

White Paper
Military Pension Division and the Radical Rewrite

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FACTS: The 2017 Department of Defense Appropriation bills from the House and the Senate have similar provisions for rewriting entirely the process of military pension division upon divorce in a majority of the states. If passed, federal law would require all military retired pay to be divided according to the rank and years of service at the time of the pension division order. This new nationwide standard would overrule pension division requirements in all but half a dozen states.

QUESTIONS:

INTRODUCTION

1. What do you mean? Give me an example.

Let's say that John Doe just retired as a sergeant major (E-9) in the Army with 30 years of service under his belt. He was divorced from Mary Doe ten years ago; they married when he entered the Army. The pension division order was entered on the date of divorce, when he was a sergeant first class (E-7) with 20 years of creditable service.

- In 90% of the states, the way it works is that John's actual retired pay would be divided, but Mary's share would be discounted to give John the benefit of the last ten years of post-divorce longevity and promotions. In virtually every state, Mary would receive 50% of 20/30 times John's actual retired pay.
- The "new rule" would require the court to order for Mary 50% of the retired pay of a sergeant first class with 20 years of service (as if he'd retired on the date of the pension order). That would be a federal government requirement, regardless of what state law says her share should be.

2. Why would anyone want to cut back the share that a former spouse gets in divorce court?

That's a good question. The former spouses, most of whom are women, have usually sacrificed a lot during a military career... their jobs, their retirement and their careers, plus providing support for the servicemember during moves which occur every 3-4 years. The usual rule (in 90% of the states) provides for a fair share by dividing the ACTUAL retired pay of the member/retiree, not some hypothetical number, and then it reduces it to give the member/retiree credit for the final years of military service after their divorce. That goes out the window under this new proposed rule. The share of the former spouse is artificially shrunk, and then it's put off – postponed till the member/retiree chooses to put in for retirement – so there's a second discount that occurs as well.

3. What problems would occur if this approach becomes law?

Since there have been no hearings, and there is no committee analysis, we can only guess what the problems will be. Here are several which will certainly occur –

*COLAs. There is no mention of COLAs (cost-of-living adjustments) for Mary to allow her share to rise over time from John's pension division date to his actual retirement. Depending on the final

language of the statute, if enacted, her dollar share may be fixed as of the date of the decree, like a fly frozen in amber. All of the COLAs since the hypothetical retirement date would go to the military member or retiree.

*“One Size Fits All.” In addition, there’s no provision for settlements and agreed orders so that the parties could decide on a different method of pension division. About 90-95% of all military pension orders are done by settlement. Unless the consent order rigidly complies with the “fixed benefit” requirement, it will be rejected by the retired pay centers (Defense Finance and Accounting Service and the Coast Guard Pay and Personnel Center). The parties are no longer free to settle their cases in their own way – they have to comply with the decree of Congress.

*Immediate Payment. In California and all of the western community property states, the law allows a spouse’s share to be determined based on the rank of the military member when the retired pay begins or else – upon the spouse’s choice – at the time of divorce with pay based on that rank and years of service, with payments to begin immediately upon retired pay eligibility. Yes, that’s right – immediate payments, even though the member has not yet retired. Under current state rules, a certain number of spouses will decide to wait it out and take payments when the member retires. However, the logical result of this new rule will be for *every spouse* to demand immediate payments, since the rank and years of service must be frozen at the time of the MPDO. Why should a spouse wait till the day that pension payments start? All spouses will demand immediate payment, rather than postpone the monthly pension share. Just wait for the uproar when that occurs!

*Removal to Federal Court. Plus there is no reason why the disgruntled spouse/retiree can’t open the door to federal court if he or she is not satisfied with how the state court divided the pension. When federal law establishes the test, then federal law preempts any contrary substantive provision in state law. If there were an issue or challenge on pension division, why wouldn’t a party have the right to remove the case to federal district court on *federal question jurisdiction*? When a state court judge (against the claims and wishes of a litigant) makes a determination that is at odds with the statute, or writes the order incorrectly and refuses to correct it, then the aggrieved party would be able to petition to remove the case to federal court.

NO TIME FOR ADJUSTMENT

4. Will there be any “breathing room” so that the states can adjust to this radical change?

No. The new rule will require legislative changes in most of the states, but there’s no decent interval set out to allow the states to write up, propose and enact laws consistent with the “new rule.” Enough time must be allowed to let the states implement the new rule, yet none is granted.

