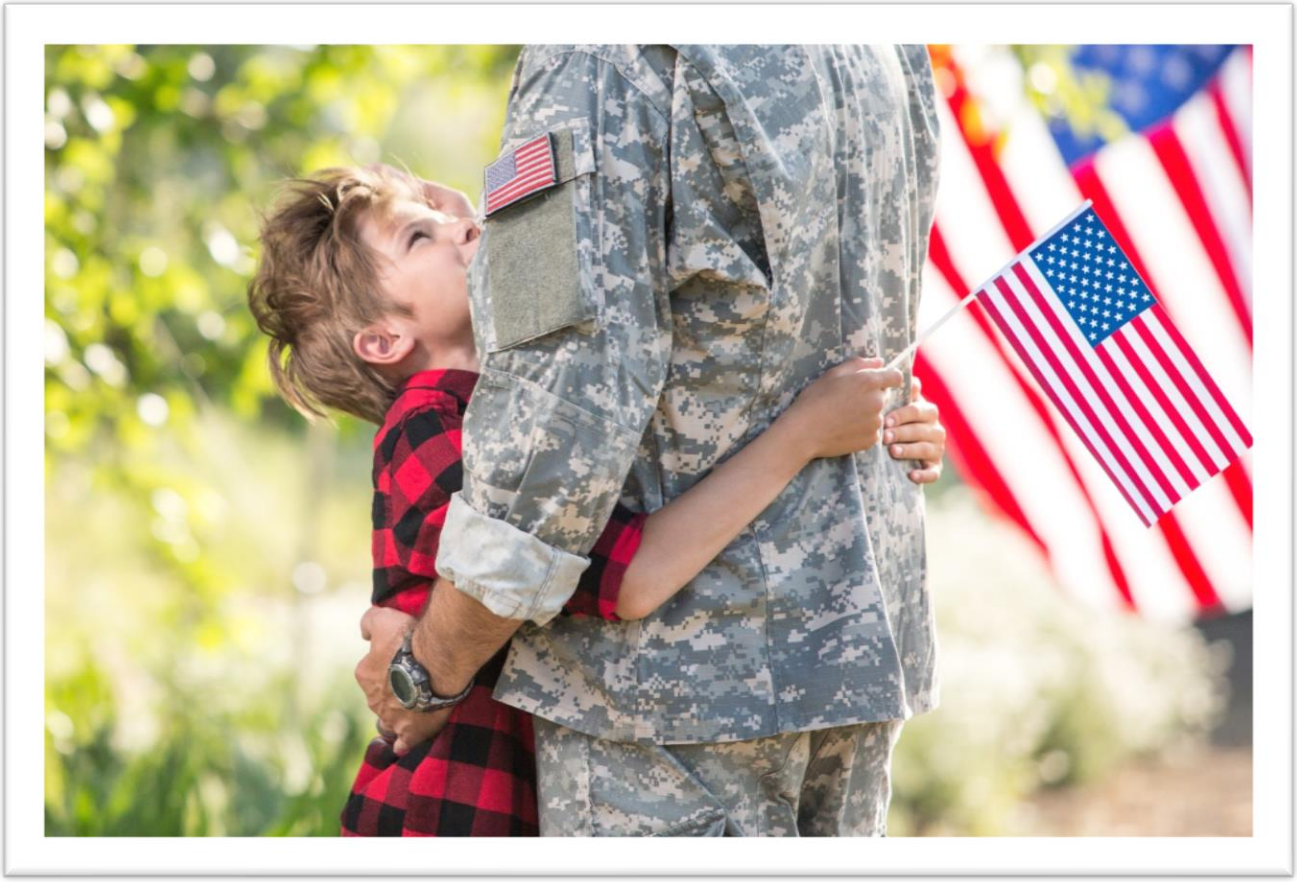
MILITARY DIVORCE GUIDE



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Military couples cannot be divorced by a military court. Divorce laws and custody laws are state, not federal. A couple looking for a divorce or looking for custody order must file in a state Family Court.

