



Best of ListServ

Q: *I represent non-military member wife in divorce. She is 20/20/15 spouse. Husband retired 4 years ago and they selected minor children only SBP coverage. If I can get deemed election order from Court for former spouse and minor children SBP coverage, will DFAS honor it? Everything I am reading seems to suggest that if they did not elect spouse coverage when retired during marriage, they can't change the election to former spouse at divorce later, but I want to make sure.*

Marriage and service overlap 17 out of 20 years, so former spouse is entitled to 42.5% of retired pay. However, husband is drawing 40% disability from VA. Unfortunately, we have no direct case law authority that I am aware of in Louisiana that protects this redirection. Assuming that I can get court to follow constructive trust theory, I think I can make him personally responsible for full 42.5% amount even if I can't get it from DFAS. Any suggestions on this? I know Congress addressed concurrent receipt last year but my understanding is that doesn't apply unless 50% disability and other service related-disability connections apply.

I also have pending claim for child support and spousal support. I know that I can garnish up to total of 65% of retired pay for property and child support and alimony. But my client's claims will exceed 65%. I know VA benefits cannot be garnished for property rights but can they be garnished for child support or alimony?

Thanks for your time.

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A: Ask and ye shall receive. Several components.

First, substitution of beneficiaries: Anecdotal accounts indicate that sometimes the military approves such requests, and sometimes not. From a recent issue of RollCall (the newsletter of the ABA Family Law Section Military Committee, chaired by Mark Sullivan, newsletter edited by Peter Cushing), the following from Florida:

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In *Wise v. Wise*, 765 So. 2d 898 (Fla. 1 DCA 2000), the former wife filed a motion for contempt and enforcement, alleging that her former husband had failed to complete the necessary paperwork to name her as the beneficiary of survivor benefit plan. (SBP). At the time of the former husband's retirement from the military in 1991, the parties were still married and elected to name SBP beneficiary not the wife, but the parties' minor daughter. In 1993, the parties stipulated to the entry of a final judgment requiring the husband to name the wife as SBP beneficiary. After the dissolution of marriage, despite repeated requests, the former husband failed to name the wife as SBP beneficiary.

The trial court, pursuant to the wife's motion, ordered the former husband to complete the necessary paperwork to name the wife as SBP beneficiary and reserved jurisdiction to enforce its order. The former husband appealed on the basis that he lacked the ability to change the SBP coverage to name his former spouse as SBP beneficiary.

The appellate court noted that under federal law, that a court may require a person, who is a participant in the SBP, and "providing coverage for a spouse or spouse and child", to revoke that coverage to provide an annuity for a former spouse, who was not a former spouse when the member became eligible to participate in the plan. See 10 U.S.C. sec. 1448(b)(3)(A), 1450(f)(3). In the case at bar, as noted, only the minor child had been named as SBP beneficiary. The legislative history, S. Rep. No. 98-174 (1983) supported former husband's position that he could not under federal law, revoke his daughter as SBP beneficiary and name his former wife. The house committee felt that child beneficiaries deserve a preference in such cases. Therefore neither the stipulation nor the court order requiring the former wife to be named as SBP beneficiary was directly enforceable. However, this did not end the matter. The court further found that SBP was a marital asset subject to equitable distribution. To compensate the former wife, the court ordered that the entire scheme of equitable distribution be revisited by the trial court or "otherwise effectuate the terms of the dissolution judgment."

On remand, the former wife brought an action to revisit the equitable distribution scheme in the parties' divorce decree. The trial judge denied the wife's motion, holding that res judicata barred the court from re-determining the property rights of the parties.

In *Wise II*, 834 So.2d 887(Fla. 1 DCA 2003), the court found that the trial court erred in not revisiting equitable distribution on the basis of res judicata. The former husband did not file for rehearing or petition the Florida Supreme Court for review of *Wise I*, therefore *Wise I* was the law of the case. Thus the trial court was required to follow the decision of the appellate court so long as the facts on which the decision was based continue to be the facts of the case.

A persuasive dissent was filed in *Wise II* by judge Van Nortwick noting that here the former husband had not unilaterally done anything to undermine the decree. Rather, the parties and their attorneys were merely ignorant of the federal statutory provisions that governed federal survivor benefit plan and entered into a stipulation and court order that were not enforceable. The dissent pointed out that specialized knowledge is required to competently handle the military related divorce case.

Editor's Comment: This case is a good example of how lack of specialized knowledge of issues unique to the military dissolution of marriage case can have unintended consequences. Ignorance, not bad faith resulted in the husband and wife stipulating to the entry of an order providing for former spouse SBP which was not available to her under federal regulations. The appellate court, sitting as a court of equity, made new law in Florida allowing the re-opening of a final judgment to attempt to give the former wife the benefit of the bargain, even though the bargain made was based on a mutual mistake. One can debate whether the sanctity of the doctrine of finality of judgments should be impaired on this basis.

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HOWEVER -- There may well be a fix, at least in your case. Specifically, an "open season" for naming former spouses is supposed to open imminently -- October 1, 1995. Cost and other details set out at <http://www.dfas.mil>, when available.
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Next, as to disability, I think the Louisiana authority is fully in keeping with Virginia and Nevada law on the subject. See the disability benefits materials on our website -- under Published Works from the button bar on the first page of our website, which I believe will lead you to all relevant text and citations.

