

Divorce in the Military

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The military litigant, with frequent relocations and deployments, presents interesting and often challenging legal issues in the context of domestic relations cases. Whether the service member (or the spouse) is the plaintiff or defendant, potential minefields abound regarding jurisdiction and venue, alimony and equitable division of marital property, and obtaining or defending rights in military retirement benefits or accounts. Whether deemed "alimony"¹ or "property", analyzing the availability and content of military retirement accounts (and the relatively new Thrift Savings Plan made available to military members under the same terms as civil servants)² requires knowledge of both state domestic relations law and federal law, specifically the Uniformed Services Former Spouse Protection Act (hereinafter referred to as "USFSPA"), which has its own jurisdictional requirements for division of military retirement benefits.³ In pleading and practice, the domestic relations attorney should not confuse the Georgia domestic relations long-arm statute⁴ with the jurisdictional requirements of federal and state law in cases with potential alimony or property claims on military retirement pay.

¹ Though typically thought of in terms of "property", Georgia and other state's courts have often deemed military retired pay "alimony." See Stumpf v. Stumpf, 249 Ga. 759, 294 S.E.2d 488 (1992).

² The Thrift Savings Plan (TSP) is not discussed further in this paper as it is far beyond the scope of this seminar session. The practitioner should be aware that TSP is not governed by the same federal laws as military pensions; rather, it is the same voluntary TSP traditionally used by federal civil servants.

³ 10 U.S.C. § 1408 *et seq.* Awarding or negotiating a portion of the military member's retirement pay is contingent upon a more or less long-term marriage; typically, at least ten years of the marriage must occur while the member is in an active or reserve branch of the military.

⁴ O.C.G.A. § 9-10-91(5).

The practitioner should also be aware of the provisions of the Service members' Civil Relief Act of 2003,⁵ (hereinafter referred to as "SCRA") the successor federal law to the former "Soldier's and Sailor's Civil Relief Act of 1940"⁶, which contains important provisions regarding stays of civil and administrative proceedings as well as protection from default judgments by court appointment of an attorney for an "absent" military defendant.⁷

JURISDICTION AND VENUE.

Generally, a divorce plaintiff in Georgia must meet the statutory six-month residency requirement prior to filing a divorce action in the county of the defendant's residence.⁸ The term "resident" is synonymous with "domiciliary" as used in the code section establishing jurisdiction in divorce cases,⁹ and both terms of art refer to a single fixed place of abode with an intent to remain there indefinitely, even though the resident may have in fact removed himself from that location, either voluntarily or "involuntarily" as may be the case with a deploying military member.¹⁰ As in any other civil matter, establishing domicile requires both an act ("residing" therein) and an intent to remain there indefinitely, regardless of the party's military or civilian status.¹¹ The minimum contacts requirement -- fair play/substantial justice/due process -- established by the long

⁵ P.L. 108-189 (effective December 19, 2003); 50 App. U.S.C.A. § 501.

⁶ See formerly 50 App. U.S.C.A. § 521*et seq.*

⁷ 50 App. U.S.C.A. § 521.

⁸ O.C.G.A. § 19-5-2. Tate v. Tate, 220 Ga. 393, 139 S.E.2d 297 (1964).

⁹ Darbie v. Darbie, 195 Ga. 769, 25 S.E.2d 685 (1943).

¹⁰ Abou-Issa v. Abou-Issa, 229 Ga. 77, 189 S.E.2d 443 (1972).

¹¹ Id. See also Midkiff v. Midkiff, 275 Ga. 136, 562 S.E.2d 177 (2002) (holding that a military plaintiff must actually reside in the county where relief is sought, rather than merely establishing that location as his "home of record." The term "home of record" is one of many military terms that have little correlation to an actual residence. In fact, many military members establish "homes of record" for beneficial income tax purposes, such as a member who attends training in Florida and, while there, establishes his home of record there to avoid state income taxes.)