There are certain considerations that arise for military members going through a divorce. If one or both parties are in the military, getting a divorce can be different than for civilians. For families in the military, certain issues become more complex. In this guide, we will address how being in the military can affect property and debt division, child custody, child support, and alimony.

The divorce court in Nevada only has authority to make decision in five areas; division of assets, division of debts, child custody, child support and alimony. These are the only areas or authority a divorce court judge has authority to decide.

Jurisdiction in a Military Divorce

When a married couple wants to divorce and one or both spouses is a military service member, the first step in the divorce process is to establish which state and which courts have the jurisdiction, which is the authority to grant the divorce and handle other issues related to a divorce. That is because all divorce and custody laws act at the state level, not the federal level. For example, a judge in Arizona cannot grant a divorce or establish custody for a couple living in Nevada.

It is important to determine which state has the jurisdiction or authority to grant a divorce when one spouse lives in Nevada and the other lived in Florida with the kids. Different states have different rules to determine whether a spouse is a state resident. More than half of all states require at least six months (180 days) of verified residency in order to file for divorce, while many other jurisdictions require 60 or 90 days. Each state's rules are different from other states.

For example, Nevada only requires the filing spouse to be a Nevada resident for the previous six weeks before the filing. If the couple have children, they can usually can only file the divorce in a state where a spouse and children have lived for at least the previous six months.

Essentially, there are usually three places where a service member can initiate a divorce:

- Where the service member and children reside; or
- Where the service member's spouse and children reside.

Because military families move frequently and may be overseas determining the state of residence can be trickier than a civilian divorce.

Residence Versus "Home of Record"?

Many military members confuse "residence", "domicile" and "home of record". All three terms mean different things when it comes to a divorce.

Residence is where you are physical residing. What state are your feet actually in. Your domicile is where you have roots currently and it is considered your permanent residence. It's the state you plan to return to permanently. Your "home of record," which may show up on many military records, tends to be the state where you lived when you first joined the military. Or many military members change home of record to a state that doesn't have state taxes.

In a divorce the state wants to know what state you reside in. Or what state your spouse and children reside in. The courts are not concerned with your domicile or home of record. Although, the home of record may be applicable in a divorce if you are deployed overseas.

If you are in the service and deployed outside of the United States, a state may allow you to file a divorce in your home of record, although it is recommended that you file in the state where your spouse is currently living.

Let's walk through an example. We have military member who currently lives in Nevada with his wife and children, has a home in North Carolina and has Texas listed as his home of record. Nevada is his residence because he is physically present. North Carolina may be his domicile because he owns a home and intends to return there when he leaves the military. Texas is his home or record and because he in the states it is only relevant to taxes.

If this military member wanted to file a divorce, he would need to file in Nevada. He is a resident of Nevada along with his spouse and children. He cannot file in North Carolina or Texas because no one is actually living in those states. Let's change the example a little. His spouse and children have lived in Florida for the last year. Now, the military member would want to file the divorce in Florida because Florida has jurisdiction of the children.

Child Custody Jurisdiction

The law that typically applies to child custody when parents live in different states or countries is the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). According to the UCCJEA, jurisdiction over a child is in the state where the child legally resides and has been physically located for the previous six months.

Spouse can agree to another state having jurisdiction over a divorce. Spouse cannot waive jurisdiction for a child. A court cannot take jurisdiction over children who do not reside in their state. A state having jurisdiction over a service member does not necessarily mean they have jurisdiction over child custody. According to the UCCJEA the child must be a physical resident in that state for the past six months.

Jurisdiction Over Divorce and the Military Pensions

When dividing assets in a divorce, it may be helpful to know that a foreign court cannot divide the military pension; only a court in the United States or its territories has the jurisdiction to divide a military pension. In order for a court to have jurisdiction over the servicemember's pension, the servicemember cannot be a resident of the state only through their military assignment. Alternately, the military member must give consent to

the court's jurisdiction. In other words, if the servicemember moved because of military assignment and has no intention of living in the state following their military service, the court in that state will not have jurisdiction over the pension unless the service member explicitly consents to such jurisdiction. In most cases, the servicemember's legal state of residence is usually that indicated on their Leave and Earnings Statement.

