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Divorce and Division of the Pension

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The New Case - a "Military Divorce"

Larry looked down at the piece of paper his secretary had handed him. The client in the waiting room at his law office had written a note to accompany the case file which the secretary brought in. The note read:

> I retired from the Marine Corps Reserve in 2014 after 20 years of service, and I just started receiving retired pay. I was awarded Combat-Related Special Compensation (CRSC) a few months ago. Right now I'm getting VA disability compensation (100% rating) and my full retired pay of about $2000 a month. I haven't yet opted to receive CRSC, but I plan to do so in the next "open season."
>
> Problem is, I'm going through a divorce, and my divorce lawyer "doesn't know jack" about military retired pay. That's why I came in to see you for a consultation. I hear you know something about this stuff.

Larry was familiar with these kinds of questions. A retired Army Reserve JAG colonel, and a lifetime member of ROA, he was frequently brought in - sometimes at the last minute - when there were "military overtones" in a divorce case.

He stood up when the new client, Rachel Roe, entered the office. She brought with her a thick folder full of pleadings, motions, orders and letters regarding her divorce case.

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[1]I 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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"I need to know the *connections* in my case," Rachel replied. "How does VA disability compensation fit in with retired pay, and what is the impact of CRSC on both of these? I've heard that there's something called CRDP, and I need to know how that fits in as well."

"That's a tall order, Rachel," replied Larry, "but I think I can give you some answers. Here's a note pad, so you can write down anything that you want to remember and jot down any questions that come up."

"Joe Smith is my divorce lawyer," she explained, "but he's not up to speed on the military issues in this case. He suggested that I meet with you to get a briefing on what he and I need to know in going forward."

"Happy to help, Rachel, and thanks for your service," replied Larry. "I appreciate your note outlining the situation. What are your immediate concerns?"

Connecting the Dots

Larry began by explaining that federal law only allows "disposable retired pay" to be divided in a divorce, and disposable retired pay means one's gross pension amount less certain deductions. The important one for many retirees is the "VA waiver," which refers to money which is deducted from the pension as a result of the retiree's waiver of retired pay to obtain VA disability compensation.

"I remember that," Rachel interrupted. "I saw that mentioned on the application form for VA payments. It said that I had to waive an amount of my retired pay equal to the VA disability compensation. But the funny thing is, I don't see any reduction in my retired pay each month. I'm still getting 100% of my pension, plus 100% of my VA payments. What gives?"

The answer, Larry explained, was in a statute called CRDP, or Concurrent Retirement and Disability Pay, found at Title 10, U.S. Code, Section 1414. CRDP, passed by Congress in 2004 to remedy the inequity of a VA waiver in some cases, states that those with a rating of 50% or above from the Department of Veterans Affairs will have their waived retired pay restored. That's how CRDP remedies the reduction of retired pay due to the VA waiver. And it's automatic - you don't have to apply for this benefit.

"Now I see," responded Rachel. "I thought that CRDP had something to do with the disabilities I incurred in Afghanistan several years ago."

Combat-Related Special Compensation

Larry replied, "No - that's CRSC, or Combat-Related Special Compensation, Rachel. It's easy to see how the two abbreviations could be confused. They're even right next to each other in the U.S. Code - CRSC is at Title 10, Section 1413a, and CRDP is at Title 10, Section 1414. But they're

really quite different. The first, CRDP, is restoration of waived retired pay for those with a VA rating of 50% or more. The second, CRSC, is an additional form of disability pay."

Larry explained that CRSC is tax-free, like VA disability compensation. It is payment for those retirees with a disability of at least 10% directly related to the award of the Purple Heart, or else a disability rated at least 10% that was incurred as a direct result of armed conflict, or while engaged in hazardous service in the performance of duty under conditions simulating war, or through an instrumentality of war.

"That's a mouthful!" exclaimed Rachel. "But at least now I understand what these two abbreviations are. Now let's talk about linkage and my divorce. How do these two payments figure into the division of retired pay, Larry?"

