A legal note from Marshal Willick about developments – good, bad, and ugly – in the application of family law to cases involving military personnel (part two).

As set out in the last legal note, family law has accommodated military personnel to facilitate members' participation and fair treatment in child custody, visitation, and support matters.

Despite all the advantages handed to them, however, some military members just can't resist the temptation to ask for even more special treatment. The last legal note (posted at http://www.willicklawgroup.com/newsletters) debunked the rationales under which some members claimed that they were not required to support their children on the basis of the entirety of their income (like everyone else in the United States).

This note turns to a more insidious, and unfortunately, more prevalent larceny – the rationalizations of various former military members who seek to deprive their spouses of half of the retirement benefits earned during marriage, redirecting those sums into the veterans' own pockets, by way of misguided appeals to false "patriotism."

I. SO-CALLED "VETERAN SUPPORT GROUPS" SEEK TO PERVERT FAMILY LAW FOR THEIR PERSONAL ENRICHMENT

A. SYNOPSIS OF THE PROBLEM

Small but well-organized bands of former military members, seeking to undermine the relevant federal law, and many decades of State law designed to treat spouses equally under law, have mounted bursts of lobbying. Their targets are selected State Legislatures seen as vulnerable to enactment of a radical agenda seeking to deprive military spouses of the community or marital property protections held by all other spouses, with the goal of taking the spousal share of retirement benefits and re-directing it to the military members, under any of several rationalizations.

B. BACKGROUND – BIG PICTURE – WHY SPOUSES SHARE IN RETIREMENTS

It is at this point a truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage. *See*, *e.g.*, Annotation, *Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R. 3d 176. This is particularly true of military marriages, in which frequent moves are the norm and there is often less opportunity to accumulate large real estate equity.

In every single one of the United States, and in ***every*** retirement system, the decision has been made that marriage is, among other things, an economic partnership, in which the spouses share ***equally*** in the present and future economic benefits earned during marriage. That is true for military retirement benefits, as it is true for every single ***other*** kind of retirement benefits.

Law throughout the country now recognizes military retirement benefits as marital property. The reasons for this consensus are several: the benefits accrued during the marriage; income for both parties during the marriage was reduced in exchange for the deferred pension benefits; and both parties chose to endure the rigors of the military lifestyle and forego possible alternative employment which would have paid more in current wages, in order to have the pension.

But as with the child support laws discussed in the prior note, a certain segment of the military community has decided that its members are so "special" that they should be exempt from the laws governing everyone else – or, more specifically, that their spouses and children should have fewer rights than the spouses and children of all other workers in the country.

If anything, the equities are even clearer, and the arguments more transparently absurd, when employed by former military members trying to find a rationalization permitting them to pocket their former spouses' half of the military retirement benefits earned during the marriage.

C. BACKGROUND – MILITARY RETIREMENT BENEFITS

Even more so than with active duty pay components, the information regarding military retirement benefits is too extensive to fully recap here. Those wishing more detail should see my 1998 book, or the substantial CLE materials entitled "Divorcing the Military: How to Attack, How to Defend," posted along with forms, checklists, and many other practice aids at http://www.willicklawgroup.com/military_retirement_benefits.

For the purpose of this discussion, the primary military retirement benefit is a non-contributory defined benefit pension plan payable after at least 20 years of service, for life, in a monthly amount dependent on the rank and years of service of the member. Additionally, military members can now participate in a version of the "Thrift Savings Plan" (TSP) – essentially the government version of a 401(k) that has long been available to Civil Service employees.

One provision of federal law permits a military retiree, upon a finding of partial or total disability, to waive receipt of retired pay in favor of receipt, instead, of disability pay. It makes sense for a retiree to convert retired pay into a disability award, because a disability award is received tax-free, increasing the bottom line for turning one into the other. And under certain laws, a retired member with a disability can get ***both*** the full retirement pay ***and*** disability pay, concurrently.

