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Divorce and the Military Member

How Will Military Benefits Be Distributed? Part Two of a Three-Part Article

In last month's newsletter, we looked at how military service members earn pension payments and what the attorney must do to obtain a share of those payments for his client. In this edition, we discuss how to make sure your client gets the pension share coming to him or her.

The Uniform Services Former Spouses Protection specifically does not authorize a state court to order a military member to retire so that payments to the former spouse can begin. The payments ordered under the Act must be accomplished through a final decree. A final decree is defined under the statute as a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which a timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals. 10 U.S.C. § 1408 (a)(3).

The Mechanics of Getting Payment

The Defense Finance and Accounting Service must receive effective service of the court order as provided in the statute. 10 U.S.C. § 1408(b)(1). Service of a court order is effective for purposes of § 1408(b) if: 1) an appropriate agent of the Secretary is personally served or is served by facsimile, electronic transmission or by mail; 2) the court order is regular on its face; 3) the court order identifies the service member and, if possible, his or her social security; and 4) the court order or other documents served with the order certify that the rights of the member under the Service members Civil Relief Act (50 U.S.C.App. 501 *et seq.*) were observed.

After receipt of effective service of the court order, the Defense Finance and Accounting Service has 90 days to begin direct payments to the former spouse. However, it can only make prospective payments. The Accounting Service does not have the authority to pay accrued arrearage through direct payment to the former spouse. If the military member is not yet entitled to retired pay, payments will normally begin within 90 days after the member is entitled to receive Retired Pay. 10 U.S.C. § 1408 (d)(1).

The Uniform Services Former Spouses Protection Act (USFSPA) allows a state court to award the former spouse either a percentage or a specific amount of military Retired Pay. 10 U.S.C. § 1408(a)(2)(C). Unless the former spouse has the court award a percentage of military Retired Pay, she will not benefit from cost of living increases. Thus, most orders are drafted awarding a percentage of military Retired Pay. In calculating the percentage of military retired pay to award to a service member's spouse, the usual formula divides the total number of years of marriage while in the service by the total number of years of creditable military service, and then divides this result by the equitable distribution percentage.

Direct Payment

Former spouses can have the Defense Finance and Accounting Service directly pay them their court-ordered share of military Retired Pay if the marriage encompassed at least ten years of creditable military service. 10 U.S.C. § 1408(d)(2). This requirement, known as the "10-year rule," only impacts the former spouse's ability to obtain direct payment of her court

ordered portion of the service member's military Retired Pay on a monthly basis. State courts do not have the authority to order the military to pay the former spouse more frequently than on a monthly basis or to vary normal pay and disbursement cycles. 10 USC § 1408(d)(3).

The 10-year rule does not apply where the direct payment represents spousal or child support, rather than a division of marital property. 10 U.S.C. §1408(d)(1). To receive direct payment from the Defense Finance and Accounting Service, the former spouse must personally serve or mail, through certified or registered mail with return receipt, to the designated agent, a certified copy of the court order and a completed Department of Defense Form 2293.

A Qualified Domestic Relations Order (QDRO) is not necessary to obtain military Retired Pay by direct payment. Instead, the former spouse must submit a court order as defined by the Uniform Services Former Spouses Protection Act. The divorce judgment or court order need only state that the former spouse is awarded a percentage of the member's military Retired Pay.

In order for a state court to equitably distribute military Retired Pay, the court must have jurisdiction over the military member based upon either domicile, residence by the military member other than by military assignment, or consent. 10 U.S.C. § 1408(c)(4). This statutory requirement only applies to equitable distribution of military Retired Pay as marital property. The Act's jurisdictional requirements do not apply

The total amount of the service member's Retired Pay payable by the Defense Finance and Accounting Service directly to a spouse cannot exceed 50% of the member's Disposable Retired Pay. 10 U.S.C. § 1408(e)(1). If the service member's pay is garnished for spousal or child support, in addition to a payment under the Uniform Services Former Spouses Protection Act, the combined total direct payments may not exceed 65% of the member's Disposable Retired Pay. 10 U.S.C.

§ 1408(e)(4)(B). The provision for direct payment by the Defense Finance and Accounting Service does not relieve former service members from payment of their entire court ordered obligation for maintenance, child support, or other court ordered payments. 10 U.S.C. § 1408(e)(6). See *also* 42 U.S.C. § 659.

If the service member was on active duty when an order was issued for the military to make direct payment to the spouse, and the member was not represented by counsel in court, the court order or allied documents must specify that the court complied with the Service Members Civil Relief Act. 10 U.S.C. § 1408(b)(1)(D) (1988) — (This does not apply to court orders for spousal or child support. See *also* 50 U.S.C. App. § 501. (Service Members Civil Relief Act)).

Military pension division judgments and orders that require direct pay from the military finance center should include the addresses of the parties, their Social Security numbers, the grade/rank of the service member, the Branch of service for the military member, the years of marriage and military service, jurisdictional findings and a statement regarding the protection of the member's rights under the Service Members Civil Relief Act. The judgment or order should also provide that a certified copy of the order is served on the finance center by certified mail, return receipt requested, although service by facsimile, electronic transmission or regular mail is allowed.

The judgment or order should state that the finance center pay the nonmilitary spouse at his or her correct address as shown therein. It ought also to provide that the percentage of Disposable Retired Pay or a specific dollar amount, not to exceed 50% of the Disposable Retired Pay, should be paid once a month, starting no earlier than 90 days after service of the decree on the finance center and that payments should end no later than the death of the service member or spouse, whichever occurs first. The judgment or order must be certified within 90 days of service on the finance center. An application letter to be signed by the spouse should also be included. A copy of such a letter can be obtained from the appropriate finance center.

In next month's newsletter, we discuss Survivor Benefit plans and medical and commissary privileges.

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