Fairness and the Military Divorce: "What's Your 20?" – Part 1

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INTRODUCTION

Real estate agents often say, "Location is everything." That applies to CB radio operators also. "10-20" is CB code-talk for "location," and "What's your **20**?" means "Where are you?" or "What's your location?"

In the world of military divorce, "What's your **20**?" means "Which side do you represent?" or "Who's your client?" What's fair for one side may seem overreaching or outrageous to the other. The viewpoint of the client, and his or her situation, may play a large part in military divorce settlement negotiations.[1]

The issue of fairness in military divorce and pension division cases first arose in 1981. In that year, the U.S. Supreme Court ruled that military retired pay could not be divided in divorce cases since Congress had not authorized it.

Congress acted quickly, passing the USFSPA (Uniformed Services Former Spouses' Protection Act), 10 U.S.C. §1408, in 1982. The USFSPA made military pensions divisible in state courts. And it provided that – most of the time – the states could write the rules as to division.

In general, military pensions are now treated in much the same way as federal pensions and private retirement plans, although there are still cries of "It's not fair" heard in courtrooms and conference rooms across the nation.

[1] The different approaches to military pension division are set out in two Silent Partner info-letters, *Military Pension Division: The Servicemember's Strategy*, and *Military Pension Division: The Spouse's Strategy.* All 60+ Silent Partner info-letters are found at the website for the N.C. State Bar's military committee, www.nclamp.gov at "Publications."

What's fair in military divorce, retired pay division, and the allocation of retirement benefits? That's the subject of this article.

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PENSION DIVISION BASICS

Q. I thought that the passage of the Uniformed Services Former Spouses' Protection Act (USFSPA) made pension division in military cases easier and more uniform, leading to a *level playing field* and fairer outcomes. Isn't that so?

A. It depends on your viewpoint. In the last 40 years, the Act has gathered amendments, expansions and restrictions like barnacles clinging to the hull of a Navy destroyer. To truly understand what's going on, lawyers for a party either must devote an extraordinary amount of time researching the niches and nooks, the crevices and crannies of the USFSPA, or else they need to hire a consultant to advise the client and the lawyer on what can be done, what must be done, and what's *verboten*.

Q. Let's start with the basics. It was my impression that, in the interest of fairness and uniformity, Congress would have passed a nationwide law that made military pensions divisible in every state and territory under generally the same set of rules. Isn't that what we have now in the USFSPA?

A. Congress steered away from the idea of a single uniform law of military pension division in 1982, opting for what might be called *local option* in the area of dividing military retirement benefits. It allowed the states to divide military retired pay in divorce cases, but it didn't *require* division. As a result, whether it's considered fair or unfair, there is now a nationwide opportunity for servicemembers and spouses to seek out the state where the "best deal" is available. Lawyers sometimes call provision, set out in 10 U.S.C. §1408 (c)(4), a prime example of "forum-shopping."

FORUM-SHOPPING

Q. Well, that certainly sounds unfair. Give me an example.

A. I'll give you several…

- When Major John Doe files for divorce against his wife, Jane Doe, he can bring the pension division case in his state of domicile (or "legal residence"), which might be Indiana or Arkansas; these states don't allow the division of military retired pay unless the pension is "vested" (i.e., an absolute entitlement, which occurs in military cases after one attains at least 20 years of service).
- Or – if he meets the filing requirements – John might file in Puerto Rico, which doesn't allow the division of military pensions at all.
- John might even file in the state where he's stationed (e.g., North Carolina) and ask only for divorce, leaving out any claim for pension division.
- And Jane, his soon-to-be ex-wife, might file in California, where she can request an order requiring John to start making pension-share payments to her as soon as John reaches the 20-year mark for active-duty service, even though he's not retired yet.

Q. Well, that latter situation certainly sounds unfair, since John might die in combat (or in a car accident) before he ever starts to receive retired pay!

A. Yes – and it might be equally unfair for John to file *only for divorce* in State A (where he's stationed), leaving it up to Jane to find a lawyer in State B, where John is domiciled… which might be 3000 miles away! And what about the examples involving Puerto Rico, Indiana, and Arkansas? Certain Jane Doe would view it as unfair if – after 19 years of marriage during John's military service – she could not get the court to divide this marital asset!

WHAT IS DIVIDED?

Q. What if the court does wind up dividing the military pension? Will the judge fix the benefit as John's *expected retired pay* on the date of divorce? Or would it be the *full retired pay* for John when he finally "hangs it up" and applies for the start of retired pay, after maybe 25 or 30 years of service?

A. Until the end of 2016, the answer would have been "final retired pay" in virtually every state. Only Texas, Florida, Tennessee, Kentucky, and Oklahoma have state rules which restrict pension division to the hypothetical amount earned as of the divorce date. Note that these are *state restrictions*, not federal ones.

