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Divorce and the Military

How Will Military Benefits Be Distributed? Part One of a Three-Part Article

By Evan B. Brandes

One of the least understood areas of law that New York matrimonial lawyers may encounter is the equitable distribution of military benefits. This is largely due to the relatively small number of military personnel who have traditionally resided in New York, the even smaller number of military personnel who divorce here, the paucity of the decisions dealing with them, and the lack of sufficient interest to spark Continuing Legal Education providers in this state to devote attention to the subject. Still, there are more than a few military personnel in New York, so any attorney may one day find him/herself having to decipher the intricacies of federal military retirement and disability laws on behalf of a client. Therefore, an understanding of each of the military benefits that can be distributed upon divorce and the circumstances under which they can be distributed may one day prove useful.

Which Law Is Applied?

In *McCarty v. McCarty*, 453 U.S. 210 (1981), the U.S. Supreme Court held that federal law regarding the military retirement scheme preempts state property division laws. It also held that Congress could decide to change this by appropriate legislation. In 1982, Congress responded to the *McCarty* decision and enacted the Uniformed Services Former Spouses Protection Act, (Pub.L. No. 97-252, 96 Stat. 730 (1982)), the basic statute dealing with the distribution of military pensions. The Uniform Services Former Spouses Protection Act makes military pensions subject to distribution by state courts in divorce and equitable distribution proceedings. The law also provides for each state to decide whether military retirement is marital or community property distributable upon divorce or whether it is solely the property of the military member. 10 U.S.C. § 1408(c)(1). The statute provides that pension division jurisdiction is limited to a state where the service member is domiciled, has consented to jurisdiction, or resides not due to military assignment. 10 U.S.C. § 1408(c)(4). Although a state court can distribute military retirement rights in equitable distribution actions, it cannot force a military member to retire. 10 U.S.C. § 1408(c)(3).

Disposable Retired Pay

State courts can order the direct payment of pension distribution awards through the Defense Finance and Accounting Service if there is a 10-year overlap between the marriage and creditable military service. 10 U.S.C. § 1408(d)(1)-(2). Therefore, if the parties were married for 14 years but the military member was only in the military for 7 of those years, direct payment to the non-military spouse from the military pension fund is not available. If direct payment is an option, you must keep in mind that such direct payments may not exceed 50% of the service member's Disposable Retired Pay. 10 U.S.C. § 1408(e)(1). Additionally, the direct payments cease upon the death of the member or the spouse or former spouse. 10 U.S.C. § 1408 (d)(4).

The pension rights contemplated by the Uniform Services Former Spouses Protection Act are nondisability longevity retirement rights, not disability retirement rights. In *Mansell v. Mansell*, 490 U.S. 581(1989), the U.S. Supreme Court held that a disability retirement pension is not distributable under the Uniform Services Former Spouses Protection Act and that the states may only distribute "disposable retired pay" as that term is defined in the Uniform Services Former Spouses Protection Act.

The Act is not limited to active-duty retirement benefits. It also covers National Guard and Reserve retirement. When dealing with Reserve or National Guard issues, counsel for the non-military spouse must obtain from the service member a copy of his or her most recent "points" statement to see how many total points have been acquired and how many were earned during the marriage. (The formula for Reserve/National Guard retirement pay is: Base Pay x (Number of Retirement Points / 360) x 2.5%. Since Reservists do not begin to get paid until age 60, regardless of when they retire, this deferral of payment must be taken into account in the negotiations and the present value calculations. The marital fraction should be computed once using marital years of service over total years of service, and then again using marital retirement points over total retirement points, in order to determine which computation will best benefit the client.)

"Disposable Retired Pay" means gross retired pay minus recoupments or repayments to the federal government, such as repayments for the overpayment of retired pay, deductions from retired pay for court-martial forfeitures or for dual compensation purposes such as when a retired service member obtains a federal civil service job and forfeits a portion of his pension under Title 5 of the U.S. Code. 10 U.S.C. 1408(a)(4). It is the obligation of counsel for the spouse of the service member to ascertain if the service member has already reduced his disposable retired pay and to make sure he does not do it after the parties' agreement is signed.

Military Retired Pay is allocated each year by Congress with cost of living adjustments. It is calculated using a point system. An active duty service member who serves 20 years will accumulate about 7305 points. Upon retirement, this number of points will afford the member a payment of approximately 50% of his or her base pay.

