NFLR
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OFFSETTING PENSION VALUES

by Marvin Snyder

In a case where both husband and wife are employees and participants in defined benefit pension plans, it may be tempting to recognize that each will receive a pension, and then just call it a "wash" without valuations or qualified domestic relations orders. The concept of such "offsetting" of pensions is a terrible idea, as I hope to show in this article.

If the parties are employees of different employers, each in his or her separate pension plan, rarely would there be any correspondence between the two plans' benefit structures, plan conditions, details of payment and the like. Even when the two people work for the same employer and are in the same plan, their benefits and values will be different. The pension plan benefits will differ for each one by their individual service records and their salaries. The actuarial values will differ by age and sex.

In determining the present value of a pension benefit, the valuator must select methodology and actuarial assumptions. The "time rule" algorithm method has become fairly standardized, but there is a decision to be made as to which pension benefit to value: the accrued pension benefit for service to date, the benefit at some past date certain, or an estimated future benefit.

The source and accuracy of the pension benefit to be valued should be noticed. It is helpful if there is an official benefit statement issued by the plan, or a letter from a plan official giving benefit information. Sometimes all that is available is a computer printout that is not easily decipherable. The evaluator may have to make do with an educated assumption as to the pension benefit itself.

The actuarial assumptions of mortality (life expectancy) and the annual rate of interest for discounting strongly influence the mathematical value

(cont'd. on page 2)

IN THIS ISSUE:

Nevada Family Law Report

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OFFSETTING PENSION VALUES

cont'd. from page 1

in the end result. The most important test for such assumptions is the one of reasonableness. Is the mortality table utilized appropriate for the parties in the case? Is the interest rate available for long-term investments? Would some small or large deviation in the tables result in greater or less resulting values? Is a range of values more helpful than one specific value? The preparer of the pension analysis should be able to answer these questions (and counsel for the parties should think of these things to ask).

In any attempt to arrive at an equalization of benefits, these differences must be recognized. The generalization "he keeps his pension and she keeps her pension" will result in a disservice to one or both of them.

When one party is in a defined benefit pension plan and the other is a participant in a defined contribution plan (such as 401(k) or profit sharing), there is no direct way to compare them even if that was desired. However, an actuary can compute the present value of the benefit in a defined benefit pension plan for the person in that plan. Then that value can be compared to the account balance of the person in the individual account plan.

If both husband and wife have accounts in defined contribution plans, the items to look for include the degree of vesting, the variety of sub-accounts and investments, and whether or not there are any outstanding loans in the account. The date of the reported account balance in an individual account plan may influence the value being considered. If values are needed as of a date certain, such as date of marital separation or date of filing of the decree of divorce, the plan may or may not be able to provide figures as of an exact date.

The reported dollar amount in an account as of a reporting date may be misleading. There may be employer and/or employee contributions soon to be made, or already made but not posted to the account as of the date in question. There could be forfeitures arising from the termination of employment of non-fully vested individuals, where such forfeitures are reallocated among the remaining plan members. There could be loan repayments made but not yet recorded, or about to be made. Depending on the internal investments, the amounts in the account can vary so slightly from short time to short time as to not be worth the time to investigate. Alternatively, in any given matter, there could be a considerable swing in value to the advantage of one or the disadvantage to the other party in the divorce.

The value of a pension, in whatever form, should never be overlooked in a divorce, nor offhandedly dismissed as "offsetting."

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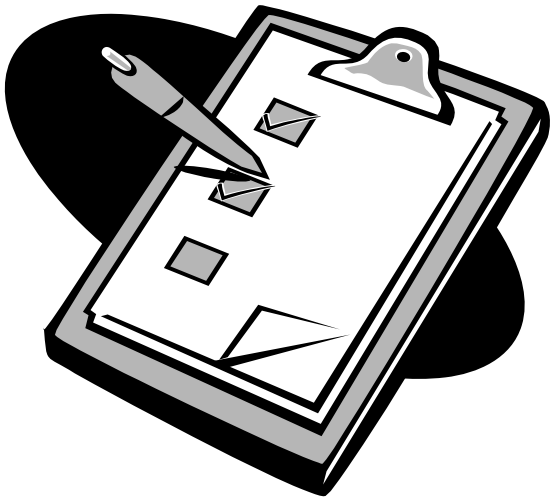
LIFESTYLE ANALYSIS PREPARATION:
Checklists for Success



By Melissa G. Attanasio, CDFA

Because the *Affidavit of Financial Condition* ("Financial Disclosure" in counties outside of Clark) **in divorce is the operative document, a thorough and professionally-prepared Lifestyle Analysis will augment your case, keep you one step ahead of motion practice, allow you to "aggressively settle," and will, by default, deposition-prepare your client.**

RULES OF THUMB for a defensible and accurate Lifestyle Analysis

1. More is better (documents).
2. Ask questions.
3. Ask questions again.
4. Make an inventory list.
5. Take detailed notes and make folders for each asset, liability and expense item (color coding is helpful—green asset, red liabilities, etc.).
6. Most important, ask the client: What period of time is most reflective of the marital standard?
7. DO NOT TRY THIS AT HOME. Never give a client a net worth statement and tell them to bring it back completed. You have no idea what they used for their analysis (facts and assumptions), what time frame they selected, if it's real or accurate, etc. This must be done in your office, or you must "train" them on the process to have a comfort level before you file the *Affidavit of Financial Condition*.