"From the standpoint of the former spouse - your soon-to-be-ex-husband, Rachel," Larry continued, "there's a world of difference. CRDP is the good side of things. It means that there is, in effect, no VA waiver, since there is no reduction in the retired pay. The CRDP payment restores the waived money amount. So the entire pension is still there, divisible with the ex-spouse. There's no reduction, as there would be if the disability rating were less than 50%; when the rating is 10-40%, there would be NO payment of CRDP."

The receipt of CRSC, explained Larry, changes things around drastically. That is because the receipt of CRSC wipes out CRDP. A retiree cannot receive both. "If you elect CRDP," Lary continued, "then you've declined CRSC. If you choose CRSC, then you've waived CRDP. When a retiree opts for CRSC, it means that all of her VA disability compensation is deducted from her retired pay. In your case, since your retired pay is about $2,000 a moth gross, that means that you'll have wiped out your retired pay of $2,000."

"You've said you intend to elect CRSC at the next open season, Rachel. That'll be in January, and DFAS will notify you in December that the next month is when you can switch back and forth between CRDP and CRSC or - in your case - opt out of CRDP by choosing to receive CRSC."

Limits on the Judge's Power

"But that's where I'm concerned," exclaimed Rachel. "I know that will means that I have no retired pay to divide with my husband. When he and his attorney find out about that, they'll be hoppin' mad! Can the judge order me not to opt for CRSC, so that there'll still be a military pension to divide?"

Larry spent the next few minutes reassuring Rachel. He told her, "No, the court doesn't have that power. It is not within the authority of a judge to tell servicemembers or retirees what federal benefits to elect or forego. That's an individual decision, not one subject to the rulings of the magistrate, master or judge who is hearing the case. So if the judge orders payment of a percentage of the military pension, you still have the option of accepting CRSC, which will have

the effect of destroying the entire pension, and replacing it with non-divisible and non-taxable CRSC."

Half of the Pension?

Rachel replied, "I'm asking this because I've heard through my attorney that my husband is going to ask the judge for 50% of my military pension."

Larry told Rachel that the usual approach is for the court to order a percentage to the spouse of all the marital property, and that percent is ordinarily 50% of the marital portion of the pension, not the whole pension. "Now, if the entire time of the military service was during the marriage, then it might be appropriate to order the husband to receive 50% of the pension. Is that the case here?"

"No," answered Rachel. "We were almost married for 10 years during my 20 years of Marine Reserve service."

Larry frowned. "I see. Well, that means we have another problem which we need to discuss."

The second part of this article discusses the problem Larry has detected as well as another issue - the Survivor Benefit Plan - which Rachel will need to confront.

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Divorce and Division of the Pension, Part 2

This article deals with divorce and related problems involving military retired pay. The first part introduced the case of Rachel Roe, a retired Marine Corps Reservist. She is visiting the office of Larry, her lawyer, and Part 1 dealt with the division of the pension, what "disposable retired pay is," how VA disability compensation impacts the military pension, and the additional impacts of CRDP (Concurrent Retirement and Disability Pay) and CRSC (Combat-Related Special Compensation). Rachel is just asking Larry about how much of the pension can be divided with her soon-to-be ex-husband.

Half of the Pension?

"So you're telling me that he only gets half if he's been married the entire time that I was in the Corps?" asked Rachel. "Well, that's not the case here. We were married for almost 10 years during my 20 years of Marine Reserve service."

Larry frowned. "I see. Well, that means we have another problem which we need to discuss."
"What's that?" asked Rachel.

Larry then explained the "10/10 Rule." When the marriage did not overlap the military service by at least ten years, payments cannot be made by the retired pay center, which in this case is DFAS, the Defense Finance and Accounting Service. That means the inconvenience of making monthly payments direct to the payee, Rachel's husband, instead of having the money taken out of her retired pay through a DFAS garnishment.

"How am I supposed to make the payments?" Rachel inquired. "Does it need to be with a certified check each month?"

