A Legal Synopsys of Veteran Benefits

Their use in Support Awards and Enforcement

Child Support

Most significant changes happen in failure. The VA was supposed to be accepting apportionment applications and directly providing benefits to a veteran's family when they live separately. Primarily used in conditions of a veteran being hospitalized the VA was refusing to get involved in messy family issues. Under great pressure to complete veteran injury claims the VA back-burnered apportionments. This was a big mistake.

In 1987 the failure to perform apportionments by the previous Veterans Administration was identified. The Supreme Court of the United States made the infamous Rose v. Rose ruling. The court ruled the previous language of 38 USC § 211 did not provide sole authority. If the administrator did not make a decision, others could. They also said it was only on decisions of eligibility, not the entire provisioning process. They ruled it did not include state courts, only federal courts of the US. As insult the Supreme Court said the law did not even "obligate" the VA to do its job.

38 USC § 211 - "**The decisions of the Administrator** on any question of law or fact under any law administered by the Veterans' Administration **providing benefits** for veterans and their dependents or survivors shall be final and conclusive and no other official or any **court of the United States** shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.."

The Court had pointed this failure at Congress. Congress had just declared federal authority over establishment and enforcement of child support. The States are granted permissions but "the federal government plays a major role in dictating policy and structure" (US House, Green Book). Through the enactment of the Child Support Enforcement Act, the federal government had taken a large chuck of authority over family law out of State hands and then ordered the States to perform it and report to them.

This Act was made because the States had let kids fall onto the AFDC child welfare system instead of holding absent parents responsible. Because the VA was failing to perform apportionments it was this act which forced States to take over the Federal Government's job under the VA. President Reagan and the Republican controlled Senate were hugely distressed. It was scandalous political irony. The federal government took over child support because the States had failed to do it, thus ordering the States to do the VA's job because they were failing. It was the epitome of backwards.

With the formal language of rulings, it's hard at times to see how emotionally charged cases are. This ruling had a huge impact. The Child Support Enforcement Act was the Affordable Care Act of it's time. Putting a State right at the federal level is a very dangerous thing to do. Veterans are considered a matter of national security. In there

way, the Court had ruled legislators had ignored the dangers. They were scolding the Legislative Branch for reversing the rolls of our government.

President Reagan was a strict Republican in these terms. While this matter is complex and the line between State Family Law and Federal Veterans Law might appear grey to some, it was as black as night to President Reagan. He was extremely protective of both sides of that line. The Department of Veterans Affair Act was a hard hit against the major damages he saw coming from the Child Support Enforcement Act. He wasn't going to leave office without ensure that line was clear.

The US Constitution requires the complete legal separation of the troops including their family law. The Bill of Rights was written, in part, to specifically protect the public from its military. Because they are required to sacrifice their Bill of Rights, service members are provided a separate "equal protection under the law". This unique balance of security versus freedom is found under Titles 10 and 38 of the US Code. Title 10 is very restrictive on rights with little to no protections for active serving members. Title 38, on the other hand, is heavy in rights and protections for veteran after discharged.

From the failures of the Veterans Administration for not performing apportionments, Congress and the President responded with extreme magnitude in comparison to previous cases. In McCarty v. McCarty the Court ruled the Federal law did not give the States permission or guidance in family law of service members, thus earned retirements could not be used. Retirements are considered jointly earned by both people in a marriage working as a team. Only brief additions of family law were needed in the federal code to give permission and guidance on dividing that earned income (see 10 USC § 1408).

For veterans and their families, President Reagan with Congress responded with the Department of Veteran Affairs Act of 1988. They addressed the issue of exclusive and sole authority over any legal issue for veteran funds. It now prohibits the States from making any decisions which affect these benefits not just the eligibility process. The language of the new § 511 is inclusive of all courts not just federal. This language is so thorough an exception had to be made for claims appeals. It obligates this new Department of Veteran Affairs (DVA) to assert this authority and perform their duties.

