DIVORCE IN THE TRENCHES

By Anna Goulet Zimmerman

Divorces in which one or both spouses are, or were, in the military present many obstacles that are often overlooked by divorce practitioners. The intent of this article is to address just a few of the most common issues frequently encountered in military divorces. In a world filled with acronyms and an overlap of federal and state laws, military divorces can be significantly different than what is encountered in most "civilian" cases and the potential minefields often seem endless.

THE BASICS OF MILITARY PAY AND BENEFITS:

When representing a client in a military divorce, one must know what benefits the military spouse is receiving and how these benefits might change following a divorce. Much of this information is available from the service member's Leave and Earnings Statement (LES) -- the equivalent of a military pay stub. The LES reflects not only earnings and deductions, but also such information as the service member's grade (rank) and years in service.

The LES will list the service member's base pay and any incentive or special pay (examples include hazardous duty incentive pay, aviation career incentive pay, or variable special pay for medical/dental officers), as well as non-taxable benefits such as the basic allowance for subsistence (BAS) and basic allowance for housing (BAH). BAS is a set figure for food expenses (2012 rates are $348.44 per month for enlisted military members and $239.96 per month for officers). The amount of the BAH varies by location and whether the service member has any dependents. The website for the Defense Travel Management Office of the Department of Defense includes links to the 2012 BAH allowances by zip code, rank, and dependent status, as well as a useful BAH calculator.[1] BAH "with dependents" is the same regardless of the number of dependents, so a military service member will receive the same BAH allowance with just a spouse and as with a spouse and multiple children. BAH is generally not received if the military member and his or her dependent(s) live in military housing (such housing is provided at no cost to the family).

A military member who pays child support will receive BAH at the "with dependents" rate, whether or not his or her minor child(ren) resides with that service member, unless "(A) the member is assigned to a housing facility under the jurisdiction of a uniformed service; or (B) the member is assigned to sea duty, and elects not to occupy assigned quarters for unaccompanied personnel; or unless the member is in a pay grade above E–3."[2] However, even a military member who is not authorized to receive full BAH at the "with dependents" rate under the foregoing provisions, can receive a differential BAH payment, the difference between BAH with dependents and BAH without dependents, provided the service member is paying child support.[3] As the differential BAH is capped at the amount of child support, practitioners should calculate this figure and plan accordingly to maximize the benefit the child(ren) will receive in cases where the child support might otherwise be less than the BAH differential.

BAS and BAH are cash benefits and, accordingly, should be included both on any Financial Affidavit and in "gross income" for the purposes of calculating child support.[4] If a military member receives in-kind benefits instead, such as living in rent-free military housing in lieu of BAH, the cash benefit might no longer fall within the definition of "gross income" under RSA 458-C:2, IV, but could instead be used to justify an upward deviation from the guideline child support amount pursuant to RSA 458-C:5.[5]

Please note that there may be other benefits that the service member may be receiving. This article examines the most common, but any additional benefits being received should be researched, considered, and applied when applicable.

MILITARY RETIREMENT BENEFITS

In most instances, once a military member has completed 20 years of active duty service, he or she is entitled to military retirement benefits. The details of the timelines for the different military branches can be found in Title 10 of the United States Code.[6] If the service member is active duty, these benefits can start immediately upon separation from the service after the required 20 years have been completed. These 20

years do *not* have to be earned consecutively and, accordingly, the possibility of becoming eligible for such benefits after the marriage ends should be considered even if the military spouse is not currently serving in the military. A copy of the military member's DD Form 214, entitled "Certificate of Release or Discharge from Active Duty" and received by active duty military members when they separate from service, can also be very helpful as it will list the total years, months, and days of active duty service, as well as the dates of entry and separation.

