

SILENT PARTNER

Master Checklist for Military Retirement Benefits

SILENT PARTNER is a resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section and the North Carolina State Bar's Committee on Legal Assistance for Military Personnel. There are many Silent Partner infoletters on military family law issues. Just go to www.americanbar.org > Family Law Section > Military Committee, or www.nclamp.gov > For Lawyers. Please send any comments, corrections and suggestions to the address at the end of this document.



The aim of this article is to teach the reader how military retired pay works, to assist in understanding the Survivor Benefit Plan, and explain how to accomplish the allocation and division of military benefits. Also shown below are the places where attorneys can find resources which clarify these issues so that they can guide their clients in decision-making and can submit pension division orders which will be honored by the retired pay centers (DFAS and the Coast Guard Pay and Personnel Center).

1. Got “DOCs”? What are the documents you need to understand military pay and retired pay, Reserve Component retirement points, accrued leave, elections for the Survivor Benefit Plan (SBP), and notification of eligibility for retirement for a Guard/Reserve member? For a full list of documents, see the Silent Partner info-letter, “Docs for Division,” available at www.nclamp.gov > For Lawyers. Here’s a simple list to use:

- a. Leave and Earnings Statement for active-duty personnel (this is DFAS Form 702)
- b. “How to Read Your LES” on the Defense Finance and Accounting Service (DFAS) website (www.dfas.mil)
- c. Retirement Points Accounting System statement for Guard/Reserve personnel
- d. Retiree Account Statement for retired personnel (DFAS-CL Form 7220)
- e. “20-year letter” (Notice of Eligibility) for Guard/Reserve personnel as when SM attained 20 creditable years of service, was notified as to SBP elections
- f. DD Form 2656-1 for SBP elections, coverage for retirees
- g. DD Form 214 – discharge statement (“Report of Separation”)
- h. Thrift Savings Plan quarterly statements
- i. Letter from DFAS that servicemembers (SMs) receive upon retirement (pay status), showing expected amount of retired pay and calculations
- j. If a document cannot be obtained through SM’s signed release or discovery from SM, then get an order from a court of competent jurisdiction, or a judge-signed subpoena. With this, the document can be retrieved from the retired pay center (DFAS for Army, Navy, Air Force, Marines Corps, or the Coast Guard Pay and Personnel Center for members of the USCG, and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration, or NOAA). The records also might be at the Reserve headquarters (e.g., Human Resources Command for Army Reserve and Army National Guard, Buckley Air Force Base for Air Force Reserve and Air National Guard) or the state adjutant general’s office, or other military agency.

2. “Who’s in charge here?” This is about the rules for division of military retired pay and the SBP.

- a. Division of military pensions is authorized by USFSPA (Uniformed Services Former Spouses' Protection Act), 10 U.S.C. 1408. It is an enabling act which allows states to divide pensions but does not require it; it does not specify a method of division and contains some restrictions.
- b. The Survivor Benefit Plan is the survivor annuity program for pension division, to allow a former spouse (FS) to continue to receive payments after the member/retiree dies. 10 U.S.C. 1447 *et seq.*
- c. Volume 7B of the Department of Defense Financial Management Regulation, DoD 7000.14-R (DoDFMR) explains how each of these works. Look up "DODFMR" on any search engine to find the Regulation. Pension division under the USFSPA is at Chapter 29; SBP rules begin at Chapter 43.
- d. The Silent Partner infoletter series has guidance for lawyers on SBP and on military pension division.
- e. State laws and rules exist for pension division, whether survivor annuity is available for the FS, what the marital fraction is, whether military leave is divisible, etc.

3. To play the game, know the rules! You need to know how military retired pay works, how compensation for a retiree is calculated, and what is needed for state court jurisdiction to divide military retired pay.

- a. Active duty retirement is under one of 3 systems: a) Final retired pay b) High-3 c) CSB/Redux. Details are at Army Retirement Services. Go to www.armyg1.army.mil – this is good for all branches of the uniformed services. The important date is DIEMS (Date of Initial Entry into Military Service).
- b. Reserve/National Guard retirement rules (pension based on retirement points)
 - i. In general retired pay starts when retiree attains age 60
 - ii. 20 "good years" needed to be retirement-eligible (50 points needed for a "good year")
 - iii. Four points for a "drill weekend," one point per day of active duty (e.g., 14 points for two weeks' annual training or "summer camp")
- c. Jurisdiction rules are found at 10 U.S.C. 1408 (c)(4). A court has jurisdiction over a SM's pension through by:
 - i. Domicile – his or her legal residence
 - ii. Consent – entry of general appearance in the lawsuit
 - iii. Residence – but not because of assignment
- d. SCRA – Whether the SM has retired or not, the pension order must state that court has honored his or her rights under the Servicemembers Civil Relief Act, 50 U.S.C. 3901 *et seq.*
- e. There are four methods for division of retired pay (from active duty retirement). The full explanation is in the Silent Partner info-letter, "Guidance for Lawyers: Military Pension Division" at www.nclamp.gov. Examples:
 - i. Fixed dollar amount - \$500 a month
 - ii. Percentage – "Mary gets 10% of Tim's pension monthly" (use when retirement has occurred and all numbers are known)
 - iii. Formula clause – "Mary is to receive 50% of Tim's final retired pay times 214 months of marriage during service divided by Tim's total service when he retires" (use when SM not yet retired)
 - iv. Hypothetical - "Mary is to receive 50% of Tim's retired pay times 214 months of marriage during service divided by Tim's total service when he retires, with his

retired pay calculated as if he had retired as a staff sergeant with 16 years of creditable service. His HIGH-3 pay amount is \$3,400 monthly.”

- f. For divorces granted after 12/23/16 when the SM is not receiving retired pay at divorce, the amount of retired pay which is divisible is limited to a share of the SM's hypothetical retired pay as if he had retired on the date of the divorce. See the Silent Partner info-letters, “Fixing the Frozen Benefit Rule” and “All Clauses Considered: Writing the Frozen Benefit Clause” for details.
- g. Reserve/Guard methods of division – same as above except that formula clause must be expressed in points, not months.
- h. Disposable Retired Pay (DRP) = gross retired pay less any VA disability waiver and premium for SBP (for FS in this divorce). DRP is what retired pay center divides, regardless of what the order says. See also “Break a leg!” below.
- i. COLAs (cost of living adjustments to retired pay) usually occur in January. They are automatically included in all division methods except the fixed dollar amount, which does not allow COLAs to be included or added on.
- j. The military pension is not a “fund,” so you cannot refer to the account balance or the part of the fund acquired during the marriage or at divorce. It is a defined benefit, governmental program (not a “qualified plan”) with monthly payments to retiree. TSP is a fund (Thrift Savings Plan), similar to 401K plan. Remember “What you see is what you get” – you can always check the account balance to see what’s there.

4. SBP – choose it or lose it. This is about how the Survivor Benefit Plan (SBP) works, its cost and benefits

- a. SBP – an annuity that continues stream of income to designated beneficiary when SM/retiree dies first; without it, the pension stops upon death of the SM/retiree.
- b. It pays 55% of selected base amount to the recipient.
- c. In a retirement from active duty, FS coverage costs 6.5% of base amount, to be paid upon retirement by deduction from pension check.
- d. If the FS dies first, then the entire pension is restored to the retiree.
- e. FS coverage is implemented through a voluntary election by the SM/retiree, or through a court order sent to the retired pay center
- f. The base amount may be any the full monthly retired pay (which is the default if order or clause is silent) down to \$300/mo.

5. Snooze... and you lose. Here we learn the limitations and deadlines which apply across the board.

- a. 10/10 Rule – direct pay from the retired pay center requires 10 years of service concurrent with 10 years of marriage. This is an enforcement rule, not a rule as to pension division eligibility. The FS is still eligible to claim pension division if less than 10/10.
- b. Never take a default judgment against the SM/retiree. File where there is jurisdiction to divide the pension, obtain proper service, and always state the basis for jurisdiction in the order (see jurisdiction rules above) to get valid direct-pay order honored by retired pay center.
- c. SBP is suspended for the FS if she/he remarries before age 55.
- d. SBP deadlines – when the SM/retiree makes the former-spouse election, it must be done within one year of divorce. If the SM/retiree is required to make the election and fails or refuses to do so, then the FS may make a “deemed election,” and this must be done within one year of order granting SBP coverage (use DD Form 2656-10)

- e. SBP cannot be divided between present and former spouses.
 - f. SGLI and Ridgway decision – when representing FS, do not rely solely on Servicemembers Group Life Insurance to secure benefits. A 1981 Supreme Court decision says that courts cannot enforce orders or agreements that require SGLI. *Ridgway v. Ridgway*, 454 U.S. 46 (1981).
 - g. 20/20/20 Rule – full medical benefits for an unmarried FS requires 20 years marriage, 20 years of creditable service, and an overlap of 20 years. This means TRICARE and space-available care at military medical facilities. If 20/20/20 not met, use CHCBP (Continued Health Care Benefit Program).
6. **“Break a leg!”** One must understand how disability pay can reduce the divisible pension
- a. The primary types of disability payments are: military disability retired pay, VA disability compensation, Combat-Related Special Compensation (CRSC)
 - b. Courts cannot divide VA disability compensation, and only a small part of military disability retired pay may be subject to pension division (although disability benefits ARE usually subject to consideration in support cases).
 - c. When retiree has a VA disability rating of less than 50%, the election of VA payments means a dollar-for-dollar reduction of the pension; thus the share for the FS is reduced due to the unilateral action of retiree.
 - d. When retiree is receiving CRSC, then all VA payments operate to reduce retired pay on a dollar-for-dollar basis.
 - e. Courts and agreements often employ indemnification language to guard against this. Check state law on reserving jurisdiction to return to court and adjust the pension share, to revise the entire property settlement, to require reimbursement, or to include in the settlement a clause providing (for example) for \$1 a year modifiable alimony for the FS.
 - f. For details, read *Scouting the Terrain*, *The Servicemember’s Strategy*, *The Spouse’s Strategy*, *The “Evil Twins” – CRDP and CRSC*, and *The Death of Indemnification* (Silent Partner infoletters).

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SILENT PARTNER

Getting Military Pension Orders Honored by the Retired Pay Center

Introduction: Silent Partner is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the North Carolina State Bar's military committee. Send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many Silent Partner infoletters on military pension division, the Survivor Benefit Plan and other aspects of military divorce. Just go to <https://www.nclamp.gov> > For Lawyers (the website of the military committee, N.C. State Bar).



Getting a military pension division order honored by the retired pay center isn't easy. What does the uniformed services pension division order need to say? Is there "magic language" which must be included? Where do you send the order? Who does the processing? This infoletter contains ten tips for the practitioner on how to get the job done seamlessly.

Tip #1 – Where Do I Start?

Retired pay orders for the Army, Navy, Air Force, Marine Corps, and Space Force, as well as the National Guard and Reserves (known as the RC, or Reserve Component), are processed by the Defense Finance and Accounting Service (DFAS), located in Cleveland, Ohio. Pension orders for members of the Coast Guard are sent to the USCG Pay and Personnel Center (<http://www.uscg.mil/ppc/>), located in Topeka, Kansas, which also handles orders for the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration. The title "retired pay center" will be used to refer to the above two offices which process applications for a division of uniformed services retired pay under USFSPA, the Uniformed Services Former Spouses' Protection Act.¹ Note that USFSPA refers to the retired pay center as the *designated agent*.²

The three basic issues in the division of retirement benefits are "pension share," Survivor Benefit Plan (SBP), and indemnification. The tips below explain how to write and get approved an order for division of military retired pay as property, as well as how to deal with SBP coverage and reduced payments due to the "VA waiver."

Tip #2 – Know Your Resources.

Read closely the provisions of 10 U.S.C. §1408 to understand what the law requires for military pension division. There is a survivor annuity available to spouses and former spouses; the statutes regarding SBP (Survivor Benefit Plan) coverage are found at 10 U.S.C. §1447-1455.

The rules promulgated by DFAS to implement the USFSPA are in the DoDFMR (Department of Defense Financial Management Regulation).³ The Coast Guard follows DFAS guidance and there is a useful USCG pamphlet, "FSPA and SBP, 8th Edition," at: <http://www.dcms.uscg.mil/Portals/10/CG-1/PPC/RAS/PPCPUB5825.pdf?ver=2017-03-02-093836-327>. The DFAS website is www.dfas.mil, and the fact sheets and application forms needed are at the "Retired Military and Annuitants" tab.

¹ 10 U.S.C. § 1408.

² 10 U.S.C. § 1408 (b)(1)(A).

³ Dep't of Defense Financial Management Regulation, DoD 7000.14-R, "Military Pay Policies and Procedures—Retired Pay." Vol. 7B, Chapter 29, "Former Spouse Payments from Retired Pay" (February 2023) contains full details about USFSPA payments from retired pay. Referred to hereafter as DoDFMR, the Regulation can be accessed at <http://comptroller.defense.gov/fmr>.

At the end of Chapter 29 of Vol. 7B of the DoDFMR are two sample military pension division orders. Use a large measure of caution in deciding whether to use them; although by and large they provide helpful language that will be accepted by the retired pay centers, they are full of mistakes:

- *Figure 1* is titled “Military Retired Pay Order (on or before December 23, 2016),” and the text contains the note, “(For Decree of Divorce, Dissolution, Annulment, or Legal Separation that occurs on or before December 23, 2016),” implying that it should not be used today for division of the military pension. In fact, it may also be used for today’s divorce case also, when the case involves a military retiree.
- *Figure 2* is titled “Military Retired Pay Order (after December 23, 2016)” and the text contains the note, “(For Decree of Divorce, Dissolution, Annulment, or Legal Separation that occurs after December 23, 2016).” In fact, it only needs to be used when a) the divorce, dissolution, annulment or legal separation is after 12/23/16 and b) the servicemember is not receiving retired pay at the date of divorce, etc.
- The sample orders refer to the “Service Members’ Civil Relief Act, 50 U.S.C. App. 501-548 and 560-591.” The correct title is the Servicemembers Civil Relief Act.⁴ The section numbering is incorrect, since the Act was codified (i.e., removed from the Appendix of Title 50 and designated Chapter 50 of Title 50) in December 2015. The correct title and section numbering should be “Servicemembers Civil Relief Act, 50 U.S.C. §3901 *et seq.*”
- The two sample orders are silent as to SBP.⁵ This could be a costly malpractice trap for the former spouse’s attorney who drafts or reviews and approves the final military pension division order. When the settlement or trial ruling requires the member or retiree to elect SBP, that statement must be in the court order.
- The second omission is indemnification in the event of an election of disability pay that reduces disposable retired pay.⁶ When there is a clause in the settlement or trial ruling regarding reimbursement for any reduction due to receipt of VA disability compensation, that requirement should be stated in the court order. But, since DFAS is not responsible for reimbursements due to disability pay reductions, no such clause appears in the sample orders. Thus it is not something that a DFAS model order needs to contain, but it is something which the attorney for the FS (former spouse) certainly needs to consider.

A better order, addressing both all these mistakes and issues, is referenced at Tip #10 below.

The Silent Partner series of infoletters contains “Military Pension Division: Guidance for Lawyers,” and “Guidance for Lawyers: The Survivor Benefit Plan,” which provide detailed information on how to understand and implement the rules and statutes mentioned above.

Tip #3 – Use the Right Document.

A separation agreement or property settlement, standing alone, is not the way to accomplish military pension division when the nonmilitary spouse wants to receive direct pension payments from the retired pay center. USFSPA only allows direct pension payments pursuant to a “final decree of divorce, dissolution, annulment, or legal separation issued by a court” or a property settlement that is ratified or approved by the court and issued incident to such a final decree.⁷ You can either:

⁴ 50 U.S.C. §3901.

⁵ Perhaps this is because the samples were prepared by the Garnishment Operations office of DFAS in Cleveland, Ohio; in general, SBP is managed through the DFAS office in Indianapolis, which is called “Retired and Annuitant Pay.”

⁶ For information on indemnification and the 2017 Supreme Court decision in *Howell v. Howell*, 137 S.Ct. 1400, see the Silent Partner, “The Death of Indemnification.”

⁷ 10 U.S.C. §1408(a)(2).

- Insert the military pension language in the divorce decree; or
- Prepare a separate military pension division order, judgment, or decree to submit to the court at the appropriate time, entered incident to the divorce, such as when the divorce occurs, or when the hearing on property division takes place; or
- Draft a separation agreement or property settlement which can then be incorporated into the divorce decree.

Tip #4 – Can You Get Direct Payments from the Retired Pay Center?

There are several requirements which must be met to get pension payments from the retired pay center. First of all, a pension division order must meet a unique jurisdictional test, over and above the usual requirements for personal and subject matter jurisdiction. Military pension division is allowed only when the retiree/military member:

- is domiciled in the state in which the suit for the divorce or property division occurs; or
- resides in the state in which the lawsuit occurs (other than because of military assignment); or
- consents to the jurisdiction of the court in which the lawsuit is pending.⁸

The order must state the jurisdictional basis for dividing military retired pay.⁹ For more detailed information on these jurisdictional tests, see the Silent Partner infoletter, *Military Pension Division: Scouting the Terrain*.

Second, in property division cases involving the retired pay center's division of military retired pay incident to a divorce or separation, the parties must be married for at least 10 years during which time the military member performed at least 10 years of service creditable toward retirement.¹⁰ Without this, the retired pay center cannot honor an application for the direct payment of any court-ordered division of retired military pay as property. The pension is still divisible, but the former spouse must look to the retiree for payments, not the retired pay center.

Third, there must be evidence that the member's rights under the Servicemembers Civil Relief Act (SCRA)¹¹ have been honored. The SCRA offers protection for military members who are on active duty at the time of the divorce. USFSPA requires a statement in the pension division order for military pension division that the military member's rights pursuant to the SCRA have been observed.¹² Although the SCRA does not apply in cases where the member is retired or is not on active duty at the time the decree was entered, USFSPA does not make that distinction; it requires such a statement in all cases.

Fourth, in most cases involving those still serving, the order must state the "High-3" pay of the member at the time of divorce and also the number of years of creditable service at that time. If the individual is in the Guard or Reserves and still drilling, then the order needs to state retirement points as of the date of divorce (instead of years of service). This doesn't apply if the member is already retired and in pay status at divorce. More information on this is contained in the two Silent Partner infoletters on the "Frozen Benefit Rule."

The pension order or divorce decree may be submitted at any time after it is entered.¹³ One need not wait until the servicemember (SM) has already applied for retirement or is in pay status. If the SM is not yet in pay status when the order is tendered to the retired pay center, a conditional approval will be made, subject

⁸ 10 U.S.C. §1408(c)(4).

⁹ DoDFMR, Vol. 7b, Chapter 29, ¶290605.

¹⁰ 10 U.S.C. §1408(d)(2).

¹¹ 50 U.S.C. §3901 *et seq.*

¹² 10 U.S.C. §1408(b)(1)(D).

¹³ DoDFMR, Vol. 7b, Chapter 29, ¶290404.

to final approval at the time the individual actually starts to receive retired pay.¹⁴

At the time of final approval, the retired pay center will notify the SM that payments will start not later than 90 days after the service date of the approved application or the start of retired pay, whichever is later.¹⁵ The FS also gets an approval notice.¹⁶ When the court order divides military retired pay as property, no more than 50% of disposable retired pay (DRP) may be deducted.¹⁷ The retiree remains liable for any amount still owing.¹⁸ In cases where there is an application for the direct payment of court-ordered division of military retired pay and a garnishment issued pursuant to 42 U.S.C. § 659 (child or spousal support), the retired pay center may deduct up to 65% of the military member's disposable earnings.¹⁹

Tip #5 – Use the Right Language.

“Creative drafting” and “made-up wording” may result in your pension order being rejected. Don't make the mistake of thinking that (without guidance such as is found herein) you can write it up better than the officials at the retired pay center who are going to be processing the order. You probably can't. And if your order is rejected, you'll have to explain to your client why the payments are still not flowing, why the order must be rewritten and submitted again to the judge, and why the legal bill keeps going up.

Even if it is incorporated into a court order or a divorce decree, the separation agreement or property settlement must contain all the terms required for court orders to be honored by the retired pay center. You should state the following:

- a. The names and addresses of the parties, and the last four digits of their Social Security numbers (the application document, DD Form 2293,²⁰ requires the full SSN);
- b. The years of marriage and of military service, the overlap of these two periods and the date of divorce;
- c. When the divorce was after 12/23/16 and at that date member has not started receiving retired pay, the member's “High-3” monthly amount and years of creditable service (or, for those in the Guard or Reserve, the number of retirement points) at the date of divorce;
- d. The SCRA rights of the member have been observed;
- e. Jurisdictional findings (domicile, consent, or residence) under 10 U.S.C. 1408 (c)(4); and
- f. A statement as to what the retired pay center will pay the spouse (see “Know What You Want” below).²¹

Payments are made once a month, starting no later than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later.²² They are made by direct deposit. The payments end at the death of the retiree or spouse, whichever occurs first.²³ Payments are prospective only; the retired pay center does not disburse arrears.²⁴ The USFSPA does not provide for garnishment of payments missed prior to the approval of the application by the retired pay center.

¹⁴ DoDFMR, Vol. 7b, Chapter 29, ¶ 290405.

¹⁵ 10 U.S.C. § 1408(d)(1).

¹⁶ DoDFMR, Vol. 7b, Chapter 29, ¶ 290501.

¹⁷ The award is construed as dividing “disposable retired pay” regardless of the language used. DoDFMR, Vol. 7b, Chapter 29, ¶ 290601.D.

¹⁸ 10 U.S.C. § 1408(e)(6).

¹⁹ DoDFMR, Vol. 7b, Chapter 29, ¶ 290901(b).

²⁰ DoDFMR, Vol. 7b, Chapter 29, ¶ 290401.

²¹ See DoDFMR, Vol. 7b, Chapter 29, Figures 29-1, 29-2 for the data DFAS recommends.

²² 10 U.S.C. § 1408(d)(1).

²³ 10 U.S.C. § 1408(d)(4).

²⁴ DoDFMR, Vol. 7b, Chapter 29, ¶ 90304.

****When dealing with a Guard/Reserve case, be careful as to how the pension clause is worded. Many RC members wind up with enough active-duty time to qualify for a *regular retirement* (i.e., one from active duty, with retired pay starting right away) rather than waiting for payments from a *non-regular retirement* (i.e., retired pay from Guard/Reserve service, which usually starts at age 60). When representing the FS, counsel should avoid such phrases as “John’s Army Reserve retired pay,” since the SM sometimes argues that this means the hypothetical non-regular retired pay he would have received if he hadn’t attained a regular retirement, and thus the FS should only start getting payments when he turns 60, not at present. A wise strategy is the use of a clause which contemplates “Plan A” for a non-regular retirement, as well as “Plan B,” for a regular retirement. The attorney for the FS should use language such as “military pension” or “uniformed services retired pay” to describe the asset being divided.**

Tip #6 – Know What You Want.

The order may award a percentage or a fixed dollar amount to the former spouse of the military member.²⁵ Set out below are examples of the phrasing for these and other types of pension-division clauses.

A percentage clause might state: “Wife is granted 43% of Husband’s military retired pay.” Alternatively, a “fixed dollar amount” clause could read: “Wife is awarded \$550 per month as military pension division.” Every allowable clause automatically provides for cost-of-living adjustments (COLAs) except for the “fixed dollar amount” clause.²⁶ A COLA cannot be added to a fixed dollar clause.

The rules also allow awards that are considered to be variations on the percentage clause.²⁷ The retired pay center will honor a court award in which the amount due to the FS is expressed as a formula or a hypothetical. These are usually used if the SM is still serving.

A formula is an award expressed as a ratio.²⁸ For example, the order could state: “Wife shall receive 50% of the Husband’s disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband.” The order must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service. The retired pay center cannot guess or infer what the court (or the parties) have determined to be the months of service during marriage (the numerator). The retired pay center will, however, provide the total months of service (the denominator). Note that if the court also provides the total months of service, DFAS will honor that number regardless of its accuracy.

A hypothetical clause²⁹ is the most difficult one to draft. It involves an award based on a rank or status which is different from that which exists when the SM retires. For example, the order might say: “Wife is granted 50% of what an Army staff sergeant (E-6) would receive if he were to retire with over 18 years of military service and ‘High-3’ pay of \$___ per month.”³⁰ Since there’s no table that shows this type of pay, DFAS would calculate the hypothetical pay amount and compute a ratio to the actual retired pay in order to calculate the amount to which the wife in this example should receive.

Be sure to include the rank and years of service of the member when submitting a hypothetical award, as well as the “High-3 pay” of the SM. If variables such as these are missing, the retired pay center will not supply them; the order will be rejected.³¹

²⁵ DoDFMR, Vol. 7b, Chapter 29, ¶290601.C.

²⁶ DoDFMR, Vol. 7b, Chapter 29, ¶290601.C.

²⁷ DoDFMR, Vol. 7b, Chapter 29, ¶290601.E.

²⁸ DoDFMR, Vol. 7b, Chapter 29, ¶290211.

²⁹ DoDFMR, Vol. 7b, Chapter 29, ¶¶290213 and 290608.

³⁰ For members entering military service on or after September 8, 1980, retired pay is calculated using the average of the member’s highest 36 months of basic pay at retirement, also known as “High-3.” See Vol 7b, Chapter 3 of the DoDFMR, ¶030101.A.2.

³¹ There is extensive treatment of the wording for various clauses in the Silent Partner, “Military Pension Division:

Guard/Reserve pension clauses deserve separate treatment. When a Guard or Reserve pension is involved and the member has not stopped drilling and put in for retirement, a “formula clause” is typically used, since the final retired pay isn’t known and the total service creditable for retirement is also unknown. The usual formula is marital pension service divided by total pension service. In a Guard/Reserve case involving a formula clause, you must specify division according to retirement points.³² The usual language refers to points earned during marriage divided by total points during the member’s career.

If a formula clause is not used for a still-drilling Reserve/ Guard member, then this “points divided by points” rule does not apply. For example, the order could state “John will pay Mary 35% of his uniformed services retired pay,” or “John will pay Mary \$500 per month as her share of John’s military pension.”

Tip #7 – Use a Checklist for Pension Division.

“One size fits all” definitely doesn’t apply to military pension division orders. A good practitioner will check and re-check the pension division order to be sure it complies with the regulations and the statute, accomplishes the needs of the client, makes sense, and will be honored by the retired pay center. In addition to the tips shown above, here is a checklist that DFAS uses for pension division orders:

DFAS CHECKLIST FOR MILITARY PENSION DIVISION ORDERS

FORMER SPOUSES’ PROTECTION ACT CHECK SHEET	
MEMBER’S NAME	SOCIAL SECURITY NUMBER

- ☐ SERVICE OF APPLICATION (personal, certified or registered mail, return receipt requested)
- ☐ FINAL DECREE OF DIVORCE, DISSOLUTION OR ANNULMENT OR LEGAL SEPARATION ISSUED BY A COURT – OR – A COURT ORDERED, RATIFIED OR APPROVED PROPERTY SETTLEMENT INCIDENT TO SUCH A DECREE
- ☐ AUTHENTICATED OR CERTIFIED PRIOR TO SERVICE OF PENSION ORDER
- ☐ MEMBER PROPERLY IDENTIFIED (E.G., NAME, ADDRESS, SSN)
- ☐ NAME, ADDRESS, AND SSN OF FORMER SPOUSE
- ☐ ORDER PROVIDES FOR ONE OF THE FOLLOWING:
 - A) PAYMENT OF FIXED MONTHLY AMOUNT OF \$_____
 - B) FIXED PERCENTAGE OF _____%
 - C) FORMULA CALCULATION (must use retirement points in Guard/Reserve case):
 - D) HYPOTHETICAL CALCULATION:
- ☐ MEMBER’S RIGHTS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT COMPLIED WITH
- ☐ JURISDICTION MET –
 - ☐ RESIDENCE (NOT DUE TO MILITARY ORDERS)
 - ☐ DOMICILE
 - ☐ CONSENT

Guidance for Lawyers.”

³² DoDFMR, Vol. 7b, Chapter 29, ¶290211.B.

