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Married to the Military: How to Protect Your Property Interests after the Marriage Mission Fails.

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MARRIED TO THE MILITARY: HOW TO PROTECT YOUR PROPERTY INTERESTS AFTER THE MARRIAGE MISSION FAILS

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I. INTRODUCTION

While most non-military spouses take a very active role in their military spouse's employment, from support groups to holding down the fort while their spouse is deployed, many are still uninformed about the intricacies of military retirement pay and disability benefits. Familiarity with the military retirement system and disability benefits programs may not be a top priority for young military couples, but it should be. When the marriage mission fails and divorce is on the horizon, it is imperative that both parties, especially the non-military spouse (and their attorney), understand the array of possible benefits to which their military spouse is, and will be, entitled. Recent Texas cases have proved this very point.¹

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1. See, e.g., *Hagen v. Hagen*, 282 S.W.3d 899, 900 (Tex. 2009) (holding that respondent was not entitled to receive more than her share of the military retirement that petitioner received, even though petitioner, after the divorce decree was finalized, began to receive

An unsuspecting spouse cannot rely upon a merciful court's interpretation of a divorce decree to avoid an injustice when the benefits he or she was originally entitled to receive under the decree suddenly decrease or cease due to the ex-spouse's post-decree benefit changes and elections.

There are several types of military benefits available to the brave men and women who serve our country (hereinafter "service member"). An overview and explanation of the general types of retirement and disability benefits follows in Section II of this Article.

While it is beneficial to become familiar with *all* military benefits, particular types of retirement pay and disability benefits have been the subject of recent cases, and deserve a prioritized analysis. These particular types of benefits are discussed in Section III, and an analysis of the recent case law affecting these particular benefits is included in Section IV of this Article.

II. OVERVIEW OF MILITARY RETIREMENT AND DISABILITY BENEFITS

A. Retirement Benefits and Veteran Pensions

The Department of Veterans Affairs (VA) oversees the qualification process and administration of retirement benefits and pensions for retired military. The active duty² "military retirement system is arguably the best retirement deal around."³ A military retirement pension can commence as early as age thirty-seven for service members.⁴ The amount of a service member's pension depends on several factors, including when the service member entered the service.⁵ This calculation may be complex to the untrained eye, but it can and should be mastered, especially by

Veteran's Administration disability benefit payments); *Sharp v. Sharp*, 314 S.W.3d 22, 24 (Tex. App.—San Antonio Oct. 14, 2009, no pet.) (denying appellant any further payment from appellee's military retirement, other than what the divorce decree provided).

2. See *Military Reserve Component Retirement Overview*, MILITARY.COM, <http://www.military.com/benefits/military-pay/retired-pay/military-reserve-component-retirement-overview> (last visited Nov. 7, 2010) (indicating that members of the Reserve must complete twenty years of service before they can get retirement pay at the age of sixty, although there is an exception when a Reserve member has served twenty years, but is then deployed, which allows them to receive retirement benefits before the age of sixty). To learn more about benefits available to Reserve members, visit your local military post, or visit www.military.com for more information.

3. *The Military Retirement System*, MILITARY.COM, <http://www.military.com/benefits/military-pay/retired-pay/military-retirement-system> (last visited Nov. 7, 2010).

4. *Id.*

5. *Id.*

the non-military spouse in order to protect his or her property interest after divorce.⁶

Military retirement pensions are available to wartime veterans who are sixty-five or older, can no longer work, and have limited or no income.⁷ Veterans do not have to be disabled in order to receive a VA pension. “Many veterans of wartime service are completely unaware of the fact that if they are [sixty-five] or older and on a limited income they may qualify for a VA Pension without being disabled.”⁸ It is important for divorcing parties to be cognizant of the eligibility requirements for VA pensions, as well as the related options available in addition to or in lieu of the same. A post-divorce election by an ex-spouse service member could alter the effect of an intended benefits allocation, so careful consideration should be given to all options.

B. *Disability Benefits*

Disability benefits are available to service members who are injured in the line of duty. Eligibility for these benefits is based on a service member’s “discharge from active military service under other than dishonorable conditions.”⁹

6. See *Computing Retired Military Pay*, MILITARY.COM, <http://www.military.com/benefits/military-pay/retired-pay/computing-retired-military-pay> (last visited Nov. 7, 2010) (providing a guide to calculating military retirement pay).