A similar system applies for retirement from a reserve component of the military or the National Guard, but the requirements are generally 20 qualifying years of service.[7] A qualifying year of service is most often defined as a year within which at least 50 retirement points are earned.[8] Once the 20 qualifying years are obtained, the military member is eligible to start receiving retirement benefits at age 60.[9] For National Guard members, their Current Annual Statement provides a summary of the points earned towards retirement, broken out by year, making calculating the marital portion to be divided in a divorce fairly straight forward. For reservists, the ARPC Form 249-2-E, entitled "Chronological Statement of Retirement Points," provides a similar summary of the military member's retirement points.

There are a variety of formulas which apply to calculate military retirement depending on factors such as when the service member first joined active duty service and whether the service member chose to receive a Career Status Bonus.[10] The website for the Office of the Secretary of Defense provides calculators that allow retirement benefits to be calculated based on a variety of different scenarios.[11] If the service member is already receiving retirement benefits, the member's Retiree Account Statement (RAS) will show the retired pay and benefits received. The statements can now be obtained by the military service member on-line from the military myPay website.[12]

Like many pensions, military retirement benefits end at death unless the service member elects a Uniformed Services Survivor Benefit Plan (SBP). A SBP election allows the surviving spouse (or former spouse) to continue to receive benefits, through an annuity, after the service member's death.[13] A SBP election can be changed, but only under limited circumstance, such as divorce.[14] A divorce decree should specify whether the SBP will be continued. If the former spouse is going to continue as a SBP beneficiary, a DD Form 2656-1[15], entitled "SBP Election Statement for Former Spouse," must be filed within one year of the divorce with the Retired Pay Office of the Defendant Finance and Accounting Service.[16] The SBP election is generally independent of the division of the military retirement itself, although the reduced benefits due to the SBP allowance could be considered in the equitable allocation of the retirement benefit.

DIVIDING A MILITARY RETIREMENT IN DIVORCE:

In many instances involving military families, the service member's military retirement is the single largest asset of the divorcing couple. How this asset has been treated in the context of a divorce in New Hampshire has changed significantly over the last 30 years.

In *Baker v. Baker*, the New Hampshire Supreme Court first addressed military retirement benefits, concluding that such benefits were *not* "property" to be divided in a divorce.[17] The *Baker* Court concluded that military retirement pay was not part of the marital estate as it lacked characteristics of property, such as "cash surrender value, loan value, redemption value, lump sum value and value realizable after death."[18] Although holding that military retirement pay could not be "allocated and distributed as part of a division of property," the *Baker* Court did find that retirement benefits "could be considered in making equitable support orders and property distributions."[19]

The New Hampshire Supreme Court revisited the issue of military retirement pay 10 years later in *Blanchard v. Blanchard*.[20] The *Blanchard* decision followed changes in both the federal and state law. Specifically, RSA 458:16-a, I, effective January 1, 1988, specified that, in a divorce proceeding, "[p]roperty shall include all tangible and intangible property … Intangible property includes, but is not limited to, employment benefits, vested and non-vested pension or other retirement benefits…."[21] The enactment of RSA 258:16-a was preceded by a change in the federal law allowing for military retirement to be considered property in a divorce proceeding. The Uniformed Services Former Spouses' Protection Act (USFSPA)[22] was enacted on September 8, 1982, and effective retroactively to June 25, 1981.[23] With the enactment of the USFSPA, state courts were authorized to "treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse, in accordance with the law of the jurisdiction of such court."[24]

In looking at state law, the *Blanchard* Court found that the language of RSA 458:16-a "is unambiguous and plainly includes military retired pay."[25] In considering federal law, the *Blanchard* Court found that, through the USFSPA, "Congress gave back to the States the power to decide whether military retired pay is divisible as property in a divorce action."[26] Thus, the *Blanchard* Court concluded that "military retired pay is divisible as property in New Hampshire divorce actions."[27]

The *Blanchard* Court gave some guidance as to how military retirement benefits might be divided by equating military retirement to pensions. Specifically, in looking at *Hodgins v. Hodgins*, the