If the service member is retired, their residence is either the last state where they lived before going overseas or in the state where they lived while on active duty. If the service member resided in a state for at least six months after retirement, that state is usually considered the state of residence.

Military Process of Service

When you file a divorce or custody case you must notice the other party. This is service of process. Typically, this is handled by being personally served with the court documents. If the defendant service member is in agreement, they may simply agree to accept service. They can do this by drawing up an acceptance of service form. that indicate this.

Because of all the restrictions, when a military spouse is stationed or deployed overseas, it can be very difficult to serve process on them. The United States Department of State website contains a complete list of all the requirements necessary to serve a service member in various countries.

Servicemembers Civil Relief Act (SCRA)

Divorces involving active military have the potential to add another layer of complexity to the divorce process. Normally divorce is handled by Nevada law. But, the Service Members' Civil Relief Act (SCRA) is a Federal Law that protects military members. The law was passed by Congress as a way to cut down on distractions for soldiers or other active military personnel engaged in important operations.

Under the Servicemembers Civil Relief Act, you can obtain an automatic 90-day stay or postponement of a court or administrative proceedings if your military service materially affects your ability to proceed in the case. Your stay can be longer, at the discretion of the judge.

The Servicemembers Civil Relief Act protects the legal rights of any servicemember when they have been called to active duty, including the following:

- Active-duty members
- Members of the National Guard when serving in an active-duty status
- Members of the reserve called to active duty
- Members of the Coast Guard serving on active duty

The SCRA essentially prevents litigants from pursuing certain actions such as divorce and child custody cases against deployed military personnel without a specific court order taking into account their status in the military. In addition, there are restrictions from eviction, and special conditions for the termination of property and automobile leases.

In addition to the federal SCRA, many individual states, including Nevada, have passed their own laws that actually tend to go above and beyond the federal SCRA. That is why it is critically important that your divorce lawyers are always fully informed on both the federal and the state statutes, so as to avoid the consequences of violations.

How the SCRA Can Affect a Divorce

SCRA protects servicemen who might not be able to answer a divorce complaint or appear in court. The military member could be exposed to a default judgment against them because they are far from home performing tasks as part of their military service.

Unless a court finds that a military spouse's ability to defend or pursue action is not materially affected by his military duties, the court will likely issue a stay of the proceedings. The stay can last for the duration of their deployment plus sixty days.

That does not mean a service member never has to show up for trial, but it means the court can stay (meaning delay) the trial if a party's military service has a material effect on their ability to defend the litigation. Of course, a court may also deny any stay requested if their military service has no material effect on their ability to defend against the litigation.

SCRA offers a lot of protection for active service members in a divorce or custody matter. Failing to take the law into account can delay a case.

It is worth noting how SCRA would affect a current child custody order. Any custody order that was in place before the deployment of military parent should be reinstated when the parent returns. Only have the military parent returns can the court hold a hearing to determine if the old custody order should be changed.

Dividing Property and Military Pensions

Nevada is a community property state. This means that all assets and debts considered community property will be divided equally. Community assets are defined as anything of value acquired/earned by either spouse upon the inception of the marriage.

There are a few exclusions to the community property rule for both civilian and military marriages, primarily inheritance. Inheritance property remains separate if it isn't commingled with community property. This is true of anything you owned before the marriage—so long as the asset does not become commingled with community property.

For example, a service member's earnings during the marriage are community property. However, if you inherit an antique vehicle, or $20,000 from a family member either before or during your marriage, it will be separate property.

Military members have property that is unique to their career. Military pensions, medical benefits, GI Bill accounts, and base privileges, are a few property issues that civilian divorces do not encounter. We discuss each of these assets and how they are divided in a divorce.

Military Retirement & Pensions

Any retirement account, thrift savings plan (TSP), or pension contributed to during your marriage is community property. The courts look to divide this community property equally. Although there are few special rules regarding military pensions.

Wages are community property. Any contributions to a retirement plan or TSP are technically wages. The amount of deposits during the marriage will be divided evenly in a divorce.