7. *Veterans Pension Program*, U.S. DEP’T VETERANS AFF., <http://www.vba.va.gov/bln/21/pension/vetpen.htm> (last visited Nov. 7, 2010) (explaining eligibility requirements for military pensions for veterans). For a further explanation of benefits and eligibility, see *Veteran’s Pensions*, MILITARY.COM, <http://www.military.com/benefits/military-pay/veterans-pensions> (last visited Nov. 7, 2010). A wartime veteran may be eligible for Veteran’s Pension if he or she was “discharged from service under other than dishonorable conditions” and the service member “served 90 days or more of active duty with at least 1 day during a period of war time.” *Id.* These benefits are subject to some limitations:

[A]nyone who enlists after 9/7/80 generally has to serve at least 24 months or the full period for which a person was called or ordered to active duty in order to receive any benefits based on that period of service. With the advent of the Gulf War on 8/2/90 (and still not ended by Congress to this day), veterans can now serve after 9/7/80 during a period of war time. When they do, they generally now must serve 24 months to be eligible for pension or any other benefit.

Id. Service members are also eligible if they are “permanently and totally disabled, or are age 65 or older” and their “countable family income is below a yearly limit set by law.” *Id.*

8. *Veteran’s Pensions*, MILITARY.COM, <http://www.military.com/benefits/military-pay/veterans-pensions> (last visited Nov. 7, 2010).

9. *Veteran’s Benefits Explained*, MILITARY.COM, <http://www.military.com/benefits/veteran-benefits/veterans-benefits> (last visited Nov. 7, 2010). The availability of benefits for service members (both current and former) with reference to discharge status are explained:

Honorable and general discharges qualify a veteran for most VA benefits. Dishonorable and bad conduct discharges issued by general courts-martial may bar VA benefits.

Military veterans with a service-related disability who were not discharged under dishonorable conditions may qualify for Veteran Disability Compensation (VDC).¹⁰ “These benefits are paid to veterans who have injuries or diseases that [were incurred] while on active duty, or were made worse by active military service. [VDC] is also paid to certain veterans disabled from VA health care. These benefits are tax-free.”¹¹ Because VDC benefits are tax-free, many veterans will elect to receive these benefits if they qualify to do so. It is important for divorcing military couples, especially a non-military spouse, to be aware of this possible election and to provide for allocation and division of such if so elected by the ex-spouse service member post-divorce.

III. SPECIFIC BENEFITS THE SUBJECT OF RECENT LAWSUITS

A. *Concurrent Retirement and Disability Pay*

Before 2004, service members could receive both military retirement pay and VA disability compensation, but the military retirement pay was reduced by the amount of disability compensation received. This changed with the passage of Public Law 108-136, the National Defense Authorization Act for Fiscal Year 2004,¹² which introduced Concurrent Retirement and Disability Pay (CRDP). “[CRDP] is the gradual (phased in) restoration of the retired pay currently being offset by VA disability pay. Under the current law, retirees who are entitled to CRDP will receive both full military retired pay and full VA disability pay with no reduction (i.e., concurrent receipt) by 2014.”¹³ Qualified disabled mili-

Veterans in prison and parolees may be eligible for certain VA benefits. VA regional offices can clarify the eligibility of prisoners, parolees and individuals with multiple discharges issued under differing conditions.

Id. A veteran as well as his or her family may visit <http://www.va.gov> or call either 1-800-827-1000, or 1-800-827-4833 for those who are hearing impaired should they have any questions about applying for benefits. *Id.*

10. *Veteran Disability Compensation*, MILITARY.COM, <http://www.military.com/benefits/military-pay/va-disability-compensation> (last visited Nov. 7, 2010).

11. *Id.*

12. *Concurrent Retirement & Disability Pay (CRDP)*, MYARMYBENEFITS.US.ARMY.MIL., [http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Concurrent_Retirement_and_Disability_Pay_\(CRDP\).html?serv=243](http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Concurrent_Retirement_and_Disability_Pay_(CRDP).html?serv=243) (last visited Dec. 30, 2010).

