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Military Service, Civil Service, Settlement and Sabotage

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5.1—Division of Military Benefits Upon Divorce

There's always the unexpected...

Introduction

“The unexpected” is a major theme in David Lean’s complex 1957 war film, *The Bridge on the River Kwai*. Early in the plot, Commander Shears is unmasked and found to be an ordinary seaman impersonating a Navy officer in the hope that he would get better treatment in a Japanese POW camp; in fact, as he discovers, officers and men are both treated with equal harshness and cruelty in the camp. Major Warden, who will lead the commando team to blow up the bridge, wryly remarks, “Yes, there’s always the unexpected, isn’t there?”³

Lusso v. Quiggle – The Unexpected

The unexpected is what happened to Muriel Quiggle in her divorce case upon appeal to the Minnesota Court of Appeals in 2015.⁴ The expected division of her ex-husband’s retirement plan

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2300 “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 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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³References to “the unexpected” occur often in *The Bridge on the River Kwai*. After the saboteurs have completed their work, the River Kwai goes down unexpectedly overnight, exposing the demolition charges previously hidden under water and the electric cord to the detonator downstream. The Allied Command reports that, unknown to the commando team, the bridge construction is abandoned and a new span erected at a site downstream from the old one. And a troop and VIP train from Bangkok to Rangoon is scheduled for just a few days hence. Warden, upon hearing of this surprise “target of opportunity,” points out that the swift kick Shears gave to the malfunctioning radio brought it back to life, giving the commando team new intelligence as to the bridge’s location and the train. Shears, in a sarcastic reprise of Warden’s earlier remark, exclaims, “Well, there’s always the unexpected, isn’t there?”

⁴Lusso v. Quiggle, 2015 Minn. App. Unpub. LEXIS 28

vanished into thin air, and the appellate court laid the blame on the wording of the divorce settlement. It left her no room to wiggle.

The parties married in April 1973, and the husband joined the Air Force in November of that year. In 1989 he filed for divorce. A divorce was granted in October 1989.

Like many divorcing couples, the parties signed a settlement, contained in a stipulated decree. The text regarding the husband's retirement rights said that for 15 years of the marriage the husband had been on active duty in the Air Force, accumulating retirement benefits payable to him should he retire after 20 years. Should he become eligible for a military pension benefit as a result of this service, 37.5% of any such pension would be awarded to the wife.

What happened next defies any planning and cannot be explained. The husband left the Air Force. He stopped serving before he reached twenty years of service. The record doesn't say that he decided not to reenlist. It doesn't tell us that he was forced out. It's simply silent.

When the husband left the service, he took a job with the Department of Veterans Affairs. In order to get credit toward civil service retirement for the 15+ years that he had served in the Air Force, the husband paid \$9,700 to buy into the FERS (Federal Employee Retirement System) pension plan.

When Mrs. Quiggle found out, she moved to amend the divorce decree and re-open the judgment on the ground that she had a marital interest in the ex-husband's civil pension. The trial court denied her motion, stating that the plain language of the decree governed, and Court of Appeals affirmed. There was no provision for her to receive part of any retirement plan or program which would replace the military one. No constructive credit was contemplated, expressed or agreed upon.

Civil Service Rollovers

Few civilian lawyers (and even fewer spouses) realize that a servicemember can "roll over" his or her retirement into a federal civil service job and receive a year-for-year credit based on the time spent in the military.⁵ Even fewer lawyers and spouses have the foresight to anticipate this situation may occur in connection with the divorce case. Fewer still possess a working knowledge of the statute allowing this credit. The failure of the lawyer for the former spouse to consider this might cost her a packet of money.

The interrelationship of military and civil service retirement is complex.⁶ Various sections of the law:

- Allow the transfer of creditable military service to civil service in computing civil service retired pay;
- Mandate the reduction of civil service retired pay when the retiree attains age 62; and/or

⁵This different from the "dual compensation" restriction, which used to require reduction of military retired pay when a retired SM entered federal civil service. "Dual compensation" limitations were eliminated in 1999. National Defense Authorization Act of 2000, Pub. L. No. 106-65, 113 Stat. 512, 664 (1999).

⁶This summary is adapted from David Burrelli, **MILITARY BENEFITS FOR FORMER SPOUSES: LEGISLATION AND POLICY ISSUES** 19-20, Cong. Research Serv. Report (updated Dec. 10, 2002).

- Allow retroactive payments into the federal retirement fund (Civil Service Retirement Fund or Federal Employees Retirement System) to avoid a recalculation that can occur at age 62 for those who have military service credited to civil service.

Choices for the Member or Retiree

A military member or retiree can choose one of three options regarding military retired pay, Social Security, and the civil service pension. These choices are:

1. **Receive military and civil service pensions plus Social Security benefits based on time in the military.** This gives the retiree three distinct retirement benefits. Since the military service provides Social Security benefits, the spouse or former spouse will receive Social Security survivor benefits if the marriage lasted at least ten years.
2. **Waive military retired pay and credit all military service to civil service retirement, with Social Security benefits to be based on military service.** With this alternative, the retired SM obtains two separate benefits, civil service retirement plus Social Security. The amount of the civil service pension is based on total federal service, including military service. When the retiree attains age 62, however, the years of military service stop counting toward the civil service pension because they are counted toward Social Security. Thus, the civil service employee annuity drops at age 62 when Social Security becomes payable to the retired SM.
3. **Elect Option 2 above and deposit a lump sum into the federal retirement fund (Civil Service Retirement Fund or Federal Employees Retirement System) to avoid the above reduction at age 62.** Here the retired SM also would be eligible for two retirement benefits – civil service pension and Social Security (without reduction of the latter at age 62).⁷

An Example

The Idaho case of *Leatherman v. Leatherman* provides an example of how the rollover,

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waiver, and division work. The parties were divorced in 1982 after about 35 years of marriage. The former husband had served in the Navy for 14 of the years of marriage, and the divorce court awarded him his Navy retirement pay as his separate property.

