

► CIVIL LITIGATION

Minefield: Division of Military Retirement Pensions in Divorce

by Douglas C. Cranmer and Kyle P. Sollars

Douglas C. Cranmer is a member of Stinson, Lasswell & Wilson, L.C. A native of Wichita, and a life-long resident of Kansas, Mr. Cranmer graduated Cum Laude with a B.B.A. from Wichita State University in 1983, and graduated with honors with a Juris Doctorate degree from Washburn University School of Law in 1987. Mr. Cranmer is a highly rated attorney, as evidenced by his “B-V” rating in the “Martindale-Hubbell Law Directory.” Mr. Cranmer focuses in the areas of family law, business law, estate planning, and civil litigation.

Mr. Sollars is an associate attorney with Stinson, Lasswell & Wilson, L.C. A native of St. Joseph, Missouri, Kyle graduated Summa Cum Laude with a Bachelor of Arts degree in Criminal Justice and Criminology from the University of Missouri-Kansas City in 2009, and received his Juris Doctorate degree with honors from Washburn University School of Law in 2013. Mr. Sollars’ practice is very diverse, with a strong emphasis in family law and general civil litigation.

Introduction

One of the most valuable assets that is often divided in a divorce is a retirement plan, such as a defined-contribution plan, a defined-benefit plan, or a similar account. Many of the plans divided are governed by the Employee Retirement Income Security Act (“ERISA”) and relevant sections of the Internal Revenue Code. However, the family law practitioner should be cognizant of the legal “minefield” that is the regulatory framework governing division of military retirement pensions, in particular the complications that arise with VA disability waivers. Furthermore, attorneys should be aware of the documents that should be reviewed prior to drafting a Military Pension Division Order.

It would be impossible for this article to discuss this area exhaustively. Therefore, this article is intended only to provide a brief guide as to the federal and state laws that govern the division of military retirement pensions in divorce, in particular the dangers of not taking VA disability waivers into account, and the key documents that should be reviewed prior to dividing a military retirement pension. This article will not discuss other facets of dividing a military retirement pension, such as the Survivor Benefit Plan, voluntary separation initiatives, or special separation bonuses, nor will it discuss other plans that may be available to service members, such as the Thrift Savings Plan.

Federal and State Laws Governing Division of Military Retirement Pensions

Division of military retirement pensions was not always possible.¹ However, Congress passed the Uniformed Services Former Spouse Protection Act (“USFSPA”) to specifically allow division of “disposable retired pay.”² Although USFSPA allows for division of military retired pay, as a matter of federal law, how that division is accomplished is governed, generally, by state law.³ Kansas law specifically includes “any vested or unvested military retirement pay” in the marital estate upon the filing of a “divorce, separate maintenance, or annulment” action.⁴ In Kansas, a divorce court “shall divide the real and personal property of the parties, including any retirement and pension plans” in such a manner as the court finds to be “just and reasonable.”⁵

Military pensions are divided using what is often called a Military Pension Division Order (“MPDO”).⁶ Although state law generally governs the degree to which a military pension will be divisible in divorce, a substantial number of federal regulations govern certain aspects of this division. Under USFSPA itself, the court may not award more than 50 percent of a service member’s disposable retired pay to a former spouse.⁷ However, this does not mean that the court cannot award more than 50 percent of the military pension to the non-service-member spouse. It

only means that 50 percent is the maximum the payment center will pay out to the non-service-member spouse. Any excess award becomes the responsibility of the service member spouse.⁸ This is significant because, under Kansas law, a court may order a party's entire pension payable to that party's former spouse if it holds that such an order is "just and reasonable."⁹

MPDOs are governed, at the federal level, by the Department of Defense Financial Management Regulation ("DODFMR"), specifically volume 7B, Chapter 29.¹⁰ Pursuant to that regulation, a Retired Pay Award may be awarded either as a fixed amount per month or as a percentage of the service member's disposable retired pay.¹¹ In regards to a reservist, the Retired Pay Award should be expressed using points, rather than a percentage based on length of marriage.¹²

Documents to Analyze

Prior to dividing a military retirement pension, an attorney should analyze a number of documents. This is a non-exhaustive list of some of the essential documents that a practitioner should secure and review prior to drafting an MPDO:

LES: If the service member is still on active duty or reserve service, the service member will be receiving Leave and Earning Statements (LES). These will provide a great wealth of information, including the service member's income, pay grade, branch of service, years of service, discharge date, and used and unused leave.

RPAS: Those service members in the National Guard and Reserve will receive a Retired Points Annual Statement (RPAS) once a year. The RPAS shows how many retirement points the service member has accumulated to date.

DD FORM 214¹³: Upon discharge from active duty, the service member will receive a DD Form 214, commonly referred to as the "discharge papers." The DD Form 214 provides useful information related to the service member's service, such as dates of

service, date of separation, and character of service (including any awards and medals the service member may have earned during service).

RAS: During retirement, a service member will receive an electronic Retiree Account Statement (RAS). The RAS will contain the service member's total monthly retired pay, any VA waivers (discussed below), deductions for the Survivor Benefit Plan (SBP)¹⁴, the taxes that are withheld, and any other deductions. It is continually updated, and the service member will have access to it online.

DD FORM 2656: DD Form 2656 provides the retired pay center with all of the information it will need to process payments of retired pay.

1099-R: The 1099-R is a tax form used to report income from pensions and other retirement plans, among other sources. The retired pay center generates it each year.

