

The Nuts & Bolts of a “Military Divorce”

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Subject Matter Jurisdiction

91 days domicile required before filing. C.R.S. 14-10-106(1)(a)(I)

- Military stationed in CO, without more, insufficient for SMJ. Viernes v. District Court, 509 P.2d 306 (Colo. 1973)
- Former domicile insufficient. IRM Booker, 833 P.2d 734 (Colo. 1992).
- Presumption of continued domicile. McMillion v. McMillion, 497 P.2d 331 (Colo. App. 1972)
- Some factors. Mulhollen v. Mulhollen, 358 P.2d 887 (Colo. 1961)

Military Spouse’s Residency Relief Act

Expands Servicemembers Civil Relief Act so spouse absent from state of residence due to accompanying servicemember on military orders not change residence for:

- Tax. 50 U.S.C. § 571
- Voting. 50 U.S.C. § 595

Jurisdiction Factors

- Where grow up / Home of record
- State of legal residence on LES (next slide)
- Prior duty stations
- Purchase home in CO/elsewhere
- When anticipate PCS'g from Colorado
- Where intend to live after military
- Driver's license state
- Vehicle registration. Out of state affidavit?
- Voter registration, when last voted
- Ever claim CO as state of residence.

Sample Leave & Earnings Statement (LES)

The image shows a sample Leave and Earnings Statement (LES) form. The form is divided into several sections: 'LEAVE', 'EARNINGS', 'DEDUCTIONS', and 'SUMMARY'. The 'LEAVE' section is circled in red. The 'EARNINGS' section shows various pay components like BASIC PAY, INCENTIVE PAY, and QUARTERLY PAY. The 'DEDUCTIONS' section lists items like SOCIAL SECURITY, MEDICAL, and LIFE INSURANCE. The 'SUMMARY' section provides totals for each category. The form is a standard military LES form used for reporting pay and leave.

Service of Process on Military

- No unique military protections
- Domestic - often installations are exclusive federal enclaves with no state jurisdiction, so needs coordination with military authorities
- Overseas - Hague Convention

SCRA Stay of Proceedings

50 U.S.C. App. § 522. Court may, on own motion, and shall, upon application by a servicemember which meets these criteria, stay the proceedings for at least 90 days:

- Applicant is in military service, or within 90 days after it ended,
- Applicant has actual notice of the proceeding,
- Application is written, and includes facts stating (i) how service materially affects ability to appear, and (ii) date when servicemember may appear, and
- Application includes communication from commander that military duty prevents appearance, and leave not authorized.

SCRA Stay of Proceedings (Contd)

- Initial 90-day stay is mandatory. May apply for additional stay, using same criteria, and court must grant application unless appoints attorney to represent servicemember.
- Simply being stationed overseas, thereby making it harder to appear, does not materially affect ability to appear. Telephonic testimony, 30 days annual leave, cooperative military.
- If stay denied, cannot invoke §521 to set aside default judgment.
- Sample Motion for Stay at EXH 1.

SCRA Protection vs. Default Judgment

50 U.S.C. App. § 521.

- Petitioner seeking default judgment must submit affidavit stating whether Respondent is in military, or whether Petitioner does not know.
- Court shall reopen default judgment and allow servicemember to defend when:
 1. Judgment entered during military service or within 60 days thereafter,
 2. Servicemember's ability to defend materially affected by service,
 3. Meritorious or legal defense, and
 4. Application made during the military service, or within 90 days.

Military Retirement - Authority/Jurisdiction

- Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(c) (4) requires (1) Residence not due to military orders, (2) Domicile, or (3) Consent (can be broadly interpreted!)
- USFSPA preempts state law, and CO lacks subject-matter jurisdiction to divide absent domicile or affirmative conduct of servicemember demonstrating express or implied consent. IRM Akins, 932 P.2d 863 (Colo. App. 1997).
- Retirement is property interest, so survives remarriage. IRM Gallo, 752 P. 2d 47 (Colo. 1988).

Military Retirement Subject to Division

Per 10 U.S.C. §1408(a)(4), Disposable Retired Pay is gross pay minus:

1. Amounts owed to U.S. due to previous retired pay overpayments.
2. Court-martial forfeiture.
3. Waived to receive VA Disability.
4. SBP premiums for benefit of former spouse.

Military Retirement - Marital Share Calc.

