MILITARY RETIRED PAY AND THE DANGERS OF "REDUX"

There are three different non-disability benefit formulas within the military retirement system. The first group is composed of members who entered service before September 8, 1980, the second consists of those who entered between that date and July 31, 1986, and the third is for those who entered service on or after August 1, 1986.

Members who entered service before September 8, 1980, have retired pay equal to terminal basic pay times a multiplier. The multiplier is equal to 2.5 percent times years of service, but is limited to 75 percent. Thus, retired pay equals 50 percent of terminal basic pay after 20 years of service.

Members who first entered service between September 8, 1980, and July 31, 1986, must use the highest 3 years of basic pay rather than terminal basic pay. This has the effect of lowering retired pay for members whose pay increased at any time during their three most highly compensated years of service.

The third group is made up of members who entered service on or after August 1, 1986. That year, Congress had arranged to provide retirement benefits to those members that were lowered in two different ways.

First, their retirement benefits multiplier was reduced by one percentage point for each full year less than 30 years of service.[1] Under this plan, at age 62, the reduction is removed and the retired pay multiplier is restored to 2.5% per year, yielding the same percentage payable under the earlier system.[2]

Second, each year the COLA for such members is less than for other retirees (Consumer Price Index adjustment minus one percent). However, at age 62, the retiree's monthly income is recomputed to supply the sum that ***would have been paid*** if the full COLA had been applied every year from retirement to age 62, which at that moment becomes prospectively payable, as if there had not been reductions during those intervening years.[3] After that "restoral," however, the reduction returns with each COLA after age 62 for life.

In 1999, Congress again changed the rules,[4] modifying what had become known as the "REDUX" plan to provide for an irrevocable choice of retirement plans to be made by that third group of

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[1] For example, at 20 years, instead of receiving 50% of basic pay (2½% per year x 20 = 50%), the calculation would be 2½% per year x 20 = 50% **- 10** (years less than 30 years served as of retirement), or 40%. The final subtraction decreases by one for each year beyond 20 served, so that as of 30 years of service, the calculation is 2½% per year x 30 = 75% - 0 (the same 75% that it would have been under the older system).

[2] Pub. L. No. 99-348 (July 1, 1986). *See* Office of the Actuary, Dep't of Defense, FY 1996 DOD Statistical Report on the Military Retirement System 1 (1997).

[3] Thus, at the time such members turn 62, their monthly retired pay becomes the same sum as it would have been if they had been in the class of members who first entered service between September 8, 1980, and July 31, 1986.

[4] In Pub. L. No. 106-65, 113 Stat. 512 (October 5, 1999) the National Defense Authorization Act of 2000.

members (who entered service after July 31, 1986), at their 15th year of service. Such members are given the choice of taking the same "High-3" retirement paid to those who entered service between September 8, 1980, and July 31, 1986, ***or*** to take the lowered REDUX benefits described above, ***plus*** a one-time lump-sum "Career Status Bonus" (CSB) of $30,000.00 payable at the 15-year mark.[5] After the 1999 change, this option became known as the CSB/REDUX option.

There are a number of challenges and choices for divorce practitioners created by these retired pay changes. First, lawyers on both sides need to be aware that the primary military retirement benefit is at least somewhat less valuable than it has been previously, which factors into the total distribution of assets and debts upon divorce.[6]

When the divorce is ongoing at the fifteen-year mark of the military career, there is a new danger for spouses of military members who started service after July 31, 1986. There is no provision for spousal consent, or even notification, before a member can take the $30,000.00 CSB/REDUX payment, which irrevocably reduces the lifetime "regular" retirement benefits payout. Especially where the parties have already separated, it is possible that the member could simply pocket the cash payment and the spouse would never even know of the devaluation of the retirement benefits being divided in the divorce.

There is not much published authority regarding the divisibility of the CSB/REDUX payment, but both the trial-level cases that have appeared, and analogous precedent, indicate that the cash should be divisible precisely as the retirement benefits for which it partially replaces. The analogy is to the lines of authority concerning "early-outs" and disability benefits.

There have been a number of early retirement programs offered at times by the military, through which members could terminate service before completing 20 years, receiving lump-sum or time payments instead of a regular military pension. These programs have included the Variable Separation Incentive (VSI), the Special Separation Benefit (SSB), and an early (15-19 year) retirement program known as the "Temporary Early Retirement Authority" (TERA).[7]

Especially when they were new, there was some question as to whether VSI and SSB benefits were, or should be, divisible as marital or community property because (as with the CSB/REDUX) there is no explicit mechanism for division of the payments with a spouse.