Larry responded, "There is nothing in federal law that says how pension-share payments will be made when the 10/10 Rule isn't met. You could take out an allotment, or you could mail a check to your husband. You might want to look into EFT, or electronic fund transfer, which is a way that your bank can transmit the money to your husband's bank."

"Well, that's a hassle. The last thing I want to do is be reminded of my divorce by making a payment every month to my ex," said Rachel.

"It doesn't end there," said Larry. "Since most of the time, your payment will be a percentage of your retired pay, you'll need to recalculate it every January due to the usual COLA, or cost-of-living adjustment, that is made to retired pay. So, for example, if the percent you pay him is equal to $500 this year, you'd need to find the information on COLA in December and then adjust the payment to reflect the increase. If the COLA were 2%, then you'd need to change your allotment or EFT to make the new payment $520 each month."

Larry continued his explanation by telling Rachel that a percentage is only one of the possible methods of pension division. A better result for her would be the use of a fixed-dollar amount. If, for example, the calculations show that the husband is entitled to $500 a month, why not fix the amount at that? If the court order or court-approved settlement calls for $500 instead of a percentage, then that fixed sum will involve no COLAs for future years. All of the COLAs remain with the retiree, instead of being shared with the former spouse. That's only true for the fixed-dollar award, however. The COLA applies to any other pension division clause, such as a percentage award.

"Speaking of *percentage,*" replied Rachel, "what *is* the percentage that he's supposed to get? I heard from some of my friends that it's 50%. That *can't* be right!"

Larry explained to Rachel that the courts in most states usually start by determining what part of the pension was acquired during the marriage. This is called the community property portion or the marital share. It's usually a fraction with the numerator being the months of pension service during the marriage, and the denominator being the servicemember's total creditable service.

"So in your case, Rachel," continued Larry, "the law here in the state of East Virginia says that you'd have a marital fraction of about 10 years of marital pension service divided by 20 years of

total pension service, if we use the *time-rule method* of calculating the marital fraction. That means that about 50% of the pension is marital property, and thus your soon-to-be ex-husband's share would be about 25% of the monthly pension payment, or "disposable retired pay."

"What do you mean, '...if we use the *time-rule method*'? Is there some other method we could use? Would it produce a different result?"

"Yes, there is another method," replied Larry. "Instead of using months of marital pension service divided by total months of service, we could calculate the marital fraction using your retirement points. If you had, for example, a large number of premarital retirement points - such as the amount attributable to 6 or 8 years of active duty before you reverted back to a traditional drilling Reservist - then you'd find that the marital fraction is much smaller, because of all those non-marital points that piled up during your service before the wedding bells. It might be as little as 10% marital, which means 5% for your husband."

"Yikes!" shouted Rachel. "I didn't realize that there are two ways of calculating the marital fraction."

Larry explained that, in all his military pension division cases involving those who will get a non-regular retirement (i.e., members of the National Guard or Reserves), his firm always did the calculations both ways - *time-rule division* and *points division* - to determine which is more favorable to the client." There are only a handful of states which have definite rules regarding the use of points to do the computation. These include Maine, Alaska, Colorado, California and Ohio. Of course, if the parties reach an agreement on the fraction and the former spouse's percentage, the court will ordinarily approve it without inquiring into how the numbers were calculated.

Rachel decided that she wanted to have the benefit of seeing the results of both calculations, and she promised to send Larry a copy of her full and final retirement points statement so that his paralegal could crunch the numbers and figure out how many points were acquired during the marriage. She then asked about the 50% share that was discussed earlier.

"Why does he get 50%, Larry? Is that carved in stone? Could it be lower than that or - God forbid - higher than 50%?"

Larry replied, "In most states the *default solution* is 50%; unless there is a good reason for an unequal division, the court always divides marital property 50-50. And, in those western states which recognize "community property" instead of "marital property," the general rule is that it is *always* 50% of the community property for each spouse. Here in East Virginia, the share of the non-owning spouse is presumed to be 50%."