NECESSARY DOCUMENTS

1. Prior year-end summary or, marital living standard representative year-end summary of credit card and checking accounts (all of them) where the client(s) spend money.
2. Checking accounts (all of them).
3. Tax returns (minimum three previous years).
4. Credit reports (a ***must*** to verify liabilities, credit score, mistakes***, and*** any hidden issues).
5. Loan applications of loans taken out in last five years.
6. Invoices from contractors and any "big ticket" expense(s).
7. In general, anything and everything the client can produce to support their lifestyle expenses (more is better).

PRACTICE TIPS

1. Be consistent.
2. Do not rely on Quicken or Quick Books (which can be easily manipulated).
3. Always add a disclaimer if you are missing information or operating under any assumptions.
4. Get the CPA involved with the income section of the net worth statement (fax the "Income" page of the affidavit/net worth statement directly to the client's CPA and ask them to complete it. BE SURE to have a conference call with the CPA after they return it to you so you have working knowledge of their data.).

(cont'd. on page 4)

LIFESTYLE ANALYSIS - *cont'd. from Page 3*

5. ALLOCATE THE CASH ADVANCES— the $ is being spent. It's a process of elimination and a "bottom-up" exercise. Think of how you spend cash advances (the fancy coffees in the morning, three-martini lunches, tips for valet or other professionals, etc.) as a starting point. Working with the client to allocate the cash advances in various expense categories is an invaluable exercise should the case get to the deposition stage. You are already prepping them for accuracy and recall.
6. There are ***always*** "non-recurring items" which belong in the expense section as regularly occurring expenses, even if they are not monthly. (Cars purchased every 3-5 years; three kids to give Bar Mitzvahs/weddings, graduations, ongoing necessary repairs/home maintenance, etc.).
7. If working with a business owner or self-employed individual, speak to the CPA about how to allocate the "quasi-" business expenses. (some are always personal and nondeductible against the gross receipts of the business income).
8. Step back at each stage of the analysis and ask yourself if it makes sense.

✔ THE PROCESS: Reaching the goal to have sufficient records available at the first meeting and spending at least 2 hours with the initial lifestyle questions.

1. Send the initial "What to Bring to Your First Appointment" letter with the retainer agreement. Be sure to include lifestyle documents mentioned above.
2. At the first meeting, ask the broad-stroke question: Where do you spend money? (Where will your expenses show up? Checking account(s)? Credit cards? Credit union? Are you the primary or secondary cardholder on the account?)
3. If client comes without all necessary summaries and documents, offer to get on the Internet with them and download statements for bank accounts and credit cards.
4. Make three copies of all documents. One copy will be your working copy, where you will literally write the purpose and category directly next to the listed expense/vendor/payee. The other two copies will be for your exhibits/attachments for the net worth statement and one for your files.
5. Meet with client at regularly-scheduled intervals to go over interim progress.

✔ TRICKY CATEGORIES

1. **Cash Advances** (make client allocate all cash expenses). Walk them through a typical week of cash expenses so you can allocate accordingly.
2. **Superstores and Department Stores** (Wal-Mart, Costco, Kohls, Target). We are a different retail society than we used to be. For example, when at a superstore, ask the client what they typically place in their cart and why they normally go there. Do they buy clothing, groceries, computer accessories, appliances, gifts, etc.? Can they accurately estimate what percentage to allocate to each? I ask them to quantify it in percentages. For example: "In Wal-Mart, do you normally go to buy household supplies, clothes, groceries? Do you spend 33% in each?" Clients can recall this information when you ask them questions versus handing them an itemized expense list and telling them to complete it at home alone. It is much harder to hand them an affidavit and tell them to record their estimates of certain categories. The affidavit will almost always be wrong that way.
4. **The "Quasi-Business Expense."** Don't get caught with an improper allocation of personal vs. business expenses.
5. **Allocating Clothing Expenses.** From their credit card summaries, make a master list of the retail stores where they purchase clothes. Ask them to tell you who usually shops where. For example, when they shop with the kids, do they typically buy half for the kids, half for them?