Blanchard Court noted that, although the nature of a pension can make valuation impossible in some cases, "in such cases, where it is nevertheless clear that the pension in question has some significant value, the problem of valuation may be avoided, and the risk of uncertainly evenly placed upon the parties, by a decree providing 'that upon maturity of the pension rights the recipient pay a portion of each payment received to his or her former spouse.'"[28]

Most family law practitioners are familiar with the *Hodgins* formula, dividing a pension plan based on the amounts accrued between the date of marriage and the filing of the petition for divorce or legal separation, a formula which has become so common it has been incorporated into the model forms for the family divisions of the circuit courts.[29] Unfortunately, unlike most pensions, military retirement cannot always be divided by order of a state court.

A Military Pension Division Order (similar in format to the Qualified Domestic Relations Orders that most divorce practitioners are familiar with) can be issued dividing a service member's military retirement, but the Defense Finance and Accounting Service (DFAS) will not issue payment directly to the non-military spouse unless the "10/10/10 rule" has been satisfied.[30] Under the 10/10/10 rule, the parties must have been married for 10 or more years, and 10 years of the marriage must have overlapped 10 years of creditable service.[31] This often leads to confusion by the parties, wherein one or both believe that the non-military spouse is not entitled to a share of the military retirement. This rule, however, goes to the method of payment, not the entitlement.

Assuming the 10/10/10 rule is satisfied, once a Military Pension Division Order has been submitted and approved by the Court, a certified copy must be forwarded to the appropriate Uniformed Services designated agent[32] with a DD Form 2293[33], entitled "Application for Former Spouse Payments from Retired Pay." The DD Form 2293 is also the form used for requesting direct payments of alimony or child support from retired pay. Once processed, payments will be made directly to the non-military spouse and each party will be issued an IRS Form 1099-R for the retirement benefits received during each tax year.

For those who do not meet the 10/10/10 rule, an order can still be issued dividing the retirement benefit, but the military spouse will need to make the monthly payments directly to his or her former spouse. For some couples, this is more hassle than it is worth – especially when benefits will not commence for several years and the couple has no other reason (such as children) to maintain an ongoing relationship. In these instances, the approximate value of the marital share of the retirement could be calculated and the parties could agree to an offset against another asset. For divorcing couples where only a few years of marriage overlap, this is often an attractive option as it allows the parties to part ways and avoid concerns about receiving small monthly payments over time. In electing this method, practitioners should remember that the expected benefit to be received over time needs to be reduced to a net present value. For the practitioner hoping to get a general idea of this value, one of the many reverse annuity calculators on the web can be useful. For a more exact figure, contact a certified public accountant who can factor in and include future cost of living increases and other variables.

If, by agreement or order, the parties do find themselves dividing the military retirement by way of payments from the retired military member to the former spouse, the Decree of Divorce will need to address how the tax consequences of this division are going to be handled. Since the military spouse will receive an IRS Form 1099-R for the full amount of the military pension payments, the military spouse will incur the tax burden on the full amount of the retirement received although only his or her portion was retained, unless this division is properly addressed. One option is for the military spouse to deduct the estimated income taxes from the portion to be paid to the former spouse. The one problem with this solution is that, if the non-military spouse is in a lower tax bracket, taxes are paid at a higher

rate than is necessary. Another option is to have the military spouse issue an IRS Form 1099 to the recipient spouse for the sums paid. Yet another possibility is to have the payments treated as alimony for tax purposes so they are includible in the gross income of the recipient spouse and deductible by the military spouse. Such a provision should include clear language regarding the purpose, along the lines of: *"Such alimony designation is solely for the purposes of allocating the tax liabilities of the military retirement received by each party."*

Regardless of how the parties decide to effectuate the proper allocation of taxes, language should be included in the decree or stipulation that explains the intent and allows for any necessary modifications to comply with IRS regulations. For example, after specifying the amount of the retirement to which the recipient spouse is entitled, the parties could use the following language:

> As Spouse 1 cannot be paid her share of the military retirement directly from the Defense Finance and Accounting Services office under current federal law, Spouse 2 shall pay directly to Spouse 1 her share of Spouse 2's military retirement. To properly allocate the income tax liability owed by each party. . . . [insert specifics of how parties intend to address]. In the alternative, the parties shall work together with an accountant to achieve the parties' intent of Spouse 1 receiving, and paying taxes on, her share of the Spouse 2's military retirement. Both parties shall cooperate in signing any additional documents or orders necessary to effectuate the intent of this provision.