IRM Hunt, 909 P.2d 525 (Colo. 1995). "Time Rule" formula, or "coverture" fraction.

$$\frac{1}{2} \times \frac{\text{Mos of marriage overlapping military service}}{\text{Total months of creditable service at retirement}}$$

EXAMPLE: 5 yrs (60 mos) marriage overlap & 22 yrs (264 mos) service.
Spousal share = $\frac{1}{2} \left(\frac{60}{264} \right) = 11.36\%$.

Military Retirement - Still On Active Duty

Hunt authorizes 3 methods:

- **Net Present Value.** Immediately distribute spousal share, based upon coverture, actuarial tables, risks, etc. Authorized when retirement not vested. [IRM Riley-Cunningham](#), 7 P.3d 992 (Colo. App. 1999).
- **Deferred Distribution.** Share calculated at dissolution, receipt deferred until retirement matured and vested.
- **Reserve Jurisdiction.** Share calculation deferred until retirement vested and matured. Most common method.

Military Retirement - Direct DFAS Payment

Need 10 yrs marriage overlapping military service. Order must contain:

- Indication that rights under SCRA respected.
- Basis of jurisdiction over servicemember (residence, domicile, or consent).
- Marriage date / indication that 10/10 rule met, and
- % (or \$ amt) awarded to former spouse.

Military Retirement - Direct DFAS Payment

- No QDRO necessary, just (1) copy of decree & order dividing retirement, and (2) DD Form 2293.
- Maximum DFAS pays is 50% of disposable pay.
- DoD 7000.14-R, Vol. 7B, Chapter 29 "*Former Spouse Payments from Retired Pay*", 30-page document with summary and sample language: http://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/07b_29.pdf
- Sample language for order/agreement at EXH 2

Survivor Benefit Plan (SBP)

- "Insurance policy" on retirement
- If retiree dies, pays 55% of "designated base amount" with COLA
- Maximum "designated base amount" is base pay
- Required to elect max. spousal coverage if married, unless spouse consents. 10 U.S.C. §1448(a)(3)(A)

SBP Beneficiaries

- Spouse/Former Spouse
- Not remarry under 55, else suspended during marriage
- At least one yr marriage or a child. 10 U.S.C. § 1447
- Children if under 18 or in college and under 22
- Disabled children, if disability happened while under 18 or in college under 22

SBP Premium

- 6.5% of designated base amount
- Premiums stop once retiree is 70 and has paid 360 months of premiums
- Premium payments in discretion of court. IRM Payne, 897 P.2d 888 (Colo. App. 1995). DFAS takes off top, but typically Ct divides equally

SBP Election

- Retiree - change election to former spouse on DD Form 2656-1.
- Former spouse - deemed election on DD Form 2656-10.

***ELECTION MUST BE MADE WITHIN ONE YEAR OF
ORDER REQUIRING SBP!!!***

VA Disability & Waiver

- Servicemember with service-connected disability entitled to receive tax-free VA disability payments.
- Retired Pay waived, dollar for dollar, except:
 1. At least 50% disability rating. 10 U.S.C. §1414.
 2. Combat-related disability rating of at least 10%. (Combat-Related Special Compensation, or CRSC).

VA Waiver Indemnity

- **Pre-Dissolution Disability** – Not Divisible.
Mansell v. Mansell, 490 U.S. 581 (1989).
IRM Franz, 831 P.2d 917 (Colo. App. 1992)
- **Post-Dissolution Disability** – Per IRM Warkocz, 141 P.3d 926 (Colo. App. 2006), retiree required to indemnify former spouse for reduction in retirement due to VA waiver, even without specific indemnity clause. Majority rule in states.

Temporary Disability Retired List (TDRL)

- Servicemember with fewer than 20 years of service may be retired due to disability if (1) unfit for service, and (2) has 30% or greater disability rating
- Condition is temporary. 10 U.S.C. §§1202 & 1205.
- Can remain in TDRL for up to 5 years, with medical evaluations every 18 months to determine whether (1) disability has stabilized and become permanent, or (2) fit to return to active duty.
- After five years of TDRL, if unfit then (1) retire for longevity if eligible, (2) PDRL if under 20 years of service, or (3) medical separation.

TDRL Payments

Per 10 U.S.C. § 1401, servicemember may choose between:

- Military retirement calculation: $2.5\% \times \text{monthly base pay} \times \text{yrs of service}$, or
- Base pay x disability %.

Permanent Disability Retired List (PDRL)

- Servicemember with fewer than 20 years of service may be retired due to disability if (1) unfit for service, and (2) has 30% or greater disability rating
- Condition is permanent. 10 U.S.C. §§1202 & 1205.