line of cases predating and subsequent to International Shoe also applies to divorce cases¹²; therefore, the domestic relations practitioner should consider such evidentiary matters as state tax returns, drivers' license records, voter registration records and/or requests for absentee voting ballots, deed records, automobile registration records, banking records, and the like when attempting to establish the true "residence" of a party. Even though personal jurisdiction over the defendant is not required for a court to grant a divorce in Georgia,¹³ if a plaintiff seeks a portion of a defendant's military retirement pay, the court must have jurisdiction over the defendant himself, rather than merely having jurisdiction over the *res* of the marriage.¹⁴

A military plaintiff may also plead his or her divorce in any county adjacent to an army post or military reservation in Georgia so long as he or she has been a "resident" of that post or reservation for one year prior to filing.¹⁵ A military member who does not himself reside in Georgia, but whose spouse is a Georgia resident, may file the action in the spouse's county of residence if the spouse has resided there for six months.¹⁶ Of course, by filing an action the military plaintiff submits himself to the jurisdiction of the court.

BENEFITS? WHAT BENEFITS?

The Uniformed Services Former Spouse Protection Act¹⁷ requires that a state court, before awarding military retirement pay benefits as either alimony or property division, establish personal jurisdiction over the military member in one

¹² 326 U.S. 310 (1945).

¹³ Abernathy v. Abernathy, 267 Ga. 815, 482 S.E.2d 265 (1997).

¹⁴ Id.

¹⁵ O.C.G.A. § 19-5-2.

¹⁶ Id.

¹⁷ 10 U.S.C. § 1408(c)(4).

of three ways: by establishing the military member's "domicile"; by consent; or by the member "residing" there for reasons other than military assignment in that state or territory. Clearly, a military plaintiff submits him/herself to the personal jurisdiction of the court by simply filing the action. The military defendant, however, should consider whether a Georgia court would award the plaintiff relief in the form of equitable division of marital property or alimony (possibly in the form of his or her military pension). Contrary to the belief and fear of many military members ("she's gonna get half of my retirement!"), the USFSPA does not require that a court award any military retirement to a former spouse; the Act merely provides guidelines establishing the maximum amount that may be awarded to the spouse and paid by the Defense Finance and Accounting Service (DFAS) should the court determine the pension "marital property" (or payable as alimony), if the spouse meets the coverture requirements.

The coverture requirement is commonly referred to as being a "20/20/20" spouse or "20/20/10" spouse, meaning that the marriage and the military duty were concurrent for (overlapped for) at least ten (10) years. For example, the division of military pension of a service member serving twenty years active duty, but who was married to this spouse for only five of those years, would not be governed by USFSPA. The spouse would, instead, seek an equitable division of marital property other than a portion of the military retirement payable directly from DFAS, or as an award of alimony in lieu of military retirement "property."

The domestic relations attorney should also be aware that a "military retiree" may be either a retired active duty member (generally, one who served

twenty years or more on active duty and who draws retirement benefits immediately upon retirement) or a retired reservist (one who does not draw retirement pay until age sixty (60)). A military reservist's retirement pay is calculated in terms of career "points" (generally, one "point" for each day of active duty, plus points earned during drill weekends, completing certain courses, or by other methods). A "year" of reserve duty, to be considered eligible as a retirement "year", must also be a "good year." A "good year" is one during which the reservist earned a minimum of fifty (50) points; failure to earn at least that many points would not qualify the member to retire using that "year." Thus, twenty years may not actually be twenty years when discussing reservists' retirement benefits. The formula for determining the amount of a reservists' retired pay is available from DFAS; basically, the total number of career points is divided by 360, then multiplied by .025 times the base pay of the member's pay grade (rank) at the time of the member's 60th birthday. $(\text{total points}/360 \times .025 \times \$x.xx)$. To further complicate matters, a military member can bounce back and forth between "active" and "reserve" duty over the course of his or her career. The practitioner should also be aware that a drilling reservist may not even be drawing drill pay, but may instead be drilling simply for "the points." This working-for-no-money may then reduce the ability to pay alimony, and the nonmilitary spouse may wonder why the reservist bothers. The domestic relations attorney should also be aware of "early-out" provisions that allow retirement from either active or reserve duty prior to the twenty-year mark. Reservists who are "retired" but who are not yet eligible to receive pay are called "gray area" reservists; generally, the reservist and his or her former spouse are

still eligible for commissary and exchange privileges if other requirements are met, i.e., the 20/20/20 rule.

