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The 20-20-20 Rule and nonregular Service

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5.1—Division of Military Benefits Upon Divorce

Q: I am the husband of an Air Force Reserve Lieutenant Colonel.[3] I met my wife in college, where she was a member of the Air Force Reserve Officers Training Corps (ROTC). We both graduated from the same college in 1994, and she was commissioned a Second Lieutenant immediately upon graduation. We were married five days after we both graduated and after she was commissioned, and we have remained married continuously, but now the marriage is on the rocks.

My wife served on active duty for five years, until May 1999, when she was released from active duty and affiliated with the Air Force Reserve. My wife has been called to active duty and deployed to Southwest Asia four times since the terrorist attacks of September 11, 2001. She often volunteers for active duty periods of military service, so she may have as much as 13 or 14 years now of active duty time. I believe that she has earned a "good year" each year since we married, so she should be receiving her Notice of Eligibility (NOE) or "20-year letter" later this year. I have never served in the armed forces myself, but I feel that I have contributed greatly to my wife's military career. Our first child was born during her initial 1994-99 active duty, and we have had two more children in the 15 years since she left active duty. It was up to me to care for the children and to keep the home fires burning during her deployments plus scores of active duty periods, drill weekends and annual training periods. My own career (as an attorney) has suffered as a result. I did not make partner at the law firm where I have worked for many years, and the firm cut me loose last year. I think that it is very likely that I would have made partner but for all of these family complications, related to my wife's military service.

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[1] I 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.

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[3] In these military divorce situations, the service member spouse is not always the husband and the civilian spouse is not always the wife.

My wife sued me for divorce last year and is trying to expedite the divorce so that she can move on with her life—I think that she has been unfaithful to me, but I cannot prove it. I recognize that divorce is unavoidable, but I am frankly trying to spin this out for a few more months so that I can qualify under the "20-20-20 rule" and retain my military dependent id card, and continue to shop at the commissary and the exchange. More important, I want to qualify for the military health care system (TRICARE) when my wife turns 60 in 18 more years.[4] Will it matter if she takes a "Reserve (non-regular) Retirement" or one that is based upon her active duty service?

A: I am asked this question often, and let me say the rules for 20-20-20 determination for active duty members and their former spouses are pretty straightforward; *but* the rules for 20- 20-20 determination for Reservists and National Guard members are more complicated.

A. ACTIVE DUTY: Generally you look at the date when creditable service (for retirement) begins. Usually it is the DIEMS (Date of Initial Entry for Military Service) and the Date of Retirement. Overlay that date with the Date of Marriage (from the Marriage *Certificate*, not License!) and the Date of the Entry of a Final Decree of Divorce. Deduct out any periods when there was a "break in creditable service" or time that did not count towards retirement. If you have at least 240 months of time in the marriage that is concurrent with 240 months of creditable military service for a regular retirement, then the 20-20-20 rule is satisfied and the Former Spouse gets the TRICARE and Base Access privileges as a statutory right (entitlement). It may not be granted or withheld by a state court provided all of the conditions are met. As we know, the Former Spouse entitlements start concurrently with those of the Active Duty Military Member. If the 20-20-20 Rule is satisfied before the Military Member actually retires from active service, then the Former Spouse benefits start immediately upon divorce. He or she merely goes and makes the application for 20- 20-20 Former Spouse recognition by the Military Department, and he or she gets her/his own Military ID Card *tut suite*.

B. RESERVISTS AND NATIONAL GUARD MEMBERS: In these cases we look once again at the Marriage Certificate and Entry Date of the Final Decree of Divorce to determine the "marriage window." Then, overlay that marriage window with the Reserve Retirement Point Summary Sheet to see if at least 20 of the "good years" for Reserve Retirement (i.e., those in which at least 50 Reserve Retirement Credit Points were earned and sufficient to be considered a "good year" for determining Reserve Retirement Eligibility) are concurrent with marriage. If there are 240 of those "concurrent months" of marriage and Creditable Reserve Service, then the Former Spouse satisfies the 20-20-20 Rule. He or she will commence TRICARE eligibility when the Military Sponsor turns 60 (even if the sponsor might become entitled to Reserve Retired Pay earlier than 60). If after divorce and before turning age 60 the Reserve Military Member becomes eligible for TRICARE coverage (such as performing a period of active duty), then the Former Spouse will also have TRICARE eligibility during that period. The Former Spouse does have to go in to a

[4]This factual scenario is based on an amalgamation of several situations of which I am aware, along with a lot of poetic license. Please do not attribute these facts to any one person.

Military ID Service Center and make his or her application for Former Spouse 20-20-20 benefits and the Service Secretary's OPR must determine eligibility.