A pension is technically wages, or credits for working, added to a retirement fund. A military pension is a defined benefit based on the military members pay and time in

service. The court will look to calculate the marital share of the pension and to divide it evenly.

The marital share represents how much of the military pension is community property. It is a function of the amount of time the service member is both married and in the military. If you were married before entering the military, then the marital share begins when you enlist. If you were already in the service prior to your marriage, then the marital share commences upon the date you were officially married.

The marital share ceases when the divorce decree is finalized or when the service member exits the service. Marital share is the amount of time you were married while serving and will determine what percentage of your pension your former spouse will receive.

That's a lot of legalese. An example will help. You got married exactly 15 years into your military career. You retired after 20 years. At the same time as your retirement you for filed for divorce. You had only been married for 5 years. The marital share of the pension is 25%, because you were only married 5 of your 20 years in the military. Assets are divided evenly in Nevada. Your ex-spouse would be entitled to 50% of the 25% marital share.

This is an extremely simplified explanation of how the pension would be divided. Calculated the marital share of a pension is much more complex and involves the Frozen Benefit Rule, the High 3, and other factors. But don't worry the military provides the courts with calculations to include in the divorce order.

You may also choose to divide the amount differently with your spouse. With an uncontested divorce, the couple may split the assets however they choose, so long as the judge does not think the allocation as absurdly unfair to one spouse.

Survivor Benefit Plan

An SBP is an insurance plan a service member elects to pay into to ensure that their retirement benefits continue to be paid after their death.

After divorce, the spouse's entitlement to any death benefits ends automatically. The service member may elect to name his/her former spouse as the beneficiary of the SBP, but this election must be made to DFAS within one year of the finalization of the divorce decree, and there is a cost associated with this.

You cannot order DFAS to make your spouse pay for this benefit. The service member must pay. But, a change in the percentage or amount of the pension division can, in effect, shift the premium costs to the other party. There are numerous advantages and disadvantages to the SBP. It's always a good idea to check with a life insurance agent to see if there is life insurance which provides a similar benefit and costs less.

All SBPs are initially voluntary. The service member is permitted to revise his SBP and name a new beneficiary. Alternatively, in a court-adjudicated divorce decree, a judge might order that the service member assign the SBP rights to the former spouse once the divorce is finalized.

The 10-Year Rule

Your pension is paid out from the Defense Finance and Accounting Service (DFAS). DFAS may divide your pension between you and your ex-spouse only if certain conditions are met. If the DFAS requirements are not met, you will be responsible for dividing and dispensing your disposable income between your ex-spouse and yourself when the pension becomes available.

If you have been married and in the service for more than 10 years, you may submit a voluntary allotment form to DFAS, and they will then send your ex-spouse the check each month for his/her share of your retirement without you having to do anything more.

Without the 10-year rule, the service member must send a check (or other method determined by the court) with the amount each month to his/her former spouse for the amount of time specified in the divorce order.

Dividing Military Benefits

Party of the allure of the military life is the benefits provided to military members and their spouses. Upon a divorce the ex-spouse is entitled to keep some of these benefits if certain rules and criteria are met.

Medical Benefits

In some cases, medical benefits may be extended to the non-military spouse, even after the divorce. However, like with most government benefits, there are conditions.

The 20/20/20 test is also sometimes called the 20-year rule. For a former non-military spouse to qualify for military medical coverage under TRICARE, they must have been married to a service member at least 20 years. The service member must also have served for at least 20 years. Finally, there must be a 20-year overlap between military service and the marriage.

If the non-military, ex-spouse qualifies for the 20/20/20 rule and has no employer-sponsored health insurance, they will qualify for TRICARE. If the spouse does have employer-sponsored health insurance and also meets the 20/20/20 rule, there is a possibility that TRICARE may function as a secondary payor. A secondary payor covers medical bills not covered by the primary insurance.

20/20/15 Test

If the overlap between military service and years of marriage was between 15 and 20 years, you have a few options. First, if you are close to the required 20 years, you may ask the court to hold off finalizing the divorce until the 20 years are met; such a determination is at the judge's discretion. Secondly, you may request an extension of military benefits. This typically will only last one year from the divorce date.