"What could we do to get it lower?"

Larry thought for a moment. “There aren’t any cases here in the context of military pension division, but sometimes our courts will reduce the *50% default* to a lower figure if one of the statutory factors for unequal division is present. That might include the physical or mental health of the parties, the contributions of each one to the other’s career advancement and to the acquisition of property, and the existence of economic fault during the marriage, such as wasting or squandering of marital assets.”

“But you didn’t mention *cheating*! My husband’s been having one affair after another for the last five years. I’ve lost count! Can’t we use adultery as a factor to reduce that *50% default* that he might be getting?”

The answer, Larry explained, is that in virtually all states, the role of marital fault (as distinguished from economic or financial fault) plays little or no role in the distribution of marital property. In one North Carolina case from 1983, for example, the Court of Appeals reversed the trial judge’s decision to award the wife more than 50% based on her husband’s assaulting her with a shotgun and disabling her; the Court stated that marital fault doesn’t count, since it’s not one of the enumerated factors for an unequal division.

After a pause, Larry continued. “So if we take this case to trial, Rachel, we may need to decide on a means of proving one of the statutory grounds for non-equal division. We might try to show that your husband didn’t support your efforts in the Marine Corps Reserve and that he thwarted your attempts to get promoted or retained. We could show that he damaged, mis-spent, or dissipated marital funds. We might even be able to convert what appear to be *marital fault* in this case - his adultery - into *economic fault* by showing that it involved the misuse of marital funds in his affairs.”

“Why did you say, ‘...if we go to trial,’ Larry? You should know by now that I want a settlement, not a trial. Why do we have to go to court with this strategy?”

Larry explained that no husband in his right mind would agree to a settlement of less than 50% unless there was a very strong incentive for such a settlement. Thus the likely result in every case involving a demand for unequal division will be a courtroom drama, rather than a mediation or negotiated settlement. Few spouses are willing to agree to less than 50% of the marital or community property without a fight.

Larry continued, “As to the other question, Rachel, you asked whether the court could grant *more* than 50% of the marital asset to your husband. That’s another question of mixed federal and state law. Here in East Virginia, there are limited times when, by law, the judge can grant more than 50% of the marital portion of property to the non-owning spouse. None of those apply in your case. Under federal law, there is a cap or a maximum on what can be divided with the spouse. That is 50%. The court cannot order more than one-half of the military pension to the ex-husband as property division, regardless of the facts or circumstances.”

Rachel sighed. “What’s left to discuss, Larry? Is there anything we haven’t covered?”

"Yes," replied Larry. "We have more ground to cover. In my office we use the *Three-D Rule* to explain military pension division, and that means **D**ivision, **D**eath and **D**isability. We've covered how to divide the pension and also the impact of disability. Next we talk about death."

The third part of this article discusses what happens when the servicemember or retiree dies before the former spouse, and the role of the Survivor Benefit Plan.

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Divorce and Division of the Pension, Part 3

This article deals with divorce and related problems involving military retired pay. The first part discussed division of the pension, what "disposable retired pay" is and how receipt of Combat-Related Special Compensation (CRSC) and Concurrent Retirement and Disability Pay (CRDP) can change the equation. Part 2 covered what the former spouse's share of the pension may be and when the retired pay center will allow garnishment of the pension as division of marital or community property. It also dealt with the four ways of dividing the pension and two methods of calculating the marital fraction when the pension is based on Guard/Reserve service. And it covered marital fault.

The case is that of Rachel Roe, a retired Marine Corps Reservist. She is getting divorced and is visiting the office of Larry, her lawyer, and the subject is *death.*

Planning for Death

"My husband is the same age as I am," explained Rachel. "What happens to the pension if I die? Does he continue to receive pension payments?"

"No, he doesn't," Larry responded. "The phrase to remember is this: *When the servicemember dies, the pension dies.* Federal law stops military retired pay at the earlier of the death of the member or the former spouse who's receiving a share. But there's a twist - if your husband dies first, then whatever share he's been awarded reverts to you, and your entire military pension is restored."