13. *Id.*; see also *Concurrent Retirement and Disability Pay (CRDP) Overview*, MILITARY.COM, <http://www.military.com/benefits/military-pay/retired-pay/retired-concurrent-receipt-overview> (last visited Nov. 7, 2010) (explaining that “Concurrent Receipt means to receive both military retirement benefits and VA disability compensation, and up until 2004 this was forbidden by law”). As of January 28, 2008, a retiree who has “been rated less than 100 percent, but rated 100 percent disabled by the VA under the unemployment

tary retirees will now get paid both their full military retirement pay and their VA disability compensation.¹⁴

Now that CRDP is available to eligible service members, such should be considered when drafting a decree that purports to award an ex-spouse a portion of certain benefits. Parties should be cognizant of this new option and make certain the divorce decree provides for allocation of a portion of any CRDP, if and when the ex-spouse service member becomes eligible.¹⁵ It is also important to note that concurrent receipt will be phased-in over the next few years, so service members who qualify for such will receive a “retirement pay increase by approximately ten percent each year until the phase-in is complete in 2014.”¹⁶ Accordingly, careful calculation is necessary when drafting provisions governing division and allocation of CRDP benefits.

code (UI), will now receive CRDP.” *Id.* An explanation of the CRDP benefit is as follows:

Your personal CRDP payment rate is determined by *your* current VA Disability Compensation waiver, minus the CRDP “Table Rate,” then multiplied by the current CRDP “Phase Out” percentage. This makes it impossible to create a simple CRDP Payment Rate table that applies to everyone. You can use the *CRDP Pay Computation* to figure out your personal payment rate.

When fully phased in, CRDP will fully restore your military retirement pay and VA Disability Compensation payments. For example a single retiree with a VA Rated service-connected disability could receive their full retirement pay in addition to over \$2,400 a month.

It is also important to note that the amount you receive cannot exceed the sum of your actual military retirement pay and VA Disability Compensation added together.

Id. (emphasis in original) (bullet points omitted).

14. *Concurrent Retirement and Disability Pay (CRDP) Overview*, MILITARY.COM, <http://www.military.com/benefits/military-pay/retired-pay/retired-concurrent-receipt-overview> (last visited Nov. 7, 2010) (explaining that under this new law, the VA disability offset will be gradually phased out, allowing “military retirees with 20 or more years of service and a 50% (or higher) VA rated disability” to receive both benefits without offset and “no longer have their military retirement pay reduced by the amount of their VA disability compensation”).

15. *See id.* (outlining eligibility requisites for Concurrent Receipt benefits). In order to qualify for concurrent receipt, one must:

Be a Military Retiree with 20 or more years of service, including:

Chapter 61 Medical Retirees with 20 years or more.

National Guard and Reserve with 20 or more good years. (Once they turn 60 and begin drawing a retirement check).

Temporary Early Retirement Authority (TERA) Retirees may also be eligible.

Id. (bullet points omitted). One must also “[h]ave a Service Related VA disability rating of 50% or higher” in order to qualify. *Id.*

16. *Id.*

B. *Combat Related Special Compensation*

Another benefit available to a service member is Combat Related Special Compensation (CRSC).

[CRSC] provides military retirees a monthly compensation that replaces their VA disability offset. This means that qualified military retirees with 20 or more years of service that have “combat related” VA-rated disability will no longer have their military retirement pay reduced by the amount of their VA disability compensation. Instead they will receive both their full military retirement pay and their VA disability compensation.¹⁷

It is also important to note that, “[u]nlike Concurrent Retirement and Disability Pay . . . , CRSC will not be phased-in Once a military retiree has been determined to be qualified, they will receive their regular retirement pay plus an additional sum based on their VA disability rating.”¹⁸

It is important to recognize not only the different types of benefits, but the interchangeability of them all, in regards to elections of one in lieu of the others. Knowing this is half the battle. Drafting proper language for a binding decree is the other half. The following case analysis exhibits why it is so important to be familiar with the differing military benefits, and serves as a fair warning to divorcing military couples.

IV. CASE ANALYSIS

A court will not (and should not) clarify or interpret an unambiguous divorce decree. Hence, it is important that both parties diligently choose the proper terms and specific (or vague, depending on the intent) language that best outlines the intended division of the property. But what happens when your intent is masked by a misunderstanding of the law? Unfortunately, in most cases, a court cannot give clarification to save your intention, so it is extremely important that you understand the nature of the income and benefits to which your military spouse is and will be entitled.

17. *Combat Related Special Compensation*, MILITARY.COM, <http://www.military.com/benefits/military-pay/retired-pay/combat-related-special-compensation> (last visited Nov. 1, 2010).