Unique Military Pay Categories

Service personnel are eligible to receive voluntary separation incentive or special separation bonuses. 10 U.S.C. § 1174a, 1175. The payments from the Voluntary Separation Incentive program are marital property and courts can equitably distribute them.

If a service person retires after 20 years of service, he or she will receive free medical care at any military medical facility on a space-available basis. The service member also receives the equivalent of medical insurance, currently called TRICARE, for most civilian medical care costs he incurs. All of this can be evaluated by an expert and can be attributed to the service member as part of the retirement benefits he receives. See Horbatt, William R., Grosman, Alan M.: Division of Retiree Health Benefits on Divorce: The New Equitable Distribution Frontier. 28 FAM.L.Q. 327.

Each person in the military service on active duty also accrues 30 days of paid leave each year. This leave is worth what its equivalent would be at the monthly pay rate of the service member, and can be calculated by using the pay tables available at the nearest recruiter's office. As many military service personnel end up at retirement with a large backlog of untaken leave, its value can be significant.

Watch for Retirement Pay Reduction Strategies

Veterans who become disabled during military service while in the line of duty are eligible for disability benefits. 38 U.S.C. § 310 (wartime disability); 38 U.S.C. § 331 (peacetime disability). The retiree must waive his Retired Pay to the extent of the amount of Disability Pay he receives. See 38 U.S.C. § 3105. The portion of a service member's retirement pension that is classified as Disability Pay is tax-exempt. 38 U.S.C. § 310(a). As a consequence, military members will normally elect to have a portion of their Retired Pay be classified as Disability Pay, where possible. In order to protect the spouse of a service member who is or may in the future be rated as disabled, the agreement, order or judgment must contain a provision that either values the Disposable Retired Pay as if the member had not elected to receive disability pay benefits, and consents to the continuing jurisdiction of the court to modify the judgment or order if he elects disability pay benefits; or allow the adjustment of the former spouse's share to pre-waiver levels by increasing his or her share of Retired Pay; or require payments from the retired service member directly.

A service member can request supplemental federal tax withholding, and reduce his Disposable Retired Pay, when the member presents evidence supporting such withholding.

See 10 U.S.C. § 1408(a)(4)(C); 26 U.S.C. § 3402(i). The service member may also authorize voluntary state tax withholding from Retired Pay when the Uniformed Services enter into an agreement with the concerned state. See 10 U.S.C. § 1045; 10 U.S.C. § 1408(a)(4)(D)

Members can reduce their Disposable Retired Pay by creating debts to the United States, such as a debt for the non-payment of income tax. They can also reduce their amount of Disposable Retired Pay by declaring themselves single for federal income tax withholding purposes. The Uniform Services Former Spouses Protection Act allows the service member to have military Retired Pay withheld for income taxes to the extent authorized "if such member claimed all dependents to which he was entitled." The statute discusses only the number of dependents and is silent regarding the declaration of marital status. Moreover, although a spouse may be listed on an income tax return as an exemption, she is not considered a dependent for tax purposes. In establishing income tax withholding, a member who remarries and has no additional children, can classify himself as single with no dependents. This classification decreases the amount available as Disposable Retired Pay.

Where the service member has reduced his Disposable Retired Pay, counsel may consider moving for an order temporarily increasing the monthly payments of Retired Pay in consideration of the arrearage. The order, however, cannot create a payment to the spouse over the maximum percentage authorized to be paid under the Uniform Services Former Spouses Protection. The only other way to receive the arrearage directly from the Defense Finance and Accounting Service is to petition the court to classify the arrearage as spousal support. This classification allows the service member's Retired Pay to be garnished.

If the court awards a spouse a percentage of a member's Retired Pay, that income is considered the separate property of the spouse. The spouse will continue to receive the court-awarded share of military Retired Pay unless the court order limits the period of time for the spouse to receive the military Retired Pay and that time elapses, the spouse dies, or the military member dies. 10 U.S.C. § 1408 (d)(4).

In next month's newsletter, we will look at the special situation in which former spouses may receive their monthly pension payments directly from Defense Finance and Accounting Service, thereby avoiding the risk that a former spouse might become reluctant to make payments.

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