

Military Service, Civil Service, Settlement and Sabotage

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*There's always the unexpected . . .*¹

I. Introduction

“The unexpected” is a major theme in David Lean’s complex 1957 war film, *The Bridge on the River Kwai*.² Early in the plot, Navy Commander Shears is unmasked and found to be an ordinary seaman impersonating an officer in the hope that he would get better treatment in a Japanese prisoner of war camp; however, he soon discovers that the camp officials treat both officers and enlisted men with equal cruelty.³ Upon hearing this, Major Warden, who leads the commando team to blow up the bridge, wryly remarks, “Yes, there’s always the unexpected, isn’t there?”⁴

References to “the unexpected” occur often in the movie. After parachuting into the jungle, the commando team is surprised to learn that the initial bridge construction was abandoned and a new span has been erected at a different site than the one to which they were marching.⁵ After the saboteurs finish their work, the River Kwai goes down unexpectedly overnight, exposing the demolition charges previously hidden underwater and the wires to the detonator downstream.⁶ Then the team discovers that a troop and VIP train from Bangkok to Rangoon is scheduled for just a few days after their arrival.⁷ Warden, upon hearing of this surprise “target of opportunity,” points out that the swift kick Shears gave to the malfunctioning radio brought it back to life, giving the commando team new intelligence as to the bridge’s location and the train.⁸ Shears, in a sarcastic reprise of Warden’s earlier remark, exclaims, “Well, there’s always the unexpected, isn’t there?”⁹

II. *Lusso v. Quiggle*—The Unexpected

The unexpected is what happened to Muriel Quiggle in her divorce case upon appeal to the Minnesota Court of

Appeals in 2015.¹⁰ The expected division of her ex-husband’s retired pay vanished into thin air. The appellate court laid the blame on the wording of the divorce settlement; it left the court with no room to wiggle.

The parties married in April 1973, and the husband joined the Air Force in November of that year.¹¹ In 1989, he filed for divorce.¹² A divorce was granted in October of that year.¹³

Like many divorcing couples, the parties entered into an agreement to resolve issues of property division and other matters.¹⁴ Their stipulated divorce decree, in regard to the husband’s retirement rights, said that for fifteen years of the marriage, the husband was on active duty in the Air Force, accumulating retirement benefits payable to him if he retired after twenty years.¹⁵ If he became eligible for a military pension benefit as a result of this service, 37.5% of his pension would be awarded to the wife.¹⁶

What happened next defies any planning and cannot be explained. The husband left the Air Force.¹⁷ He stopped serving before he reached twenty years of service.¹⁸ The court opinion does not indicate whether he resigned his commission or was forced out. It is simply silent.

After the husband left the service, he took a job with the Department of Veterans Affairs. With more than fifteen years of creditable service in the Air Force, the husband paid \$9,700 to the civil service retirement fund to buy into the Federal Employees Retirement System (FERS).

When Mrs. Quiggle found out that there was no Air Force pension to divide, she moved to amend the divorce decree and re-open the judgment on the grounds that she had a marital

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¹ *The Bridge on the River Kwai* (Columbia Pictures Corp. 1957).

² *Id.*

³ *Id.*

³ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Lusso v. Quiggle*, 2015 Minn. App. Unpub. LEXIS 28 (Minn. Ct. App. Jan. 12, 2015).

¹¹ *Id.* at *1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at *1-2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at *2.

interest in her ex-husband's civil service pension.¹⁹ The trial court denied her motion, stating that the plain language of the decree governed, and the Court of Appeals affirmed.²⁰

The problem in the *Quiggle* case is that there was no provision for the wife to receive part of any other retirement plan. The divorce decree contained no clause that allowed the division or allocation of a different retirement program that might take the place of the military retirement. Additionally, there was no imposition of a constructive or resulting trust on the benefits in a subsequent pension plan, which derived from marital time in the military. Constructive credit for the pension earned during the years of military pension service while the parties were married was neither contemplated, expressed nor agreed upon; it just was not on the radar.

