



AVOIDING MALPRACTICE IN DIVIDING FEDERAL CIVILIAN AND MILITARY RETIREMENT BENEFITS IN FAMILY CASES

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WFAM021916



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**AVOIDING MALPRACTICE IN DIVIDING
FEDERAL AND MILITARY
RETIREMENT PLANS**



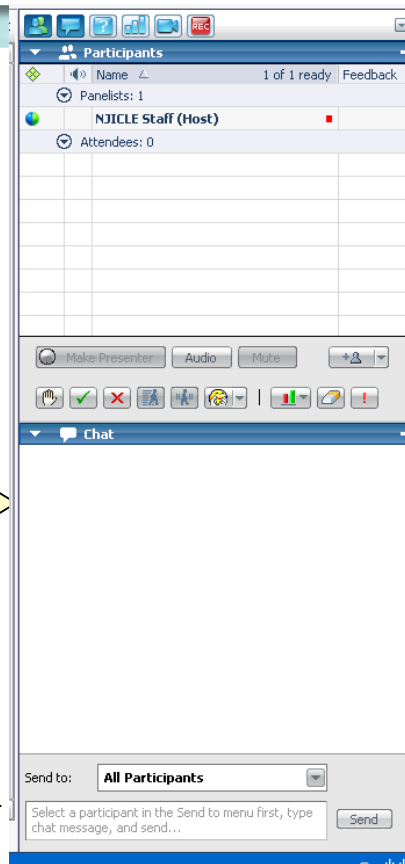
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About Our Speaker

Matthew L. Lundy, Esq. earned his B.A. from Duke University, and his J.D., with honors, from the University of Florida.

Since forming his own law firm, Matthew has established himself as one of the elite attorneys in the area of retirement account division and administration. He has represented individuals, and small and large companies in a wide variety of issues related to retirement plans, with an emphasis on qualified plan division in family law matters (usually involving "QDROs"). Matthew also frequently testifies as a court appointed "expert" on matters related to retirement account division. He has a multi-state practice.



DIVIDING FEDERAL CIVILIAN AND MILITARY RETIREMENT BENEFITS IN FAMILY CASES

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Basic Questions

- ▣ Who thinks that they can identify all of the issues that must be addressed in a settlement agreement and/or final judgment when it comes to dividing a retirement account?
- ▣ How long does the government have to review and administer an order directing the division of a retirement plan account?

What is so important about retirement accounts?

- ▣ Frequency as an issue; how much money is in qualified retirement accounts in the United States?
- ▣ Dabblers

Mediation Scenario

- ▣ You represent the Wife in a highly contested divorce. The parties have no children, and no assets other than Husband's federal retirement account(s), which was/were set up by virtue of his employment with the U.S. Government.
- ▣ You are now at mediation, and you never thought the case would settle, but apparently you and opposing counsel did a good job talking your clients down. Miraculously, the parties turn the corner. Husband makes a good offer for alimony, and that leaves only the issue of division of his retirement account(s). You have statements for a retirement plan, and you are not exactly sure how to read it, and you have not consulted with a QDRO attorney. What do you do?

Mediation Scenario (cont.)

- ▣ Option 1: Reserve on the issue until you can get full discovery and discuss the issue with someone who regularly deals with QDROs and similar orders.

- ▣ Option 2: Clearly lay out the parties' intent, and leave open the option to modify or supplement the agreement solely as to that issue; make sure that appropriate benefits are covered before agreeing to finalize.
 - Key case to consider. : Samaroo v. Samaroo, 193 F.3d 185 (3d Cir. 1999)

Defined Benefit Plan Benefits

- 1) Survivor Benefits
- 2) Duration and Benefit Commencement
- 3) Amount – Valuation
- 4) Cost of Living Adjustments
- 5) Early Retirement Subsidies, Separation Incentives, Refunds
- 6) Anti-Circumvention: Converting pension to disability; converting military pensions to civilian pensions

Key Terms

- ▣ Defined Contribution Plan: a plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account (see IRC § 414(i))
- ▣ In the context of government and military plans, this is the thrift savings plan, which is similar to a 401(k)

Key Terms

- ▣ Defined Benefit Plan: The Internal Revenue Code defines these as any qualified plan that is not a defined contribution plan (see IRC § 414(j))
- ▣ In the context of government and military plans, this is the military pension and federal employee annuity

