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Divorce and the Military: An Overview

There are many issues that need to be resolved when getting a divorce. When a member of the military, or their spouse, seeks a divorce, those issues multiply. This is a brief overview of the unique matters that a military member or their spouse must resolve when seeking a divorce in Hawaii.

Early Return of Dependents

Military members stationed in Hawaii are considered stationed "Outside of Continental United States" (OCONUS). In some cases, the military member's family may not wish to remain in Hawaii and would like to return home before the end of the member's tour of duty. Therefore, each branch of the military has procedures in place for the early return of dependents (ERD) to their home of record at government expense, including some household goods. If a spouse is not a U.S. citizen and is foreign born, they may be authorized an early return to their home country. An ERD is requested through the command. You may consult your servicing personnel officer for the procedures to request an ERD, and the request can be made either by the servicemember or the spouse. The ERD is not necessarily a legal issue, but it may give rise to disputes about custody and division of property before the dependent returns to their home of record.

Military Retirement

There are two kinds of retirement – medical and years of service (over 20 years or, in some cases, 15). Medical and years of service retirements are treated differently by the courts. While Medical retirement income is generally not divisible in a divorce, years of service retirement income can be awarded to a former spouse. There is a myth that a spouse will automatically get half of the servicemember's retirement at 10 years of marriage – this is not true. Years of service retirement can be divided for any length of marriage, or can be awarded to the servicemember alone. There is no set rule. If years of service retirement will be divided, there are various formulas that can be used:

- 1) A specific dollar amount;
- 2) A set percentage; or
- 3) A calculation of years of marriage that overlap years of credible service divided by the total years of military service. That amount is then divided by 2, resulting in the ex-spouse's share.

There are many nuances and variables involved in deciding whether to seek or award a portion of a servicemember's retirement that should be specifically discussed with an attorney.

Divorce with Children & Housing Allowance

A divorce with children will affect a member's housing allowance, also known as Basic Allowance for Housing, or BAH. This can be a complicated area and an attorney should be consulted to assist you in determining what you will be entitled to post-divorce. In most instances, whether you will continue to receive BAH depends on several factors, including:

- 1) Whether you live in single-type government quarters or in off-post housing;
- 2) Whether you were married to a civilian or another military member; and
- 3) Whether you have physical/legal custody, are paying child support; and whether you live in single-type government quarters.

If you have primary physical and joint-legal custody of your children, you will receive the BAH with dependent rate (BAH-With). If you do not have primary physical and joint-legal custody of your children, but are paying child support at least in an amount equal to the BAH-Diff rate, and not living in government quarters, then you will receive BAH-With. If, however, you are assigned to single-type government housing, then you would receive BAH-Diff. These calculations get a bit more complicated if you are dual-military and an attorney should be consulted in these situations.

Keep in mind, that although BAH is not taxable income, the amount a servicemember receives is considered income for child support purposes.

Child Support

Child support is determined by a formula adopted by the family court and is generally not allowed much deviation. A spouse cannot waive child support. Only under exceptional circumstances will the court deviate from this formula. A military member needs to know that Hawaii, like most states, considers all sources of income when determining the child support amount.

For a servicemember, income includes BAH, COLA, and other sources of military earnings. The basic rule is that "if it looks like income, it is considered income for child support purposes." A servicemember's income, however, could drastically change in the event of divorce or a PCS to a different duty station with a lower BAH and no COLA. Your military finance office can often assist you in providing a "projected LES" to show the court what amount child support should be based on since military income will change after a divorce. However, until you have a revised court order, you will be subject to the amount set by the court even if your income has dropped.

Child Custody

Child custody is a particularly tricky area for active duty servicemembers. Virtually all issues regarding children in a divorce are governed by the "best interest of the child." Parents are generally free to decide on a visitation schedule, also known as a parenting plan, which would best fit for their family

(within reason). This works out easily when both parents live in the same location but gets especially complicated for families who have to deal with an ERD, PCS, or deployments. In cases involving minor children, Hawaii requires that both parents attend a court-mandated parenting class before a divorce will be granted.

It is important to remember, that regardless of what the parties agree upon, parenting plans are reviewable by a court to ensure the best interest of the child are served.

Adultery

Hawaii is a “no-fault” divorce state and adultery has no bearing on whether a divorce will be granted or how property division and custody will be determined. It is, however, a punishable offense under Article 134 of the Uniform Code of Military Justice. Therefore, it is imperative that a servicemember refrain from going back out into the dating pool until after the divorce is final.

Separation

Hawaii does not require that a couple be separated for any period of time before filing for divorce. Within the military, however, there are special considerations if a couple is separated. These considerations also differ according to the branch of service and whether the couple is dual-military. An attorney should be consulted before any separation agreement is signed, even if it's an informal agreement. For a rundown of separation considerations see [this article](#).

Conclusion

I hope that this primer helped you understand the unique issues facing servicemembers and their families. It is preferable that the parties remain civil and communicate about these issues. I can assist you in navigating the unique and complex situations that arise in any divorce in a fair and simple way. Contested divorces can be expensive and can take a huge emotional toll, not just on the divorcing parties, but also on their children and those around them. If you would like to schedule a free consultation with me please feel free to contact me through my website at www.hookanolaw.com/contact or directly at levi@hookanolaw.com.