IRM Williamson, 205 P.3d 538 (Colo. App. 2009).

- Decree gave spouse 1/2 marital share of retirement. H placed on TDRL at 16 yrs service
- TDRL not divisible
- PDRL not divisible because under 20 years of service so would be ineligible for retirement but for payments based upon disability

IRM Poland, 264 P.3d 647 (Colo. App. 2011)

- SA gave W 1/2 marital share, had indemnity clause if VA disability
- H placed on TDRL at 21 yrs service, so eligible for 20-year retirement
- Amount attributable to disability (% of disability x base pay) not divisible
- Surplus over that is attributable to longevity and is divisible

(Once off TDRL, will receive regular retirement which is divisible).

Former Spouse Benefits: 20/20/20

20 yrs marriage, 20 yrs service, 20 yrs overlap.
Per 10 U.S. C. §1072(2)(F), ID Card & ful benefits, except:

- Medical suspended while covered by employee plan
- Remarriage terminates medical
- Remarriage suspends installation privileges (PX, Commissary) during period of remarriage

Former Spouse Benefits: 20/20/15

20 yrs marriage, 20 yrs service, 15 yrs overlap

Per 10 U.S. C. §1072(2)(G) & (H), 1 yr transitional medical benefits only, except:

- Not apply if covered by employee plan
- Terminates upon remarriage

Legally Separated Spouse

- *Joint Services Regulation, Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, And Other Eligible Personnel.* AR 600-8-14
- Table 8.3: Remains spouse until "A final divorce, dissolution, annulment, or death occurs. Exception: Do not terminate a spouse when an interlocutory divorce or legal separation occurs."
- Keeps ID card, full military benefits, continues to accrue 20/20/20 benefits, though retirement share frozen upon decree

Parenting Time Delegation

IRM De Palma, 176 P.3d 829 (Colo. App. 2007). Reserve father with equal parenting time sought to delegate parenting time to stepmother while deployed. Holdings:

- Parent has presumptive right to control children's upbringing, including making decisions on who cares for children during his/her time
- Court determines best interests if dispute, but fit parent presumed to act in best interests of children
- Stepmother had no independent right to children, but analogy to other third parties providing care to children (teachers, day care, etc).
- Stepmother cannot make decisions, so Mother makes day-to-day decisions.
- First right of refusal effectively set aside

Parenting - IRM Brandt Facts

IRM Brandt, 268 P.3d 406 (Colo. 2012).

- 2006 MD divorce, H & W lived in MD with child until H 2008 PCS to CO. W & child PCS'd to TX 2009
- W deployed 2010, parties agreed child spend 2010-11 in CO, then return to W
- W received orders to return to MD 2011, H returned child to W, registered action in CO
- Court assumed jurisdiction after finding no one resident in MD
- H got writ to pick up child from W, brought back to CO
- Both CO and MD courts asserted UCCJEA jurisdiction, scheduled hearings, etc

Parenting - IRM Brandt Holding

- Being absent from state in itself not deprive state of UCCJEA jurisdiction.
- "Presently reside" = "currently reside" or "physical presence", but "necessitates an inquiry broader than 'technical domicile' into the totality of the circumstances that make up domicile"
- Factors: permanent home where intends to return, length & reasons for absence, intent in departing state and returning to it, military assignments, where maintain home, vehicle reg, driver's license, voter registration, pay state taxes, etc.

Uniform Deployed Parents Custody and Visitation Act (UDPCVA)

- HB 13-1200 codified at C.R.S. 14-13.7-xxx
- Provides for interim agreements or orders which allocate parental responsibilities between parents, or parents and nonparents, during deployment of a parent

UDPCVA: “Deployment”

Movement/mobilization for 90 days – 18 mos where family members not authorized. §102(8)

UDPCVA - “Caretaking Authority”

“[T]he right to live with and care for a child on a day-to-day basis. The term includes physical custody, parenting time, right to access, and visitation.” §102(2).

UDPCVA - “Custodial Responsibility”

“[A]ll powers and duties relating to caretaking authority and decision-making authority for the child. The term includes physical custody, legal custody, parenting time, right to access, visitation, and authority to grant limited contact with a child.” §102(5)

UDPCVA - “Decision-Making Authority”

“[T]he power to make major decisions regarding a child, including decisions regarding the child’s education, religious training, health care, extracurricular activities, and travel. The term does not include the power to make decisions that necessarily accompany a grant of caretaking authority.” §102(6).