"But what's the result if I am the one who dies first, Larry?" Rachel asked.

Larry frowned. "In that case, the answer depends on whether there's an SBP election."

"SBP - that stands for Survivor Benefit Plan, right?"

"In my office," Larry interjected, "it also stands for *Single Biggest Problem.* That's its alternative name because it's so often overlooked or lost through a late application."

The Basics of SBP

“What are the basics of SBP, Larry?” asked Rachel.

Larry explained that the Survivor Benefit Plan is a *survivor annuity* which can be elected so as to continue money payments after the servicemember or retiree dies. The beneficiary is usually a spouse or former spouse, but coverage also can include “spouse and child(ren)” and “former spouse and child(ren).” The payment is 55% of the selected base amount (which can be anything from full retired pay down to $300 a month), and it is increased for inflation by means of a COLA, or cost-of-living adjustment. Payments are taxable income for the recipient.

“Didn’t I take care of the SBP choice when I got my *twenty-year letter*?” Rachel asked. “I remember filling out a form that asked about SBP coverage for a spouse.”

“Yes,” replied Larry. “You probably filled out DD Form 2656-5, which asked you about your choice for SBP. But a spouse’s coverage for SBP ends at the entry of a divorce decree. There is no automatic coverage for a former spouse. It can only be set up through a court decree or order.”

Rachel interrupted, “Does the ex always get SBP in a divorce?”

“Good question, Rachel,” Larry rejoined. “It often depends on the length of the marriage, the age of the spouse (or former spouse), and the mood of the judge. Cost can play a part as well.”

Larry went on to explain that the cost for SBP coverage in a Guard/Reserve retirement case (called a *non-regular retirement*) is around 10% of the base amount. A short-term marriage could lead the judge to decide against SBP coverage, while a long-term marriage where the former spouse is financially disadvantaged would be more likely to result in SBP coverage.

“What about age, Larry?”

“That’s where SBP seems a lot like alimony,” replied Larry. “As you know, alimony ends upon the remarriage of the recipient spouse. With SBP, eligibility stops if the recipient spouse remarries before age 55. Now that’s not the same thing as *termination,* Rachel. It can be reinstated if that subsequent marriage ends in death, divorce or annulment. And there is no *remarriage penalty* if the former spouse remarries after reaching 55.”

Paying the Cost

“How are those payments made?” Rachel wanted to know. “Do they come out of my retired pay? And do they last forever?”

“Not quite forever,” Larry replied. “They continue to be deducted from your retired pay until the *paid-up point*. That is when the retiree has made 30 years of payments and has attained age 70. After that, there are no premiums. And the premiums would stop even earlier if your husband remarried before age 55.”

Rachel continued, "You said earlier that there were sometimes problems with SBP - the *Single Biggest Problem*, you called it. What are the problems?"

Dates and Deadlines

Larry replied, "One way to think of the *SBP-and-divorce process* is to remember the letters **R-R-R**." Larry explained the process this way:

R - means ***R**equirement*. You need to get a court order or divorce decree to require the election of former-spouse SBP coverage. The essential language for the court order or divorce decree is: "The servicemember will immediately elect former-spouse SBP coverage for the spouse."

R - stands for ***R**equest*. There must be *an election* of former-spouse coverage. The election is made by the member or retiree by signing an SBP form selecting the spouse or former spouse as "former-spouse beneficiary." If the member/retiree fails or refuses to make the election, then the retired pay center[3] will honor a request by the former spouse, which is called a *deemed election*, requesting SBP as if the request had been properly elected in the first place.

R - means ***R**egister*. The election form, along with the court order or decree, must be served on the government. The addresses to use are on the forms (DD Form 2656-1 for the member/retiree, and DD Form 2656-10 for the *deemed election*).

