

Military Pension Division: The Frozen Benefit Rule

by Mark E. Sullivan*

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The New Pension Division Rule

The National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) contained a major revision of how military pension division orders are written and will operate. Instead of allowing the states to decide how to divide military retired pay and what formula or methodology to use, Congress imposed a single uniform method of pension division on all the states, a fictional scenario in which the military member retires on the day that the pension division order is filed. Effect December 23, 2016, the new rule up-ends the law regarding military pension division in almost every state.

The new rule applies to those still serving (active-duty, National Guard or Reserves). It is a “rewrite” of the terms for military pension division found in the Uniformed Services Former Spouses’ Protection Act, or USFSPA.¹ From now on, what’s divided will be the hypothetical retired pay attributable to the rank and years of service of the military member at the time of the order dividing retired pay. The only adjustment will be cost-of-living adjustments that occur under 10 U.S.C. § 1401a (b) between the time of the court order and the time of retirement. There are no exceptions for the parties’ agreement to vary from the new federal rule. Everyone must do it one way, regardless of what the husband and wife decide they want the settlement to say.

How Hard Is This, Anyway?

“Frozen benefit division,” is also known as a *hypothetical clause* at the retired pay centers.² It is the most difficult to draft of the pension division clauses available. An attorney at one of the retired pay centers which processes military pension division orders put it this way: “... 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.”

Due to the difficulty of doing such orders, more expenses will be involved in the military divorce

¹ 10 U.S.C. § 1408.

² For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

case and a whole new team of experts will pop up to help ordinary divorce attorneys comprehend and implement the new frozen benefit rule. Without the right help and the proper wording, rivers of rejection letters flowing back to attorneys who submit their pension orders to the retired pay center in the hope of approval. Since the new frozen benefit rule was written by Congress, which knows next to nothing about the division of property and pensions in divorce, there will be problems galore in applying it in the courts of most states.

Although the method of dividing pensions, as well as the date of valuation and classification of marital or community property, has always been a matter of state law, that will change in the military case. Since no time has been allowed for state legislatures to adjust to the change and rewrite state laws, lawyers will need to make adjustments “on the fly” to deal with military pension division cases which are presently on the docket or which come to trial before the state legislature can act.

Strategy for the Servicemember

The attorney for the SM (servicemember) will have an easier time than the lawyer for the FS (former spouse) in getting through a trial or settlement. The SM has control over all the evidence and testimony needed for either procedure.

To divide the pension under the new rule, the court must know the hypothetical retired pay for the SM at the time of the order. An active-duty SM needs to give the attorney proof of the “High Three” (i.e., average of the highest three years of continuous compensation) at the time of the order which divides the military pension.³ That will usually be the most recent three years, and the data will be found in the pay records of the SM.

Once the evidence has been admitted, the court will require a court order for dividing the pension. The attorney for the prevailing party is often tagged with the task of preparing the military pension division order, or MPDO, unless all the necessary language is placed in the divorce decree. It will help immensely if counsel obtains “outside assistance” from a lawyer experienced in writing such pension orders.

The SM needs to insist on prompt entry of the court order. If the order provides the necessary information for a hypothetical award, and the retired pay center (once the order is received) can verify this, then Mary’s pension division will be locked in at the specified years and rank. Otherwise the SM

³ The other element for determination of retired pay is the “retired pay multiplier,” which is 2.5% times years of creditable service (in an active-duty case). In a Reserve or National Guard case, the court order must also provide the applicable number of retirement points.

risks rejection of the order and further delay, which can only hurt him or her since “more time” sometimes equates to promotions and step-increases for pay. “Do it now” is the motto of the SM in regard to a pension division order. The court should be asked to order the immediate execution of the cover sheet, DD Form 2293, which would then be given to the SM’s law for transmittal to the retired pay center along with the divorce decree and court order. The SM must retain complete control over the order and the submission process.

Strategy for the Former Spouse

In most cases the above is also the strategy of the FS as to documents in settlement or trial. The lawyer for the FS must get and submit the above information to the judge in a trial, and must have this information for a settlement so as to write up if the court is to do a proper hypothetical clause in light of the new frozen benefit rule. If the SM is obstinate, it can take weeks or months to obtain this information from the source (that is, the pay center) with a court order or judge-signed subpoena.⁴

There are several ways to try to get around the immediate division of a frozen benefit for the FS. In thinking through the twists and turns in this process, John needs to remember that the new rule is written with “at the time of the court order” as the benchmark. It is the order dividing the pension (whether a separate MPDO, the divorce decree, or a property division judgment) which must be crafted as a division of the “frozen benefit.” This is not a fixed and established date, such as the date of separation, the date of divorce or the date of commencement of the matrimonial action. It is a mobile target, one which – to some extent – is subject to movement, massaging and maneuvering by the attorney for the former spouse. Whenever that order is entered is the “snapshot date” for fixing the retirement benefit. While in some states, this must be at the time of divorce, in others the law allows the division of marital property before entry of the decree of dissolution or – if the pending claims have been bifurcated – after the parties are divorced.