☐ ORDER HAS NOT BEEN AMENDED, SUPERSEDED, OR SET ASIDE

☐ ORDER IS FINAL DECREE, NO APPEAL MAY BE TAKEN, NO APPEAL WAS TAKEN WITHIN TIME PERMITTED

☐ FORMER SPOUSE MARRIED TO MEMBER AT LEAST 10 YEARS DURING AT LEAST 10 YEARS OF CREDITABLE SERVICE

PAY ENTRY DATE:	RETIREMENT DATE:
MARRIAGE DATE:	DIVORCE DATE:

☐ IF DIVORCE AFTER 12/23/16 AND MEMBER WAS NOT RECEIVING RETIRED PAY AT DIVORCE, ORDER CONTAINS TWO DATA POINTS REQUIRED BY DoDFMR VOL. 7B, CH. 29, §2908: HIGH-3 PAY AT DIVORCE AND TOTAL YEARS OF CREDITABLE SERVICE (FOR RC MEMBER, TOTAL RETIREMENT POINTS) AT DIVORCE

For a full explanation of the Frozen Benefit Rule and the requirements found in the last check-box above, see the Silent Partner infoletters, “All Clauses Considered: Writing the Frozen Benefit Award,” and “Fixing the Frozen Benefit Rule.”

Tip #8 – Don’t Forget SBP Coverage for the Former Spouse.

SBP (the Survivor Benefit Plan) is an essential tool in divorce planning for the FS. It provides an annuity of 55% of the base amount chosen for the rest of the life of the FS, so long as she does not remarry before age 55. Divorce ends SBP coverage unless the court orders “former-spouse coverage” and the parties make a timely election with the retired pay center.

The retired pay center cannot apportion the SBP premium between the parties; the premium must be deducted “off the top” before arriving at “disposable retired pay.”³³ DFAS resources on this topic are found at “Retired Military and Annuitants” at the DFAS website, www.dfas.mil, under the “Provide for Loved Ones” tab; look for “Survivor Benefit Plan” or “Reserve Component Survivor Benefit Plan.” The checklist below will help the practitioner to understand SBP and the cost and benefits of coverage for the non-military spouse.

SBP CHECKLIST

✓	Action or issue	Comments
	SBP is a unitary benefit, cannot be divided between current spouse and former spouse	
	Election: Servicemember on active duty is automatically covered; at retirement an election must be made, and spouse concurrence is necessary if member chooses no SBP, child coverage or coverage at base amount less than his/her full retired pay	
	Election - Guard/Reserve: There is opportunity to make election at the 20-year mark (i.e., after 20 years of creditable Guard/Reserve service). Spouse concurrence needed for Option A (defer decision till age 60) or Option B (elect coverage, but to start at age 60); no spouse consent needed for Option C (immediate coverage).	Option C is also called RC-SBP, or Reserve Component SBP.
	If representing the nonmilitary spouse and survivor annuity is desired, be sure order requires member/retiree to elect former spouse coverage, with full retired pay as base amount	SBP benefit payments equal 55% of the selected base amount, which can be \$300 or above

³³ DoDFMR, Vol. 7b, Chapter 29, ¶290610. “Disposable retired pay” is defined at 10 U.S.C. §1408 (a)(4) and at DoDFMR, Vol. 7b, Chapter 29, ¶290701.

	If representing the member/retiree and SBP coverage for the FS is not desired, try to negotiate a reduction of the spouse's share of military pension to reflect the additional cost of the SBP premium, which is deducted from retired pay, or to require the FS to pay back the client for cost of SBP	In active-duty cases, SBP premium is 6.5% of selected base amount. It is "taken off the top" (deducted before division of disposable retired pay), which means that both parties pay for it in same ration as their respective shares of the pension
	If representing the member/retiree, try to negotiate a reduction of the FS's share of the military pension to reflect the additional cost of the SBP premium, which is taken out of the retired pay	SBP premium is 6.5% of selected base amount (in active duty cases), payable out of retired pay before taxes. It is about 10% for Reserve Component SBP coverage. The premium is "taken off the top" and deducted before division of disposable retired pay, so both parties pay in same shares as their shares of the retired pay.
	If representing the member/retiree, ask the court to value the SBP, present evidence on this, and then argue that the present value must be placed on the FS's side of the "property division ledger"	This may require hiring a CPA, economist or actuary.
	SM/retiree must make election with retired pay center within one year of divorce; be sure to monitor this. Use DD Form 2656-1 and documents shown thereon to accompany it.	
	When spouse/former spouse applies, be sure to enclose copy of divorce decree that includes language about SBP coverage and Survivor Benefit Plan Request for Deemed Election (DD Form 2656-10).	By federal law, the deemed election request must be received within one year of the order that requires SBP.
	Send SBP documents and court records to the military agency/office shown on the DD form	Documents should be transmitted by certified or registered mail, return receipt requested
	Above one-year deadlines are mandated by statute.	If above deadlines are exceeded, apply to the appropriate Board for the Correction of Military Records for relief
	SBP is usually reduced by Dependency and Indemnity Compensation received.	

Tip #9 – Where and How to Serve the Order.

Addresses for service are found on the application form, DD 2293. Note that the decree must be certified by the clerk of court. The spouse or former spouse must sign the form, and the documents to be included are a certified copy of the order and divorce judgment (if separate order). DD Form 2293 can be obtained from the DFAS website, or from any internet search engine. Anyone may serve the completed application. While you should ensure delivery by sending the documents by certified or registered mail, return receipt requested, this is not a requirement.

Be sure to include the Social Security Number (SSN) of the servicemember (SM) or retiree in all correspondence and phone calls with the retired pay center. Providing this will ensure a more rapid response.

Tip #10 – Suggested Military Pension Division Order Clauses

For a set of model clauses to use in a military pension division order, see the text below. This is not perfect, and it's not for every case. It should only be used in consultation with an expert in this area or after extensive review of the rules, regulations, statutes and state cases in regard to division of the pension, allocation of SBP, indemnification and other matters which are important to the client.

[Case caption here]

MILITARY PENSION DIVISION ORDER

THIS CAUSE came before the undersigned judge upon Plaintiff's claim for distribution of Defendant's military retirement benefits. The Plaintiff was represented by [*Plaintiff's attorney*], and the Defendant was represented by [*Defendant's attorney*]. [*if entered as a consent order, add next sentence*] The parties agree to the entry of the following order to assign to Plaintiff a portion of those benefits. The

court makes the following:

FINDINGS OF FACT

1. Plaintiff is a resident of [county], [state]. Defendant is a resident of [county], [state]. The parties were married on [date]. They were separated on [date]. They were divorced in a judgment filed on [date].
2. Plaintiff's address is [address]. Her Social Security number is xxx-xx-____; the full SSN will be shown on DD Form 2293, which accompanies the court's order when tendered to DFAS (Defense Finance and Accounting Service) for enforcement through garnishment. *Note: DFAS administers orders for the Army, Navy, Air Force and Marine Corps. Pension orders for the Coast Guard and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration are handled by the Coast Guard's Pay and Personnel Center in Topeka, Kansas. Since the majority of military retired pay orders are submitted to DFAS, that agency is used throughout this order; when necessary, replace DFAS with "the Coast Guard Pay and Personnel Center."*
3. Defendant's address is [address]. His Social Security number is xxx-xx-____; likewise the full SSN will be found on DD Form 2293.
4. The marital portion of the uniformed services retired pay of Defendant (hereafter military pension or retired pay) is subject to marital property division. Plaintiff is entitled to a share of Defendant's military retirement benefits, as set out in the Decree below. Plaintiff's entitlement to retired pay accrues upon the retirement of Defendant. The remaining portion of Defendant's military retired pay is the sole and separate property of Defendant. *[Note: Replace "marital" with "community" when the order is for a state which recognizes community property.]*
5. *[Selection A: if retired, use the following - -]* The Defendant retired with the rank of [state rank] in the [here state branch of service, such as "U.S. Air Force" or "Utah Air National Guard"] and is currently receiving [state amount of retired pay and any deductions, such as SBP premium, federal income tax, etc.]. He is retired as of [give date of retirement (whether receiving retired pay or, if Guard/Reserve, awaiting age 60)].

[Selection B: if active duty, still drilling, or in the "gray area" (i.e., no longer drilling, but not yet receiving retired pay), use the following - -] The Defendant is currently a [state rank] in the [here state branch of service, such as "U.S. Air Force" or "Utah Air National Guard"].
6. *[Use this clause to protect non-military spouse of non-retired member or retiree with no disability at present. Delete if not needed.]* Currently there is no waiver in place for disability payments, and the court bases the award to Plaintiff set out below on these facts.

-OR-

[for retiree with disability rating] Defendant currently has a VA disability rating of [state percentage] and his election of disability compensation has reduced his military retired pay by [dollar amount]. *[Use if parties are still married and divorce decree will be entered simultaneously with MPDO]* This amount is based on the VA compensation table rates for veteran and spouse in effect at the time this Order is entered. Upon the parties' divorce, the VA compensation should be recalculated based on the veteran only. This rate is currently [dollar amount].

Note: The above language helps the spouse to establish a base-line, setting out the current facts and data, as well as the court's expectations in case the SM decides to waive additional military pension payments for disability compensation in the future.

7. Defendant's rights under the Servicemembers Civil Relief Act, found at Chapter 50 of Title 50, U.S. Code, have been observed and honored.

Note: It is probably best to insert this into all orders, whether for SMs or retirees, although the SCRA doesn't apply to retirees and usually does not apply to Guard and Reserve personnel, unless called up to active duty.

8. [This clause is to allow the non-military spouse to view the amount of total retired pay and any deductions. It is optional.] The terms below require Plaintiff to have knowledge of Defendant's military retired pay on a regular basis. To avoid the inconvenience of monthly mail or e-mail exchanges of this information, the parties can use the *myPay* system available on the Defense Finance and Accounting Service (DFAS) website (<https://mypay.dfas.mil/mypay.aspx>). Defendant has the ability to set up a Limited Access Password for Plaintiff which, along with a proper Login ID, will allow the viewing of retired pay information (but not to make changes). Defendant can locate instructions on how to set up a Limited Access Password for Plaintiff on-line at <https://mypay.dfas.mil/FAQ.htm>. This applies to the Defendant upon the receipt of retired pay.
9. Plaintiff is entitled to former-spouse coverage as the beneficiary of Defendant's Survivor Benefit Plan (SBP) as set out below [if applicable, and the Plaintiff's share of the pension below is adjusted to account for her payment of the full SBP premium].

-OR-

Plaintiff is not entitled to former-spouse coverage as the beneficiary of Defendant's Survivor Benefit Plan.

10. [Use when the former spouse's share of the pension is to be adjusted due to allocation to her of entire SBP premium]. Since Plaintiff will be responsible for paying the entire cost of the SBP premium and DFAS will not allocate SBP premiums to either party, Plaintiff's share of the military retired pay must be adjusted downward to account for her full payment of the premium that is attributable to former spouse coverage. The shift of the premium to Plaintiff results in her share being reduced to ___% of the military retired pay.

Note: The premium is 6.5% of the selected base amount in active-duty cases and about 10% when the member of the Guard/Reserve selected "Option C," that is, full coverage starting when he/she reaches 20 creditable years of service.

Note: The reduction is not simply 6.5% subtracted from the share of the former spouse (e.g., spouse's nominal share of 45% less 6.5% for her to pay the full SBP premium = 38.5%). Rather, due to cost-sharing between the parties (since the premium comes "off the top" before division of "disposable retired pay") the reduction is about 4% - 4.5% for active duty cases. Calculation details are below, and also in "Military Pension Division: The Servicemember's Strategy," a Silent Partner infoletter located at www.nclamp.gov > For Lawyers.

11. [Delete if not applicable] The marital share is a fraction made up of ____ months [or points if Guard/Reserve] of marital pension service, divided by ___, which represents the total months [or points if Guard/Reserve] of Defendant's military service. Based on this calculation, one-half of the marital share of the divisible retirement benefits is equal to Plaintiff receiving ____% of Defendant's military retired pay. *Note: [When a fraction with an unknown denominator is used in a case where there will be a non-regular retirement under Chapter 1223 of Title 10, U.S. Code, i.e., a Guard/Reserve retirement with pay starting at about age 60, the fraction must be expressed in terms of retirement points, not time.]*

12. *[When divorce was granted after 12/23/16 and member was not receiving retired pay at time of divorce, these two data points are required by federal law and regulations, under 10 U.S.C. §1408 (a)(4)(B) and Vol. 7b, Ch. 29, ¶2908, Dept. of Defense Financial Management Regulation].* The Defendant's information required by the retired pay center is as follows:

1.FOR ACTIVE DUTY AWARDS

If the Defendant entered the service BEFORE 9/1/80:

On the date of divorce, [date], (a) the Defendant's military pay grade (rank) was [grade/rank], and (b) the Defendant had [number of years and months] of creditable service.

If the Defendant entered the service ON OR AFTER 9/1/80:

On the date of the divorce, [date], (a) the Defendant's military retired pay base (High-3) was \$ _____ per month and (b) the Defendant had [number of years and months] of creditable service.

2.FOR GUARD/RESERVE MEMBER'S NOT YET RECEIVING RETIRED PAY

If the Defendant entered the service BEFORE 9/1/80:

On the date of divorce, [date], (a) the Defendant's military pay grade (rank) was [grade/rank], (b) the Defendant had ____ Reserve retirement points, and (c) the Defendant had [number of years and months] of service for basic pay purposes.

If the Defendant entered the service ON OR AFTER 9/1/80:

On the date of divorce, [date], (a) the Defendant's military retired pay base (High-3) was \$ ____ per month, and (b) the Defendant had ____ Reserve retirement points.

Note: "High-3" means the highest 36 months of compensation for the Defendant, using active-duty pay information. For information on what this means in terms of the pension which will be divided by the retired pay center, see the Silent Partner infoletters on the Frozen Benefit Rule at www.nclamp.gov > For Lawyers.

[If Frozen Benefit Rule is not applicable, use this clause] The data points required by the revised definition of "disposable retired pay," 10 U.S.C. § 1408 (a)(4)(B) are not applicable in this case because *[choose one of these clauses and delete the other one]* (1) the parties were divorced on or before December 23, 2016, OR (2) the servicemember was already drawing retired pay on the date of divorce.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action and the parties hereto based on the consent of the Defendant to the jurisdiction of the court. *[in non-consent cases, state other basis for jurisdiction -- see below]*

Note: Read 10 U.S.C. 1408 (c)(4). In the case of a non-consent order, be sure to include statement which supports the court's jurisdiction under 10 USC 1408(c)(4). This means evidence of domicile of the retiree or servicemember within the territorial jurisdiction of the court, or else residence within the state but not due to military orders. The jurisdictional basis must be stated in the order.

2. Plaintiff is entitled to an assignment of Defendant's military retirement benefits as set forth herein, subject to the conditions set forth in the Decree below.

3. The facts above are incorporated herein by reference to the extent that they represent conclusions of law.
4. The terms of this order are fair, reasonable, adequate and necessary.
5. *[When order is entered by consent]* The parties have knowingly and voluntarily consented to this order.
6. The parties are entitled to the relief granted below.

DECREE

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. *[Note: If retroactive parts are required, state effective date in this paragraph.]* Defendant will pay Plaintiff *[choose an Option from below and insert here]*

Option A: *[Percentage]* __% of Defendant's military retired pay each month.

Note: DFAS will accept percentages carried out to four decimal places.

Note: The non-military spouse receives a specified percent, not to exceed 50%, of disposable retired pay. This increases with cost-of-living adjustments (COLAs), which are automatic under the regulations and need not be mentioned. This award is used when member has retired, and it is based on the final retired pay of SM, including post-divorce raises and grade increases.

Option B: *[Time Rule]* a percentage of the Defendant's military retired pay, to be computed by multiplying __% times a fraction, the numerator of which is *[insert #]* months *[or points if Guard/Reserve]* of marriage during the Defendant's creditable military service, divided by the Defendant's total number of months *[or points if Guard/Reserve]* of creditable military service.

Note: The spouse gets a percentage, usually 50%, of the marital share of member's retired pay. This increases with COLAs, and that is automatic; it need not be mentioned. It is based on the final retired pay of member, including post-divorce raises and grade increases.

Note: Order must contain data for numerator – DFAS will not fill that in, although DFAS will complete the denominator when calculating final retired pay. Percent cannot exceed 50% of retired pay for property division.

Option C: *[Fixed Dollar Amount]* \$__ per month.

Note: The spouse receives a fixed dollar amount, which may not exceed 50% of disposable retired pay. There are no COLAs for spouse, and all COLAs go to the retiree. This clause this favors the SM/retiree.

Option D: *[Hypothetical Award]*

D1: *[Active-duty hypothetical calculated as of time of division, for all members regardless of service entry date]* __% of the military retired pay the Defendant would have received had the Defendant retired with a retired pay base of \$_____ and with ____ years of creditable service on _____.

D2: *[Active-duty hypothetical calculated as of time of division; may only be use for members entering*

service before September 1, 1980] ____% of the military retired pay the Defendant would have received had the Defendant retired with the rank of _____ and with ____ years of creditable service on _____.

D3: [Active duty hypothetical calculated as of member's actual retirement date] ____% of the military retired pay the Defendant would have received had the Defendant retired on his actual retirement date with the rank of _____ and with ____ years of creditable service.

D4: [Reservist hypothetical calculated as of time of division, for all members regardless of service entry date] ____% of the military retired pay the Defendant would have received had the Defendant become eligible to receive military retired pay with a retired pay base of \$_____ and with ____ retirement points on _____.

D5: [Reservist hypothetical calculated as of time of division; may be used for members entering service before September 1, 1980] ____% of the military retired pay the Defendant would have received had the Defendant become eligible to receive retired pay on _____, with the rank of _____, with ____ retirement points, and with _____ years of service for basic pay purposes.

D6: [Reservist hypothetical calculated as of the date the member becomes eligible to receive retired pay] ____% of the military retired pay the Defendant would have received had the Defendant become eligible to receive retired pay on the date he attained age 60, with the rank of _____, with ____ retirement points, and with _____ years of service for basic pay purposes.

Note: The spouse receives a hypothetical amount, based on the rank/retired pay base and years of service of the SM at time of separation, divorce or other date, according to state law or agreement of the parties. This increases with COLAs for retiree, and that is automatic; it need not be mentioned. This clause favors the SM/retiree. It is usually used in states which divide retired pay based on the fixed-benefit method, such as Florida, Texas, Kentucky, Tennessee and Oklahoma.

Note: If the clause does not specify a retirement year (i.e., date), DFAS will assume the year to be the actual year of retirement, and that year's pay scale will be used. If a date is specified, DFAS will freeze the benefit based on the pay tables in effect on that date, not on the pay tables which exist when the SM actually retired or will retire.

Note: These sample clauses are found in the Department of Defense Financial Management Regulation (DODFMR), Volume 7B, Chapter 29, Appendix A, Figures 29-1 & 29-2. Figure 29-1 applies to divorce decrees entered on or before December 23, 2016, or for decrees entered after that date when the member is already receiving retired pay at divorce; Figure 29-2 applies to divorce decrees entered after December 23, 2016 when the member is not receiving retired pay as of the date of divorce.

2. Defendant has served at least ten years of creditable service concurrent with at least ten years of marriage to Plaintiff. Plaintiff is entitled to direct payments from DFAS.

-OR-

Defendant will pay Plaintiff directly the amount/share specified in the preceding paragraph. Payments will be due on the first of each month, beginning [date]. In the event that federal law changes to allow direct payments from DFAS to Plaintiff, then this order shall be submitted to DFAS by Plaintiff to accomplish this.

-OR-

Defendant will pay Plaintiff by a voluntary allotment from his retired pay the amount specified in the preceding paragraph. In the event that federal law changes to allow direct payments from DFAS to Plaintiff, then this order shall be submitted to DFAS by Plaintiff to accomplish this.

Note: As another alternative, the parties may agree to payment from Defendant to Plaintiff of maintenance, spousal support or alimony, which is not limited by the 10/10 overlap above; in this case, an alimony clause should be utilized which (a) does not terminate payments at remarriage or cohabitation of Plaintiff, and (b) does not provide for modification upon a change of circumstances. Note that, under documents executed on or after 1/1/19, alimony payments are neither taxable to the recipient nor excluded from the income of the payor, whereas pension-share payments remain includable in the payee's income and deductible for the payor.

3. Plaintiff will receive payments at the same time as Defendant. The parties acknowledge that DFAS is not required to begin payments to the former spouse until 90 days after receipt of an acceptable order or the start of retired pay, whichever is later. Defendant is responsible for making these payments each month to Plaintiff until DFAS begins payments; during this interim period, Defendant will pay Plaintiff directly the full share – unadjusted for taxes, unless the parties agree otherwise in writing – as set out herein.
 - a. Payments are due on the first day of each month.
 - b. Pursuant to *Pfister v. Comm'r*, 359 F.3d 352, *Proctor v. Comm'r*, 129 T.C. 92 (2007), *Mitchell v. Comm'r*, T.C. Summary Opinion 2004-160, *Mess v. Comm'r*, 79 T.C.M. (CCH) 1443 and *Eatinger v. Comm'r*, 59 T.C.M. (CCH) 954, the parties acknowledge that the periodic payments made by Defendant to Plaintiff through a pension-share garnishment from DFAS are included in Plaintiff's taxable income and excluded from Defendant's taxable income.
 - c. As to the taxation of payments not made through DFAS, the parties are advised to consult with a qualified tax advisor.
4. *[Delete if not applicable]* The following terms apply to the Defendant upon the receipt of retired pay. Defendant will provide to Plaintiff a Limited Access Password and Login ID for access to the *myPay* system to verify receipt of the proper share of Defendant's retired pay each month. Defendant shall set up Plaintiff's access to *myPay* and provide the Limited Access Password and corresponding Login ID to Plaintiff simultaneously with the signing of this Order. Defendant shall not delete Plaintiff's Limited Access Password without specific written approval from Plaintiff or by court order. If Defendant breaches this provision, attorney's fees shall be assessed against him under the enforcement clause below.
5. When DFAS has determined that this order meets the requirements of the applicable federal law as a military pension division order, then it will carry out the provisions of this order and shall give written notice to Plaintiff (at her address set out above) and to her attorney, [name and address], that this order complies with said requirements.
6. *[This is for protection of spouse; SM/retiree may reject this clause. It is not a requirement for MPDO.]* Defendant will provide promptly to Plaintiff any information that she needs in order to have this order honored for direct payment of military pension benefits and will keep her informed at all times of his current address.
7. *[This is for protection of spouse; SM/retiree may reject this clause. It is not a requirement for MPDO.]* If Defendant receives any amount that belongs to Plaintiff pursuant to the terms herein, he will

reimburse her immediately. Since the retired pay center may pay the Plaintiff less than what is owed under the terms of this Order, the Defendant is ordered to make up any difference promptly in direct payments to the Plaintiff.

8. To implement direct payments from DFAS, Plaintiff will tender a certified copy of this order to DFAS with a certified copy of the parties' divorce decree and an executed DD Form 2293. *[This is a requirement for direct payments from DFAS.]*
9. *[Selection A: If member is on active duty, or is Guard/Reserve and still drilling, or is in the "gray area" (no longer drilling, but not yet in receipt of retired pay), or is retired and NOT receiving disability compensation, use the following - -]* The parties have agreed upon a set level of payments to Plaintiff to guarantee income to her based upon Defendant's military retired pay without any deductions due to the election of VA Disability Compensation from the Department of Veterans Affairs, the election of Combat-Related Special Compensation (CRSC), or the receipt of Military Disability Retired Pay (MDRP) under Chapter 61 of Title 10, U.S. Code, or any other reason. Defendant shall indemnify Plaintiff as to any reduction in her payments from what they would have been based solely on length of service. If there is a reduction in Plaintiff's share or amount of military retired pay, whether due to disability payments or caused by any other event (such as the receipt of severance pay, bonuses or an early-out payment), the parties consent to the court's retaining continuing jurisdiction to provide relief to include 1) adjusting the pension division payments or the property division specified herein; 2) changing Plaintiff's share or amount to the pre-reduction level; 3) reconfiguring the property division; or 4) granting contractual alimony pursuant to this clause to compensate Plaintiff for any losses she may suffer due to the above circumstances. *[NOTE: Generally trial courts will not adjudicate this pre- or post-judgment without consent. See Howell v. Howell, 137 S.Ct. 1400 (2017), as to judicial indemnification being barred by the USFSPA.]*

[Selection B: if retired and already receiving reduced retired pay due to disability compensation, use the following - -] The parties have agreed upon a set level of payments to Plaintiff to guarantee income to her, based upon Defendant's military retired pay without any additional deductions for disability payments, over and above his present percentage disability rating (___%), or for any other reason. Defendant shall indemnify Plaintiff as to any reduction in her payments from what they would have been based solely on length of service. If there is a reduction in Plaintiff's share or amount of military retired pay, whether due to increased disability percentage payments or caused by any other event, the parties consent to the court's retaining continuing jurisdiction to provide relief to include 1) adjusting the pension division payments or the property division specified herein; 2) changing Plaintiff's share or amount to the pre-reduction level; 3) reconfiguring the property division; or 4) granting contractual alimony pursuant to this clause to compensate Plaintiff for any losses she may suffer due to the above circumstances.

10. *[This is to protect the spouse if the SM obtains civil service employment; delete if representing the SM or if not applicable.]* If Defendant shall attempt to waive or convert any portion of his military service, whether active-duty or Guard/Reserve, into federal or state civil service time, without first obtaining Plaintiff's consent, and the effect of this action is that her benefits would be reduced, then
 - a. Plaintiff shall receive either:
 - i. Non-modifiable alimony equal to the amount or share of the military pension that she was entitled to receive before any waiver (with cost-of-living adjustments, if applicable), and not terminating at her remarriage or cohabitation; or
 - ii. A portion of the federal retirement annuity (FERS or CSRS) that provides Plaintiff an amount equal to what she would have received as her share of the military pension had there been no

waiver to obtain an enhanced federal retirement annuity.

- iii. In the event of such conversion, pursuant to 5 U.S.C. § 8411(c)(5), Defendant shall authorize the Director of the Office of Personnel Management to deduct and withhold (from the annuity payable to Defendant) an amount equal to the amount that, if the annuity payment were instead a payment of Defendant's military retired pay, would have been deducted, withheld, and paid to Plaintiff under the terms of this Order. The amount deducted and withheld under this subsection shall be paid to Plaintiff.
- b. If the waiver of military pension for federal civil service retirement prevents Plaintiff's coverage under the Survivor Benefit Plan, then Defendant will –
 - i. Designate Plaintiff as beneficiary under the equivalent federal retirement survivor annuity plan and provide equivalent coverage; or
 - ii. Obtain life insurance (with Plaintiff as the owner) covering his life with a death benefit equal to full SBP coverage; or
 - iii. Purchase a single-premium annuity (with Plaintiff as the owner) that is equal to the benefits payable for full SBP coverage.
- c. If Defendant accepts employment with the federal government and he intends to waive or convert any portion of his military service, whether active-duty or Guard/Reserve, into federal or state civil service time, he will promptly notify the Plaintiff before he transfers his active duty service to purchase credits with FERS and before he loses that active duty time, which may result in the elimination or reduction of his military retired pay. Any subsequent retirement system of Defendant is directed to honor this court order to the extent of Plaintiff's interest in the military retirement and to the extent that the military retirement is used as a basis of payments or benefits under the other retirement system, program, or plan.