Courts were often most forceful where the member chose to take the substitute benefit ***after*** the divorce decree (which, of course, therefore did not mention the benefit). In *In re Crawford*,[8] the

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[5] It has to be proportionally repaid if the member terminates service before 20 years.

[6] Of course, simultaneously, other valuable assets have been added to the "total package" of retirement benefits. *See* article on TSP accounts.

[7] TERA was established in 1993, Pub. L. No. 103-160, Div. A, Title V, Subtitle E, § 555(a), (b), Title XI, Subtitle H, § 1182(a)(2), 107 Stat. 1666, 1771 (Nov. 30, 1993), and repeatedly extended.

[8] 884 P.2d 210 (Ariz. Ct. App. 1994).

court specifically quoted and analogized to *In re Marriage of Strassner*,[9] which addressed disability benefits. The Arizona court held that in both situations, the spousal interest was "finally determined" on the date of the decree, and the member would not be permitted to effectively make the spouse's property his own merely by recharacterizing it in some way. The court explicitly held that enforcing divorce decrees by ordering that the spouse receive a portion of the benefit taken by the member in lieu of the regular retirement did not violate *Mansell*.[10]

Courts throughout the country are in fair consensus hold that a spouse can receive a share of any ***early retirement*** taken by a member, under the theory that the "early out" benefits are as divisible as the retirements that were given up to receive those benefits, whether or not there is any federal mechanism for direct payment to the former spouse.[11] Very few courts have reached the opposite result.[12] Others have reached that opposite result, just to be reversed on appeal or upheld upon narrow findings of special circumstances.[13]

Similar results have been seen in the line of authority dealing with disability benefits, which are dealt with in greater detail in a separate article.

Together, these cases stand for the general proposition that it makes no difference how or why the member reduces the sum of retirement benefits otherwise payable to a former spouse – the fact that he does so mandates that compensation be provided.[14] For those litigating cases involving a CBS/REDUX payment, the case law indicates that the spouse is entitled to a share of the cash payment equal to the spousal share of the retirement benefits.

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[9] 895 S.W.2d 614 (Mo. Ct. App. 1995).

[10] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989)

[11] *See In re McElroy*, 905 P.2d 1016 (Colo. Ct. App. 1995) (SSB); *In re Shevlin*, 903 P.2d 1227 (Colo. Ct. App. 1995) (VSI); *In re Heupel*, 936 P.2d 561 (Colo. 1997); *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995) (SSB divisible in place of military retirement divided in divorce, refusing to "allow[] one party to retain all the compensation for unilaterally altering a retirement plan asset in which the other party has a court-decreed interest"); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996) (SSB); *Pavatt v. Pavatt*, 920 P.2d 1074 (Okla. Civ. App. 1996) (SSB); *Abernathy v. Fishkin*, 638 So. 2d 160 (Fla. Ct. App. 1994) (VSI); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995) (VSI); *In re Babauta*, 66 Cal. App. 4th 784, 78 Cal. Rptr. 2d 281 (1998); *Marsh v. Marsh*, 973 P.2d 988 (Utah Ct. App. 1999) (SSB); *Lykins v. Lykins*, 34 S.W.3d 816 (Ky. Ct. App. 2000).

[12] *See McClure v. McClure*, 647 N.E.2d 832 (Ohio Ct. App. 1994).

[13] *See Kelson v. Kelson*, 647 So. 2d 959 (Fla. Ct. App. 1994) (VSI held not divisible in split opinion); *overruled*, 675 So. 2d 1370 (Fla. 1996); *Baer v. Baer*, 657 So. 2d 899 (Fla. Ct. App. 1995) (where service member given ultimatum to accept VSI or be immediately involuntarily terminated, VSI payments were severance pay rather than retirement pay, and not divisible); *In re Kuzmiak*, 222 Cal. Rptr. 644 (Ct. App. 1986) (pre-SSB/VSI case; separation pay received upon involuntary discharge pre-empted state court division).

[14] The cautious practitioner for the spouse, however, cannot presume that a reviewing court will reach the same result, and so will ensure that the property settlement agreement or divorce decree is crafted with sufficient demonstrations of intent (and reservations of jurisdiction, if necessary) that a later reviewing court would be able to transcend recharacterization of the benefits addressed, and provide compensation to the spouse.