# VETERANS' BENEFITS AND CHILD SUPPORT

This memorandum contains information for lawyers whose clients receive Veterans' Disability Benefits and for lawyers whose clients want to collect child support from someone who receives Veterans' Disability Benefits. The first two parts of the memorandum discuss the establishment of child support on behalf of dependents of beneficiaries of Veterans' Benefits in a state court and collection of child support through the state court process short of direct garnishment of the federal benefits. The third part takes an in depth look at the seminal United States Supreme Court decision on Veterans' Benefits and child support – *Rose v. Rose*. The fourth and final part explains the establishment of child support through "apportionment," the VA process of establishing and garnishing child support directly from Veterans' Disability Benefits.

## 1. The legal distinction between "remuneration" and "disability benefits" – a state or obligee can garnish one but not the other.

In examining how a veteran's disability benefits will be affected by a child support order, one must first clarify what type of Veterans' Disability Benefits the veteran has. Title 42 U.S.C. § 659(a) allows for the collection and garnishment of "moneys…based upon remuneration for employment…to enforce the legal obligation of the individual to provide child support or alimony." This initial paragraph seems straight forward. However, contained within this law is subsection (h) which creates two classifications of Veterans' Disability Benefits – one type may be garnished and the other may not.

Section (h)(1)(A)(ii)(V) of Title 42 U.S.C. § 659 specifically includes Veterans' Disability Benefits as "remuneration," ***if*** the former service member has waived a portion of his or her retired or retainer pay to receive disability benefits. This situation occurs when a former service member has 20 years or service and is also disabled. Since the disability pay is not taxable, there is an advantage to waiving retirement pay. After 20 years of service, many veterans qualify as disabled through the VA's disability claims process. Section (h)(1)(B)(iii) complements section (h)(1)(A)(ii)(V) by specifically excluding Veterans' Disability Benefits from garnishment for child support or alimony where a former service member is not entitled to retired or retainer pay.

A different federal law, 38 U.S.C. §5301, specifically protects Veterans' Disability Benefits from most forms of garnishment:

> § 5301. Nonassignability and exempt status of benefits
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> (a) (1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary…

Before the Supreme Court's 1987 decision in *Rose v. Rose*, 481 US 619 (1987), veterans argued that § 5301 (formerly 38 U.S.C. 3101(a)) prevented state courts from having any jurisdiction to satisfy a child support obligation based upon the receipt of Veterans' Disability Benefits. *Rose* at 629 - 630. They argued that this section of the law made Veterans' Disability Benefits essentially untouchable by the states.

In *Rose*, the Supreme Court clarified that not only could a state court consider the amount of disability benefits in setting child support, but also, once a child support obligation had been created, a state or obligee could look to the veteran's benefits, in the possession of the veteran, to satisfy that obligation.

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This very important holding and the many questions raised by *Rose v. Rose* are analyzed below.

### 2. The essential holding in *Rose v. Rose* – the states can decide how to treat Veterans' Disability Benefits in establishing child support and in enforcing child support orders.

The legal doctrine that states have exclusive authority in the area of domestic relations is over 100 years old. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890). A number of United States Supreme Court cases have dealt with the scope of the supremacy of the federal law with regard to family law. *Rose v. Rose*, 481 U.S. 619 (1987), is a very important case because it deals directly with child support and not property division. The basic doctrine regarding family law and federal supremacy is:

> Before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests.'"

*Rose v. Rose*, 481 U.S. at 625, quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) and *United States v. Yazell*, 382 U.S. 341, 352 (1966).

The analysis provided by Justice Marshall in *Rose v. Rose* distinguishes claims against Veterans' Disability Benefits from claims against other federally-sponsored programs by explaining that the veteran is NOT the exclusive beneficiary of Veterans' Disability Benefits. He quotes the legislative record describing the purpose of Veterans' Disability Benefits - to "provide reasonable and adequate compensation for disabled veterans *and their families*." *Rose v. Rose* at 630, quoting S Rep. No. 98-604, p. 24 (1984). By making this important distinction the court was able to create an exception to the prohibition against "attachment, levy or seizure" of Veterans' Benefits that did not disturb existing precedent. See, *Wissner v. Wissner*, 338 U.S. 655 (1950) (refusing to divide military life insurance proceeds); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (refusing to divide railroad retirement benefits); and *Ridgway v. Ridgway*, 454 U.S. 46

(1981) (refusing to allow a state court to designate the beneficiary of a military life insurance policy).