-OR-

- d. *[Use if the retiree is already employed by the federal government]* Since Defendant is currently employed by the U.S. Civil Service, the terms of this paragraph are made with the purpose of ensuring that nothing involving that employment shall diminish the amount or share of Plaintiff's pension benefit as specified in Paragraph 1 of this decree. Defendant shall not attempt to waive military retired pay to obtain credit for civil service retirement (CSRS or FERS). If he should do so, then the United States Office of Personnel Management is directed to pay Plaintiff's share (as set out in Paragraph 1 of this decree) directly to her. The court retains authority over this award to ensure that Plaintiff shall receive her proper share, that such other remedies as may be necessary are still available to Plaintiff, that Defendant acts in good faith in carrying out the terms of this order, that he indemnifies her in the event of any reduction of her amount or share due to his actions, and that the intent of this order will be carried out by both parties in full.
- e. *[CSB/Redux clause – To protect spouse from effects on retired pay of the SM's prior election of CSB/Redux bonus of \$30,000 at or around the 15-year mark for military service, thus reducing pension share upon retirement, use this clause. Note that CSB/Redux was repealed effective January 1, 2018.]* If Defendant elected CSB/Redux (a bonus of \$30,000 paid at approximately 15 years of service, the election of which reduces the military pension), the Defendant will indemnify Plaintiff for any loss and cooperate as set forth below to protect Plaintiff's interest in an unreduced share of the military pension. The court retains jurisdiction over this cause to implement and enforce these indemnification terms. As a remedy for Plaintiff, the court may award Plaintiff an

equitable adjustment of her pension division award herein to make up for the decrease caused by CSB/Redux. Upon application by Plaintiff, the court may allow her an equitable share of the bonus received by Defendant or award such other equitable relief as is just and proper, including the reallocation of marital/community property.

11. *[This is to protect spouse if future information is needed regarding member's status, location or benefits for modification or enforcement purposes; SM may object to this]* If Defendant breaches any terms in this document, then the court shall award to Plaintiff any and all attorney's fees she may incur in obtaining information on Defendant from the U.S. government and in enforcement of the provisions herein.
12. If either party violates this order, then the court will indemnify the party seeking enforcement, and the court will award damages, interest at the statutory rate, consequential damages, reasonable expenses and attorney's fees to that party.
13. The monthly payments herein shall be paid to Plaintiff regardless of her marital status and will not end at remarriage. Any future overpayments to Plaintiff by DFAS are recoverable and subject to involuntary collection from Plaintiff or from the estate of Plaintiff.
14. *[This is not necessary but the SM/retiree usually wants to see this in writing.]* Plaintiff shall be responsible for the taxes on her share of Defendant's military retired pay received from DFAS. Plaintiff shall not be entitled to any portion of retired pay upon the death of either party.
15. *[Leave this out if this is not awarded by the judge or agreed to by the parties. If you want to be certain about this and are not concerned, when a consent order is involved, about raising "red flags," you may state: There shall be no Survivor Benefit Plan coverage for Plaintiff.]* Defendant shall provide coverage for Plaintiff through the Survivor Benefit Plan (SBP) as follows:
 - a. Upon the parties' divorce, the Defendant shall immediately elect the Plaintiff as "former-spouse beneficiary" for SBP, with his monthly retired pay as the base amount. He will do nothing to reduce or eliminate her benefits.
 - b. Defendant will immediately complete DD Form 2656-1 and send the executed form to DFAS at the address shown thereon, with a copy sent simultaneously to Plaintiff's attorney.
 - c. Plaintiff will effectuate a deemed election for former-spouse coverage within one year of the entry of the first court order granting former-spouse SBP coverage by sending a certified copy of said order to DFAS along with a certified copy of the divorce decree and an executed DD Form 2656-10.

Note: If Defendant has not yet made the SBP election and thus may elect coverage at less than the full amount of his monthly retired pay, then use the following clause: At the time of Defendant's election of a base amount for the Survivor Benefit Plan, he will elect former spouse coverage, choosing as the base amount \$_____. [This may be any amount from full retired pay down to \$300 a month. The SBP base can also be a percentage of the member's retired pay.]

16. If Defendant does anything that changes the former-spouse election, then an amount equal to the present value of SBP coverage for Plaintiff shall, at the death of Defendant, become an obligation of his estate. In addition, Plaintiff shall be entitled to any other legal or equitable remedies for breach.

Note: The premium for SBP coverage is deducted from the member's gross retired pay before it is divided between the parties. This "off-the-top" deduction means that the parties share in the premium

payment (in the same ratio as the division of military retired pay). If the parties desire to allocate SBP costs entirely to the non-military spouse, this can be difficult. DFAS will not honor such a clause under current law. When the retired pay amount is known or can be estimated with reasonable accuracy, then one can allocate the cost of SBP premiums to the non-military spouse by the following steps:

- ☐ *Figure out what dollar amount the Plaintiff would get each month as pension division.*
- ☐ *Then figure out how much in dollars the SBP premium is (for spouse or former spouse coverage in active-duty cases, use 6.5% of the member's selected base amount; it is approximately 10% for Guard/Reserve cases).*
- ☐ *Then subtract this from Plaintiff's dollar amount or anticipated dollar amount. This gives her net share less the SBP premium.*
- ☐ *Next divide this figure by the disposable retired pay of the Defendant (gross pay less SBP premium) and multiply it by 100.*

The resulting percentage is approximately what she should receive to have her pay for the full SBP premium. Go back to #1 of the Decree above and insert the revised percentage in place of 50% (or other fraction) of his disposable retired pay. Also complete Finding of Fact #12.]

-OR-

This clause sets out a way for the retired servicemember to be reimbursed by the spouse for the cost of SBP: Plaintiff shall reimburse Defendant within 10 days of each monthly premium payment for Defendant's share of the SBP cost.]

17. *[Use this clause when Plaintiff's share of pension is reduced to allocate to her the full SBP premium under Finding of Fact #12]. The adjustment herein of the military pension division share for Plaintiff, to shift to her the full premium costs for SBP, shall end upon either of the following two events, either of which would result in no premium payable for SBP:*
- a. *Plaintiff's remarriage before age 55 (which suspends SBP coverage for her), or*
 - b. *The continuous payment of SBP premiums for 360 months and Defendant's attainment of age 70 (which results in paid-up SBP).*

If either event occurs, the adjustment herein shall stop, and Plaintiff shall be entitled immediately to her full, unadjusted share of the pension (without regard to shifting payment of the SBP premium). To obtain reversion to the original unadjusted percent or share from DFAS, Plaintiff will apply to the court for an order allowing same, and Defendant hereby stipulates that Plaintiff is entitled to such adjustment. If Plaintiff remarries before age 55, the Plaintiff is required to inform Defendant immediately. Defendant will cooperate with the entry of a new order effectuating the restoration of Plaintiff's full, unadjusted share. Until the new order is implemented by DFAS, Defendant shall pay directly to Plaintiff her full and unadjusted share of his military retired pay.

18. *[Use this clause when there is no SBP coverage at present, either through spousal concurrence or through lapse upon divorce. This requires the SM/retiree to elect SBP coverage for the spouse or former spouse at the next open enrollment period; note that all previous premium payments must be paid before coverage is effective, and this can be costly.] At the next open enrollment period for SBP, the Defendant agrees to elect and pay for coverage for the Plaintiff as his spouse/former spouse, using*

his full retired pay as the base amount *[OR state other amount down to \$300 a month]*.

19. *[Use this clause to attempt to give Plaintiff some protections against reduction of disposable retired pay due to election of VA disability compensation or the election of CRSC by retiree]* The parties shall comply with the terms of this order in good faith and shall notify the court and the other party if there are any substantial changes which would impact the retired pay of the Defendant. Examples of this include-

a. the remarriage of Plaintiff before age 55, which suspends SBP coverage (thus justifying termination of the SBP premium deduction), and

b. the Defendant's election of VA disability compensation or Combat-Related Special Compensation, either of which would reduce the available retired pay of Defendant (thus reducing the share for Plaintiff).

Defendant will take no action to reduce Plaintiff's share or amount of the military pension. As a remedy if the Defendant violates this clause, the court reserves jurisdiction to amend the pension division terms to increase Plaintiff's share of Defendant's retired pay, to indemnify the Plaintiff, to award compensatory alimony, to re-open the property division or to take other remedial action to grant equitable relief.

Judge Presiding

Date: _____

[If order is entered by consent, use the following language.]

WE HAVE READ THE ABOVE AND CONSENT:

_____, Plaintiff

_____, Attorney for Plaintiff

_____ COUNTY
STATE OF _____

I certify that the following person personally appeared before me this day, and I have personal knowledge of the identity of the Plaintiff or have seen satisfactory evidence of the Plaintiff's identity, by a current state or federal identification with the Plaintiff's photograph in the form of a ____ Driver's License; acknowledging to me the voluntary signing of the foregoing document for the purpose stated therein and in the capacity indicated: [NAME], Plaintiff.

Date: _____

(Notary's printed or typed name), Notary Public

_____ [signature of notary public]

(Official Seal)

My commission expires: _____

_____, Defendant

_____, Attorney for Defendant

_____ COUNTY
STATE OF _____

I certify that the following person personally appeared before me this day, and I have personal knowledge of the identity of the Defendant or have seen satisfactory evidence of the Defendant's identity, by a current state or federal identification with the Defendant's photograph in the form of a ____ Driver's License; acknowledging to me the voluntary signing of the foregoing document for the purpose stated therein and in the capacity indicated: [NAME]. Defendant.

Date: _____

(Notary's printed or typed name), Notary Public

_____ [signature of notary public]

(Official Seal)

My commission expires: _____

(Rev. 4/23/22)

* * *

This **SILENT PARTNER** was prepared by COL Mark E. Sullivan (USA-Ret.). For revisions, comments or corrections, contact him in Raleigh, N.C. at 919-832-8507, or at mark.sullivan@ncfamilylaw.com.

SILENT PARTNER

SBP – By the Numbers

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military family law issues. Comments, corrections and suggestions should be sent to the address at the end of the last page.*

The survivor annuity option available with military retired pay is called SBP, the Survivor Benefit Plan. It continues a stream of income to the spouse, former spouse or other beneficiary after the death of the servicemember or retiree. When a divorce is pending or imminent, the lawyers on both sides should have a clear idea of what it is and how it works. Here's a summary... "by the numbers."

0	Exactly <u>ZERO</u> subsequent orders for SBP coverage can "restart the clock" on the one-year deadline explained below. In other words, you cannot <i>retrieve the missed year</i> by convincing the court to enter yet another order awarding SBP to a former spouse (FS) if it's already been awarded in the first place.
1	> There is only <u>ONE</u> year in which to send to DFAS* the election form for former-spouse SBP coverage. See #2 below for an explanation of the two deadlines. > There is <u>ONE</u> DFAS office which accepts SBP application forms, and it's located in London, KY. Transmit the forms and court papers there by registered or certified mail, return receipt requested (or by fax) to ensure that you have proof of receipt. The address is on any of the SBP forms mentioned in this SILENT PARTNER. > Only <u>ONE</u> adult beneficiary is allowed for SBP. It cannot be subdivided between a current spouse and a former spouse. Tell the client to make a choice: "Your EX or your NEXT." > 2656-<u>1</u> is the number of the form to use when the servicemember (SM) or retiree applies for former-spouse SBP coverage (DD Form 2656-1).
2	> The <u>TWO</u> deadlines for SBP applications are: Election by SM/retiree must be done within one year of the divorce; a "deemed election" by the FS, when the SM/retiree fails or refuses to make the election required by court order, must be submitted within one year of the order granting SBP coverage. > <u>TWO</u> to three years after retired pay begins is the period in which the parties may agree to terminate SBP coverage (between the 25th and the 36th months after "pay status" for the retiree). This election cannot be reversed, and there is no refund of premiums already paid.
3	Guard and Reserve retirees have <u>THREE</u> options for SBP coverage when they attain 20 "good years" toward retirement and receive their NOE (notice of eligibility) or "20-year letter." <u>Option A</u> is to wait till pay status (usually age 60) to decide; this means no coverage in the interim period. No interim coverage also applies to <u>Option B</u> , which involves election of coverage but age 60 as the effective date (or when the SM would have turned 60 if death occurs before then). <u>Option C</u> , the only one which doesn't require written spousal consent, is called "RCSBP," or Reserve Component SBP" and it means immediate coverage for the Guard/Reserve member. If the member fails to return the form to DFAS, the default choice will be applied, which is Option C.
4	<u>FOUR</u> percent is the approximate reduction needed to the former spouse's pension share to shift payment of the entire premium to her or him in a retirement from active duty. There are tables and an Excel spreadsheet in <u>The Military Divorce Handbook</u> (Am. Bar Assn., 2 nd Ed 2011) which allow more precision in the calculation. Without an adjustment or a decree requiring one party to reimburse the other directly, DFAS will take the premiums "off the top" before retired pay is divided between the parties, since that's required by federal law. Thus the premium is divided in the same ratio as the pension itself (e.g., if John gets 70% of the pension, he pays 70% of the SBP premium).
5	> <u>FIVE</u>-five percent (55%) of the selected base amount is the benefit paid out to the beneficiary. The base amount is the full retired pay (as the "default option") or any amount down to \$300 a month. > <u>FIVE</u>-five (55) years old is the age limit for remarriage. If a former spouse remarries before then, SBP coverage is suspended. It will be reinstated if that marriage ends in death, divorce or annulment. > 2656-<u>5</u> is the number of the form which is used by a Guard or Reserve member to make one of the three choices set out above (DD Form 2656-5). > There are <u>FIVE</u> options for beneficiaries with SBP: spouse, former spouse, spouse (or former spouse)

	and child, child (or children), and individual with an “insurable interest.”
⑥	SIX point five percent (6.5%) is the premium for those electing spouse/former spouse coverage in a retirement from active duty. >2656- 6 is the number of the form to use for a permitted change of beneficiary, such as when a retiree remarries and there is no requirement for former-spouse coverage (DD Form 2656-6).
⑦	SEVEN words describe the single unchangeable rule for SBP when the base has been selected initially: “You can not change the base amount.”
⑧	EIGHT words will do it for an SBP election clause: “John will elect former spouse SBP for Mary.”
⑨	One four NINE (149) is the number of the Dept. of Defense form (DD Form 149) used to apply to the appropriate Board for the Correction of Military Records (BCMR) when a deadline has been missed and the former spouse wants to get the military to change the records to allow coverage. There are BCMR’s for the Army, Navy, Air Force, Marine Corps and Coast Guard. The time to apply is within three years of the discovery of the error.
⑩	> TEN percent is the approximate percent of base amount paid by Guard/Reserve retirees for RCSBP coverage. > 2656- 10 is the number of the form used to make a “deemed election” by the FS (DD Form 2656-10) when the SM/retiree fails or refuses to make the election required by court order. The deemed election must be submitted to DFAS within one year of the order granting former-spouse SBP coverage.

*DFAS, the Defense Finance and Accounting Service, processes SBP applications for all of the uniformed services except the Coast Guard, and the commissioned corps of the Public Health Service and the National Oceanographic and Atmospheric Administration. Locations for the latter pay centers are found on any SBP form mentioned above.

* * *

SILENT PARTNER is prepared by Mark E. Sullivan, a retired Army Reserve JAG colonel and the author of *The Military Divorce Handbook* (American Bar Association, 2d Edition, Aug 2011) For revisions, comments or corrections, contact him at Sullivan & Tanner, P.A., 5511 Capital Center Drive, Suite 320, Raleigh, N.C. 27606 (919-832-8507); E-mail – mark.sullivan@ncfamilylaw.com.

SILENT PARTNER

The Big Freeze: Finding the Facts

SILENT PARTNER is a resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section and the North Carolina State Bar's Committee on Legal Assistance for Military Personnel. There are many *Silent Partner* infoletters on military family law issues. Just go to www.americanbar.org > Family Law Section > Military Committee, or www.nclamp.gov > For Lawyers. Please send any comments, corrections and suggestions to the address at the end of this document.

Frozen Benefit Basics

The military pension division case is tough enough to handle most of the time. It becomes even more complicated, however, when the uniformed services pension to be divided is governed by the Frozen Benefit Rule. The new, required method of military pension division involves a hypothetical amount of retired pay, calculated as of the SM had retired on the date of the decree of divorce, dissolution, annulment or legal separation (hereafter divorce*). Details regarding the Rule may be found in several *Silent Partner* info-letters located at the website of the military committee of the N.C. State Bar, www.nclamp.gov > For Lawyers.¹ The text below explains how to obtain specific information about the data points required in a *pension division document*² and the amount of "disposable retired pay" which is subject to division.³

The Rule was effective on December 23, 2016 in an amendment to the Uniformed Services Former Spouses' Protection Act. It states that the pension to be divided - for servicemembers who are not receiving retired pay on a divorce* date after 12/23/16 - will be a hypothetical amount calculated as if the member had retired on the day of divorce.⁴

Data Required

Specific data from the records of the servicemember (SM) are required for the *pension division document* if it is to be accepted and honored at the retired pay center⁵ for garnishment of the military pension as property division. These are:

- The SM's retired pay base, also known as the "High-3" amount⁶ (i.e., the actual dollar

¹ You can also find explanations and information at the DFAS website, www.dfas.mil > Garnishment > Notice of Statutory Change, and there is also sample order language to use in complying with the Rule.

² The *pension division document* is a decree of divorce, dissolution, legal separation or annulment, or a settlement agreement incorporated therein. 10 U.S.C. § 1408(a)(2).

³ "Disposable retired pay" is that pay which may be divided between the parties in a divorce or separation case. 10 U.S.C. § 1408(a)(4).

⁴ The terms of the amendment are found at 10 U.S.C. § 1408(a)(4)(B) and at ¶ 2908 of Chapter 29, Vol. 7B of the Dept. of Defense Financial Management Regulation.

⁵ Retired pay orders for the Army, Navy, Air Force, Marine Corps, as well as the National Guard and Reserves (known as the RC, or Reserve Component), are processed by the Defense Finance and Accounting Service (DFAS), located in Cleveland, Ohio. Pension orders for members of the U.S. Coast Guard and Coast Guard Reserve are sent to the USCG Pay and Personnel Center (<http://www.uscg.mil/ppc/>), located in Topeka, Kansas. Orders for the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration are also serviced by the Coast Guard PPC.

⁶ The retired pay base for those entering military service before 8 September 1980 is the individual's final pay, but there are almost none of these SMs still serving today. The "High-3" amount is the highest three years of pay at

figure); and

- The SM's years of creditable service.⁷

Counsel for the Servicemember

When the attorney represents the SM, information about Sergeant John Doe's years of creditable service can usually be provided by John himself. In a pinch, it may be accessed from the Pay Date and DIEMS data shown on his Leave and Earnings Statement.⁸

Military members still serving can usually find their "High-3" amount at the on-line secure personnel portal for their branch of service (e.g., Human Resources Command for the Army). Otherwise it may be necessary to request information from government officials who have access to the individual's military records, especially the ones involving military pay. John's attorney might consider a communication to John that looks like this:

John: I need you to get letter from the base finance office showing your "High-3" at date of divorce. That means the highest 36 months of base pay. It's usually the 36-month period leading up to the specified date for valuation under state law [which is the divorce date here in the state of East Carolina]. The letter from finance might look like this:

*LETTERHEAD, 359th Finance Office, Joint Base Andrews
To: John Q. Doe, Staff Sergeant, U.S. Air Force, xxx-xx-1234
From: Major Ed P. Wilson, Finance Office Commander
Date: August 2, 2018*

You asked this office to prepare information on your "High-3" pay as of February 28, 2015, the date of your divorce in Raeford County, East Carolina. The "High-3" pay of a servicemember is the highest three years (36 months) of compensation. 10 U.S. Code 1407(c).

I have reviewed your records, and the highest 36 months of compensation would be the three-year period ending 28 February 2015 in your case. The figures are:

<i>March 1-December 31, 2012</i>	<i>\$ ____</i>
<i>January - December 2013</i>	<i>\$ ____</i>
<i>January - December 2014</i>	<i>\$ ____</i>
<i>January 1 - February 28, 2015</i>	<i>\$ ____</i>
<i>Total of the above</i>	<i>\$ ____</i>

the time of retirement (or, in the case of the Frozen Benefit Rule, the time of hypothetical retirement). 10 U.S.C. § 1407(c).

⁷ See DoDFMR, Vol. 7B, Ch. 29, ¶290803. In the case of a member of the Reserves or National Guard, the years of creditable service is replaced with "total number of retirement points" as of the date of the decree of divorce*.

⁸ For details, see the Silent Partner info-letter, *Military Pension Division and the "Big Freeze": Nuts and Bolts*.

<i>Average of the above</i>	\$
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The final figure ("Average of the above") is your High-3 Pay as of 28 Feb. 2015.

If the base finance office cannot help, the military member can try Customer Service at DFAS (or the equivalent office at the Coast Guard Pay and Personnel Center) or whatever other office manages his pay.

Note that John Doe or his attorney will have to specify what period of time is involved. The pay center will not give him the number or the underlying data responding to a request for "my High-3 pay." Even though the pay center *has the information*, the officials there may reply that the computers have not been programmed to provide the data. So John may need to phrase his request in terms such as, "My base pay for each month between June 1, 2015 and June 1, 2018," if that is his highest 36 months of pay. Once that information is obtained, getting the monthly average on a handheld calculator is pretty simple.

In lieu of obtaining the documents and data from the pay center, John can prepare a spreadsheet, such as a chart in Excel. Such a document - based upon military pay tables found at www.dfas.mil for present and past years, as well as his dates of promotion, if any - will show his rank and his pay for the applicable 36-month period.⁹

For RC (Reserve Component) personnel (that is, those in the Reserves or the National Guard), the issue is finding out how many retirement points exist on the date of divorce. This usually means that the SM has to get on-line and go to the secure personnel portal for his branch of service, such as Human Resources Command at Ft. Knox, Kentucky for Army Reservists, or the Naval Reserve Personnel Center, Millington, Tennessee for sailors in the Naval Reserve. Once the annual points statement is obtained, there might need to be some interpolation to figure out the approximate number of points X months ago when the divorce occurred. Or the attorney might need to extrapolate to come up with a good faith estimate on what the points total would be Y months from now when the divorce is scheduled to occur.

When Representing the Spouse...

If you represent spouse, you'll need to try to get information from the other side. Sometimes opposing counsel is cooperative. When that's the case, one can obtain information by writing a message or a letter that asks the SM to provide the following:

INFORMATION -

- *Which were the highest three years (36 months) of your pay as of the date of divorce?
- *What was the total amount paid in those 36 months?
- *What is your DIEMS (Date of Initial Entry into Military Service)? Note: This is usually shown on the right side of the SM's LES.
- *What is your Pay Date? Note: This is shown on the top of the SM's LES.
- *If applicable, state any periods reflecting a break in your military service.

⁹ An example of an Excel chart is at ATCH 3 of the Silent Partner cited in the previous footnote.

*What total years and months of creditable service did you have as of the date of divorce? Note: For RC personnel, this would ask for total retirement points in place of “years and months of creditable service.”

*What was your “High-3” pay (i.e., the monthly average of your highest 36 months of compensation, or base pay) as of the date of divorce?

*What is the date of your last promotion?

DOCUMENTS -

*Your most recent leave and earnings statement (LES).

*LES’s which include your highest 36 months of pay as of the divorce date (or else official pay data or an extract of pay data from military finance center, either DFAS or the Coast Guard Pay and Personnel Center).

*W-2 Forms for the tax years that include your highest 36 months of pay.

When the other side resists, consider a release and consent form. An example is found at the end of the Silent Partner infoletter, “Docs for Division.” Another option is to pursue discovery by means of interrogatories and document requests. When all else fails and the case involves DFAS as the pay center, try to obtain the documents by using a court order or subpoena signed by the judge. With the Coast Guard, sometimes a phone call, letter or e-mail to the Pay and Personnel Center in Topeka, KS will produce useful information.

(Rev. 1/27/19)

* * *

This **SILENT PARTNER** was prepared by COL Mark E. Sullivan (USA-Ret.). For revisions, comments or corrections, contact him in Raleigh, N.C. - 919-832-8507, or at mark.sullivan@ncfamilylaw.com.

SILENT PARTNER

Fixing the Frozen Benefit Rule

INTRODUCTION: The Silent Partner series of info-letters, a lawyer-to-lawyer resource for military family law issues, is a project of the military committees of the American Bar Association's Family Law Section and the North Carolina State Bar. For others in this series, go to www.americanbar.org > Family Law Section > Military Committee, or to www.nclamp.gov > For Lawyers. Comments, corrections and suggestions should be sent to the address at the end of the last page.

What's All the Hubbub, Bub?

The National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) contained a major revision of how military pension division orders are written and will operate. Instead of allowing the states to decide how to divide military retired pay and what formula or methodology to use, Congress imposed a single uniform method of pension division on all the states, a hypothetical scenario in which the military member retires on the date of divorce. Despite the fact that more than forty states employ the "time rule" to divide a defined benefit plan, all states – as of December 23, 2016, the date the law was enacted – will have to use this new method for dividing a military pension.

The new rule applies to those still serving – the servicemember (SM) who goes through divorce and property division while still on active duty in the uniformed services (Army, Navy, Air Force, Marine Corps and Coast Guard, plus the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration). It also applies to those in the National Guard and Reserves who are not yet receiving retired pay. It has no impact on those who obtain a divorce and property division after retirement.

How the Frozen Benefit Rule Works

The new military pension division rule is a "rewrite" of the terms for military pension division found in the Uniformed Services Former Spouses' Protection Act, or USFSPA.¹ The rewrite requires that the military retired pay to be divided will be that attributable to the rank and years of service of the military member at the time of the parties' decree of divorce, dissolution, annulment or legal separation (hereafter divorce*).² This is so even though the servicemember may rise in rank and years of service

¹ 10 U.S.C. § 1408.

² Details are found in the several Silent Partner info-letters regarding the Frozen Benefit Rule, which are found at the website of the military committee of the N.C. State Bar, www.nclamp.gov > For Lawyers. You can also find explanations and information at the DFAS website, <https://www.dfas.mil> > Garnishment > Notice of Statutory Change, and there is also sample order language to use in complying with the Rule. Lawyers should take care in using the sample order language. If the attorney provides the information required in the sample, then the order will be approved. The key, according to one

afterwards, resulting in a larger pension to be divided, which would then be discounted by using the “marital fraction” to apply pension division to only the benefit which was acquired during the marriage. The only adjustment will be cost-of-living adjustments that occur under 10 U.S.C. § 1401a (b) between the time of the court order and the time of retirement.

The NDAA 17 rewrite makes no exceptions for the parties’ agreement to vary from the new federal rule. Everyone must do it one way, regardless of what the husband and wife decide they want the settlement to say.

How Hard Can This Be?

“Frozen benefit division” is known as a *hypothetical clause* at the retired pay centers.³ It is the most difficult to draft of the pension division clauses available. A government lawyer familiar with the processing of military pension orders put it this way: “... over 90% of the hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of ... military retired pay. This legislative change will geometrically compound the problem.”

But now everyone will have to know how to do it. Since few lawyers know how to write such an order without a handful of Excedrin, this means the cost of military divorce will go up once again, with rivers of rejection letters flowing back to attorneys who submit their pension orders to the retired pay center in the hope of approval.⁴

Then it’s back to the drawing board for another attempt, or else the local attorney will have to farm it out to some expert who can do it properly – if there’s enough information available to figure it out. The required data include the servicemember’s rank and years of creditable service, as well as his or her “High-3” figure (i.e., the average of the highest 36 months of compensation). An expert will need to be located, assuming there is enough money is left to pay this draftsman for the work.

Past Efforts, Future Promotions

retired pay center attorney, is ensuring that the lawyers know and understand what is included in the sample order - “Do you know what this means and how it affects your client before you fill it out?” To illustrate, the sample order contains language setting the denominator of the marital or coverture fraction as the total military service of the SM. Yet from the former spouse’s viewpoint, that is not only illogical (when dividing a benefit that’s fixed on the date of divorce*), it’s also unfair. The former spouse will want it to be fixed as of the divorce* date, if state law allows that.

³ For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

⁴ A guide for attorneys on how to write acceptable military pension clauses may be found at the Silent Partner, “Guidance for Lawyers: Military Pension Division,” and it includes the necessary elements and language for a proper hypothetical clause.

Most courts already give consideration to how the efforts of the SM and the spouse during the marriage should be apportioned in regard to future promotions. The *time rule* is based on the “marital foundation theory,” which recognizes that the individual’s final retired pay is based on a foundation of marital effort (e.g., a servicemember would never have attained the rank of sergeant major, with 30 years of service, if it hadn’t been for the efforts expended during the marriage up to the rank of sergeant first class over 20 years, when the parties divorced).⁵ That’s one reason why a large majority of states have adopted the time rule for dividing every type of pension – it provides the fairest approach to division of this asset, whether the pension is state or federal, private or public. And it accounts for the postponement of the benefit (i.e., the spouse’s inability to obtain immediate payments in most states) by allowing for the growth in the pension over time.