III. Civil Service Rollovers

The conversion of military time to civil service time often occurs when an individual has a few years of prior military service and is discharged. Federal law allows the individual to purchase time credits toward a civil service retirement, using active duty time spent in the armed forces and paying into a fund for the additional time gained, meaning an earlier pay date for the civil service retirement annuity.²¹

In these cases, the litigated issue is usually whether the former spouse possesses a property right in the additional time purchased. Sometimes the purchase was made during the marriage, with the former spouse claiming that this means the property is marital or community property and, thus, is divisible.²² In other cases, the court is asked to determine whether the purchase was made with marital or community

funds or with separate funds.²³ When there is a marital or community component, whether time or payment, the court can either grant the former spouse a share of the new retirement benefit or return the funds to 'the marital pot' for division by the parties.²⁴ This may be done by requiring the individual acquiring civil service pension rights to pay back the former spouse for fifty percent (or other percentage) of the cost incurred with marital funds.²⁵

The interrelationship of military and civil service retirement is complex. Few civilian lawyers (and even fewer spouses) realize that a servicemember can "roll over" his or her years of active duty service into federal civil service and purchase a year-for-year credit based on the time spent in the military.²⁶ Even fewer lawyers and spouses have the foresight to anticipate that this situation may occur in connection with the divorce case. Almost no one possesses a working knowledge of the statute allowing this credit. The failure of the former spouse's lawyer to consider this consequence might be an expensive mistake.

IV. Choices for the Member or Retiree

Military members should carefully consider their options regarding a post-retirement job with the federal civil service.²⁷ A military member eligible for military retirement (or a military retiree) who is working as a civil servant may choose one of three options regarding military retired pay, Social Security, and the civil service pension. The first option is to receive military and civil service pensions plus Social Security benefits based on time in the military.²⁸ This gives the retiree three distinct retirement benefits. Since the military service provides Social Security benefits, the spouse

¹⁹ *Id.*

²⁰ *Id.* at *1.

²¹ 5 U.S.C. § 8334(j) (1994). *See also* 5 U.S.C. §§ 8332(c), 8334(j), 8411(c), 8422(e) (1994). The implementing regulations of the U.S. Office of Personnel Management (OPM) are found in 5 C.F.R. § 831.2101 to 831.2107 (1995) (for the Civil Service Retirement System) and 5 C.F.R. §§ 842.306 to 842.309 (1995) (for the Federal Employees Retirement System).

²² *See, e.g.*, in *Re Marriage of Mahaffey and Mahaffey*, 773 P.2d 806 (Or. Ct. App. 1989) (holding that four years of military service used by a husband in purchasing federal civil service credit was jointly owned by his wife since the purchase occurred while the couple was married).

²³ *See, e.g.*, *Gainer v. Gainer*, 639 S.E.2d 746 (W. Va. 2006). In this case, the husband purchased federal civil service credit prior to his marriage. *Id.* The court held that this increase in the husband's federal retirement benefit was his separate property, but his wife was entitled to reimbursement of one-half of the cost because marital funds were used for the purchase. *Id.*

²⁴ *See, e.g.*, *Leatherman v. Leatherman*, 833 P.2d 105 (Idaho 1992).

²⁵ *See, e.g.*, *Gainer*, 639 S.E.2d 746. The problem is not limited to federal pension rights, as some cases involve the purchase of time credits in a state or local retirement system. *See, e.g.*, *Valachovic v. Valachovic*, 780 N.Y.S.2d 222 (N.Y. App. Div. 2004). In that case, both parties were retired school teachers receiving pension benefits from the New York State Teachers' Retirement System at the time of their divorce. *Id.* During the marriage, the husband purchased three additional years of credit for military service in the state system. *Id.* The wife filed a motion to receive a share of

those credits but the court denied the motion, holding that the credits were the husband's separate property since they preceded the marriage. *Id.* The order was affirmed on appeal, with the court stating that whether, and to what extent, a pension benefit was marital or separate property was determined by the time period in which the credit for the pension was earned. *Id.* at 223. *See also* *Okos v. Okos*, 739 N.E.2d 368 (Ohio Ct. App. 2000) (involving a similar situation related to a husband's disability pension). *But see* *Lodrigue v. Lodrigue*, 817 So. 2d 466 (La. Ct. App. 2002). In that case, the husband had purchased state employment credit during his marriage with military service that occurred before he was married. *Id.* at 467. The appellate court held that since there was no evidence presented at trial that the credit was purchased with separate funds, the service was deemed to be community property. *Id.* at 470.

²⁶ *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 643, 113 Stat. 512, 664 (1999). This is different from the dual compensation restriction, which required reduction of military retired pay when a retired servicemember entered federal civil service. *Id.* Dual compensation limitations were eliminated in 1999. *Id.*

²⁷ *See* OFF. OF PERS. MGMT., *CSRS and FERS Handbook for Personnel and Payroll Offices* ch. 22 (Apr. 1998), <https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c022.pdf> [hereinafter *CSRS & FERS Handbook*].

