

LAW REVIEW¹ 24023

April 2024

Seven Myths about Military Pension Division

By Colonel Mark E. Sullivan, USA (Ret.)*

5.1—Division of Military Pension Benefits upon Divorce.

*Mr. Sullivan is a retired Army Reserve JAG colonel and a life member of the Reserve Organization of America. He practices family law in Raleigh, North Carolina, and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He works with attorneys nationwide as a consultant on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and at mark.sullivan@ncfamilylaw.com.

Dividing military retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. §1408, can be a daunting task. Clients and lawyers are often confused and mystified by the rules, some of which appear to be contradictory or counterintuitive. Here are some of the myths which might be heard in the field of military pension division.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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Myth #1 – There’s no standard method for dividing military retired pay; you can word the clauses any way you want, as long as it’s clear what the court is dividing.

Response: The easiest way to get a *rejection letter* from the retired pay center is to *wing it* when wording the pension division order. This is not a class in “creative writing.” There are four accepted methods of wording the clause for dividing a military pension. They are all explained and illustrated in the rules for “Former Spouse Payments from Retired Pay,” Ch. 29, Vol. 7B, Dep’t of Defense Fin. Mgt. Regulation; each one is found at Section 6.0, “Court Orders.” A more extensive explanation, with sample language for each clause, is located in the Silent Partner infoletter, *Guidance for Lawyers: Military Pension Division*.²

Myth #2 – Payments from the retired pay center³ begin as soon as the pension division order is received and the servicemember has retired.

Response: When the servicemember’s pension is in *pay status* and the government is paying him or her each month, the retired pay center will take up to 90 days to process a court order dividing retired pay.⁴ The client who is a servicemember/retiree will want a clause which says that payments to the former spouse will begin when the retired pay center starts to garnish the pension and transmit the money to the ex-spouse’s bank account. *Payments beginning as soon as the former*

² This and over sixty other infoletters on military family law and divorce may be found at the website of the N.C. State Bar’s military committee, www.nclamp.gov > Publications.

³ For division of retired pay involving the Army, Navy, Air Force, Marine Corps or Space Force, the retired pay center is the Defense Finance and Accounting Service, or DFAS. Retired pay division for members of the Coast Guard and for commissioned officers in the Public Health Service and the National Oceanic and Atmospheric Administration is handled by the Coast Guard Pay & Personnel Center.

⁴ This assumes that the former spouse is entitled to government payments, based on the “10/10 Rule,” which requires that the parties have at least 10 years of marriage overlapping at least 10 years of service creditable for retirement eligibility. 10 U.S.C. §1408(d)(2).

spouse is entitled to a share of the pension is how the ex-spouse would want the clause to read, regardless of when the government starts its electronic fund transfers to the ex-spouse.

Myth #3 – There’s only ONE meaning for “disability” in terms of a military retiree.

Response: “Disability” has several meanings in the military context. Knowledge of each one is essential for attorneys who handle divorce cases.

- Disability compensation is paid by the Department of Veterans Affairs (VA) to those who have service-connected wounds, illnesses, or conditions. The money is tax-free and exempt from division as retired pay.⁵ If the retiree’s VA rating is less than 50%, then the amount of money from the VA must be debited from military retired pay; this is called the “VA waiver.”⁶ That means that the former spouse gets less of the pension. There is no waiver if the VA rating is over 40%; this is due to Concurrent Retirement and Disability Pay, which restores the money that is waived from retired pay.⁷ The restoration is automatic, with no application required. VA disability tables, which include higher payments where there are dependents of the veteran, can easily be found by looking for “VA disability rates” on any Internet search engine.
- Combat-Related Special Compensation (CRSC) is another form of disability pay for the military retiree.⁸ It is based on conditions arising from combat, training for combat, instrumentalities of war,

⁵ VA disability compensation is, however, subject to garnishment for family support (i.e., alimony or child support) when the recipient is a military retiree. 42 U.S.C. §659.

⁶ See 10 U.S.C. §1408(a)(4)(A)(ii) and 38 U.S.C. §5304-5305.

⁷ CRDP is found at 10 U.S.C. §1414.

⁸ See 10 U.S.C. §1413a.

or other situations covered in the statute.⁹ CRSC rates involve the same monetary payments as VA rates for the same percentage. They are not divisible as retired pay.¹⁰ The receipt of CRSC wipes out any money paid as CRDP; this can leave the retiree with little or no retired pay to divide with an ex-spouse, while receiving monthly VA and CRSC payments which are exempt from tax.¹¹

- Medical retirement is a forced separation from the military.¹² It involves a situation where the servicemember is found to be unfit to perform his or her military duties. When the individual has a *military disability rating*¹³ of less than 30%, the separation is accompanied by a government payment of severance pay. If the military rating is over 20% or if the servicemember has at least 20 years of service, then he or she will receive military disability retired pay (MDRP). An extensive explanation of MDRP may be found in the Silent Partner infoletter, *Q&A – Military Disability Retired Pay*. The amount of MDRP paid to a retiree which is based on his or her disability rating is exempt from military pension division.¹⁴

Myth #4 – Courts may not order a retiree to indemnify the former spouse for any pension-share money lost if the retiree obtains disability payments.

