

Equitable Distribution: Change in Federal Law Regarding Military Pensions Part 1

Before 1981, military pensions were not subject to division by state courts in marital dissolution proceedings. However, Congress enacted the [Uniformed Services Former Spouses Protection Act \(USFSPA\)](#) to provide that, for pay periods after July 25, 1981, “disposable retired pay” of military personal is subject to division by a state court in a divorce proceeding. [10 USC 1408\(c\)\(1\)](#). Effective December 23, 2016, Congress has changed the definition of “disposable retired pay” as it relates to property distribution upon divorce in a way that has left family law practitioners and judges across the country struggling to quickly determine how to reconcile existing state law with the new federal definition. In this blog post, I will try to explain the change as it relates to North Carolina equitable distribution law. In my next post, I will discuss some issues and questions arising from the change.

The Change to Federal Law

Before the effective date of this amendment, the [USFSPA](#) defined “disposable retired pay” as “the total monthly retired pay to which a member is entitled less [certain specified] amounts.”

The 2016 amendment adds that the:

“monthly retired pay to which a member is entitled shall be—

“(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by

“(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.”.

[National Defense Authorization Act for Fiscal Year 2017](#), sec. 641; PL 114-328, December 23, 2016, 130 Stat 2000.

Before this amendment, state courts had the authority to order a division of any portion of a service member's disposable retirement pay, even if retirement occurred many years after the property division and the total disposable retired pay reflected years of continued service following the state property division. The new amendment means that state courts now have authority to distribute only that portion of a member's final retirement pay that would have been paid to the service member had she or he retired on the date of the entry of divorce plus any cost of living adjustments that occur between the time of divorce and the actual retirement of the service member.

How does this affect North Carolina law?

It appears that this change will not affect either the classification or the valuation of a military pension in a North Carolina equitable distribution proceeding.

[G.S. 50-20.1](#) requires that all pensions be classified using the coverture fraction; the numerator of the fraction represents the number of years of the marriage, up to the date of separation, which occurred simultaneously with the employment that earned the pension, and the denominator represents the total number of years during which the pension accrued up to the date of separation. So for example, if one spouse has been employed by the same company earning a pension for 10 years by the date of separation, and the parties were married for 5 of those years, we know that 5/10ths or one half of the date of separation value of the pension is classified marital property. See *Bishop v. Bishop*, 113 NC App 725 (1994); *Robertson v. Robertson*, 167 NC App 567 (2004). Because classification is determined as of the date of separation and the date of separation always will be before the date of divorce, the federal change to the definition of disposable retired pay will not affect the classification of any pension under North Carolina law.

Similarly, North Carolina law requires that pensions be valued as of the date of separation by assuming that the military service member retired on the date of separation. *Bishop*. So again, because the date of separation always will be before the date of divorce, the change to the federal law will not result in a change in the value of a pension under North Carolina law.

What about distribution?

In [Seifert v. Seifert, 319 NC 367 \(1987\)](#), the Supreme Court approved of the use of a very common application of the distribution method authorized by [GS 50-20.1\(a\)\(3\) and \(b\)\(3\)](#). Referred to as “the fixed percentage method” or “deferred distribution,” these statutes authorize the court to make an award of pension benefits payable “as a prorated portion of the benefits made payable to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits.” The *Seifert* court approved use of a specific fraction to determine the “prorated portion of benefits” to be paid in the future. The fraction is the total time earning the pension while married up to the date of separation over the total time earning the pension up to the time of actual retirement.

This fraction is applied to the total disposable retired pay of a service member, which until December 2016 was defined to mean the total retirement pay of the service member at the time of actual retirement. Service members have argued that application of a fraction such as the one approved in *Seifert* inappropriately allowed the non-service member spouse to share in increases in retirement benefits earned by the service member spouse after the date of separation. The court in *Seifert* rejected this argument, holding instead that using a fraction that takes into account the total employment time earning the pension makes “deferral of payment ... possible without unfairly reducing the value of the award [to the nonemployee spouse]... and [allows] the nonemployee

spouse [to] share in any growth in the benefits [earned during the marriage].”

The recent change in the federal definition of disposable retired pay will significantly affect the amount of benefits that will be received by a former spouse of a retired service member if the fraction approved in *Seifert* continues to be used. That is because the fraction will be applied to a smaller number, the amount of retirement pay the service member would have received if he or she retired on the date the divorce judgment was entered plus cost of living adjustments that accrued between that date and the actual date of retirement.

Consider an example. Wife joins the military shortly after marriage. Parties separate after 20 years and the court decides the pension is 100% marital and husband should receive 50% of the marital portion. Wife stays in military until she retires with 30 years of service. Her disposable retired pay under the old definition (and the amount she actually will receive even with this new definition applicable only for the purpose of property distribution upon divorce) is \$3000 per month. Application of the *Seifert* fraction to the \$3000 will result in payment to husband of \$1020 per month. $[20 \text{ years}/30 \text{ years times } 50\% \text{ times } \$3000 = \$1020]$

However, application of the fraction to the new definition of disposable retired pay means that, assuming for the sake of a simple illustration that the divorce judgment is entered the same year the parties separate, husband will be awarded a portion of a 20 year retirement benefit plus cost of living adjustments rather than a portion of a 30 year benefit. Let's assume for this example that this amount would be \$2200. When wife retires after 30 years, husband will receive \$748 per month rather than the \$1020 he would have received before the legislative change. $[20 \text{ years}/30 \text{ years times } 50\% \text{ times } \$2200 = \$748]$.

This Raises Some Questions

I think the first legal issue to address is the question of whether application of the *Seifert* fraction in light of this change results in distributions that may be inherently unfair to the non-military spouse. If so, does North Carolina law actually require that we use the *Seifert* fraction or are judges and litigants free to determine the “prorated portion of the benefits made payable to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits” in some other way?

I will write about that in the next blog. In the meantime, let me know if you have thoughts about any of this.

