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Parents in Juvenile Court

The Challenges of Intervention in Juvenile Court

ORS 419B.116

By Mark Kramer, Esq

Introduction

For those of you who dare to practice in the world of juvenile court, you probably know that the juvenile court table is quite crowded. Typically, there is mother and her attorney; father and his attorney; child's attorney (sometimes more than one, if there are multiple children); a deputy district attorney (and/or an assistant attorney general); the caseworkers from the Department of Human Services; and often a court-appointed special advocate (CASA). It is not surprising, therefore, that some in the system are reluctant to invite others to the table, much less participate in the meal. This becomes particularly challenging when people with significant relationships with the child at issue want to be involved. Under ORS 419B.876, a foster parent, a grandparent, or a relative currently providing care for the child, have the opportunity for notice and the "right to be heard at the proceeding." That is not the same as being a party. A person with that status alone, cannot file motions or provide testimony and is not privy to documents that parties are entitled to have.

The significance of intervention cannot be overstated. An intervener may file a motion to be considered a temporary placement or visitation resource for the child and at the permanency hearing stage, the intervener can move to be considered as the permanent placement resource for the child. Similar rights may apply to persons granted rights of limited participation but the statute vests the court with discretion to specify exactly what rights of limited participation are being granted, and that discretion can lead to a broad or very narrow grant of rights. Grandparents may also move the court for visitation, if they have had an ongoing relationship with the child, without seeking intervention.

Intervention can be the crucial portal to challenge critical decisions by DHS, for example whether and when to return the child to a parent and whether and when to place the child in a durable or permanent guardianship or adoption. Although it is rare, an intervener can move the court to terminate DHS as the custodian for the child and appoint the intervener as a juvenile court guardian under ORS 419B.366. The intervener can also

move the court to change the permanency plan from "return to parent" to adoption, guardianship, or a concurrent plan. In two cases (one in Multnomah County and one in Wasco County), the judge in fact did that, terminated DHS as custodian for the child, and ordered that long-term foster parents be appointed as durable guardians. In such cases, the court then assumes the role of supervising the guardianship and DHS is out of the picture.

A relative or foster parent caregiver can also consider filing a civil action under ORS 109.119 to establish custody or alternatively visitation. Such action is filed against the parent (or other person) who had custody by virtue of the court order which existed prior to the wardship. When an ORS 109.119 case is filed, it must be consolidated with the juvenile case under ORS 419B.806. That statute provides that "Consolidation does not merge the procedural or substantive law of the individual actions." It also provides that "The court shall hear the juvenile matters first unless the court finds that it is in the best interest of the child or ward to proceed otherwise." This provision provides the court, in an unusual case, to suspend the juvenile case and adjudicate the ORS 109.119 custody claim. If the third party prevails in the ORS 109.119 psychological parent claim the court can then dismiss the juvenile court case because at that point there is no longer any need for State intervention to protect the child from abuse or neglect.

The Mechanics

To provide critical input to the court for a child involves seeking intervention or rights of limited participation.[1] This class includes relatives or step-parents who had a caregiving relationship with the child before State involvement or had an ongoing personal relationship with the child. It also includes foster parents who have been caregivers for the child for the year before the initiation of the dependency proceeding or for half of the child's life if the child is less than six months of age. Recognizing that such individuals may be entitled to a formal role in the dependency case and being granted intervention are two very separate matters. To obtain intervention or rights of limited participation in the circuit court involves maneuvering your way through a thicket of parties and a difficult statute.

The controlling statute is ORS 419B.416 which defines both the class of people who can seek intervention or rights of limited participation and the standards and procedures to obtain that status. The intervener must prove by a preponderance of the evidence (ORS 419B.116(5)(c)):

> (A) A caregiver relationship exists between the person and the child or ward;
>
> (B) The intervention is in the best interests of the child or ward;
>
> (C) The reason for intervention and the specific relief sought are consistent with the best interests of the child or ward; and
>
> (D) The existing parties cannot adequately present the case.