Remarriage

Any TRICARE benefits will cease upon the non-military, ex-spouse remarrying. The same is true of commissary privileges.

GI Bill Benefits

The federal government offers a special education benefit for service members that have served at least 90 days of active duty service since September 10, 2001 and have been honorably discharged.

The education benefit may be applied to tuition costs for up to 15 years after your discharge if you were discharged before January 1, 2013—those with later discharge dates have no time limit in which to use the funds. The benefits will cover all the in-state tuition and fees at public universities along with providing a housing and book allowance while in school.

The Pentagon has a standard policy that applies for transferring Post-9/11 GI Benefits to a spouse or dependent—a divorce will not affect the rights of a spouse or dependent. Service members may transfer their benefits under the bill to a spouse immediately but must serve at least ten years before the benefits may be transferred to a dependent. However, it is important to note that the service member retains the right to revoke or modify the transfer of benefits at any time. Military spouses and dependents need to be aware of this fact.

Base Privileges

Bx/Px and Commissary are base privileges and are only available to an ex-spouse if the 20 / 20 /20 rule is met. If there are minor children, the children (not the parent) will be allowed Bx/Px benefits (not Commissary). The non-servicemember parent can utilize these benefits when shopping with the children.

Military Divorce Child Custody

Military custody issues are the same as civilian custody issues. The courts must decide legal custody and physical custody. These issues are completely controlled state law.

Legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing. The court may award one parent sole legal custody or award legal custody to both parents jointly, designated as "joint legal custody." The court prefer joint legal custody.

Physical custody is the physical care and supervision of a child. Physical custody involves the time that a child resides with the parent. Court may order a joint physical custody arrangement or for one parent to have primary physical custodian with the other parent having specified visitation with the child.

Parents may agree to a joint custody schedule. Joint custody requires nothing less than 60/40 shared visitation. Parent can agree to a week-on or week-off schedule, or other variations. The most common being a 3-4. This is where the child is with Parent A for 3 days, then Parent B for 4 days, then goes back to Parent A for 4 days and back to Parent B for 3 days. Another common schedule a 5 -2. This is where the child to resides with Parent A for 5 days, Parent B for 2 days, Parent A for 2 days and then spend 5 days with Parent B.

If parents cannot agree to a custody arrangement the court will order would. There is a presumption that joint custody would be in the best interest of a minor child. For a judge to award a parent primary custody that parent must convince the judge primary custody would be in the child's best interests.

In Nevada the laws have made it abundantly clear that when making a determination regarding the custody of a child, the sole consideration of the court is the best interest of the child. Parents can obviously differ in their opinions as to what is in the best interests

of their children. Therefore, the legislature has also set some standard factors for the court to look at. These are not the only factors, but they are the primary factors the court will look at.

Best Interest Factors for Custody

- The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.
- Any nomination by a parent or a guardian for the child.
- Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
- The level of conflict between the parents.
- The ability of the parents to cooperate to meet the needs of the child.
- The mental and physical health of the parents.
- The physical, developmental and emotional needs of the child.
- The nature of the relationship of the child with each parent.
- The ability of the child to maintain a relationship with any sibling.
- Any history of parental abuse or neglect of the child or a sibling of the child.
- Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

Family Care Plans

The military has specific rules in place for situations in which a child's caretaker, or both caretakers if there are two parents, might be deployed. It is due to those situations that make a Family Care Plan a required element of a divorce involving a servicemember.

All divorcing parents should have a parenting plan in place, in which they describe how they will share time with and care for their children following the divorce. If you are in the military and uncertain about where, when or for how long you'll be deployed, a Family Care Plan is especially important, and it may be both practical and useful for you to develop alternate parenting plans for a variety of possibilities. For example, if the

servicemember might remain at a base that's close to where the children live, you can prepare a Family Care Plan that calls for visitation consistent with expected free time for that parent.

Any Family Care Plan must set out what will happen with the servicemember's children if the service member is deployed or is required to be absent, for either the short term (less than 30 days) or for a longer term (31 days or more).