18. *Id.*

A. *Hagen v. Hagen*¹⁹

Doris Hagen and Raoul Hagen, a military retiree, divorced in 1976.²⁰ In the final decree, the court awarded Doris a percentage of Raoul's military retirement pay as follows:

One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, IF, AS AND WHEN RECEIVED, and the Petitioner RAOUL HAGEN shall be a Trustee of the One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, for the use and benefit of DORIS J. HAGEN, and shall pay the same immediately upon each receipt of the same, to DORIS J. HAGEN.²¹

Raoul retired in 1992, and began receiving military retirement pay at that time.²² About ten years later, the VA determined that "Raoul had a service-connected disability rating of forty-percent," which made him eligible to receive disability benefits in lieu of the retirement pay he was already receiving.²³ Raoul elected to receive the disability benefits.²⁴ Once the retirement payments ceased, Doris received payments reduced by the retirement pay amount Raoul had opted to no longer receive.²⁵

Doris took her issue to the court and "filed a combined motion for contempt, clarification of the decree, and petition for damages," claiming that Raoul had "failed to comply with the 1976 decree because he failed to pay her the proper amount of his gross retirement pay, and in the alternative, she sought clarification of the decree."²⁶ Doris also "sought damages from Raoul alleging that by electing to be paid VA disability pay and waive part of his retirement pay, he breached a fiduciary duty to her and converted payments she should have received."²⁷

As seen above, the divorce decree stipulated that Doris was entitled to receive a portion of Raoul's "Army Retirement Pay" or "Military Retirement Pay."²⁸ The decree was silent on disability benefits or disability pay.²⁹ As to Doris's request for clarification, the court explained that, generally, courts treat divorce decrees "as [they] do other judgments of

19. 282 S.W.3d 899 (Tex. 2009).

20. *Id.* at 900.

21. *Id.* at 901.

22. *Id.*

23. *Id.*; see also 38 U.S.C. § 5305 (2006) (outlining eligibility for disability and alternative election of disability benefits in lieu of military benefits).

24. *Hagen*, 282 S.W.3d at 901.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Hagen*, 282 S.W.3d at 902.

courts . . . [and] construe the decree as a whole to harmonize and give effect to the entire decree.³⁰ If the decree is unambiguous, the court must adhere to the literal language used.³¹ The court further explained that “The [Texas] Family Code provides that trial courts may enter orders of enforcement and clarification to enforce or specify more precisely a decree’s property division But courts may not ‘amend, modify, alter, or change the division of property’ originally set out in the decree.”³²

Following *Shanks v. Treadway*,³³ and per the Texas Family Code, the court decided it would not interpret the Hagan decree, because it was unambiguous.³⁴ Pointing specifically to the phrases, “Retirement Pay” and “Military Retirement Pay” and to the phrase “IF, AS, AND WHEN RECEIVED,” the court held that the decree clearly awarded Doris a portion of any retirement pay Raoul was entitled to receive, but did not award her any interest in disability pay.³⁵ “The decree language [did] not specifically reference VA disability compensation Raoul might receive, and the parties [did] not contend that VA benefits were referenced anywhere in the decree.”³⁶ Hence, the court ruled that Doris was not entitled to a portion of the disability benefits Raoul had elected to receive in lieu of his retirement pay.³⁷

30. *Id.* at 901.

31. *Id.* (citing *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003)).

32. *Id.* at 902 (citing TEX. FAM. CODE ANN. §§ 9.006(a), 9.007(a) (West 1997)). The Texas Family Code provides that “the court may render further orders to enforce the division of property made in the decree of divorce or annulment to assist in the implementation of or to clarify the prior order.” FAM. § 9.006(a). *But see* FAM. § 9.007(a):

A court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment. An order to enforce the division is limited to an order to assist in the implementation of or to clarify the prior order and may not alter or change the substantive division of property.

Id.

33. 110 S.W.3d 444 (Tex. 2003).

34. *Hagen*, 282 S.W.3d at 902 (stipulating that courts do not have the power to change the manner in which the couple’s property had been divided in a divorce decree). However, courts do have the power to clarify provisions in an order that will assist in the division of the property so long as the order is ambiguous. *Id.*

35. *Id.* at 908 (highlighting the presumption that divorce courts carefully choose the language they use in divorce decrees and therefore a right to obtain part of the disability pay must have been intentionally left out). The court emphasized that Doris Hagen had not attempted to appeal the divorce decree and have it amended to include disability pay for thirty years and, therefore, the language used in the decree must be viewed on its face as unambiguous. *Id.*

36. *Id.* at 902.

37. *Id.* at 908.

Despite adherence to the law, this decision worked an injustice upon Doris.³⁸ However, if Doris and her attorney had been aware of the different military pay options her spouse was entitled to or would be entitled to in the future, a more astute provision governing allocation of benefits could have been drafted to better protect her property interest.

