

TJAGLCS Practice Note

Family Law Note

State Court Treats Service Member's Receipt of CSB/Redux Bonus as "Retirement Benefit" for Purposes of Property Division

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Legal assistance practitioners should be familiar with the structure and effect of the Uniformed Services Former Spouses' Protection Act (USFSPA),¹ which permits states to divide service members' disposable military retired pay² as marital property in a divorce. Many courts also treat other types of military pay, such as voluntary separation incentives (VSI) and voluntary lump-sum separation benefits (SSBs), similarly to "retired pay," which is subject to division between a service member and his spouse upon divorce.³ These courts do so despite no clear provision in the USFSPA permitting such "other" types of pay to be characterized as divisible. Courts that divide such "other" types of pay upon divorce typically do so based on a theory that the payments compensate the service member now, for retirement benefits that he would have received in the future.

A type of pay available to some service members is the "fifteen-year career status bonus," or CSB/Redux.⁴ Federal law makes such pay available to a service member who first became an armed forces member on or after 1 August 1986 and who has completed fifteen years of active duty in the armed services.⁵ Eligible service members may elect to receive a \$30,000 bonus in one to five installments.⁶ Service members who choose to receive this bonus must agree in writing to remain continuously on active duty until their completion of twenty years of active service.⁷ Service members who elect to receive the bonus and who retire with less than thirty years of service prior to age sixty-two receive military retirement pay at a lesser rate than members who do not elect to receive the bonus.⁸

Until very recently, no judicial decision determined whether courts should classify this CSB/Redux benefit as a "military retirement benefit" pursuant to a property settlement or divorce decree that equitably divides marital property.⁹ However, in December 2004, a Virginia state court decision divided a service member's CSB/Redux upon that service member's divorce from his spouse.¹⁰ As a case of first impression addressing the division of CSB/Redux bonuses upon divorce, *Boedeker v. Larson*¹¹ may prompt other courts' willingness to divide such service member bonuses as retirement benefits in the future.

¹ 10 U.S.C. § 1408 (2000).

² "Disposable retired pay" consists of pre-tax gross retired pay, minus amounts that section 1408(a)(4) of the USFSPA defines, including government recoupment for prior overpayments, waiver of retired pay that a court-martial adjudges, waiver of retired pay to receive disability pay, and Survivor Benefit Plan premiums. *See id.* § 1408(a)(4).

³ *See, e.g., Kelson v. Kelson*, 675 So.2d 1370, 1371 (Fla. 1996) (likening VSI payments to retired pay, in which a former spouse has an interest); *Marsh v. Wallace*, 924 S.W.2d 423, 425 (Tex. Ct. App. 1996) (likening SSB payments to "retirement pay, compensating [a service member now] for the retirement benefits he would have received in the future").

⁴ Enacted in October 1999, 37 U.S.C. § 322, establishes the mechanism for providing certain service members a choice in converting to the military's pre-1986 military retirement plan, or accepting a bonus and choosing the military's new retirement plan. *See* 37 U.S.C. § 322(b) (2000).

⁵ *See id.*

⁶ *See id.* § 322(d).

⁷ *See id.* § 322(a).

⁸ *See id.* § 322(f).

⁹ *See generally* Major Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 MIL. L. REV. 40, 69 (2001) (noting that "courts have yet to litigate treatment of CSB/REDUX"); *see also Boedeker v. Larson*, 2004 Va. App. LEXIS 596, at *21 (Va Ct. App. Dec. 7, 2004) ("We are unaware of any judicial decisions determining whether CSB/Redux benefits are classified as military retirement benefits . . .").

¹⁰ *Boedeker v. Larson*, 605 S.E.2d 764 (Va. Ct. App. 2004).

¹¹ *Id.*

The service member-husband in *Boedeker* married his wife in 1986, and during the parties' marriage, he enlisted in the U.S. Navy.¹² The husband remained on active duty at the time the parties separated in 2002.¹³ On 9 October 2002, the parties agreed in writing to a property settlement, which contemplated that the settlement would be made part of a final decree or judgment concerning divorce.¹⁴ As part of that agreement, the parties agreed that "all retirement and pension types of accounts [had] been disclosed," and that the civilian spouse would receive a percentage of the service member's military "retirement pension."¹⁵ In July 2003, the service member's spouse filed a divorce action in Virginia requesting the court to merge the separation agreement into the couple's final divorce decree.¹⁶

In October 2003, the service member testified that he expected to receive a \$30,000 Redux bonus.¹⁷ The husband also testified that his receipt of that bonus would reduce the amount of his military retired pay and stated that his wife should receive a portion of the Redux bonus, because "her portion of his pension would be reduced as a result of his taking the Redux."¹⁸ The parties' written agreement did not indicate that the husband would be permitted to reduce the amount of retirement benefits to which he would be entitled by forfeiting a portion of his military retired pay in exchange for receipt of his CSB/Redux bonus. The parties' attorneys then determined that the wife would receive 46% of any Redux bonus the service member received.¹⁹

