

MILITARY RETIREMENT BENEFITS TELECLASS

With Carol Ann Wilson, CFP

- I. How important are the military retirement benefits in a divorce case involving a military member?
 - A. Critical. In a long-term marriage involving years of active duty service, the pension is typically the sole or major asset of the marriage.
 1. Senior enlisted personnel frequently retire after 20 years active service in their early forties and receive a lifetime pension of one-half their basic pay.
 - a. This means a minimum of about \$2,000 per month, every month for life. And there are cost of living adjustments.
 - b. Worth some half million to million dollars in present value and not including cost of living or inflation increases.
 - B. Usually divided by “time rule.” Note variation from place to place.
 - C. Note that now there is an entirely second plan in place – the TSP.

- II. Is there something special about the basic matter of jurisdiction in military cases?
 - A. You bet! To divide a military retirement as property, “federal jurisdiction” is necessary in addition to subject matter and personal jurisdiction.
 1. It’s a big deal because if you *don’t* federal jurisdiction, the order will not be honored by DFAS, and they will not pay out money as divided marital property.
 - a. But this does not apply to alimony/child support, as to which traditional state law rules apply
 2. Subsection c(4) of the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408, divests state courts of power to divide retired pay as property unless the jurisdictional provisions of the act are satisfied. In other words, for an order to be enforceable, the court issuing it must have exercised personal jurisdiction over the member by reason of: (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court. These limitations override state long-arm rules, and must be satisfied in *addition* to any state law jurisdictional requirements.

- B. Do the new regulations help at all?
 - 1. Yes. DoDFMR) 7000.14-R, Vol. 7B, Ch. 29 (“Former Spouse Payments From Retired Pay”) (Feb. 2009). For DoDFMR 7000.14-R, see the DFAS website at <http://www.dod.mil/comptroller/fmr>.
 - 2. For the first time, Sec. 290604(A)(3) (Feb. 2009) provides: “The member indicates his or her consent to the jurisdiction of the court by participating in some way in the legal proceeding.”
- III. Does this lead to some special practical rule to follow in a military case?
 - A. Never default an out-of-state military defendant where a pension is at issue
 - B. Default divorce judgment should be treated by the former spouse’s attorney as a malpractice trap. The short version, at least for spouse’s attorneys is “DON’T.”
- IV. What exactly is the “ten year rule”
 - A. A court order that divides military retired pay as property may only be enforced by direct payment to the former spouse if the parties were married for at least ten years during which the member performed at least ten years of creditable military service. 10 U.S.C. § 1408(d)(2); 32 C.F.R. § 63.6(a)(1)-(2). This is often called the “20/10/10” rule, for “years of service needed to reach retirement/years of marriage of the parties/years of overlap between service and marriage.”
 - B. The restriction is upon direct payment *only*, and not upon the substantive right of the former spouse under state law to a portion of the retired pay as property. If the marriage lasted less than ten years during active duty, the retired pay could still be treated as marital property by the court in balancing the property awards to each spouse, but no award to the former spouse of a portion of that retired pay could be enforced by obtaining direct payment from the military pay center.
 - 1. The 20/10/10 rule is *not* a limitation upon the subject matter jurisdiction of the state courts.
 - 2. Its practical effect is often the same as a legal bar, however. A former spouse in possession of an order that does not satisfy the rule must rely on whatever enforcement mechanisms are available under state law. The only work-around for this trap is to provide for alimony, either entirely as a replacement for a property interest in the retirement, or as a reserved possibility if the retirement cannot be divided as provided in the decree or the member fails to make promised payments.
- V. If the member is still on active duty, how certain are considerations of when the member will

actually retire?

- A. If history is any guide, there is no certainty at all.
- B. The member could retire early.
 - 1. SSB, VSI, 15-year retirement program
- C. The member could retire late
 - 1. Now, can extend a military career for 40 years!
 - a. Consciously consider *Gillmore* division at eligibility – by case law, or agreement in a particular case.
- D. The retirement could be entirely swapped for something else.
 - 1. Even many years after the divorce, a member may request a disability rating, obtain it, be awarded (non-divisible) disability retired pay, and waive (divisible) retired pay equal to the sum of disability pay, thus effectively reducing or eliminating the spousal share.
 - 2. There is way more to the disability picture – CRDP, CRSC – it’s in flux.
 - 3. Could be rolled into Civil Service retirement
- E. Any obvious fixes or safeguards?
 - 1. Reservation of jurisdiction to enter an alimony award if the retired pay is ever reduced can prevent that result as to the former spouse, as can an outright indemnification for any reduction. *See In re Strassner*, ___ S.W.2d ___ (No. 65448, Mo. Ct. App., Mar. 14, 1995), 21 FLR 1246 (BNA Apr. 4, 1995); *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).

VI. What is the Survivor’s Benefit Plan?

- A. The Survivor’s Benefit Plan provides monthly payments of 55% of the retired pay amount to a single named survivor. It can be allocated to the former spouse by the divorce court.
- B. There is a premium for coverage, and there is a way to arrange for it to be paid by the member, the spouse, or divided between them.
- C. This is important because in the military system there can be ONLY a divided benefit

stream, not a “separate interest” award as you can do under ERISA.

1. What this means is that if the spouse dies first, the member gets an automatic reversion of the full spousal share to him
 2. But if the member dies first, the spouse gets nothing at all, unless the SBP is in place
 - a. #1 malpractice trap in the military system – all kinds of technical application rules, like the one-year-to-send-in-the-application rule.
 3. Private life insurance as an alternative
 - a. But beware SGLI! (Ridgway)
- D. Because the system works so differently for member and spouse, in “equal division” States, it is often fairest to split the SBP premium cost.
- VII. What sort of medical benefits are available?
- A. 20/20/20 spouses have free Tricare through medicare eligibility
 - B. 20/20/15s – 1 year free
 - C. All others CAN get Continuation of Health Care Benefits Plan (“CHCBP”; *see* 10 U.S.C. § 1078a) has always provided some relief, allowing *any* former spouse to get up to 36 months of CHCBP coverage, and a former spouse who satisfies the 20/20/15 rule up to 48 months of post-divorce coverage (12 months free + 36 months of CHCBP coverage). *See* <http://www.humana-military.com/chcbp/main.htm>. There is a premium cost and certainly is not as desirable as TRICARE, but certainly beats not having any other option available.
- VIII. Is there more?
- A. Lots. “Divorcing the Military” article, guides, model clauses, SBP premium-shifting calculator, & lots more on the website.