That approach goes out the window under this new NDAA 17 rule. The share of the former spouse (FS) is *artificially fixed*, frozen like a fly in amber. And then the payments are postponed until the SM chooses to put in for retirement, so a second shrinkage is imposed on the pension share of the FS.

Since the Frozen Benefit Rule was written by Congress, which knows next to nothing about the division of property and pensions in divorce, there will be plenty of problems applying it in most state courts. And the harmful impact won’t be limited to spouses; members and retirees will feel the pain as well. Consider this example:

- Husband and Wife agree to divide the husband’s retired pay exactly according to the Frozen Benefit Rule. At the time Husband is a major in the Marine Corps with over 16 years of service.
- Their property settlement language tracks the new statute by stating that the disposable retired pay to be divided by court order is that of Husband, based on his years of service and rank at the time of the court order, that is, “major over 16.” It even calculates the hypothetical retired pay.
- Both sign it, and they have their signatures notarized.
- They do not, however get divorced immediately. Due to a deployment and an overseas assignment for Husband, filing for divorce does not take top priority for him. As for Wife, she needs to maintain medical coverage as a dependent spouse so she is not eager to pursue the dissolution either. Five years pass before one of them files. By that time Husband is a *lieutenant colonel over 20*, not a *major over 16*.

⁵ The majority rule provides for a fair share by dividing the *actual* retired pay of the member/retiree, not some hypothetical number, and then it reduces it to give the member/retiree credit for the final years of military service after the divorce.

- When the divorce is granted, with the settlement incorporated into it, it is submitted to the retired pay center. And the center rejects it, since the rank and years of service *at the time of the divorce* is not “major over 16” but “lieutenant colonel over 20.” The latter is what must be stated in the order or decree, not the agreed terms.⁶

Breathing Room and Time to Adjust

How much time was allowed for states to revise their laws to accommodate this new rule? None. There was no “breathing room” allowed, no decent interval set out to let the majority of the states write up, propose and enact laws consistent with the “new rule.” Counsel for the FS will need to consider arguing that an unfair formula will result if the denominator of the marital fraction is not revised, to avoid imposition of a *double discount* on the FS.

Here’s how the double discount works: First of all, the benefit to be divided with the FS is frozen at the rank, years of service and retired pay base at the date of divorce. In addition, since state laws have not been rewritten to revise the “marital fraction,” the fraction will still be calculated in 90% of the states based on years of marital pension service divided by *total pension service years* (marital service years ÷ total service years), rather than years of marital pension service years divided by *service years up to the date of the divorce*.

It is essential to stop the clock for the denominator at divorce since the benefit is also fixed at that date. Anything else would doubly dilute the pension benefit granted to the spouse. This was recognized in a 2014 Texas case, *Douglas v. Douglas*,⁷ which held that the denominator in a “hypothetical clause” is the months of creditable service during marriage *up to the date of divorce*, rather than the date of retirement. The Texas Court of Appeals stated that accepting the husband’s proposition – that the denominator should be total years of service – would impermissibly dilute the ex-wife’s share acquired during the parties’ marriage.

The new law is effective and binding on the states upon enactment (i.e., 12/23/2016). Although the method of dividing pensions, as well as the date of valuation and classification of marital or community

⁶ The same result would obtain if the parties didn’t specify exactly the components required for a hypothetical clause, including the years of creditable service, rank, and retired pay base of the member based on his “High-3” years of pay (see text below); the order would be rejected by the center, which would withhold acceptance until the proper information was inserted.

⁷ *Douglas v. Douglas*, 2014 Tex. App. LEXIS 12398, citing *Berry v. Berry*, 647 S.W.2d 945, 946-47 (Tex. 1983). See also *Dziamko v. Chuhaj*, 193 Md. App. 98, 996 A.2d 893, 903 (2010) (explanation of results from denominator of marital fraction ending upon divorce vs. one which ends upon retirement).

property,⁸ has always been a matter of state law, that will change in the military case. Since no time has been allowed for state legislatures to adjust to the change and rewrite state laws, lawyers will need to make adjustments “on the fly” to deal with military pension division cases which are presently on the docket or which come to trial before the state legislature can act.

Setting up the Example

An illustration may help to paint the problems and suggest solutions more clearly. We’ll use in these examples a divorce case involving the civilian former spouse, John Doe, and his ex-wife, Navy Commander Mary Doe. They are litigating in a *time rule* state, one which has not made any changes regarding the marital fraction used in dividing a military pension.

Strategy for the Servicemember

There’s no easy day for attorneys handling either side of the pension division case under these new rules. But the SM’s lawyer will always have the less difficult task. The new law was tailor-made for the servicemember, by freezing his or her retirement benefit. In addition, the SM has control over all the evidence and testimony needed for court or in settlement.

The active-duty SM needs to provide her attorney with proof of the “High-3” figure (i.e., the average of her highest 36 months of compensation) at the time of the divorce.⁹ That will usually be the most recent three years. The *High-3* amount can be calculated from Mary’s pay records. The document showing her pay is called the LES, or Leave and Earnings Statement. She can get help in obtaining the data through her finance office, and she should be able to retrieve about a year’s worth of LES’s from the Defense Finance and Accounting service (DFAS) secure pay portal (<https://mypay.dfas.mil>)¹⁰ or from her own secure portal online for pay and personnel information (e.g., “Army Knowledge Online” for soldiers). Mary can also obtain a pay transcript from DFAS summarizing the last three years of base pay.

Mary’s attorney will place the numbers for these 36 months of base pay on a spreadsheet, and Mary

⁸ For example, in New York, the valuation and classification date is the date of commencement of the divorce case. In California, a spouse’s share of community property stops accruing at the “final separation.” See, e.g., *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (Cal. Ct. App. 1985). The date of final separation is also the classification and valuation date in North Carolina. N.C. Gen. Stat. § 50-20 (b)(1). In Nevada, community property stops accruing on the divorce date. See, e.g., *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983). In other states it may be the date of divorce, the date of irretrievable breakdown of the marriage, or a date in the discretion of the judge.

⁹ The other element for determination of retired pay is the “retired pay multiplier,” which is usually 2.5% times years of creditable service (in an active-duty case). In a Reserve or National Guard case, the court order must also provide the total retirement points on the date of divorce.

¹⁰ Members of the Army, Navy, Air Force and Marine Corps have access to the DFAS secure website mentioned above; Coast Guard members have access to the USCG on-line pay portal, “Global Pay.”

will authenticate the pay in her trial testimony. The spreadsheet should be offered to the court as a summary of the written records which have been verified by Mary, and Mary must also be able to testify that the spreadsheet is indeed an accurate transcription of her pay records, even if she did not prepare the spreadsheet. If the records were obtained from the pay center (DFAS in this case), then Mary may need to obtain a declaration from the business records custodian.¹¹

Once the evidence has been admitted, the court will require a court order for dividing the pension. The attorney for the prevailing party is often tagged with the task of preparing the military pension division order, or MPDO, unless all the necessary language is placed in the divorce decree, or in a property settlement incorporated into the decree.¹² If “outside assistance” from a lawyer experienced in writing such pension orders is needed, this should be done as early as possible, preferably at the start of the case.

Whenever possible, the SM needs to request bifurcation of the divorce from the claim for equitable distribution or division of community property.¹³ The earlier that the SM gets the court to pronounce the dissolution of the marriage, the lower his or her “High-3” figure base will be, which means the lower the dollar amount for pension division with the spouse.

Strategy for the Former Spouse

When operating under the new rules, the former spouse needs to realize that, in the words of the Rolling Stones’ 1964 hit, “Time Is on My Side.” The longer it takes to obtain the divorce, the higher the servicemember’s rank, years of service and “High-3” will be. Should the SM move to bifurcate the hearing into “divorce now, property division later,” the FS should oppose the request by arguing that judicial economy and efficiency will be impaired, state law frowns upon severance of the issues and a multiplicity of hearings (if that is accurate) and that Congress has joined inextricably the divorce and the division of a military pension by requiring the setting of the retired pay base (the “High-3”) at the time of divorce.¹⁴

Discovery and Documents

¹¹ Under federal law, notary seals are not required for instruments which must be verified for federal purposes; instead, the federal government uses an unsworn declaration, made under penalty of perjury. 28 U.S.C. § 1746.

¹² For the necessary terms for the MPDO, see the Silent Partner, “Getting Military Pension Orders Honored by the Retired Pay Center.” See Note 4 *supra* for guidance on how to write the specific pension division clause.

¹³ See Brett R. Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* (4th Ed. 2019), Sec. 3.2. In those states which have adopted the Federal Rules of Civil Procedure, the issue of separate trials under Rule 42 (b) deals with bifurcation of claims into separate hearings.

¹⁴ For an excellent summary of arguments against bifurcation of the divorce and the property division, along with case citations for state appellate decisions, see Brett R. Turner, *supra* Note 13.

Once the divorce case has started, the FS ought to propound discovery immediately, asking – among other things – for verification of when the highest three years of compensation were for the SM, and for information on what the “High-3” is so that the court can calculate this essential element of military pension division. The latter inquiry can be posed in interrogatories and also in document requests. If the SM is less than forthcoming in the responses, the FS can argue for putting off the divorce until the SM begins to cooperate in responding to discovery. Counsel for the FS, John Doe, may be able to use principles of equity and the “clean hands doctrine” to argue that the SM must be in compliance with the rules and orders of the court – including full, prompt and honest answers to discovery – to be able to move for affirmative relief herself, in the form of a hearing on the application for a divorce judgment.

As to documents and evidence in trial, the above approach for Mary Doe’s case would also be what John and his attorney would use most of the time. For an effective trial presentation, John’s lawyer will need to get and submit the above information if the court is to do a proper hypothetical clause for the Doe case in light of the new Frozen Benefit Rule. While the records might be obtained from Mary through discovery, a written consent signed by Mary (for transmission to the retired pay center) may be necessary if she won’t produce the data on her own. It could take weeks or months to obtain this information from the source.

Restoring the Balance

To attempt to find the flaws and wiggle through the loopholes in the new rule, the lawyer for John Doe (the ex-husband of CDR Mary Doe) faces a daunting task, and it doesn’t simply involve the assembly of numbers for the court to use in ruling on a hypothetical award. The strategy for John is more of a global approach to the entire process, and it might involve half a dozen possibilities, depending on the state court rules for pension division, opposing counsel (or *pro se* litigant), the particular judge involved, the phase of the moon and other factors!

The goal of the FS, John Doe, is to “restore the equilibrium” in pension division. He needs what he would have received before the new rule was passed: a division of the amount of retired pay which Mary gets *at retirement*. At best, he wants to employ an approach which will yield a result that is numerically the same as that produced by the *time rule* if that were still available. His “Plan B” would be to obtain other payments or benefits which would help him obtain what he sees as a fairer division of Mary’s retired pay and benefits, or of the marital or community property in general.

As to John’s possible strategies, note that these are not labelled “One Size Fits All.” While some states may prohibit or restrict a particular approach, the summary below is written to set out the entire

spectrum of possible strategies, not to advocate one specific method for a particular case or state.

The Pension Division Rules from DFAS

The new rules were published at the end of June 2017 in Volume 7B, Chapter 29 of the Department of Defense Financial Management Regulation (DoDFMR).¹⁵ It is clear that DFAS has settled on the “date of divorce” as the target for when the *High-3* must be fixed. Under 10 U.S.C. § 1408 (a)(2),

...“court order” means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree)....

DFAS removed everything from this sentence except “final decree of divorce, dissolution, annulment, or legal separation issued by a court,” and used that to specify the *High-3* date. Regardless of what potential pension benefit is earned later in the servicemember’s career, it is the *High-3* as of the *date of divorce* which DFAS interprets as being “the time of the order” as specified in Section 641 of NDAA 17, also found at 10 U.S.C. § 1408(a)(4)(B). For those military members who entered service *on or after* September 8, 1980, the following information must be provided to the retired pay center in the decree, order or incorporated settlement:

1. A fixed amount, a percentage, a formula or a hypothetical which is awarded to the FS;
2. The SM’s *High-3* amount at the time of divorce (i.e., the actual dollar figure); and
3. The SM’s years of creditable service at divorce or, for a member of the Guard or Reserves, the creditable retirement points at divorce.

Outline of Time-Rule Strategies

Spousal Support Settlement. When the parties are in agreement, a consent order for alimony, maintenance or spousal support is one way to obtain *time-rule* payments from the military pension without the limitations of the Frozen Benefit Rule. An alimony garnishment is based on “remuneration from employment.” It is not tied to DRP, or *disposable retired pay*; thus the new rule and its definition of DRP do not apply to permanent alimony payments which start at retirement and function as a division of retired pay.¹⁶

¹⁵ See ¶ 290204 for the definition of “court order,” ¶ 2908 for an entire revised section as to the new rules, and Figure 29-2 for a sample court order with language to meet the requirements of the Frozen Benefit Rule.

¹⁶ The rules for collecting alimony, child support or both from an individual’s military retired pay are found at 42 U.S.C. § 659 and 5 C.F.R. Part 581. The money from which family support may be withheld is termed “remuneration for

Here are a few other pointers about using alimony to mimic *pension division as property*:

- Note that there is no “10/10 rule” for alimony payments from the retired pay center, as is the requirement when the pension is divided as property (i.e., property division payments from the retired pay center may only be made if there are at least 10 years of creditable service concurrent with at least 10 years of marriage).¹⁷
- Make sure that the FS payments do not end at remarriage or cohabitation (since pension-share payments would not end at either of these two events) and are not subject to modification.
- Admittedly, spousal support is usually effective immediately (not at a future date). In addition it usually consists of a fixed dollar amount, not a formula such as:

$$50\% \times \frac{120 \text{ months of marital pension service}}{\text{total months of creditable service}} \times \text{final retired pay.}$$

There is no reason, however, why the retired pay center should refuse to accept a formula for the spousal support, rather than a specific set dollar figure.¹⁸

- A consent order for permanent spousal support will, however, have different tax consequences for the parties than a pension division order. The latter, when paid through the retired pay center, produces taxable income for the payee and results in an exclusion for the payor. Not so with alimony, however. The Tax Cuts and Jobs Act changed the rules, and instruments executed after 12/31/19 do not result in the tax consequences stated above.

A Spoonful of Alimony. John’s attorney could argue for division of the pension under the new rule, with the remaining amount made up by alimony to be decided upon Mary Doe’s retirement, in order to get the equivalent of a “time rule” order. If John is awarded alimony while Mary is still serving, the alimony should not end automatically upon Mary’s retirement; John’s attorney needs to review carefully the results of dividing Mary’s retired pay to decide whether *some alimony* should be continued to equalize the parties’ positions. The terms of the alimony order might make the amount adjustable depending on economic and financial factors at the time of Mary’s retirement, including any reduction of the retired pay to which John would be entitled under the *time rule* due to the “Frozen Benefit Rule,” or any reduction because Mary elects VA disability compensation and that reduces John’s amount due

employment.” This includes military retired pay (5 C.F.R. 581.103(c)), and even military disability retired pay (5 C.F.R. 581.103 (b)(13)); *see also* DoDFMR Vol. 7B, ch. 27, para. 270101.A. It is advisable to mention the above citations to the DoDFMR in the permanent alimony order so as to avoid confusion by those who are processing the order. Counsel may also want to include these citations in the order itself.

¹⁷ 10 U.S.C. § 1408 (d)(2).

¹⁸ The application form for payments from military retired pay is DD Form 2293.

to a “VA waiver” under 10 U.S.C. § 1408 (a)(4) and 38 U.S.C. § 5304-5305. Note that the order regarding spousal support as a “stand-in” for pension division must clearly state that the support does not end at the remarriage or cohabitation of the recipient spouse, since true pension division orders do not change upon either event.

Using the Time Rule Formula Anyway. The revised law doesn’t say that a court may not enter a *time-rule* order. It merely states that the retired pay center (DFAS or the Coast Guard Pay and Personnel Center) will only honor “date-of-divorce division” for those still serving. Recognizing this limitation on payments from the pay center, the court may still enter a time rule order, noting that at Mary’s retirement only a portion of the pension-share payment for John Doe will come from DFAS. The court’s order would provide that Mary will still be responsible for the rest and will indemnify John for any difference between the two amounts.

There is a parallel to the remedy often used in “VA waiver” cases in which the FS gets less than intended. Election of VA disability compensation often results in a dollar-for-dollar reduction in retired pay. The duty to indemnify is a common solution for this “VA waiver” and the former spouse’s receipt of a lower amount due to operation of the law.¹⁹ Why shouldn’t it work for cases in which the “operation of law” involves an amendment to USFSPA, the “Frozen Benefit Rule”? As will be explained below, 10 U.S.C. § 1408 (e)(6), the “savings clause” in USFSPA, allows the courts to employ state enforcement remedies for any amounts which may not be payable through the retired pay center.²⁰

Be sure not to use “disposable retired pay” in the order to describe what is divided. Disposable retired pay, or DRP, means the restrictive definition in the Frozen Benefit Rule (i.e., the retired pay base at the date of divorce) less all of the other specified deductions, such as the VA waiver and moneys owed to the federal government. The best way to word a pension clause is to provide for division of total retired pay less only the SBP premium attributable to coverage of the former spouse. Regardless of the wording, DFAS will construe orders dividing retired pay as dividing “disposable retired pay.”²¹

Put Off the Divorce. Delay of the divorce will gain time for the FS, and *time is money*. The longer the divorce is postponed, the higher the retired pay base (i.e., the “High-3”) of the SM. Intervening months and years will yield “step increases” (i.e., pay increases which occur every two years), Congressional pay raises and possibly promotions. Who could object to this approach? The expected naysayers for

¹⁹ But see *Howell v. Howell*, 137 S.Ct. 1400 (2017) on the issue of indemnification by court order, and also the *Silent Partner*, “The Death of Indemnification.”

²⁰ See also Brett R. Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* (3rd Ed. & 2016-2017 Supp.), Sec. 6.4.

²¹ DoDFMR, Vol. 7B, ch. 29, Sec. 290601.

this strategy are two types of attorneys whom we'll call "Naïve Ned" and "Ethical Ethel."

Naïve Ned says, "It can't be done! How can you postpone the divorce for more than a couple of weeks on the outside, once the case has been filed?" Sadly, Ned hasn't had much experience in the big, wide world outside his office walls.

Many legitimate tactics exist for slowing down the wheels of litigation. Rather than accepting service of process, Ned could politely tell his opponent that the client will not allow him to sign an acceptance, and that regular service of process must be employed. When the client is finally served, Ned can ask for an extension of time for filing an answer. If there is a flaw in the pleadings, Ned may file a motion to dismiss. If there are questions regarding grounds for the divorce or the validity of the plaintiff's claim of domicile, then Ned can initiate discovery. With these and other tactics, an attorney in Syracuse, New York (for whom the author was a consultant) was able to drag out and delay a divorce decree from 2010 (when the case was filed) until 2014. And all the while the client, a retired Army colonel, was begging him to speed it up and get the divorce granted!

Ethical Ethel takes a different approach. "While it may be possible to postpone the divorce, there are serious concerns under the Rules of Professional Conduct. It's never right to delay the litigation. Counsel has an ethical duty to move forward toward completion, not drag his feet. Slowing down the process with the goal of delay is unethical!" Unfortunately, Ethel hasn't read the Rules very closely.

While delay for its own sake is improper, delay which results from the legitimate use of objections, discovery, motions and other tactics is not inappropriate or a violation of the Rules of Professional Conduct. The Rules prohibit "unreasonable delay" or "improper delay." They do not bar the use of legitimate devices, such as discovery, to obtain needed information, even though the employment of discovery and the unresponsiveness of the other side may lead to lengthy delays in the legal process.

In a 1998 divorce and property division case, the author embarked on a campaign of discovery to ascertain whether the plaintiff, a soldier, was a legitimate resident of North Carolina. Domicile is an essential element of divorce, and the defendant was a maid at a motel in coastal Georgia, so it could not be *her domicile* which was at stake. The plaintiff was in New York. Using sequential discovery (i.e., interrogatories followed some weeks later by document requests, and then followed by requests for admissions, rather than simultaneous service of all of these on the plaintiff), the author beamed in amusement when the plaintiff – instead of answering the discovery immediately – decided to obtain an extension of time for response by 30 days, following that with his objections and motion for protective order. In due course the author filed a motion to compel. A hearing was eventually calendared on the

objections, motion for protective order and motion to compel. The latter motion was granted, and the clock just kept on ticking. The plaintiff eventually fired his first lawyer and hired a new one to get the case moving faster. Legitimately using these discovery tactics, the author was able to get the granting of a divorce postponed for 18 months, thus allowing the client to obtain a share of the SM-husband's retired pay (which otherwise would have been lost due to a change in state law).

If you get the file when the divorce has already been granted (after 12/23/16), don't give up. Check to see if the divorce is valid. A faulty dissolution might be set aside by the court, giving the FS a larger potential pension to divide.²² Imitating Sherlock Holmes may pay dividends in terms of flushing out a flawed divorce, so get out that magnifying glass!

How to "Even Out" the Pension Division

The next five methods are not true adjustments to the pension division to make it numerically the same as that which results from the *time rule*. They will, however, help in ameliorating the result of the "frozen benefit division" for John Doe (the ex-husband of Commander Mary Doe).

Unequal Share of Pension. In states where the court has a degree of flexibility in how much of a marital or community property asset to award the non-employee spouse, John's attorney can ask the court to award a share to him that is larger than the usual "50% of the marital share" portion. Thus the order could be framed in terms of "70% of the marital share of Mary Doe's military retired pay," which would leave John with a larger share than he could receive through frozen benefit analysis.²³ Have a financial expert help to estimate the monetary loss for the FS, so that a set-off can be calculated. It would, however be impossible to compare the two results at the time of the pension division order. Only in hindsight, at the time of Mary's retirement, would it be possible to measure one against the other.²⁴

Fixed Percentage Award. Another alternative, when the laws of a state have not been adjusted to provide for a denominator of the marital fraction which ends on the date of the divorce is to have the court award to John Doe, the non-military spouse, a fixed percentage of the military retired pay while Mary is still serving. After all, if John is forced to receive only a share of a *frozen benefit* at the time of divorce, why shouldn't he get a *fixed percentage* of that *frozen benefit*? In this situation, the amount of the frozen benefit would remain relatively stable, instead of losing value over time (as would occur if the

²² A guide to scrutinizing the validity of divorces is found at the Silent Partner, "'Lost' Military Pensions: The Ten Commandments."

²³ John's share of the pension, divided as property, is limited to 50% of disposable retired pay which may be garnished through the retired pay center. 10 U.S.C. § 1408 (e)(1).

²⁴ It would also be possible to have the court award other assets to John in view of his loss due to the truncated division set out in the new Frozen Benefit Rule.

denominator of the marital fraction remains the total amount of Mary Doe's creditable service). So, for example, if the property division order occurred when the parties had been married for 10 years of the 20 that Mary had already served, John would be awarded half of 50% (i.e., $\frac{1}{2} \times 10/20$), or 25% of the frozen benefit. If the *fixed percentage approach* were not employed and Mary served for a total of 30 years, then John would still receive 50% of the frozen benefit times the marital fraction. However, at that time the marital fraction would be 10/30, or 33%, and John's share would be 16.5%, rather than 25%. Fixing the percentage at the same time as the benefit is fixed is one way of "retaining value" for John's pension-share award.

Present Value. In addition to the future division of retired pay, state laws also recognize a second method of dividing pensions, the "present value offset." This analyzes the present value of a series of money payments over the course of the SM's life; these are, of course, her retired pay. The present value of this retired pay is the amount that can be used for a trade or an offset, allowing the SM to keep her pension intact. This is beneficial for the parties since it results in a complete present accounting and division, not the postponement of property division until retirement. In addition, it provides the spouse with property "in hand" when it is unknown whether the SM will live for few or many years after retirement, or even survive to apply for retirement.

Evaluating a pension is a complex task. It is not for the faint-hearted, the unprepared, or the amateur. These complicated computations generally demand an evaluation report and the testimony of an expert.²⁵ The steps to be taken include these:

- Counsel must locate the appropriate state statute or cases which describe the methodology to use in ascertaining the present value of periodic payments.²⁶
- The FS needs to find and hire an expert (e.g., CPA, economist or actuary).
- The FS needs to get a "wingman" to educate the expert in understanding the military retirement system; this advisor might be a senior lawyer with lots of experience in handling military pension cases, a retired JAG officer, or a judge advocate who is a member of the National Guard or Reserves with experience in this area.
- The expert needs to read the cases, apply the methodology and placed a value on the pension. In

²⁵ See, e.g., *Trant v. Trant*, 545 So. 2d 428 (Fla. Dist. Ct. App. 1989), cited in *Smith v. Smith*, 934 So. 2d 636 (Fla. Dist. Ct. App. 2006).

²⁶ See, e.g., *Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) and *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994) for rules regarding the present value of pensions and the methodology to be employed in North Carolina.

an ideal world, counsel may even have one or two examples of pension present-value reports to give the expert to help out in regard to what must be done, what discounts need to be applied, what mortality table should be used, and so on.

- Then the hunt is on for some property or asset which matches the pension value and can be given to the FS in exchange for the division of the pension, or which can be awarded to the FS by the judge in a contested case so that the SM may retain the military pension.

Present Value and Payments. The present value of a military pension can be a pretty large figure in some cases.²⁷ When this happens, the court may need to do a partial setoff for the marital value of another asset awarded to the FS, with the remainder to be made up in periodic payments. Thus, if the present value of CDR Mary Doe's retired pay were \$400,000 and the marital component were \$300,000 (that is, the parties were married for 15 of the 20 years used by the expert in the pension value report), then the court might set off the pension awarded to Mary by granting sole ownership to John of marital assets worth \$200,000. To complete the equation, the court could order Mary to pay \$100,000 to John by making annual payments of \$20,000 for five years. This could be done by requiring Mary to set up an allotment immediately for the monthly payment of \$1,666.67 ($\$20,000 \div 12$ months) to John. Or the court could enter a military pension division order requiring monthly payments of \$1,667.67 from Mary's retired pay. The retired pay center will honor these "set dollar amount" payments so long as they do not exceed the allowable percent of disposable retired pay which may be garnished as property division, that is, 50%.²⁸

The Western Gambit. In several jurisdictions (mostly western states), the court may order the SM to begin present payments to the nonmilitary spouse as soon as the SM is eligible to retire and receive monthly payments. This is so whether the military member has actually retired or not.

The seminal case is *In re Marriage of Luciano*,²⁹ in which the judge ordered pension-share payments

²⁷ See, e.g., *Cunningham v. Cunningham*, 173 N.C. App. 641, 619 S.E.2d 593 (2005) (remanding case for presentation of husband's valuation of military pension; wife's value, without expert, was about \$560,000 for a Marine Corps lieutenant colonel).

²⁸ This 50% means half of the disposable retired pay of the SM calculated at the date of the court order. The same limits apply if the court – instead of time payments on a present-value setoff – decides to order the SM to pay the FS a fixed dollar amount upon retirement. See Note 23 *supra*.

²⁹ *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980). See also *In re Marriage of Scott*, 156 Cal. App. 3d 251, 202 Cal. Rptr. 716 (Ct. App. 1984); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Balderson v. Balderson*, 896 P.2d 956 (Ida. 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. App. 1990); *In re Marriage of Harris*, 107 Wn. App. 597, 27 P.3d 656 (Ct. App. 2001); *Maccarone v. Maccarone*, 108 A.3d 1053 (R.I. 2015); *Janson v. Janson*, 773 A.2d 901 (R.I. 2001); *Furia v. Furia*, 692 A.2d 327 (R.I. 1997); and *Bailey v. Bailey*, 745 P.2d 830 (Utah App. 1987) ("... the distribution of retirement benefits should generally be postponed until benefits are received or at least until the earner is eligible to retire." (emphasis

for the wife to begin when the SM-husband retired from the Air Force. The California Court of Appeals reversed, stating that it would be unfair to postpone payment to the ex-wife since that would give the SM the power to determine when she received her own property. The Court went on to say that the employee spouse cannot defeat the nonemployee spouse's interest in community property by relying on a condition solely within his control. The proper order for the judge to issue would state that the former wife is the one who has the choice as to when to start receiving her share of the pension. This election may be made at any time after the pension is matured, through a motion filed by the nonemployee spouse. The Court stated that, if the motion is made before retired pay starts, this constitutes an irrevocable election to give up increased payments in the future which might accrue due to increased age, longer service and a higher salary.³⁰

Nothing in the Frozen Benefit Rule blocks or bars this “Western Gambit,” as illustrated by the *Luciano* case. And the logical approach – nay, the only rational approach – for a nonmilitary spouse in those states which follow *Luciano* is to move immediately for payments, to start as soon as the SM attains sufficient service for retirement (usually after 20 years of active duty). Since there can no longer be an increased payment in the future, as mentioned above, and the benefit to the FS is locked into the rank and years of service at the time of divorce, every nonmilitary spouse should file a motion to elect payments from the SM as soon as the pension matures.