UDPCVA - “Limited Contact”

“[T]he authority of a nonparent to visit a child for a limited time. The term includes the authority to take the child to a place other than the residence of the child.” §102(10).

UDPCVA Procedure

- Notice of deployment within 12 days of orders. §105(1)
- Parents exchange parenting proposals
- Reach written/signed agreement, or
- Expedited hearing

UDPCVA - Contents of Interim Agreement

- Facts surrounding deployment
- Caretaking authority
- Decision-making authority
- Limited contact to nonparent
- Dispute resolution for nonparent
- Deployed parent contact during deployment/leave
- Support change needs court approval
- Agreement terminates after deployment

UDPCVA - Interim Court Order

- Prior parenting agreement/order addressing deployment binding absent grounds for change
- Caretaking authority to family member or someone with physical care for 182 days
- Nonparent time, up to max of deploying parent's time
- Decision-Making
- Limited Contact to family member or someone with 182 days
- Child support

UDPCVA - Termination of Interim Parenting

- Agreement terminates upon specified date, or 35 days after notice that returned
- Order terminates 35 days after notice that returned
- Court "shall immediately issue an interim order" for deployed parent contact

UDPCVA & UCCJEA JURISDICTION

- Deployment not change deploying parent residence
- Interim parenting not change child home state

EXHIBIT 1

MOTION FOR STAY OF PROCEEDINGS PURSUANT TO SERVICEMEMBERS' CIVIL RELIEF ACT

THE PETITIONER, by and through his undersigned attorney, hereby requests a stay of all proceedings in the above-captioned case, and as grounds, states the following:

1. Statement of Compliance. On _____, parties' counsel discussed this issue, and counsel for the Respondent indicated _____.
2. A Permanent Orders hearing is currently scheduled for _____.
3. The Petitioner is a soldier on active duty with the U.S. Army. On or about _____, he was deployed to Iraq (Deployment Order attached as Attachment 1). The deployment is open-ended, with no termination date yet set, but is expected to last about a year. Petitioner's Counsel will advise the Court upon learning of a return date.
4. This deployment materially affects the Petitioner's ability to participate in the proceedings in that while he is deployed, he is prohibited from taking leave to appear, and his ability to communicate with his attorney is severely curtailed. A letter from his commander is attached as Attachment 2.
5. The pertinent portions of the Servicemembers Civil Relief Act, 50 U.S. Code App. § 522, read:

“(a) **APPLICABILITY OF SECTION-** This section applies to any civil action or proceeding in which the defendant at the time of filing an application under this section--

(1) is in military service or is within 90 days after termination of or release from military service; and

(2) has received notice of the action or proceeding.

(b) **STAY OF PROCEEDINGS-**

(1) **AUTHORITY FOR STAY-** At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.

(2) **CONDITIONS FOR STAY-** An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.”

6. The Petitioner has met the SCRA requirements for a mandatory stay: he is on active duty, he submitted this written motion which sets out how his military duties materially affect his ability to appear, and he has attached the required letter from his commanding officer.

WHEREFORE, the Petitioner requests that all proceedings in this matter be stayed until such time that he has redeployed back to the United States and his ability to participate in the case is not materially affected.

EXHIBIT 2

SAMPLE MILITARY RETIREMENT LANGUAGE

1. The Husband (hereinafter "servicemember" for the purposes of this section) is a member of the U.S. Army, having served on active duty continuously from _____. This Court has jurisdiction to divide the military retirement because the servicemember consented to jurisdiction ****OR** resides in and maintains Colorado as his state of legal domicile. All of the servicemember's applicable rights under the Servicemembers Civil Relief Act have been adequately protected or waived.
2. Effective the first month in which the servicemember becomes entitled to the receipt of retired pay, and continuing each month thereafter until the death of either party, the Wife (hereinafter "former spouse", for the purposes of this section) shall receive a share of the disposable military retired pay, including annual COLAs, determined as follows:

$$\begin{array}{r} 1 \\ \text{---} \end{array} \times \frac{\text{_____ Months of marriage overlapping military service}}{\text{-----}} = \text{____}\% \\ 2 \\ \text{of accrued service at retirement}$$

3. The current disposable retired pay is \$*** per month, and the former spouse's share is about \$**.

****OR****

As the share cannot be determined until retirement, the servicemember shall advise the former spouse of a prospective retirement or separation from the military or from active duty at least 90 days in advance. Within 14 days of receipt, the servicemember shall provide the former spouse with a copy of all documents pertaining to the separation or the receipt of any money in lieu of retirement, including retirement orders, memorandum of release from active duty, DD 214, Retiree Account Statement, Statement of Service, chronological statement of retirement points, VA Disability documents, etc.

