

## Military Retirement Primer

By Marshal S. Willick, Esq.

### Dealing with military retirement benefits in divorce actions

Military retirement benefits are usually the most important part of any military divorce and the largest single marital asset in a military marriage. The rules governing what benefits are available during life and upon death, how they can be divided, and how they can be protected or lost are complex. Knowing a few basic concepts, though, can help you protect critical interests.

The most valuable asset

Retirement benefits are usually the most valuable asset of marriages, often exceeding the value of all other marital assets combined.

In Nevada, all pension benefits are community property, including benefits that are still being earned (“unvested”) or not yet being paid (“unmatured”). This is because the benefits accrued during marriage and future receipt of retirement income is actually a large part of what was earned.

The primary military retirement is a “defined benefit” type of pension plan, in that it does not have a cash balance, but pays monthly benefits for life. Most military personnel retire after 20 years active service in their early 40s and receive a lifetime pension of half their basic pay, which usually \$2,000 or more (depending on rank and length of service) every month for life, plus cost of living adjustments (“COLAs”). Such benefits have a “present value” of a million dollars or more. Reservists have a slightly different retirement system, which usually begins payments only after age 60.

Occasionally, the military permits members to take an early retirement without serving the minimum 20 years. Service can also extend many years after 20. If the divorce is during service, the attorney for the spouse must know about these possibilities and build protections for the spouse into the decree.

A former spouse’s right to a portion of retired pay as property terminates upon the death of either the member or the former spouse, unless the court order explicitly makes the former spouse the beneficiary of the Survivor’s Benefit Plan (“SBP”), as discussed below.

Military retirement division may be made by percentage or dollar sum. COLAs will be included if divided by percentage, securing both parties against erosion of the value of their portions of the retirement by inflation.

Most states divide pensions according to the “time rule,” in which each spouse gets 50 percent of whatever benefits accrued during the marriage. Under the USFSPA, a spouse may get direct payment of up to 50 percent of “disposable retired pay” directly from the military pay center (“DFAS”). If arrears are also owed for child or spousal support, up to 65% can be collected. Some changes to these rules have been proposed in Congress, and the entire military retirement

system is slated for overhaul.

There is also a Thrift Savings Plan

The Thrift Savings Plan (“TSP”) is a defined contribution type of plan for federal employees made available to military members in 2001. Like a private employee’s 401(k) plan, it diverts pre-tax funds into retirement savings. As of 2012, a “Roth” (post-tax) option was added.

TSP balances are divisible upon divorce; typically, each spouse is awarded half of whatever benefits accrued during the marriage. Orders dividing TSP should deal with gains and losses, select a proper valuation date, etc.

Special jurisdictional rules

Special jurisdictional rules must be followed in military cases for the order to be enforceable. An order dividing retired pay as property will only be honored if the court had 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. You should never default a member in a divorce case who has not made a general appearance.

Disposable retired pay

In 1991, divisible “disposable pay” was re-defined so that each spouse gets a portion of the retirement before taxes, which each pays on the sum he or she receives.

A military member with a disability claim will receive the same or more money monthly (depending on which program is involved), and the payments become partly or entirely tax-free, and so are much more valuable.

Some disability awards are in addition to the retired pay, so the member receives additional sums and the spouse is unaffected. But some disability elections greatly reduce the “disposable retired pay” and therefore reduce the money paid to the former spouse. The attorney for the non-military spouse must understand all the disability programs and how to draft appropriate indemnification clauses to protect the spouse from being divested of benefits after divorce.

The attorneys have to anticipate post-divorce status changes and build that anticipation into the decree.

The “Ten Year Rule”

Military retired pay divided as property may only be directly paid from the military pay center to the former spouse if the parties were married for at least ten years during military service.

If the marriage overlapped service by less than ten years, the right still exists, but the spouse has

to obtain the monthly payments from the retired member. Alternatively, the court could characterize the payments as a stream of spousal support in order to obtain direct payment from the military pay center.

Other military benefits to consider

Survivor's benefits

The military retirement system is different than most other plans, especially regarding survivorship benefits. If the spouse dies first, the spouse's full share of the benefit automatically reverts to the member. But if the member dies first, the spouse gets nothing at all, unless the SBP is in place.

The SBP provides monthly payments of 55 percent of the selected retired pay amount to a single named survivor. The divorce court can name the former spouse as beneficiary. There is a premium for coverage, and there is a way to arrange for that premium to be paid by the member or the spouse so that it be divided between them.

Medical benefits

If the parties were married for 20 years during military service, the spouse is entitled to free Tricare until eligible for Medicare. If the overlap of marriage and service was shorter than 20 years, lesser benefits are available, and most former military spouses can get Continuation of Health Care Benefits Plan ("CHCBP") medical coverage, although there is a premium cost for that coverage.

Other resources

Much greater explanation of these and other aspects of military retirement in divorce, including a detailed article titled "Divorcing the Military," drafting guides, model clauses, special calculators, and lots more, is posted at <http://willicklawgroup.com/military-retirement-benefits/>.

Marshal S. Willick, Esq. is the Principal of the Willick Law Group, an A/V-rated Las Vegas family law firm, and QDROMasters, its pension order drafting division. He can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2198. Phone: (702) 438-4100; fax: (702) 438-5311; e-mail: [Marshal@WillickLawGroup.com](mailto:Marshal@WillickLawGroup.com).

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