Continuing Conundrums

Several questions remain. The answers will likely be provided in case law developments. Below are some examples.

How should the courts write a proper court order to implement the Frozen Benefit Rule? The “hypothetical clause” (as it is called by DFAS) is the most difficult clause to prepare. For those who entered military service after September 1980, the current DoDFMR rule as to hypothetical clauses requires that the order contain detailed information about the SM, including the years of creditable service as well as the “retired pay base” calculated according to the “High-3.”³¹

At present, counsel must provide this information to the court. What if a court order specifies the “old definition” of disposable retired pay? Will it be rejected by the retired pay center, as would happen before the Frozen Benefit Rule when an order was found to be unacceptable? Will the center send to

added)). *But see Barron v. Barron*, 440 P.3d 1136 (Ariz. 2019)(holding that federal law prohibited the immediate payments described in *Luciano* and similar cases).

³⁰ *In re Marriage of Luciano*, 104 Cal. App. 3d at 960–961, 164 Cal. Rptr. at 95–96.

³¹ DoDFMR, Vol. 7B, ch. 29, Sec. 290608.

counsel or the former spouse directions to specify the required data for a hypothetical clause?

When a retiree doesn't make payments according to a pension division order which uses the original definition of DRP, will the FS be able to obtain compliance through a show cause hearing? Will the court's contempt sanction be upheld? Or will an appellate court strike down the punishment on the basis of federal preemption, ruling that the Frozen Benefit Rule cancels all other methods of dividing the future retired pay of a still-serving member?

If an order entered after 12/23/16 sets out terms under the original DRP definition and the SM wants to petition the court to change the order to comply with the present definition, will the court allow a motion to alter or amend under Rule 59 or its equivalent (in states which have not adopted the federal Rules of Civil Procedure)? What about a motion to set aside under Rule 60? Or will the existence of a final decision bar that change? Generally speaking, courts refuse to modify final property division judgments or to allow them to be attacked collaterally.³²

What happens if a *time rule* order dividing the pension is final and unappealed, and then the attorney for the former spouse finds out that it will not be honored by the retired pay center? What if the order will only be honored to the extent that it divides the "frozen benefit," rather than final retired pay? Can the court still hold the retiree liable for the unpaid portion of the pension under 10 U.S.C. § 1408 (e)(6)? That section of USFSPA, known as the "savings clause," states:

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) [e.g., 50% of disposable retired pay] has been paid....

Numerous court decisions have held that orders which require the retiree to pay more than 50% of disposable retired pay are not void or invalid; they are simply not enforceable through garnishment from the retired pay center for amounts in excess of 50%.³³ Can counsel for the FS defeat the arguments of

³² See, e.g., *In re Marriage of Thorne*, 203 Cal. App. 4th 492, 136 Cal. Rptr. 3d 887 (2012); and *Moore v. Moore*, 484 S.W.3d 386 (Mo. App. Unpub. 2016).

³³ See, e.g., *In re Hicks*, 530 B.R. 912 (M.D. Fla. 2015); *In re Madsen*, 2002 Bankr. LEXIS 2037 (Bankr. S.D. Iowa 2002); *In re Mackmeekan*, 117 B.R. 642 (D. Kan. 1990); *Ex Parte Smallwood*, 811 So. 2d 537 (Ala. 2001); *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987); *Forney v. Minard*, 849 P.2d 724 (Wyo. 1993); *Marquis v. Marquis*, 175 Md. App. 734, 931 A.2d 1164 (Md. Ct. Spec. App. 2007); *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984); *Stout v. Stout*, 144 So. 3d 177 (Miss. App. 2013); *Gonzalez v. Gonzalez*, 2011 Tenn. App. LEXIS 21; *Maxwell v. Maxwell*, 796 P.2d 403, 406 n.6

the SM/retiree that federal law preempts state court orders, since this section of USFSPA provides an “escape hatch” for the FS in enforcement of the pension division order?

Final Notes

Labelled as John Doe’s “Plan B” above under *Strategy for the Former Spouse*, other methods and strategies exist for obtaining a “fair deal” (or perhaps a “fairer deal,” in John’s view) regarding division of military retirement benefits. These would include requiring the SM to pay the full cost of the Survivor Benefit Plan, or valuing the SM’s military medical coverage and placing that as an asset in the SM’s share of marital or community property.³⁴ These do not involve a larger portion of the pension; rather, they focus on other benefits which may be valued and allocated in the property division process.

All of the above methods should be considered by lawyer for the former spouse. And this should be done in consultation with an expert in dividing military retired pay, so as to choose the best alternatives to the Frozen Benefit Rule.

These rules and requirements, strategies and suggestions may not apply to everyone. There are certainly variations among the states as to what may be done in the area of division of retired pay. For example, while some states may allow “make-up alimony” to adjust the equities when a spouse is left short in the pension division, others maintain a strict line of division between spousal support (based on need and the ability to pay) and property division (based on the value of what was acquired during the marriage and how best to divide it). Be sure to understand the law and the cases. Consult an expert in your state (if you’re not one yourself), and contact a specialist in military pension division whenever possible – even if it’s in another state! Review the Silent Partner, “All Clauses Considered: Writing the Frozen Benefit Award.” You can’t ask too many questions or know too much in this area. “One size” does *not* fit all!

* * *

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(Utah Ct. App. 1990); *In re Marriage of Bocanegra*, 58 Wn. App. 271, 792 P.2d 1263 (Wash. Ct. App. 1990); and *Geesaman v. Geesaman*, 1993 Del. Fam. Ct. LEXIS 126 (Del. Fam. Ct. 1993).

³⁴ Both of these approaches are covered in detail in Chapter 8 of Sullivan, *THE MILITARY DIVORCE HANDBOOK* (American Bar Assn., 3rd Ed. 2019) and both may be employed in any military divorce case, not just one which falls under the Frozen Benefit Rule.

SILENT PARTNER

Military Pension Division: The Spouse's Strategy

*Introduction: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many **SILENT PARTNER** infoletters on military pension division, the Survivor Benefit Plan and other aspects of military divorce. Just go to www.abanet.org/family/military (the website of the above committee) or www.nclamp.gov (the website of the military committee, N.C. State Bar).*



Introduction

The battlefield in military divorces is often military pension division. It is essential to learn and understand its unique set of rules. The basic issues for the military spouse (usually the wife) in the divorce battlefield are the first topics covered below. An overview of the battlefield is contained in “*Scouting the Terrain*,” and the topics below expand that advice to help protect the spouse and ensure that she receives her benefits from her marriage to the servicemember (SM). It is essential for the spouse and her counsel to understand the law, to know the rules and to be alert for minefields.

It is also essential to keep records to help the spouse make the case. This includes records of taxes (state income taxes, personal and real property taxes), voting registration, home ownership, copies of the SM's Leave and Earnings Statements, bank records and motor vehicle documents. These can help with the first part of the battle, which is the issue of domicile and residency.

Remember to help the client with costs, time and research. A fully contested equitable distribution trial or pension division trial can be costly indeed. Few clients have the will or the pocketbook for diehard resistance. Fortunately for the spouse, not many servicemembers or retirees want to risk battles over visitation, child support, alimony and other matters in a case that could be settled, just to engage in “nuclear warfare” regarding the pension. All states allow military pension division. As will be outlined below, only a few bar the division of pensions that are not vested. The job of a good lawyer is to guide the client with sage advice and serious judgment. Advice and guidance for the “big picture” along these lines is essential for those who are truly serious about helping these clients.

ADDITIONAL NOTE: There were several new developments in 2016-2018 regarding military pension division. Be sure to read these SILENT PARTNER infoletters: “Fixing the Frozen Benefit Rule,” “All Clauses Considered: Writing the Frozen Benefit Award,” “The Blended Retirement System and Divorce,” and “The Death of Indemnification.” These will add context and new information to the text below.

Roadblocks and Minefields

Our client in this example is Mrs. Roberts, the wife of Army Colonel Bill Roberts. He's been in the Army 20 years and now they're going through a divorce. Mrs. Roberts wants her share of the military pension. He wants to block her in the division of the pension.

There are only a few jurisdictions which bar pension division or limit it. These fall into the following categories: 1) states where there is a *vesting requirement*; 2) one state where ten years of marital military service is required and the pension must be vested (Alabama); and 3) one jurisdiction (Puerto Rico) which bars division of any noncontributory retirement pay.

A pension is vested when the employee is entitled to receive something upon termination of employment, whether that is in the form of a return of contributions or an early (and reduced) retirement

benefit.¹ A SM with 11 years of service, for example, would not have a vested pension because there is no right to retire after 11 years' service. One with 25 years' service, on the other hand, would clearly have vested retirement rights.

There are two states, Indiana and Arkansas, which limit court jurisdiction over pension division to those pensions which are "vested." Arkansas held in *Holaway v. Holaway*² that an unvested pension is non-divisible and thus the separate property of the party who earned it. In Indiana the right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share, and the burden is on the non-employee spouse to prove that the pension is vested.³

Alabama law provides a unique limitation on pension division jurisdiction. The law specifically states that retirement benefits are not divisible as marital property unless they are vested and the employee or "owning spouse" has ten years of pension service during the marriage.⁴

Finally, Puerto Rico does not allow the division of noncontributory pensions at all; it treats these pension rights as separate property.⁵ The military pension is noncontributory, and so it would not be divisible there. The Thrift Savings Plan, however, is divisible in Puerto Rico because it is based on marital contributions.

There may be several states which could divide COL Roberts' military pension. To minimize his exposure, COL Roberts will want to "shop around" for a jurisdiction that will either limit pension division (as with a vesting requirement), bar pension division entirely (Puerto Rico) or will otherwise allow military pension division on the best terms for him. COL Roberts can employ these divisibility provisions to his advantage in the pension division litigation. If he is stationed in Indiana, for example, he might decide to become domiciled there and then file for divorce in that jurisdiction so as to exclude his pension benefit from division. In like manner, Mrs. Roberts and her attorney will want to examine each state or territory which may have jurisdiction where she may file for division of COL Robert's pension to see whether the laws there allow such division. It is impossible for any individual attorney to know each of these state rules. The importance of this point for Mrs. Roberts' attorney is that it is vital to *shop around* for the jurisdiction that will allow military pension division on the best terms for Mrs. Roberts. For COL Roberts, the opposite approach would apply; he needs to find a jurisdiction which can hear his case but will deny the division of his pension. How to go about this forum-shopping, which is implicitly allowed by the triple jurisdictional approach of 10 U.S.C. 1408(c)(4), is found below.

Federal Jurisdiction.

If a state does not have jurisdiction *under federal law*, then that state may not divide COL Roberts' pension, regardless of his wife's wishes. As set out in the USFSPA, 10 U.S.C. 1408 (c)(4), a state may only exercise jurisdiction over a military member's pension rights if -

- That state is his or her domicile; or
- The member consents to the exercise of jurisdiction; or
- The member resides there (for reasons other than military assignment in that state or territory).

These statutory provisions override the more traditional long-arm statutes which allow the exercise of jurisdiction consistent with due process if there are sufficient minimum contacts with a state. These are explained in detail in "*Scouting the Terrain*."

How can Mrs. Roberts use these to her advantage? Here are the key points for the nonmilitary spouse's attorney to remember in the jurisdiction arena:

Find the Right Place to File Suit. If COL Roberts is domiciled in Alaska, then sue him there. Bringing the suit in Virginia, where Mrs. Roberts is now residing, ensures that there will be a jurisdictional battle unless COL Roberts' attorney is asleep at the wheel or else COL Roberts doesn't care.

Consider the "Vesting" Issue. If vesting of the pension (or some other limitation on pension division) is required in the *state of suit*, and also in the *state of domicile*, then it probably would not make any difference where he's sued. Likewise if neither her state nor his domicile state has a pension division limitation, it probably won't make any difference. But if COL Roberts is domiciled in a state or territory

which has a limitation on pension division (such as “vesting”), then the choice of a forum for the lawsuit could be critical if he is not vested in his pension (usually 18 or 20 years of service, depending on state law). Don’t sue him in a jurisdiction that has a limitation on pension division, such as vesting, if he isn’t vested. Find a way to sue him in a state that has no such pension division limitation. Here’s how:

- Just because domicile is required for one of the tests above doesn’t mean that you cannot sue COL Roberts in another place and acquire jurisdiction *if he consents*. So you will need to find a jurisdiction where you can sue him that doesn’t have a pension division limitation. If he’s domiciled in such a limiting state, consider suing him where Mrs. Roberts lives (which, hopefully, is not such a jurisdiction). If she’s in such a state, consider suing him in his domicile (hopefully not a state that limits pension division).
- What is the next step? Because of the complexity of this area, get on the phone to associate competent co-counsel right away. You’ll need a good attorney to go to court for Mrs. Roberts who knows military pension issues and also jurisdiction. In other words, a good military divorce attorney who’s also knowledgeable on civil procedure issues.
- One issue to discuss is how to get COL Roberts to file an answer or some other pleading that will be treated as a general appearance and will result in the court’s having jurisdiction over him. Consider suing first for custody and alimony, for example, to ensure that he “joins in the fight.” By filing motions or responsive pleadings, he’ll be calling upon the power of the court to adjudicate his case, which may (under the law of that jurisdiction) amount to *consent to jurisdiction*. Then Mrs. Roberts can amend her pleadings to add a claim for pension division (if that’s necessary under the state statutes). The issue of general appearances and specific consent is covered in more depth in the “*Scouting the Terrain*.”
- COL Roberts may make a request for a stay of proceedings under the Servicemember’s Civil Relief Act (SCRA) while he’s deployed in Southwest Asia or undergoing training “out in the field.” This *would not* subject him to the court’s jurisdiction since the SCRA specifically states that a motion for a stay does not waive any defense of the servicemember, including jurisdiction.
- Even if the pension has been defined as non-divisible because it’s not vested, (or for some other reason), don’t give up. The courts may decide that, because such a large asset is not divisible as marital or community property, the rest of the property should be divided unequally in favor of Mrs. Roberts in order to compensate for this inequity.⁶

Bluff. Be aware that it may be COL Roberts’ strategy to make sure that his wife has to expend the maximum amount of money to get a piece of his pension. He may want to ensure a fight in two states – the *state of suit* and the *state of his domicile* -- to try to get her to back down. Or perhaps he’s sure that she won’t spend the time or money to try to get counsel in State #2 to ask for a piece of the pension. If this is the case, then her attorney may have to do some hard bargaining to adjust the property division in light of his pension not being divided. As counsel for Mrs. Roberts, you would certainly want substantial concessions on other property or alimony issues in exchange for not pursuing the military pension.

The Danger of a Default Judgment. When there is a lawsuit pending for pension division and the SM has not filed an answer, be aware of one important matter regarding entry of a pension division order. Don’t be tempted to get a default judgment for pension division when you’re not clearly in the state of domicile of COL Roberts. If you do get one, here’s what may happen:

- You probably don’t have jurisdiction in State #1 (which is not his domicile) over the pension because you do not have his consent. Unless the SM consents to the court’s jurisdiction, which does not occur in a default divorce and property division, the judge does not have the power to divide the military pension. The only (rare) exception to this is where the court is in a state where the member resides for reasons other than military assignment.
- DFAS will examine your “perfectly good” military pension division order and then reject it for lack of jurisdiction.

- This will probably make your client very unhappy -- in terms of lost time, lost payments of pension, and wasted attorney's fees.
- You will then probably try to sue him elsewhere, in State #2, since you can't "fix" this order.
- And this will likely be his state of domicile.
- But you'll have to hire an attorney there and Mrs. Roberts will wind up paying a *second* retainer to a lawyer in order to "do it right" this time (or *you* may wind up paying the retainer if she starts talking about malpractice or a bar grievance).
- And after you've engaged the attorney, you may find out that you *cannot* get pension division there. The opposing attorney will invariably argue that Mrs. Roberts went to court in State #1 where she got the court to assert jurisdiction over the pension and to divide it.
- And therefore State #2 cannot do it over again. Exclusive jurisdiction was acquired earlier by State #1. A second state cannot also assert jurisdiction over the division of the pension after the first state has already divided it. Opposing counsel will probably succeed in her motion to dismiss, and your client will have *lost* any rights to military pension division.

Type of Pension

The pension rights contemplated by USFSPA involve nondisability "longevity retirement" under 10 U.S.C. 1401-12, not retirement for disability under 10 U.S.C. 1201-21. In *Mansell v. Mansell*⁷ the U.S. Supreme Court in 1989 held that VA disability compensation is not divisible under USFSPA, and that the states may only divide "disposable retired pay" as that term is defined in USFSPA. This means that COL Roberts, by electing disability pay instead of retired pay, may defeat Mrs. Roberts' claim to his pension benefits. A short summary of the system is found in "*The Servicemember's Strategy*."

Thus COL Roberts can, by his own actions, reduce his disposable retired pay by electing VA disability pay if his VA disability rating is less than 50%, due to a dollar-for-dollar setoff under federal law. For Mrs. Roberts' lawyer, it should be noted that the careful drafting of a marital settlement agreement is the key to indemnifying the nonmilitary spouse when this situation might occur in the future. For a good example of this, see *Owen v. Owen*, a Virginia Court of Appeals case.⁸ In that case a settlement agreement provided for a guarantee/indemnification clause which required the retiree to pay the same amount of support to the spouse as was waived by the federal statute due to the retiree's receipt of VA disability pay. This was held not to violate the mandate of the *Mansell* case. Such a clause might state:

If the husband takes any action (such as accepting disability pay) that reduces the pay the wife receives, then he shall pay her directly the amount by which her share is reduced. In addition, he hereby consents to the deduction of this amount from any periodic payments he receives (such as wages) to allow this payment to wife, and this clause may be used to show said consent when this is necessary for the entry of a garnishment, wage assignment or income withholding order.

To further protect the nonmilitary spouse, it is advisable to include in the agreement, order or judgment a provision that the division of the military retirement is based on *no waivers* for disability pay and consents to the continuing jurisdiction of the court on the issue of property division (in the event that the military member still elects to apply for a waiver). These are especially important ways to insulate the spouse from conduct of the member which defeats the purpose of the award by reducing the amount of disposable retired pay that is subject to division and direct payment through DFAS.⁹

Here are some additional pointers on the language needed for "full body armor" to protect the spouse and maximize her chances for recovery:

- State the facts and assumptions behind the settlement or clause [“John is an LTC with over 16 years’ service in Army, and he will receive a pension based on longevity after at least 20 years of service.”]
- State the intent of the agreement or order [“Mary is to receive an unreduced share of pension based on years of service”]
- Indemnify the spouse as to expenses – this can be a general statement applicable to both parties [“Each party will pay for all expenses and damages incurred because of the other’s breach of this agreement.”]
- Include interest on any unpaid amount [“The breaching party will also pay interest at the statutory rate on all unpaid amounts and damages.”]

Roadblocks and Minefields - Summary

The above discussion shows clearly the need for competent and creative lawyering. It is vital to ask questions -- lots of questions -- to make sure that the case for Mrs. Roberts is on a firm factual footing. Where is COL Roberts’ domicile? Is it in Indiana or Arkansas? If so, is his pension vested?

It is just as important to think before one acts. If there is a valid jurisdictional objection to a pension division claim filed against COL Roberts, why file the lawsuit? What will be gained? Can Mrs. Roberts draw him out so he’ll have to file an answer, which will waive the jurisdictional objection? What if he files a motion to continue instead of an answer? What about a motion to dismiss? The answer to these questions lies in the law of the states involved.

Dividing the Military Pension – Crossing the Minefield

Once it is understood how to set up obstacles to pension division, the next step should be to understand how to overcome them and divide the pension once the court has acquired jurisdiction over it. There are generally two methods available for pension division. Both of these topics are covered in “*Scouting the Terrain*.”

The first is *deferred division*, often called “if, as and when” payments. This refers to sharing payments received by the retiree. This is the most common way of allocating the pension between the spouses. In the usual situation, a share of the husband’s pension is paid to the wife. This can be done by DFAS if the marriage and the length of service overlap by at least 10 years; otherwise the payment must be made by the SM. Note that this “10-year rule” is not a federal rule of divisibility; as a matter of federal law it has nothing to do with the eligibility of Mrs. Roberts for pension division. It’s only a method of enforcement. It determines how she gets paid – by DFAS, rather than by COL Roberts. And this can be very important if he’s likely to move to another state (or country) after retirement.

The second method of division involves a *present value setoff*, in which property or money is traded against the present value of the pension. In this scenario, the house and other property go to Mrs. Roberts and the pension goes to COL Roberts (if they are approximately equal in value).

Opening the Attack

When dividing the military pension on a *deferred division* basis, there are four separate ways to allocate the division that will be accepted by DFAS for direct payments to Mrs. Roberts. These are treated at length in “*Getting Military Pension Division Orders Honored by DFAS*.” According to the regulations on military pension division, published in the Defense Department’s Financial Management regulation (at www.dod.mil/comptroller/fmr/07b/07b29.pdf), these four methods are:

Fixed dollar amount. This might read: *Jane is awarded \$550 per month, payable from Bill’s retired pay.*

Percentage clause. This could state: *Jane is granted 50% of Bill’s retired pay.*

Formula clause. This is usually used when a SM is on active duty (or a Reservist is still drilling). It is an award expressed as a percentage of a fraction. The percentage is the share Mrs. Roberts gets of the marital

portion of the pension. The fraction (in the majority of states) is the period of marital pension service over the total period of pension service. For example, the order could state: *Jane shall receive 50% of Bill's retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband.* The court must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service.

Hypothetical clause. This is an award based on a rank or status which is different from that which exists when the SM retires. For example, the order might say: *Jane is granted 40% of what a major would earn if he were to retire with 18 years of military service in 2001.* This is often used when state law requires that the share of the pension awarded to the spouse be determined according to the grade and years of service of the member at a specific date (see below). A COLA (cost-of-living-adjustment) will automatically be awarded with each of these except the first.

Note that when a Guard or Reserve pension is involved, DFAS will not only honor orders specifying division according to retirement points earned during marriage divided by total points, but it will also honor a percentage award (such as "John will pay Mary 35% of his Army Reserve retired pay"). The only time when retirement points *must* be used is when a "formula clause" is involved.

Fixed Rank Division

Sometimes the SM's attorney will try to structure a pension division that "fixes" the rank and years of service of COL Roberts at the date of divorce or separation. Let's see what the alternatives are. With a 20-year marriage during military service, the clause Mrs. Roberts would want usually looks like this (when COL Roberts is still on active duty):

Husband shall pay to wife, at such time as he retires, one-half of his disposable retired pay times a fraction, the numerator of which is 20 years of marital pension service and the denominator of which is his total years of military pension service. The hypothetical date of retirement is October 1, 2001.

But the one proposed by the SM's attorney will probably look like this:

Husband shall pay to wife, at such time as he retires, one-half of the disposable retired pay of a colonel with 20 years of creditable service, times a fraction, the numerator of which is 20 years of marital pension service and the denominator of which is his total years of military pension service. The hypothetical date of retirement is October 1, 2001.

Avoid a division of pension that excludes future promotions and years of service (while retaining a denominator of total years of service for the marital fraction) unless your state law demands it. Always argue that the division should include future promotions and years of service. Why shouldn't you accept such a clause? There are two reasons:

- First of all, the husband's post-divorce promotions and continued service are based on the foundation of marital efforts in most cases. In other words, COL Roberts might never have made it to the rank of brigadier general were it not for the marital efforts of Mrs. Roberts during those years when he was a captain, a major, a lieutenant colonel and a colonel.
- The second reason is that, while we have "frozen" the rank and years of service of COL Roberts (so that Mrs. Roberts is excluded from any portion of his pay if he gets promoted to general), we have not frozen the denominator in the marital fraction. Thus the bottom part of the fraction keeps on growing, but the grade and years of service of COL Roberts are frozen, and that's not fair. To be logical, consistent and fair about this, either the grade and years of service should go up with the total years of

military service (which is the denominator in the marital fraction), or else the denominator should be frozen along with the grade and years of service. Don't mix apples and oranges!

Reserve and National Guard Pension Rights

There are *two key considerations* in dividing retirement rights for members of the Reserve or National Guard. First, since Guard and Reserve personnel do not begin (in general) to get paid until age 60 (regardless of when they retire), this deferral of payment must be taken into account in the negotiations and the present value calculations.

The second consideration concerns the marital fraction. In those cases where the marriage and the service career do not exactly overlap, the nonmilitary spouse usually receives one-half of the marital fraction times the SM's pension benefit. This marital fraction should be computed twice -- once using marital years of service over total years of service, and then again using marital retirement points over total retirement points -- to determine which computation will best benefit the client.

To see what a difference this might make, let's take an example. Major Bill Smith has five years of Army active duty and 15 years of Army Reserve service. He married when he left active duty.

When dealing with Reserve or National Guard issues, be sure to ask the SM for a copy of his most recent "points statement" to see how many points have been acquired and how many were during the marriage.¹⁰ To calculate the marital fraction using points, calculate the points he acquired during active duty by multiplying 5 times 365 to get 1825 points. Then count his Reserve points. Assume that he acquired 60 points a year (for weekend drill, "summer camp" and membership) for 15 years, or 900 points. Thus his total points at 20 years are 2725 [1825 + 900], of which 900 (or about 33%) are marital. This should mean that 33% of his retirement pay (assuming retirement and date of separation both occur at year 20) is marital.

If we apply the marital fraction *using years* to his retirement pay, however, then his pension is 75% marital (15 years/20 years = 75%).

What a difference! Recognition of these two ways of calculating the marital benefit, and the difference when Major Smith's pension is calculated, is essential to competent representation in the Guard/Reserve pension case. Once again, the federal statutes do not tell us what to do, what fraction to use or what results to expect. This is state-law territory, not something set out in the USFSPA.¹¹

Dividing Disposable Retired Pay

When you represent the spouse, take care in drafting the terms for pension division. What is the basis for Mrs. Roberts' share -- retired pay or "disposable retired pay"?

The USFSPA states that disposable retired pay ("DRP") means total military retired pay less certain deductions. One of these -- at issue here -- is a deduction for VA disability compensation, pursuant to 10 U.S.C. 1408(a)(4). An award phrased in terms of *disposable retired pay*, if he has or gets in the future a VA waiver, may give her 50% of the marital share of something less than his retired pay. It would give her half of the marital share of a *lower number*.

The husband's lawyer might argue, "But wait -- what's the basis for the objection? Isn't it clear that the retired pay center (DFAS or the pay centers for the Coast Guard, Public Health Service or National Oceanographic and Atmospheric Administration) will only divide *disposable retired pay*?"

It is true that USFSPA states that -

- (d) Payments by Secretary concerned to (or for benefit of) spouse or former spouse.
- (1) After effective service on the Secretary concerned of a court order... with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse... with

respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order.

10 U.S.C. 1408(d)(1) [emphasis added].

Doesn't this mandate that the order state that "disposable retired pay" is what the court is dividing?

Here is where the confusion arises. It's true that the uniformed services retired pay centers will only divide *disposable retired pay*. But that doesn't mean that the retired pay center must have an order *phrased in terms of DRP*. So long as the order is otherwise clear and subject to calculation of a monetary amount, the pension division order can say just about anything regarding the money that it's dividing. This is because the rules, at least for DFAS, state that percentage awards are construed as a share of "disposable retired pay," regardless of how they are worded:

The designated agent will construe all percentage awards (such as a percentage of gross retired pay) as a percentage of disposable retired pay, regardless of the language in the order.