Pursuant to USFSPA, the maximum amount that may be awarded and paid by DFAS is fifty percent (50%) of "disposable" military retired pay.¹⁸ "Disposable" military retired pay means gross retired pay minus (a) recoupments or repayments to the federal government, such as overpayments for retired pay; (b) deductions from retired pay for court-martial fines or forfeitures; (c) disability pay benefits;¹⁹ and Survivor Benefit Plan²⁰ premiums.²¹ A military member may elect to receive disability payments in lieu of regular retirement benefits, and such election would then reduce the amount awardable.

The practitioner should carefully weigh the pros and cons of requesting that military retirement benefits be deemed "property" or "alimony" for both tax and logistical reasons the same as any other (non-military) retirement account, taking into consideration the ability to modify the amount as well as restrictions on remarriage, cohabitation, and other factors. The military, like civil service, provides Cost-of-Living adjustments (COLA's), which may impact the decision of whether to seek a fixed dollar amount, a percentage amount, a formulaic

¹⁸ 10 U.S.C. § 1408(e)(1).

¹⁹ Disability pay can be elected by the military member, thereby reducing the "disposable" retired pay available for alimony or property division. The practitioner is advised that other federal statutes govern disability pay: besides the VA, Combat Related Special Compensation and Concurrent Receipts Disability Pay

²⁰ Survivor Benefit Plan (SBP) is another topic outside the general scope of this paper. It is a death benefit annuity paid to a spouse or former spouse of the deceased military retiree. Just be aware that it exists and that the Defense Finance and Accounting Service provides more information and guidance on this benefit.

²¹ 10 U.S.C. § 1408(e)(1). Servicemembers' Group Life Insurance (SGLI) is another life insurance policy belonging to and under the sole control of the service member, who designates the beneficiary regardless of any court order. This is another area that is not suitable for negotiation; a spouse seeking beneficiary status for self or minor children should insist on an additional policy.

calculation, or based upon a hypothetical amount.²² On the other hand, receiving the benefits as "property" rather than "alimony" could result in a reduction due to the service member's election to receive military disability retirement or VA disability compensation rather than regular military retirement, thereby reducing the "disposable" military retired pay available to the former spouse.²³ In any event, a spouse seeking the benefits should request that the court maintain continuing jurisdiction over the account. Attorneys should also be aware that some military members can "roll over" their retirement into a federal civil service job, obtaining a year-for-year credit on civil service retirement based on the time spent in the military. Military retired pay does not impact a former spouse's eligibility for Social Security (at least, not yet...). A former spouse may receive SBP monies even in the absence of the receipt of military retired pay unless the spouse has waived that benefit. Furthermore, a military member, even one who retired prior to the current marriage, can be ordered to maintain a former spouse as a beneficiary, with such benefit being deemed an award of "alimony" rather than a property right.²⁴ Be advised, however, that there may be a future offset of SSI for SBP annuitants. The author strongly advises accounting or tax consulting for these financial issues, and for any and all tax-related questions or concerns.

The domestic relations attorney should also be aware that some jurisdictions

²² The first two are generally used when the service member has already retired; the last two are more commonly used when the service member has not yet retired but is eligible and retirement is imminent, or at least anticipated. The practitioner would be wise to draft the agreement or request in the order alternative awards if the member does in fact decline to retire, particularly if the member is a reservist. A fixed amount will not receive COLA whereas a percentage or formula would receive COLA.

²³ This pitfall could be avoided by careful drafting of an agreement or order with some contingency language that any disability reduction would then be paid directly by the military spouse rather than by DFAS, and be enforceable by garnishment, wage assignment, or similar methods.

²⁴ Hipps v. Hipps, 278 Ga. 49, 597 S.E.2d 359 (2004).

have state tax exemptions for military retiree pay. This further complicates negotiations in a "multi-state" divorce.