It is important that the foregoing issue regarding taxes be addressed not only when the parties are in agreement, but in any final hearing as well. Orders are commonly issued dividing military retirement pursuant to the *Hodgins* formula, leaving the parties to determine how taxes and future payments are to be dealt with if the 10/10/10 rule is not satisfied. Be specific in your proposed orders and explain to the Court why the requested relief is important. Or, better yet, reach an agreement on the issue of how the military retirement will be handled and submit a partial stipulation addressing this issue.

HEALTH INSURANCE – CONTINUING TRICARE

Military medical insurance, known as TriCare, is available to military members and their dependents. The standard TriCare coverage for active duty military members can be upgraded to TriCare Prime for $260.00 per year for an individual and $520.00 per year per family.[34] There are also several TriCare options for retirees.[35]

The 20/20/20 rule is used to determine whether a former spouse is eligible to continue to receive TriCare following a divorce. Like the 10/10/10 rule, for the 20/20/20 rule to be satisfied the parties must have been married for 20 or more years, and 20 years of the marriage must have overlapped 20 years of creditable service.[36] If the rule is satisfied, a former spouse is eligible to continue to receive TriCare as long as the former spouse does not remarry and has no coverage under an employer-sponsored health plan.[37] If a former spouse meets the first two requirements of the 20/20/20 rule, but only has 15 years of active duty service that overlapped the marriage, then the former spouse is eligible to continue coverage under TriCare for one year.[38] The coverage under the 20/20/15 rule does end if the former spouse remarries or has coverage pursuant to an employer-sponsored health plan.[39]

Following the divorce, the former spouse eligible to retain TriCare coverage will need to enroll in the Defense Enrollment Eligibility Reporting System (DEERS) under his or her own social security number – having been enrolled under the military member's social security number during the marriage.

HEALTH INSURANCE – WHAT ABOUT COBRA?

Similarly to the right to extend benefits under a group health plan pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA)[40], former military spouses who don't meet the 20/20/20 rule, or after a year of coverage under the 20/20/15 rule, can continue coverage through the Continued Health Care Benefit Program (CHCBP).[41] This coverage, at $1,065.00 per quarter for individuals,[42] is more expensive then TriCare under the 20/20/20 and 20/20/15 rules, but can be an affordable option when continued coverage is needed. Generally, this coverage continues for 36 months, but this may be extended for certain former spouses who are receiving either a portion of the service member's retirement or an annuity based on the service member's retirement, or who are otherwise entitled by order, agreed or otherwise, to such retirement or annuity.[43]

As with all things military, there is a form to be filed to continue coverage under the CHCBP. The former spouse must submit a completed a DD Form 2837[44], entitled "Continued Health Care Benefit Program," along with the documents outlined in this form, within 60 days of when eligibility for coverage under the military health system ends (typically this is going to be the date the divorce is final).

ALIMONY AND VA BENEFITS

The New Hampshire Supreme Court issued an order on May 11, 2012, in *Brownell v. Brownell*, which addressed the issue of veterans' disability benefits in awarding, and enforcing an award of, alimony. The petitioner, Ronald Brownell, argued that the trial court erred in considering his federal veterans' disability benefits as income for alimony purposes. In this case, the petitioner received approximately $2,578 in monthly federal veterans' disability benefits as a result of suffering from service-connected post-traumatic stress disorder.