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WHAT FINANCIAL EXPERTS EXPECT FROM ATTORNEYS

By Richard M. Teichner, CPA/ABV, CVA, CDFA ™

Numerous articles have been written for CPAs and other financial specialists rendering advice about what is expected of them when they provide litigation consulting services and expert witness testimony. Also, I have seen articles for attorneys on what they should consider in selecting an expert. However, I have not seen any articles about an expert's expectations of attorneys (although I cannot say for certain that no such articles exist).[1] Therefore, I wanted to at least express my views on what I believe financial experts and forensic accountants expect of litigators, including family law attorneys, of course (and what experts in other fields most likely expect as well). I have attempted to do just that in this article.

In the articles that I have seen directed at financial experts and forensic accountants, there have been some common themes. For example, for trial testimony, we are told that, besides needing to remain composed during the rigors of cross-examination, we are to be well prepared; have a supportable basis for our conclusions or opinions (cases such as *Daubert*[2] and *Kumho Tire Co.*[3]); be completely truthful; do not guess; maintain independence and objectivity— not be an advocate for the client; be clear and concise; use visual aids when possible; use analogies to explain complex concepts; frequently look at the trier(s) of fact when responding to questions; admit when we have made a mistake; try to anticipate opposing counsel's questions before trial; and pause before answering so that we can formulate our response and, when questions are coming from opposing counsel, our client's counsel can have time to object.

The discussion below probably does not contain anything that is especially new or revealing to an attorney whose practice includes litigation, but at least some of the points revisited may serve to heighten his/her awareness of what is already known from experience and study. Furthermore, probably as to most of these points, the attorney might want to use them to express what he/she expects of the expert. So, in situations where the roles could be reversed, the attorney might say to the expert, "Make sure that you_____," or "Make sure that you remind me to _____."

The expectations that I believe an expert has of an attorney are relatively simple and straightforward. Certainly, some of the expectations differ when the expert is engaged by the attorney as a consultant rather than as someone who is expected to testify. In either event, the expert does not welcome being contacted about a matter within only a few days before a conclusion or opinion is needed. Virtually all experts, at one time or another, have received an initial call from an attorney who says, "The trial is next week and I need you to testify" (although this has been thwarted in many jurisdictions), or "I need to designate an expert by noon tomorrow." Obviously, the lead time given to the expert depends on the nature and complexity of the case, but there must be enough leeway for the expert to be able to assess and analyze all pertinent documentation, and then arrive at a conclusion or opinion that is supportable and will withstand challenges. What if the attorney waits until nearly the last minute, and the circumstances are such that the expert is in fact able to arrive at a conclusion— which happens to be unfavorable to the case? The attorney may then first realize that the chances of "winning" the case are poor and, if so, the client has been done a great disservice.

In situations where the expert is going to testify, the attorney should not withhold any information that is relevant to any part of the case that could possibly affect the expert's conclusions. The more the expert knows about the entire case, the more reliable the work product will be and the better he or she will be prepared for any contingencies at deposition or

(cont'd. on page 6)

FINANCIAL EXPERTS
cont'd. from Page 5

trial. When the expert is engaged as a consultant, the attorney may not want to reveal certain aspects of the case, which is generally not an issue from the expert's perspective. However, the attorney must realize that the conclusions of that expert could very well be different (and more favorable) than from the conclusions of the expert who may later be designated as a witness, as he or she will undoubtedly have obtained more information from which to formulate conclusions and opinions.

Testifying experts need to become familiar with the evidentiary and procedural rules to which they will be subject. In non-federal cases, experts should be informed about the rules of the jurisdiction in which they will be testifying and to what extent, if any, the courts follow or parallel Federal Rules of Evidence and cases such as *Daubert* and *Kumho Tire Co.*, referred to above. (Some states may still follow the likes of *Frye.*[4]) Also, the expert needs to know what documents are discoverable (e.g., preliminary drafts of schedules or reports, e-mails, handwritten or electronically-produced notes) and what may be considered spoliation of evidence. See *Trigon Insurance Co. v. United States*.[5] Some other particulars that the expert needs to or should know are the cutoff date for discovery, opposing counsel's background and courtroom methods, the jury instructions relative to testimony, the make-up of the jury and how the judge normally runs his courtroom.

Of course the expert should take the initiative to ask the attorney or otherwise learn about many issues mentioned in the preceding paragraph. However, there are certain specifics and legal issues about which the expert will not be aware or that are best interpreted and imparted by the attorney. Thus, the attorney should ascertain that the expert is informed about these issues.

Also, as alluded to above, the attorney needs to keep the expert informed about all the aspects of the case that in any way could be germane to the expert's work product, opinions or testimony. Ongoing communication is very important. The attorney and the expert each need to let the other know the weak points as well as the strong points of the case. Strategizing together can benefit everyone. The attorney, however, must not lose sight of the fact that the opinions of the expert are his or her own, and that the expert is an advocate of such opinions and not an advocate for the litigant.

