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Military Retirement Pension Division Law
A Quick Primer On Recent Changes To Federal Law

I. HISTORY

Title 10 § 1408 of the United States Code – the Uniformed Services Former Spouse Protection Act ("USFSPA") was enacted in 1982, intended to ensure that spouses of service members received their marital share of the military retirement benefits. It was enacted in response to the *McCarty* decision.[1] The USFSPA did not guarantee that a spouse received a certain share of the benefits, but left to the States to determine – under their laws – how military pensions were divided.

Obviously, Nevada is a community property State in which "All property acquired after marriage is presumed to be community property."[2] The Nevada statute addressing the division of community property is, typically, vague and expansive, providing only that any division other than equal must be "deemed just," based upon a "compelling reason," and supported by written findings.[3]

Nevada case law[4] mandates use of the "time rule" for defined benefit pension divisions.[5] The time rule is defined as the time married during service divided by the

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[1] See *McCarty v. McCarty*, 453 U.S. 210 (1981).

[2] See *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

[3] See NRS 125.150.

[4] See *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990) and *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

[5] The use of the time rule for division of defined ***contribution*** plans is problematic and has not been addressed by the courts. This mini-CLE does not address that issue.

total time worked for full retirement benefits; half of the resulting percentage belongs to each spouse. Additionally the "wait and see" approach is mandated; the community has an interest in pension ultimately received, not just the pension that would be payable as of the date of divorce. Until the passage of the FY17 NDAA, ***ALL*** pensions divided in Nevada were subject to this uniformly applicable rule.

II. WHAT HAS CHANGED

Based on a false assertion of fact made by a junior member of the House and inserted into an appropriations bill without a hearing, the federal government has made an unprecedented voyage into State domestic relations law. The USFSPA was amended through section 641 of the FY17 National Defense Authorization Act to include a provision defining the military retired pay that DFAS[6] can divide:

> (i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by
>
> (ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.

The remainder of the USFSPA remains unchanged.

This altered the pension division law of 45 States; the Representatives and Senators from those States approved the change without apparently knowing, or caring, that they were altering their States' divorce statutes.

III. WHAT DOES THIS MEAN TO YOU?

The short version is that the change in law requires some additional work by the lawyers, and by the Court, to comply with both federal and State law in a military divorce.

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[6] The Defense Finance and Accounting Service.

For any military retirement division after December 23, 2016, the military member's rank and time in service are frozen for the calculation of the share of benefits that can be awarded to the former spouse. The former spouse's share will grow by the "retired" COLA increases that may be granted each year from the date of the order awarding the benefits to the date of actual retirement.

Since the benefit to the former spouse only increases by what she would get anyway (retired COLAs) there will never be a reason in military cases that the benefit should ***not*** be made payable at the member's first eligibility to retire.[7]

The change only affects members that are still in service. A member that has already retired will be treated the same as they are currently, since their rank and time in service will have already been fixed by retirement.

This will result in an unequal division of the community property in active duty military divorce cases. The new law reduces the portion of a retirement to be received by any spouse of a military member, and makes calculations much more difficult. Whenever a court divides military retirement benefits, what the spouse will receive from DFAS is less than what Nevada law requires a spouse to receive.

It gets even worse if ***both*** parties have retirement benefits – the military spouse will get a larger (time rule) interest in the non-military spouse's pension than the non-military spouse gets in the member's retirement, which is on its face a violation of NRS 125.150, *Blanco*, and perhaps equal protection.

As to what the Court can and should ***do*** about resulting inequalities, nothing in the new law affects the Court's ability to offset other property (or make an alimony award) to equalize the community being divided so as to satisfy the duty under NRS 125.150 to divide property equally.[8]

The Court can order that the difference between what the spouse should receive under the time rule, and what is directly payable under the revised federal law, be

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[7] *See Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

[8] *See also Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013). This is already done to cope with other limitations of the USFSPA, such as the so-called "10-year rule," by providing other property or an alimony award to compensate for the lack of a federal mechanism for division of that community property asset.

compensated to the spouse by a supplemental property award or alimony.[9] Such a paragraph might look like this:

> **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that [wife] is awarded her time rule share of [husband's] military retirement in accordance with the holdings in *Gemma*,[10] *Fondi*,[11] and *Sertic*.[12] The benefits payable directly from DFAS calculated in accordance with 10 U.S.C. § 1408(a) are payable upon [husband's] first eligibility to retire.[13] This Court retains jurisdiction to make a further property distribution or order permanent alimony in a sum sufficient, inclusive of the sums payable from DFAS, to equal a time rule distribution in accordance with Nevada law requiring equal division of community property. [Husband] is required to cooperate by providing any pay information necessary to achieve that result.

There are additional changes coming over the next year to what benefits are actually available for division, because a change in the actual pension benefits payable becomes effective in 2018. The (defined contribution) Thrift Savings Plan (TSP) will become a much larger asset to be divided in future divorce cases, and the (defined benefit) regular pension will become smaller. Obviously, both benefits should be addressed in any military divorce.

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[9] The USFSPA contains a "savings clause" providing that any benefits awarded but not payable by DFAS "may be enforced by any means available under law other than the means provided under this section."

[10] *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

[11] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[12] *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

[13] This order eliminates the need for a further motion to be filed before payments are to begin. *See Henson v. Henson*, 130 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 79, Oct. 2, 2014).