



THE LEGAL EAGLE

FACT OR “WHACKED”? MYTHS AND MISTAKES IN MILITARY DIVORCES

INTRODUCTION: As a service to our legal assistance clients, we have prepared this handout with frequently asked questions on issues involving an overview of the divorce process. It is, of course, very general in nature since no handout can answer your specific questions. We do ask, however, that you read over these explanations carefully in connection with your visit to our legal assistance attorneys so that you may have the fullest information available to help you with your family law problem. Please send comments, corrections and suggestions regarding this pamphlet to the address at the end of the last page.

INTRODUCTION

In too many military divorces, a client or lawyer makes a costly mistake. Often it's because the client is unaware of the options or the law, someone relies on rumors and myths, “barracks lawyers” and buddies provide well-meaning but erroneous information, the attorney is unaware of the rules for military retirement and its division, or the rules themselves are too complex, illogical and confusing. This LEGAL EAGLE will help you sort out truth from “urban legends,” the fact from the “whacked.” Since this information is necessarily brief, ask your lawyer for a further explanation if you need to learn more.

HALF THE MILITARY PENSION?

“It was not his fault,” Mrs. Green explained when she brought her new husband, retired Army Master Sergeant Jake Green, to see the divorce lawyer. “He was very upset when he went through the divorce from his ex-wife, Jane. He was confused. He didn't have a lawyer and he didn't pay attention to what he was signing.”

“You're right about that, ma'am,” the new divorce attorney replied. “I've reviewed these divorce papers and it appears that he signed away half of his military pension to his ex-wife, even though he'd only been married to her for ten of the thirty years he was in the Army. That's a huge problem, and he wasn't forced to do it – he did it willingly. Jane got way more than she should have.”

FACT #1: Unless the marriage lasts for the entire military career, you need to know about the “marital share.” MSG Jake Green didn't. He gave away half of his pension, when he should have divided only the marital share of the pension. The marital share is that acquired during the marriage while in military service. It begins with the wedding or the start of military service, whichever comes later. It ends usually on the date of marital separation or divorce, depending on state law. In Jake's case, he gave away too much of the pension – 50% to his ex – rather than the correct percentage, which probably would have been closer to 16%. “It's all his lawyer's fault,” shouted the new Mrs. Green. “He didn't know a thing about dividing military retirement pay!”

SURVIVOR BENEFIT PLAN BASICS

“That's for sure,” replied the new divorce lawyer. “It's obvious he didn't know anything, because that lawyer also missed out on the Survivor Benefit Plan. He should have written the agreement to award the SBP to Jane, the former Mrs. Green, but he completely overlooked it. It's left out. He probably wasn't even aware it was available.”

FACT #2: Ignorance of the SBP (Survivor Benefit Plan) can be costly.

Jake's divorce settlement should have specified who got the SBP. Ordinarily, this is awarded to the non-military spouse, or Jake's ex-wife, especially if she has been with him for a substantial part of the marriage. Occasionally the former spouse gives it up as a bargain against something else, like life insurance, so that the SM or retiree can retain it for a possible future spouse. SBP coverage means that the non-military spouse, if she

survives the retiree, gets 55% of the selected base amount of the pension for the rest of her life. This was a huge benefit that Jane Green, Jake's ex-wife, didn't receive. Without SBP, Jane's share of the pension stops when Jake dies. This is another costly mistake." The biggest malpractice mistakes I've seen," says Mike McCarthy, a Phoenix retired attorney and retired Air Force Reserve brigadier general, "lie in the area of SBP. Either the attorney for the former spouse doesn't know about this survivor annuity, or there's only an agreement (instead of a court order), or else the order providing for SBP coverage is never sent to DFAS. Any of these errors is huge and costly."

MISTAKES AT THE START OF THE CASE

Mistakes can be made at the state of the case. Let's say that John Doe, a senior master sergeant in the Air Force, is being sued for divorce and military pension division by Mary Doe, his wife. An error which Mary's lawyer might make is choosing where to sue John to get division of the military pension. Usually a lawyer will just include the pension and property division in the divorce lawsuit, suing where Mary happens to live. This can be a costly problem.

FACT #3: To be safe, sue the SM in the state of his legal residence.

To be sure you can get the pension divided, bring the lawsuit in the legal residence state, or "domicile," of the SM. The federal law that allows military pension division, The Uniformed Services Former Spouses' Protection Act (USFSPA), says that you can always obtain military retirement division in that state. Any other state is "iffy" since it may depend on whether the SM consents to the court's power to divide the pension. For more on that, see the next problem.

