Under?”
– same website as above

“Which System Applies to You?”
http://militarypay.defense.gov/retirement/ad/01_whichsystem.html

CSB = Career Status Bonus

$30,000
Know the Basics

- Regulations
- Federal jurisdiction – three tests (domicile, consent, residence not due to military assignment), 10 U.S.C. 1408(c)(4)
- Wording of the pension division clause
- Four acceptable division methods
FORGET LONG-ARM STATUTES...
THROW AWAY INTERNATIONAL SHOE

FEDERAL JURISDICTIONAL LIMITS:
10 USC 1408(c)(4)

PENSION JURISDICTION IS LIMITED TO:
1. Domicile
2. Consent
3. Residence not due to military assignment
Residence test: \textit{SM resides in State A not due to military orders}

Example: Airman Smith assigned to Eglin AFB, FL – but lives in Gulf Shores, AL to be near his parents

DOMICILE

- PHYSICAL PRESENCE (excluding temporary absences)
- INTENT AS SHOWN BY...
  - state income taxes
  - car title, registration
  - driver's license
  - voting
  - home ownership
  - in-state tuition
  - voting
  - bank accounts
“YOU CAN’T SUE ME HERE - - I’M FROM KANSAS!

Ft. Bragg, NC

Domicile of servicemembers...

- Servicemembers Civil Relief Act – protects domicile for voting, tax purposes
- False domicile claims
- Costly to litigate in 2 states!
Leave-and-Earnings Statement

> Filing the lawsuit... or

> Responding to it

CONSENT
Safe havens?

- Unvested pension is Sep. Prop. in ARK., IND., ALA.
- Rest of states don’t require “vesting”
- Puerto Rico doesn’t divide non-contributory pensions

What is Spouse’s Share?

- 50% of Pension?

“Wife shall receive 50% of the military retirement benefits of Husband.”
What is Spouse’s Share?

- 50% of Pension?
- ONLY if married during SM’s entire career…
- Otherwise- 50% of marital share of pension

Wording the pension division clause – the marital fraction

- Majority rule
- Minority rule
Pension division formulas

- Majority of states: $50\% \times \text{"marital fraction"} \times \text{final retired pay}$

Majority Marital Fraction:

(When COL Roberts is still on active duty…)

\[
\frac{\text{Yrs. Marital Military Svc.}}{\text{Yrs. Total Military Svc.}} = \frac{20}{X}
\]
Pension division formulas

- Minority of states: 50% X “marital fraction” X retired pay earned as of divorce date

Minority Marital Fraction:

(When COL Roberts is still on active duty…)

\[
\text{Yrs. Marital Military Svc. till divorce} / \text{Yrs. Total Military Svc. till divorce}
\]
“All Clauses Considered”

– SET DOLLAR AMOUNT

(favors SM - no COLA),

-or-

– % OF DISPOSABLE RETIRED PAY

-or-

“All Clauses Considered”

– FORMULA CLAUSE (when SM is not yet ret’d)

-or-

– HYPOTHETICAL

(favors SM - freezes grade/ years)
RULES FOR DIRECT PAY ORDERS

• NOT MORE THAN 50% OF DISPOSABLE RETIRED PAY
• STARTING NO LATER THAN 90 DAYS AFTER SERVICE ON DFAS
• PMTS END AT DEATH OF RETIREE OR SPOUSE, WHICHEVER OCCURS FIRST
• PROSPECTIVE ONLY-- NO ARREARS

RULES FOR DIRECT PAY ORDERS

• SERVE ON DFAS CERTIFIED MAIL [RET. RECEIPT REQUESTED]
• DECREE TO BE CERTIFIED WITHIN 90 DAYS OF SERVICE
• APPLICATION LETTER SIGNED BY SPOUSE [DD Form 2293, www.dfas.mil ]
Know the Basics

- Wording, logistics
- Documents
  - LES [Leave and Earnings Statement]
  - RAS [Retiree Account Statement]

Gross pay, VA waiver, SBP premium, Taxable Income

RETIREE ACCOUNT STMT.
Know the Basics - Resources

- 6 SILENT PARTNERs re military pension division

  www.abanet.org/family/military

- DFAS guide for attorneys as to military pension division, “Dividing Military Retired Pay”


Disability Details

- Waiver of ret’d pay for VA disability $

- VA is tax-free, AND…

  news to me!
V.A. DISABILITY PAY = NOT DIVISIBLE!

