

Military Pension Division: The Warrant Officer and the Wingman

By COL Mark E. Sullivan, JAGC, USAR (Ret.)²

5.1—Division of Military Benefits Upon Divorce

10.2—Other Supreme Court Cases

***McCarty v. McCarty*, 453 U.S. 201 (1981).**

Q: I am a warrant officer in the Army Reserve and a life member of ROA. I read your “Law Review” articles with great interest. Nine years ago, I was divorced from my wife of 15 years, and the court awarded her a 45% interest in my military retired pay. I think that was entirely too much and that I was ill-served by the attorney whom I hired. She said she was an expert in family law, but she was clueless as to military pension division. She was confused about the difference between a regular military retirement, with retired pay beginning immediately upon retirement, and a Guard/Reserve case, in which the pay usually begins at age 60.

I did about six years of active duty before I was married. I left active duty about the same time and went into the Army Reserve. For most of the 15 years that we were married I was a traditional Army Reservist, doing one drill weekend a month and two or three weeks of annual training each year.

After we were divorced, and after the terrorist attacks of September 2001, I got back on full-time active duty, serving in 2005-06 (Iraq), 2007-08 (Afghanistan), and 2009-12 (part of that time in Afghanistan). As we know, Guard/Reserve retired pay is based on the total number of points that one earns during the entire military career, and a Reservist gets one point for each day of active duty.

As you can see, I earned a lot more points during the 1982-88 time period (before marriage) and in 2004-12 (after my divorce) than I earned during the 1989-2004 period, when I was

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “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 Spouse 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 very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²Mr. Sullivan is a retired Army reserve JAG colonel. He practices family law in Raleigh, NC and is the author of *THE MILITARY DIVORCE HANDBOOK* (Am. Bar Assn., 3rd Ed. 2019). 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 consults with lawyers nationwide on military divorce issues and in drafting military pension division orders. He can be reached at mark.sullivan@ncfamily.com and 919-832-8507.

married. But the judge didn't really understand this, so now it looks like I have to pay 45% of my pension to my ex. I want to go back and revisit the pension division, adjusting it so that my former spouse gets a correctly counted share – or even a set dollar amount, without COLAs. Can I get back into court?

A: Most likely it's too late. This is due to the legal doctrine of *res judicata*. That's Latin for "the thing has been adjudicated." In your case, a better translation might be "your case is now closed."

In our judicial system, you only get shot, one chance to make your case. If you are not satisfied with the result and there is a substantial legal error in the trial, you have only a very limited time to ask the court for a new trial or appeal to an appellate court. Your deadline expired about nine years ago, shortly after the judge signed the court document dividing your pension, which is usually the divorce decree. That was the deadline for A) notice of appeal, B) a motion to amend the decree, C) a motion for a new trial, or D) a motion to set aside the judgment. You probably cannot reopen the case now, and you cannot file a new case about the same subject—division of your military retired pay.

Q: Wait a minute! My ex-wife has reopened the case several times, to get the court to increase my child support payments and to re-do child custody and visitation when I deployed to Iraq. Why does she get to reopen the case and I don't?

A: When it comes to child support and custody, it's a completely different ballgame. Child support and custody cases are never really final and are constantly subject to change, up until the child ages out, which is usually at the child's 18th or 21st birthday, or when the child finishes high school. When there is a substantial change in the child's situation or that of one of the parents, a judge can change the terms for custody, visitation or support.

For example, when you deployed to Iraq, you could not take the child with you and you couldn't exercise alternate weekend visitation, so a change in the custody arrangement was necessary. In addition, the courts will often re-consider the amount of child support when the ability of a parent to pay increases, such as when one goes from Guard/Reserve drill status to active-duty status, or when one begins receipt of pay in a hostile-fire zone, which means that there are reduced taxes on base pay.

Unlike these situations, the determination of property division and pension payments is almost always fixed and final when the judge brings down the gavel. The signed and filed final decree or pension division order is not subject to changes based on later financial circumstances or, in your case, a subsequent re-analysis of the way the retired pay was split. Courts do not allow property division to be "revisited."

Q. Does that mean that the court can never reconsider or rewrite my pension division order?

A: The only way that the court can go back and reconsider the pension division decree is either for implementation (that is, to enforce the terms of the order) or for clarification. In the latter case, the court is sometimes called upon to revise the wording of a clause because it doesn't make sense or it cannot be accepted by DFAS, the Defense Finance and Accounting Service. For example, the pension rights of a drilling Reservist can ordinarily be divided only by measuring the points acquired during the marriage against the total retired points when one applies for retired pay; DFAS will not accept pension orders which try to allocate the pension according to years of marital pension service and total creditable years of service. So the judge might have to re-open the decree to express the same division that was granted earlier in terms of points, rather than time.

Q: What about *implementation*? Do you have an example of that?

A: A judge might need to hold a contempt hearing to enforce the terms of a pension order which required certain payments to be made by the retiree, not by DFAS. If the retiree refused to make the payments, the judge can hold him or her in contempt of court, and this enforcement procedure is – in a sense – “revisiting” the pension order. But neither of these approaches amounts to a substantial change to the terms of the original order, which remains fixed and final.

Q: Where do the state courts get the authority to divide military retired pay in the first place? Military retired pay should be governed by federal law, not state law. I heard that the Supreme Court has held that the states are barred from dividing military retired pay in state court divorce proceedings.