John's lawyer may fall prey to the reverse side of this rule. If the military pension rules of Mary's state aren't favorable, or if the military pension rules of John's home state will benefit him, John's lawyer should not consent to the jurisdiction of the court when Mary files for divorce. Not all state court rules on military pension division are the same. Several western states require that the SM begin making pension payments immediately to the former spouse or else suffer the accrual of interest on the unpaid award. A few states limit or bar the division of military pensions under certain circumstances. John might want to shop around.

FACT #4: Think before you ink! Don't file an answer to the pension division claim unless you want your case in that court.

John and his lawyer need to decide whether to file an answer or response to Mary's claim for pension division. If they do, then they have probably consented to the court's dividing the pension. Only if John objects to pension division at or before the time he files his answer can he preserve this issue for trial in the courts of his legal residence. This can sometimes preserve the pension division for courts where the rules are more in John's favor, although it also can result in two cases in court, not just one, at the time of the divorce.

TIME FOR A BRAKE?

The Servicemembers Civil Relief Act (SCRA) is a federal law that allows the SM to obtain a stay of proceedings, much like a continuance. This can stop or slow down the lawsuit for a while. John needs to ask for a stay under the SCRA if his military duties prevent his appearing in court or participating in the lawsuit.

FACT #5: The SCRA can get a needed stay of proceedings for the SM who can't respond to a lawsuit; use it but don't abuse it.

John's lawyer needs to know how to request a stay. The initial stay requires a statement to the court showing how the SM's duties prevent his participation in the court case and when he will be available; also required is a statement from John's commanding officer that his military duties prevent his appearance and he cannot be given leave. Additional stays are available; when requesting one, be sure to provide clear and specific information about the negative impact that military service has on your ability to respond to the lawsuit. Judges don't like exaggerations. A SM who claims inability to appear in court when he's stationed at a nearby base and not "in the field" or deployed will likely face an uphill battle on his stay request.

SBP DEADLINES

The problems for Mary Doe don't stop with *where to sue John*, her husband, for military pension division. If she obtains a court order for SBP coverage, she needs to know that there are deadlines for sending the order to DFAS (Defense Finance and Accounting Service).

FACT #6: There are TWO SBP deadlines – know them.

One deadline applies if the SM or retiree submits the order; this is one year from the date of divorce. If, on the other hand, the spouse or former spouse submits the order for SBP coverage, then the deadline is one year from the date of that SBP order. This is done with a “deemed election” request letter. “Former spouse” coverage must be specified in the order; merely naming Mary as the SBP beneficiary is not enough. “The common malpractice mistake that I see,” says Warner Robins, Georgia attorney John Camp, “is failure to meet the one-year deadline for former spouse coverage with a deemed election letter. It can be disastrous if the retiree dies early; the former spouse is left with nothing.”

MORE DEADLINES

There are more deadlines than just ones for SBP. One of the most important ones is that which covers military medical coverage for a former spouse. This coverage can mean tremendous savings for her or him, so long as everyone keeps their eyes on the clock and the calendar. Retiring early or proceeding too soon with the divorce can wipe out these benefits.

FACT #7: Don't rush the divorce or retirement; 20-20-20 medical coverage is valuable.

If there is military service of at least 20 years, a marriage that has lasted at least 20 years, and an overlap of at least 20 years, then the former spouse is entitled to TRICARE and military medical treatment. Be sure that those deadlines are met, if possible. It doesn't cost John Doe anything for Mary's coverage, and it can save her a substantial amount. If he has some “alimony exposure,” it can save him too!

Another deadline deals with direct pay from DFAS. Knowing if that has been met means Mary knows if she'll get her check every month from the source – DFAS – or whether she'll have to chase John around the nation, or the world, to get him to pay.

“**WHACKED**” – Some people go ahead and get the divorce without paying any attention to whether there's 10 years of marriage during military service. Ordinarily the attorney doesn't pick up on the fact that a garnishment order for pension division, as property, will be “dead on arrival” at DFAS if there's no 10-10 overlap.

FACT #8: Ten years of marriage and military overlap means garnishment.