Q. What happened in 2016?

A. On December 23, 2016, a new federal law changed all of that. An amendment to the USFSPA stated that, in the future, the benefit to be divided for military pensions would be the hypothetical retired pay of the servicemember (SM) as of the divorce date. The "Frozen Benefit Rule," as it's called, applies to every military retired pay case where the divorce was after December 23, 2016 and, at the time of divorce, the SM is not receiving retired pay.[2]

Q. Can you give me an example of how the Frozen Benefit Rule works?

A. Assume that Jake Smith retired as a sergeant major (E-9) in the Army with 30 years of service. He was divorced from Mary Smith 10 years ago; they married when he entered the Army. Also assume that the Frozen Benefit Rule (FBR) applies. The pension division order was entered on the date of divorce, when he was a sergeant first class (E-7) with 20 years of service.

- Before the FBR became law, most states would divide Jake's actual retired pay, but Mary's share would be discounted to give John the benefit of the last ten years of post-divorce longevity and promotions. In virtually every state, Mary would receive 50% of 20/30 (e.g., 50% times a fraction representing marital pension service over total service) times John's *actual retired pay*.
- But the Frozen Benefit Rule requires the court to order for Mary 50% of the retired pay of a *sergeant first class* with 20 years of service (as if he'd retired on the date of the divorce and the pension order). That's now a federal government requirement, regardless of what state law says her share should be.

[2] There are five Silent Partner info-letters on the Frozen Benefit Rule at the website shown in Fn. 1.

IMPACT OF THE FROZEN BENEFIT RULE

Q. Why would anyone want to cut back the share that a former spouse gets in divorce court?

A. That's a good question. The former spouses, most of whom are women, have usually sacrificed a lot during a military career… their jobs, their retirement assets (if any) and their careers. Military spouses provide essential support for the servicemember during moves which occur every 3-4 years. The usual rule (in 90% of the states) provides for a fair share by dividing the *actual retired pay* of the member/retiree, not some hypothetical number, and then it is adjusted to give the member/retiree credit for the final years of military service after the divorce.

But that went out the window under the Frozen Benefit Rule. The share of the former spouse is artificially shrunken, and then the division and the payments are put off; the actual division is postponed till the SM chooses to put in for retirement, so there's a second discount that occurs as well.

Q. But after all, the parties are no longer married after the divorce decree is handed down. The former spouse shouldn't be allowed to share in any post-divorce increase in his benefits, such as promotions or increases in pay.

A. That's one argument. However, the law in every other area (state and federal pensions as well as private retirement plans) uses the *final retired pay* of the employee and adjusts for future benefits by ratcheting back the spouse's share through the "marital fraction." The marital fraction in those cases involves a denominator which is the total service time of the individual. Thus the former spouse is, in effect, receiving a smaller piece of a larger pie. There are those who feel that this is the fairer approach, and a majority of states have adopted this rule for pension division.

CAN YOU "OPT-OUT"?

Q. Well surely the law allows the parties to "agree otherwise" and to write their own divorce settlement and military pension clauses! After all, it's pretty well

known that about 90-95% of all military pension orders are done by settlement. What about agreeing to "opt-out" of the FBR?

A. You can't do it. The motto of Frozen Benefit Rule supporters might be "One Size Fits All." There is no provision in the law, found at 10 U.S.C. §1408 (a)(4)(B), for settlements and agreed orders that allow the parties to decide on a different method of pension division. Unless the consent order rigidly complies with the "fixed benefit" requirement, it will be rejected by the retired pay center.[3] Parties are no longer free to settle their cases in their own way – they have to comply with the will of Congress.

WHAT'S THE DENOMINATOR?

Q. Have the states adjusted to the new law?

A. In general, the answer is "No". As a result, a warped formula occurs in most state military pension orders, one that imposes a *double discount* on the former spouse.

- First of all, Jane Doe's share will be fixed and frozen at the rank and years of service at the time of the order.
- In addition, since most state laws have not been rewritten to revise the "marital fraction," it will still be calculated in 90% of the states based on *years of marital pension service* divided by *total pension service years.* Here's the formula: $\frac{marital\ years\ of\ pension\ service}{total\ years\ of\ pension\ service}$.
- The logical and mathematically correct approach would be marital pension service years divided by the years of pension service *up to the date of the pension division order*. But only Maryland and Virginia (by case law) and North Carolina (by statute) have recognized the problem and have fixed the denominator as of the divorce date.

[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.