⁹ A disability is considered to be combat-related under 10 U.S.C. §1413a (e) if it A) is attributable to an injury for which the member was awarded the Purple Heart; or B) was incurred 1) as a direct result of armed conflict; or 2) while engaged in hazardous service; or 3) in the performance of duty under conditions simulating war; or 4) through an instrumentality of war.

¹⁰ CRSC payments, like VA disability compensation, are subject to garnishment for family support.

¹¹ For an explanation of CRSC and CRDP, see the Silent Partner infoletter, *Military Pension Division: The “Evil Twins” – CRDP and CRSC*.

¹² Chapter 61 of Title 10, U.S. Code, covers disability retirements.

¹³ Note that this is a rating provided by *the military*, not the “VA rating” given by the Department of Veterans Affairs. The military rating measures the servicemember’s ability to perform military duties, while the VA rating measures his or her ability to obtain civilian employment.

¹⁴ See 10 U.S.C. §1408 (a)(4)(A)(iii).

Response: The U.S. Supreme Court ruled in *Howell v. Howell*, 581 U.S. 214 (2017) that a judge cannot impose on a military retiree a duty to reimburse the former spouse for any pension-share money lost as a result of the retiree's electing to receive VA disability compensation. This ruling, made in the context of a contested case at the trial level, did not speak to the issue of *contractual indemnification*. It did not prohibit the parties from entering into a consent order or separation agreement providing repayment requirements when the former spouse may be shortchanged in pension-share payments received due to the "VA waiver." Numerous courts have upheld indemnification language when the basis for enforcement is either a) agreement of the parties to such a reimbursement arrangement, or b) *res judicata*, that is, the prior entry of an order requiring indemnification, with no appeal of that order.¹⁵

Myth #5 – Resisting "direct-pay orders" involving garnishment of military retired pay is important for the servicemember/retiree; such orders only benefit the ex-spouse.

Response: The former spouse does indeed benefit from pension-share payments transmitted by the retired pay center, since they must be transmitted each month unless there is a subsequent order stopping or reducing them. But a *direct-pay order* benefits the retiree as well, since he or she gets to exclude the amount paid to the ex-spouse when the payments are made through the retired pay center; there is no tax break when the payment is made directly between the parties.

Myth #6 – The ex-spouse is entitled to a share of the final military pension amount which the retiree receives.

¹⁵ For an explanation of the indemnification rules post-*Howell*, read the Silent Partner infoletter, *The Death of Indemnification?*

Response: That used to be the rule before December 2016 in all states except Florida, Texas, Oklahoma, Tennessee, and Kentucky, which had their own state rules that required division of the “date-of-divorce” pension. That is, the relevant amount is the hypothetical amount of retired pay as if the servicemember had retired when the divorce was granted. The new rule, which applies to all states, is based on an amendment to the Uniformed Services Former Spouses’ Protection Act (USFSPA) effective December 23, 2016. It requires that a) in a divorce granted after that date, b) when the military member was not receiving retired pay on the divorce date, c) the only pension capable of division is that which the member would have received if he or she had retired on the divorce date. This is known as the “Frozen Benefit Rule,” and it cannot be waived or avoided by the agreement of the parties. There are five Silent Partner infoletters which explain various aspects of the Rule.

Myth #7 - The marital fraction in a Guard/Reserve case must be expressed in terms of retirement points.

Response: The rules are found in “Former Spouse Payments from Retired Pay,” Ch. 29, Vol. 7B, Dep’t of Defense Fin. Mgt. Regulation. Paragraph 6.7.3 states that any formula which contains a fraction must be expressed in retirement points when the individual is to receive a non-regular retirement (i.e., retiring from the Reserves or National Guard, which usually means retired pay begins at age 60).¹⁶ The rules do not say, however, that the ex-spouse’s share cannot be expressed *as a fixed dollar amount or as a percentage*; these are still available methods for dividing the pension. It is only when the clause employs a fraction that the numerator and denominator must be stated in terms of retirement points (e.g., “John Doe will pay the ex-spouse, Jane Doe,

¹⁶ Non-regular retirement is found at Chapter 1223 of Title 10, U.S. Code.

50% of a fraction, the numerator of which is 1,200 retirement points acquired during their marriage, and the denominator is 3,600 total retirement points.”). If the denominator is unknown, such as when the member is still drilling and state law requires the denominator to reflect total pension service upon retirement, the retired pay center will fill it in at the time the member begins to receive pension payments.

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ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.”

¹⁷ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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¹⁸ Congress recently established the United States Space Force as the eighth uniformed service.

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¹⁹ You can also contribute on-line at www.roa.org.