38 USC § 511 - "The **Secretary shall decide all questions of law** and fact necessary to a decision by the Secretary under a law that **affects the provision of benefits** by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or **by any court**, whether by an action in the nature of mandamus or otherwise." (Final Codification 1991 - P.L. 102-83)

The case of Rose v Rose is one of infamy as it was the catalyst for the largest response in US history to a ruling by the US Supreme Court. A unanimous response was made by both the Executive Branch and the Legislative Branch by throwing out the entire book of law, Title 38. President Reagan had in effect fired the second largest federal agency. While some of the law was simply renumbered, major rewrites were done.

To ensure the new Department of Veteran's Affairs did its job, Congress left the enforcement part of the ruling under Title 42 open for 10 years. This said the limitations under § 659 only protected the VA from receiving a garnishment and not the veteran since they were not included under § 662. Leaving this portion of law in place gave the child support agencies a means to get the funds if the new DVA continued in its failures. It also provided a way to continue getting funds on existing cases while transitioning.

The enforcement portion was where the veteran had been held in contempt of court. The ruling placed heavy blame on Congress for the deficient wording of the authoritative statement as well as Veterans Administration for their part. However, Mr. Rose made two offending mistakes. While he had conceded the language of 38 USC § 211 allowed the State to use the funds in establishment, he kept asserting the amount for the children was only the amount added. His first mistake was not recognizing the benefits are awarded based on the cost effectiveness of shared resources. His second mistake was by doing so he was asserting he had the authority to perform the calculation and apportionment.

On the 10 year anniversary of the case in 1997 Congress discussed this matter at length at the Senate Arms Committee. To ensure the process of Apportionment was properly being followed and claims were being processed, DVA representatives testified. They assured Congress they had learned their lesson and were currently paying monthly on over 20,000 completed applications and States were modifying awards accordingly.

At which point Congress superseded the enforcement part of the case by repealing 42 USC § 662. This change now prevents garnishments of any Title 38 funds from being submitted to the veteran after receipt of benefits. Hence this is when IM 98-03 was provided to the Administration for Children and Families (ACF) and instructed them the only legal processes the States are allowed to follow are Apportionment and the limited garnishments to the DVA under § 659.

The new DVA has also learned not to be a bully with its authority and to work hand in hand with the ACF and State agencies. The IM recommends applications be taken to the State Office of Child Support to request they submit form vba-21-4138 with the application for apportionment. By submitting these together, it helps prevent a 2 week delay in processing caused by a request to determine the need of the child being sent and received between these agencies. The DVA works with the States because each has its own economic standards and each case can have a different need of a child.

Spousal Support

The opinions of the court on 38 USC § 3101 (now § 5301) are confusing to most; they were only about the enforcement and not establishment. Establishment was decided based on eligibility. Tennessee Courts had ruled spousal support was a clear conflict with the federal authority and therefore superseded. They also said divorce separates a spouse from the veteran’s family but not the children. Thus, why there would be a decrease in benefits as a spouse no longer exists but the children remain. Legally removed from the veteran, the ex-spouse was now able to apply for their own benefits under public programs as a civilian.

As part of the US Supreme Court's ruling on page 481 at 625, they applauded Tennessee and agreed with their ruling. For enforcement, the ruling was the same. However, Justice O'Conner did not agree with this. While she agreed with the ruling over child support she wrote a dissenting opinion on why and enforcement of spousal support. In her opinion of the previously § 3101, she believed congress had not "intended" the law to have been written so ironclad to provide the level of protection against the claim of spousal support enforcement.

The Court was hugely offended by the opinion of Justice O'Conner's. The "intent" of Congress had already been severely stretched to allow for enforcement of child support. Her opinion conflicted with both anti-corruption statutes and the "purpose" of the benefits. Federal benefit for the "loss of abilities" are based on intent of eligibility. It was stated to be "an opinion to which this court disdains". That might not sound too harsh but "disdain" is a very harsh word by the Court. It is the feeling of contempt and disgust for something regarded as unworthy or inferior.