The 10-10 rule specifies that DFAS will send a check to the former spouse by garnishment of the retiree's pension as property division. If there is a 10-10 overlap, then DFAS sends out two checks (and withholds the appropriate tax amount from each). Without 10-10 compliance, the former spouse must look to the retiree for direct payments. Note that 10-10 overlap is not necessary for child support or alimony garnishment.

“**WHACKED**” – “My wife can't get a share of my pension – we haven't been married ten years during my Navy service.”

FACT #9: There is no minimum number of years for divisibility of the military pension.

As mentioned earlier, the 10-10 rule deals with how payments are made. A 10-10 overlap of marriage and military service means that the payment will come from DFAS if you serve the court order there. Without a 10-10 overlap, payments come from the retiree. It has nothing to do with eligibility for a share of retired pay.

WORDING CHALLENGES

“**WHACKED**” – “We just need the court papers to state that I get my share of *all pension and retirement benefits available under federal law.*”

FACT #10: There is NO specific share set out in federal law for the spouse or former spouse.

Federal law only makes pension division available, under rules set out in state statutes. There is NO federal entitlement to anything, and a clause stating this is worse than worthless. It gives the spouse nothing.

“**WHACKED**” – “We settled your case for 40% of John's gross military pension. Since DFAS sent the order back to us with a request for a *clarifying order*, we'll just re-write it to say 40% of his Disposable Retired Pay. I know they'll accept that.”

FACT #11: Disposable retired pay is often a lower amount than gross retired pay; know the difference!

While gross military retired pay means all entitlements for the retiree, DRP (Disposable Retired Pay) is a technical term which excludes medical retired pay, VA disability compensation, the SBP premium and Combat-Related Special Compensation. This change of wording could mean a loss of several hundred dollars or more. In a case which this author handled in Raleigh in 2006, the prior attorney's acceptance of DRP instead of gross pay in the clarifying order means that the former spouse's share went from \$1300 a month down to only \$300 a month. And there was nothing she could do about it!

“WHACKED” – “I’ve done the calculations, Mrs. Reilly. You’re entitled to 40% of Roger Reilly’s military retired pay, which comes to \$735 a month. He just retired. I have his current RAS (Retiree Account Statement) right here in front of me. So we’ll just put \$735 a month in the military pension division order.”

FACT #12: A set dollar amount order leaves all the Cost-Of-Living-Adjustments (COLAs) to the retiree. Mrs. Reilly receives none of these annual adjustments for inflation. There are other approaches to pension division – percentage, formula and hypothetical clauses – which allow the sharing of COLAs between the parties.

“WHO’S IN CHARGE HERE?”

“WHACKED” – “I can do this myself. I don’t need a lawyer.”

“My JAG officer can provide all the help that I need.”

“I’ll just use Sarah Smith, our family attorney – she’ll know what to do.”

FACT #13: Military pension division is specialized work. Get a specialist to help you.

The specialist doesn’t have to be your main lawyer for the divorce; the divorce lawyer can simply associate co-counsel to help with the military pieces of the divorce, like family support, pension division or SBP. Often there is a former JAG officer, a Guard or Reserve lawyer, or a retired JAG officer who can provide assistance on an “as needed” basis. Don’t go it alone! JAG officers can be very useful, and the help is free, of course. But often they don’t have the in-depth knowledge necessary for a serious case, they cannot go into court, and they usually have short-term assignments in legal assistance, yielding limited exposure and expertise. If you are going to use a military legal assistance attorney, ask him or her whether it would be a good idea to get some help from a civilian attorney, preferably one in the state where the divorce would occur. A list of such attorneys is available through the Military Committee of the American Bar Association’s Family Law Section. Says Ft. Dix chief of claims Jackey Nichols,

The saddest story is know about a client I’ll call Helge Schmidt. After 25 years of marriage to a full colonel, she was awarded only \$1,000 per month, for life, in a Texas divorce. Since Texas law does not provide for life-long alimony, she and her attorney thought she was getting a good deal. But the attorney didn’t know beans about the military pension and benefits for a former spouse. There was no mention of retirement benefits in the decree. Now, many years later, she struggles with no health care, no retirement, and no cost-of-living increase in her monthly support.

“WHACKED” – “Well, Mrs. Reilly, we finally got that agreement on military pension division. That finishes my job. Good luck with your divorce next month.”

FACT #14: Don’t let your attorney abandon you before the pension papers are sent to DFAS.