In summary, conflict arises when a military retiree does such a conversion ***after*** a divorce in which a spouse was awarded a portion of the military retirement as her separate property, since the conversion to disability shuts off the retirement payments to the spouse (in whole or part), and sends that money, now called "disability pay," to the retired military member instead.

The technicalities of how such waiver and conversion works, and what courts have done about it, is too lengthy to detail here, but those that are interested should see pages 40-61 of the article noted above, where that treatment, nationally over the past 30 years, is detailed.

D. BACKGROUND – NEVADA CASE LAW

The Nevada Supreme Court, siding with the overwhelming majority of courts everywhere, found that a retiree who has waived military retirement benefits for disability, as allowed under the federal retirement scheme, must nevertheless indemnify a former spouse awarded a portion of that retirement benefit and pay to the former spouse what she was receiving before the conversion. *See Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507, 511 (2003).

The Court was likewise in the mainstream in holding that where retirement benefits contain both retirement and disability components, only the disability component is shielded from distribution ***as property*** upon divorce. The remaining disability portion is not divisible property – but it clearly constitutes a separate property income stream for all other purposes, such as calculating child or spousal support. *See Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989).

II. FEDERAL LAW

A. WHY THE USFSPA EXISTS, AND WHY IT IS FAIR

For many years, recruiters and others described the job of a military spouse as "the hardest job in the military" in recruiting literature, and recognition awards. Whether that statement was accurate or just recruiting hyperbole, there is no doubt that the ability to have the military retirement benefits after retirement has been used for decades as an enticement to ***both*** parties to a military marriage.

The reality of the life of a military spouse almost always involves frequent relocations (prohibiting the development of a personal career and retirement benefits), and extended periods of being solely responsible for family duties that in other households take both parents.

The 1981 United States Supreme Court case (*McCarty*) that gave rise to the federal legislation included the flat statement that "We recognize that the plight of an ex-spouse of a retired service member is often a serious one," and noting that "Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member."

Congress did, and reversed *McCarty* by enacting the Uniformed Services Former Spouses Protection Act (USFSPA) the following year. The law explicitly returned to the States the ability to divide military retirement between spouses, so that ***military*** retirement benefits – like all other retirement benefits – could be treated by State divorce courts as what they are – a valuable asset accrued during marriage that is received later.

The USFSPA is entirely gender-neutral, exactly like every ***other*** retirement division statute – including the ones governing Civil Service workers, state government workers, and all workers in all civilian businesses. And like every other retirement system in the United States, it makes no difference of any kind what work was done to earn the pension – firing a rifle, arresting bad guys, putting out fires, sitting behind a desk, or teaching first-graders. There is no connection whatever

between the services performed and the fact of accrual of pension benefits during marriage.

Through the details of the USFSPA, military members have more protections than ***any*** of the workers in ***any*** other retirement system. Put another way, the ***spouses*** of military members have fewer, and lesser, rights than the spouses of any other employees in or out of government service. This was verified by the Department of Defense review and comparison of retirement systems in 2001. (Those wishing to compare how various retirement systems actually work can review the materials from the day-long seminar our firm taught on this subject, posted at http://www.willicklawgroup.com/published_works.)

That means that a military servicemember, married to a spouse who works for the Civil Service (or in the private sector) will always get a better deal out of the spouse's retirement than the spouse gets out of the member's retirement. Military members are the single most favored group of retirees in ***any*** retirement system in the United States.

And it's not like military members had no choice. First, no one is ***in*** the military except by choosing to do so. Every member of our all-volunteer armed forces ***decided*** to do that for a living, knowing the risks. Second, those who did not want to share equally in everything earned during military service had another pretty easy solution – don't get married.

B. MEMBERS RECEIVING *ONLY* DISABILITY PAY

A military member might be discharged for disability with far fewer than the 20 years of service required for a regular longevity retirement. Where the member qualifies for a disability retirement, he has a separate property income stream, presumably for life. But it is still income.