And then you have the *still more* complicated case of the former spouse who has been married to the Reservist long enough to qualify as a 20-20-20 Former Spouse under the "Reserve Retirement Rules",.....*but* after the divorce the Reservist continues to serve and accumulates sufficient active duty time to later qualify for a "regular (active duty) retirement" and in fact does so. Few are aware that the Former Spouse who did earlier qualify as 20-20-20 Former Spouse under the rules for a "Reserve Retirement" will not then be eligible as a 20-20-20 former spouse under the rules for a "regular retirement"....meaning he or she would not receive *any TRICARE* or Base Access benefits when the Military Member takes the Regular Retirement. And no....the Former Spouse will not get 20-20-20 Former Spouse benefits (TRICARE, TRICARE for Life, Base Access privileges) when the Military Member turns 60. That Former Spouse gets *zero*! Pretty screwy right?

These are all essentially Defense Eligibility and Enrollment Records System (D.E.E.R.S) questions (not questions for the state court hearing the divorce) that are initially determined by the individual Military Department Secretary, but these determinations are also subject to review and reversal by DOD. The entitlement all starts with the federal statute that allows for former spouses to have TRICARE Coverage in the first place. (10 USC §1072(F), (G) & (H)), and the Joint Services Military ID Card Regulation, AFI 36-3026_IP (17 June 2009), primarily in Chapter 3. Essentially the way the statute defines the eligibility requirements to be considered a 20-20- 20 Former Spouse is dependent upon what is considered "creditable service" for determining the retirement of the Military Member. We all know that the 20-20-20 Rule requires that a Former Spouse be married to a Military Member for: (1) 20 years; (2) The Military Member have 20 years of creditable service towards retirement; and, (3) that 20 years of the marriage must be concurrent with 20 years of that creditable service.) We also know what time is considered as "creditable service" for a Reserve (non-regular) retirement and what counts as creditable service for a "Regular (active duty) Retirement" are determined differently under federal statutes for the Army, Navy, Air Force allowing for "regular retirements." Although as a general rule, "all active duty time" will count towards a "Reserve Retirement", the corollary of that is *not true* as all creditable "Reserve Time" does *not* count towards a Regular Retirement. For instance, the two weeks of Active Duty Training for a Reservist would count as "creditable service" for either a "regular" or a "Reserve" retirement. *But*.... "weekend UTAs" (unit training assemblies, or drills) would *only* count towards qualifying for a "Reserve" Retirement, and only be counted for pay purposes once the Military Member has reached the 240 months of active duty service time. Yes..... a Reservist who might qualify for a Regular Retirement will still have his or her UTAs and other Reserve Retirement Credit Points considered for determining his or her "Retired Pay", but those UTAs count for nothing in determining *eligibility* for the Regular Retirement. So it is entirely possible to have a Former Spouse qualify under the 20-20-20 Rule for a *Reserve* Retirement, but then lose it when the Service Member later qualifies for a *Regular* Retirement. If that "Reserve" 20-20-20 Former Spouse was not married to the Service Member for at least 20 years of the creditable active duty time, then he or she is "out at third base!" And no the "Rules of Horse Shoes" do not apply....close does not count in satisfying the statutory entitlement requirements for TRICARE or Base Access Privileges.

Sounds complicated? Well it is, and a "whole lot of bean counting" has to be done at the Reserve Personnel Center for the service to determine whether a Former Spouse will satisfy the

20-20-20 Rule depending upon whether the Military Member is going to have a *Reserve* or *Regular* Retirement. Fortunately there is a program that speaks of a program that *all* of the services are supposed to have that a Former Spouse can make a formal request to get a determination. Now I have heard that the program works well in the Air Force and Air Force Reserve, and pretty well in the Navy and Navy Reserve, but is "hit and miss" in the Army and Army Reserve. And always keep in mind that just because the Former Spouse of a Reservist with 14 years of active duty service and six years in the Reserves (all of it occurring during the marriage) might get a favorable determination as a 20-20-20 Former Spouse at the time of the divorce, should that Service Member go on six years of active duty subsequent to the divorce and qualify for a Regular Retirement, that Former Spouse will no longer have 20-20-20 status. Boy....that is when the "cat fighting starts!"

And all of this does not even get to the division of the military retired pay (regular or reserve) under state law and the Uniformed Services Former Spouse Protection Act. As my friend Colonel Mark Sullivan explained in Law Review 13169, you really need an attorney who not only knows family law but also is familiar with the military complications. You can probably find such an attorney in a military-heavy area like Norfolk, San Diego, or here in Warner Robins, Georgia, near a major Air Force base. Outside a military area, you likely won't find an attorney with this dual expertise—there is not much demand for such expertise in Pittsburgh, Pennsylvania or Milwaukee, Wisconsin. If you cannot find a lawyer with this dual expertise, you will likely need to retain an expert (like Colonel Sullivan or myself) as the "wingman" (Colonel Sullivan's word) for your divorce attorney.