

Military Retirement & Obtaining Military Records

Carl O. Graham
cgraham@graham.law
(719) 630-1123

Timothy R. Franklin
tim@lowryveteranslaw.com
(719) 895-6979

Jurisdiction to Divide Defined Benefit Retirement

- Uniformed Services Former Spouses Protection Act (10 USC 1408(c)(4)) requires jurisdiction due to:
 - Residence not due to military orders,
 - Domicile, or
 - Consent
- USFSPA is subject matter & preempts state law. *IRM Booker*, 833 P.2d 734 (Colo. 1992), *IRM Akins*, 932 P.2d 863 (Colo.App. 1997)

Domicile - Definition

- “actual residence with the intention to remain permanently, or for an indefinite time, and without any certain purpose to return to a former place of abode.” *IRM Akins*, 932 P.2d 863, 868 (Colo.App. 1997)
- Presence due to military orders not sufficient for domicile. *Viernes v. District Court*, 509 P.2d 306 (Colo. 1973)
- Person may have multiple residences, but only one legal domicile at a time. *Old Republic Nat'l Title Ins. Co. v. Kornegay*, 2012 COA 140 ¶ 16, *Grippin v. State Farm Mut. Auto. Ins. Co.*, 2016 COA 127, ¶ 18

Domicile - Proof

- Testimony of witnesses - subjective
- Home ownership alone not sufficient, per *IRM Akins*, 932 P.2d 863, 865-67 (Colo. App. 1997).
- Documents:
 - Military Leave & Earnings Statement - “State Taxes” section
 - Military Career Data Brief - at least shows home of record
 - State docs - voter & vehicle registrations (but beware of DR 2667 non-resident affidavit), driver’s license
 - Bank statements, home ownership, etc

LES (EXH 1) - State Taxes Section

	48.0	7.5	0	55.5	.0	.0	.0	18.0	TAXES	1426.19	113114.2
FICA TAXES	Wage Period 9521.40	Soc Wage YTD 114256.80	Soc Tax YTD 7083.92	Med Wage YTD 114256.80	Med Tax YTD 1655.72	STATE TAXES	St WA	Wage Period .00			
PAY DATA	BAQ Type	BAQ Depn	VHA Zip	Rent Amt	Share	Stat	JFTR	Depns	2D JFTR	BA	

Consent - Definition

- “the statutory language requires some form of affirmative conduct demonstrating express or implied consent to general in-personam jurisdiction... However, husband continually objected to the court's jurisdiction over his pension and asserted that he was a resident and domiciliary of North Carolina. Thus, husband did not consent to the exercise of jurisdiction under the USFSPA.” *IRM Akins*, 932 P.2d 863 (Colo.App. 1997)
- Consent requires seeking affirmative relief, not merely procedural motion. *Gognat v. Ellsworth*, 224 P.3d 1039, 1054 (Colo. App. 2009)
- Filing motion to modify child support is consent to jurisdiction. *IRM Booker*, 833 P.2d 734 (Colo. 1992)

Types of Military Retirement - Thrift Savings Plan

- Defined Contribution Plan, match if “Blended” retirement plan
- No special jurisdictional requirements to divide
- See LES for current-year contributions, statement on tsp.gov

TRADITIONAL PLAN (TSP)	Base Pay Rate 6	Base Pay Current 278.41	Spec Pay Rate 0	Spec Pay Current .00	Inc Pay Rate 0	Inc Pay Current .00	Bonus Pay Rate 0	Bonus Pay Current .00
ROTH PLAN	Base Pay Rate 2	Base Pay Current 92.80	Spec Pay Rate 0	Spec Pay Current .00	Inc Pay Rate 0	Inc Pay Current .00	Bonus Pay Rate 0	Bonus Pay Current .00
CM AGCY CONTR	AGCY-AUTO .0	AGC-MATCH .0						
CONTRIBUTIONS TOTALS	YTD Deductions 5568.15	YTD TSP Deferred 4176.15	YTD TSP Exempt .00	YTD ROTH 1392.00	YTD TSP AGCY-AUTO 0 .00	YTD TSP AGCY-MATCH 0 .00		

Types of Military Retirement - “Blended”

- Joined 1/1/18 or later, or earlier & elected blended
- Defined Benefit pays 2% x base pay x yrs service
- TSP match of 1-5%, vests at 2 yrs
- Continuation Pay at 12 yrs of 2.5 - 13x monthly base pay
- Can elect lump sum of 25% or 50% of NPV at 20 yrs in return for reduced payments. Probably divisible per *IRM Heupel*, 936 P.2d 561 (Colo. 1997)
- Vests at 20 yrs