Allowing the expert to review and comment on an opposing expert's report is almost always essential. Also, whenever appropriate and possible, the expert should be asked to sit in on the opposing expert's (and often on other witnesses') testimony at deposition and at trial. When indicated, the attorney should seek the expert's assistance in formulating deposition and trial questions, interrogatories and requests for production of documents for the opposing parties and witnesses. Experts who testify expect the attorney to prepare them for trial, and this includes going over questions that will be asked on direct examination. Many of these questions should be prepared jointly by the attorney and expert.

Lastly, when you determine that a matter warrants having an expert (or consultant), please communicate the reasons for your decision or recommendation so that the client understands the importance of the expert's role in the case. With this understanding, given the expert's function, the client will be inclined to be more receptive to the need for the expert. Also, if the client recognizes the value of the expert's role, then the client will normally be more accepting of the fees charged by the expert. An important point in this regard is that an expert who is owed a considerable amount of unpaid fees may have to overcome the burden of being perceived as an advocate for the client or for the case. This expert may very well be subject to rigorous questioning by opposing counsel in an attempt to convince the trier of fact that the expert is not independent and cannot be objective, as the payment of his/her fees could depend on the outcome of the trial.

The bottom line is that attorneys and experts work most effectively together and best serve the client when each knows and is willing to regard the other's expectations.

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Footnotes:

[1] However, an article titled "Working with an Expert: The Seven Deadly Sins," April 12, 2002, by Gabrille Bonne, under Practice Center Search at *Law.com*, provides advice to attorneys as to what not to do when working with an expert.

[2] *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993).

[3] *Kumho Tire Co., Ltd. et al v. Patrick Carmichael*, et al, 119 S Ct 1167 (1999).

[4] *Frye v. United States*, 293F, 1013, 1014 (D.C.Cir 1923).

[5] *Trigon Insurance Co. v. United States*, 204 F.R.D. 277 (E.D Va. 2001) (the spoliation opinion).

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FACT OR WHACKED?

Myths and Mistakes in Military Divorces

By Mark Sullivan, Esq.

In too many military divorces, a client or lawyer makes a costly mistake. Often it's because the client is unaware of the options or the law, relies on rumors and myths, "barracks lawyers" and buddies provide well-meaning but erroneous information, the attorney is unaware of the rules for military retirement and its division, or the rules themselves are too complex, illogical and confusing. This article will help you sort out truth from "urban legends," the fact from the "*whacked*."

Half the Military Pension?

"It was not his fault," Mrs. Green explained when she brought her new husband, retired Army Master Sergeant Jake Green, to see the divorce lawyer. "He was very upset when he went through the divorce from his ex-wife, Jane. He was confused. He didn't have a lawyer and he didn't pay attention to what he was signing."

"You're right about that, ma'am," the new divorce attorney replied. "I've reviewed these divorce papers and it appears that he signed away half of his military pension to his ex-wife, even though he'd only been married to her for 10 of the 30 years he was in the Army. That's a huge problem, and he wasn't forced to do it– he did it willingly. Jane got way more than she should have."

FACT #1:

Unless the marriage lasts for the entire military career, you need to know about the "marital share."

MSG Jake Green didn't. He gave away half of his pension when he should have divided only the marital share of the pension. The marital share is that acquired during the marriage while in military service. It begins with the wedding or the start of military service, whichever comes later. It ends usually on the date of marital separation or divorce, depending on state law. In Jake's case, he gave away too much of the pension– 50% to his ex– rather than the correct percentage, which probably would have been closer to 16%. "It's all his lawyer's fault," shouted the new Mrs. Green. "He didn't know a thing about dividing military retirement pay!"

Survivor Benefit Plan Basics

"That's for sure," replied the new divorce lawyer. "It's obvious he didn't know anything, because that lawyer also missed out on the Survivor Benefit Plan. He should have written the agreement to award the SBP to Jane, the former Mrs. Green, but he completely overlooked it. It's left out. He probably wasn't even aware it was available."

FACT #2:

Ignorance of the SBP (Survivor Benefit Plan) can be costly.

Jake's divorce settlement should have specified who got the SBP. Ordinarily, this is awarded to the non-military spouse, or Jake's ex-wife, especially if she has been with him for a substantial part of the marriage. Occasionally the former spouse gives it up as a bargain against something else, like life insurance, so that the servicemember (SM) or retiree can retain it for a possible future spouse. SBP coverage means that the non-military spouse, if she survives the retiree, gets 55% of the selected base amount of the pension for the rest of her life. This was a huge benefit that Jane Green, Jake's ex-wife, didn't receive. Without the SBP, Jane's share of the pension stops when Jake dies. This is another costly mistake. "The biggest malpractice mistakes I've seen," says Mike McCarthy, a Phoenix retired attorney and retired Air Force Reserve brigadier general, "lie in the area of SBP. Either the attorney for the former spouse doesn't know about this survivor annuity, or there's only an agreement (instead of a court order), or else the order providing for SBP coverage is never sent to DFAS. Any of these errors is huge and costly."

