

Military Issues in Divorce

I. INTRODUCTION

The Servicemember's Civil Relief Act (SCRA) protects servicemembers from dealing with a divorce while they are deployed. If a servicemember is served with a divorce complaint while overseas, they can request a 90-day extension to respond to the petition.

Each branch of the military has a legal assistance office which can answer questions about separation and divorce for both the servicemember and the civilian spouse. Some of the branches may even help with paperwork. If a branch's office is already assisting one spouse, the other spouse can go to another branch's office.

Each branch also has Family Advocacy Centers. These can provide additional resources such as counseling and can also refer the client to other military agencies.

Filing for divorce can be a very dangerous time for victims of domestic violence. **Those who may fear their spouse should talk to an attorney before filing for divorce.**

This brochure addresses special issues that may be encountered when divorcing a member of the military.

II. OBTAINING TESTIMONY AND RECORDS

Records and testimony must be sent (either requests or subpoenas) to the Secretary and serve them to the Office of General Counsel of the particular service (i.e., Secretary of the Air Force, c/o Office of General Counsel of the Air Force). A copy should also be provided to the Staff Judge Advocate for the local command holding the records. Because many types of military records are protected, a subpoena must be signed by a judge (not a clerk) or accompanied by a written consent of the release of the records signed by the subjects. Service generally requires two to three weeks.

Alternatively, most servicemembers have access to their personnel and pay records, and servicemembers and dependents usually can get access to their own medical records. The servicemember can be asked to produce these documents, either voluntarily or through discovery. If there is a military police report, the complaining witness is usually able to get a copy.

III. HOUSING

If the servicemember moves out of the house, the non-military spouse may receive notice to vacate military housing *within 30 days*. For servicemembers to qualify for family housing, children must typically reside with the servicemember for more than six months per year.

Military housing may grant an exception to policy if the spouses have a specific plan, such as:

- A plan of when they will both be back in housing (e.g., a counseling plan and date spouse will return to housing)
- They can show a date they will be leaving (e.g., early return of dependents).

Spouses should plan ahead if they are thinking about divorce. Otherwise, they (and their children) could end up without housing.

IV. SEPARATION CONTRACTS

Separation contracts are simply agreements between the spouses on issues regarding military spouses' separation. Most of the military legal assistance offices offer help in drafting a separation contract.

A separation contract can help the spouses start working out the issues to be resolved in a divorce. It may also be helpful to show the commanding officer irreconcilable differences (for decisions the commander officer will make, such as early return of dependents). **A separation contract is just a contract, and is *not* the same as a formal separation through the court system.** However, the contract could be binding on the terms of the eventual divorce.

V. SUPPORT OF FAMILY MEMBERS

While spouses are still married, even if they are separated, a civilian spouse is considered a family member of the military member. The military member is required to support the non-military spouse. The military has regulations concerning support of family members. These include guidelines for how much the military member should pay, depending on the number of family members. The military branches have enforcement procedures to ensure support is provided. If a civilian spouse is not receiving any support, they can contact the member's commanding officer.

A divorced servicemember who is obligated to pay child support will continue to receive Basic Allowance for Housing With Dependents, even if the other spouse may have physical custody.

The Cost-of-Living Allowance (COLA) will probably change upon divorce. If the civilian spouse is awarded physical custody, the servicemember will receive a COLA based on zero dependents, even if the servicemember is required to pay child support.

Once the spouses are divorced and have a support order entered, the military will help enforce it. The military will usually send court-ordered payments directly to the former spouse.

Civilians with existing child support obligations who have been recalled to active duty with the National Guard or Reserve should determine whether they will be able to comply with support orders if they were calculated on former (higher) salaries. Mobilization often causes a significant loss of income. Because child support is not retroactively modifiable, a soon-to-be-mobilized spouse should seek adjustment of child support as soon as possible.

VI. RELOCATION AND EARLY RETURN OF DEPENDENTS

A. Relocation After Divorce

If a servicemember is permanently stationed outside the continental US and their marriage terminates, the government will pay to transport the former spouse, children, and household goods back to their home location. Travel must start at the servicemember's present or former duty station and end in the US or, if the former spouse is a foreign national, at a designated place in the former spouse's country of origin. Travel must be completed within one year of the effective date of filing of the Divorce Decree or six months after the servicemember's permanent change of station from outside the continental US to a new duty station, whichever is sooner.

B. Relocation After Custody Change

If there is a change in child custody, the military will provide transportation for children to the servicemember's duty station outside the continental US if the servicemember has at least 12 months remaining on their overseas tour, and the dependents are command-sponsored.