As a result, a warped formula will occur in most of the state military pension orders, one that imposes a double discount on the spouse. First of all, her share will be fixed and frozen at the rank and years of service at the time of the order. In addition, since state laws have not been rewritten to revise the “marital fraction,” it will still be calculated in 90% of the states based on years of marital pension service divided by total pension service years (marital years/total years), rather than marital pension service years divided by the years of pension service up to the date of the order. It is essential to stop the clock for the denominator at the date of the MPDO since the benefit is also fixed at that date. Anything else would doubly dilute the pension benefit granted to the spouse. See Douglas v. Douglas, 2014 Tex. App. LEXIS 12398 (holding that, in a “hypothetical clause,” the denominator is months of creditable service during marriage up to the date of divorce, rather than the date of retirement, citing Berry v. Berry, 647 S.W.2d 945, 946-47 (Tex. 1983); accepting the husband’s proposition that denominator should be total years of service would impermissibly dilute the ex-wife’s share acquired during parties’ marriage).

And yet no time is allowed for state legislatures to adjust to the change and rewrite the state laws. The law would become effective and binding on the states upon enactment.

5. Is anyone in Congress even aware of all these problems?

Probably not. These time bombs and landmines show clearly the error in trying to insert into the U.S. Code a new national standard for military pension division when this issue hasn't been studied, has received no hearings, and in reality should be left for state court decisions. State lawmakers have far more knowledge about these matters than members of Congress, who have never before enacted substantive rules on how to divide the military pension.

This bill represents a huge expansion of Congressional power over family law issues. When it was passed in 1982, the Uniformed Services Former Spouses' Protection Act wisely avoided the intrusion issue; it created a structure that is a respectful acknowledgment of state laws and courts, which have preeminent powers and expertise in this area.

“TIGHTEN UP” – THE FEDERAL STRAIGHTJACKET

6. Why would Congress want to dictate to the states how they are to divide pensions for military personnel?

That's the “24-carat question.” The expertise of Congress in division of federal pensions is best described as NONE. That's because Congress makes the broad general laws allowing the division of the six federal pensions (military, Foreign Service, CIA, federal civil service [CSRS or FERS] or Railroad Retirement). Pension provisions in the U.S. Code do not “get down in the weeds” to tell the states how to do their job.

These proposals intrude in a field which has always been reserved for the states. Why should Uncle Sam step in, take over and dictate the outcome? Congress should not hamper the states' abilities to craft fair, equitable and just pension division orders. Each case is unique, and a single national standard would tie up military cases involving pension division into a federal straightjacket.

STATE EXPERTISE vs. “A NATIONAL STANDARD”

7. How are the states doing in this arena?

Fewer than ten states (including Texas, Florida, Oklahoma, Tennessee, Kentucky and Maine) require the “Frozen Accrued Benefit” method, which is another name for this method of pension division. This approach “fixes the retirement benefit” that was earned as of the date of separation or divorce.

All the rest, either by statute or by court decision, use the “Time Rule” in dividing a defined benefit plan, whether it's civil service, state government, military, local government or a private pension.

*The time rule approach involves the presumptive share of 50% for the spouse or former spouse times the actual retired pay of the retiree.

*Then, to discount the benefit and give the member credit for post-divorce longevity and promotions. This is multiplied by the *marital fraction*, which is years of marriage during employment divided by total years of employment. This reduction factor makes sure that the former spouse will not be overpaid.

The states have been charged with writing and administering the rules regarding divorce and pension division. The Constitution says *nothing* about federal government powers in this area. Over the last 30+ years, the states have entered hundreds of thousands of orders for the division of military retired pay. They have built up a substantial body of case law and statutory rules regarding how the division is done. The pension order is required to be fair, neutral and even-handed, regardless of whether the retiree or employee is the *husband* or the *wife*, whether it's a “safe job” like an office worker, or one fraught with danger, such as a soldier, policeman, CIA agent or firefighter. The states have the responsibility, and they're doing their job.

The time rule in the vast majority of states would be cast aside in favor of ONE SIZE FITS ALL. The “federal rule” for military pension division – all without hearings in Congress – will require that the pension divided would be fixed at the rank and years of service of the military member at the time of the court order making the division.