LES - Blended Retirement

SUMMARY	
+Amt Fwd	.00
+TOT ENT	5390.78
-TOT DED	3191.39
-TOT ALMT	30.00
=NET AMT	2169.39
-CR FWR	.00
=EOM PAY	2169.39
DIEMS	RET PLAN
120515	BLENDE

Types of Military Retirement - “Legacy”

- Joined before 1/1/18 & not elect blended
- Defined Benefit pays 2.5% x base pay x yrs service
- Contributory TSP, but no match
- Vests at 20 yrs
- LES “Ret Plan” section will reflect “High-3” or “Choice”

LES - Legacy Retirement

SUMMARY	
+Amt Fwd	.00
+TOT ENT	7880.81
-TOT DED	2901.92
-TOT ALMT	3642.47
=NET AMT	1336.42
-CR FWR	.00
=EOM PAY	1336.42
DIEMS	RET PLAN
980611	HIGH 3

SUMMARY	
+Amt Fwd	.00
+TOT ENT	9913.38
-TOT DED	5749.39
-TOT ALMT	30.15
=NET AMT	4133.84
-CR FWR	.00
=EOM PAY	4133.84
DIEMS	RET PLAN
990526	CHOICE

Types of Retirement - Chapter 61 Disability Retirement

- 10 USC 1201-1205. AKA Temporary Disability Retired List (TDRL), Permanent Disability Retired List (PDRL)
- Temporary (lasts up to 3 yrs), or permanent (requires 30% disability or 20+ yrs service)
- Amount. Per 10 USC 1401, retiree receives greater of
 - $2.5\% \times \text{base pay} \times \text{years of service}$, or
 - $\text{Base pay} \times \text{disability \%}$, up to a max of 75%
- Not to be confused with VA Disability benefits

Chapter 61 Retirement Not Divisible

- Per 10 USC 1408(a)(4)(A)(iii), percentage of disability portion not divisible, so portion which exceeds that due to longevity is divisible
- No division at all if under 20 yrs (“but for” test). *IRM Williamson*, 205 P.2d 538 (Colo.App. 2009)
- No dividing percentage of disability portion if over 20 yrs. *IRM Poland*, 264 P.3d 647 (Colo.App. 2011), *IRM Tozer*, 2017 COA 151

DD214 to Identify Chapter 61 Retirement

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)		
23. TYPE OF SEPARATION RETIREMENT	24. CHARACTER OF SERVICE (Include upgrades) HONORABLE	
25. SEPARATION AUTHORITY AFI 36-3203	26. SEPARATION CODE RBD	27. REENTRY CODE N/A
28. NARRATIVE REASON FOR SEPARATION VOL. RETIREMENT; SUFFICIENT SERVICE FOR RETIREMENT		
29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD) NONE		30. MEMBER REQUESTS COPY 4 (Initials) N/A
DD FORM 214, AUG 2009 PREVIOUS EDITION IS OBSOLETE MEMBER-4		

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)		
23. TYPE OF SEPARATION RETIREMENT	24. CHARACTER OF SERVICE (Include upgrades) HONORABLE	
25. SEPARATION AUTHORITY AFI 36-3212	26. SEPARATION CODE SEJ	27. REENTRY CODE N/A
28. NARRATIVE REASON FOR SEPARATION DISABILITY, PERMANENT (ENHANCED)		
29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD) NONE		30. MEMBER REQUESTS COPY 4 (Initials) N/A
DD FORM 214, AUG 2009 PREVIOUS EDITION IS OBSOLETE MEMBER-4		

Retired Pay Subject to Division

10 U.S.C. § 1408(a)(4)(A) retirement subject to division is gross retired pay minus:

- (i) Owed to U.S. due to previous overpayments
- (ii) Deducted for court-martial forfeiture or VA Waiver
- (iii) % of disability formula if Chapter 61 disability retirement
- (iv) Survivor Benefit Plan (SBP) premiums for benefit of former spouse

Methods of Dividing Retirement

- Court can award specific dollar amount or percentage of retired pay. 10 USC 1408(a)(2)(C)
- Percentage award includes COLAs, but dollar amount does not. DODFMR, Vol. 7B, § 290601(C)
- Net Present Value & put on spreadsheet
 - Authorized by *IRM Hunt*, 909 P.2d 525 (Colo. 1995)
 - May use NPV when retirement not yet in pay status. *IRM Riley-Cunningham*, 7 P.3d 992 (Colo.App. 1999)