The most difficult and problematic requirement is the last: "The existing parties cannot adequately present the case." What does "adequately present" mean? The conventional interpretation, and the one all too frequently adopted, is that the intervener must show that no one already sitting at the table can adequately present the case, and the "case" meaning whether or not the state should be involved to protect the child from abuse or neglect and how the state should be involved. In effect, this means that the intervener must question the competence or at least the efficacy of DHS, child's attorney, mother's attorney, father's attorney, the district attorney (or assistant attorney general), and the CASA. You can imagine how difficult and challenging this is and how, in the process, it could lead to alienation of potential allies.

There is however a different interpretation of "adequately present" which is suggested by the legislative history of the implementing legislation (House Bill 2950 – 2001). That history strongly suggests that the legislature intended a liberal and not restrictive interpretation of the statute such that grandparents and caregivers be allowed involvement in the dependency case as an intervener.

That interpretation of legislative history would lead to a different perspective on the "adequately present" standard, one which views "adequately presents" from the perspective of the intervener. In other words, the issue is whether the other parties can adequately present the intervener's case. "The case" can thus, in the context of ORS 419B.116(4)(d), only refer logically to the would-be intervener's own case, her own claim in distinction to the claims presented by the other parties to the proceeding. A simple showing that the would-be intervenor's claim or proposed remedy is nonduplicative with any of the pre-existing parties' would be enough to assure the court that the proposed intervention is not just a piling-on of parties in essentially the same litigative position (resulting in, say, two parties crowding the room, proposing the same remedies for the same reasons, even though each of whom could be expected to be able to carry the full burden of that particular "case" by him- or herself). And so that is all that should be needed to satisfy what ORS 419B.116(4)(d) asks for.

Assuming this is the correct perspective, given the inherent conflicts and tensions between potential interveners and the other parties it is understandable why the other parties would not be able to adequately present the intervener's case. At least one Multnomah County Circuit Court judge has adopted this interpretation and granted intervention to a long-term caregiver (and de facto grandparent) of a child. Adopting this intervener-focused interpretation does not spring the barn door wide open because the statute still requires that there be a caregiver or other significant relationship with the child and, of equal importance, that the proposed intervention is in the best interests of the child.

Where Do We Go From Here?

There have been no appellate cases to date on the intervention statute so we do not have appellate wisdom on the application of the statute and particularly the interpretation of "adequately present." Because of the importance of this issue and the difficulties inherent in this statute, this author is interested in working with other concerned attorneys and individuals to reform the intervention statute and hopefully have the legislation presented as a Family Law Section bill in the next long legislative session in 2019. Anyone interested in this herculean endeavor or would like to otherwise comment on this statute and its application is encouraged to contact the author.

To be sure, seeking intervention is among the most difficult challenges we face as practitioners. Moreover getting a seat at the table does not mean one gets to partake in the meal. There is no guarantee that the intervener will obtain the relief he or she is seeking. However the stakes are very high. A child in juvenile court has been removed from a primary parent relationship and his or her future is subject to the twists and turns of a wardship proceeding. Without intervention and active advocacy long-term relative and foster care relationships may be destroyed or critically impaired. So while the path is steep and there are many obstacles to overcome, the stakes to the child can be incredibly important. Don't be intimidated by these challenges. The future of a child may rest upon your zealous efforts to protect and preserve his or her caregiver and relative relationships.

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Dividing PERS Benefits in Pay Status

By Clark Williams

Dividing PERS benefits on divorce can be tricky. PERS benefits are divisible on divorce, or legal separation, pursuant to a domestic relations order ("DRO") under ORS 238.465. The DRO can be included as part of the judgment itself or it can be written as a supplemental judgment post-divorce.

We have written several articles on the issues to consider in dividing PERS benefits *before* retirement.[1] This article will focus on the issues to consider when dividing PERS benefits *after* retirement when the member is in pay status. The issues are entirely different but equally complicated.

A hypothetical example will be helpful to illustrate the issues. So let's assume that Hal and Wilma Smith are divorcing after 23 years of marriage. Wilma is now 63 and Hal is now 66. Wilma retired five years ago after a 30-year career as a schoolteacher, the last 18 years of which were during the marriage. When she retired, she elected Option 2A, which is a joint and 100% survivor annuity with a "pop up" feature. The pension is now paying $2,700/month. Had she elected Option 1 (single life annuity) at retirement, it would now be paying $3,000/month. The present value of this benefit, still, is about $725,000 in pre-tax dollars[2].