A couple years ago, the papers recounted the story of a lineman for the power company who touched a live line and lost use of both arms, and was permanently disabled. His family lost its primary provider, and he was relegated to a limited future life of pain, disability, and reduced opportunities. But that did not erase the fact that he also had obligations – to his children, and to his spouse – that the court in the ensuing divorce was obliged to weigh in determining who would obtain what from whom. His children still required support; he and his spouse still had to equitably divide their property and determine their future support obligations to one another.

It is absolutely no different for disabled military veterans. The loss, to every member of the family, is just the same. The obligation of the courts to determine equity – among ***all*** those involved upon consideration of ***every*** source of income – is just the same.

The source of the disability is simply irrelevant to the distribution of benefits and burdens after such a disability. If there is disability income, it is the separate property of the individual receiving it, meant to compensate for future lost wages – but it ***is*** income. Sorting out who should get, and pay, what, among the individual facts of individual cases, is what divorce courts are for.

III. THE ANTI-USFSPA FRINGE GROUPS

A. WHO THESE GROUPS ARE, AND WHAT THEY WANT

A certain segment of the military retiree community has always hated the USFSPA. They routinely portray themselves as "victims" of the law, because their spouses can obtain a share of the retirement benefits earned during marriage. Unconcerned with concepts such as community property, marital property, marital partnership, or equality, and fixated solely on themselves, they see no irony in demanding upon divorce half of whatever their spouses accrued (pension or otherwise) during the marriage, while screaming with outrage that military retirement benefits are considered divisible property.

The groups in question, pretending to be large organizations and operating under important-sounding names such as "Veterans for Justice," have persuaded themselves that they are so "special" that they deserve to be treated differently than everyone else under the law. One recently put into print that the existence of a Cabinet-level department of veteran affairs justifies the financial rape of his former spouse and children.

They typically advocate that the member should get it ***all*** – any retired pay, and any disability pay, all of which they insist should be "immune" from being considered as the income that it is when a divorce court determines child and spousal support.

It is an ugly but altogether too-often-seen self-delusion. The Nevada Highway Patrol troopers tried a similar tactic, and succeeded in getting NRS 125.155 – which was largely neutered only at the last minute – enacted by claiming that they deserved special treatment (and superior property rights to those of their spouses) because of the job they did while earning retirement benefits. (For a full discussion, see "PERS Primer (extracted from *Hedlund* Amicus)" posted at http://www.willicklawgroup.com/ely_2010_advanced_track_materials.)

But the fringe military-retiree groups are even ***more*** self-impressed, and self-obsessed. They routinely categorize anyone who disagrees with their position (that they get all of the benefits, and their former wives and children get nothing) as "Benedict Arnolds," "sewer rats," and even betrayers of "the Life of the Almighty while He was still on earth." One posted for the world a couple weeks ago that "anti-veteran attorneys [. . .] should all be lined up and shot so they can experience a little of the pain and anguish our combat wounded troops experience. The battle line has been drawn, and we know who the enemy really is."

And some of them have gone beyond rationalizing that they deserve superior rights as a matter of "patriotism," to believing that a higher power gives some theoretical foundation for their greed. They appear unable to process the concept that there should be some actual meaning to the fact that they each once stood at the altar of their respective gods, and proclaimed to their spouses "With all my worldly goods I thee endow." Apparently, they have persuaded themselves that their respective preachers put some kind of special reservation in about military retirement benefits, entitling them to a retroactive Mulligan to their vows.

In other words, they are whack-jobs. But they are persistent. The groups have gone to State legislatures in several jurisdictions (including Arizona, Oklahoma, Alabama, and Maryland) with an assortment of proposals that in any other context would be laughed out of the room as absurd and backward. They range from exempting disability income from consideration in figuring child and spousal support (instead pretending that the income does not exist), to limiting the spousal share of the future lifetime benefits to the length of the marriage, to seeking to re-introduce fault into divorce by only permitting a spouse to share in retirement benefits if the spouse is retroactively adjudged a "good wife" throughout the marriage.