Mistakes at the Start of the Case

Mistakes can be made at the start of the case. Let's say that John Doe, a senior master sergeant in the Air Force, is being sued for divorce and military pension division by Mary Doe, his wife. An error which Mary's lawyer might make is choosing where to sue John to get division of the military pension. Usually a lawyer will just include the pension and property division in the divorce lawsuit, suing where Mary happens to live. This can be a costly problem.

(cont'd. on page 8)

FACT OR WHACKED

cont'd. from page 7

FACT #3:

To be safe, sue the SM in the state of his legal residence.

To be sure you can get the pension divided, bring the lawsuit in the legal residence state, or "domicile," of the SM. The federal law that allows military pension division, The Uniformed Services Former Spouses' Protection Act (USFSPA), says that you can always obtain military retirement division in that state. Any other state is "iffy" since it may depend on whether or not the SM consents to the court's power to divide the pension. For more on that, see the next problem.

John's lawyer may fall prey to the reverse side of this rule. If the military pension rules of Mary's state aren't favorable, or if the military pension rules of John's home state will benefit him, John's lawyer should not consent to the jurisdiction of the court when Mary files for divorce. Not all state court rules on military pension division are the same. Several western states require that the SM begin making pension payments immediately to the former spouse or else suffer the accrual of interest on the unpaid award. A few states limit or bar the division of military pensions under certain circumstances. John might want to shop around.

FACT #4:

Think before you ink! Don't file an answer to the pension division claim unless you want your case in that court.

John and his lawyer need to decide whether to file an answer or response to Mary's claim for pension division. If they do, then they have probably consented to the court's dividing the pension. Only if John objects to pension division at or before the time he files his answer can he preserve this issue for trial in the courts of his legal residence. This can sometimes preserve the pension division for courts where the rules are more in John's favor, although it also can result in two cases in court, not just one, at the time of the divorce.

Time for a Brake?

The Servicemember's Civil Relief Act (SCRA) is a federal law that allows the SM to obtain a stay of proceedings, much like a continuance. This can stop or slow down the lawsuit for a while. John needs to ask for a stay under the SCRA if his military duties prevent his appearing in court or participating in the lawsuit.

FACT #5:

The SCRA can get a needed stay of proceedings for the SM who can't respond to a lawsuit; use it but don't abuse it.

John's lawyer needs to know how to request a stay. The initial stay requires a statement to the court showing how the SM's duties prevent his participation in the court case and when he will be available; also required is a statement from John's commanding officer that his military duties prevent his appearance and he cannot be given leave. Additional stays are available; when requesting one, be sure to provide clear and specific information about the negative impact that military service has on your ability to respond to the lawsuit. Judges don't like exaggerations. A SM who claims inability to appear in court when he's stationed at a nearby base and not "in the field" or deployed will likely face an uphill battle on his stay request.

SBP Deadlines

The problems for Mary Doe don't stop with *where to sue John*, her husband, for military pension division. If she obtains a court order for SBP coverage, she needs to know that there are deadlines for sending the order to DFAS (Defense Finance and Accounting Service).

FACT #6:

There are TWO SBP deadlines—know them.

One deadline applies if the SM or retiree submits the order; this is one year from the date of divorce. If, on the other hand, the spouse or former spouse submits the order for SBP coverage, then the deadline is one year from the date of that SBP order. This is done with a "deemed election" request letter. "Former spouse" coverage must be specified in the order; merely naming Mary as the SBP beneficiary is not enough. "The common malpractice mistake that I see," says John Camp, an attorney from Warner Robins, Georgia, "is failure to meet the one-year deadline for former spouse coverage with a deemed election letter. It can be disastrous if the retiree dies early; the former spouse is left with nothing."

More Deadlines

There are more deadlines than just those for SBP. One of the most important ones is that which covers military medical coverage for a former spouse. This coverage can mean tremendous savings for her or him, so long as everyone keeps their eyes on the clock and the calendar. Retiring early or proceeding too soon with the divorce can wipe out these benefits.

FACT #7:

Don't rush the divorce or retirement; 20-20-20 medical coverage is valuable.

If there is military service of at least 20 years, a marriage that has lasted at least 20 years, and an overlap of at least 20 years, then the former spouse is entitled to TRICARE and military medical treatment. Be sure that those deadlines are met, if possible. It doesn't cost John Doe anything for Mary's coverage, and it can save her a substantial amount. If he has some "alimony exposure," it can save him too!