Here are the key issues to consider in dividing the PERS benefits now in pay status:

1. Dividing Joint Lifetime Benefits by the Time Rule.

Under our example, PERS is committed to pay $2,700/month to Hal and Wilma, plus cost of living adjustments[3], for as long as either living. There is no "account" anymore after retirement. What we have is a stream of future payments. Generally, subject to two exceptions discussed in sections 3 and 4 below, the duration and amount of payments cannot be changed. The only thing we can do with the DRO is to affect *who* receives those payments.

1 See Family Law Newsletter articles in April, June and October 2011, and April 2013.

2 This estimate assumes Wilma has a life expectancy of 22 years, Hal has a life expectancy of 17 years, that the benefit will increase with COLAs at 2%/year, and a discount rate of 2.8%/year (current 30-year Treasury rate).

3 After PERS benefits commence to a retiree, the benefits are increased each July by a "cost of living adjustment" (COLA) equal to the lesser of 2% or the Consumer Price Index increase for the previous year. For purposes of simplicity in explaining the example of Hal and Wilma Smith, I will disregard future COLAs, but be aware that COLAs exist and can be an important feature.

We can easily divide the marital share of the payments for as long as they are both living. Using the "time rule,"[4] Hal's share of the payments would be 50% x $2,700 x [18 years married ÷ 30 total years of service] = $810/month. And so Hal would be awarded $810/month, or 30% of Wilma's payments, and Wilma would keep the other $1,890/month, or 70% (which is her half of the marital share and the entire pre-marital share), for as long as they both live. So far so good.

2. What Happens on the First Death?

The payments will continue until the *second* death. So, for example, if Hal is the first to die, his $810/month continues to be paid *to someone* for as long as Wilma still lives. So the question is who should receive these payments after Hal dies? The DRO should anticipate this. There are two common choices.

A. Pay to the Decedent's Designated Beneficiary.

The DRO can allow Hal to designate a beneficiary to receive his $810/month for as long as Wilma still lives. The same is true in reverse for Wilma as to her $1,890/month share if she dies first. This approach makes it a perfectly equal division of the marital share. In other words, each party would receive or control his/her share until the second death, when all benefits stop. This is consistent with the Oregon law that pension benefits are "property." [5] One of the inherent incidents of property ownership is the right to determine who receives the property at the death of the owner.

Under PERS, there is no restriction on who can be a designated beneficiary. The beneficiary does not have to be a spouse, or even a child or relative, of the member or alternate payee. So if Hal dies first he could, for example, designate a charity or even a new "significant other" to receive his $810/month for as long as Wilma still lives. This freedom to designate non-spouse beneficiaries after death is unique to PERS compared to other types of pension plans.

B. Survivor Take All

More commonly in my experience, parties will agree that on the first death, the benefit being paid to the first to die will be paid over to the survivor, the so-called "survivor take all" approach. So if Hal dies first, then his $810/month is paid to Wilma which, along with her own $1,890/month, means that she will receive the entire $2,700/month for the rest of her life. And the same can be true in reverse - - if Wilma dies, her $1,890/month would be paid to Hal which, along with his $810/month, means he will receive the full $2,700/month for the rest of his life. There is some logic to this approach, because this is what would occur if the parties had stayed married. This approach preserves the "status quo." This approach continues the implicit agreement the parties made together when Wilma retired, i.e., that whoever lives the longest will receive both shares because he or she may need it.

But there are two additional issues with this approach that should be considered. The first is that, in our example, part of Wilma's share is pre-marital. So if she should die first, should Hal succeed to her entire $1,890 payment? Or should Hal receive only Wilma's $810/month marital share and should Wilma be allowed still to designate another beneficiary of her choice to receive the non-marital share ($1,080/month) for as long as Hal lives? PERS will allow split beneficiaries. This can issue can and should be addressed in the DRO.