In 1983 the Veterans Administration determined that he was 100 percent disabled as a result of a heart attack. To qualify for full civil service disability, he waived his full military pension. In 1983 he retired from federal civil service, where he had been employed as a postal worker. Though he lacked military retirement benefits at that time, because he had left the Navy too early, he received credit for his years of Navy service in determining his civil service retirement.

Upon the motion of the former wife to modify the divorce decree, the magistrate granted her 19% of her former husband's civil service annuity. This was due to credit for his service in the Navy during the parties' marriage. The Idaho Supreme Court upheld this decision.

The Mischief Potential

⁷The rules on military service, waiver of military retirement, transfer of creditable military time, and the like are found in *CSRS and FERS Handbook for Personnel and Payroll Offices*, ch. 22 (Creditable -Military Service) (U.S. Office of Personnel Mgmt. Apr. 1998), at <http://www.opm.gov/retire/pubs/handbook/hod.htm>.

The potential for mischief is obvious. Before January 1, 1997, a military retiree could avoid paying a former spouse her share of the military pension by using federal employment to circumvent the military pension division order; all the employee had to do was to convert his years of military service into creditable time for an increased civil service retirement benefit.

Because of this, Congress changed the rules in 1996. Changes to 5 U.S.C. § 8332(c)(4) (Civil Service Retirement Act) and 5 U.S.C. § 8411(c)(5) (Federal Employees Retirement Act) allow a former spouse to continue to receive payments of military pension division when the military retiree has waived military retired pay to credit military service toward a single civil service employee annuity, effective January 1, 1997. A worker in the federal government thus no longer can count his or her years of military service toward a civilian federal retirement without authorizing the Office of Personnel Management (OPM) to deduct the appropriate amount adjudicated by court order for the former military spouse. The statute directs OPM to promulgate rules for implementation of this change.

The Last Word

When one encounters the unexpected, where one meets the unplanned, the last word is left to the senior staff. In this case, it's Colonel Green, the commandant of the sabotage training school. His advice to the team assigned to blow up the bridge: "As I've told you before, in a job like yours, even when it's finished, there's always one more thing to do."

Here, the attorney for the former spouse must think about one more thing, one unanticipated issue, namely, "What happens if the servicemember doesn't retire – is that possible? After all, he hasn't attained 20 years of creditable service."

Counsel also needs to ask: "If he resigns his commission now, or if he doesn't re-enlist, then he won't have a military pension to divide with my client. And if he leaves military service and rolls over his military credits to federal civil service, he may not have ANY pension divide with her at all!"

Language to Protect the Former Spouse

With these concerns in mind, the former spouse's attorney needs to ensure that the settlement contains the following protective clauses:

1. *If Defendant-Husband tries to waive or convert any portion of his military service (whether active-duty or Guard/Reserve) into federal or state civil service time without first obtaining Plaintiff's consent, and the effect of this action is that her benefits would be reduced, then –*
 - a. *Plaintiff-Wife will receive either:*
 - i. *Non-modifiable alimony equal to the amount or share of the military pension that she was entitled to receive before any waiver (with cost-of-living adjustments, if applicable), and not terminating at her remarriage or cohabitation; or*
 - ii. *A portion of the federal retirement annuity (FERS) that provides Plaintiff an amount equal to what she would have received as her share of the military pension had there been no waiver to obtain an enhanced federal retirement annuity.*
 - iii. *In the event of such conversion, pursuant to 5 U.S.C. § 8411(c)(5), Defendant shall authorize the personnel office (e.g., Director of the Office of Personnel*

Management) to deduct and withhold (from the annuity payable to Defendant) an amount equal to the amount that, if the annuity payment were instead a payment of Defendant's military retired pay, would have been deducted, withheld, and paid to Plaintiff under the terms of this Order. The amount deducted and withheld under this subsection shall be paid to Plaintiff.

- b. If the waiver of military pension for other government retirement prevents Plaintiff's coverage under the Survivor Benefit Plan, then Defendant will –*
 - i. Designate Plaintiff as beneficiary under the equivalent federal retirement survivor annuity plan and provide equivalent coverage; or*
 - ii. Obtain life insurance (with Plaintiff as the owner) covering his life with a death benefit equal to full SBP coverage; or*
 - iii. Purchase a single-premium annuity (with Plaintiff as the owner) that is equal to the benefits payable for full SBP coverage.*
 - c. Defendant will also notify Plaintiff immediately if he accepts employment with the federal government. He will include in said notification a copy of his employment application and his employment address. Any subsequent retirement system of Defendant is directed to honor this court order to the extent of Plaintiff's interest in the military retirement and to the extent that the military retirement is used as a basis of payments or benefits under the other retirement system, program, or plan.*