8. How about the other five federal retirement systems? Does Congress dictate how they do the division of the pension?

No. Congress has left the job to the states for how to divide these five other federal pensions.

9. Where’s the current law found regarding division of military pensions?

It’s contained in the Uniformed Services Former Spouses’ Protection Act (“FSPA”), which is found at 10 U.S.C. § 1408. At the time FSPA was passed, there was a clear understanding in Congress that the states would be granted the power to divide military pensions (or refuse division). The federal government was accorded limited powers, such as the power to enforce orders through garnishment and the duty to ensure that federal jurisdiction tests were met.

WHERE’S THE BEEF?

10. So who is claiming that FSPA needs radical surgery?

You be the judge. Here’s an April newspaper piece -

4/28 article by Tom Philpott -- Northwest Florida Daily News:

***Ex-Spouse Law Tweaked** — The 1982 Uniformed Services Former Spouses Protection Act allows divorce courts to divide military retired pay as property jointly earned in marriage.*

Congress hasn’t considered even modest changes to the USFSPA for more than a decade. But on Wednesday freshman congressman Steve Russell, R-Okla., a combat veteran and retired infantry officer, won bipartisan support for a USFSPA amendment to benefit members who divorce after the defense bill is enacted into law.

Russell took aim at a “windfall” feature of the USFSPA that retirees have criticized for decades. If a member is not retired when divorced, state courts often award the ex-spouse a percentage of future retired pay.

In effect, that allows the value of the “property” to rise based on promotions and longevity pay increases earned after the divorce. In 2001, the Armed Forces Tax Council said this was inconsistent with treatment of other martial assets by divorce courts.

The amendment would end the windfall in future divorce cases by directing that an ex-spouse’s share of retirement must be based on a member’s grade or rank at time of divorce.

Making such a change retroactive would force recalculation of tens of thousands of divorce settlements, an unpopular idea with ex-spouses. So the change is prospective only. But both Republicans and Democrats praised the amendment as fair. It cleared committee on an uncontested voice vote.

11. What’s this business about a “windfall”?

That’s anyone’s guess. In the “zero-sum game” of divorce, *everything* can be labelled a windfall if it benefits one side to the detriment of the other. If the husband gets the house, the wife claims that he got a windfall. If the wife receives a share of the husband’s 401K plan, he’s sure to shout about the windfall that she received. As a practical, factual matter, there are NO windfalls in the world of military divorce and pension division. But lots of people write to Congress about their own divorce and how unfair certain things are, and they may not like how certain state rules apply to them.

Thus, for example, California and several other community property states allow the pension to be divided based on final retired pay, or else divided at the time of divorce with payouts commencing

immediately upon retirement eligibility (based on the rank and years of service of the military member at that time). Is that a “windfall” for the former spouse?

On the other hand, Puerto Rico does not allow the dividing of military pensions at all. Indiana and Arkansas require the pension to be “vested” to be divided, which means the spouse gets nothing when there’s less than 20 years of service. North Carolina requires the spouse to get expert testimony on valuation of the military pension, or else it cannot be divided at trial, making it a steep, uphill battle for the non-military partner. Alabama requires the pension to be vested and evaluated and obtained through ten years of military service concurrent with ten years of marriage. Maine does not allow the apportionment of COLAs (cost-of-living adjustments) to the former spouse. Are all of these state rules “windfalls” for the military member?

Congress has done nothing to eliminate any of these alternative methods found in the 50 states. It now proposes, however, to create a single nationwide standard – the “Frozen Accrued Benefit” approach – to require that the division of retired pay always and everywhere be based on the rank and years of service of the member at the time of the court order for division.

12. Is this new? Has Congress tried this before?

There have been attempts to rewrite FPSA (or to remove it entirely from the federal law landscape) going back decades. Every time someone in Congress has tried to change the law in this area, the American Bar Association and other critics have asked, “Where’s the beef?” What is the problem?

A SOLUTION IN SEARCH OF A PROBLEM

13. So what is the problem that this proposal is supposed to be solving?

There is no reported case in which a court determined that the time rule, the present system of pension division in most states, created a “windfall” for the former spouse. The bill is a solution in search of a problem. Where is the problem which would allegedly be solved by such legislation? There’s a simple answer – no such problem exists. With no defined problem as the reason for these bills, one has to wonder why we would want to change the law in most of the states, thus creating unfortunate, costly and easily foreseeable new consequences in military pension division cases.