The second issue is to recognize that the "survivor take all" approach may create a financial discrepancy, in that the reciprocal contingent survivor benefits will have different values. In our example, Wilma is younger, and female, and so she is more likely to survive Hal than Hal is likely to survive Wilma. Two Oregon cases[6] have recognized that a survivor benefit (i.e., the chance for one spouse to receive additional benefits following the death of the other spouse) is a separate benefit, independent of the member's lifetime benefit, which should be valued and taken into account in the division of assets. The present values of those reciprocal contingent survivor benefits can be determined actuarially. In our example, the chance that Hal will survive Wilma and receive her $810/month marital share (in addition to his own share) for the rest of his life thereafter is valued at about $11,000, whereas the chance that Wilma will survive Hal and receive his $810/month for the rest of her life is valued at about $57,000. So there is a differential of $46,000 (pre-tax value) in Wilma's favor that should be addressed, unless the parties choose to ignore it.

One way to address this differential, of course, is by offsetting the $46,000 against other assets in the divorce. But perhaps a better way is to make the adjustment by shifting an additional portion of Wilma's lifetime PERS benefit with a corresponding value over to Hal. Since the entire benefit is worth $725,000, then to adjust the lifetime benefit for this differential would mean that Hal

4 *Marriage of Richardson*, 307 Or. 307 (1989), *Kiser and Kiser*, 176 Or.App. 627 (2001).

5 ORS 107.105 (1)(f)(A) specifically says that pensions are "property" for divorce purposes.

6 Miller and Garren, 208 Or.App. 619 (2006); Forney and Forney, 239 Or.App. 406 (2010). These cases addressed only the contingent survivor benefit in favor of the member's spouse. But you should recognize that there is a reciprocal, offsetting contingent survivor benefit in favor of the member as to the spouse's share should the spouse die first. Our example with Hal and Wilma demonstrates how the contingent survivor benefits go both directions. In fact, under the facts given, the contingent survivor benefit in favor of Wilma is more valuable than Hal's contingent survivor benefit since he is older and not as likely to survive her.

should receive an extra percentage of the lifetime benefit under this formula: 50% x ($46,000 ÷ $725,000) = 3.2%. So Hal would receive 30% + 3.2% = 33.2% of the joint lifetime benefit. That would compensate Hal for the greater likelihood that Wilma will survive him and receive his $810/month marital share for the rest of her life thereafter. Wilma would receive the remaining 66.8% of the joint lifetime benefit.

This solution assumes that Wilma retains the right to designate her own beneficiary for her $1,080/month pre-marital share if she dies first. In the alternative, Wilma could agree to allow Hal to receive her entire $1,890/month share if she dies first, which increases the value of Hal's contingent survivor benefit. Under these facts, the differential in the value of the reciprocal survivor benefits would be reduced to about $20,000. Thus, the extra percentage of joint lifetime payments that Hal should receive to equalize the division overall is lowered to 1.4%, so that Hal would 31.4% of the lifetime benefit and Wilma would retain the other 68.6% of the lifetime benefit.

3. Member to Keep the Benefit and Change Beneficiary.

ORS 238.465(2)(d) allows the Court, as part of a DRO, to expressly provide that a PERS retiree who had designated his or her spouse as the survivor beneficiary (Option 2, 2A, 3 or 3A), may change the beneficiary to someone else. This is helpful when the member will be keeping the PERS benefit entirely.

So in our example, if Hal had his own retirement benefit of equivalent marital value (e.g., a 401(k) account worth $435,000 which is equal to the value of the marital share of Wilma's PERS benefit), then the parties could agree to each keep their own retirement benefits as part of the settlement. And if Wilma would like someone else to take Hal's place as beneficiary (such as a new "significant other," or even a child of hers), then she could do so if the DRO so allows. In that event, PERS would adjust the monthly payments to reflect the life expectancy of the new beneficiary. If Wilma's new beneficiary is younger than Hal, then PERS would reduce the $2,700/month payment to reflect the fact that the payments may be paid longer after Wilma's death to the new beneficiary than if Hal remained as beneficiary.