Military/Civilian Pension Benefits

- 1) Survivor Benefits
- 2) Duration and Benefit Commencement
- 3) Amount – Valuation (always available)
- 4) Cost of Living Adjustments
- 5) Refunds (Only for Civilian Pensions)

Choosing a Formula

- ▣ Before electing a formula:
 - True Coverture
 - ▣ $50\% \text{ times (total number of years in the Plan while married divided by total number of years in the Plan) times monthly benefit}$
 - ▣ Limitation on military valuation formulas
 - Frozen Coverture
 - ▣ $50\% \text{ times (total number of years in the Plan while married divided) times monthly benefit}$
 - Never utilize a marital portion formula for defined contribution plans

Military: Key Terms

- Order for Division of Military Retirement Pay
- Gross Disposable Retirement Pay (see 10 U.S.C. § 1408):
- (4)The term “disposable retired pay” means the total monthly retired pay to which a member is entitled less amounts which –
 - (A)are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
 - (B)are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
 - (C)in the case of a member entitled to retired pay under chapter [61](#) of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member’s disability on the date when the member was retired (or the date on which the member’s name was placed on the temporary disability retired list); or
 - (D)are deducted because of an election under chapter [73](#) of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member’s retired pay is being made pursuant to a court order under this section.
- 10/10 Rule: Must be married for 10 years of creditable service in order to direct DFAS to make direct payment to a former spouse as property division

Military: Key Terms

- ▣ Cost of Living Adjustments: Set by consumer price index; may vary by 1% depending on when member entered service; need to use a percentage in your agreement or order

- ▣ Survivor Benefit Plan: up to 55% of base pension amount (base increases with COLAs); cost is
 - (1) 6.5% of the base amount, or if less,
 - (2) 2.5% of the first \$595.00 of the base amount, plus 10% of the remaining base amount.

- ▣ Retirement Benefits Court Order: Order used to divide a thrift savings plan

Military: Key Terms

20/20/20 rule: full entitlement to medical, commissary (store for provisions)

20/20/15 rule: one year of transitional medical benefits

Deemed election: Within 1 year of entry of final judgment, must make application for SBP

How is a Military Pension Valued?

- ▣ DIEMS before 9/8/1980: Final Pay
 - $2.5\% \times \text{years of service} \times \text{final base pay}$
- ▣ DIEMS after 9/8/1980-7/31/1986: High 3
 - $2.5\% \times \text{highest 36 months of basic pay} \times \text{years of service}$
- ▣ DIEMS after 8/1/1986: Redux
 - Can use the High 3 discussed above, or has option to use Redux, so MUST specify in settlement agreement
 - Redux = Member agree to do 20 years of service, and gets a \$30,000.00 mid-career bonus, then 40% of high 3 at 20 years, and for years after year 20 it is 3.5%
- ▣ For Reservist: Use points divided by 360 for years of service

Miscellaneous

- ▣ Remarriage prior to Age 55

- ▣ Military:
 - Separation Incentives
 - SSBs

- ▣ Conversion for disability or civilian employment

Recent Changes to Military Pension Law

- ▣ Howell v. Howell (US Supreme Court):
https://www.supremecourt.gov/opinions/16pdf/15-1031_hejm.pdf
 - Cannot indemnify against disability waiver
- ▣ 2017 National Defense Authorization Act:
Cannot award more than $\frac{1}{2}$ what was earned at time of divorce
- ▣ Active duty pension formula will change effective 2018 to create a 401(k) like plan for active members with 2+ years and reduce the pension factor from 2.5% to 2%

Federal Civilian Retirement Key Terms

- ▣ Court Order Acceptable for Processing
- ▣ Self-Only Annuity: Annuity based on the lifetime of the employee spouse
- ▣ Gross Annuity: self-only annuity less survivor annuity cost
- ▣ Net Annuity: gross annuity, less amounts: owed to government, deducted for health benefits, deducted for life insurance, deducted for Medicare, deducted for state and federal taxes

How are CSRS pensions valued?

See OPM.Gov

First 5 years of service	1.5 percent of your high-3 average salary for each year
Second 5 years of service	Plus 1.75 percent of your high-3 average salary for each year
For all years of service over 10	Plus 2 percent of your high-3 average salary for each year.

How are FERS pensions valued?