14. Even if there WERE a problem, where does it say that Congress gets to do this? Can Congress tweak, change and correct anything in state procedures that it thinks might be “unfair”?

Congress has never held the power to reach out and correct what it thinks should be changed in the laws of the states. Our nation has, as it should, a vast variety of methods of reaching a fair and just division of marital or community property. FSPA was meant to protect these varied methods of dividing military retired pay, since they have been developed in state courts and legislatures over the last 30+ years.

WHO’S SO SPECIAL?

15. Why are military pensions to be given such special treatment?

No one knows. The new rule will require statutory or case law revisions in 90% of the states because it makes the military pension *super-special*. And it does so without any recognition of terms for state court division of all the other defined benefit plans (e.g., IBM, state government, local government) or even the federal defined benefit plans which Congress has enacted (i.e., FERS, CSRS, CIA, Foreign Service, Railroad Retirement).

In addition, if enacted, this “special treatment legislation” will lead to inequitable and unfair results in every divorce in which a spouse (most of whom are women) is married to a military member. The spouse, in 90% of the states, would have her own pension divided according to her actual retired pay, but she would be denied this same treatment when it comes to dividing the military member’s pension,

which would be “frozen” at the date of division; thus the military member will have a greater interest in her benefits than she has in his, creating an obvious unfairness.

Perhaps some readers will be reminded of the text from George Orwell’s Animal Farm – “All animals are equal; but some animals are more equal than others.” Thus military retirees are so super-special that they have to have their pensions divided by a Congressional edict, unlike every other federal, state or private pensioner. For example, no one who’s retired from the State Department, the Federal Marshal’s Service or the CIA is treated to this type of federal division requirement upon divorce. It’s reserved for only military retirees. They are entitled to “special treatment” above all others.

16. I thought that the courts could give consideration to how the efforts of “Mary Doe” and her husband during the marriage could benefit him in terms of future promotions.

That’s right. The time rule is based on the “marital foundation theory,” which recognizes that the individual’s final retired pay is based on a foundation of marital effort; a servicemember would never have attained the rank of sergeant major (with 30 years of service) if it hadn’t been for the efforts expended during the marriage up to the rank of sergeant first class over 20 years, when the parties divorced. That’s one reason why a large majority of states have adopted the time rule for dividing pensions of all kinds and stripes – it provides the fairest approach to division of this asset, whether the pension is state or federal, private or public. And it accounts for the postponement of the benefit (i.e., Mary Doe’s inability to obtain immediate payments in most states) by allowing for the growth in the pension over time.

17. How are pensions divided now at the retired pay centers?

The military pension award may be a –

*Fixed dollar amount;

*Percentage of retired pay;

*Formula clause (e.g., 50% of 120 months of marital pension service divided by X total months of creditable service times final retired pay); or

*Hypothetical award, fixing the benefit at a specific time for rank and years of service purposes (such as “the pay of a sergeant first class with over 20 years of service at the date of divorce/separation”).

State courts may, depending on what is fair and equitable, use any of these approaches as allowed by state law. The FSPA revision would torpedo this “state law approach.” It would dictate the use of the hypothetical award (above) or “fixed benefit” approach for every case, whether settled or tried, and regardless of whether it produces a fair or unjust result.

HELPING (OR HINDERING!) THE SERVICEMEMBER

18. Is the fixed benefit clause easy to do?

“Fixed benefit” division is the hardest to handle of the four pension clauses mentioned above. An attorney at one of the retired pay centers that processes military pension division orders put it this way: “I estimate that over 90% of the hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of ... military retired pay. This legislative change will geometrically compound the problem.”

But everyone will have to know how to do it. Since almost no one now can write one competently without a lot of research and a handful of Excedrin, this means the cost of military divorce will go up once again, with rejection letters flowing back to attorneys who submit their pension orders to the retired pay center in the hope of approval.

Then it's back to the drawing board for another crack at it, or else farm it out to some expert who can do it properly (IF there's enough information available to figure it out, including the member's "High-3" annual compensation) (and an expert can be located) (and enough money is left to pay the expert draftsman for the next stab at this!).