No single approach is best, and the rules have not been written yet. The rule is NOT “One Size Fits All.” Some states may restrict or prohibit one or more of these strategies. The FS’s attorney may try out the following to “even the scales” in trial or settlement:

- When the parties are in agreement, spousal support is one way to obtain payments not restricted to a retirement based on rank and years of service (and the *High Three*) at the time of the order.

An alimony order – which can be used by skilled attorneys to mimic a pension division, gives

⁴ The anticipated delay, however, may work to the FS’s advantage. The longer the division of retired pay is put off, the better chance the FS will have of dividing a higher amount of retired pay. In general the FS’s case usually will benefit from delay under the new rule.

much more flexibility in dealing with the retired pay center, so long as the payments do not end at remarriage or cohabitation of the FS. There is, for example, no requirement for 10 years of marriage overlapping 10 years of creditable service. A consent order for spousal support should suffice to obtain the payments to the FS upon retirement of the SM, and the tax consequences will be the same, namely, the FS is taxed on the payments and they are excluded from the income of the payor/retiree.

- A delay in entry of the pension division order is another way for the FS to deal with the frozen benefit rule. Since the statute requires fixing the benefit to be divided *at the time of entry of the order*, the FS may ask the court for postponement of the decision on pension division, that is, request the court to *reserve jurisdiction* over division of the pension until the SM begins to receive retired pay. A later division means a later “snapshot” of rank, years of service and the *High Three*.⁵ Note that there may be difficulty in monitoring the retirement of the SM. How will the FS know when retirement occurs?
- If the lawyer for the SM is not fully skilled in preparing hypothetical orders (and few attorneys nationwide are), then an imperfect order might result, one which is rejected by the retired pay center. In this case, the FS’s attorney may just sit back and do nothing. Let the “imperfect order” cure for a while – like a fine wine or a country ham – until the SM retires, and then have the FS ask the court for a “clarifying order” which can be properly submitted to the retired pay center. Then it would be the *High Three* at retirement which would be divided.
- The FS can ask the court for an award of spousal support to make up the difference, that is, the money which would be lost to the FS by division of the hypothetical retired pay of the SM. If the FS is awarded alimony while the member is still serving, the FS will try to argue that it should not simply end automatically upon the SM’s retirement, since some amount might be needed to even out the pension division for the FS.
- What if there is a later modification of the order, such as the addition of terms for the Survivor Benefit Plan which were left out of the original order, or an adjustment to fix the proper percentage for the SM – upon retirement – to pay the FS? It would appear that the new order filed just prior to Mary’s retirement would “re-set” the amount to be divided. The frozen benefit

⁵ There is no regulatory restriction in the Uniformed Services Former Spouses’ Protection Act as to how long former spouses may wait before they are barred from obtaining pension-share garnishment payments from the retired pay center. The center will start payments whenever the FS submits an appropriate order. In one recent case, the FS got payments from DFAS upon submitting her application 16 years after the parties’ divorce. *Koonce v. Finney*, 2017 Ind. App. LEXIS 10.

rule is based on “at the time of the court order.”⁶ A later court order which modifies the previous one would mean that the retired pay of Mary which is divided is that which is calculated “at the time of the court order,” which is the *later order* submitted to the retired pay center.

- The FS can always ask the court for an unequal division of the property acquired during the marriage, in an attempt to even out the entire property division scheme due to the division of a truncated asset of the SM, not the final retired pay. Or the FS can ask for a greater share of the pension to make up for the smaller amount which will be divided.
- The FS can also demand a present-value division of the pension, with an expert witness setting the likely value of the retired pay, so that it can be offset by other assets given to the FS in exchange for a full or partial release of pension division. Evaluating a pension is a complex task. It is not for the faint-hearted, the unprepared, or the amateur. These complicated computations generally demand the evaluation report and testimony of an expert.
- Finally, in several western states, the court may order SM to begin present payments to the nonmilitary spouse as soon as the SM is eligible to retire. This is so whether the military member has actually retired or not.⁷ A judge can order that the FS may choose to take a share immediately (if the SM is eligible for retired pay) through a motion filed by the FS. The probable approach for a nonmilitary spouse in those states which follow *Luciano* is to move immediately for payments, to start as soon as the SM attains sufficient service for retirement (usually after 20 years of active duty).