As the sign on the outhouse wall says, “The job’s not done till the paperwork is finished.” According to Mike McCarthy of Phoenix,

I’m seeing more and more abandonment of clients when the attorney has finished writing up the property settlement or the separation agreement, and then thinks that the job is finished. That’s NOT the end. That’s not full and competent service to the client. DFAS requires a court order, and you have to serve that on DFAS for the pension division to be divided with a garnishment. To handle a military pension division properly, you must prepare a military pension division order (or incorporate the separation agreement into the divorce decree). Then you submit the documents (along with DFAS Form 2293) immediately to DFAS upon divorce. That way, if there is any problem in the papers submitted, it can be caught and cleared up promptly.

THE SBP BLUES

“WHACKED” – “Let’s divide the SBP 50-50 between my ex and my new wife.”

FACT #15: The SBP is a unitary benefit; you cannot subdivide it.

It can be waived, with the written consent of both spouses, or it can be given to a former spouse or a present spouse. It can’t be divided between an ex-spouse and a current one.

“WHACKED” – Mary Doe was upset. “Who cares if I’m going to get remarried? That’s nobody’s business! I want that SBP coverage, I was married to him for his entire career, and I’m entitled to it!”

FACT #16: SBP is not good if the former spouse remarries before age 55.

Why? Don’t ask. It’s in the statute, but it doesn’t make any sense. It treats the survivor annuity as if it were alimony. No other form of marital or community property division ends upon the remarriage of one of the spouses. That being said, however, it’s important to remember that SBP coverage is not available if the former

spouse marries before age 55. If elected initially for her, however, it can be reinstated if the second marriage ends in death, divorce or annulment.

“WHACKED” – “I know what we can do, Mrs. Doe. Since John insists on saving SBP for his new wife, we’ll use life insurance to cover you in the event of his death. While he’s on active duty, he has SGLI with a death benefit of \$400,000. That’s a good substitute for SBP.”

FACT #17: SGLI is worthless in divorce settlements because it’s unenforceable. A 1981 decision of the U.S. Supreme Court, Ridgway v. Ridgway, says that no SM can be compelled to elect a former spouse in a divorce settlement, and that – even if he chooses to do so – he’s free to change his mind later. He can select his next wife and the courts cannot do anything to punish him or alter his choice.

“WHACKED” – Confronted with the demand of his wife for SBP coverage, Sergeant First Class Roger Reilly went ballistic. “I don’t want to pay any part of that SBP premium at retirement. SHE demanded coverage – let HER pay for it. Just write up the order to say that the SBP premium comes out of her share of the pension!”

FACT #18: DFAS won’t apportion SBP premiums between the parties. SBP premiums come “off the top” by law. They are deducted from gross pay to get to Disposable Retired Pay. It’s DRP which is then divided by DFAS, so – in effect – the parties are each paying for a share of the SBP premium, in proportion to their share of the pension. DFAS cannot apportion the SBP premium, which is 6.5% of the selected base amount, between the spouses. The only way to do this is “through the back door” by adjusting downward the percentage or amount which the former spouse receives, so that she’ll in effect be paying for the entire SBP premium.

“WHACKED” – John Doe decided to go along with the request of Mary Doe for SBP coverage, even though he and she had only been married for 10 years and he knew he was going to stay in for at least 30 years and probably remarry. He felt bad about how much it would cost. His lawyer said the premium would be 6.5% of his retired pay. But he felt there was nothing he could do about it.

FACT #19: The premium for SBP coverage is 6.5% of the selected base amount. This CAN be the SM’s full retired pay. It also can be any amount down to a minimum of \$300. The court order for SBP coverage needs to specify what the base amount will be. If there is no stated base amount, then DFAS will choose the full retired pay as the “default solution.” This can be costly – compare 6.5% of your full retired pay to 6.5% of, say, \$300. It can also be too high a benefit for Mary. If she were married to John for only 10 of his 30 years in the military, then her share of the pension might be, in many states, 50% of 1/3 of the pension, or about 16%. That’s the share she gets during John’s life. Yet upon his death, her share jumps up to 55% of the pension. Does that seem fair? The way to change this is to select a lower base amount for the SBP, so that the death benefit mirrors the life payment.

HOW TO LOSE MONEY

A common mistake for the former spouse is ignorance of the rules of VA waiver. A retiree can waive part of his pension to receive VA disability compensation, if he has a service-connected disability. That VA money is not taxable and isn’t divisible with the former spouse.

