

Divorce, retirement benefits

Number: INFORMAL

Date: June 16, 2000

The Honorable Jerry Melvin
Representative, District 4
38 Miracle Strip Parkway, Suite 1A
Fort Walton Beach, Florida 32548

Dear Representative Melvin:

You ask on behalf of a constituent about property division in a divorce proceeding when at least one party to the proceeding is a military retiree or civil service retiree. Attorney General Butterworth has asked me to respond to your letter.

Upon reviewing the subject matter of your inquiry, however, it appears that your inquiry involves mixed questions of law and fact that this office cannot resolve. In an effort to be of some assistance, however, I would generally note that section 61.075, Florida Statutes, in providing for equitable distribution of marital assets and liabilities, defines "Marital assets and liabilities" in subsection (5)(a)4. to include:

"4. All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs[.]"

Thus, generally a spouse's entitlement to pension or retirement benefits would be considered a marital asset for purposes of equitably distributing marital property.[1] Once a pension, or other type of retirement benefit, is considered a marital asset, that asset may be treated as property subject to equitable distribution.[2]

With regard to federal military retirement pay, I would note that in *McCarty v. McCarty*,[3] the United States Supreme Court held that federal statutes governing military retirement pay prevented state courts from treating such benefits as marital property subject to division in dissolution proceedings. In response to this decision, Congress enacted the Uniformed Services Former Spouses' Protection Act, which allows state courts to divide "disposable retired or retainer pay" in dissolution proceedings according to state law.[4]

In *Kelson v. Kelson*,[5] the Florida Supreme Court held that a trial court may enforce a settlement agreement or dissolution decree providing for division of military retirement pay against benefits received by service member under voluntary separation incentive program or special separation benefit program, where benefits are the "functional equivalent" of retirement pay and are calculated in a similar manner. On the other hand, the courts of this state have stated that the division of veterans' disability benefits, whether through court order or settlement agreement, is preempted by federal law.[6] I am enclosing copies of several cases in this area for your constituent's review and consideration.

It would be advisable for your constituent to contact a private attorney who specializes in this area of the law who can provide the constituent based on the particular facts with the legal direction and guidance necessary. If your constituent does know of an attorney, the Florida Bar operates a Lawyer Referral Service at the following address: 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, telephone (800) 342-8011.

I trust that the enclosed material may be of some assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

Enclosures

[1] See, e.g., *Diffenderfer v. Diffenderfer*, 491 So. 2d 265 (Fla. 1986); *Hatcher v. Hatcher*, 533 So. 2d 917 (Fla. 2d DCA 1988).

[2] See, e.g., *Johnson v. Johnson*, 602 So. 2d 1348 (Fla. 2d DCA 1992); *McReynolds v. McReynolds*, 546 So. 2d 1153 (Fla. 2d DCA 1989).

[3] 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981).

[4] See 10 U.S.C. s. 1408(c)(1).

[5] 675 So. 2d 1370 (Fla. 1996).

[6] See, e.g., *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997). And see *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), in which the Court held that disability benefits received were not subject to equitable distribution under the Uniformed Services Former Spouses' Protection Act.