Resources

A complete guide to problems and pitfalls stemming from the “Frozen Benefit Rule” is in the Silent Partner infoletter, “Fixing the Frozen Benefit Rule.” How to write acceptable military pension clauses may be found at the Silent Partner, “Guidance for Lawyers: Military Pension Division.” For the necessary terms for the MPDO, see the Silent Partner, “Getting Military Pension Orders Honored by the Retired Pay Center”; this guide includes the necessary elements and language for a proper hypothetical clause. All these info-letters are located at www.nclamp.gov > For Lawyers, the website of the N.C. State Bar’s military committee.

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⁶ 10 U.S.C. § 1408 (a)(2) defines “court order” in the context of USSPA.

⁷ The seminal case is *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980). Other states include Arizona, Idaho, Nevada and Colorado.

The Weather Report and the Wingman

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Introduction

Conditions were dark and stormy at the end of the second day of the Coons divorce trial.¹ Then the judge invited the attorneys back into his chambers for “a weather report.”² For Ms. Coons, it turned out to be a cloudburst with no warning.

The judge advised the parties' lawyers that there was a problem. Mr. Coons' military retirement was not vested. The judge stated that the court

“... would not and could not distribute [husband's] military retirement because he had not yet served the requisite number of years to vest in the system. In short, there was not yet anything to distribute because [husband] had no entitlement to the benefit.” The trial court indicated that the benefits could be distributed only once they vested; because husband was ten months shy of a full twenty years of service as of the final hearing date, there was nothing to distribute.³

Following this in-chambers “weather report,” the parties entered into a stipulation resolving all issues. This included the wife's acceptance of \$15,000 in exchange for her waiver of any claims to the husband's military pension.

The court was wrong. It's clear that Vermont law does not require the vesting of marital assets as a prerequisite to their division in equitable distribution.⁴ Only Indiana, Arkansas and Alabama require a pension to be vested before division as marital property.⁵ The wife realized this and filed a motion to alter or amend under Rule 59, asking the court to set aside the stipulation but to retain the rest of the settlement. The judge, who still maintained that the unvested pension couldn't be divided, denied her motion. As described in the Vermont Supreme Court's opinion, the judge ruled that the wife

... “could have rejected the proposed stipulation”; had an “opportunity to argue before the [c]ourt that the benefit should be included in the property settlement”; had an attorney throughout the entire proceedings whom she could have consulted; and could have reserved the right “to litigate or appeal the issue of the unvested military pension.” Since wife did “none of those things,” the trial court denied the motion.⁶

¹ *Coons v. Coons*, 2016 VT 88, 2016 Vt. LEXIS 84.

² 2016 VT 88 at [*P1], 2016 Vt. LEXIS 84 at **1.

³ 2016 VT 88 at [*P2], 2016 Vt. LEXIS 84 at **1-2.

⁴ *Golden v. Cooper-Ellis*, 181 Vt. 359, 924 A.2d 19 (stock options which are deferred compensation for past and present performance must be considered marital property even though they are not yet vested).

⁵ Mark E. Sullivan, *THE MILITARY DIVORCE HANDBOOK* 505-506 (ABA, 2nd Ed. 2011).

⁶ 2016 VT 88 at [*P4], 2016 Vt. LEXIS 84 at **4.

The Supreme Court affirmed that ruling, stating that there was no mutual mistake of fact, and that “mistake of law” does not constitute a reason for setting aside a stipulation. It noted that lawyers are charged with knowing the law and that stipulations are generally set aside only when there is no failure to exercise due diligence.⁷

What the Supreme Court didn’t say is also important. It didn’t say, “When you’re flying in bad weather, you need a wingman.”

Defining the “Wingman”

What is a wingman? Let’s do a little historical research. Fans of Top Gun, the 1986 movie by Paramount Pictures, may remember this epic scene – and the lines that go with it.

The flight test was just completed. The locker room held a dozen pilots, with Tom Cruise as “Maverick” in the center, towel wrapped around his waist. The flight evaluator – “Jester” – enters the room. He’s just watched Maverick and “Goose,” his RIO (Radar Intercept Officer) rush to score a “victory” and in the process leave their wingman vulnerable. In the end, they too fell victim to Jester, who took them out.