²⁸ DAVID BURRELLI, CONG. RESEARCH SERV., RL31663, *MILITARY BENEFITS FOR FORMER SPOUSES: LEGISLATION AND POLICY ISSUES* 19 (Dec. 9, 2004).

or former spouse will receive Social Security survivor benefits, if the marriage lasted at least ten years.²⁹

The second option is to waive military retired pay and credit all military service to civil service retirement, with Social Security benefits to be based on military service. With this alternative, the retired member obtains two separate benefits: civil service retirement plus Social Security.³⁰ The amount of the civil service pension is based on total federal service, including military service.³¹ When the retiree attains age sixty-two, however, the years of military service stop counting toward the civil service pension because they are counted toward Social Security; thus the civil service employee annuity drops at the age of sixty-two when Social Security becomes payable to the retiree.³²

The third alternative is to elect the second option, discussed above, and deposit a lump sum into the federal retirement fund (Civil Service Retirement Fund or Federal Employees Retirement System) to avoid the reduction mentioned above at age sixty-two.³³ Here, the retiree is also eligible for two retirement benefits—the civil service pension and Social Security payments, the latter being without reduction at age sixty-two.

V. Roll-Over of Military Service in the Courts

The Idaho case of *Leatherman v. Leatherman* provides an example of how the rollover, waiver, and division works.³⁴ In that case, the parties were divorced in 1982 after thirty-five years of marriage.³⁵ The former husband served in the Navy for fourteen years during the marriage, and the court awarded him his Navy retirement pay as his separate property.³⁶

In 1983 the Veterans Administration determined that the husband was 100% disabled as a result of a heart attack.³⁷ He had been employed as a postal worker; to qualify for full civil service disability, he waived his military pension.³⁸ Though he lacked military retirement benefits at that time because he left the Navy too early, he received credit for his years of Navy service in determining his civil service retirement.³⁹

Upon the motion of the former wife to modify the divorce decree, the magistrate granted her nine-teen percent of her

former husband's civil service annuity.⁴⁰ This was due to credit for his service in the Navy during the parties' marriage.⁴¹ The Idaho Supreme Court upheld this decision, stating that "the district court correctly ruled that the portion of appellant's civil service benefits representing his years of service in the military are divisible military retirement benefits" under state law.⁴²

VI. The Potential for Abuse

The potential for abuse in these cases is obvious. Before January 1, 1997, a military retiree could avoid paying a former spouse her share of the military pension by using federal employment to circumvent the military pension division order; all the employee had to do was convert his years of military service into creditable time for an increased civil service retirement benefit.

Because of this workaround, Congress changed the rules effective January 1, 1997. The changes to the Civil Service Retirement Act and the Federal Employees Retirement Act allow a former spouse to continue to receive payments of military pension division when the military retiree has waived military retired pay to credit military service toward a single civil service employee annuity.⁴³ A worker in the federal government who retired from military service can no longer count his or her years of military service toward a civilian federal retirement without authorizing the Office of Personnel Management (OPM) to deduct the appropriate amount adjudicated by court order for the former military spouse.⁴⁴

For the last twenty years, former spouses have been protected from loss of divided military retired pay through transfer of retirement benefits from military retirement to civil service retired pay. That protection, however, does not address the issue of past military service that has not matured into a military pension.

VII. The Last Word

When one encounters the unexpected, the last word is sometimes left to the commander, supervisor or senior staff. In *The Bridge on the River Kwai*, the final words on planning

²⁹ *Id.*

³⁰ *Id.*

³¹ Burrelli, *supra* note 28.

³² *Id.* See also *CSRS & FERS Handbook*, *supra* note 27, §§ 22A3.1-4A.1., 22A5.1-1, 22A5.1-3.

³³ *CSRS & FERS Handbook*, *supra* note 27, § 22A5.1-3.

³⁴ *Leatherman v. Leatherman*, 833 P.2d 105 (Idaho 1992).

³⁵ *Id.* at 106.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 108.

⁴³ Civil Service Retirement Act of 1920, 5 U.S.C. § 8332(c)(4) (1920); Federal Employees Retirement System Act of 1986, 5 U.S.C. § 8411(c)(5) (1986).