Department of Defense Financial Management Regulations, DoD 7000.14-R, Volume 7B, Chapter 29, "Former Spouse Payments from Retired Pay" ¶290601.D. (rev. February 2009). In general, the pay centers for the Coast Guard, PHS and NOAA follow DFAS regulations.

Under this rule, the order for pension division is not bound to state the benefit divided as *a percentage of DRP*. It can award the former spouse a percentage of the member's retired pay using any one of several phrasings. It can describe this as *military retirement benefits, pension* or *total military retired pay*. The decree can be stated in terms of *longevity deferred compensation benefits upon retirement*, or it can divide *gross retired pay*. Conceivably the award can call for the spouse to share in the SM's "chocolate and vanilla retired pay" and DFAS will interpret it as DRP!

But here's the rub. If counsel for the spouse believes that the pension division order must be *written in terms of DRP* - whether from reading the DFAS rules or a rejection letter received from DFAS - and drafts it accordingly, then the result will torpedo the spouse's future payments if -

1. the member/retiree has a condition, injury or illness which results in disability payments through the Department of Veterans Affairs with a rating of less than 50%, or
2. the member/retiree has a rating of 50%-90% and elects compensation for certain conditions through Combat-Related Special Compensation (CRSC).

Either of these will reduce pension share payments. And such a pension reduction will reduce the money that the spouse/former spouse receives.

This bad outcome is not necessarily due to the negligence of counsel for the former spouse. In fact, it is a problem that is enhanced by the superior knowledge of the former spouse's attorney, reminding us that "A little bit of knowledge is a dangerous thing." The one who appears to know the rules - "DFAS only divides DRP, so phrase your order in those terms" - is the one who is penalized. The savvy attorney (for the former spouse) will write the order in terms of *total pension, gross retired pay*, or *military retirement benefits*. He or she will see the same result in the garnishment from the retired pay center (*i.e.*, it will still be the appropriate share or percentage of DRP), but there will be a *potential remedy* if the retiree elects disability compensation, as mentioned above, instead of straight longevity retired pay. This is because the division of *gross* or *total* military retirement leaves a non-garnishment remedy, such as contempt or indemnification, in the hands of the spouse and the court. USFSPA, at section (e), states -

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the

grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. §1408(e).

An example might help to explain how this works. In 2010 the author was hired to testify as an expert in a Missouri case. The clause at issue read:

- 1) PENSION SHARE. Jane Doe, the wife, is to receive 40% of the disposable retired pay of John Doe, the husband.
- 2) INDEMNIFICATION. John Doe shall do nothing to reduce the share or amount due to Jane Doe from the above-stated 40% of his disposable retired pay.

The indemnification clause was worthless, because there is nothing that John can do – after DRP is calculated – to reduce Jane’s share. This is because the mischief, if any, is done “above the line.” A reduction due to his election of CRSC or taking a VA waiver (if his rating is 40% or less) occurs before the resulting DRP (thus “above the line”) – it is an operation done on total retired pay that results in its reduction, to arrive at disposable retired pay. And disposable retired pay is what DFAS will divide; it cannot pay a distribution based on some other amount.

The initial calculation (ignoring any SBP premium) looks like this:

Total retired pay – disability deduction = disposable retired pay.

The “disability deduction” is either a VA waiver, if the retiree has a rating of less than 50%, or the reduction caused by electing CRSC. As is explained in the SILENT PARTNER entitled *Military Pension Division: The “Evil Twins” – CRDP and CRSC*, lost pension money due to the VA waiver is gradually restored through Concurrent Retirement and Disability Pay (CRDP) when the individual has a rating of 50-90% from the Department of Veterans Affairs. Electing CRSC wipes out CRDP. You cannot receive CRDP if you elect CRSC. It not only eliminates *current* CRDP, but it also results in a collect-back action by DFAS for all past CRDP paid, whether to spouse or retiree.

The “Latent Pension” - Federal Employment and Other Mischief

Another problem arises when a SM leaves military service for a job with the federal government before he’s eligible to retire. Few civilian lawyers (and even fewer spouses!) realize that a member can “roll over” his retirement into a federal civil service job and get a year-for-year credit on civil service retirement based on the time he spent in the military. Even fewer lawyers and spouses have the foresight to anticipate this situation will occur “a few years down the road” and possess a working knowledge of the statute allowing this credit. The way to handle the problem -- by anticipatory drafting -- is to include a clause that states:

If Defendant fails to retire from military service and elects to “roll over” or merge the time of his military service into federal government service in order to get credit for same, then the Plaintiff shall be entitled to her share of any federal retirement pay or annuity he

receives based on the parties' period of marriage during Defendant's period of military service. Defendant shall notify Plaintiff immediately upon his termination of military service, through retirement or otherwise, and shall include in said notification a copy of his military discharge certificate, (DD Form 214), and, if applicable, his retirement orders and certificate. Defendant shall also notify Plaintiff immediately if he takes a job with the federal government, and will include in said notification a copy of his employment application and his employment address.

A similar problem arises if John Doe has been in the military previously, whether Guard/Reserve or on active duty, but is not in either situation when the divorce settlement occurs. Lulled to sleep by the absence of any present pension benefit, counsel for the spouse may overlook the fact that – just a few months after the case is tried or settled – John may get back into his uniform and return to military status, thus ensuring that he will have a pension down the road which he doesn't have to share with Jane, his by-now ex-wife. If he had anything more than a few years of military service under his belt when the settlement took place, the result for Jane is the loss of many thousands of dollars in potential pension benefits, since John is using "marital years" that were over looked in the settlement as the basis, in part, for his upcoming retirement. The pension benefit is "latent" since it is not obvious at all to the ordinary practitioner. Unless there's a crystal ball in the room, most lawyers would not be aware of this problem.

To provide some safeguard for Jane Doe in this situation, set out terms in the divorce decree or court order that allow the re-opening of the property division clause to let the court inquire into potential pension division rights which did not exist at the time of the settlement or hearing, so that the spouse may claim her marital share of these rights should he become eligible to retire from this service.

Caring for the Survivors: Survivor Benefit Plan and Life Insurance

After the battle comes caring for the survivors. Its equivalent in the area of military pension division is deciding on a replacement for the SM's pension at his death.

The Survivor Benefit Plan is the usual issue at stake here. An overview of this survivor annuity is covered in *'Scouting the Terrain.'* Also found there is a summary of the benefits and disadvantages of SBP coverage.

Especially when deferred division is used, the attorney for the spouse of the servicemember should insist on SBP coverage to allow continued receipt of retirement benefits if the spouse survives the member. This is a valuable tool in planning for continued income for the nonmilitary spouse.

The most likely strategy for the SM in this area is *silence*. If no one says anything about SBP, then COL Roberts won't have to elect coverage, which will save him money and also retain this option for a remarriage and a new wife, if that's in his future. Thus you'll need to *speak up* if you want to protect Mrs. Roberts in this area.

If there is a discussion about SBP, then the SM's attorney will want to deflect the conversation into *death benefits in general*, of which life insurance is the most obvious choice. Life insurance for Mrs. Roberts would probably be cheaper than SBP (which generally cost 6.5% of the base amount selected), and it has the advantage of paying Mrs. Roberts a lump-sum cash amount at his death, rather than doling out the monthly payments to her. If there's a dispute, they may offer to split the cost with Mrs. Roberts – each will pay half the premium. Even better for him, they may propose to include the premium in the amount of alimony, if any, that COL Roberts would pay Mrs. Roberts; that way, the premium will be deductible for him at tax time each year.

Often the SM says, "Why doesn't my wife have to pay for SBP? After all, she wants it! I'll be dead and gone by the time she gets it. She should have to pay the premium." Unfortunately for the SM, it doesn't work that way with DFAS. They won't shift the premium to Mrs. Roberts since the SBP premium, according to USFSPA, comes off the top before determining disposable retired pay. This

results in the parties *both* paying the SBP premium in the same ratio as the pension is divided. But the parties can accomplish the same thing by adjusting the percentage that Mrs. Roberts receives. See the “*The Servicemember’s Strategy*” for information on how to do this.

When the other side tries to avoid the issue or change the subject, it’s important for Mrs. Roberts to decide on her strategy. Here are some examples.

If she wants SBP coverage and has no interest in alternatives, then stick to that. Don’t engage in discussions about life insurance. The counter-argument for the former spouse to make (when there is an attempt to shift the entire cost of the former-spouse SBP coverage to her) is this:

- There is no cost associated with the servicemember’s death benefit, so why should I pay for the SBP?
- The *SM’s death benefit* is what happens if the former spouse dies first. If she or he passes away before the SM, then the entire pension is restored to the servicemember.
- There is no cost or premium associated with this death benefit for the SM.
- Thus it’s unacceptable for the FS to pay for the cost of *his/her death benefit*, while the SM gets a death benefit for free!

At the end of the argument, it may be possible to achieve a compromise by either leaving the premium payments the way they were (i.e., “taken off the top” by the retired pay center, which means that each party, in effect, pays in proportion to the share of the pension he or she gets) or else by dividing the SBP premium 50-50 between the parties.

If you’re interested in life insurance, make sure that you don’t use Servicemembers Group Life Insurance (SGLI). According to a 1983 Supreme Court decision called *Ridgway v. Ridgway*¹², you cannot enforce a court order or separation agreement that provides for SGLI to secure the payment of a divorce settlement.

And if you’re interested in life insurance, be sure to transfer ownership of the policy to your client. Such provisions for life insurance are commonly funded or secured by “owned” policies which belong to the premium payor and build up cash value or equity (e.g., whole life, variable life or universal life policies), ones which belong to the payor but build up no cash value (term life insurance), and ones which have no equity/cash value and do not belong to the person who pays the premiums (group life policies).

Remember this when drafting a clause that attempts to ensure that the premium payor will not inadvertently (or intentionally) change the beneficiary to a new spouse, for example, in lieu of the beneficiary stated in the agreement. How will the other party ever know whether the intended beneficiary remains as such when the policy and all incidents of ownership remain elsewhere--with the payor or his employer? How can one prevent the payor from signing an agreement containing a life insurance clause and then immediately breaching it by designating a new beneficiary?

The answer is through policy ownership. Except in the case of group life insurance policies (including SGLI), most insurance companies allow a collateral assignment of ownership of the policy to a person other than the premium payor. The policy owner is the one who designates the current beneficiary and who must consent to any proposed change in beneficiary. The owner must be informed by the company of any attempts to cancel the policy, and must also be advised as to nonpayment of premiums that would have the effect of canceling coverage. Finally the owner is the only one who, with life insurance that has cash value, can borrow against the policy. Since these are the very things which ought to be withdrawn from the premium payor--the power to borrow against the policy, cancel it or change the beneficiary--it makes sense to agree on transfer of ownership of the insurance policy.

Ownership of the policies can revert back to the original owner after the support terms have been satisfied. A transfer of ownership has the effect of protecting each party, preserving their promises and putting temptation out of the way.

Extra Benefits for Consideration. You'll find an overview of early-out options (VSI/SSB), military medical benefits and dividing accrued leave in "*Scouting the Terrain*." Here are some specific tips you need to know about representing the military spouse in regard to additional benefits.

Accrued Leave. When it comes time to do the division and distribution of marital property, one often-overlooked asset is accrued leave for the military member. Each person in the military service on active duty accrues 30 days of paid leave each year, regardless of rank. This leave is worth what it's equivalent would be at the monthly pay rate of the servicemember, and this can be figured out by using the pay tables available at the nearest recruiter's office or at www.dfas.mil, the DFAS website. Thus if a servicemember is paid \$4,400 gross pay per month and he has 45 days of accrued leave at the point of evaluation (e.g., date of separation, date of filing, date of marital breakdown.), his accrued leave would be worth about \$6,600 [45/30 x \$4,400]. Since senior enlisted members and officers frequently carry as much as 60 days of accrued leave from year to year, this is a significant asset to consider in the division of marital property.

Member's Medical Benefits. A separate issue that bears mentioning is the valuation of the member's medical benefits. If Colonel Roberts retires after 20 years of service, he will receive *free* medical care at any military medical facility on a space-available basis. He also receives military medical insurance, currently called TRICARE, for most medical expenses he incurs. All of this can be evaluated by an expert, and this value can be attributed to COL Roberts as part of the retirement benefits he receives.¹³ So many attorneys are concerned solely with the evaluation of retired pay that they forget the valuation of *other retirement benefits* that should be included. Since this medical care for COL Roberts is part of his retirement benefits, so the argument goes, it should be included for valuation purposes, even if the statutory benefit cannot be transferred to Mrs. Roberts. Such an approach may yield a substantially better settlement for Mrs. Roberts than the valuation of only her husband's pension payments. It should also be pointed out that this valuation approach, of course, can also be applied to Mrs. Roberts' own marital medical benefits and entitlements; these can also be valued and added to *her* share of the marital property to the extent they were acquired during marriage.

Spouse's Medical Care. Pub. L. 98-525, the Department of Defense Authorization Act of 1985, expanded the medical (and other) privileges set out in Pub. L. 97-252 to extend certain rights and benefits to unmarried former spouses of military members.

If the former spouse was married to a member or former member for at least 20 years during which he performed at least 20 years of creditable service (also called "20/20/20" spouses, which refers to 20 years of service, 20 years of marriage, and 20 years of overlap), then she is entitled to full military medical care, including TRICARE, if she is not enrolled in an employer-sponsored health plan. She is also entitled to commissary and exchange privileges.¹⁴

If the former spouse was married to a member or former member for at least 20 years during which he performed at least 15 years of creditable service (also called "20/20/15" spouses, for 20 years of service, 20 years of marriage and 15 years of overlap), and the former spouse is not enrolled in an employer-sponsored health plan, then the length of time that she is entitled to full military medical care, including TRICARE, depends upon the date of the divorce, dissolution or annulment, as set out below. No other benefits or privileges are available for her.

If the date of the final decree of divorce, dissolution or annulment of marriage was before April 1, 1985, then the former spouse is authorized full military medical care for life, so long as she does not remarry. If the decree date is on or after April 1, 1985, then she is entitled to full military medical care, including TRICARE, for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, she may purchase a conversion health policy¹⁵ under the DOD Continued Health Care Benefit Program (CHCBP), a health insurance plan negotiated between the Secretary of Defense and a private insurer, within the 60-day period beginning on the later of the date that she ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe.

Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(2)(H) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.¹⁶ Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is *not* part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse may also obtain indefinite medical coverage through CHCBP (under 10 U.S. Code 1078a) if she or he meets certain conditions. The former spouse:

- Must be entitled to a share of the servicemember's pension or SBP coverage;
- May not be remarried if below age 55;
- Must pay quarterly advance premiums; and
- Must meet certain deadlines for initial application.

Details regarding application for this "CHCBP-indefinite" coverage may be found at www.tricare.mil/chcbp/default.cfm. The coverage is the same as that for federal employees, and the cost is the sum of the following: premium for a federal employee, plus premium paid by the federal agency, plus 10%. This amounts to less than \$350 per month as of 2010.

It is important to remember that *these are statutory entitlements*; they belong to the nonmilitary spouse if she or he meets the requirements of federal law set out herein. They are not terms that may be given or withheld by the military member, and thus they should not be part of the "give and take" of pension and property negotiations since the military member has no control over these spousal benefits.

* * *

ENDNOTES

¹ Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* (McGraw Hill), §6.09, p. 340 (2009-2010 Supp.).

² *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000); *see also Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1991).

³ *Dowden v. Allman*, 696 N.E.2d 456 (Ind. Ct. App. 1998); *see also Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990) and Indiana Code §31-15-7-4.

⁴ Ala. Code § 30-2-51.

⁵ *See Delucca v. Colon*, 119 P.R. Dec. 720 (1987).

⁶ *See, e.g., Atkinson v. Chandler*, 130 N.C. App. 561, 504 S.E.2d 94 (1998) (affirming judge's award of larger share of marital estate to wife of servicemember's whose pension was exempt from division because it was not vested, which was a requirement for pension division in North Carolina until October 1, 1997).

⁷ *Mansell v. Mansell*, 490 U.S. 581 (1989).

⁸ *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).

⁹ For cases allowing the reopening of a property division judgment based on a retired member's waiver of retired pay in order to receive VA disability benefits, *see Torwich v. Torwich*, 660 A.2d 1214 (N.J. Super. 1995); *Clausen v. Clausen*, 831 P.2d 1257 (Alaska 1992); and *McMahan v. McMahan*, 567 So.2d 976 (Fla. Dist. Ct. App. 1990).

¹⁰ The document for the Army Reserve is AHRC Form 249-2E, DARC Form 249, or AGUZ Form 115. For National Guard points, *see* NGB Forms 22 and 23. The Air Force Reserve document is AF Form 526, and the Navy Reserve

document is NAVPERS Form 1070-161. For the Coast Guard Reserve, obtain CG HQ Form 4973.

¹¹ For cases holding that classification of the marital part of a Reserve pension could be based on "marital points" divided by "total points," see *In re Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979) and *In re Beckman*, 800 P.2d 1376 (Colo. Ct. App. 1990). Some states, on the other hand, require calculation of the marital fraction based on time, not "points" or some other factor. See, e.g., N.C. Gen. Stat. 50-20(b), which states, "The award shall be determined using the proportion of time the marriage existed, (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment."

¹² *Ridgway v. Ridgway*, 454 U.S. 46, 102 S. Ct. 49, 70 L.Ed. 2d 39 (1981)..

¹³ See W. Horbatt and A. Grosman, *Division of Retiree Health Benefits on Divorce: The New Equitable Distribution Frontier*, 28 FAM.L.Q. 327 (Summer 1994).

¹⁴ 10 U.S.C. § 1062.

¹⁵ 10 U.S.C. § 1086 (a).

¹⁶ 10 U.S.C. § 1078 a (g) (1) (C).

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Military Pension Division: The Servicemember's Strategy

Waiver. Mrs. Roberts' rights may have been waived. Did she sign a separation agreement or property settlement agreement? A premarital agreement can also waive property division rights. In some jurisdictions, such an agreement does not have to define specifically the property that is involved or that is exempted from division. In those states, even if there is no mention of the pension, a general clause in the agreement which waives the marital rights of the parties can be construed as barring a claim for equitable distribution.

Nonvested or Nondivisible Pension Benefit. There are only a few jurisdictions which provide that, by law, a military pension may not be divided. These fall into the following categories: states where there is a "vesting requirement," one state where ten years of marital military service is required and one jurisdiction which bars division of any non-contributory pension plan.

A pension is vested when the employee is entitled to receive something upon termination of employment, whether that is in the form of a return of contributions, regular retired pay or an early (and reduced) retirement benefit. A service member with 11 years of service, for example, would not have a vested pension because there is no right to retire after 11 years' service. A member with 25 years of service, on the other hand, would clearly have a vested retirement benefit.

There are two states, Indiana² and Arkansas,³ which limit court jurisdiction over pension division to those pensions which are "vested." Alabama law provides unique limitations on pension division jurisdiction: retirement benefits are not divisible as marital property unless the employee or "owning spouse" has ten years of pension service during the marriage.⁴ The benefit must also be vested and must be valued to be divided.

A fourth jurisdiction, Puerto Rico, does not allow the division of noncontributory pensions at all. Puerto Rico treats these pension rights as separate property.⁵ Thus a military pension would not be divisible there although the Thrift Savings Plan, being contributory, would be divisible by the courts.

There may be several states which *could divide* COL Roberts' military pension. To minimize his exposure, COL Roberts may want to "shop around" for a jurisdiction that will either limit pension division (as with a vesting requirement), bar pension division entirely (Puerto Rico) or will otherwise allow military pension division on the best terms for him. COL Roberts can employ these divisibility provisions to his advantage in the pension division litigation. If he is stationed in Indiana, for example, he might decide to become domiciled there and then file for divorce in that jurisdiction so as to exclude his pension benefit from division. In like manner, Mrs. Roberts and her attorney will want to examine each jurisdiction where she might be able to file for division of COL Robert's pension to see whether the laws there allow such division.

It is impossible for any individual attorney to know each of these state rules. To find out the rules in an individual state, contact a lawyer there who specializes in family law and divorce.

The importance of this point for Mrs. Roberts' attorney is that it is vital to *shop around* for the jurisdiction that will allow military pension division on the best terms for Mrs. Roberts. For COL Roberts, the opposite approach would apply; he needs to find a jurisdiction which can hear his case but will deny the division of his pension. How to go about this forum-shopping, which is implicitly allowed by the triple jurisdictional approach of 10 U.S.C. § 1408(c)(4), is found below.

Federal Jurisdiction. If a state does not have jurisdiction *under federal law*, then that state may not divide COL Roberts' pension, regardless of his wife's wishes. As set out in the USFSPA, 10 U.S.C. § 1408 (c)(4), a state may only exercise jurisdiction over a military member's pension rights if:

- That state is his or her domicile; or
- The member consents to the exercise of jurisdiction; or
- The member resides there (for reasons other than military assignment in that state or territory).

These statutory provisions are explained in detail in the Silent Partner, *Military Pension Division: Scouting the Terrain*. They are limitations on pension division which exist in addition to traditional state

long-arm statutes, which allow the exercise of jurisdiction consistent with due process if there are sufficient minimum contacts with a state.

How can the SM use these to his advantage? The primary way is not to allow “jurisdiction by consent” to pave the way to division of his pension if he has truly decided on a course of *complete resistance*. This might involve one of the next two approaches.

Meritorious Issue. Assume that COL Roberts is domiciled in a state where division of the pension is limited or barred (e.g., Arkansas), *and* his wife has sued him in a state that has no such limits on pension division. In this situation, his not consenting to military pension division could *save* his pension.

Due to the complexity of this subject, is to be sure he has skilled counsel in both jurisdictions. Don’t even try to get a continuance while he’s “out in the field” without advice from co-counsel. The issues and tactics are too difficult for the average JAG officer or civilian attorney, and it isn’t worth your professional reputation (or malpractice liability) to try to disprove this. Seek out competent co-counsel, as your state rules of professional require. Contact a consultant or an expert witness who can provide the due diligence and the extra margin of safety.

Even then, don’t assume you’re “out of the woods” with the pension being defined as non-divisible. The court may decide that, because such a large asset is not divisible as marital or community property, the rest of the property should be divided unequally in favor of the nonmilitary spouse in order to compensate for this inequity.⁶

Bluff. COL Roberts may want to make sure that his wife has to expend the maximum amount of money to get a piece of his pension. He may want to ensure a fight in two states – State #1 (the *state of suit*) and State #2 (the *state of his domicile*) – to try to get her to back down. He may be convinced that she won’t spend the time or money to try to get counsel in State #2 to ask for a share of the pension, which means that you may have to do some hard bargaining to adjust the property division in light of his pension not being divided. Counsel for Mrs. Roberts would certainly want some concessions on other matters in exchange for not pursuing the military pension.

Type of Pension

The pension rights contemplated by USFSPA (the Uniformed Services Former Spouses’ Protection Act) involve non-disability “longevity retirement”, not retirement for disability under Title 10, Chapter 61, or disability compensation under Title 38. In *Mansell v. Mansell*⁷ the U.S. Supreme Court in 1989 held that at the time of divorce, a court may divide only “disposable retired pay” as that term is defined in USFSPA, and that is what the retired pay center¹ will allocate in a pension garnishment for property division. Disability pay is a complicated issue. A member’s case may involve two different systems for disability benefits.

Military Disability Retired Pay. Military disability retired pay is available for those members who are sufficiently disabled that they cannot perform their assigned duties. If a member has enough creditable service, he or she may be placed on the disability retired list and may begin to draw disability retired pay. When a SM is rated as disabled by the uniformed services, that means that he is unfit to perform his duties consistent with his rank and position. Such a servicemember, if the military rating (not the VA disability rating) is 30% or more, will be able to retire with military disability pay.

The SM’s amount of disability retired pay would be based on the higher of two different amounts of pay. There are three steps to this process. For the purposes of this example, assume that the SM has an active duty base pay of \$3,000 per month, 20 years of creditable service and a disability rating of forty percent (40%).

¹ For the Army, Navy, Air Force and Marine Corps, pension division garnishments are handled by Garnishment Operations at DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

- Years of Service Calculation: The first step is to calculate the SM's normal retired pay based on his years of service, which we will assume for this example is 2.5% times his years of service times his high-3 base pay. The "high-3" is the average of the three highest years of continuous compensation. Here we'll just assume that his "high-3" is \$3,000 a month. In this case, it comes to 2.5% X 20 years X \$3000, or \$1500.
- Percent of Disability Calculation: This calculation involves multiplying the SM's base pay times his disability rating. This is achieved by multiplying \$3,000 by 40%, or \$1,200.
- Result: The SM would then receive the *higher of these two amounts* (\$1500 per month in military disability retired pay in this example).

When the higher of the two amounts is based on *percent of disability*, no amount is divisible. If the higher is based on *years of service*, then USFSPA makes divisible *only the amount of pay that is the difference between the two above amounts*, that is, the difference between the SM's gross disability retired pay and his disability pay based solely on the disability rating. In this example, the difference is \$1,500 minus \$1,200, or only \$300 as divisible military retired pay. Thus although the SM's wife might be entitled to half of \$1,500, or \$750 per month as her spousal share of military pension rights, a disability retirement as shown in the above example would yield only half of \$300, or \$150 per month for her share of the pension. Her attorney should consider a provision for the agreement -- whether consent order or separation agreement -- that protects her interest in her husband's pension against a possible disability retirement in the future. This is discussed in the Silent Partner, *Military Pension Division: The Spouse's Strategy*.

VA Disability Benefits. A second system of disability retirement benefits is administered by the Department of Veteran's Affairs (VA). If COL Roberts' disability is not such as to qualify him for military disability retired pay, he might still elect to receive monthly payments from the VA. He can even elect VA disability pay when he's receiving military disability retired pay! To qualify for disability compensation from the VA, he would need to waive an equivalent amount of his military retired pay. Almost all retirees who can make this election do so. Why? There are two distinct benefits for the military client who is contemplating a divorce:

- While taking this option doesn't provide an increase in gross income, it does yield a net increase in pay since the VA portion of the SM's compensation is tax-free. Thus if the SM's pension (without disability) were \$1,600 per month and his disability were evaluated as equivalent to \$600 per month in VA benefits, he could waive the same amount of taxable longevity pension in order to receive this amount with no taxes on it. His monthly benefits would still total \$1,600, but only \$1,000 of this would be subject to taxes if he makes this choice.
- In addition, the VA benefit is not subject to division. Only the longevity-based portion of the pension is divisible in divorce court.

This latter "benefit" for the SM was the issue involved in the *Mansell* case.⁸ The Supreme Court, after reviewing the history of *McCarty* and USFSPA, proceeded to define the problem as one of statutory interpretation of 10 U.S.C. § 1408(c)(1), which allows the division of military pensions, and Section 1408(a)(4), which exempts VA disability benefits from "disposable retired pay." While the courts are allowed to treat disposable retired pay as community or marital property, the Supreme Court stated that -- at the time of divorce -- they were not allowed to treat *all* retired pay as such, only disposable retired pay. Thus the Court ruled that states are preempted from dividing at divorce the retired pay that a retiree has waived to receive VA disability pay. As 10 U.S.C. § 1408(a)(4) now reads, both these types of disability benefits are exempted from division to the extent stated above:

"Disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which... (B) are deducted from the retired pay of such member as a result of ... a waiver of retired pay required by law in order to receive compensation under... title 38; (C) in the case of a member entitled to retired pay under chapter 61 of this title [10 USC

1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list).

Congress has taken steps to modify the VA waiver requirement by allowing concurrent receipt of both forms of payments – retired pay and VA disability compensation – for certain retirees. The statute is found at 10 U.S.C. § 1414, and the restoration of retired pay is known as Concurrent Retirement and Disability Pay, or CRDP. For those with at least 20 years of qualifying military service and a VA disability rating of at least 50%, CRDP eliminates the VA offset to retired pay. The disability does not have to be combat-related. These retirees are entitled to full retired pay and full VA payments.

Combat-Related Special Compensation (CRSC) is another form of tax-free disability pay. It's found at 10 U.S.C. § 1413a, and it includes those who have a disability of at least 10% directly related to the award of the Purple Heart decoration or related to combat, operations, instrumentalities of war or hazardous duty.