Any plan must include the names and contact information of the person or persons who would care for the child, who must be a civilian over the age of 21, along with a certification that the caregiver has all necessary information and has agreed to accept that responsibility. The plan must also include an alternate caregiver, in case the primary caregiver is unable to perform their responsibilities when the time comes.

The plan will also include information regarding how the child will be supported financially during the servicemember's absence, including powers of attorney to allow the caregiver to deal with financial matters on the servicemember's behalf. The military also requires a lot of information about transporting family members if the Family Care Plan goes into effect, including a lot of detail such as how airline tickets will be paid for how the caregiver and child will get to the airport. The plan must also include the transfer arrangements for the child to the caregiver, should the servicemember be deployed on short notice.

In case in which only one parent is in the military and the parents have joint custody, generally speaking, the non-military ex-spouse will care for the child when the military parent is unavailable through either assignment or deployment. However, when the military parent has sole custody, many states will consider transfer of custody to the other parent to be a change in custody.

Military Child Support

Military members have an obligation of support that exists even without a court order. The military branches largely consider financially supporting their dependents is part of a servicemember's solemn duty, regardless of their marital or custodial status.

Based on federal regulations, military servicemembers and veterans are required to provide child support to all of their children, whether they are custodial or non-custodial. While the rules for military personnel do not supersede state rules with regard to child support, they do intend to ensure compliance with payment rules, while also providing an interim guideline for calculating financial responsibilities when a legal agreement has not been achieved.

Child Support Calculation

In the absence of a military interim measure to determine the amount of child support obligation, the calculation of the required child support payments is exactly the same for a servicemember as it would be for a non-military servicemember. It is based on the type of custody, the number of children, and each parent's monthly gross income.

The first step in calculating the amount of money a servicemember must pay for dependent child care is to determine the members gross monthly income (GMI). Most often the court reviews the Leave and Earning Statement (LES), calculates the year to date income, and divides by the relevant number of months. The court does the same for the other parent and then using a child support formula calculates the monthly child support owed by either parent.

For a military member gross monthly income is all income. This includes Base Pay, Basic Allowance for Housing (BAH), Basic Allowance for Subsistence or Separate Rations (BAS), incentive pay, deployment, etc.

Once the GMI is calculated the court applies percentages to the income. For example, if there is one child, the child support amount is 16% of the firs $6,000, 8% between $6,000 and $10,000 and then 4% of everything above $10,000. The percentages increase based on the number of children.

If a parent has primary physical custody this other parent pays the entire amount. If the parents have joint custody, then each parent's child support is calculated. The two figures are offset against each other with the higher earning parent paying the difference. For a complete understanding of child support use our child support calculator.

Child Support Payments

Once the monthly child support amount has been determined, it is important to set up a means of receiving the support payments when a service member is not able to assist in physically caring for the child or able to send money easily due to deployment. Keep in mind, the military does not regulate the method of child support payment; instead, they leave the decision up to the parents.

The Defense Finance and Accounting Service (DFAS) does allow military parents to set up a voluntary allotment, which is an amount to be automatically withdrawn from military income.

Regulations Governing Child Support

Whereas the US military does not routinely send payment to the NCP, the US military legally requires servicemembers to provide financial care for their children. Regulations also require them to abide by either the agreement between parents, the court order, or the military interim support measure, whichever is in place at a particular time.

Unlike civilian courts, the military branches consider it a service member's duty to provide support for dependents, regardless of their custodial or marital status. Whenever a servicemember fails to fulfill their child support duties, it is possible to contact their commanding officer, who can then pursue non-judicial punishments against them. Those

servicemembers who fail in their child support regulations may experience disciplinary action, up to and including separation from military service.

Interim Child Support Payments Through the Military

If a non-military parent with primary custody needs child support payments before a court order has been finalized, they may ask the military parent's commanding officer for assistance. The officer will investigate and can then order the military parent to make interim support payments. While each branch of the military

Each military branch has its own regulations for determining child support payments, which are typically based on a formula that accounts for a service member's gross pay and Basic Allowance for Housing (BAH). A service member is required to pay these interim support payments until there is a court order or child support agreement with the other parent setting the amount and schedule of payments. The interim support payments through the military will not trump the child support contained in a court order or agreement.