⁴⁴ See *Id.*

the destruction of the bridge are from Colonel Green, the commandant of the commando training school.⁴⁵ He advises the sabotage team: “As I’ve told you before, in a job like yours, even when it’s finished, there’s always one more thing to do.”⁴⁶

Here, the attorney for the former spouse must think about one more thing, one unanticipated issue, namely, What happens if the servicemember does not retire—is that possible? After all, the servicemember has not attained twenty years of creditable service. If this is the case, the former spouse’s attorney must also ask what happens to the client’s share of the potential military pension? What happens to the years of service that accrued during the marriage?

Finally, counsel should consider if the husband resigns his commission now, or if he does not re-enlist, then he will not have a military pension to divide with the former spouse. And if he leaves military service and rolls over his military credits to federal civil service, he may not have *any* pension to divide with her.

VIII. Guidance and Dangers

To assist attorneys who may not be fully familiar with these questions and issues, the OPM provides the following guidance in its booklet, *Court Ordered Benefits for Former Spouses*:

What Happens if Military Service is Used for Civilian Retirement Credit, and There is a Court Order Awarding a Former Spouse a Portion of the Retiring Employee’s Military Retired Pay?

Receipt of military retired pay often bars credit for the military service for Civil Service Retirement or Federal Employees Retirement unless the retiring employee elects to waive the military retired pay, and have the military service added to civilian service in computing their civilian annuity.

If the employee’s military retired pay is subject to a court order awarding a former spouse

a portion of the military retired pay, the retiring employee cannot receive credit for the military service for Civil Service Retirement or Federal Employees Retirement without first consenting for us to continue payment to the former spouse, in the amount the military pay center would pay the former spouse if military retired pay continued.⁴⁷

The OPM provides further guidance in its booklet, *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits and Life Insurance under the Civil Service Retirement Benefits, Federal Employees Retirement Benefits, Federal Employees Health Benefits, Federal Employees Group Life Insurance Program*.⁴⁸ The agency suggests adding the following clause in a federal retirement division in order to protect the nonmilitary spouse or former spouse in the event that the servicemember waives the military retired pay to allow crediting the military service under CSRS or FERS:

If [Employee] waives military retired pay to credit military service under the Civil Service Retirement System, [insert language for computing the former spouse’s share from 200 series of this appendix]. The United States Office of Personnel Management is directed to pay [former spouse]’s share directly to [former spouse].⁴⁹

When a division order pertaining to military pension contains proper protective language and is entered and served on the designated agent,⁵⁰ the nonmilitary spouse will be covered. This is true whether the servicemember retires or leaves the military with only ten or fifteen years of service and fails to retire on the military side. So long as the designated agent⁵¹ is served, then the OPM and the designated agent will cooperate to protect the non-military spouse.

Counsel should take care in preparing a settlement in the light of the above rules. There are traps to avoid. The first danger lurks in failure to serve the designated agent. Effective service on the designated agent triggers implementation of the law and the rules set out above.⁵² If the order is never forwarded by the court or the attorney for the spouse, then the enacted protections are meaningless. The servicemember will be able to convert his or her military time into credits toward

⁴⁵ *The Bridge on the River Kwai*, *supra* note 1.

⁴⁶ *Id.*

⁴⁷ OFF. OF PERS. MGMT., COURT ORDERED BENEFITS FOR FORMER SPOUSES 5 (July 2014), <https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri84-1.pdf>.

⁴⁸ OFF. OF PERS. MGMT., A HANDBOOK FOR ATTORNEYS ON COURT-ORDERED RETIREMENT, HEALTH BENEFITS AND LIFE INSURANCE UNDER THE CIVIL SERVICE RETIREMENT BENEFITS, FEDERAL EMPLOYEES RETIREMENT BENEFITS, FEDERAL EMPLOYEES HEALTH BENEFITS, FEDERAL EMPLOYEES GROUP LIFE INSURANCE PROGRAM ¶ 111 (July 1997), <https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri38-116.pdf>.

⁴⁹ *Id.* ¶ 111. The paragraph should be used only if the former spouse is awarded a portion of the military retired pay. *Id.*

⁵⁰ Uniformed Services Former Spouses’ Protection Act, 10 U.S.C. § 1408(b)(1)(A) (1982).

⁵¹ U.S. DEP’T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7B, ch. 29, ¶ 290403 (Apr. 2013). The Defense Finance and Accounting Service in Cleveland, Ohio, is the designated agent that processes retired pay division orders for Army, Navy, Air Force and Marine Corps cases. *Id.* The Coast Guard Pay and Personnel Office in Topeka, Kansas, processes paperwork for that service as well as the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration. *Id.*

⁵² 10 U.S.C. § 1408(d)(1).

civilian federal retirement without violating the law and without protecting the nonmilitary spouse's rights under the military pension division order.