The rules are much more complicated than the brief overview given here. For further information, see the Silent Partner, *Military Pension Division: The 'Evil Twins' – CRDP and CRSC*.

Dividing the Military Pension -- Crossing the Minefield

Overview. Once it is understood how to set up obstacles to pension division, the next step should be to understand how to overcome them and divide the pension once the court has acquired jurisdiction over it. There are generally two methods available for pension division.

The first is *deferred division*, often called *if, as and when* payments, which refers to shared payments when the retired SM starts receiving his pension. This is the most common way of allocating the pension between the spouse and SM. In the usual situation, a share of the SM's pension is paid to the former spouse (FS). This can be done by the retired pay center through garnishment if the marriage and the length of service overlap by at least 10 years; otherwise the payment must be made by the SM.

The second involves a *present-value offset*, in which property or money is traded against the present value of the pension. For example, the house and other property might go to Mrs. Roberts and COL Roberts would receive the pension, if they are approximately equal in value. Both of these topics are covered in the Silent Partner, *Military Pension Division: Scouting the Terrain*.

Opening the Attack

When dividing the military pension on a *deferred division* basis, there are four separate ways to make the division that the retired pay center will accept for direct payments to Mrs. Roberts. These four methods are set out in the pension division regulations.⁹ They are explained in detail in the Silent Partner, *Getting Military Pension Division Orders Honored by the Retired Pay Center*.

Fixed dollar amount. A fixed dollar clause might read: *Wife is awarded \$550 per month, payable from Husband's disposable retired pay.*

Percentage clause. A percentage clause might state: *Wife is granted 40% of Husband's disposable retired pay.*

Formula clause. This is an award expressed as a fraction or a ratio, and it is usually employed when a SM is on active duty (or a member of the National Guard or Reserves is still drilling). It might read: *Wife shall receive 50% of the Husband's disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband.* The court must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service. In Guard/Reserve cases, when the member is still drilling, this fraction must be expressed in terms of retirement points, not time.

Hypothetical clause. This is an award based on a rank or status which is different from that which exists when the servicemember retires. For example, the order might say: *Wife is granted 40% of what a major*

would earn if he were to retire on January 31, 2015 with 18 years of military service and a retired pay base of \$2,200 per month. This is often used when state law requires that the share of the pension awarded to the spouse be determined according to the grade and years of service of the member at a specific date, such as the date of divorce or of separation (see below). This is the most complicated of the four, and the attorney should pay careful attention to the tips and terms set out in the Silent Partner, *Military Pension Division: Guidance for Lawyers*.

For COL Roberts, the most advantageous way to allocate the pension is through the *fixed dollar amount*. That's because this does not grant Mrs. Roberts a COLA (cost-of-living adjustment) each year. The fixed dollar amount simply excludes a COLA – it's outside the definition of *fixed dollar amount*, in other words. All other clauses automatically include COLAs.

The Marital Fraction.

Assume that COL Roberts is on active duty and has 20 years of creditable service. He has been married for all 20 years. He tells his lawyer, who is inexperienced in military pension division, that he is willing to give his wife half of his pension, either because that seems fair to him or it appears to be inevitable under state law. The lawyer, taking him at his word, proceeds to draft a clause for pension division which is worded as follows:

Husband shall pay to Wife fifty percent (50%) of the disposable retired pay that he receives from the Defense Finance and Accounting Service at retirement.

Are there any problems with this wording?

At least from COL Roberts' point of view, the answer is yes. The clause fails to take into account the marital fraction and future military service. Defined by state law, the "marital fraction" is the number of years of marital pension service divided by years of total pension service.¹⁰ This fraction reflects the fact that COL Roberts will probably continue on active duty and acquire additional retired pay due to those years. These are not "marital years"—they are years after the separation or divorce. There also may be years of military service *before the parties married*, and these non-marital years must also be taken into account.

The way to do this is with the marital fraction. In reality, Mrs. Roberts is not entitled to half of the pension; she is only entitled to half of the marital share of the pension. The above clause gives Mrs. Roberts too great a share.

Doing a Double-Dip

Assume, however, that the drafting lawyer is aware of the above issue and proceeds to include reference to the marital fraction in the clause, which now reads as follows:

Husband shall pay to wife fifty percent (50%) of his disposable retired pay times 20 divided by his total years of military pension service.

While this may be an improvement for COL Roberts over the first example, there is a way to further "improve" the clause (from COL Roberts' viewpoint). This is by "fixing" the benefit to be divided with Mrs. Roberts to that which exists, based on his grade and years of service, at the "valuation date."

Each state has a "valuation date." This is the date specified in state law for the classification of assets (as marital or community property or as separate property) and the determination of the fair market value of the property for purposes of division or allocation between the spouses. It may be the date of separation, date of divorce, date of commencement of the divorce case, or some other date set by statute or by case law.

As explained above, in states where the *date of divorce* is the valuation date, nonmilitary spouses are limited to pension division based on the benefit accrued at that date, that is, the rank and years of service of the service member at the date of divorce.¹¹ They do not share in any increase in pension benefits due to further promotions or additional years of service. For example, in *Grier v. Grier*, the Texas Supreme

Court held that the wife of a major who was on the promotion list for lieutenant colonel at the time of divorce could only share in the retired pay of a major.¹²

Drafting a pension division clause (as above) without reference to COL Roberts' grade and years of service at the valuation date will result in division of his pension according to his grade and years of service at retirement. This is the approach used by the majority of the states, which employ the *date of retirement* method of deferred division of retirement benefits, often called the "time rule."

As a result of this drafting, all post-separation service and promotions will be "tacked on" to the marital estate for pension division purposes. This gives (in COL Roberts' view) his former wife a "free ride" on the rest of his career and future promotions. Even though Mrs. Roberts may be married to a colonel (pay grade 0-6) with 20 years of service at their date of separation, Bill Roberts may be a brigadier general (pay grade 0-7) with 30 years of service by the time he retires. At the time of his 0-7 retirement with 30 years of service, Mrs. Roberts (under the above clause) would then begin to receive half of her marital fractional share of his pay *at a higher grade* and with more creditable service than that which COL Roberts had attained when they separated or divorced.

In COL Roberts' view, the above wording would be acceptable only in the unlikely event that he stayed in the same pay grade that he held at the valuation date and retired in that same rate of pay. When deferred division of the pension is involved, COL Roberts may want to propose a settlement with a hypothetical division based on his rank and years of service at the valuation date contained in state law.

Fixing the grade and years of service is not the majority rule, as explained above. Most jurisdictions mandate the deferred division of pension benefits based on "a fixed percentage of the benefits actually received by the employee spouse at retirement" because under this method "the non-employee spouse is permitted to share in the increases in retirement benefits due to post-separation efforts *which were built on the foundation of marital effort.*"¹³ This has the effect of letting the wife of a colonel (at separation) share in the pension pay of a general (at retirement) because she helped him to attain the rank of colonel in the first place, and it discounts her share to account for post-divorce service by using the marital fraction.

But even in the time-rule states, COL Roberts and his attorney aren't limited in their in their settlement discussions. In negotiations, you get what you bargain for – not what state law requires; almost anything is fair game. In this case, because Bill Roberts was a colonel with 20 years of active duty upon the parties' separation, he may want to negotiate with the other side to give Mrs. Roberts her share of his pay in the grade of colonel with 20 years of service, not a future grade with future years of service.

What is the better wording for COL Roberts? Assuming that state law allows for the fixing of grade and years of service at a specified date or that the other side (regardless of state law) will agree to this division in a settlement, the proper wording for COL Roberts might be as follows:

Husband shall pay to Wife fifty 50% of the disposable retired pay of a colonel (O-6) with 20 years of creditable service, a retired pay base of \$7,000 a month and a hypothetical retirement date of June 1, 2009, divided by his total years of military pension service as of the date of divorce in East Virginia, that is, June 1, 2016.

Another way of reducing the payments from COL Roberts is to specify that the pay tables to be used by the retired pay center are those in effect on June 1, 2016, the effective date of the above hypothetical division and rank. This double-dip approach will not only fix the rank and years of service (and thus his retired pay base), but it will also fix the pay tables which are employed. To do this, add the following sentence to the above clause: *The retired pay will be based on the pay tables in effect on June 1, 2009.*

A final attempt to reduce the FS's share of retired pay would be to convert the denominator in the marital fraction into COL Roberts' full term of service, rather than stopping it as of the date specified in state law. Thus the applicable wording would be:

Husband shall pay to Wife fifty 50% of the disposable retired pay of a colonel (O-6) with 20 years of creditable service, a retired pay base of \$7,000 a month

and a hypothetical retirement date of June 1, 2016, divided by his total years of military pension service.

Dividing Disposable Retired Pay

What is it that the courts divide – gross pay or net pay? USFSPA specifies that the court at the time of divorce can only divide *disposable retired pay*.¹⁴ The U.S. Supreme Court upheld this requirement in the *Mansell* decision. According to 10 U.S.C. § 1408(a)(4), "disposable retired pay" means gross retired pay minus:

- recoupments or repayments to the federal government, such as for overpayment of retired pay;
- deductions from retired pay for court-martial fines or forfeitures, or such amount required by law to be waived to get VA disability compensation;
- military disability retired pay; and
- Survivor Benefit Plan premiums.

Note that VA disability payments are deducted from gross pay in order to arrive at "disposable retired pay." Thus a retired SM can waive receipt of retired pay to receive an equivalent amount of VA disability compensation, and these latter benefits will be received tax-free. This tactic can be used by a military member to reduce the portion of retired pay that is divisible with one's former spouse. And there's no way to stop a SM from taking disability pay! This topic is covered more fully above at VA Disability Benefits and in the Silent Partner on CRSC and CRDP.

Reserve and National Guard Pension Rights

There are *three key considerations* in dividing Guard/Reserve retirement rights.

- First, Guard and Reserve personnel generally do not begin to get paid until age 60 (regardless of when they apply for retirement); therefore this deferral of payment must be taken into account in the negotiations and the present value calculations.
- Second, when the SM has stopped drilling and the total number of credited retirement points are known, the pension should be calculated in two ways to determine the best outcome for the client – using months of military service and then again using retirement points.
- The third point involves Guard/Reserve personnel who are still drilling. A pension division clause for these SMs usually involves a formula to determine the marital share of the pension, which is then divided with the FS. Such a formula must be expressed in terms of retirement points, not months or years, to be acceptable to the retired pay center.

A fuller explanation of Guard/Reserve retired pay is found in the Silent Partner, *Military Pension Division: The Spouse's Strategy*.

Survivor Benefit Plan.

After the battle comes caring for the survivors. The equivalent of this in the area of military pension division is deciding what to do if the SM dies before the FS. Since the military pension ends when the SM dies, the Survivor Benefit Plan (SBP) is the usual issue at stake here. This survivor annuity is a means of continuing monthly payments to the former spouse who survives.

The Survivor Benefit Plan pays a specified beneficiary 55% of the selected base amount when the SM dies. This topic is covered in detail in the Silent Partner, *Military Pension Division: Scouting the Terrain*. The cost in active-duty cases is usually 6.5% of the base amount, paid out of the pension; in Guard/Reserve cases, it's about 10% if the SM selects immediate coverage for a spouse or former spouse.

The best SBP option for the SM is, of course, *silence*. If no one says anything about SBP and the settlement is worded properly, then COL Roberts won't have to elect SBP coverage. This will save him money and also retain the option for a remarriage and a new wife, if that's in his future. SBP cannot be

divided between current and former spouses. There can only be one adult beneficiary. There are other options for COL Roberts, however.

Life Insurance. If there is a discussion about SBP, then his attorney would want to deflect the conversation into *death benefits in general*, of which life insurance is the most obvious choice. Life insurance for Mrs. Roberts would probably be cheaper than the SBP premium, and insurance has the advantage of paying Mrs. Roberts in a lump-sum cash amount at his death, rather than doling out monthly payments to her. Life insurance payments are tax-free, unlike the payments from SBP. If there's a dispute, offer to split the cost with Mrs. Roberts – each will pay half the life insurance premium. Even better, include the premium as alimony which COL Roberts pays; that way, the premium will be deductible for him at tax time each year.

Put a Present Value on the Benefit. Since the former spouse, Mrs. Roberts, is the sole beneficiary of this survivor annuity, COL Roberts feels that it's only fair that she should be charged with the total value of the SBP in dividing marital property. Hiring an expert to value the SBP which Mrs. Roberts will receive is the key to this strategy.

An example of a survivor annuity evaluation can be found in a 1998 Pennsylvania case, Palladino v. Palladino.¹⁵ In this divorce case, the judge found that the wife had requested that the husband elect survivor annuity coverage to continue payments to her if he died before she did. The expert witness who valued the survivor annuity determined that it had a present value of about \$57,000.

The judge ruled that the survivor annuity, which derived from the husband's civilian pension, had a value independent of the pension's value, the wife had elected to receive the survivor annuity, and therefore she should be charged with the value of the survivor annuity as an asset in equitable distribution. The court decided that \$57,000 was the proper value of the survivor annuity which ought to be charged to the wife. The survivor annuity was found to be marital property.

Upon an appeal by the wife, the Superior Court affirmed the trial court's decision. This meant that the wife did not get any of the husband's pension; she only received the survivor annuity. Thus the husband received a fair distribution (not a windfall) regarding his pension; he kept the entire payment, simply because his ex-wife insisted on getting the survivor annuity. His monthly pension was cut by about \$80 monthly to pay the survivor annuity premium.

Palladino represents a case in which the trial judge did the right thing, that is, valued the survivor annuity at the equitable distribution hearing. A 2010 case from Oregon, *Forney and Forney*, represents the opposite situation, a judge who refused to value the survivor annuity and whose ruling was reversed by the appellate court. In this military case, the expert witness valued the Survivor Benefit Plan at \$84,855. The trial court refused to place a value the asset.

The Oregon Court of Appeals decided otherwise, stating:

In addition to the military pension itself, however, there is also wife's survivor annuity on that pension. That annuity, acquired by the parties during the marriage, is a marital asset. As we held in Miller and Garren, 208 Ore. App. 619, 623, 145 P3d 285 (2006), a survivor's annuity is analogous to an unvested pension and is subject to valuation and the court's disposition on dissolution. Although it is possible that wife could die before husband and never see the benefits from the annuity, in light of the 18-year disparity in their ages, it is likely that wife will survive husband. As in Miller, the parties' expert in this case took into account the contingency of wife's survival when valuing annuity. Wife is the only beneficiary of the survivor annuity, and it will provide her with income for many years. We conclude that it is appropriate to take wife's survivor annuity into account in the property distribution and that the trial court erred in failing to do so. As we have noted, the present value of wife's survivor annuity is \$84,855. That value should be assigned to wife in the property division.¹⁶

The Court reversed and remanded for a new judgment allocating the entire value of the Survivor Benefit Plan to the wife.

Lower Base Amount. When you can't dissuade the other side from SBP, then consider the selection by COL Roberts of a base amount that's lower than his full retired pay when he's not been married to Mrs. Roberts the entire term of his service. After all, does it sense to him that she should get 55% of his full retired pay when he dies if she was only married to him for 10 of the 20 years he served? In this situation, with her pension share at half of 50% of his retired pay (or 25%), she should get the same dollar amount at his death, not 55% of his full retired pay. This is sometimes termed a "mirror award" – the death benefit mirrors the life benefit.

If possible, reduce the base amount selected so that her SBP benefit reflects the same percentage as her share of the military pension.¹⁷ You'll also be saving COL Roberts money because the premium will be lower. Note that there are only limited time when the match can be made, however. The problems that exist in trying to establish a mirror award are set out in the Silent Partner infoletter (for lawyers) and the LEGAL EAGLE handout (for clients) on this subject.

Who Pays the Premium? COL Roberts might say, "Why doesn't my wife have to pay for SBP? After all, she wants it! I'll be dead and gone by the time she gets it. She should have to pay the premium." Unfortunately for the SM, it doesn't work that way with the retired pay center. You can submit as many orders as you want – signed by judges, certified by clerks and approved by the highest court you can find – and they'll still pay no attention if you try to shift the premium payment to Mrs. Roberts by telling the pay center to take the premium out of her share. The retired pay center will refuse to do it since the SBP premium, according to USFSPA, comes off the top before determining disposable retired pay. This results in the parties *both* paying the SBP premium in the same ratio as their share of the military pension is divided.

But the same thing can be accomplished by adjusting the percent that Mrs. Roberts receives. Here's how:

- Figure out what dollar amount Mrs. Roberts would get each month as pension division, multiplying her spousal percentage times the gross retired pay of the member.
- Then figure out the dollar amount for the SBP premium. Use 6.5% except for Guard/Reserve members who choose immediate coverage at the 20-year point. This is multiplied by the member's retired pay unless a lower amount has been – or will be – selected).
- Then subtract this from Mrs. Roberts' dollar amount (or anticipated dollar amount). This yields her spousal share less the SBP premium.
- Next divide this figure by the disposable retired pay (gross pay less SBP premium) of COL Roberts and multiply it by 100.

The result is the percentage of his retired pay that she would get with *her* paying for SBP. You've effectively shifted the premium payment to her by reducing the percentage of retired pay that she receives, assuming there are no other deductions from gross pay, such as a disability pay waiver or money owed to the federal government.

Early Out Options.

If your client has taken early retirement through VSI (Voluntary Separation Incentive), SSB (Special Separation Bonus) or a similar program, you should argue that this is not divisible as marital property under the *McCarty* decision. The analysis is set out (along with counter-arguments) in the Silent Partner, *Military Pension Division: Scouting the Terrain*.

Even if this argument is not successful, remind opposing counsel that, in any event, the retired pay center will not garnish VSI or SSB as property division under 10 U.S.C. § 1408(d). Only military retirement pay can be garnished under this statute. Use this argument to attempt to get concessions.

A separate, but related, question is whether the separation benefit is separate or marital property. If the courts decide in favor of divisibility, how will they treat the property?¹⁸ Some courts have held that

severance pay is not marital property since it takes the place of *future* compensation, rather than being payment for *past* services (like retirement pay and other deferred compensation benefits).¹⁹

If, on the other hand, they are seen as an economic benefit earned during the marriage and attributable to marital work, efforts and labor, they may be seen as damages for an economic loss to the marriage. This is called the "analytic approach" and is most often applied in the personal injury area.²⁰ In an Arkansas case involving severance pay, the wife was granted one-half of the husband's lump-sum payment because the judge determined that the benefit was earned by *service during the marriage*.²¹ Finally, even if the payment is marital property and divisible, one would need to apply the marital fraction (years of marital service over total years of service) to the lump-sum payment to arrive at the portion that is marital. This is necessary to reflect fairly the part of the pension earned during the marriage.

ENDNOTES

¹ *Marriage of Tucker*, 226 Cal. App.3d 1249 (1991). See also *Marriage of Hattis*, 196 Cal. App. 3d 1162, 1168 n.6, 242 Cal. Rptr. 410 (1987).

² See, e.g., *Dowden v. Allman*, 696 N.E.2d 456 (Ind. Ct. App. 1998); see also *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990) and Indiana Code §31-15-7-4.

³ See, e.g., *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000) and *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1991).

⁴ Ala. Code § 30-2-51

⁵ *Delucca v. Colon*, 119 P.R. Dec. 720 (1987).

⁶ See, e.g., *Atkinson v. Chandler*, 130 N.C. App. 561, 504 S.E.2d 94 (1998).

⁷ *Mansell v. Mansell*, 490 U.S. 581 (1989).

⁸ *Id.*

⁹ Dep't of Defense, Financial Management Regulation, Vol. 7B, chap. 29, Former Spouse Payments from Retired Pay, available at <http://comptroller.defense.gov/fmr.aspx>.

¹⁰ In a minority of states, this is years of military pension service until separation (or divorce) divided by that pension service till that date. In these states, the marital fraction is multiplied by the pension benefit earned as of separation or divorce.

¹¹ See, e.g., *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983) (holding that, in Texas, the valuation and apportionment of retirement benefits in divorce is to be based on the value of the community's interest at the time of divorce)

¹² *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987)

¹³ *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504, 508 (1986), *aff'd on other grounds*, 319 N.C. 367, 354 S.E.2d 506 (1987)(emphasis added); see also *In re the Marriage of Hunt and Raimer*, 909 P.2d 525 (Colo. 1995).

¹⁴ 10 U.S.C. § 1408 (c) (1).

¹⁵ *Palladino v. Palladino*, 713 A.2d 676 (Pa. Super. 1998).

¹⁶ *Forney and Forney*, 239 Ore. App. 406, 412, 244 P. 2d 849 (2010).

¹⁷ For example, assume that the SM's retired pay is \$1,000 a month, and that he was married 10 of his 20 years of military service. The pension benefit (during the SM's life) for the former spouse would usually be 50% X 10/20 X \$1000, or \$250. To make the SBP death benefit the same, divide \$250 by .55 to get the proposed base amount, which is \$454.

¹⁸ See, e.g., *Boger v. Boger*, 103 N.C. App. 340, 405 S.E.2d 591 (1991).

¹⁹ See, e.g., *In re Marriage of DeShurley*, 255 Cal. Rptr. 150, 207 Cal. App. 3d 992 (1989) and *In re Marriage of Lawson*, 256 Cal. Rptr. 283, 208 Cal. App. 3d 446 (1989).

²⁰ See, e.g., *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).

²¹ *Dillard v. Dillard*, 772 S.W.2d 355 (Ark. Ct. App. 1989); see also *Chotiner v. Chotiner*, 829 P.2d 829 (Alaska 1992).

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SILENT PARTNER

All Clauses Considered: Writing the Frozen Benefit Award

*Introduction: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section and the North Carolina State Bar's military committee. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many **SILENT PARTNER** infoletters on military pension division, and other aspects of military divorce. Just go to www.nclamp.gov > For Lawyers (the website of the military committee, N.C. State Bar).*

Introduction

Major changes in military pension division occurred in December 2016 with the enactment of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 17). Section 641 of the Act contained a major revision of how military pension division orders are written and will operate for those not yet receiving retired pay. Rather than allowing the states to decide how to divide military retired pay and what formula or methodology to use, Congress imposed a single uniform method of pension division on all 50 states plus other federal jurisdictions (e.g., the District of Columbia, Guam, etc.), employing a hypothetical scenario in which the military member retires on the date of divorce.¹

Everyone who is not yet receiving retired pay is affected. This means the servicemember (SM) who goes through divorce and property division while still serving in the uniformed services including:

- Members of the armed forces (Army, Navy, Air Force, Marine Corps and Coast Guard);
- The commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration; and
- Those in the National Guard and Reserves who are not yet receiving retired pay (which usually begins around age 60).

The statutory revision has no impact on divorces with property division after retired pay has started.

Understanding the Frozen Benefit Rule

A “rewrite” of the military pension division rules in the Uniformed Services Former Spouses’ Protection Act, or USFSPA,² the new statute says that the “disposable retired pay” which is paid in

¹ This ignores the fact that over forty states use the “time rule” to divide a defined benefit plan, which involves a marital fraction composed of marital pension service divided by total pension service times final retired pay. Irrespective of state laws, cases and rules, the federal law applies to those still serving when the divorce is after December 23, 2016, the date the law was enacted.

² 10 U.S.C. § 1408.

pension shares by the retired pay center³ is that attributable to the “High-3” amount and years of service of the military member at the time of the parties’ decree of divorce, dissolution, annulment or legal separation. In effect, this means that the military will only pay the ex-spouse no more than a share of the military member’s retired pay as it hypothetically exists on the day of divorce (i.e., if the court assumes that he or she had stopped serving and put in for retirement on that date). The only increase is COLAs (cost-of-living adjustments) pursuant to 10 U.S.C. § 1401a (b) which may occur between the time of the court order and the time of retirement.

Can the parties agree to “opt out” of this straight-jacket approach? Congress says “NO.” There are no exceptions for the parties’ agreement to vary from the new federal rule. Everyone must do it one way, regardless of what the husband and wife decide they want the settlement to say.

“Hard Times” and the Hypothetical

How should the courts write a proper court order to implement the Frozen Benefit Rule? Guidance on military pension division rules and requirements was published in June 2017 in the Department of Defense Financial Management Regulation.⁴ The “hypothetical clause” (as it is called by the Defense Finance and Accounting Service, or DFAS) is the most difficult clause to prepare. For those who entered military service on or after September 8, 1980, the current DoDFMR rule requires that the court order contain the member’s years of creditable service and his “High-3” amount (i.e., the average of the highest three years of compensation before the specified division date).⁵

- The court order must provide this information.⁶
- This means, in effect, that the attorneys must obtain this information, in order to avoid rejection of the pension division order.
- And this, in turn, means that the attorney *for the non-military spouse* has to get this information or else there will be no qualified order for division of the military pension.

Because few attorneys are conversant with drafting such an order, the cost of military divorce will go up and counsel will start receiving rivers of rejection letters when pension orders are submitted which don’t

³ For the Army, Navy, Air Force, Space Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

⁴ DoD 7000.14-R, Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures (DoDFMR). Retired pay is found in Vol. 7B, and Chapter 29 covers former-spouse payments.

⁵ DoDFMR, Vol. 7B, ch. 29, Sec. 6.9. For members of the National Guard or Reserves, any order containing a fraction with an unknown denominator must be expressed in terms of retirement points, not months or years.

⁶ The order must be expressed as a fixed amount, a percentage, a formula or a hypothetical which is awarded to the FS.

comply with the new rule.⁷

This Silent Partner will attempt to explain the writing of a clause for military pension division using the instructions contained in Chapter 29 of Volume 7B of the DoDFMR. It will discuss what's needed from the standpoint of the member and the spouse or former spouse (FS). The attorney should also read the several other Silent Partner infoletters on the Frozen Benefit Rule, which outline the terms and data needed to comply with the new statute, where to find the information, strategies for the member and the spouse for compliance with NDAA 17, and how to dodge the impact of the new rules. They are at the website for the military committee of the N.C. State Bar, www.nclamp.gov > For Lawyers.

For members entering the uniformed services on or after September 8, 1980, the required data for the pension division document (e.g., military pension division order, dissolution decree, or property settlement incorporated into a divorce judgment) are years of creditable service as well as the member's High-3 figure. For Guard/Reserve members, the number of retirement points as of the divorce date will replace the years of creditable service stated in the previous sentence. In some cases, an expert may need to be employed to assemble the records and calculate the results. One thing is certain – either the member must provide records for these calculations (or sign a release to allow the other side to obtain this information) or else the court must order the federal government to supply the documents needed to determine the years of creditable service and what the amount of *High-3* compensation would be. These rules are spelled out in the DoDFMR, Vol. 7B, Chapter 29, which says that the court order has to state:

a) the “High-3” amount of the member on the date of divorce (i.e., the average of the highest three years of compensation), which is \$_____; and

b) the member's creditable service time as of the date of divorce, which is ____ years and ____ months (or in the case of members of the National Guard or Reserves, the creditable retirement points at divorce, which is _____ points).⁸

Serving the Servicemember

When counsel is representing the SM, the language employed in the order, judgment or decree must be anchored in terms which strictly adhere to the language of the NDAA 2017. This means that the order will say that the amount to be divided is “disposable retired pay,” which is what the NDAA 17 redefined

⁷ A guide for attorneys on how to write acceptable military pension clauses may be found at the Silent Partner, “Military Pension Division: Guidance for Lawyers,” and it includes the necessary elements and language for a proper hypothetical clause.

⁸ See the two Silent Partner infoletters, “Military Pension Division and the *Frozen Benefit Rule*: Nuts and Bolts,” and “The Big Freeze - Finding the Facts” for more information on these and how to calculate and verify the *High-3* amount.

in December 2016. This approach for the order limits the FS to a smaller number for division with the SM, perhaps about 60% of the previous amount to which she or he would have been entitled under the “time rule.” The smaller the disposable retired pay (which is what is divided with the FS), the smaller the amount which must be paid to the FS.

[Wording for the servicemember] The servicemember will pay as military pension division to the former spouse a share of his “disposable retired pay” as defined in § 641, National Defense Authorization Act for FY 2017, codified at 10 U.S.C. §1408(a)(4).