The Problems Presented by VA Disability Waivers

The service member may obtain a physical from a VA hospital to determine his or her disability rating. If the VA determines that the service member has a disability, the VA will send the service member a letter regarding the service member's disability rating. This rating has certain consequences on the service member's retired pay, and a spouse's ability to obtain a share of it. Generally, if a service member receives VA disability benefits and retired pay federal law requires the service member to waive a corresponding amount of his or her retired pay.¹⁵ However, Congress enacted legislation in 2004 that gradually decreased the amount of military retired pay that a service member would be required to waive in order to receive VA disability benefits.¹⁶ This program is generally referred to as Concurrent Retirement and Disability Payments (CRDP). CRDP's phase-in period ended at the end of 2013.¹⁷ Under the 2004 legislation, a service member with a disability rating of 50 percent or more is

no longer required to waive retired pay in order to receive VA disability benefits.¹⁸ However, if a service member has a disability rating of less than 50 percent, and wishes to receive VA disability benefits and retired pay, that service member will be required to waive a corresponding portion of his retired pay in order to receive the VA disability benefits.

VA disability waivers have profound consequences in the division of a military retirement pension in divorce. USFSPA specifically excludes from the definition of "disposable retired pay" any portion of the service member's retired pay that was waived in order to receive VA disability benefits.¹⁹ Therefore, VA disability retired pay is not a marital asset that is divisible in divorce.²⁰ Because a VA disability waiver may occur after the divorce has occurred, any practitioner representing the non-service-member spouse should always include language in any divorce decree that would protect the payments coming to that spouse in the event that the service member waives a portion of his military retirement pay to receive VA disability benefits. The consequences to the non-service-member spouse can be devastating if this is not considered. In *In re Marriage of Pierce*, the divorce decree granted the service member's former spouse a portion of his "military retirement benefits."²¹ However, the decree made no mention of how, or even if, those payments would continue to be paid to his former spouse if he was no longer receiving military retired pay. The service member converted his military retirement pay into VA disability benefits. The court held that because the service member was no longer receiving "military retirement benefits," and VA disability benefits are not divisible in divorce, the former spouse was not entitled to any portion of the service member's VA disability payments.²²

To avoid the harsh and devastating result in *In re Marriage of Pierce*, the practitioner representing the former spouse of the service member should ensure that the Court reserves

jurisdiction to make orders in the future, including reserving the right to award spousal support, in the event the service member elects to receive disability benefits, which would reduce or eliminate his retirement benefit. Failure to do so could very well leave the former spouse without a retirement benefit, which in many divorce cases is a major asset that is divided.

Conclusion

Dividing a military pension in divorce is a challenging and complicated process. Knowing the federal and state laws that govern the division, the documents that will be needed to effectuate the process, and the problems that may arise from VA disability waivers will keep the practitioner on top of the requirements and will prevent any potential losses from befalling the client. As stated previously, this is a topic that cannot possibly be discussed with any completeness in this article. However, it is our hope that this article will provide a starting point to practitioners who are handling the division of a military retirement pension in divorce. ▲

Endnotes

1 *McCarty v. McCarty*, 453 U.S. 210, 232 (1981) (“Congress has neither authorized nor required the ... division of military

retired pay. On the contrary, that pay continues to be the personal entitlement of the retiree.”).

2 10 U.S.C. § 1408(c). USFSPA defines “disposable retired pay” as “the total monthly retired pay to which a member is entitled less” certain statutory amounts. *Id.* at 1408(a)(4).

3 10 U.S.C. § 1408(c)(1) (allowing a court to divide “disposable retired pay ... in accordance with the law of the jurisdiction of such court.”). However, USFSPA contains unique jurisdictional requirements. A court does not have jurisdiction to divide a military retirement pension unless it has obtained jurisdiction over the service member “by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.” 10 U.S.C. § 1408(c)(4).

4 K.S.A. 23-2801(a).

5 K.S.A. 23-2802(a), (c).

6 “NOTE: A QDRO is not required but will be accepted.” Department of Defense Financial Management Regulation (“DODFMR”), Vol. 7B, Ch. 29, ¶ 290204, available at http://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/Volume_07b.pdf.

7 10 U.S.C. § 1408(e)(1).

8 10 U.S.C. § 1408(e)(6). Practitioners should also be aware of the “10 year

rule” under USFSPA, under which a payment center will only make direct payments to the former spouse if the spouse was married to the service member “for a period of ten years or more during which the member performed at least ten years of service creditable in determining the member’s eligibility for retired or retainer pay.” 10 U.S.C. § 1408(d)(2).

9 K.S.A. 23-2802(a), (c).

10 Available at http://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/Volume_07b.pdf.

11 DODFMR, Vol. 7B, Ch. 29, ¶ 290601.C.

12 DODFMR, Vol. 7B, Ch. 29, ¶¶ 290607.C, 290608.C.2.

13 This form is issued to service members who served active duty. Other separation forms may be available to those service members in the Reserve Component.

14 The SBP provides an annuity to certain eligible beneficiaries in the event of the service member’s death. The service member pays a premium each month. Other forms will be required if the service member elects to cover a former spouse under the SBP. The service member must make this election within one year of the divorce decree. 10 U.S.C. § 1448(b)(3)(A).

15 38 U.S.C. § 5305.

16 10 U.S.C. § 1414(a), (c).

17 *Id.*

18 10 U.S.C. § 1414(a).

19 10 U.S.C. § 1408(a)(4)(B).

20 *Mansell v. Mansell*, 490 U.S. 581 (1989).

21 26 Kan. App. 2d 236, 237 (1999).

22 *Id.* at 238-40.

Sometimes it’s not just
your client who is

Suffering

... Sometimes, it’s

YOU

Suffering from ... ?

- Depression
- Substance Abuse (alcohol or drugs)
- Family Issues

CALL THE KANSAS LAWYERS ASSISTANCE PROGRAM.
IT’S CONFIDENTIAL AND FREE.

515 South Kansas Avenue, Ste. 202
Topeka, Kansas 66603

Toll Free: 1-888-342-9080
(785) 368-8275