Thus, *Rose v. Rose* created the exception to the general provision of 38 U.S.C. §5301 (a) (1) that Veterans' Disability Benefits "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary…" It sent a message to veterans that state courts could establish child support obligations based upon their benefits and could collect child support from their benefits by the ordinary state court means, "after receipt by the beneficiary."[1]

### 3. Justice Marshall's deeper discussions in *Rose v. Rose*.

Part II of Justice Marshall's decision in *Rose v. Rose* has four sections, A through D. Each section expounds upon different aspects of the intersection of state and federal law regarding enforcement of child support orders. Each part also provides important insight into the powers and limits of state and federal law in the area of child support, even if these insights are not essential to the holding of the case. The parts are outlined below:

**Part II (A).** *The ability of a state court to enforce a child support order is not pre-empted by the VA's apportionment process.*

The disabled veteran in *Rose* argued that only the VA had the power to order payment of disability benefits as child support. He cited Title 38 U.S.C. § 5307, *Apportionment of benefits*, to support his position. This law allows the VA to make a determination regarding whether to pay part of a veteran's benefits to another person for support or his or her children. The veteran argued that this process was the ***only*** way that a veteran's disability benefits could be paid out as child support. The Court disagreed. It found that allowing a state court to create and enforce child support obligations does not interfere with the VA's apportionment process. "…[W]e conclude that Congress would surely have been more explicit had it intended the Administrator's apportionment power to displace a state court's power to enforce an order of child support." *Rose* at 628. See section **4** below for an explanation of the apportionment process.

**Part II (B).** *The power of the VA to make final and conclusive decisions does not include child support.*

The Court explained that the VA's exclusive jurisdiction over disability benefits is only with regard to "the technical interpretations of the statutes granting entitlements, particularly on the definition and degrees of recognized disabilities and the application of the graduated benefit schedules." *Rose* at 629. Nothing about state court child support

[1] Recently, the Court of Appeal of California, relying on *Rose v. Rose*, found that military housing and food allotments can be counted as income for child support purposes, even though under federal law these allotments are not counted as gross income. *In re Marriage of Stanton*, 190 Cal. App. 4th 547 (2010). This case is now on appeal to the United States Supreme Court with Mr. Stanton representing himself and the California Attorney General's Office arguing for counting the allotments as income.

orders interferes with that power, thus, federal interests are not damaged by the exercise of state court jurisdiction to enforce a veteran's child support obligation. *Rose* at 629-630.

**Part II (C).** *The federal government's strong interest in protecting a veteran's means of subsistence is not constrained by allowing a state court to collect child support because Congress intended to support the veteran and his family.*

The Court examined the legislative history of the creation of veteran's disability benefits. It found an intention on the part of Congress to "to support not only the veteran, but the veteran's family as well," and, therefore, it concluded that the veteran is not the exclusive beneficiary of the disability benefits. *Rose* at 634. From this conclusion, it made a great leap. It held that the statute[2] protecting Veterans' Disability Benefits from garnishment was not applicable to child support because the veteran's benefits belonged to the *family*. The Court said:

> Recognizing an exception to the application of § 3101(a)'s prohibition against attachment, levy, or seizure in this context would further, not undermine, the federal purpose in providing these benefits. Therefore, regardless of the merit of the distinction between the moral imperative of family support obligations and the businesslike justifications for community property division, *we conclude that § 3101(a)* (now 5301(a)) *does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support.* (Emphasis added.)

*Rose* at 634.

The final assertion in this quote seems very broad. Did the Court mean that the Department of Veteran's Affairs should have to comply with withholding and garnishment orders from state courts? This issue was not essential to the question presented in *Rose* because the obligee was only seeking to hold the veteran in contempt in state court for not paying child support. However a close reading of **Part II (D)** of the decision (explained below) reveals that the court did not go this far because it was constrained by the doctrine of sovereign immunity.

**Part II (D) – Main Holding -** *Even if Veterans' Disability Benefits are exempt from garnishment, once they are paid to the Veteran, the benefits may be considered income by a state for child support purposes. In addition, efforts to enforce a child support order by holding the veteran in contempt are not in conflict with federal law.*

Finally, in part D of decision, the Supreme Court reaches the crux of the legal issue in *Rose v. Rose* – after the disability benefits are paid out (and have been passed from the United States to the veteran), a state may pursue the veteran in possession of this money to try to make him or her pay child support. The benefits may be counted as income in

[2] The Court cites 38 U.S.C. 3101(a) which is now found at 38 USC 5301(a).

determining the amount of child support. The amount of the benefits may also be used to determine whether or not an obligor has an ability to pay child support debt piling up against him or her. As the Court in *Rose* states:

> Thus, while it may be true that these funds are exempt from garnishment or attachment while in the hands of the Administrator, we are not persuaded that once these funds are delivered to the veteran a state court cannot require that veteran to use them to satisfy an order of child support.

*Rose* at 635.