All of those proposals were rejected at the last possible moment in Oklahoma last year. The year before that, some of those provisions were snuck into a bill in Arizona and became law before anyone noticed them, taking advantage of the diversion of attention to immigration and other matters, and a particularly extremist legislature (one Arizona lawyer described the bill as a "compromise" measure, with secondary provisions waiting for later consideration that would revoke voting rights for women and mandate that they stay barefoot and in the kitchen). The Arizona statute effectively nullified decades of solid and nationally-respected case law. (If and when a measure of sanity is returned to the Arizona legislature, repeal of that measure should be the first matter of business.)

B. WHY THEY ARE WRONG

1. THEIR BOGUS ARGUMENTS

The groups have many arguments. One typical line is that a military retirement is not "really" a pension (that might be divided with a spouse) because of the rules governing military members – except when it benefits them. They tend to argue that a military retirement is not a pension, but actually "reduced pay for reduced services," an argument they only abandon, as in *Barker v. Kansas*, 503 U.S. 594 (1992), when the members' tax position required military retirement to ***be*** a pension in order to get tax benefits.

Commonly, they purposely confuse division of the military retirement benefits with alimony, and complain that a spousal share of the military retirement benefits should terminate upon the spouse's remarriage – even though the member's share of all benefits earned by the ***spouse*** during the marriage would not end if the ***member*** remarried – whether the asset in question was cash in the bank, a Civil Service pension, a 401(k) account, or any other asset.

In recent years, they have postured that while "perhaps" it was fair to divide military retirement benefits in 1981, when the USFSPA was enacted, it no longer is so, because so many women are now in the workforce. That argument is utter hogwash, factually and logically.

First, to the extent that spouses ***are*** now in the workforce, the members ***share*** in their spouses' pension benefits, 50/50, as to all benefits earned during marriage. And while they complain at the State level that division of military retirement with spouses is no longer "necessary," the Military Officers Association was testifying before Congress as recently as November, 2011, that the existing

military retirement system should not be altered in the current budget debate because the pension is such an inducement for ***both*** parties to a military marriage to stick out 20 years of service, despite "enormous demands and sacrifices that have no counterpart in civilian employment, including frequent relocations that disrupt spousal earnings and children's education . . . ." *See* "Voice for vets in D.C. fights to preserve retirement," *Air Force Times*, Nov. 21, 2011, at 11.

In fact, those "disruptions and interference" with the ability of a military spouse to create an independent career pension were explicitly a large part of the reason why Congress permitted spouses to share in the retirement benefits in the first place, and that reality has not changed from that time to this one.

The 2011 "Navy Spouse of the Year" is a gentlemen named Robert Duncan of Fallon, Nevada, whose wife is a Judge Advocate General officer. The write-up on his selection included the notation that the parties' child "depended on his dad 'for everything'" while the officer (mom) was deployed, and the observation from Mr. Duncan that:

> The thing about it is you're just one person, judge, jury, and executioner. You've got to do everything. You're not just dad, you're mom. You're mom and dad.

That has been the burden of the non-member military spouse since time immemorial – male or female. The burdens of the military life are substantial, last for decades, and fall on both parties – and are to be offset, in large part, by the promised reward of the substantial retirement benefits, which ***both*** parties endure the military lifestyle in order to receive.

Members of the groups are particularly incensed that, when they seek to convert retirement benefits into disability benefits payable only to themselves, judges have the temerity to indemnify their former spouses from such retroactive recharacterizations and order them to ensure that the former spouses continue to receive what was previously awarded. In other words, they consider it "unfair" that they are not allowed to steal their former spouses' property without interference.

Their arguments vary, depending on the audience and issue of the moment, with the only universal theme that they get more, and everyone else (especially their spouses and children) get less. The point is the utterly shameless hypocrisy and over-reaching of these groups in adopting whatever rationale leads to the conclusion that they get more – to the detriment of their spouses and children.