- It is essential to stop the clock for the denominator at the date of the divorce, since the benefit is also fixed at that date. Anything else would doubly dilute the pension benefit granted to the spouse. *See Douglas v. Douglas*, 2014 Tex. App. LEXIS 12398 (holding that, in a "hypothetical clause," the denominator is months of creditable service during marriage up to the date of divorce, rather than the date of retirement; the Court ruled that accepting the husband's proposition that denominator should be *total years of service* would impermissibly dilute the ex-wife's share acquired during parties' marriage).

WHY THE SPECIAL TREATMENT?

Q. Why are military pensions to be given such special treatment?

A. No one knows. The FBR will certainly require statutory or case law revisions in 90% of the states because it makes the military pension *super-special.* And it does so without any recognition of terms for state court division of all the other defined benefit plans (e.g., IBM, state government, local government) or even the federal defined benefit plans which Congress has enacted (i.e., FERS, CSRS, CIA, Foreign Service, and Railroad Retirement).

In addition, this "special treatment legislation" leads to two specific inequitable and unfair results for former spouses. First of all, it reduces the amount paid to a former spouse by about one-third across the board. In other words, where Jane Doe would have received, say, $900 a month before the FBR took effect, the result is now that she will receive only $600 on average.

Secondly, this impacts those cases in which the spouse has a pension of her own. That spouse, in 90% of the states, would have her own pension divided according to her *actual retired pay*, but she would be denied this same treatment when it comes to dividing the military member's pension, which would be "frozen" at the date of division; thus the military member will have a greater interest in her benefits than she has in his, creating an obvious unfairness.

Perhaps some readers will be reminded of the text from George Orwell's novel, Animal Farm – "All animals are equal; but some animals are more equal than others." Thus, military retirees are so super-special that they must have their pensions divided by a Congressional edict, unlike every other federal, state or private pensioner. For example, no one who's retired from the State Department, the Federal Marshal's Service or the CIA is treated to this type of federal division requirement upon divorce. It's reserved for only military retirees. They are entitled to "special treatment" above all others.

REQUIRED DATA POINTS

Q. Does the Frozen Benefit Rule require the court to actually calculate the hypothetical retired pay of Major John Doe on the date of divorce?

A. No. The FBR only requires that the court order specify two data points as of the divorce date, i.e., the "retired pay base" for John and his creditable service. The *retired pay base* is the average of the highest three years of pay, usually the most recent 36 months just before the divorce; this is known as the "High-3." Creditable service means total service years at divorce for those who will attain a "regular retirement" from active duty; for Guard/Reserve members, it means the number of retirement points acquired as of the divorce date.

THE "HIGH-3" BLUES

Q. Doesn't the retired pay center have the figures for the High-3? Why should the judge or the parties get stuck with this task?

A. It makes no sense at all… and the only answer is that the retired pay centers (DFAS and the Coast Guard Pay and Personnel Center) haven't programmed their computers to calculate the High-3. That's it.

And that means that someone else has to do it. It's up to the parties to come up with the calculated number for the High-3.

Q. Is it likely that John Doe will have all 36 of those Leave and Earnings Statements (LES's) leading up to the divorce?

A. No. And that means that someone has to pull out an Excel spreadsheet and compute the pay for John Doe for those 36 months, using the published uniformed services pay tables which DFAS has posted at its website, https://www.dfas.mil > Military Member > Pay/Allowances/Entitlements > Pay/Special Pay/Allowance Tables.

Q. I'm sure that puts a special burden on Jane Doe's attorney, since that's who will have to do the calculations to prepare an order for pension division that will be accepted at the retired pay center.

A. Not in every case. After all, Jane can still use state-law enforcement mechanisms, such as contempt of court, to force John to make payments. John, it turns out, also has an incentive to make the calculations, since he cannot get an exclusion from income for the money he's paying Jane unless the pension division requirement is being enforced by a property division garnishment order from the retired pay center. So, each of the parties has a good reason for doing the calculations.

However, those calculations add more money to the attorney fees and legal expenses associated with the military divorce process. It can cost several hundred dollars to go through the process of calculating John Doe's "High-3 pay," since it includes accounting for breaks in service, determining his date of initial entry into military service (or DIEMS), finding out his "date of rank" and predicting or projecting the divorce date. In virtually every case, some lawyer gets stuck crunching the numbers and determining the High-3. In the ideal case, the other side agrees with the calculations. But in some cases, there are arguments and disagreements about the numbers and the calculations, adding more and more money to the process of military pension division.

Q. Does the retired pay center check the calculations?

A. No. The center doesn't do an audit. It relies on the parties and the judge to "get it right." In the world of pension division and divorce, that's a highly questionable assumption.

[The second part of this article covers getting payments from the retired pay center, arrears, death and the Survivor Benefit Plan, and the "VA waiver".]