B. *Sharp v. Sharp*³⁹

The case of *Sharp v. Sharp* produced a similar result.⁴⁰ In *Sharp*, the parties' divorce decree unambiguously awarded Linda Sharp a percentage of Tracy Sharp's military retirement pay "if, as, and when he received it."⁴¹ Specifically, the divorce decree awarded Linda the following:

All right, title, and interest in and to Fifty Percent (50%) of the [monthly amount of the] United States Air Force disposable retired or retainer pay to be paid as a result of [Tracy's] service in the United States Air Force, and Fifty Percent (50%) of all increases in the United States Air Force disposable retirement or retainer pay due to cost of living or other reasons, if, as, and when received.⁴²

Years later, Tracy received a 100% disability rating from the VA, which made him eligible to receive CRSC instead of retirement pay.⁴³ Tracy so elected, and as a result, Linda's portion of Tracy's retirement benefits diminished. "Linda then filed a Motion for Enforcement and Clarification as to Military Retirement Pay, in which she sought clarification of the decree and asked that Tracy be held in contempt."⁴⁴ Linda argued that "Tracy violated the terms of the decree by failing to pay Linda her share of his military retired pay."⁴⁵ The court, referencing *Hagan*, which was decided just months before, reinforced the notion that the court could not

38. *See id.* (allowing an ex-husband to cut off his former spouse from community property that she had been awarded). The dissenting opinion stated that her divorce decree awarded her part of all of the army retirement pay which should include VA disability pay because the court has previously held that a veteran had to continue to pay his ex-wife the benefits owed to her even when the majority of those benefits had been changed to come out of his VA disability pay. *Id.* at 909 (Brister, J. dissenting).

39. 314 S.W.3d 22 (Tex. App.—San Antonio 2009, no pet.).

40. *Id.* at 25 (upholding the ruling in *Hagen* and stating that when a divorce decree is unambiguous and only awards a portion of military retirement pay, it does not include VA disability pay).

41. *Id.*

42. *Id.* at 23–24.

43. *Id.* at 24 (stating that when Tracy began to receive CRSC, Linda began receiving less benefits from his retirement pay). See Section III.B. of this Article, defining Combat Related Special Compensation.

44. *Sharp*, 314 S.W.3d at 24.

45. *Id.*

interpret an unambiguous decree.⁴⁶ The *Sharp* decree specifically awarded Linda the right to (and right to increases in) “United States Air Force disposable retired or retainer pay.”⁴⁷ While CRSC benefits are different than the disability benefits Raoul Hagan elected to receive in lieu of retirement benefits, both benefits escape the umbrella of “retirement pay.”⁴⁸ Since the *Sharp* decree specifically awarded Linda retirement pay, and CRSC benefits are not considered retirement pay, the court held that Linda was not entitled to a portion of the CRSC benefits and Tracy’s election to receive such, and though it worked an inequity on Linda, it did not constitute contempt in regards to the final decree.⁴⁹

V. CONCLUSION

It is imperative that divorcing military couples and their attorneys be cognizant of the different types and the nature of all military benefits now available to service members. They should also be aware of the possible elections or substitutions an ex-spouse service member may be entitled to in the future. Attorneys must draft intelligently and specifically so as to avoid inequity due to an election or substitution made by an ex-spouse service member post-divorce. The courts have clearly established their position regarding interpretation of decrees—courts will not interpret or expand the plain language if unambiguous. Until the legislature recognizes the unjust effect of elections and substitutions of benefits and addresses such with new law, it is the responsibility of the parties and their attorneys to carefully consider the same and meticulously draft decrees that protect the interests of all involved, both now and post-divorce.

46. *Id.* at 25; *see Hagen v. Hagen*, 282 S.W.3d at 901 (“If the decree is unambiguous, the Court must adhere to the literal language used.”).

47. *Sharp*, 314 S.W.3d at 23.

48. *See Hagen*, 282 S.W.3d 899, 903 (Tex. 2009) (adhering to prior judgments which have held that VA disability is a gratuity which comes from a disability sustained during service and is not an earned property right which was accumulated during service). Retirement pay is not a gift for being injured during service, but rather a property right, which can be divisible when two people are divorced. *Id.* There is no obligation by the VA to give awards for disability, which distinguishes the award from military retirement pay. *Id.*

49. *Sharp*, 314 S.W.3d at 25 (stipulating that the federal statute that authorizes CRSC specifically declares that these benefits are not to be construed as retirement pay).