The *Rose v. Rose* decision makes clear that a state court contempt action is not pre-empted by any federal law protecting veteran's benefits. *Rose* at 634-635. Thus the entire panoply of remedies available under state law to collect against obligors found to be in contempt is available to obligees and state child support agencies. Moreover, the court in *Rose* goes a step further. It also holds that the amount of money specifically awarded through the VA as additional compensation for a veteran's dependents is not the only amount that may be set aside and collected as child support. *Rose* at 630-631.

New rules from the Treasury Department also make it clear that the bank account of a depositor who receives Veterans' Disability Benefits MAY be garnished if (a) the garnishment order comes from a state child support enforcement agency and (b) it includes a *Notice of Rights to Garnish Federal Benefits*. See, *31 CFR 212.4 and Appendix B to that part*. This is a marked exception from the new protections for bank deposits that consist only of directly deposited federal benefits. Two months worth of federal benefits must now be protected from garnishment *except* in the case of garnishment orders for child support or from the federal government itself. See, *31 CFR 212.4- 212.6*. Also see, *Case v. Dubaj*, 2011 U.S. Dist. LEXIS 96808 (W.Dist.PA. 2011) ("[S]ection 5301(a) does not bar the seizure of Plaintiff's bank account to satisfy his family support obligations.")

**Part II(D) – Sovereign Immunity** - *Rose v. Rose does not open the door to direct garnishment of child support through orders served directly upon the Department of Veterans Affairs.*

Even though some of the language in Part II (C) of *Rose v. Rose* seems to express the Court's support of direct garnishment of Veterans Disability Benefits from the DVA ("we conclude that § 3101(a) does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support."), Part II (D) clarifies the limited nature of the decision. In Part II (D), the Court deals with the veteran's argument that, because Title 42 U.S.C. § 659 (a) – which allows for the garnishment of "moneys…based upon remuneration for employment…" specifically excluded Veterans' Disability Benefits (that are not in lieu of retirement pay), then Veterans' Disability Benefits should not be subject to "any legal process." *Rose* at 635.

The Court disagrees and explains that section 659 (a) does not refer to "any legal process." Rather, the statute deals with a narrow aspect of child support collection which "was intended to create a **limited waiver of sovereign immunity** so that state courts could issue valid orders directed against agencies of the United States Government attaching funds in the possession of those agencies…" *Rose* at 635 (Emphasis added.)

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *Freeman v. U.S.*, 556 F.3d 326, 334-335 (5th Cir.2009). The very explicit federal law waiver of sovereign immunity found at 42 USC 659(a) (and defined at § 662(e) of the law) to allow for garnishment orders against agencies of the United States is necessary because the federal government's sovereign immunity extends to attachment proceedings. See, *Applegate v. Applegate*, 39 F.Supp. 887, 889-890 (E.D.Va. 1941) and *Commonwealth ex rel. Caler v. Caler*, 16 Pa.D.&C. 3d 14, 24 (1980) ("Attachment of money or property in the hands of private third persons must be distinguished from attachment thereof in the hands of the Federal or state government, because those governments possess sovereign immunity from suit absent a statute consenting to such proceedings. As to the Federal government, it has been held that its sovereign immunity extends to attachment proceedings naming it as a party garnishee.") Thus, section 659(a) opens a small window of additional legal process for states attempting to collect child support. It does not, contrary to the argument of the veteran in the case, provide extra protections for Veterans' Disability Benefits that were not already found in 38 U.S.C. § 5301.

As its essence, Rose stands for the proposition that the exemptions in § 5301 are limited. The Court creates in Part II (C) a clear exception to § 5301 that allows the state to pursue collection of child support against individual recipients of Veterans' Disability Benefits because the benefits are for the veterans' families and not just for the veterans. However, the *Rose* decision did not, and could not, waive the sovereign immunity of the Department of Veterans Affairs to open the door to direct garnishment.[3]

### 4. The "apportionment" process – a way to get child support sent directly to the custodial parent/children.

The apportionment process is run very much like the process that a family court would use in determining child support. Essentially, an employee of the Department of Veterans Affairs (DVA) reviews all of the relevant financial information from both the veteran and the claimant (the parent with whom the children live) and makes a determination about how much the veteran should pay in child support to the claimant.

However, there is one very important difference between the apportionment process conducted by the DVA and the process of determining child support through a family court or local Department of Human Services. As the reference manual for VA employees doing apportionments explains, "VA's primary obligation is to the Veteran.

[3] That has not stopped some states from issuing such orders. See, *Ruffin v. Ruffin*, 753 SW2d 824, 827 (Tex.App.1988).

Even if the claimant demonstrates a need, VA cannot impose undue hardship on the Veteran." See, WARMS (Web Automated Reference Material System) at http://www.benefits.va.gov/warms/M21_1MR1.asp , MR21-1MR, Part III, Subpart v, Chapter 3, Section A. (If you are dealing with a veteran who has waived military retired pay, the garnishment process is explained at MR21-1MR, Part III, Subpart v, Chapter 3, Section C.)

