

MEMORANDUM FOR RECORD

FROM: Mark E. Sullivan

SUBJ: Summary of the EXECUTIVE SUMMARY, A Report to Congress Concerning Federal Former Spouse Protection Laws, submitted to the Armed Services Committees of the U.S. Senate and House of Representatives, September 4, 2001

Section 643 of the National Defense Authorization Act for Fiscal Year 1998 required the Department of Defense (DoD) to report to Congress on the Uniformed Services Former Spouses' Protection Act (USFSPA), comparing it to other governmental and private systems and plans for protecting employees/retirees and their spouses during separation and divorce. In response, DoD reviewed and made recommendations as to the following issues:

1. Treatment of VA Disability Compensation.

- A. Issue/Problem: USFSPA excludes from disposable retired pay amounts waived to receive VA disability compensation. When a former spouse is receiving a certain percentage of the member's disposable retired pay each month, the waiver of military retired pay reduces the amount that the former spouse will receive each month.
- B. DoD Recommendation: "Punt" is the best description. This issue was pushed aside by the Department with the following language:

The treatment of VA disability compensation is not within the purview of DoD. Such matters are exclusively within the purview of the Department of Veterans Affairs and the Congress. If Congress chooses to revisit the issue of the treatment of disability compensation, in relation to retired pay, it would be appropriate to ensure that the concerns of both members and former spouses are taken into account.

2. Termination of Payments Upon Remarriage of Former Spouse.

- A. Issue/Problem: USFSPA does not require that distributions of retired pay to a former spouse stop if the former spouse remarries.
- B. DoD Recommendation: "Don't go there!" This is an issue for domestic relations laws of the 50 states, and DoD shouldn't attempt to rewrite these laws to treat pension division as alimony, that is, ending on remarriage.

3. Grant of Benefits to 20/20/15 Spouses as Well as 20/20/20 Spouses.
 - A. Issue/Problem: Currently, 20/20/15 spouses are eligible for only limited benefits under USFSPA. ["20/20/15" refers to 20 years of marriage, 20 years of military service and 15 years of overlap between the two.]
 - B. DoD Recommendations: Allow 20/20/20 medical care, commissary and exchange benefits for 20/20/15 spouses who have at least five years of marriage to the member after his or her retirement.

4. Calculation of Benefits based on Time of Divorce Rather Than Time of Retirement.
 - A. In cases where the member is not retired at the time of divorce, courts often award a percentage of the member's retired pay to the former spouse as of the date the member actually retires. In essence, the court treats post-divorce promotions and longevity pay increases earned by the member as marital assets, in DoD's view.
 - B. DoD Recommendation: In sharp contrast to the **"Don't go there"** approach adopted in #2 above, based on deference to state domestic relations laws, DoD has decided to plunge into the family law fray by recommending that all military pension division awards be based only on the member's rank and time served at the time of divorce. The stated purpose of this proposal is to ensure that pay increases attributable to promotions and additional time served after the divorce should be the member's "separate property," and that the former spouse should only benefit from post-divorce increases in the pay table for the member's rank and time served.

What's wrong with this? It's an unwarranted, misguided interference into the carefully created pension division structures that have been developed by statute and judicial decision over the past 30 years in the 50 states and the District of Columbia. While there are many states which allow no consideration of post-divorce increases in pension benefits in the division process, there are also many states which allow, may require, the court to award the non-participant spouse a share of post-divorce increases. In states such as Delaware, Indiana, North Carolina, Missouri, New York, Pennsylvania, North Dakota, Washington, and Illinois, the courts often base this approach on the underlying economic realities:

[T]he greater-value later years would not have been possible without the lesser-value earlier years. We cannot say the years after the marriage were more valuable than the years during the marriage. Because of the time value of money, the opposing

would appear to be true, unless contributions were significantly greater in later years. In re Marriage of Wisniewski, 675 N.E.2d 1362, 1369 (Ill. Ct. App. 1997).

For a thorough explanation of this approach, see Brett R. Turner, *Equitable Distribution of Property* § 6.10, "Post Divorce Increases" (2d ed. 1994).

A further problem with this approach is that there is no uniformity among the states as to the "magic date" for classification and explanation of assets acquired during the marriage. Some, like North Carolina, use the date of separation. Others use the date of divorce, date of summons issuance in the divorce action or date of marital breakdown.

5. The "10-year Rule" for Direct Payment of Retired Pay Allocations. Former spouses are eligible for direct payment, through the Defense Finance and Accounting Service (DFAS), of their allocable share of retired pay *only* if the member and former spouse were married for 10 or more years during which the member completed 10 or more years of creditable service.
 - A. Issue/Problem: Former Spouses can only get pension division payments from Defense Finance and Accounting Service (DFAS) if their marriages and their spouses' military service overlapped by at least 10 years. This prevents garnishment for pension payments in a large number of cases for no logical purpose. No other system has such a requirement.
 - B. DoD Recommendation: Repeal requirement.
6. SBP (Survivor Benefit Plan) Issues.
 - A. Problem/Issue: A spouse or former spouse who remarries before age 55 loses entitlement to SBP coverage. This rule also applies if the current surviving spouse of a retired military member remarries before age 55.
 - B. DoD Recommendations: Since the rule treats both divorced ex-spouses and surviving spouses equally unfairly, leave it alone.
 - C. Problem/Issue: A member can designate only one SBP beneficiary. This deprives a surviving (current) spouse of SBP coverage and overcompensates the former spouse.
 - D. DoD Recommendation: Make the SBP divisible among multiple beneficiaries and establish a presumptive allocation corresponding to the division of the underlying pension. Premiums would have to be adjusted for the cost of this.

- E. Problem/Issue: Former members have SBP premiums for spouses or former spouses deducted from disposable retired pay. This cannot be allocated in whole or part to the spouse or former spouse.
- F. DoD Recommendation: Let the judge (or, in a consent order, the parties) set out who pays for SBP coverage. Also permit any spouse or ex-spouse to waive any or all of her proportionate coverage under SBP.
- G. Problem/Issue: The "1-year rule" (requiring a one-year time limit for submitting an SBP order to DFAS) creates hardships for spouses who, upon divorce, seek "ex-spouse coverage" for SBP and whose attorneys are unfamiliar with this deadly deadline.
- H. DoD Recommendations: Repeal the "1-year rule."

What didn't the Report recommend? Here's a short list -- it didn't recommend:

- Pre-approval of military pension division orders by DFAS;
- Publication of a guide to USFSPA and the preparation of military pension division orders;
- Preparation of standard forms for dividing military pension division order;
- Education of retirees and former spouses as to their rights under USFSPA.

The rationalization put forth for these omissions was that lawyers and clients already have access to key legal info on USFSPA and nothing more is needed.

The Report also contains a number of other sections that will be useful to the family law practitioner. These include:

- Appendix C -- a 50-state summary of laws and cases pertaining to division of military retirement pay;
- Appendix F -- a comprehensive background analysis of USFSPA and its amendments;
- Appendix H -- comparison of USFSPA to federal civil service (both CSRS and FERS), the Railroad Retirement System, the Foreign Service, the Central Intelligence Agency, Thrift Savings Plan and private employer plans (ERISA and COBRA) in regard to pension division, health coverage and survivor benefits;
- Appendix J -- the complete text of USFSPA; and
- Appendix K -- a useful bibliography of books and articles on the division of military retired pay.

Each of these sections would be helpful to the domestic attorney who is handling a military case, and Appendix H would be especially useful as an introduction to other pension/retirement systems for the new practitioner. The complete report and Appendices can be found at <http://dticaw.dtic.mil/prhome/docs/finalrpt.doc>.