The registration must be made within specific deadlines, or else SBP coverage is lost. For the servicemember or retiree, the deadline is one year from the date of the decree of divorce or dissolution. For the spouse or former spouse, the deadline is one year from the order requiring SBP coverage. If there is no timely election and registration, then SBP cannot be resuscitated by going back for a new court order. It's gone. The only possibility for retrieving "lost SBP" is to apply to the appropriate agency for correction of records which, in Rachel's case, would be the Board for Correction of Naval Records.

More about Cost

"It doesn't sound fair, Larry. You're saying that my soon-to-be ex-husband might get SBP coverage, and yet I have to pay for it out of my Marine Corps pension. That doesn't make sense! After all, I have to be dead for him to start getting the money. And he'll be getting 55% of my pension at my death, which is way more than his share of the pension while I'm living."

Larry was quick to agree on both counts. The answer to the latter issue - what's sometimes called "excess survivorship" - is in the choice of a base amount. It is sometimes possible (at or

[3]For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service). SBP coverage for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration is handled by the Coast Guard Pay and Personnel Center.

before one's retirement) to select a lower base amount for the SBP. It's easy to calculate, Larry explained, since all you have to do is divide the recipient's expected pension-

share amount by .55 to yield the appropriate SBP base. Larry continued with an example. If Rachel was expecting retired pay of $3,000 a month and she'd been married for 10 of the 20 years of USMCR service, the marital share of the pension would be 50% and the ex-husband's one-half share of that means that he would receive about $750 per month from the pension. Dividing the $750 by .55 yields a new SBP base amount of $1,364/mo., which means that Rachel's election of $1,364 as the SBP base would result in her former husband getting a death benefit which mirrors the "lifetime share." This is sometimes called *the SBP mirror benefit*.

"The other issue can also be fixed," Larry continued. "If you want your ex to pick up the tab for SBP, you'll find that there are three possible doors, three portals of entry. But the first one is closed."

"Which door is that?" Rachel exclaimed.

"It's putting in the court order a requirement that DFAS take out of your husband's share of the pension the cost of SBP coverage. That's impossible for DFAS to accomplish, since it's contrary to the terms of the Uniformed Services Former Spouses' Protection Act. The statute requires the cost to come *off the top*, which means that in effect both parties are paying for the SBP premium in the same ratio as they're sharing the pension - 75:25 in this case. But you can always go around to the side door if the front door is closed, Rachel."

"What's the side door?"

Tips on Cost-Shifting

Larry explained that a "side-door approach" means that the court order can require the ex-husband to reimburse Rachel each month (or even quarterly or annually) for the cost to her of the SBP premium. If that's about 10% of the base amount, which is $3,000 monthly, and she receives 75% of the pension, then that's about $2,250 monthly, and 10% of that is $225 a month. So if the ex pays Rachel $225 a month, she would be receiving her full pension share without any SBP cost; the entire premium would be paid by her former husband.

"But I don't want to wait for him to cut me a check every month," exclaimed Rachel. "He'll be busy with other things, and he'll never get around to paying me."

Larry tried a different approach. He told Rachel that, with a little math, he could work out an *adjusted percent* for her ex-husband which would result in his bearing the entire cost of his SBP coverage. "I've done a little back-of-the-envelope figuring, Rachel," Larry said, "and it turns out that reducing your husband's share from 25% to about 17% will mean that he's carrying the whole load of SBP premium. And DFAS will honor a pension division order that contains an *adjustment clause* to deal with the SBP premium."

Wrapping It Up

"Well, that's a relief," sighed Rachel. "Larry, you've given me in the last hour a whirlwind tour of the subject of military pension division and divorce. My head is spinning, but I think I understood everything that you said about divorce, military pension division and SBP. I only have one piece of advice for those friends of mine who may be going through the same ordeal!"

"What's that?" asked Larry.

"Make sure that you have Larry on your side when you go through a divorce - or someone like him. Don't go it alone, don't get a family friend who just happens to be a lawyer, and don't hire the lawyer with the biggest internet presence or the "no-cost consultation" ads. Be sure you get a lawyer who knows the subject to guide you through the wilderness!"

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