Likewise, if Wilma wanted to increase her monthly payment, she could elect someone much older (e.g., her 90-year old mother if still living) to be her new beneficiary in place of Hal. And PERS would increase the monthly benefit to be very close to the amount that would be payable to her under Option 1. This is a clever technique to effectively accomplish a "pop up" for anyone who had elected Option 2 or 3, rather than Option 2A or 3A.

4. The "Pop Up" Option.

For members who elected Option 2A or 3A at retirement (rather than Option 2 or 3) with his or her spouse as beneficiary and then become divorced from that spouse, ORS 238.305(6) offers the opportunity for the member to "pop up" to an Option 1 single life benefit on divorce (but *not* on legal separation). Under the statute, the right to pop up is automatic unless expressly restricted by the DRO. So when representing the spouse of a member for whom you are wishing to preserve the survivor benefit, it is essential that the DRO expressly preclude the member from exercising the pop up.

In our example, for Wilma to "pop up" would mean that her benefit would increase from $2,700/month to $3,000/month. The pop up would also terminate the survivorship interest for Hal. This would mean that she is retaining the entire benefit worth $725,000. The marital share of that benefit is $725,000 x [18 years married ÷ 30 years total] = $435,000 in pre-tax dollars. Presumably, this amount would have to be offset by other assets awarded to Hal.

The pop up creates the risk that the member could die prematurely, in which case the entire PERS benefit terminates. So in the alternative, the parties could agree that member should keep the lifetime payments but *not* pop up and that the spouse retains the survivor benefit if the member dies early. For Wilma and Hal, this would mean that Wilma retains the $2,700/month payment (but does not pop up to $3,000/month) for her lifetime, and that if she dies before Hal then Hal receives the $2,700/month for the rest of his life thereafter. This approach reduces proportionately the value of what Wilma retains, and it means that Hal should be charged for the value to him of the contingent survivor benefit ($11,000 as stated above).

5. Differences for Option 3 or 3A.

The discussion thus far has assumed that the member, Wilma, elected a form of joint and 100% survivor benefit, which is Option 2 or 2A. All of the considerations discussed above apply equally if the member elected a joint and 50% survivor benefit, which is Option 3 or 3A. However, the math is a bit different.

So back to our illustration. Let's assume that Wilma elected Option 3A rather than 2A. Her payment now would be closer to $2,800/month rather than $2,700/month as under Option 2A.

Still, we can easily divide the benefits during the joint lifetime of the parties. The only change in the formula is the gross payment. Hal's share would be 50% x [18 years married ÷ 30 years total] x $2,800 = $840/month, which is still 30% of the total benefit.

However, there is a difference on what happens at each death. If Hal dies first, the $2,800/month continues

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The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

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Publication Deadlines

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as before, including Hal's $840/month share. So the DRO should address whether Hal's $840/month share will pass to his designated beneficiary or whether it will revert to Wilma. But if Wilma dies first, then the payments are reduced by 50% to $1,400/month. So in a "survivor take all" system, Wilma will receive $2,800/month if Hal dies first, but Hal will receive only $1,400/month if Wilma dies first. This is an inequity that occurs in dividing an Option 3 or 3A benefit that does not exist when dividing an Option 2 or 2A benefit.

This inequity could be evened out, again, by with a small adjustment to the percentage of the lifetime benefits awarded to Hal. Another approach to address this inequity is to provide that, if spouse dies before the member, then the spouse's share goes to an agreed neutral party (e.g., the common children of the parties) rather than reverting to the member. So in our example if Hal dies first, his $840/month would go to their children rather than Wilma, for as long as Wilma lives thereafter. Wilma would still receive her remaining $1,960/month. And if Wilma dies first rather than Hal, then Hal would still receive the full 50% survivor benefit of $1,400/month. This is not a mathematically perfect solution, but it closes the gap somewhat and perhaps it is "close enough."

Conclusion

Division of PERS benefits after retirement is complicated. But creative opportunities exist for the parties to apportion the lifetime and survivor benefits, and even to alter the benefit form, in a manner that best suits the needs of both parties. There is great flexibility in how PERS benefits in pay status can be divided. Each divorce case is unique, and so the manner in which PERS benefits are divided should take into account the ages of the parties, their health outlook, their short-term and long-term needs, and the extent of other resources available to each party in retirement.

