

Equitable Distribution: Change to Federal Law Regarding Military Pensions Part 2

[In my last blog post](#), I wrote about a recent change to federal law regarding the portion of a military pension subject to division by a state court in a divorce proceeding. Effective December 23, 2016, the definition of disposable retired pay in the context of a division of a military pension in a marital dissolution proceeding found in 10 USC sec. 1408 was amended to be the amount a service member would have received had he retired on the date of divorce plus cost of living adjustment accruing between the date of divorce and the date of actual retirement. Before amendment, the definition of disposable retired pay was the total amount a service member receives upon actual retirement, regardless of whether that amount reflected years of service and elevations in rank of the service member following the date of divorce.

The change in the definition of disposable retired pay does not appear to impact the way we classify and value a military pension under North Carolina equitable distribution law, but the change does raise issues regarding how military pensions actually are divided between the parties when the fixed percentage, deferred distribution method of division is used.

Distribution Methods

In [Seifert v. Seifert, 319 NC 367 \(1987\)](#), the Supreme Court explained the difference between the immediate offset method of distributing a pension and the fixed percentage, deferred distribution method. In the immediate offset method, the pension is valued and distributed to the service member whose employment earned the pension. The other spouse receives more marital property to offset the value of that spouse's marital interest in the pension that is distributed to the service member spouse. This method is not the most common distribution method because it requires that there be sufficient other marital property to offset the value of the pension. In most cases, the value of a marital pension far exceeds the rest of the marital estate. If the immediate offset method is used to accomplish an equitable distribution, the recent change to the federal law will not affect the process at all.

The fixed percentage, deferred distribution method is far more common. The division of the marital portion of a pension is accomplished by the entry of an order designating the portion of each future retirement check that must be paid to the non-service member former spouse when the service member retires and begins to receive retirement benefits. The *Seifert* court approved of the use of a fraction to determine the portion of each future pension check payable to the non-service member spouse. In that case, the fraction was to be applied to the total retirement pay received by the service member upon retirement, an amount determined by his rank and years of service at the time of retirement. The recent change in federal law means that the fraction set out in our division orders now will be applied to a lesser amount, the amount the service member would be receiving

had he or she retired on the date of divorce** plus any cost of living adjustments accruing between the date of divorce and the service member's actual retirement date.

Do we need to modify the *Seifert* fraction?

The fraction used in [Seifert](#) had a numerator that was the amount of time earning the pension while married up to the date of separation and a denominator that was the total time the service member spent earning the pension up to the time of his retirement.

While the *Seifert* court decided that application of this fraction to award the non-service member a share of the total pension earned by the service member up to the date of retirement was fair because it protected the non-service member's interest in the growth of the marital interest over time, application of this same fraction to the lesser amount now authorized by federal law will result in a dilution of the non-service member's marital interest. For a discussion of this dilution effect that at least one appellate court concluded is unfair to the non-service member spouse, see [Douglas v. Douglas, 454 SW3d 591 \(Tex. App. 2014\)](#). To avoid this dilution, the denominator of the fraction must be the total time earning the benefits that actually are being divided rather than the total time earning all the benefits the service member will receive. With the change in the federal law, the benefits actually being divided are only those earned by the service member up to the date of the divorce.

Can we apply the *Seifert* formula this way?

I think so. The court in [Seifert](#) defines the denominator of the fraction used in that case as "the total period of participation in the plan." I do not think it is inaccurate to interpret this definition to mean the total period of participation in the plan "earning the amount being divided." That certainly is what the court meant considering the facts in [Seifert](#), but the amount being divided in that case was the member's full retirement pay. If we define the amount being divided in accordance with the new federal law, the denominator should be the total number of years earning the pension up to the date of the divorce.

Returning to the admittedly over simplistic example from my last post, let's assume we have spouse who served in the military 20 years while married up to the date of separation, 22 years up to the date of divorce and 30 years by the time of actual retirement. Also assume the non-service member is awarded 50% of the marital portion of the pension. The fraction as applied in [Seifert](#) was $20/30$ times 50% times the disposable retired pay received by the service member when he retires. If the disposable retired pay is the service member's full retirement, [Seifert](#) says that is fair. But if the fraction is applied to the reduced disposable retired pay now required by the federal law, using 30 years as the denominator dilutes the share of the non-service member spouse. To accurately account for the marital interest in the amount actually available for division, the denominator should be 22 years rather than 30.

Other pensions

A change in the fraction may take care of the unfair dilution. However, courts and practitioners also should remember when fashioning distributions that this change in federal law applies only to military pensions. So, if one spouse has a military pension and the other has, for example, a North Carolina state employee pension, the *Siefert* fraction still will be applied to the state employee's full retirement benefits at the time of retirement while the amount of the military pension to be divided will be the reduced disposable retired pay.

Should courts and practitioners somehow adjust the distribution to account for this difference? This is a difficult question to answer because the difference in the two pensions will not be reflected in their valuation within the context of the equitable distribution proceeding. For this reason, we cannot assume that the military pension is somehow less valuable than the state employee's pension. Even if it is less valuable, if we use the correct fraction to designate the portion of the military pension that should be paid to the non-service member spouse, how significant will the difference be between what the military pension would have been before the federal law change and what it is now, especially when we add in the cost of living adjustments? That certainly is not something to be considered without actual evidence in each individual case.

I would love to have comments from those of you with more experience actually drafting division orders. Are there other issues raised by this change in the federal law?

**I use the term divorce judgement because the [Uniformed Services Former Spouses Protection Act, 10 USC 1408](#), defines the term court order as "a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree judgment." The amendment changing the definition of disposable retired pay fixes the pay at the time of "the court order".