Formula to Divide Retirement - Time/Rule

- AKA “Coverture” - use for retirement (1) divided in decree prior to 12/23/2016, or (2) in pay status at divorce
- Months of marriage overlapping service divided by total months of service at ***retirement***
- Spouse receives benefits of increased retirement due to post-decree promotions
- See *IRM Hunt*, 909 P.2d 525 (Colo. 1995)

Formula to Divide Retirement - “Frozen Benefit Rule”

- Use for decree after 12/23/2016 when retirement not yet in pay status
- Months of marriage overlapping service divided by total months of service at **decree**
- Hypothetical retirement awarded to member with rank & yrs of service at decree, so no post-decree enhancements other than same COLA retirees receive. MAJ at 10 yrs, not COL over 24 yrs
- 10 USC 1408(a)(4)(B)

Reserve Retirement

- Same coverture or frozen benefit formula, but substitute reserve points for months/years
- DODFMR §§ 290205, 290211
- *IRM Beckman*, 800 P.2d 1376 (Colo.App. 1990)
- Need Points statement
 - Army - DA Form 5016 (Chronological Statement of Retirement Points)
 - Air Force - AF Form 526 (Point Credit Summary)

Direct Payment from DFAS - Order Needs (EXH 3)

- SCRA rights waived or respected. SCRA. DODFMR, Vol. 7B, § 290602
- Jurisdiction basis (residence/domicile/consent). DODFMR, Vol. 7B, § 290604(A)
- Marriage date & indication 10/10 rule. 10 USC 1408(d)(2) met. DODFMR, Vol. 7B, § 290604(B)
- Either (a) percentage, (b) formula, or (c) dollar amount. DODFMR, Vol. 7B, § 290803(B). If formula, need numerator & define denominator. DODFMR, Vol. 7B, § 290615
- “Frozen Benefit”: Rank, yrs of service, High-3 pay. DODFMR, Vol. 7B, § 290803(B)

Direct Payment Process

- Decree & order/agreement certified within 90 days
- Submit with DD Form 2293
- No deadline, but only pay prospectively
- Takes about 90 days to process

Survivor Benefit Plan (SBP)

- “Insurance policy” on retirement. Without SBP, retirement ends when retiree dies. 10 USC 1408(c)(2)
- Premiums
 - 6.5% x “designated base amount”. Pays 55% of base amount, so effectively 11.8% per month. 10 USC 1451(a)
 - Court may allocate premium. *IRM Payne*, 897 P.2d 888 (Colo.App. 1995)
 - DFAS only deducts premium pre-division, so effectively pay % to shares. DODFMR, Vol. 7B, § 290610
 - Commonly shared between parties
- Premiums stop once retiree is 70 and has paid 360 mos of premiums. 10 USC 1452(j)

SBP Rules

- Can only have one primary beneficiary (children contingent)
- If married at retirement, max SBP unless spousal waiver
- If waived at retirement, cannot select later, even with order
- Beneficiary is “office” of spouse, so if spouse SBP elected at retirement, must convert to “former spouse” coverage upon divorce
- Spouse can do deemed election for former spouse coverage within **1 year of decree** - use DD Form 2656-10

VA Waiver - When Applicable

- Any veteran, not just retiree, may receive disability benefits from the Veterans Administration (more later from Tim)
- Per 10 USC 1409(a)(4)(A)(ii), must waive retirement, dollar for dollar, to receive disability unless retiree has:
 - Disability rating of 50% or higher, AND
 - 20 years or more yrs service. 10 USC § 1414

VA Waiver - No Indemnity

- States cannot divide VA disability, nor order indemnity for VA waiver. *Howell vs. Howell*, 137 S.Ct 1400 (2017), *IRM Tozer*, 2017 COA 151
- But disability payments count as income for purposes of calculating support/maintenance. *In re: M.E.R.-L*, 2020 COA 173

Summary - Documents Needed If Still in Military

- Leave & Earnings Statement (LES) (24 months, but good luck)
- Career Record Brief - jurisdiction, service/rank dates
- Any DD214s from prior service
- Points statement (if reserve time)
- TSP statement

Summary - Documents Needed if Already Retired

- Retirement Orders
- Retiree Account Statement
- CRSC Statement (if receiving Combat-Related Special Compensation)
- VA Verification of Benefits Letter (or bank statement?)
- All DD214s (Member copies)
- Points statement (if reserve time)
- Applications for VA disability & CRSC if still pending