Military Divorces and Spousal Support

Spousal support (also known as alimony) is not much different for military divorces than civilian divorces. A divorce, and specifically alimony, is controlled by state laws.

Spousal support is separate and apart from assets and debts. Nevada is a community property state and any assets or debts acquired during the marriage are divided evenly during a divorce. Compared to alimony which is an attempt to equalize any income difference the spouses may have after the divorce.

Types of Alimony

There are several types of alimony a court may grant; temporary, permanent, and rehabilitative.

Temporary Support

Temporary alimony is to help cover legitimate short-term needs. Temporary support is often called alimony but is actually not alimony. It's a court ordering one spouse to share community property income with the other spouse during the divorce proceeding.

Permanent Alimony

Permanent alimony is meant to assist a spouse of a long-term marriage where there is a discrepancy in income or earning potential. Permanent alimony doesn't mean non-modifiable. Permanent means the amount will be paid for a certain period of time, or until a spouse files for a modification.

Rehabilitative Alimony

States may allow courts to award rehabilitative alimony to help one spouse obtain training or education to re-enter the workforce. The court uses rehabilitative alimony to help a spouse gains the skills necessary to support themselves. This type of alimony might be appropriate for a military spouse who has not been able to keep consistent employment because of frequent relocations.

Calculating Spousal Support

Spousal support is not like child support, in that there is not a concrete formula for how much alimony should be granted. Spousal support is solely based on the judge's discretion of what they consider to be "fair and equitable" in the context of each case. There are no hard and fast rules the judge must use to determine how much one spouse should pay in alimony. The judge has full discretion to determine whether or not spousal support is appropriate. Then the judge has full discretion to determine the amount of monthly alimony and for how many months it should be paid.

Each judge reviews the facts, and on a case-by-case basis decides on alimony. To determine alimony the judge looks at "factors". Factors such as the length of the marriage and the income difference between the two spouses. The courts have traditional factors to review, but a judge can use any factor it finds relevant.

The main factor will be the difference in income. If both spouses make similar income, then alimony would not be appropriate. On the other hand, if one spouse earns significantly more than the other, then spousal support might be necessary, based on the length of the marriage. However, there are a number of common factors judges take a look at.

Main Spousal Support Factors

- Income differences
- Duration of the marriage
- Standard of living during the marriage
- Financial condition of each spouse
- Earning capacity of both spouses
- Age and health of each spouse
- Specialized education or training attained during the marriage
- Amount of assets each spouse is receiving from the divorce

Although there is no absolute formula for calculating alimony, we have created calculator. The calculator takes into consideration the main factors courts look at. To get a ballpark calculation visit our Spousal Support Calculator.

Special Laws for Military Members

As noted earlier, each state has jurisdiction over divorce cases. Each state's laws determine how the divorce proceeding will be held, and any orders of alimony. However, there are a few federal laws that apply to military members and therefore could affect alimony.

Support of Dependents

All branches have provisions for the maintenance of a service member's family until the final divorce orders. The military will not allow a military member to withhold economic support from a spouse or dependent. These are usually interim guidelines and roughly equal to your Basic Allowance for Housing (BAH). The Nevada courts may take this into account when ordering temporary support. Once the divorce is finalized, the court-ordered alimony will replace this interim amount

Military Benefits and Spousal Support

Military benefits are not included in alimony and would not affect alimony. Whether a spouse receives alimony or not does not affect the military benefits a spouse would be entitled to. And vice versa.

Whether a military spouse receives military benefits after the divorce is controlled by the Uniformed Services Former Spouses' Protection Act (USFSPA). Typical benefits a spouse is requesting is the pension, health benefits or base privileges. All three of these are based on whether the marriage was for 20 years, and whether the military members was in the military for 20 years. This is often called the 20-20 rule. The 20 years of marriage and military service must overlap each other.

RIGHT | LAWYERS

Divorce & Custody Attorneys

600 S. Tonopah Dr., Suite 300, Las Vegas, NV 89106

www.rightlawyers.com

(702) 914-0400