The second danger is when there is no order dividing the military pension because the servicemember leaves military service far enough away from military retirement that the issue does not come up in the trial or negotiations. In this situation, the issue is not addressed in an order dividing military retirement benefits because there are no benefits presently to divide and none anticipated. While there is no military pension to waive, however, the former servicemember may still transfer *creditable military service* to civil service in computing civil service retired pay.⁵³ If the time to be transferred is marital time—that is, years or months during the marriage—then it is important for the nonmilitary spouse's attorney to be alert in drafting the separation agreement or marital settlement agreement.

As is true elsewhere in this field, the best way to handle this potential problem is through anticipatory drafting. The attorney should anticipate that the former servicemember may well choose to roll over those years in military service toward a federal retirement down the road and that the non-military spouse should get a portion of the federal retirement if part of it was acquired through credit for military service. A well-drafted contingency clause, such as the following, can take this condition into account and promise some protection for the non-military spouse:

If the Defendant fails to retire from military service and elects to "roll over" or merge the time of his military service into federal or other government service in order to get credit for same, then the Plaintiff shall be entitled to her share of any such retirement pay or annuity he receives based on the parties' period of marriage during Defendant's period of military service. Defendant shall notify Plaintiff immediately upon his termination of military service, through retirement or otherwise, and shall include in said notification a copy of his military discharge certificate, Department of Defense Form 214. Defendant shall also notify Plaintiff immediately if he obtains government employment, and will include in said notification a copy of his employment application and his employment address.

Of course, this clause is not self-implementing. The non-military spouse must remain alert and help to determine whether the former military spouse elects federal employment in the future. There is simply no incentive for the former servicemember to engage in self-reporting only to have his or her future civilian federal retirement diminished.

IX. Language to Protect the Former Spouse

With these concerns in mind, the former spouse's attorney needs to ensure that the property settlement contains the following protective clauses:

1. If Defendant-Husband tries to waive or convert any portion of his military service (whether active-duty or Guard or Reserve) into federal or state civil service time without first obtaining Plaintiff's consent, and the effect of this action is that her benefits would be reduced, then -

a. Plaintiff-Wife will receive either:

i. Non-modifiable alimony equal to the amount or share of the military pension that she was entitled to receive before any waiver (with cost-of-living adjustments, if applicable), and not terminating at her remarriage or cohabitation; or

ii. A portion of the federal civil service retirement annuity that provides Plaintiff an amount equal to what she would have received as her share of the military pension had there been no waiver to obtain an enhanced federal retirement annuity.

iii. In the event of such conversion, pursuant to 5 U.S.C. § 8411(c)(5), Defendant will authorize the personnel office (e.g., Director of the Office of Personnel Management) to deduct and withhold (from the annuity payable to Defendant) an amount equal to the amount that, if the annuity payment were instead a payment of Defendant's military retired pay, would have been deducted, withheld, and paid to Plaintiff under the terms of this Order. The amount deducted and withheld under this subsection will be paid promptly to Plaintiff.

b. If the waiver of military pension for other government retirement prevents Plaintiff's coverage under the Survivor Benefit Plan, then Defendant will -

i. Designate Plaintiff as beneficiary under the equivalent federal retirement survivor annuity plan and provide equivalent coverage; or

ii. Obtain life insurance (with Plaintiff as the owner) covering his life with a death benefit equal to full Survivor Benefit Plan (SBP) coverage; or

iii. Purchase a single-premium annuity (with Plaintiff as the owner) that is equal to the benefits payable for full SBP coverage.

c. Defendant will notify Plaintiff immediately if he accepts employment with the federal government. He will include in said notification a copy of his employment application and his employment address.

⁵³ See discussion *supra* Section III.

d. Any subsequent retirement system of Defendant is directed to honor this court order to the extent of Plaintiff's interest in the military retirement and to the extent that the military retirement is used as a basis of payments or benefits under the other retirement system, program, or plan.

If the civilian lawyer or legal assistance attorney for the spouse or former spouse is aware of these civil service roll-over issues, then the client can be fully advised about the risks and further litigation which may be in store. If that attorney plans for these contingencies through the drafting of a remedial clause such as the above, there will be some measure of prevention, protection, or relief available for the client—avoiding “the unexpected.”