A: It is true that 32 years ago the Supreme Court held that federal law precluded the division of military retired pay in divorce actions. *McCarty v. McCarty*, 453 U.S. 201 (1981).³ The Supreme Court did *not* hold that it was *unconstitutional* for the states to split military retired pay between warring spouses; the Court simply stated that the federal statute that created military retirement (dating back to the Civil War) forbade such division.

Within a few months after the Supreme Court decided *McCarty*, Congress enacted and President Reagan signed the Uniformed Services Former Spouses' Protection Act (USFSPA), found at 10 U.S.C. 1408.⁴ This 1982 federal statute amended federal law to *permit* (but not to require) the states to divide military retired pay in divorce actions. Thus, Congress tossed this “hot potato” back into the state courts.

In our country, family law has always been governed by state law, not federal law. There are considerable variations among the states as to how property (including military retired pay) is divided in divorces, but all 50 states, the District of Columbia, the Virgin Islands, and Guam all

³The citation means that you can find the *McCarty* case in Volume 453 of the *United States Reports*, starting on page 201.

⁴This citation means that you can find the Act in Title 10 of the United States Code section 1408.

divide military retired pay. Among U.S. jurisdictions, only Puerto Rico does not divide military retired pay.

Q: I guess that my situation is irretrievably lost. What can others do to avoid the mistakes that I made?

A: When a servicemember or retiree needs help in understanding the INs and OUTs of military pension division, it's time to look for a "wingman." Hiring an expert to assist your primary attorney can bring a much higher level of knowledge and expertise to the divorce case.

Who can act as your wingman? The expert might be a former JAG officer, a Guard/Reserve judge advocate, a retired JAG, or a lawyer with prior military experience. If the expert has specialized knowledge in the area of military divorce, then he or she can make the difference between a poor and a good settlement. Asking around for information on who in the local or state bar has written or spoken on military family law issues will usually reveal one or two attorneys who could be consultants for the divorce attorney whom you hire.

You don't even have to get a wingman from the city or county where your divorce is taking place. A good consulting expert can be from Texas, North Carolina or Georgia; the important point is to have someone who knows the statutes, the DFAS rules and the general issues which come up time and time again in the military divorce. Having a wingman to help with "brainstorming" and to advise the divorce attorney can make a real difference when it comes to common questions that really matter for the servicemember or retiree, such as: A) How is the pension divided, by points or by years? B) Does my former spouse get Survivor Benefit Plan coverage? C) If so, who pays for it? D) Can the judge order her to pay for the cost, since only she benefits from it? E) Can the court require DFAS to deduct the cost from her share of the pension? F) Can we reduce my former spouse's share of SBP so that it mirrors her share of the pension? G) Does the pension share have to be paid through DFAS? H) Can we value the pension and give my ex other marital or community property to offset the value of the pension, which I intend to keep? I) What can my ex do if I elect disability pay (VA disability compensation or Combat-Related Special Compensation) and that wreaks a small amount of havoc on her share of the retired pay? Or even a *large* amount of havoc?

Q: But can't I find a military divorce specialist who can handle my case alone? I really don't want to hire TWO lawyers!

A: You might be able to find a lawyer who is a family law specialist and who is also an expert in USFSPA, its case law and the military-specific issues that arise. But you likely will not find such a combined specialist outside of a few major military cities, such as Tampa, San Diego or Norfolk. In other locales, you'll strike out. There's no demand for military divorce expertise in, say, Waukegan or Walla Walla.

This “heavy lifting” isn’t simple, and it isn’t cheap. Retirees and service members should expect to pay some significant bucks for expert legal advice and representation. But remember what happened in the divorce described above? It often boils down to this – do you want to be

cheap, or be safe? Take your pick! Way too many clients who have met with the author “after the fact” readily admit that they never should have tried to do the divorce paperwork without an expert at their side.

A wingman can take the worry out of the significant issues in military divorce cases. Don’t be “penny wise and pound foolish.” You have a lot at stake in a divorce proceeding, and you only have one chance to get it right.

Q: When I got divorced in 2004, I expected that I would start drawing my Army Reserve retired pay in 2020, when I turn 60. But Congress amended the reserve retirement law in 2008, and now reservists who have contingency service after January 28, 2008 can qualify to start receiving their reserve retired pay several months – or sometimes several years – before their 60th birthdays.⁵ Based on service in Afghanistan after January 28, 2008, I am entitled to start drawing my reserve retired pay on my 58th birthday in 2018.

When the divorce became final in 2004, everyone – my wife and I, our respective attorneys, even the judge – anticipated that I would start drawing my Army Reserve retired pay on my 60th birthday in 2020. But now I will start drawing it two years earlier. When do I have to start making payments to my ex-wife?

A: That is an interesting question, and numerous other Guard/Reserve retirees have made the same inquiry. As of yet, there are no published appellate court decisions on that question. Whether there will be reported cases depends on whether one of the parties – the husband or the wife – decides to appeal what is viewed as an erroneous ruling by the trial court.

In most cases, the answer lies in the divorce court’s order for military pension division. Does it say that payments begin at age 60? Or that payments start as soon as the retiree starts to draw pension payments? If it says the latter, then the former spouse is paid when the retiree gets paid. If it states the former, then it’s pretty clear that the court intended for payments to start at a specific date – your 60th birthday. In that case, don’t be surprised if it’s the *former spouse* who goes back to court to try to reopen the pension division order! Wait – isn’t that where we started this discussion?

⁵Please see Law review 1164 for a description of the 2008 change in the law.