Because of this focus on the veteran, the apportionment process requires an independent assessment of how much child support should be paid by the veteran, even if there is a state court order in place that specifies the amount that a veteran should pay each week or each month. Conversely, even if there is no state court order, the VA can create one through the apportionment process.

The current regulations governing the apportionment process can be found at *Title 38 C.F.R. § 3.450-3.461, Apportionments*. ***However***, the VA has had a project in the works since 2002 to overhaul all of the regulations that govern the VA's compensation and pension programs which will be found in a new Part 5 of Title 38. These new regulations will also include a re-organization of the Apportionment section which will be called *Subpart M: Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries* and will be found at *Title 38 C.F.R. § 5.770 – 5.784*. The proposed rules can be found at *76 Fed. Reg. 2766* (Subpart M proposals begin at p. 2774) (Jan. 14, 2011) and online at: http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=TdbeEH/0/2/0&WAISaction=retrieve. For more information on the new regulations see, *Pine William L. and Russo, William F., Recent Developments in Administrative Law, Making Veterans Benefits Clear: VA's Regulation Rewrite Project*, 61 Admin. L. Rev. 407 (Spring, 2009).

The apportionment process begins when the claimant files VA Form 21-0788, entitled *Information Regarding Apportionment of Beneficiary's Award* and found at: http://www.vba.va.gov/pubs/forms/VBA-21-0788-ARE.pdf. This forms sets in motion a lengthy process that includes the following:

a. **The initial screening of whether the VA should even consider the claim**:
   - Are the benefits too small to be divided between the veteran and his/her children? If so, the VA will not allow an apportionment.
   - Has someone else legally adopted the child/ren? If so, the adoptive parent could receive an apportionment **limited to** the amount of any additional benefits that the veteran was receiving for the children.
   - Is the proper person requesting the apportionment? The veteran cannot make the claim for apportionment on behalf of his children just to make paying child support more convenient.

b. **If the apportionment claim can be considered, the evidence gathering process begins**:

- The VA examines the complete financial circumstances of the claimant.
- The VA examines the complete financial circumstances of the veteran.
- Even if the VA determines that the children need the money, it will not take money from the veteran's disability benefits, if this would create a financial hardship.

c. **Interim Withholding**:

- The veteran will receive a notice of "proposed adverse action" which establishes an interim withholding amount.
- In making the determination of what the interim withholding should be, the VA will consider (a) the additional amount the veteran is paid for dependents, and (b) parameters between 20 and 50 percent of the veteran's benefits.
- The final decision can grant an apportionment amount ***less*** than the interim withholding, but ***not more***.
- The veteran can stop the interim withholding from taking effect by requesting a hearing within 30 days of the release of the notice of "proposed adverse action."

d. **Final Decision and Appealing a Final Decision.**

- If the claimant cannot show that the child/ren have a financial hardship, then the apportionment will be denied.
- If the person claiming the child support has shown financial hardship, BUT the veteran will also suffer financial hardship from the loss of the money, then the apportionment will be denied.
- BUT, if the person claiming the child support shows financial hardship AND the veteran does not show that he will suffer financial hardship, then the apportionment will be granted.
- To appeal the Final Decision the veteran must file a "notice of disagreement" with the VA within 60 days from the date that the VA mailed the notice of the Final Decision. A "notice of disagreement" does not require a special VA form. It can be a simple letter stating that the veteran wants to contest the result.

## CONCLUSION

The amount of a veteran's disability benefits and his/her personal financial circumstances vary widely. In general, states will take into consideration the amount of a veteran's disability benefits in determining child support. The following issues should be considered by veterans who may be subject to a child support order and by people seeking child support from a veteran:

If your state allows Veterans' Disability Benefits to be counted as income for child support purposes,

- A state court child support order could be used to garnish income other than the disability benefits, if the veteran has other income.
- The state court order could also be used to attach the veteran's bank accounts, revoke his/her driver's license and employ any other state court means of collection.
- The state court child support order could NOT be used to garnish the Disability Benefits directly from the federal government, unless the veteran has waived military retirement income to get VA payments, or unless the child support recipient goes through the apportionment process with the VA.

When the state court process does not provide a way to establish or collect child support from a veteran with Disability Benefits, then the apportionment process provides a way to request child support directly from the VA

- The process begins with a request to the VA using VA Form 21-0788.
- The VA makes the determination of whether or not the financial hardship of the child/ren outweighs that of the veteran.
- The VA's primary obligation is to the veteran.
- All adverse actions including the final decision can be appealed by the veteran.

At some point Congress could decide that Veterans' Disability Benefits can be garnished by the states. Until then, garnishing other (non-disability) income or assets and/or using the apportionment process are the only options for collecting child support.