2. THEIR UN-AMERICAN POLITICAL AGENDA

In America, couples electing to marry pledge themselves and their fortunes to one another for the future. When that does not work out, for whatever reason, they divide that which they accrued during the marriage, and go their separate ways, with a judge ensuring their children are supported, and making a call as to whether the needs and abilities of the parties mean that one of them should help support the other after divorce.

In pretty much any ***other*** community, the prospect of lifetime retirement benefits payable starting

at age 39 or 40, plus cost of living increases forever, sounds pretty good just now. And splitting those benefits with a spouse upon divorce, to the extent earned during marriage, would be met with "of course."

But not with these folks. The members of the fringe groups want to ***retroactively*** decide – after years or decades of marriage – that their spouses do not get half of what is almost always the single most valuable asset accrued during years of mutually living the military lifestyle.

If you run the scenario past any of them of, say, a Sergeant married to a Wal-Mart employee with a 401(k), and ask what should be divided at the end of the marriage and why, all you get is a hysterical screech changing the subject to how "She didn't have to put her life on the line! . . . ." This is true despite the irrelevance of the work performed to the benefits accrued during marriage and to be divided upon divorce, and is the same even where the guy in question ***actually*** maintained trucks at a depot in Kansas.

As discussed in the last prior legal note, and as the United States Supreme Court stated in *Rose*, disability payments are intended for the support of a veteran ***and his family***. But the fringe groups are having none of that; they want any income titled "disability" to land in their pockets invisibly to the courts – unlike any similar income received by any other citizen of the United States.

Zoo keepers "put their lives on the line," as do construction workers, cops, fire-fighters, and a host of others. The sort of entitlement mentality exhibited by the military groups is not (usually) seen from any of those workers, and neither would or should be tolerated if it was tried. Besides, whether a career is risky is irrelevant. It simply makes no difference ***what*** job created the pension benefits that the marital couple decided was worth the risks involved, for whatever rewards would be gained.

The proponents of the fringe-group positions being sold to State legislatures are entirely fixated, unconcerned with any opinion but their own, and have no concept of equal justice under law, equity, reciprocation, spousal or child rights, or anything else that does not mesh with their particular branch of jihad. Trying to have a rational discussion with them is the oratorical equivalent of stepping in bubble gum.

C. "THEY WALK AMONG US"

It should not be assumed that the nut-jobs who cannot focus beyond their own predispositional focus are all located elsewhere. One local member of the military-obsessed fraternity – a lawyer! – actually wrote in, protesting the last legal note (No. 46, "Military allowances for child/spousal support," posted at http://www.willicklawgroup.com/newsletters), and suggesting that garnishing military pay was some kind of illicit money-making scheme.

The inane note ignored, of course, that if garnishment has been ordered, it is because the obligor has ignored his duty to make court-ordered child and spousal support, and that the sum garnished goes to the spouse and children who have been left unsupported. The point is that there are some members of the Nevada Bar who just shouldn't be.

IV. RED HERRINGS, WILD GEESE, AND ASIDES

A. COMPLAINTS ABOUT THE FORMER SPOUSE

We frequently see the screeds of the fanatic groups include horror stories about the two-timing Jezebels they married who spent the time the members were on deployment sleeping their way around the command (or the city, the county, or the continent).

But as one Montana lawyer says: "It's a damn flat pancake that doesn't have two sides." In the 30 years I've done military divorces, I've seen plenty of bad behavior on both sides, including a shocking number of military marriages involving unforgivable recurring physical abuse by members against their spouses and children. This was such a problem on a national scale that the USFSPA was amended years ago to preserve the spousal share of retirement benefits when members were court-martialed for such domestic violence.

However, ***none*** of that misbehavior – on either side – matters to the concept of property division at the termination of a marriage. In modern America, anyone unhappy with their spouse for any reason can choose divorce, but that choice does not alter the fact that valuable assets were accrued ***during*** the time that the parties chose, for whatever reason, to remain married. When the marriage ends, the property accrued during the marriage is to be divided, and neither side should be permitted to retroactively recharacterize the property awarded to the other spouse as his or her own, whether by conversion to disability, or by any other means.