Another deadline deals with direct pay from DFAS. Knowing if that has been met means Mary knows if she'll get her check every month from the source– DFAS– or whether she'll have to chase John around the nation, or the world, to get him to pay.

WHACKED Some people go ahead and get the divorce without paying any attention to whether there's 10 years of marriage during military service. Ordinarily the attorney doesn't pick up on the fact that a garnishment order for pension division, as property, will be "dead on arrival" at DFAS if there's no 10-10 overlap.

FACT #8:

Ten years of marriage and military overlap means garnishment.

The 10-10 rule specifies that DFAS will send a check to the former spouse by garnishment of the retiree's pension as property division. If there is a 10-10 overlap, then DFAS sends out two checks (and withholds the appropriate tax amount from each). Without 10-10 compliance, the former spouse must look to the retiree for direct payments. Note that 10-10 overlap is not necessary for child support or alimony garnishment.

WHACKED "My wife can't get a share of my pension – we haven't been married 10 years during my Navy service."

FACT #9:

There is no minimum number of years for divisibility of the military pension.

As mentioned earlier, the 10-10 rule deals with how payments are made. A 10-10 overlap of marriage and military service means that the payment will come from DFAS if you serve the court order there. Without a 10-10 overlap, payments come from the retiree. It has nothing to do with eligibility for a share of retired pay.

Wording Challenges:

WHACKED "We just need the court papers to state that I get my share of *all pension and retirement benefits available under federal law*."

FACT #10:

There is NO specific share set out in federal law for the spouse or former spouse.

Federal law only makes pension division available, under rules set out in state statutes. There is NO federal entitlement to anything, and a clause stating this is worse than worthless. It gives the spouse nothing.

WHACKED "We settled your case for 40% of John's gross military pension. Since DFAS sent the order back to us with a request for a *clarifying order*, we'll just re-write it to say 40% of his Disposable Retired Pay. I know they'll accept that."

FACT #11:

Disposable retired pay is often a lower amount than gross retired pay; know the difference!

While gross military retired pay means all entitlements for the retiree, DRP (Disposable Retired Pay) is a technical term which excludes medical retired pay, VA disability compensation, the SBP premium and Combat-Related Special Compensation. This change of wording could mean a loss of several hundred dollars or more. In a case which this author handled in Raleigh in 2006, the prior attorney's acceptance of DRP instead of gross pay in the clarifying order means that the former spouse's share went from $1300 a month down to only $300 a month. And there was nothing she could do about it!

WHACKED "I've done the calculations, Mrs. Reilly. You're entitled to 40% of Roger Reilly's military retired pay, which comes to $735 a month. He just retired. I have his current RAS (Retiree Account Statement) right here in front of me. So we'll just put $735 a month in the military pension division order."

FACT #12:

A set dollar amount order leaves all the Cost-Of-Living-Adjustments (COLAs) to the retiree.

Mrs. Reilly receives none of these annual adjustments for inflation. There are other approaches to pension division– percentage, formula and hypothetical clauses– which allow the sharing of COLAs between the parties.

"Who's In Charge Here?"

WHACKED "I can do this myself. I don't need a lawyer."

"My JAG officer can provide all the help that I need."

"I'll just use Sarah Smith, our family attorney– she'll know what to do."

FACT #13:

Military pension division is specialized work. Get a specialist to help you.

The specialist doesn't have to be your main lawyer for the divorce; the divorce lawyer can simply associate co-counsel to help with the military pieces of the divorce, like family support, pension division or SBP. Often there is a former JAG officer, a Guard or Reserve lawyer, or a retired JAG officer who can provide assistance on an "as needed" basis. Don't go it alone! JAG officers can be very useful, and the help is free, of course. But often they don't have the in-depth knowledge necessary for a serious case, they cannot go into court, and they usually have short-term assignments in legal assistance, yielding limited exposure and expertise. If you are going to use a military legal assistance attorney, ask him or her whether it would be a good idea to get some help from a civilian attorney, preferably one in the state where the divorce would occur. A list of such attorneys is available through the Military Committee of the American Bar Association's Family Law Section. Says Ft. Dix chief of claims Jackey Nichols:

> The saddest story is know about a client I'll call Helge Schmidt. After 25 years of marriage to a full colonel, she was awarded only $1,000 per month, for life, in a Texas divorce. Since Texas law does not provide for life-long alimony, she and her attorney thought she was getting a good deal. But the attorney didn't know beans about the military pension and benefits for a former spouse. There was no mention of retirement benefits in the decree. Now, many years later, she struggles with no health care, no retirement, and no cost-of-living increase in her monthly support.

