

## Survey of Family Law Cases 2004-2013

### 2011 Family Law Survey

## **DIVIDING PROPERTY IN DENVER**

The Court of Appeals returned to the issue of division of military retirement benefits in *In re the Marriage of Poland*, No. 10CA1158 (Colo. App., September 29, 2011). Husband appealed from an order awarding Wife a portion of the pay he received from the military after he was placed on the Temporary Disability Retired List (TDRL). The parties' separation agreement provided that husband's "gross military retirement" benefits were marital property and would be divided, upon his retirement, under the Hunt Gallo formula. See *In re Marriage of Hunt*, 909 P.2d 525, 532 (Colo. 1995). Wife moved to establish her share of the TDRL pay. The trial court ordered husband to pay wife her share of his TDRL pay as determined under the decree, and Husband appealed.

A military service member is placed on TDRL under 10 U.S.C. § 1202 if the member has a disability rating of at least thirty percent but the disability has not yet been determined to be permanent. In *re Marriage of Williamson*, 205 P.3d 538, 540 (Colo. App. 2009). The member may remain on TDRL for five years. The member submits to a medical evaluation every 18 months to determine whether the disability has stabilized to a degree that permanent disability retirement is appropriate, or whether the disability has improved to the point where the member is fit to return to active duty. 10 U.S.C. § 1210. After five years, the member must be returned to active duty, be permanently retired for longevity (if the member has at least 21 of service), or be permanently retired for disability.

While a service member is on the TDRL, the member is entitled to pay, calculated under 10 U.S.C. § 1401(a), using one of two formulas. Under the first formula, the member receives 2.5 percent of his or her monthly base pay for each year of service; under the second formula, the member's pay is calculated by multiplying the base pay by the member's disability percentage.

A spouse's military retirement benefits may be distributed as marital property in dissolution cases under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408. However, only "disposable retired pay" may be distributed. Thus, the trial court's determination that it could, based on the parties' agreement to divide husband's "gross military retirement," divide more than husband's "disposable retired pay" was rejected by the Court of Appeals. The Court concluded that an amount equal to the amount of TDRL pay, as calculated based on husband's percentage of disability when he was placed on the TDRL, must be excluded from the marital property, but that any amount in excess of that amount may be divided under the decree.

Because the trial court divided all of husband's TDRL pay under the time rule formula without considering the extent to which the pay was computed on husband's disability, the trial court order could not stand. 10 U.S.C. §1408(a)(4)(C) of the USFSPA suggests that for service members who are eligible to retire based on longevity, their disability retirement benefits may include elements of both disability and regular retirement benefits. Here, the record does not indicate either how husband's TDRL pay was calculated or the percentage of his disability when he was placed on the TDRL. Thus, the Court vacated the order and remanded the case to the trial court to determine the amount of husband's TDRL pay, as computed based on his percentage of disability, and then exclude that amount from the TDRL pay that is divided under the decree.