PERS benefits in retirement typically have a present value in the hundreds of thousands of dollars, and often more than $1 million. So it can be well worth a little extra effort and time to pause, study, and carefully evaluate the options available to the parties in dividing PERS benefits in retirement, to craft the best "win-win" solution for the parties.

—

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Errata

In the December 2017 Issue Terry A. Donahe's name was misspelled. The editor apologizes and corrects that spelling – it should be Terry A. Donahe. His article was Finanical Mistakes Divorcees Make by Terry A. Donahe and Jim Corbeau

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Writing and Submitting the Military Pension Division Order: Ten Tips (Part 1)

By Mark E. Sullivan

Getting a military pension division order honored by the retired pay center isn't easy. What does the order need to say? Is there "magic language" which must be included? Where do you send the order? Who does the processing? This two-part article contains twelve tips for the practitioner on how to get the job done seamlessly.

Tip #1 – Where Do I Start?

Retired pay orders for the Army, Navy, Air Force, Marine Corps, as well as the National Guard and Reserves, are processed by the Defense Finance and Accounting Service (DFAS), located in Cleveland, Ohio. DFAS has numerous lawyers and paralegals reviewing the many decrees subpoenas and court orders which arrive there every day. There is a substantial rejection rate.

Pension orders for members of the U.S. Coast Guard and Coast Guard Reserve are sent to the USCG Pay and Personnel Center (www.dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-Human-Resources-CG-1/Pay-and-Personnel-Center-PPC/) located in Topeka, Kansas. Orders for the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration are also serviced by the Coast Guard PPC.

The two basic issues in the division of retirement benefits are "pension share" and the survivor annuity. These tips tell how to write and get approved an order for division of military retired pay as property, and how to obtain coverage under the Survivor Benefit Plan. The title "retired pay center" will be used to refer to the above two offices which process applications for a division of uniformed services retired pay under USFSPA, the Uniformed Services Former Spouses' Protection Act.[7] Note that USFSPA refers to the retired pay center as the "designated agent."[8]

Tip #2 – Know Your Resources.

Read closely the provisions of 10 U.S.C. 1408 to understand what the law requires for military pension division. The SBP (Survivor Benefit Plan) statute is found at 10 U.S.C. 1447 *et. seq.*

DFAS has a pension division implementing regulation, the DoDFMR (Department of Defense Financial Management Regulation).[9] The Coast Guard follows DFAS guidance and there is a useful USCG pamphlet, "FSPA and SBP, 8th Edition."

The DFAS website is www.dfas.mil, and the fact sheets and application forms needed are at the "Retired Military and Annuitants" tab. At the end of Chapter 29 of Vol. 7b, DoDFMR, you'll find two sample military pension orders (Figures 29-1 and 29-2). The practitioner can import that language into an order for pension division. Read this order closely. If you vary from the language recommended here, you'll probably have your pension order rejected. Don't make the mistake of thinking that you can write it up better than the folks at DFAS who are going to be processing the order; you probably can't. And if your order is rejected, you'll have to explain to your client why the payments are still not flowing, or the legal bill keeps going up, or you still have not finished with his or her case, although you're "trying really hard" to do so!

Note that there are two significant omissions in the sample order. First, it is silent on SBP, perhaps because the sample order was prepared by the Garnishment Operations office of DFAS in Cleveland, Ohio; Retired and Annuitant Pay is located at the DFAS office in Indianapolis, and this includes the election of SBP by a member or retiree. The second omission is indemnification language in the event of an election of disability pay that reduces disposable retired pay. This omission is due to the fact that DFAS is not responsible for reimbursements due to disability pay reductions. That is the responsibility of the retiree. Thus it is not something that a DFAS model order needs to contain, but it is something which the attorney for the FS

7 10 U.S.C. § 1408.

8 10 U.S.C. § 1408 (b)(1)(A).