B. AN ASIDE ABOUT US

Postings from members of the groups in question indicate that they have isolated and insulated themselves from meaningful analysis to the point of convincing themselves that their way of perceiving things is the right way – the ***only*** way – the question might even be seen, not even taking into account that their view might reasonably be subordinated to a larger picture of social justice or equal treatment under law.

They seem to have a nearly universal "if you're not with us, you're against us" mindset, unable to comprehend the possibility that informed, honorable people might disagree with them. And they tend to concoct elaborate conspiracy theories when their views are not shared (hence the "line them up and shoot them" comments from one of their members above).

This law firm includes both civilians and several veterans, including two former 30-year career military officers. In our family law practice, we represent military members, and their spouses, in about equal numbers.

The firm regularly provides information to military personnel and JAG offices world-wide, without charge, participating in both "Operation Stand-by" and the military pro bono project since the inception of both programs. We've provided hundreds of hours of free educational programs on

military-related divorce topics, for decades, and as recently as last month. My own family includes both veterans and disabled veterans.

In short, we have no "political" agenda beyond preserving equal treatment of parties under law, and looking out for the best interest of their children. There is no conspiracy, and no other agenda. Our reasons for opposing the fanatical fringe groups are based solely on the lack of merit – logical, legal, or equitable – of their proposals, and not on any other factor.

V. SUGGESTION TO LEGISLATORS

Eventually, these nuts will reach Nevada, and it can only be hoped that there is both a high-enough IQ, and sufficient common-sense resistence to absurdity, to prevent anyone here from drinking their kool-aid.

Nevada law guarantees equal justice under law. It is a cornerstone of our democratic republic that the armed services exist to protect. When a flag-wrapped militant shows up, demanding special privilege in the form of financially victimizing his wife and children, he should be shunned as the opportunistic reprobate that he is.

VI. CONCLUSIONS

Amending the family law system to ensure an opportunity for meaningful participation in family law cases by military personnel is reasonable. Abandoning equity because a participant is or once was in uniform is not. And once a military member retires, he or she is a civilian entitled to equal – not superior – protection of the laws, like every other citizen.

As to child and spousal support, military allowances are just like every other kind of allowances. As to retirement benefits, it dishonors military members, and their spouses, to portray members as any kind of victims, or to suggest that military members are somehow being treated unfairly when they are subject to the same rules governing everyone ***else*** in the country. And it is intellectually dishonest to pretend that seeking repeal or evasion of the USFSPA has anything to do with looking for "fairness." It is mere greed. The single most advantaged group of retirees in the United States has ***no cause whatsoever*** to complain about it.

Here's the "take-away" for the fanatical fringe groups:

– Equal treatment under law does not make you "victims."
– Whether you were previously a paratrooper or a pastry chef, disability income is "income."
– Just because you're adjudged "disabled" does not mean your obligations, to society, to others – and most importantly, to your spouse and children – end. It's about more than you.

The best interest of the child, and equal protection under law, trump all flag-waving claims for special precedence and preference. Military retirement benefits are just like every other bit of property accrued during a marriage, and belong to both parties. This remains true when one party

attempts to convert the form of the benefits to disability after divorce, and thereby steal property already adjudged to belong to somebody else.

VI. QUOTES OF THE ISSUE

"Patriotism is the last refuge of a scoundrel."
– Samuel Johnson, *Life of Boswell*, vol. 2, p. 348 (1775).

"To strike freedom of the mind with the fist of patriotism is an old and ugly subtlety."
– Adlai Stevenson, speech, New York City, Aug. 27, 1952.

"A fanatic is one who can't change his mind and won't change the subject."
– Sir Winston Churchill (1874-1965).

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To visit our web site and review its contents, go to http://www.willicklawgroup.com/home. For a great deal more information on military retirement benefits, go to http://www.willicklawgroup.com/military_retirement_benefits. For the archives of previous legal notes, go to http://www.willicklawgroup.com/newsletters.

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