There is also a discussion in the article of the current state of concurrent receipt (you're right; for the moment, she must get the money from him, as it only back-fills retirements for those rated 50% and higher).

Finally, as to VA disability and child support. "Garnished" is not the right word, but you can apply for apportionment of the benefit. This is from the U.S. Office of Child Support Enforcement:

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U.S. Department of Health and Human Services Administration for Children & Families Office of Child Support Enforcement

1. Information Memorandum IM-98-03

DATE: September 25, 1998

TO: STATE AGENCIES ADMINISTERING CHILD SUPPORT ENFORCEMENT PLANS UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT AND OTHER INTERESTED INDIVIDUALS.

SUBJECT: Obtaining financial support for children from benefits paid by the Department of Veterans Affairs.

ATTACHMENT: VA Form 21-4138

BACKGROUND: Section 459 of the Social Security Act, as amended, provides for the garnishment of certain Federal payments for the enforcement of child support and alimony obligations. However, benefits paid by the Department of Veterans Affairs (VA) are specifically excluded with one exception [42 U.S.C. 659(h)(1)(B)(iii)]. The test to determine if a payment is subject to garnishment is whether the payment is remuneration for employment as defined in section 459 [42 U.S.C. 659(a) and (h)]. While Federal salaries fit this test, and Title II Social Security Old-Age, Survivors, and Disability Insurance benefits (OASDI) can be garnished (entitlement to these benefits is based on employee contributions into FICA), VA monetary benefits, entitlement to which is generally based on either the veteran's disability and wartime service (pension) or disability from service-connected injury or disease (compensation), is generally not considered remuneration for employment.

However, the Social Security Act and the statutes governing benefit payment by the Department of Veterans Affairs do provide for processes by which dependents may obtain financial support from veterans' benefits under certain circumstances. Below are two examples highlighting the laws or regulations under which benefits paid by the Department of Veterans Affairs can be paid to dependents to fulfill child support obligations.

Example #1: The Social Security Act [42 U.S.C. 659(h)(1)(A)(ii)(V)] provides that if a veteran is eligible to receive military retired/retainer pay and has waived a portion of his/her retired/retainer pay in order to receive disability compensation from VA, that portion of the VA benefit received in lieu of retired/retainer pay is subject to garnishment.

Example #2: The Department of Veterans Affairs has issued regulations pursuant to 38 U.S.C. 5307 that provide for an apportionment of VA benefits between the veteran and his/her dependents under certain circumstances. VA regulations at 38 CFR Section 3.450(a)(1)(ii) provide that, if the veteran is not residing with his or her spouse, or if the veteran's children are not residing with the veteran and the veteran is not reasonably discharging his or her responsibility for the spouse's or children's support, all or any part of the veteran's pension, compensation, or emergency officers' retirement pay may be apportioned.

Additionally, where a hardship is shown to exist, 38 CFR Section 3.451 authorizes a special apportionment of a beneficiary's pension, compensation, emergency officers' retirement pay, or dependency and indemnity compensation between the veteran and his or her dependents. The apportionment is based on the facts in the individual case, and may not cause undue hardship to the other persons in interest. Factors which determine the basis for special apportionment include the amount of veteran benefits payable, other resources and income of the veteran and those dependents in whose behalf apportionment is claimed, and special needs of the veteran, the dependents, and those applying for apportionment. Ordinarily, the VA considers that an apportionment of more than 50 percent of the veteran's benefits would constitute undue hardship on the veteran, while an apportionment of less than 20 percent would not provide a reasonable amount for any apportionee.

GARNISHMENT: To arrange for garnishment, contact the VA Regional Office that provides the non-custodial parent's benefits. VA provides a toll free number to help in determining which regional office is appropriate (1-800-827-1000), or refer to 5 CFR Part 581 - (Appendix A). The VA office will determine if the veteran has waived any portion of his/her retired/retainer pay in order to receive VA benefits. Send service of process for garnishment to the regional office serving the veteran.

SPECIAL APPORTIONMENTS:

1. The IV-D agency (state child support enforcement office) should write the Department of Veterans Affairs using agency letterhead to request an apportionment review. The letter should be signed by both the appropriate IV-D official and the custodial parent. The letter should be addressed to the VA Regional Office servicing that veteran's benefits. Use the toll free number to determine which regional VA office is appropriate (1-800-827-1000).

2. Complete and attach VA Form 21-4138 (copy attached) "Statement in Support of Claim." The normal VA procedure is to request this after receiving an apportionment application, so time can be saved by doing this as part of the first step. This is where information regarding income and net worth may be provided.

3. Attach a copy of the current support order, to assist VA in the development of the apportionment award.

4. Attach a copy of the arrearage determination sheet, payment ledger, payment records, etc.

CONTACTS: For more information on obtaining payments from veterans benefits, contact your ACF regional office.

David Gray Ross Commissioner Office of Child Support Enforcement

cc: Regional Administrators Regional Program Managers

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Off-list, I'm sending you a model "request for apportionment" letter. Hope this helps.

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