9 Dep't of Defense Financial Management Regulation, DoD 7000.14-R, "Military Pay Policies and Procedures–Retired Pay." Vol. 7b, Chapter 29, "Former Spouse Payments from Retired Pay" (June 2017) contains full details about USFSPA payments from retired pay for the Army, Navy Air Force and Marine Corps retirees. Referred to hereafter as DoDFMR, the Regulation can be accessed at http://comptroller.defense.gov/fmr.

certainly needs to consider. A better order, addressing both of these issues, is referenced at Tip #12 below.

Be sure to include the Social Security Number (SSN) of the servicemember (SM) or retiree in all correspondence and phone calls with the retired pay center. Providing this will ensure a more rapid response. Without the SSN, documents will be rejected and inquiries will be unanswered.

Tip #3 – Use the Right Document.

A separation agreement or property settlement, standing alone, is not the way to accomplish military pension division when the nonmilitary spouse wants to receive direct pension payments from the retired pay center. USFSPA only allows direct pension payments pursuant to a "final decree of divorce, dissolution, annulment, or legal separation issued by a court" or a property settlement that is ratified or approved by the court and issued incident to such a final decree.[10] You can either:

- Prepare a separate military pension division order, judgment, or decree to submit to the court at the appropriate time, entered incident to the divorce, such as when the divorce occurs, or when the hearing on property division takes place.
- In the alternative, prepare a separation agreement or property settlement which can then be incorporated or merged into the decree of dissolution or divorce.

Tip #4 – Does the Court Have Jurisdiction?

A pension division order can only be used for direct payments if a unique jurisdictional test is met. Military pension division is allowed only when the retiree/military member:

- is domiciled in the state in which the suit for the divorce or property division occurs; or
- resides in the state in which the lawsuit occurs (other than because of military assignment); or
- consents to the jurisdiction of the court in which the lawsuit occurs.[11]

The order must state the jurisdictional basis for dividing military retired pay.[12] For more detailed information on these jurisdictional tests, see the Silent Partner info-letter, *Military Pension Division: Scouting the Terrain*, found at www.nclamp.gov > For Lawyers, the website of the North Carolina State Bar's military committee, or at www.americanbar.org > Family Law Section > Military Committee, the website of the military committee of the ABA Section of Family Law. Also useful is the Silent Partner, "Military Pension Division: Guidance for Lawyers."

Tip #5 – Can You Get Direct Payments from the Retired Pay Center?

In addition, in property division cases involving the retired pay center's division of military retired pay incident to a divorce or separation, the parties must be married for at least 10 years during which time the military member performed at least 10 years of creditable military service.[13] Without this, the retired pay center cannot honor an application for the direct payment of any court-ordered division of retired military pay as property. The pension is still divisible, but the former spouse must look to the retiree for payments, not the retired pay center.

The Servicemembers Civil Relief Act (SCRA)[14] offers protection for military members who are on active duty at the time of the divorce. USFSPA requires a statement in the pension division order for military pension division that the military member's rights pursuant to the SCRA have been observed.[15] Although the SCRA does not apply in cases where the member is retired or is not on active duty at the time the decree was entered, USFSPA does not make that distinction; it requires such a statement in all cases.

The pension order or divorce decree may be submitted at any time after it is entered.[16] One need not wait until the SM has already applied for retirement or is in pay status. If the SM is not yet in pay status when the order is tendered to the retired pay center, a conditional approval will be made, subject to final approval at the time the individual actually starts to receive retired pay.[17]

At the time of final approval, the retired pay center will notify the SM that payments will start not later than 90 days after the service date of the approved application or the start of retired pay, whichever is later.[18] The former spouse (FS) also gets an approval notice.[19] When the court order divides military retired pay as property, no more than 50% of disposable retired pay (DRP) may be deducted.[20] The retiree remains liable for any amount still owing.[21] In cases where there is an application for the direct payment of court-ordered division of military retired pay and a

10 10 U.S.C. § 1408(a)(2).

11 10 U.S.C. § 1408(c)(4).

12 DoDFMR § 290605.

13 10 U.S.C. § 1408(d)(2).

14 50 U.S.C. § 3901 *et seq.*

15 10 U.S.C. § 1408(b)(1)(D).

16 DoDFMR § 290404.

17 DoDFMR § 290405.

18 10 U.S.C. § 1408(d)(1).