19. Where can I find an explanation of the "time rule" and the "fixed benefit" approaches to pension division?

For an explanation of the difference between these approaches, see –

*Brett R. Turner, Equitable Distribution of Property § 6.26 (3d ed. 2005 and 2015 Supp.)

*Prescott v. Prescott, 736 So. 2d 409 (Miss. Ct. App. 1999)

*In re Marriage of Hunt and Raimer, 909 P.2d 525 (Colo. 1996).

The Hunt and Raimer case contains a limited summary of "Time Rule" states (which today number more than 40 nationwide) –

"The "time rule" formula has been approved by a number of jurisdictions. *See, e.g., Cooper v. Cooper*, 167 Ariz. 482, 808 P.2d 1234, 1242 (Ct.App.1990), *review denied*, (Ariz. May 7, 1991); *In re Marriage of Freiberg*, 57 Cal.App.3d 304, 127 Cal. Rptr. 792, 796 (1976); *Stouffer v. Stouffer*, 10 Haw.App. 267, 867 P.2d 226, 231 (1994); *Warner v. Warner*, 651 So.2d 1339, 1340 (La.1995); *Lynch v. Lynch*, 665 S.W.2d 20, 23-24 (Mo.Ct.App.1983); *Rolfe v. Rolfe*, 234 Mont. 294, 766 P.2d 223, 226 (1988); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429, 431 (1989); *Berry v. Meadows*, 103 N.M. 761, 713 P.2d 1017, 1023 (Ct.App.1986); *Welder v. Welder*, 520 N.W.2d 813, 817 (N.D.1994); *Woodward v. Woodward*, 656 P.2d 431, 433-34 (Utah 1982)."

20. Where are these House and Senate provisions located?

The terms in the Senate bill, S. 2943, are found at Sec. 642; the House equivalent is H.R. 4909, Sec. 625. Sen. John McCain of Arizona is the sponsor for the Senate Bill and Rep. Mac Thornberry of Texas is the sponsor for the House Bill.

AMERICAN BAR ASSOCIATION OPPOSITION

21. Where does the ABA stand on rewriting FSPA?

The American Bar Association has been on record for over three decades on the role of Congress and the states in the division of military retired pay. As stated in the 1998 Congressional testimony of Las Vegas attorney Marshal Willick, representing the ABA:

There are two formal statements of policy by the ABA. One was in 1979, urging that all forms of deferred compensation be allowed to be subject to State dissolution laws, and the other one in 1982, in the wake of McCarty [McCarty v. McCarty, 453 U.S. 210 (1981)], and that was a formal policy, again, strongly urging specifically that military retirement be made divisible as would any other asset so that military members are treated like civilian employees of the Federal Government, employees of State governments, and private citizens all throughout the United States.

The ABA is on record opposing any attempt to "federalize" the means of dividing military retired pay.

And the American Bar Association has made it clear that complex family matters are best reserved to the states, which over the course of time have developed appropriate expertise and mechanisms to make fact-driven determinations regarding military pension division. Federal efforts to legislate the division of military retired pay depart from the long-standing history of deference to state laws in matters involving property division.

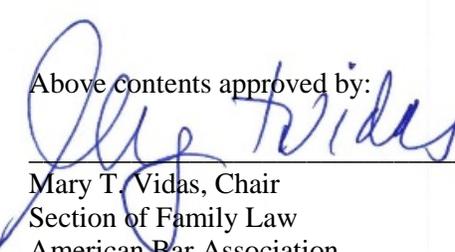
22. What can I do to stop this?

If you are opposed to this radical rewrite of FSPA and the removal of the powers, duties and abilities of the states to handle military pension division, then write your Senators and your Representative to urge them to stop this ill-advised scheme... or at least to conduct hearings on the issue (as happened when Congress passed FSPA in 1982) so that the voices of those affected – attorneys and their clients – may be heard.

Conclusion

These FSPA rewrite proposals contain serious flaws. Passage in the Department of Defense Authorization Act for Fiscal Year 2017 would lead to a major intrusion into federal court for courts, lawyers, servicemembers, former spouses and retirees. It will certainly cost them dearly in time and money spent in court and with attorneys. Family Law Section members should contact their representatives in the House and the Senate. State bars and bar associations should let their voices be known regarding this a radical revision of federal law, by means of clear and strong resolutions and statements on the record. If enough voices are heard in Washington, these unnecessary and harmful changes may never become federal law.

Above contents approved by:



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