The USFSPA does not govern other military benefits to which a "20/20/20" former spouse may be entitled. These benefits include full medical benefits under TRICARE (the successor to CHAMPUS);²⁵ an unmarried former spouse not covered by an employer-sponsored health insurance plan is TRICARE-eligible, as well as full commissary and exchange privileges (grocery and other shopping). There is nothing that the military spouse can or should do to either attempt to award or to deny (or even to negotiate) these benefits, because they are statutory entitlements belonging to the 20/20/20 former spouse regardless of any court order. The former spouse must take the appropriate documentation (certified copy of the final decree, a current valid photo ID, a copy of the marriage license, and statements that he or she is not married and has no employer-sponsored health care plan.) For a "20/20/15" former spouse with a final decree entered after April 1, 1985, the TRICARE eligibility lapses after one year.

One benefit that may be of consequence, particularly in a long-distance parent-child relationship, is "Space-A" travel. Generally, for a nominal fee, the military member or retired military member and/or his or her dependent children can fly on military aircraft around the world. This benefit should not be overlooked if travel expenses to exercise visitation are a consideration.

²⁵ TRICARE actually is a program consisting of three separate levels of care and concordant premiums and benefits.

SPECIAL CIRCUMSTANCES

The USFSPA also provides that a family member ("dependent", meaning spouse or child) who is a victim of abuse by the military member who then loses his or her right to receive military retirement pay is entitled to that portion of the retirement pay even if the military member does not receive the pay (due to incarceration or other circumstances). This portion of USFSPA requires that DFAS pay the disposable retired pay directly to the victim spouse or child.²⁶ The family lawyer should also remember that military retired pay could be lost by imprisonment for a felony, serving in a foreign military, court-martial, or other quirky conditions, even including a retiree being recalled to active duty specifically to face a court-martial for past misdeeds.

In a current marriage, military regulations and policy require that the military member support his or her family members, and it is an offense subject to court-martial or even other-than-honorable discharge for a military member to receive "with dependents" benefits or pay and fail to support the family members. Most military installations have a Family Advocacy Center as well as a personnel detachment with available resources for ensuring that an absent military member's family is provided for during the marriage and in the pending divorce. The military requires spousal consent (that is, consent by the spouse to whom the member is currently married) to decline participation or to reduce the level of SBP coverage.

²⁶ 10 U.S.C. § 1408(h).

DOCUMENTS AND LINGO.

Like most professions and occupations, the military has its own terminology and lingo, and these differ depending on the branch of service (Army, Navy, Air Force, Marines). There is a difference in many statutory schemes between "spouse" and "former spouse". The practitioner should exercise caution in waiving or failing to elect any particular benefit. For example, in SBP coverage, the "spouse" coverage would expire upon divorce, whereas the "former spouse" coverage would not.²⁷

One important document that the domestic relations attorney should be familiar with is the Leave and Earnings Statement ("LES"), which indicates base pay, additional pay, federal and state tax information, leave earned and taken, and other important information. Another important document is the DD-214 (discharge from active duty; generally, each time a member is discharged from enlisted duty or resigns a commission, he or she receives a DD-214, resulting in numerous 214's during the course of a career). Naturally, dealing with a governmental entity, there are numerous other documents that may be needed during litigation.

NOT QUITE A QDRO.

The domestic relations practitioner is advised to contact DFAS as early as possible during a military divorce for guidance in drafting and serving (on DFAS) all court orders, including but not limited to temporary child support and alimony orders, final decrees, and orders establishing lump-sum or periodic alimony and/or property division. The USFSPA contains specific service

²⁷ 10 U.S.C. § 1448 *et seq.*

procedures that also include references to SCRA to protect the due process rights of the service member.²⁸

OTHER RESOURCES.

Plentiful indeed are book and internet resources for navigating the military divorce. The American Bar Association has sections on both family law and military law. In addition, the Judge Advocate General (JAG) and military personnel offices have many print resources available for educational purposes. For the practitioner, the first place of reference, is, of course, the Official Code of Georgia Annotated, Georgia case law, and all applicable federal statutes and case law.

²⁸ 10 U.S.C. § 1408(b).