19 DoDFMR § 290501.

20 The award is construed as dividing "disposable retired pay" regardless of the language used. DoDFMR § 290601.D.

21 10 U.S.C. § 1408(e)(6).

garnishment issued pursuant to 42 U.S.C.§ 659 (child or spousal support), the retired pay center may deduct up to 65% of the military member's disposable earnings.[22]

Tip #6 – Use the Right Language.

Even if it were incorporated into a court order or a divorce decree, the separation agreement or property settlement must contain all the terms required for court orders to be honored by the retired pay center. You should state the following:

a. The names and addresses of the parties, as well as their SSN's (although the latter identifier may be omitted if that is required by state law, local rules or prudent practice, since the application document, DD Form 2293,[23] requires the SSN);

b. The years of marriage and of military service;

c. The military member's grade or rank;

d. A statement that the SCRA rights of the member have been observed;

e. Jurisdictional findings (domicile, consent, or residence) under 10 U.S.C. 1408 (c)(4);

f. A statement that the FS will be paid at his/her address as shown therein; and

g. A statement as to what the retired pay center will pay the spouse (see "Know What You Want" below).

Payments are made once a month, starting no later than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later.[24] The payments end at the death of the retiree or spouse, whichever occurs first.[25] Payments are prospective only; no arrears are paid through the retired pay center.[26] The USFSPA does not provide for garnishment of payments missed prior to the approval of the application by the retired pay center.

Tip #7 – Know the "Frozen Benefit Rule"

Sections 641 of the National Defense Authorization Act (NDAA) for 2017 and 624 of the NDAA for 2018 require that only a shrunken portion of the retiree's military pension may be divided with the FS. This is known as the "Frozen Benefit Rule." The portion of the retiree's actual retired pay which is subject to division is a hypothetical amount based on the assumed retirement of the SM on the day of divorce. This is invariably a smaller amount than the FS's share of the actual pension, sometimes as much as 35-40% lower. The pension order must contain these two data points as of the divorce date: a) the member's years of creditable service (or, for members of the Guard or Reserves, his or her total retirement points; and b) the member's "High-3" pay (i.e., the average of the highest 36 months of compensation, stated as a monthly average amount). The Rule applies whenever the divorce is after December 23, 2016 and the member - at the time of divorce - is not receiving retired pay. Be sure to advise your client about this and to read the two Silent Partner infoletters on the Frozen Benefit Rule.

(The second part of this article covers the types of clauses which the retired pay center will accept, an overview of the Survivor Benefit Plan, how to serve the order on the retired pay center, a checklist for division of the military pension, and where to find a sample order to use in drafting the pension division decree.)

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of The Military Divorce Handbook (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

22 DoDFMR § 290901(b).

23 DoDFMR § 290401.

24 10 U.S.C. § 1408(d)(1).

25 10 U.S.C. § 1408(d)(4).

26 DoDFMR § 290304.

CASENOTES

[February 2018]
Edition, OSB Family Law Newsletter

Cases decided December 1, 2017 – January 31, 2018

SUPREME COURT

No family law cases from Supreme Court for this period

COURT OF APPEALS

Property Division

In the Matter of the Marriage of Sherie Lynn VAN WINKEL, aka Sherie L. Van Winkel Petitioner-Appellant, and Andrew Louie VAN WINKEL, aka Andrew L. Van Winkel, Respondent-Respondent, 289 Or App 805 (2018)

http://www.publications.ojd.state.or.us/docs/A160074.pdf

Lane County Circuit Court 151500631; A160074 Clara L. Rigmaiden, Judge

DeHoog, P. J.
Wife appeals from a general judgment dissolving the parties' marriage. She challenges the trial court's division of the marital property, contending that the court abused its discretion by awarding husband one-half of the equity in the home that she bought before the marriage.

Held: The trial court applied the correct methodology and the resulting award fell within the range of legally permissible outcomes. Therefore, the trial court did not abuse its discretion. Affirmed. COA 01.10.18

Note on Opinions Reviewed:

The Editor tries to include all the Family Law related decisions of the Oregon Appellate Courts in these Notes. Some cases do not have holdings that have precedent significance however they are included to insure none are missed.