4. Should the disposable retired pay available for division is reduced for any reason, or converted to any other form, such as the receipt of VA Disability, merging the retirement with another pension plan, or offset against debts owed to the government, servicemember shall indemnify the former spouse for any such reduction. The Court retains jurisdiction to enter any appropriate orders pertaining to the military retirement, including, but not limited to, enforcing the division of retirement, dividing any money received in lieu of retirement, compensating the former spouse for any reduction in the disposable retired pay available for division, etc.
5. The former spouse's share of the military retirement is reportable as income to the former spouse. Any retirement payments which the servicemember makes directly to the former spouse shall be based upon the pre-tax disposable retired pay. Notwithstanding any provision in this agreement to the contrary, pursuant to Proctor v. Comm'r, 129 T.C. 12 (2007) such payments shall be treated as maintenance for tax purposes, with the servicemember deducting them from ***his/her federal and state tax returns, and the

former spouse adding them to ***his/her federal and state tax returns. **ALTERNATIVE – HAVE RETIREE PAY SHARE FROM POST-TAX INCOME.**

6. Because the parties were married on _____, they have more than 10 years of marriage overlapping the military service and the former spouse shall receive direct payment from DFAS, pursuant to 10 U.S.C. § 1408(d). The former spouse shall promptly apply to the Defense Finance and Accounting Service (DFAS) for her portion of the military retirement, utilizing DD Form 2293, or any other necessary form. If at any time, however, the former spouse has not received direct payment, the servicemember shall pay the former spouse's share of the disposable retired pay within 5 days of receiving it.

OR

Because the parties do not have more than 10 years of marriage overlapping the servicemember's military service, the servicemember shall pay the former spouse her share of the disposable retired pay directly, within five days of receipt of each payment.

7. Anytime the disposable retired pay changes, within 14 days of receipt the servicemember shall provide the former spouse with the Retiree Account Statement, VA documents, or any other documents relevant to the change. This does not apply to annual COLAs if DFAS is directly paying the former spouse's share of the retirement.
8. Prior to retirement, the servicemember shall make an irrevocable election to participate in the Survivor Benefit Plan (SBP), designating the former spouse as the "former spouse beneficiary" for an annuity which pays an amount not less than the former spouse's share of the retired pay. The servicemember shall provide the former spouse proof of enrollment, and any other forms pertaining to SBP within 30 days of receiving or filling out the form. The parties shall divide equally the costs of the SBP, and to the extent the servicemember is assessed any greater portion by DFAS, the former spouse shall compensate the servicemember for the difference every six months. **ALTERNATIVE – SIMPLY ALLOCATE RETIREMENT, SO DFAS DEDUCTS FROM EACH PROPORTIONAL TO SHARES OF RETIREMENT.**
9. Pursuant to 5 U.S.C. §552a(b)(11), this Order is a continuing court order directing DFAS to provide to the former spouse upon request all information pertaining to the servicemember's retirement, including amounts, dates of service, and periodic Retiree Account Statements. In the event that DFAS or another agency require a written release for such information, the servicemember shall, upon request by the former spouse, promptly execute such release.
10. Should the servicemember receive a reserve retirement in lieu of an active duty retirement, then the Wife shall receive her share of the military retirement utilizing the above formula, but substituting "points" for "months", with one point credited for each day of creditable service during the marriage. Moreover, the servicemember shall participate in the Reserve Component Survivor Benefit Plan (RSBP) consistent with the SBP provision above, electing Option C (Immediate Annuity) within 90 days of receiving the "20-year" letter of entitlement to Reserve retirement pay, and promptly provide the former spouse with a copy of the 20-year letter and SBP election.

11. All retirement payments due to the former spouse shall be deemed a nondischargeable "domestic support obligation" incident to divorce pursuant to 11 U.S.C. §523(a)(15).
12. The Court retains jurisdiction to implement and enforce the allocation of military retirement, including considering any relief which may be appropriate should the disposable retired pay be reduced for any reason not specified herein, and dividing any payments received in lieu of retirement consistent with the formula set forth herein.