Jester addresses Maverick: “That was some of the best flying I’ve seen yet... right up to the time you got killed. Never, ever leave your wingman!”⁸

How the Wingman Can Help

When a servicemember, spouse or retiree needs help in understanding the INs and OUTs of military pension division, it’s time to look for a “wingman.” Hiring an expert to assist the primary attorney can bring a much higher level of knowledge and expertise to the divorce case. This is especially true when the judge, taking a line from Bob Dylan, tells you that “You ain’t goin’ nowhere”⁹ with your military pension division case and the attendant military benefits for the spouse or former spouse.

Who can act as your wingman? The expert might be a former JAG officer, a Guard/Reserve judge advocate, a retired JAG, or a lawyer with prior military experience. If the expert has specialized knowledge in the area of military divorce, then he or she can make the difference between a poor and a good settlement. And a wingman is essential if the case is headed for trial.

Asking around for information on who in the local or state bar has written or spoken on military family law issues will usually reveal one or two attorneys in a given state who could be consultants for the divorce attorney. You don’t even have to get a wingman from the city or county where your divorce is taking place. A good consulting expert can be from Texas or Tennessee, North Carolina or North Dakota. The important point is to have someone who knows the statutes for pension division (the Uniformed Services Former Spouses’ Protection Act, found at 10 U.S.C. § 1408) and the Survivor Benefit Plan (10 U.S.C. § 1447-1455), the retired pay center rules (the Department of Defense Financial Management Regulation), and the specific issues which often arise in the military divorce case.

Questions for the Wingman

Having a wingman is of significant help when “brainstorming” on settlement options and information for trial. Such advice can make a real difference when it comes to common questions that are vital for the parties. The military member or retiree might ask, for example:

⁷ 2016 VT 88 at [*P10], 2016 Vt. LEXIS 84 at **6.

⁸ Watch the video at this link: <https://www.youtube.com/watch?v=eEMqLOJQUKU>

⁹ “You Ain’t Goin’ Nowhere,” from Bob Dylan’s Greatest Hits Vol. II (Columbia Records, 1971).

- How is the Guard/Reserve pension divided, by points or by years acquired while married?
- Does my former spouse get Survivor Benefit Plan (SBP) coverage? If so, who pays for it? Can the judge order my soon-to-be-ex to pay for the cost, since only she benefits from it?
- Is my expected pension divided according to my rank and years of service when the divorce occurs, or will it be pegged to my pension check when I retire?
- Does the SBP premium have to be deducted from the pension? Can the court require DFAS¹⁰ to deduct the SBP premium from the former spouse's share of the pension?
- Can my pension be divided in a state which is not my legal residence?
- Can we reduce my former spouse's share of SBP so that it mirrors her share of the pension?
- Does the pension share have to be paid through the military retired pay center?
- Can we value the pension and give my ex other marital or community property to offset the value of the pension, which I intend to keep?
- Should we also value the SBP coverage which my spouse hopes to obtain?
- What can my ex do if I elect disability pay (VA disability compensation or Combat-Related Special Compensation) and that wrecks havoc on her share of the retired pay?

Similar questions will arise when the former spouse is the client, especially in the area of SBP coverage, indemnification for pension share reductions due to disability payments, and military medical care and coverage.

The Skilled Wingman: Cost and Benefits

Faced with this prospect, the client will sometimes say, "But can't I find a military divorce specialist who can handle my case alone? I really don't want to hire two lawyers!"

While there may be a chance that the client can find a lawyer who is a specialist in family law and who is also an expert on military divorce issues, that outcome is rare. Other than lawyers in a few major military cities, such as Tampa, San Diego or Norfolk, it's hard to locate lawyers who combine both family law and military divorce in their portfolios. There's no demand for military divorce expertise in Waukegan or Walla Walla.

This "heavy lifting" isn't simple, and it isn't cheap. Retirees, spouses and servicemembers should expect to pay seriously for serious legal advice and representation. But it often boils down to this – do you want to be cheap or be safe? Take your pick! Way too many clients after a disastrous divorce will readily admit that they never should have tried to do the divorce paperwork, go through a trial, or attempt a settlement without an expert at their side.

Some lawyers choose to go it alone. They might feel that they know enough to carry the day. They might believe that they know the weather and can survive the storm. They may even believe that "You don't need a weatherman to know which way the wind blows."¹¹

Don't be swayed by false confidence and assumptions. A wingman can take the worry out of the significant issues in military divorce cases. Clients have a lot at stake in a divorce proceeding, and you only have one chance to get it right.

¹⁰ For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

¹¹ From "Subterranean Homesick Blues" on Bob Dylan's album, Bringing It All Back Home (Columbia Records, 1965).