FACT #20: For a non-military spouse, a VA waiver may be a disaster waiting to happen. If she isn’t protected, she could suffer a large reduction in her share of retired pay, which might result in a foreclosure or eviction. Due to the dollar-for-dollar setoff with VA disability compensation, and also its non-divisibility with a former spouse, many retirees opt for this if they receive a disability rating from the Department of Veterans Affairs. The former spouse needs to get a VA waiver clause placed in her agreement or order at the time of settlement or trial. Often called an indemnification agreement, it states that the SM or retiree will pay back the former spouse any money she loses if he opts for VA payments or does anything else to reduce her share. The VA waiver clause is crucial for the ex-spouse. In the words of a TV advertisement, “Don’t leave home without it!”

Another problem occurs when the former spouse and her attorney focus solely on the military pension. There’s another retirement asset in many military marriages – the Thrift Savings Plan. A TSP account is like a 401(k) plan or an IRA; you contribute to it, the savings grow tax-free and are available for use in retirement. To the extent this account was acquired during the marriage, it’s marital or community property. It can be divided through a court order which puts a share, tax-free, into a separate account of the former spouse.

FACT #21: Don’t overlook the TSP! It may be a valuable marital asset. The former spouse and her attorney need to get a copy of the TSP statement so as to decide whether to divide it between the parties or to allocate it entirely to the SM/retiree in exchange for some other asset.

“**WHACKED**” – The marriage is short. The parties both want out. The attorneys figure there’s not much value in the pension to divide, so they decide to write up a clause waiving pension division.

FACT #22: Try to get a fair trade for giving up your share of a military pension, regardless of how short the marriage was.

Even with a short marriage of, say, five years, the pension share is worth something. Don’t waive it without getting a fair trade. Assume that the husband is a sergeant first class, or E-7, with 20 years of service, who will get an estimated \$1,600 a month retired pay if he retires at the 20-year mark, which many servicemembers do. If there were only five years of marriage, his ex-wife would get 50% of 5/20 of \$1,600, or \$200 a month. If she is 40 when he retires and he were to live another 35 years, this would be worth \$2,400 a year, or a total of \$84,000. That’s a lot of money!

The lesson? If you want a pension waiver, you have to ask for it and pay for it. If you are asked to waive military pension division, make sure you do it for a reasonable, fair trade – don’t just give it away if the period of marriage is short. Look at the facts and calculate the numbers. Even if you trade the pension waiver for a washer, dryer and TV, you’re still doing better than just giving it away.

Resources –

The inspiration for this Legal Eagle came from three excellent articles written by Ed Schilling, a lawyer in Aurora, Colorado and a retired Air Force JAG officer:

"Common Mistakes" - <http://www.divorcenet.com/states/nationwide/milart-05>

How to Select an Attorney for Military Divorce - <http://www.divorcenet.com/states/nationwide/milart-01>

"You Have a Right to a Competent Attorney" –

http://www.divorcenet.com/states/nationwide/you_have_a_right_to_a_competent_attorney

There are also LEGAL EAGLE client handouts on the Survivor Benefit Plan (SBP) and the Uniformed Services Former Spouses’ Protection Act (USFSPA) at the website for the North Carolina State Bar’s military committee, www.nclamp.gov.

If you have other questions, please see a legal assistance attorney or private attorney as soon as possible. Your lawyer can answer many questions and help you to make a fair and intelligent decision about your choices, options and alternatives. Our legal assistance office stands ready, willing and able to help you in these matters. Be sure to bring along with you to the interview a copy of any documents or court papers that might be helpful to your attorney.

Location and hours of your Legal Assistance Office: _____

Information on local agencies, offices and resources: _____

[rev. 2/20/07]

THE LEGAL EAGLE SERIES OF CLIENT HANDOUTS IS PREPARED BY MARK E. SULLIVAN, WHO IS A RETIRED ARMY RESERVE JAG COLONEL, AUTHOR OF THE MILITARY DIVORCE HANDBOOK (AM. BAR ASSN., 2006), AND CHAIRMAN OF THE MILITARY COMMITTEE, FAMILY LAW SECTION, AMERICAN BAR ASSOCIATION. FOR REVISIONS, COMMENTS OR CORRECTIONS, CONTACT COL SULLIVAN AT 600 WADE AVENUE, RALEIGH, N.C. 27605 [919-832-8507]; E-MAIL— MARK.SULLIVAN@NCFAMILYLAW.COM.