WHACKED "Well, Mrs. Reilly, we finally got that agreement on military pension division. That finishes my job. Good luck with your divorce next month."

(cont'd. on page 10)

FACT OR WHACKED
cont'd. from page 9

FACT #14:

Don't let your attorney abandon you before the pension papers are sent to DFAS.

As the sign on the outhouse wall says, "The job's not done till the paperwork is finished." According to Mike McCarthy of Phoenix:

> "I'm seeing more and more abandonment of clients when the attorney has finished writing up the property settlement or the separation agreement, and then thinks that the job is finished. That's NOT the end. That's not full and competent service to the client. DFAS requires a court order, and you have to serve that on DFAS for the pension division to be divided with a garnishment. To handle a military pension division properly, you must prepare a military pension division order (or incorporate the separation agreement into the divorce decree). Then you submit the documents (along with DFAS Form 2293) immediately to DFAS upon divorce. That way, if there is any problem in the papers submitted, it can be caught and cleared up promptly.

The SBP Blues

WHACKED "Let's divide the SBP 50-50 between my ex and my new wife."

FACT #15:

The SBP is a unitary benefit; you cannot subdivide it.

It can be waived, with the written consent of both spouses, or it can be given to a former spouse or a present spouse. It can't be divided between an ex-spouse and a current one.

WHACKED Mary Doe was upset. "Who cares if I'm going to get remarried? That's nobody's business! I want that SBP coverage, I was married to him for his entire career, and I'm entitled to it!"

FACT #16:

SBP is not good if the former spouse remarries before age 55.

Why? Don't ask. It's in the statute, but it doesn't make any sense. It treats the survivor annuity as if it were alimony. No other form of marital or community property division ends upon the remarriage of one of the spouses. That being said, however, it's important to remember that SBP coverage is not available if the former spouse marries before age 55. If elected initially for her, however, it can be reinstated if the second marriage ends is death, divorce or annulment.

WHACKED "I know what we can do, Mrs. Doe. Since John insists on saving SBP for his new wife, we'll use life insurance to cover you in the event of his death. While he's on active duty, he has SGLI with a death benefit of $400,000. That's a good substitute for SBP."

FACT #17:

SGLI is worthless in divorce settlements because it's unenforceable.

A 1981 decision of the U.S. Supreme Court, *Ridgway v. Ridgway*, says that no SM can be compelled to elect a former spouse in a divorce settlement, and that– even if he chooses to do so– he's free to change his mind later. He can select his next wife and the courts cannot do anything to punish him or alter his choice.

WHACKED Confronted with the demand of his wife for SBP coverage, Sergeant First Class Roger Reilly went ballistic. "I don't want to pay any part of that SBP premium at retirement. SHE demanded coverage– let HER pay for it. Just write up the order to say that the SBP premium comes out of her share of the pension!"

FACT #18:

DFAS won't apportion SBP premiums between the parties.

SBP premiums come "off the top" by law. They are deducted from gross pay to get to Disposable Retired Pay. It's DRP which is then divided by DFAS, so– in effect– the parties are each paying for a share of the SBP premium, in proportion to their share of the pension. DFAS cannot apportion the SBP premium, which is 6.5% of the selected base amount, between the spouses. The only way to do this is "though the back door" by adjusting downward the percentage or amount which the former spouse receives, so that she'll in effect be paying for the entire SBP premium.

WHACKED John Doe decided to go along with the request of Mary Doe for SBP coverage, even though he and she had only been married for 10 years and he knew he was going to stay in for at least 30 years and probably remarry. He felt bad about how much it would cost. His lawyer said the premium would be 6.5% of his retired pay. But he felt there was nothing he could do about it.

FACT #19:

The premium for SBP coverage is 6.5% of the selected base amount.

This CAN be the SM's full retired pay. It also can be any amount down to a minimum of $300. The court order for SBP coverage needs to specify what the base amount will be. If there is no stated base amount, then DFAS will choose the full retired pay as the "default solution." This can be costly– compare 6.5% of your full retired pay to 6.5% of, say, $300. It can also be too high a benefit for Mary. If she were married to John for only 10 of his 30 years in the military, then her share of the pension might be, in many states, 50% of 1/3 of the pension, or about 16%. That's the share she gets during John's life. Yet upon his death, her share jumps up to 55% of the pension. Does that seem fair? The way to change this is to select a lower base amount for the SBP, so that the death benefit mirrors the life payment.