C. Early Return of Dependents

After marital separation and/or family violence, a servicemember or spouse can request early return to their home for themselves and their dependents. A final divorce decree or separation is not required for early return.

The departing spouse should obtain a pre-decree order permitting the child(ren)'s permanent relocation from Hawaii with the departing parent. Usually, the military requires that parties have a separation agreement addressing the child(ren)'s departure and shipment and household goods, as well as confirming the consent of the servicemember spouse. However, concurrences from the chaplain, family service center, and housing can be waived for good cause or in an emergency.

If a civilian spouse leaves Hawaii before filing their divorce action, this may mean that only the servicemember spouse satisfies jurisdictional requirements to file a divorce action in Hawaii. Therefore, a civilian spouse may want to complete a divorce filing in Hawaii before relocating.

VII. DEPLOYMENT AND CHILD CUSTODY

Single military parents and dual-military couples must have written Family Care Plans on file to nominate persons to care for their children in the event of long-term deployment and short-term missions. Family Care Plans cannot go beyond the parental rights of the non-custodial parent.

Courts are not allowed to make deployment or potential deployment the sole factor in awarding custody. Usually, if the custodial parent is deploying, the non-deploying parent has a constitutional right to custody of the child, unless the non-deploying parent is found to be unfit.

After the deploying parent returns, statute requires a transition schedule to the custody arrangement before the deployment. However, either parent is allowed to request a review hearing within 30 days of the deployed parent's return, and the court is authorized to make orders that are in the best interest of the child.

VIII. MILITARY BENEFITS

A. Retirement Pay

The Uniformed Services Former Spouses Protection Act guides the states in how to divide retirement. Hawaii treats military retirement pay like other pensions and may award up to 50% of the retirement pay accrued during the marriage to the former spouse.

Military retirement pay is considered property to be divided in a divorce. If the spouses were married more than 10 years, the military will pay the money directly to the former spouse. If the spouses were married less than 10 years, then the military pays the money to the military spouse, who should then mail it to the former spouse. VA Disability Compensation is not divisible in divorce.

The Survivor Benefit Plan (SBP) automatically enrolls every servicemember while they are on active duty. Spouse coverage under the SBP is suspended when the Defense Finance and Accounting Service is notified of a divorce. The servicemember and former spouse then have one year from the date of divorce to request a change in their elections from spouse to former spouse, either voluntarily or by court order, in order for the former spouse to continue receiving the monthly annuity. Failure to meet this one-year deadline will result in disqualification for SBP benefits.

Thrift Savings Plan (TSP) is a defined contribution plan for federal employees, similar to private-sector "401(k)" plans. TSP is divisible in divorce. The formula is either a stated amount, or half of the difference between the value on date of divorce minus value on date of marriage.

B. Benefits for Spouses

A 20/20/20 former spouse is a former spouse who was married to a servicemember for at least 20 years, during which time the servicemember performed at least 20 years of service creditable for retirement pay. As long as 20/20/20 former spouses remain unmarried, they are entitled to continued medical benefits consisting of care in a military facility and care in the civilian community through TRICARE, as well as post-divorce commissary and exchange privileges. Medical benefits terminate upon the former spouse's re-marriage and cannot be reinstated. Access to the commissary and exchange privileges can be reinstated if the remarriage terminates.

If the former spouse was married to a servicemember for 20 years, 15 of which were concurrent with twenty years of service creditable for retirement, AND the divorce occurred before April 1, 1985, they are known as a 20/20/15 former spouse and are entitled to the same benefits as above. However, if the divorce occurred AFTER April 1, 1985, the 20/20/15 former spouse is entitled to continued benefits for one year only.

Any former spouse who does not qualify for any other kind of military medical care can enroll in the Department of Defense's Continued Health Care Benefit Program (CHCBP). Former spouses who have medical insurance through their employers are not eligible for CHCBP.

C. Benefits for Children of Military Members

Children remain family members of military members regardless of divorce. This means they keep their benefits such as medical and commissary or exchange privileges, depending on the branch.

D. Educational Benefits

Education benefits can be transferred to a spouse or children. Veterans who remarry or have more children after leaving the service cannot transfer benefits to the new family members. The servicemember retains the right to revoke or modify the transfer at any time.

A spouse may start to use the transferred benefits immediately, but must be a spouse at the time of transfer. A subsequent divorce will not affect the continued receipt of educational benefits unless the servicemember or veteran revokes the transfer. Educational benefits are not treated as marital property subject to division upon divorce. My Career Advancement Account (MyCAA) is not available to divorced spouses or those legally separated by court order.