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Be specific in divorce agreements to avoid future legal trouble

By Jennifer Weisberg Millner - Special to Military Times
Posted : Thursday Mar 24, 2011 14:13:13 EDT

A recent ruling in a case in New Jersey's state courts departed from established law on the contentious issue of how a service member's military retirement pay is treated in divorce cases.

At the time of his divorce in 1987, then-Capt. Thomas Barr had completed 11 years of active duty in the Air Force. The Barrs' divorce agreement provided that his wife would receive half of his military retirement benefits "attributable to his 11 years in the military service only."

Barr then joined the Air Force Reserve, attained the rank of major, and became eligible for military retirement pay. He and his wife then had a disagreement about the calculation of the amount to which she was entitled.

In many states, a former spouse's entitlement to an employee's pension is calculated using a "coverture fraction" — a formula that separates benefits earned during a marriage from benefits earned outside of the period of marriage. The fraction is multiplied by the percentage to which the former spouse is entitled.

The practical effect of this formula is that the longer the employee spouse works after the marriage, the less the former spouse receives from the employee's pension.

But in military retired pay situations, a former spouse generally derives some benefit of increases in pay and rank attained by the service member after the marriage, as these are variables in the calculation of retired pay.

In Barr vs. Barr, an appeals court found that this calculation might not be appropriate. The court ruled that some extraordinary post-judgment increases in the service member's ultimate retired pay may be proven to be attributable to efforts made by the member after the marriage was dissolved.

In other words, a portion of a service member's pension may not be dependent on prior joint efforts of both parties during the marriage — and in such cases, those sums must be excluded from any post-marriage pension distribution decisions.

The appeals court ruled that the coverture fraction may be insufficient to accomplish this purpose — a significant departure from established law in this particular area.

All too often, the service member is not thinking about retirement at the time of his divorce, and the issue is not given the attention it deserves.

It's imperative to include in the divorce decree a statement of intent, as well as a formula, that calculates a former spouse's share of the member's retired pay.

Service members must ensure that they have counsel who understands how military retired pay is calculated and how state law applies. Failure to take these steps could cost a member a significant amount of retirement pay over a lifetime.

Jennifer Weisberg Millner is a partner at Fox Rothschild LLP and is part of the firm's family law and litigation practice groups. She represented Capt. Thomas Barr in Barr vs. Barr. She can be reached at 609-895-6712 or jmillner@foxrothschild.com. Alex Keenan will return April 11.

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