(ditto for most of Military Disability Retired Pay)

Post-Divorce VA Elections: How the states are responding

- Go to great lengths to help former spouse
  - Indemnification
  - Damage award
  - Re-open the property division
  - Compensatory alimony
How to protect the non-military spouse from VA waivers

- Indemnification Clause

- DON’T SAY “John will take no action…”

- DO SAY “John will compensate Mary…”

Indemnification Clause

- State facts, assumptions [“John is COL with over 18 years’ service in Army, will receive pension based on longevity after at least 20 years of service.”]
Indemnification Clause

- State facts, assumptions [“John is COL with over 18 years’ service in Army, will receive pension based on longevity after at least 20 years of service”]
- State intent [“Mary to get unreduced share of pension based on years of service”]

Indemnification Clause

- State facts, assumptions [“John is COL with over 18 years’ service in Army, will receive pension based on longevity after at least 20 years of service”]
- State intent [“Mary to get unreduced share of pension based on years of service”]
- Don’t call it Disposable Retired Pay – that limits her share b/c VA is excluded from DRP
Indemnification Clause

• State duty of SM/retiree [“John will compensate Mary if there is any reduction in her share of the longevity pension.”]

• Include interest on unpaid amount [“The breaching party will also pay interest at the statutory rate on all unpaid amounts and damages.”]

Indemnification Clause

• State duty of SM/retiree [“John will compensate Mary if there is any reduction in her share of the longevity pension.”]

• Indemnify also as to expenses – not just REASONABLE [“Each party will pay for all expenses and damages incurred because of the other’s breach of this agreement.”]
VA with a Vengeance

CRDP and CRSC – “The Evil Twins”
found at…
www.abanet.org/family/military > SILENT PARTNER

CRDP to the Rescue

- CRDP = Concurrent Retirement & Disability Pay
- Available if ≥50% disability rating
- Return of waived military retired pay
CRDP to the Rescue

- Phased in over 10 yrs [2004-2014]
- 100% disabled = immediately vested
- Front-loading of payments

Pg. 2 of RAS: “Based on information received from the VA, your CRDP amount is $___.”
CRSC Pay Statement

Please refer to myPay website for retirees.

TSP is Retirement, Too

- Thrift Savings Plan = defined contribution plan: [www.tsp.gov](http://www.tsp.gov)
- Participation? Check the LES!
Waiver Wording

• “Mary Doe hereby waives and gives up any claim she may have to the military retired pay [and Survivor Benefit Plan] of John Doe.”
For those left behind -
  • S.B.P. [Survivor Benefit Plan...?]
  • or Single Biggest Problem????

SBP – Single Biggest Problem?

  • SBP = 10 USC 1447 et seq.
  • Benefit at death of retiree/SM = 55% of base amount
  • Cost (from retired pay) = 6.5% of base amount for “spouse/former spouse coverage”
  • Benefits, disadvantages
  • Checklist for judges
SBP DEFINED

- Court can order SBP coverage
- Without it, payments to former spouse end at the retiree's death
- Unitary – cannot divide, share with your NEW spouse!

SBP DEFINED

- Premiums come “off the top” before DRP (if court-ordered)
- Avoid SGLI as alternative (Ridgway case)
TYPICAL CLAUSE???

“MARY DOE SHALL RECEIVE 46.5% OF ALL THE MILITARY RETIREMENT BENEFITS OF JOHN DOE, INCLUDING EVERYTHING ATTRIBUTABLE TO HIS SERVICE IN THE MILITARY TOWARDS A PENSION, AND EVERY PENSION BENEFIT OF HIS.”

LIFE & DEATH

If representing SPOUSE –

- **Life:** SPECIFY SHARE OF PENSION
- **Death:** IF SM DIES AFTER DIVORCE, SBP COVERAGE TO ‘FORMER SPOUSE’

“JOHN WILL IMMEDIATELY ELECT MARY AS SBP FORMER-SPOUSE BENEFICIARY.”
SBP Strategies

- Shifting the premium to FS...
- SBP suspended if FS remarries before 55

“Timing Is Everything”

- The 10-Year Rule for pension division garnishment
- The TWO SBP deadlines for order submission to DFAS
- Medical care for former spouses

Dealing with Deadlines
The "10-Year Rule"

COURT ORDER...

+ 10 yrs of creditable service

+ 10 yrs of marriage during svc.

= direct payment from DFAS

**not a rule of divisibility!**

Dealing with Deadlines

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SURVIVOR BENEFIT PLAN

- One-year deadline
  - From divorce if SM makes the election
  - From date of SBP order if FS sends "deemed election"

Dealing with Deadlines
"20-20-20 COVERAGE"

20 YRS OF MARRIAGE
+ 20 YRS OF CREDITABLE SVC
+ OVERLAP OF 20 YEARS
= MILITARY MEDICAL COVERAGE

Other Medical Coverage

• CHCBP – 10 USC 1078a
  – Premium-based
  – Normally 36 months after divorce
  – BUT INDEFINITE if:
    • Pension division OR SBP coverage in order
    • Unremarried if under 55
Who ya’ gonna call?

Who ya’ gonna call?

• ABA FAMILY LAW SECTION’S MILITARY COMMITTEE: www.abanet.org/family/military/

• NC STATE BAR LAMP COMMITTEE: www.nclamp.gov
“Who ya’ gonna call?”

- DFAS WEBSITE: www.dfas.mil

- ARMY RETIREMENT SERVICES:
  www.armyg1.army.mil/rso/rso.asp

Whoooo Yo Gonna Call????
“Who ya’ gonna call?”

The End