In evaluating alimony, the Court looked at the criteria of RSA 458:19, including subsection IV(c) which specifies that, in determining the amounts and source of income, "[t]he court may consider veterans' disability benefits collected by either or both parties to the extent permitted by federal law." The question then was whether 38 U.S.C. § 5301(a)(1)[45] precluded the consideration of veterans' benefits as income for alimony purposes. The Court ultimately found that veterans' benefits may be considered as income in awarding spousal support, looking at other jurisdictions that reached the same result and at the United States Supreme Court case of *Rose v. Rose*.[46] In the *Rose* case, the question before the Court was whether a veteran could be held in contempt for failing to pay child support when his veterans' benefits provided the only real means of such payment. The *Rose* Court answered this question by holding that federal law "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support."[47] In *Brownell*, the New Hampshire Supreme Court adopted the findings of other courts that "have used 'the logic of Rose' to hold that 'a state court is clearly free to consider post-dissolution disability income and order a disabled veteran to pay spousal support even where disability benefits will be used to make such payments.'"[48] Thus, the Court found compelling the holdings by other jurisdictions that "the anti-attachment provisions of section 5301(a)(1) do not shield a veteran's benefits from being considered in an alimony or maintenance proceeding because a spouse seeking maintenance is not a 'creditor' under the statute but is instead seeking family support."[49]

The result of *Brownell* is that it is now clear that, in New Hampshire, a former service member can no longer attempt to claim that his or her veterans' disability benefits cannot be considered in setting alimony (as well as child support) or in seeking to compel the payment thereof.

CONCLUSION

In writing this article it often felt as though, for every statement made, there are a multitude of additional issues that should be considered. I have not even touched here on the Servicemembers Civil Relief Act,[50] which must be reviewed and complied with when one of the parties is entitled to the Act's protection; nor the newly passed HB 1419, codified as RSA 458-E, which was effective July 13, 2012, and sets out certain rights and procedures pertaining to military members in family law matters. Moreover, once all the legal hurdles are addressed by counsel, some of the simplest tasks, like enrolling in the DEERS system, can be daunting to a military spouse who has not before acted independently in the military realm. Often a local base has services that can be used for guidance; but, the former spouse is often unaware or unfamiliar with these resources. When there is any doubt on how to proceed, consulting an attorney experienced in dealing with military issues and who is able help identify the various issues and their implications can often save all the parties a great deal of time, money, and frustration arising from unintended future consequences.

ENDNOTES

1. http://www.defensetravel.dod.mil/site/bah.cfm
2. 37 U.S.C. §403(m)(1)
3. 37 U.S.C. §403(m)(2)
4. RSA 458-C:2, IV defines "Gross income" for the purposes of calculating child support as "all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs (except public assistance programs, including aid to families with dependent children, aid to the permanently and totally disabled, supplemental security income, food stamps, and general assistance received from a county or town), including, but not limited to, workers' compensation, veterans' benefits, unemployment benefits, and disability benefits...."

5. *Clark v. Clark*, 154 N.H. 420, 424-425 (2006) (leaving "the inclusion of in-kind benefits to the discretion of the trial court under RSA 458-C:5").

6. For retirement criteria for each specific branch of service see 10 U.S.C. §§6321-6328 (Army), 10 U.S.C. §§5001-7921 (Navy and Marine), and 10 U.S.C. §§8901-8926 (Air Force).

7. 10 U.S.C. §12731.

8. See 10 U.S.C. §12732 for exceptions and details on how qualifying points are earned.

9. 10 U.S.C. §12731(f).

10. 10 U.S.C. §1401, *et seq.*

11. http://militarypay.defense.gov/retirement/calc/index.html

12. https://mypay.dfas.mil

13. 10 U.S.C. §1447, *et seq.*

14. 10 U.S.C. §§1448 and 1450

15. http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656-1.pdf

16. Defense Finance and Accounting Service, U.S. Military Retirement Pay, P.O. Box 7130, London, KY 40742-7130, Phone: 1-800-321-1080.