How to Lose Money

A common mistake for the former spouse is ignorance of the rules of VA

RESOURCES

The inspiration for this article came from three excellent articles written by Ed Schilling, a lawyer in Aurora, Colorado and a retired Air Force JAG officer:

"Common Mistakes:" http://www.divorcenet.com/states/nationwide/milart-05
"How to Select an Attorney for Military Divorce:" http://www.divorcenet.com/states/nationwide/milart-01
"You Have a Right to a Competent Attorney:" http://www.divorcenet.com/states/nationwide/you_have_a_right_to_a_competent_attorney

There are also client handouts on the Survivor Benefit Plan (SBP) and the Uniformed Services Former Spouses' Protection Act (USFSPA) at the website for the North Carolina State Bar's military committee, **www.nclamp.gov**.

waiver. A retiree can waive part of his pension to receive VA disability compensation, if he has a service-connected disability. That VA money is not taxable and isn't divisible with the former spouse.

FACT #20:

For a non-military spouse, a VA waiver may be a disaster waiting to happen.

If she isn't protected, she could suffer a large reduction in her share of retired pay, which might result in a foreclosure or eviction. Due to the dollar-for-dollar setoff with VA disability compensation, and also its non-divisibility with a former spouse, many retirees opt for this if they receive a disability rating from the Department of Veterans Affairs. The former spouse needs to get a VA waiver clause placed in her agreement or order at the time of settlement or trial. Often called an indemnification agreement, it states that the SM or retiree will pay back the former spouse any money she loses if he opts for VA payments or does anything else to reduce her share. The VA waiver clause is crucial for the ex-spouse. In the words of a TV advertisement, "Don't leave home without it!"

Another problem occurs when the former spouse and her attorney focus solely on the military pension. There's another retirement asset in many military marriages– the Thrift Savings Plan. A TSP account is like a 401(k) plan or an IRA; you contribute to it, the savings grow tax-free and are available for use in retirement. To the extent this account was acquired during the marriage, it's marital or community property. It can be divided through a court order which puts a share, tax-free, into a separate account of the former spouse.

FACT #21:

Don't overlook the TSP!

It may be a valuable marital asset. The former spouse and her attorney need to get a copy of the TSP statement so as to decide whether to divide it between the parties or to allocate it entirely to the SM/retiree in exchange for some other asset.

WHACKED The marriage is short. The parties both want out. The attorneys figure there's not much value in the pension to divide, so they decide to write up a clause waiving pension division.

FACT #22:

Try to get a fair trade for giving up your share of a military pension, regardless of how short the marriage was.

Even with a short marriage of, say, five years, the pension share is worth something. Don't waive it without getting a fair trade. Assume that the husband is a sergeant first class, or E-7, with 20 years of service, who will get an estimated $1,600 a month retired pay if he retires at the 20-year mark, which many servicemembers do. If there were only five years of marriage, his ex-wife would get 50% of 5/20 of $1,600, or $200 a month. If she is 40 when he retires and he were to live another 35 years, this would be worth $2,400 a year, or a total of $84,000. That's a lot of money!

The lesson? If you want a pension waiver, you have to ask for it and pay for it. If you are asked to waive military pension division, make sure you do it for a reasonable, fair trade – don't just give it away if the period of marriage is short. Look at the facts and calculate the numbers. Even if you trade the pension waiver for a washer, dryer and TV, you're still doing better than just giving it away. ***

Mark Sullivan is a retired Army Reserve JAG colonel, a board-certified specialist in family law and a fellow of the American Academy of Matrimonial Lawyers who practices in Raleigh, NC. The chairman of the Military Committee of the ABA Family Law Section, Mr. Sullivan is the author of *The Military Divorce Handbook* (ABA 2006). Comments or questions should be sent to: Law Offices of Mark E. Sullivan, P.A., 600 Wade Avenue, Raleigh, NC 27605, (919) 832-8507, mark.sullivan@ncfamilylaw.com.

Invitation to Participate

The Family Law Section has been invited by the Nevada Supreme Court to participate as amicus curiae and to prepare and submit an amicus brief in the case of *Ogawa v. Ogawa*. This appeal involves the interpretation and application of the Hague Convention in a child custody case, as well as issues concerning subject matter jurisdiction and orders of default. The amicus brief will be due sometime in the fall/winter of 2007.

If you are a Family Law Section member and are interested in working on this brief, please send a letter of interest to Bryce C. Duckworth, Family Law Section Chair, State Bar of Nevada, 1935 Village Center Circle, Las Vegas, Nevada 89134, by **no later than September 1, 2007**. Please include in your interest letter the following information: (1) your experience with Hague Convention issues; (2) your reasons for wanting to participate and a statement that you have no personal stake in the outcome of the Ogawa case; and (3) a brief outline of your trial and appellate experience. The working committee will be formed in the beginning weeks of September 2007.

Articles Are Invited!

The next release of the NFLR is expected in September, 2007, with a submission deadline of August 15, 2007. Please contact Bob Cerceo at bobcerceo@aol.com with your proposed articles anytime before the next submission date. We're targeting articles between 350 words and 1500 words, but we're always flexible if the information requires more space.

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