See OPM.Gov

Under Age 62 at Separation for Retirement, **OR**
Age 62 or Older With Less Than 20 Years of Service

1 percent of your high-3 average salary for each year of service

Age 62 or Older at Separation With 20 or More Years of Service

1.1 percent of your high-3 average salary for each year of service

Effect of Death of Non-Member/Non-Employee Former Spouse

- ▣ When a non-member payee spouse dies, their benefit automatically terminates and reverts to the participant
- ▣ For FERS/CSRS pensions, what happens to the former spouse's benefits will vary depending on the terms of the order. The benefit can revert, or it can continue to the estate of the former spouse

Federal Civilian Retirement Key Terms

- ▣ Retirement Benefits Court Order
- ▣ Cost-of-Living Adjustment: Uses CPI
- ▣ Former Spouse Survivor Annuity: reduces pension by specified percentage, depending upon level of coverage
- ▣ Refund: for employees who separate, they can receive a refund of their contributions to the federal pension
- ▣ Spousal Equity

Thrift Savings Plan Benefits

- 1) Valuation: Make sure that you know the actual value of the account on the date of valuation
 - Get Mandatory Disclosures
- 2) Passive Gains and Losses: Changes in value from valuation date to date of segregation of accounts
- 3) Outstanding Loans: Will they factor into award?

Hypothetical

- ▣ You are at mediation. You represent the wife of a military reservist who also works for the US Postal Service. You and the other side agree to split both pensions 50/50. You also suggest that your client be the survivor beneficiary. The other attorney says no – unless your client will pay for it.

Hypothetical

- ▣ Why is this an issue?
- ▣ What is the difference between these two pensions when it comes to death benefits?
- ▣ Can the cost be paid by one party?
- ▣ Is it OK to give up survivor benefits?

Timing

- ▣ Why you need to hurry when it comes to getting these orders done
- ▣ How long should drafting take?
- ▣ Must supply administrators with a certified copy of the Final Judgment

Timing

- ▣ Simultaneous entry of order with final decree
- ▣ Must supply pension administrators with a certified copy of the final decree
- ▣ Completion of Military Pension Orders generally takes 90 days from the date that the military receives the pension, and completion of COAPS can take 6-60 months. Plan accordingly.

Preparation and Fees

- ▣ Who should be responsible for preparing the order?
 - Attorney versus Non-Attorney
 - ▣ Liability Issues: Shifting to another attorney
- ▣ How should fees and costs be divided?
- ▣ Who should be required to contact the drafter?

The Engagement Letter

- ▣ State in your engagement letter that:
 - you do not handle QDROs or similar orders used to divided retirement accounts;
 - if a QDRO is necessary, it will require a separate fee to be paid by the client; and,
 - a retirement account or a claim to the benefits under same may be at risk if the client does not seek and obtain a QDRO immediately upon the execution of a settlement agreement or entry of any Final Judgment or other ordering necessitating a QDRO.

Thank you

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ABOUT US



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Bar Admissions:

- *Florida
- *Georgia
- *New Jersey
- *Wisconsin
- *U.S. Tax Court

Other Certifications:

- *Certified Divorce Financial Analyst

Matthew L. Lundy, Esq. earned his B.A. from Duke University, and his J.D., with honors, from the University of Florida. Following law school, Matthew worked in a law firm handling primarily domestic relations and family law litigation. It was during this time that Matthew began to develop a reputation as a young lawyer with a special skill for handling complicated legal and financial issues. As a result, Matthew took on the difficult task of building a practice across state lines, including taking numerous bar exams in addition to his regular workload. This not only grew his practice, but also his knowledge of the law, which can vary dramatically from state to state. Within two years of beginning his practice, Matthew was not only trying cases, but also publishing scholarly articles in a variety of legal journals and traveling around the country conducting seminars for judges, attorneys, and other professionals.

Since forming his own law firm, Matthew has established himself as one of the elite attorneys in the area of retirement account division and administration. He has represented individuals, and small and large companies as to a wide variety of issues related to retirement plans, with an emphasis on work related to qualified plan division in family law matters (usually involving "QDROs"). Matthew also frequently testifies as a court appointed "expert" on matters related to retirement account division.

Matthew has consistently been honored as a "Rising Star" by Super Lawyers Magazine, and as an "Outstanding Young Lawyer" by the American Registry, and has been designated one of the "Top 40 Under 40" by the American Society of Legal Advocates.

Matthew is married to Nava Lundy, a professional artist. They have identical twin daughters and a son, as well as two hound dogs. Matthew is also an avid sports fan.



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