17. *Baker v. Baker*, 120 N.H. 645, 648 (1980).

18. *Id.*

19. *Id.* (citations omitted).

20. *Blanchard v. Blanchard*, 133 N.H. 427 (1990).

21. *Id.* at 430.

22. 10 U.S.C. §1408.

23. Pub. L. 97-252, title X, §1002(a), September 8, 1982.

24. 10 U.S.C. §1408(c)(1).

25. *Id.* at 431.

26. *Blanchard*, 133 N.H. at 429.

27. *Id.*

28. *Id.,* quoting *Hodgins v. Hodgins*, 126 N.H. 711, 715-716 (1985).

29. http://www.courts.state.nh.us/forms/nhjb-2071-fs.pdf.

30. 10 U.S.C. §1408(d)(2).

31. 10 U.S.C. §1408(d)(2).

32. For the Army, Navy, Air Force and Marines, mail or fax to: Defense Finance and Accounting Service DFAS-HGA/CL, Assistance General Counsel of Garnishment Operations, P.O. Box 998002, Cleveland, Ohio 44199-8002, Fax: 877-622-5930. For the Coast Guard, mail or fax to: Commanding Office (1GL), United States coast Guard, Personnel service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591, Fax: 785-339-3788.

33. http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2293.pdf.

34. http://www.tricare.mil/mybenefit/home/Costs/HealthPlanCosts/TRICAREPrimeOptions/EnrollmentFees?

35. http://www.tricare.mil/mybenefit/home/LifeEvents/Retirement.

36. 10 U.S.C. §1072(2)(F), but see also 10 U.S.C. §1072(2)(G) for divorces occurring before April 1, 1985.

37. *Id.*, see also, generally, 10 U.S.C. 1071 *et seq.*

38. 10 U.S.C. §1072(2)(H)

39. *Id.*

40. 10 U.S.C. §1161 *et seq.*

41. 10 U.S.C. §1087a

42. http://www.tricare.mil/mybenefit/home/overview/SpecialPrograms/CHCBP.

43. 10 U.S.C. §1078a(g); However, under subsection 4, coverage "shall continue for such period as the former spouse may request" provided the former spouse is "a former spouse of a member or former member (other than a former spouse whose marriage was dissolved after the separation of the member from the service unless such separation was by retirement) - (i) who has not remarried before age 55 after the marriage to the employee, former employee, or annuitant was dissolved; (ii) who was enrolled in an approved health benefits plan under this chapter as a family member at any time during the 18-month period before the date of the divorce, dissolution, or annulment; and (iii) (I) who is receiving any portion of the retired or retainer pay of the member or former member or an annuity based on the retired or retainer pay of the member; or (II) for whom a court order (as defined in section 1408(a)(2) of this title) has been issued for payment of any portion of the retired or retainer pay or for whom a court order (as defined in section 147(13) of this title) or a written agreement (whether voluntary or pursuant to a court order) provides for an election by the member or former member to provide an annuity to the former spouse."

44. http://tricare.mil/mybenefit/Download/Forms/CHCBP_Enrollment_Form.pdf

45. 38 U.S.C. § 5301(a)(1) provides that "Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity."

46. *Rose v. Rose*, 481 U .S. 619 (1987)

47. *Brownell v. Brownell, ___ N.H. ____ (2012), quoting Rose v. Rose*, 481 U.S. 619, 684 (1987)

48. *Brownell v. Brownell, ___ N.H. ____ (2012), quoting Marriage of Strong*, 8 P.3d 763, 770 (Mont. 2000)

49. *Brownell v. Brownell, ___ N.H. ____ (2012), quoting In re Marriage of Wojcik*, 838 N.E.2d 282, 300 (Ill. Ct. App. 2005)

50. 50 U.S.C. §501, *et seq.*

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