The husband received the bonus in November 2003; however, before paying his wife the agreed-upon share, he changed his position regarding her entitlement to a portion of the bonus.²⁰ The service member argued that the bonus should be characterized as "income" rather than as "retirement pay."²¹ The trial court rejected the service member's argument and ordered that he pay his wife a portion from each of the two Redux installment payments which he opted to receive.²²

The service member filed a motion for rehearing and argued that, despite his earlier contentions, the Redux bonus constituted post-separation income.²³ As such, he argued that his wife was not entitled to share in a portion of the bonus.²⁴ The court denied the motion for rehearing, which prompted the service member's appeal to the Court of Appeals of Virginia.²⁵

In the service member's appeal, he argued that the Redux bonus did not constitute "disposable retired pay" under federal law (the USFSPA), but rather that it constituted post-separation income, and that a state court thus could not divide it.²⁶ The appellate court rejected the service member's argument, finding that federal law supported the lower court's decision that the Redux bonus constituted "marital property" subject to division pursuant to the parties' property settlement agreement.²⁷

¹² *See id.* at 765.

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *Id.* at 766. Specifically, the parties agreed that the spouse would receive a percentage of the service member's military retired pay, based on the following calculation: "166 months/number of months of active duty multiplied by .5." *Id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *See id.* The parties apparently reached this percentage by dividing the number of months they were married while the service member was in the military (166 months) by the number of total months the service member was in the service (180 months), and multiplying that fraction by one-half. *See id.*

²⁰ *See id.* at 766-67.

²¹ *See id.* at 767.

²² *See id.*

²³ *See id.*

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.* at 767-68.

²⁷ *See id.* at 768.

In reaching its decision, the court of appeals did not rely on the service member's initial statement to the effect that his wife was entitled to a portion of the bonus.²⁸ Instead, the court of appeals noted that the parties had disclosed in their written agreement "all retirement and pension types of accounts."²⁹ Moreover, the parties' written agreement did not stipulate that the husband could forfeit a portion of his military retired pay to which his wife would be entitled in exchange for his exclusive receipt of his CSB/Redux bonus.³⁰ The court declared that, because a property settlement agreement constitutes a contract, it must discern the parties' intent and the agreement's language based on an examination of the agreement.³¹

The court further recognized that the husband's acceptance of the bonus – while on active duty – would reduce his military retired pay as a result. The court found that the CSB/Redux is "in the nature of retirement pay, compensating [the service member now] for . . . retirement benefits he would have received in the future."³² The court noted that it was unclear whether Congress intended for CSB/Redux payments to be classified as disposable retired pay. In the absence of a clear congressional declaration of intent, the court found that the parties previously had disclosed all "retirement *or pension types of accounts*"³³ in their written agreement, and that they had agreed that the civilian spouse was entitled to one-half the marital share of the service member's "retirement."

At this point, the ramifications of the *Boedeker* decision are unclear. Parties may argue that this Virginia case should be limited to its facts. They first might argue that it applies only in the context of dividing CSB/Redux bonuses where the parties agree in writing that "all retirement and pension types of accounts" have been disclosed. Alternatively, parties also may argue that the court's decision applies only in situations in which a written agreement fails to stipulate that the service member may forfeit a portion of retired pay that his spouse would otherwise be entitled in exchange for the service member's exclusive receipt of a CSB/Redux bonus. However, the *Boedeker* court's willingness to liken CSB/Redux to VSI or SSB, which many state courts are willing to divide as marital property upon divorce, may signal a trend for future division of the CSB/Redux bonus.

Issues regarding courts' treatment of certain types of pay as divisible under the USFSPA remain state-specific.³⁴ Legal assistance attorneys advising clients on divorce and separation issues must remain vigilant of courts' concerns to ensure that former spouse's property interests are protected in the event service members opt to receive payments while on active duty that will reduce the percentage of military retired pay which they will receive upon retirement.

²⁸ *See id.* at 770 n.1 ("We do not rely on husband's initial statement that wife was entitled to a portion of the bonus Rather . . . husband's admission that his taking the bonus would reduce his retirement benefit – and, thus, wife's share of that benefit – supported the conclusion that the bonus [is] properly classified . . . as retirement").

²⁹ *Id.* at 769.

³⁰ *See id.*

³¹ *See id.* at 770.

³² *Id.* at 771 (quoting *Marsh v. Wallace*, 924 S.W.2d 423, 425 (Tex. Ct. App. 1996)).

³³ *See id.* at 772.

³⁴ For a thorough discussion of the divisibility of military retired pay under state property division schemes, see Bradley, *supra* note 9, at 56-59; Faculty, The Judge Advocate General's School, *Legal Assistance Note: State-by-State Analysis of Divisibility of Military Retired Pay*, ARMY LAW., Aug. 2002, at 42.