Both Justice Scalia and Justice White wrote individual responses specifically to hers. Contrary to Justice O'Conner, Justice White was on the complete opposite pole and dissented against the enforcement of child support as well as spousal. Justice White felt the stretched intent based on a single obscure comment of the veterans committee that they "review" the need for benefits of "veterans and their families", is not a demonstrated history of intent. He cited several conflicts which he felt the stretched intent was in conflict with demonstrated intent and direct language of the law. It is also worth noting, Justice White's dissenting argument over child support was not distained.

President Reagan and the US Congress also responded to Justice O'Conner as well as the rest of the Court on the "intent". They let them know Congress intended the law to be that ironclad and they distained her opinion as well. Unlike all the major changes to Title 38 as a whole and § 211, not one change was made to § 3101 when renumbered to § 5301. When combined with the new wording of § 511 it makes § 5301 even stronger than Justice White's opinion.

The power and broad encompassment of the new § 511 doesn't come without a price. The DVA is forced to feel the full weight of dealing with claims. Many feel this has contributed to backlog issues. Also, the medical services while extremely improved still leave many veterans very dissatisfied with the type and level of care. Under the previous § 211 a veteran could see a private doctor while still saving money by having prescriptions filled at the VA for little or no cost. This is no longer an option.

Just as the DVA is required to decide a calculation of an apportionment prior to sending a check, a DVA doctor must decide the medication prior to dispensing the prescription. If an outside source makes the decision on the calculation or medication, the DVA can not proceed to the next steps of those processes. For kids this means the DVA can't sent a check if states include the funds.

Apportionment – Establishment or Enforcement

Many mistakes are made trying to qualify apportionment one way or the other. The confusion is easy because it is both and neither. It is both because it is used mostly in child support cases and neither because it is legally eligibility, calculation and disbursement. Apportionment is the legal process the DVA uses to determine eligibility based on separate living status, calculate the amount and then make direct payments to individual beneficiaries.

When the DVA performs the eligibility calculation it is confused with establishment of support because their decisions can be highly subjective. The DVA will consider situations of abuse and other findings. Public programs won't consider these factors and rely solely on math. Public programs do not have the added weight of ensuring veterans maintain a required higher standard. Cases with equal income can receive opposite findings by the DVA. In one case a party could be denied and in another they could be awarded a large sum of money regardless of income because of abuse.

Disbursement and enforcement can be confused as well. However, the DVA will not enforce outside calculations and refuse garnishments. States who calculate support including Title 38 funds force the DVA to deny apportionments. The DVA can not double dip the funds and use them twice for the same purpose. Thus they can not complete eligibility. Title 38 funds are a supplement award for the loss of abilities, like public programs, an apportionment is meant to fill a gap between a support award and the need of the child.

While a judge or people in a state agency may want to take punitive actions in some cases, they are ill equipped in standards and ability for cases involving veterans. Veterans are not equal to the public. They are not better or worse but not equal under law. The DVA can hold veterans to the higher standards required for the protections they are given. Judges and case workers are on the front line and their rulings and statements carry considerable weight. If they feel a child, spouse or veteran is being abused or mistreated these people can make a big difference in rectifying the situation by reporting it.

The correct legal process is for a State agency to calculate a support award excluding any funds under Title 38. To divide Title 38 funds, complete an application for apportionment to fill the gap and meet the need. You need to make sure you specify the exclusion, the amount of the award and a case determined need. Those wishing for subjective information to be used should send statements to the DVA. By allowing the DVA to perform the apportionment you are working together to fill the gaps and meet their needs.

VA - The original "Veterans Administration" under Title 38 USC § 211
DVA - The current "Department of Veterans Affairs" under Title 38 USC § 511