The share of the former spouse will be 50% of the marital fraction of the servicemember’s disposable retired pay. The marital fraction is marital pension service⁹ divided by total pension service.¹⁰ The member’s marital pension service as of the date of classification and valuation under state law is (complete one):

____ retirement points (Guard/Reserves)	____ years and ____ months (all others)
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The servicemember’s “High-3” amount (i.e., the average of the highest 36 months of compensation) is \$_____ per month as of the date of divorce.

The member’s total creditable time of service toward retirement as of the date of divorce (expressed in retirement points for members of the Guard/Reserve) is (complete one):

____ retirement points (Guard/Reserves)	____ years and ____ months (all others)
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The above pension share is the sole retired pay entitlement for the spouse/former spouse. All remaining retired pay of the member will be the sole and separate property of the servicemember, to which the spouse/former spouse will have no claim or entitlement.

Support for the Spouse

Different wording and tactics apply when counsel is representing the spouse or former spouse. It is essential to note that the revised law doesn’t forbid entry of a *time rule* order. It means, however, states that the retired pay center (DFAS or the Coast Guard Pay and Personnel Center) will only honor “date-of-divorce division” for those still serving. Recognizing this limitation on payments from the government, the court may still enter a *time rule* order, noting that at the member’s retirement only a portion of the pension-share payment for the FS will come from the pay center. The court’s order would provide that

⁹ The end-point for marital pension service is the date of classification and valuation of marital or community property under state law. It may be the date of filing, date of separation, date of divorce, date of irretrievable breakdown of the marriage, or a date in the discretion of the judge.

¹⁰ Two points need to be made. First, the denominator which is mathematically correct would be described as “total pension service as of divorce,” since divorce is the date when the pension is frozen, according to DFAS; the SM, however, may want to stretch this out to read “total pension service,” which would mean in most cases an even smaller share for the FS. Whether state rules would allow that argument is another question, since it involves the law and cases in 50 or more jurisdictions. Secondly, marital pension service is measured in months except for members of the National Guard or Reserves. According to DFAS, when a formula for pension division contains a fraction with an unknown denominator and the SM is in the Guard or Reserves, the fraction must be stated in terms of retirement points.

the member is still responsible for the rest and will indemnify the FS for any difference between the two amounts.

The “savings clause” in the USFSPA, found at 10 U.S.C. § 1408 (e)(6), allows the courts to employ state enforcement remedies for any amounts which may not be payable through the retired pay center.¹¹

That section states:

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) [e.g., 50% of disposable retired pay] has been paid....

Numerous court decisions have held that orders which require the retiree to pay more than 50% of disposable retired pay are not void or invalid; they are simply not enforceable through garnishment from the retired pay center for amounts in excess of 50%.¹²

Avoid using “disposable retired pay” in the order to describe what is divided. Disposable retired pay, or DRP, means the restrictive definition in the Frozen Benefit Rule (i.e., retired pay figured on the *High-3* at the date of divorce) less all of the other specified deductions, such as the VA waiver and moneys owed to the federal government. The best way to word a pension clause is to provide for division of total retired pay less only the Survivor Benefit Plan (SBP) premium attributable to coverage of the former spouse. Regardless of the language used, DFAS will construe orders dividing “gross retired pay,” “total retired pay,” or any similar language as dividing DRP,¹³ but the language suggested here will be consistent with the use of indemnification if the FS’s share is reduced later.

[Wording for the spouse/former spouse] The servicemember is responsible for full payment of the funds due to the spouse/former spouse under the terms of this document.

That share is 50% of the marital fraction of the servicemember’s retired pay, less only the premium deducted for any Survivor Benefit Plan coverage for the former spouse. Note that this limitation is not for administration by the retired pay center, which must comply with federal law as to disposable retired pay, but rather for recognition of the rights and duties of the parties. “Retired pay” means the actual gross retired pay distributed to the retiree. The marital fraction is marital pension service divided by total pension service.¹⁴

¹¹ See also Brett R. Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* (3rd Ed. & 2016-2017 Supp.), Sec. 6.4.

¹² For a list of citations, see the Silent Partner, “Fixing the Frozen Benefit Rule.”

¹³ DoDFMR, Vol. 7B, ch. 29, Sec. 6.1.

¹⁴ See Notes 9 and 10 *supra* as to marital pension service and total pension service. The denominator which is mathematically correct when final retired pay is divided would be described as “total pension service,” meaning that the pay

The member's marital pension service as of the date of classification and valuation under state law is (complete one):

_____ retirement points (Guard/Reserves)	_____ years and _____ months (all others)
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The servicemember's "High-3" amount (i.e., the average of the highest 36 months of compensation) is \$ _____ per month as of the date of divorce.

The member's total creditable time of service as of the date of divorce toward retirement (expressed in retirement points for members of the Guard/Reserve) is (complete one):

_____ retirement points (Guard/Reserves)	_____ years and _____ months (all others)
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Federal law limits what the retired pay center can distribute to the former spouse as a share of military retired pay, pursuant to § 641, National Defense Authorization Act for FY 2017, codified at 10 U.S.C. § 1408(a)(4)(B). The member will pay the former spouse the share set out herein and, pursuant to 10 U.S.C. § 1408(e)(6), will indemnify the former spouse for any loss or damages resulting from failure to pay as stated above. As to any differential between what is due herein and what the retired pay center disburses, the parties will decide on an appropriate method for payment (e.g., consent order for alimony garnishment through the retired pay center, inter-bank transfer, allotment, or personal check) within 30 days after the first garnishment payment to the former spouse. If the parties cannot agree then the court will make the determination. The court reserves jurisdiction regarding enforcement of the terms herein for military pension division.

Timing and the Separation Agreement: Deal Now, Divorce Now

Sometimes the terms for pension division are set out in a separation agreement, property settlement agreement or marital settlement agreement. Thereafter the settlement is submitted to the court for incorporation into the divorce decree.

In states such as California and Florida, the divorce or dissolution may be granted in close proximity to the execution of the separation agreement. Since the dissolution is based upon no-fault grounds and there is no required period of separation in those states, this means that the required data shown above may be included in the agreement since it is unlikely to change if the divorce follows soon after the

is measured as of the end of the member's career. However, since divorce is the date when the pension is frozen by the retired pay center, the spouse may want to shrink the denominator so that it reads "total pension service as of the date of divorce," which would mean a larger share for the FS. Whether state rules would allow that argument is another question, since it involves the law and cases in 50 or more jurisdictions. The Virginia Court of Appeals recognized the denominator discrepancy in a 2019 case, *Starr v. Starr*, holding that the method by which a trial court determines the marital share of that interest continues to be a question of state law, that the trial court determines the marital share of the pension by applying the marital-share fraction, and that the denominator is the time of military service until the date of divorce when that is the date of hypothetical retirement). *Starr v. Starr*, 70 Va. App. 486, 828 S.E.2d 257 (2019); see also *Fulgium v. Fulgium*, 240 Md. App. 269, 203 A.3d 33 (Md. Ct. App. 2017) (same result). See also *Douglas v. Douglas*, 2014 Tex. App. LEXIS 12398 (holding that, in a "hypothetical clause," the denominator is months of creditable service during marriage up to the date of divorce, rather than the date of retirement; the Court ruled that accepting the husband's proposition that denominator should be *total years of service* would impermissibly dilute the ex-wife's share acquired during parties' marriage).

agreement is signed.

Deal Now, Divorce Delayed

A different scenario, however can face the SM or spouse in a state such as North Carolina, where grounds for divorce involve a separation period of one year (with the intent that the separation be permanent), or in another state where a *waiting period* is involved. In such jurisdictions, the settlement may be executed shortly after the parties separate, and yet the divorce might be granted a year later. The same situation would occur if the military member were deployed shortly after the signing of the agreement, and this delayed the filing for divorce.

If the granting of a divorce judgment is not in close proximity to the execution of the settlement, then counsel must decide where to state the data points which are required (i.e., *High-3* amount and years of service or retirement points at date of divorce). If these are not likely to change between the execution of the separation agreement, then they may be inserted in the agreement. However, when there is a chance that the data points will be different at the time of divorce, the agreement should make reference to the subsequent divorce and announce that the data will be submitted to the court at that time for inclusion into the divorce decree. A clause such as this may suffice:

Federal law requires that the *High-3* amount and years of service for the husband, Major Richard Roe, currently on active duty with the U.S. Marine Corps, be submitted to the retired pay center (in this case, the Defense Finance and Accounting Service, or DFAS) as of the date of divorce. Since that information may change between the date of execution of this document and the date of the parties' divorce, the parties agree that Major Doe must submit verification of this information to the wife, Roberta Roe, at the time that either of them files for a judgment of absolute divorce in this state or any other jurisdiction. They further agree that this information will be included in the divorce judgment, so that the wife can apply to DFAS for division of military retired pay.

Final Notes

The preparation of a military pension division clause or order should be done only after reading the available rules (i.e., Chapter 29 of Vol. 7B, DoDFMR) and Section 641 of NDAA 17, as well as existing state law regarding the division of military pensions and defined benefit plans. Counsel should also read all of the Silent Partner infoletters that explain the Frozen Benefit Rule. Be sure to understand the law and the cases, and contact an expert in military pension division whenever possible, even an attorney from another state.

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SILENT PARTNER

Military Pension Division and the *Frozen Benefit Rule*: Nuts and Bolts

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Introduction

New rules for the division of military retired pay took effect December 23, 2016 for those servicemembers (SMs) who were not yet getting retired pay on a divorce date after 12/23/16. The *Frozen Benefit Rule*, prescribed in Sec. 641 of the National Defense Authorization Act (NDAA) for 2017 and clarified at Sec. 624 of NDAA 2018, limits the disposable retired pay which can be divided. The new, required method of military pension division involves a hypothetical amount of retired pay, calculated as of the SM had retired on the date of the decree of divorce, dissolution, annulment or legal separation (hereafter divorce*).

This will make a big difference in most case. Thus, for example, even though John Doe might be a master sergeant (E-8) with 28 years of service in the Army when he eventually retires with a monthly pension of \$4,000, the retired pay to be divided is fixed at the rank and years of service for John on the date of divorce*, which might be a staff sergeant (E-6) with only 20 years of service, amounting to only \$1500 monthly.

Details are found in the several Silent Partner info-letters regarding the Frozen Benefit Rule, which are found at the website of the military committee of the N.C. State Bar, www.nclamp.gov > For Lawyers.¹ The text below will explain specifics regarding the data points required in a pension division document² and the amount of "disposable retired pay" which is subject to division.³ As always in complex areas like military pension division, it's a good idea to seek the help of a "wingman" for assistance - someone who knows the subject matter and who has handled cases like this before. Don't go it alone!

"You're Either On the Bus or Off the Bus"⁴

First of all, check to see if your case qualifies for *Frozen Benefit Rule* treatment. Was the judgment of divorce* on or before December 23, 2016? If so, you're "off the bus" - the Rule doesn't apply.

If the date of divorce* was after that date, was the military member already receiving retired pay at divorce? If so, then you're *still* "off the bus." In either of these situations, the Frozen Benefit Rule doesn't apply and you don't need to bother about the rules and restrictions set out below.⁵

Data Points Required

¹ You can also find explanations and information at the DFAS website, <https://www.dfas.mil> > Garnishment > Notice of Statutory Change, and there is also sample order language to use in complying with the Rule. Lawyers should take care in using the sample order language. If the attorney provides the information required in the sample, then the order will be approved. The key, according to one retired pay center attorney, is ensuring that the lawyers know and understand what is included in the sample order - "Do you know what this means and how it affects your client before you fill it out?" To illustrate, the sample order contains language setting the denominator of the marital or coverture fraction as the total military service of the SM. Yet, as pointed out at the end of this paper, that is not only illogical (when dividing a benefit that's fixed on the date of divorce*), it's also unfair and mathematically absurd. It should be fixed as of the divorce* date.

² The pension division document is a decree of divorce, dissolution, legal separation or annulment, or a settlement agreement incorporated therein. 10 U.S.C. § 1408(a)(2).

³ "Disposable retired pay" is that pay which may be divided between the parties in a divorce or separation case. 10 U.S.C. § 1408(a)(4).

⁴ Attributed to Ken Kesey, as quoted in Tom Wolfe's *The Electric Kool-Aid Acid Test*.

⁵ See §2908 of Chapter 29, Vol. 7B, Department of Defense Financial Management Regulation (DoDFMR).

When the pension division case involves the Frozen Benefit Rule, what information is required for the pension division document?⁶ To comply with the Frozen Benefit Rule, you must include two data points *as of the date of divorce** (as defined in the first paragraph of the Introduction above):

- The SM's retired pay base, also known as the "High-3" amount⁷ (i.e., the actual dollar figure); and
- The SM's years of creditable service.⁸

Why Is This Needed?

The military retired pay center, usually DFAS, uses these two data points in the pension division document to measure the SM's *disposable retired pay* which can be divided.⁹

Calculation of regular retired pay (i.e., retired pay based on active-duty service years)¹⁰ involves multiplying the SM's *retired pay base* by the *retired pay multiplier*.

- For those entering military service on or after September 8, 1980¹¹ and not in the Blended Retirement System, the *retired pay base* is the monthly average of the highest three years of compensation, known as the "High-3."¹²
- The *retired pay multiplier* for these SMs is 2.5% times the years of creditable service.¹³

The retired pay center uses these data points to calculate the hypothetical retired pay of John Doe as of the date of divorce*. Although the data are required *now*, the calculations are done by the center when John starts drawing retired pay.

Most family law attorneys have little knowledge of the meaning of these terms and techniques, concepts and calculations. Let's review what they mean and how to obtain this information.

A Short Detour into Dates: Creditable Service, Pay Date and DIEMS

Let's say Army Master Sergeant (MSG) John M. Doe is our client. John is on active duty, and we're trying to obtain his years of creditable service. In most cases, we can ask John and he'll know the answer.

If there's any doubt, a quick way to verify this in most cases is to look at the "Pay Date" at the top of John's LES (Leave and Earnings Statement) to see when he entered this period of military service; it need not be his last LES - one from six months ago will probably suffice. Count the years and months since that date, and then convert the result into years (e.g., "18.5 years," although "18 years and 6 months" would probably be accepted).¹⁴ Do not include days. An example of a Leave and Earnings Statement is at ATCH 1 below. The *Pay Date* is shown on the line just below the title of the document.

DEFENSE FINANCE AND ACCOUNTING SERVICE MILITARY LEAVE AND EARNINGS STATEMENT

⁶ The basic language and the methods of division are found in the Silent Partner, *Getting Military Pension Orders Honored by the Retired Pay Center*. Further information is in *Military Pension Division: Guidance for Lawyers*.

⁷ The retired pay base for those entering military service before 8 September 1980 is the individual's final pay, but there are almost none of these SMs still serving today.

⁸ See DoDFMR, Vol. 7B, Ch. 29, ¶290803. In the case of a member of the Reserves or National Guard, the years of creditable service is replaced with "total number of retirement points" as of the date of divorce*.

⁹ Retired pay orders for the Army, Navy, Air Force, Marine Corps, as well as the National Guard and Reserves (known as the RC, or Reserve Component), are processed by the Defense Finance and Accounting Service (DFAS), located in Cleveland, Ohio. Pension orders for members of the U.S. Coast Guard and Coast Guard Reserve are sent to the USCG Pay and Personnel Center (<https://www.uscg.mil/ppc/>), located in Topeka, Kansas. Orders for the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration are also serviced by the Coast Guard PPC.

¹⁰ Chapter 71 of Title 10, U.S. Code.

¹¹ This is determined by the DIEMS, as explained below.

¹² 10 U.S.C. § 1407. See also DoDFMR, Vol. 7B, Ch. 1, ¶010102.

¹³ 10 U.S.C. § 1409. For RC members, the "years of service" used in calculating retired pay would be determined by dividing the total number of points by 360. 10 U.S.C. § 12733.

¹⁴ Note that military numbering format is used for the date (e.g., 980601 means June 1, 1998).

ID	NAME (Last, First, MI)	SOC. SEC. NO.	GRADE	PAY DATE	YRS SVC	ETS	BRANCH	ADSN/DSSN	PERIOD COVERED
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When there has been a break in service, however, the above calculation won't work; a break means the start of a new *Pay Date* on the LES. *Pay Date*¹⁵ normally refers to the date of initial commissioning or enlistment; it will be updated, however, based on breaks in service (such as AWOL or being discharged and later rejoining the military). One's *Pay Date* refers to the date of the most recent start of military duty *without a break in service*.¹⁶

The *Pay Date* is not the only reference to military service dates, however. The retirement system which applies to servicemembers is based on a different label - their Date of Initial Entry into Military Service, or DIEMS.¹⁷ DIEMS refers to the date on which an individual first joined the military, irrespective of subsequent breaks in service.¹⁸ The current DFAS LES for active-duty SMs shows the DIEMS midway down the right side, under "Summary."

If Jake Smith serves in one branch of the military, separates, and then later rejoins the military (whether the same branch or a different one), his DIEMS remains the same, but his *Pay Date* changes. For example, Jake joins the Navy at 18, serves for two years, and then is discharged at age 20. At age 24, he decides to join the Marine Corps. He completes 18 years of USMC service and then retires at age 42. He is entitled to retired pay because the date he enlisted in the Navy at age 18 is his DIEMS, and his two-year tour of duty counts toward his total time in uniform. His *Pay Date*, however, will reflect only the date 18 years ago when he went into the Marine Corps; this is because the *Pay Date* is the most recent period of uninterrupted service. In this example neither Jake's *Pay Date* nor his DIEMS would measure accurately his creditable service until the date of divorce - the *Pay Date* would show too little time (18 years) and the DIEMS would show too much (24 years).

The points to remember are these:

- a) The DIEMS may be different from the *Pay Date*, since the DIEMS is based upon the very first date of military service, regardless of later breaks, while *Pay Date* refers to the start of the most recent period of uninterrupted service;
- b) If both of these labels are the same date, that means there was no break in service, and the years of creditable service until divorce should start with that date;
- c) If the DIEMS entry is earlier than the *Pay Date*, however, then there was a break in the SM's time in the military; information is needed from the SM or his records to find out how much of a gap in time there was (i.e., how much time the member was not in military service creditable toward retirement).

If you're representing the spouse, you'll need to get that information from MSG John Doe. Since this information must be accurate, you should request the figure in discovery - along with the supporting documents - to be sure that the calculation is correct. The interrogatories would ask about the date that John Doe entered military service, whether there were any breaks in service (and, if so, when they occurred), the total creditable service as of the date of divorce* (which *may* need to be estimated, since it could be in the future), and the calculations which support that statement. In most cases the document requested would be a Leave and Earnings Statement. The expected data derived from the answers would look like this: "As of the date of divorce, Defendant John M. Doe had 18.5 years of creditable service."

Note that data for years-of-service calculations is not the province of DFAS, although it can release

¹⁵ *Pay Date* means the "Pay Entry Base Date" or PEBD. The PEBD is sometimes called the Basic Pay Entry Date.

¹⁶ See DoDFMR, Vol 7A, Ch. 1, ¶010201.

¹⁷ DIEMS is also referred to as the Date of Initial Entry into Uniformed Service, or DIEUS.

¹⁸ One's DIEMS is set on the first date of joining any military service, rather than completion of any military preliminary program. For example, SMs who first join the National Guard or Reserves and the later transfer to the active component count their DIEMS from the date that they joined the Guard or Reserves. Those individuals who are receiving a scholarship through ROTC or who enter a service academy (e.g., West Point) will start their DIEMS from the date of enlisting rather than the date of graduation. Military service spans the length of time from initial entry into military service (e.g., the date of one's enlistment) until retirement or discharge. Thus if Roberta Roe signed up for the Marine Corps in January 2018 but did not report for active duty until June 2018, her DIEMS is the date that she first signed up or enlisted (i.e., January 2018).

documents from which the calculations may be made, such as the LES. One's branch of service controls the records which are the primary source of creditable service information (e.g., Human Resources Command at Ft. Knox for the Army). The data is provided to DFAS for entry on the LES.

Creditable Retirement Points

Let's suppose that Marine Corps Reserve Major Roberta Roe is the client. In this case we'll need to get her total retirement points as of the date of divorce*. Each member of the Reserves can get the current points statement from the "personnel portal" of the Reserve Component involved (e.g., U.S. Marine Corps Forces Reserve, New Orleans for Marine Reservists, Air Reserve Personnel Center for Air Force Reserve personnel). National Guard members can get their points statements from the state Guard headquarters. The number of points stated might also require making an estimate if the entry of the appropriate pension division document is in the future. As a Reservist, Major Roe will continue to receive retirement points for weekend drilling, which continues each month during the period leading up to the divorce* (with each two-day weekend counting as four points). Sometimes the client, although a member of the Guard or Reserve, will be on an active-duty tour at the time of the divorce*, and that will affect the calculation of points as well. Active-duty time is shown on the points statement as one point for each day of active duty, within certain limits per year. An example of a retirement points statement is at ATCH 2.

If you represent the spouse instead of the Reservist, you will have to get the information from the other side through discovery. Thus you should request the number of retirement points - along with the supporting documents - to be sure that the calculation is correct. Your interrogatories would ask for the total retirement points for Major Roe as of her most recent retirement points statement and as of the divorce* date (if that has already happened), as well as how Major Roe is acquiring retirement points each month (to allow the spouse's attorney to make an intelligent estimate of continued point accumulation if the divorce* is a couple of months in the future). The documents requested would be retirement points statements. The expected data derived from the answers would look like this: "As of the date of divorce, Defendant Roberta S. Roe had 1,597 Reserve retirement points."

"High-3" Pay

The High-3 pay for John Doe is the average of the highest 36 months of compensation. It involves "base pay," not other entitlements (such as flight pay, combat pay, or Basic Allowance for Housing). When your client is MSG John Doe, he will usually know the answer for the period of time involved; it's *the most recent three years*. In this situation, get his most recent three years of LES's. If he doesn't have all of them, have him contact customer service at the pay center (DFAS or Coast Guard) to request that information. The documents from the pay center will usually be a pay extract or pay summary, not actual copies of the LES's. He can also get his High-3 information from the on-line personnel portal for his branch of service (e.g., Army Knowledge Online).

When requesting documents, John will have to specify what period of time is involved. The pay center will not give him the number or the underlying data responding to a request for "my High-3 pay." Even though the pay center *has the information*, the officials there may reply that the computers have not been programmed to provide the data. So John will need to phrase his request in terms such as, "My base pay for each month between June 1, 2015 and June 1, 2018," if that is his highest 36 months of pay. Once that information is obtained, getting the monthly average on a handheld calculator is pretty simple.

In lieu of obtaining the documents and data from the pay center, John can prepare a spreadsheet, such as a chart in Excel. Such a document - based upon military pay tables found at www.dfas.mil for present and past years, as well as his dates of promotion, if any - will show his rank and his pay for the applicable 36-month period. An example of an Excel chart is at ATCH 3.

Note that the "High-3" does not involve "continuous pay." That's not in the statute, 10 U.S.C. § 1407. In rare cases, John might have had a prior period of time in which he received higher pay than at present for several months or for one or two years, due to his being in a higher pay grade. For example, John may have had a higher pay grade previously but was reduced in rank due to misconduct. These situations seldom occur, but they are

worth knowing about.¹⁹

When MSG John Doe is on the other side, discovery is the answer for “High-3” information. The interrogatories would request that he provide the specific months for his highest compensation next preceding the divorce*, including his rank and his years of service for those months, since rank and years of service are how you compute pay. While a document request could ask for the LES’s for those 36 months, it’s unlikely that he will have those documents; he may need to request them from the pay center.

If you are unable to obtain reliable documents from John Doe, you may need to calculate the base pay rate yourself. To do that, you will need to know his date of rank in his current pay grade and have at least one recent LES. Then, using published pay tables, you can ascertain the monthly base pay for each of the highest 36 months (assuming this is the most recent 36 months, which is true over 99% of the time). Keep in mind that the pay for military members increases every two years (i.e., *step increases*) and also increases on the date of a promotion. Thus there will never be 36 identical months of pay for John.

High-3 and the Guard/Reserve

In Major Roberta Roe’s case, she will also know the usual answer for the period of time involved; it’s *the most recent three years*. In rare cases Roberta may have had a higher pay grade on active duty but was reduced in rank upon transfer to the Guard or Reserves.²⁰

Major Roe’s highest three years of pay is measured on the basis of active-duty pay for an officer with her rank and years of service, not the Marine Corps Reserve pay that she receives for a “drill weekend.” This can be obtained by reviewing her years of creditable service and her pay grade, and then using the military pay tables at www.dfas.mil. The years of service can ordinarily be calculated from the *Pay Date* data shown on her LES.

The Need for Accuracy

What if the “High-3” number is wrong? What if there’s been a mistake in calculating it? What if the SM - who is the one with primary access to this data - fraudulently or carelessly states a much lower number for this data point? This would squash down the hypothetical retired pay that is fixed on the divorce* date. Or what if the spouse, taking advantage of a SM who is unrepresented or who urgently wants a divorce, inserts a higher number in the pension division document? This would have the effect of boosting the hypothetical retired pay which - as *disposable retired pay* - is what’s divided. Won’t DFAS catch the problem and set it right?

Many attorneys would reasonably guess that the answer is “Yes.” However, a shorter and more accurate answer is “No.” DFAS won’t catch the error at the time of submission, since it doesn’t calculate the award at the *initial review* stage; the calculation occurs just prior to the receipt of retired pay by the servicemember. And, if the pension division document contains all of the needed variables but the information submitted regarding the “High-3” is inaccurate (i.e., different from the SM’s actual “High-3” at divorce), it is the position of DFAS that “...we will use the information provided in the court order. If either of the parties later disagrees with our use of that figure based on the fact that it is incorrect, they will need to provide a clarifying order.”²¹

The inconvenient truth is that the correct information about one’s *High-3* is in the pay center’s computers. The government officials just haven’t programmed the computers to provide it.

And DFAS also won’t verify the years of service at divorce*. Each branch of service is responsible for correct figures for years of service, not DFAS. Retirement points are, as mentioned above, the province of the Reserve personnel center or the state Guard headquarters.

When the Other Side Won’t Cooperate

What should the spouse do when the other side is uncooperative? What about issuing a subpoena to DFAS or

¹⁹ If you learn that John was reduced in rank for punitive reasons, you will need to research the criteria set forth in 10 U.S. Code § 1407(f) and DoDFMR, Vol. 7B, Ch. 3, ¶ 030212 to determine whether the High-3 average is required by the specific facts of your case.

²⁰ Retired pay for Reservists is covered in Chapter 1223 of Title 10, U.S. Code.

²¹ The information in this paragraph comes from an e-mail from a senior attorney at DFAS to the author (December 19, 2017), Subject: “from Sullivan -- Questions, Clarifications” (on file with the author).

the Coast Guard? It's not uncommon for the author to get a phone call or an e-mail requesting "a sample of a standard subpoena that I can issue to DFAS to get some information."

There are several flaws with this proposed approach. First of all, there's no such thing as a "standard subpoena" for documents or information. The format, structure and wording of a subpoena directed to DFAS is the same as any other subpoena which is employed for the production of documents. The documents, of course, will vary from case to case. There is no single set that applies to every case.

Second, the subpoena must be *signed by a judge* from "a court of competent jurisdiction." For DFAS or another government agency for Army, Navy, Air Force or Marine Corps records, that usually means the court in which the divorce, legal separation suit or other legal action is pending. For the Coast Guard, an agency of the Department of Homeland Security, it means federal district court.

Third, you will need to choose the language you want for the documents which you are requesting. You cannot simply demand from DFAS "copies of all relevant documents regarding John Doe's pay and allowances since three years ago." That will certainly produce a rejection, since it's unclear what is being requested. You need to give specific and detailed information (e.g., "Leave and Earnings Statements, or the data thereon, showing the base pay for John M. Doe, SSN 123-22-3333, for June 1, 2015 through June 1, 2018").

Fourth, allow enough time for the agency to respond. Four to six weeks may be required. The production of documents will be controlled in most agencies by the "FOIA/PA Office," that is, the office which responds to requests for information under the Freedom of Information Act and the Privacy Act. If you want to check on the status of documents, that's the place to contact.

You may also want to read over the rules regarding the disclosure of information pursuant to court process (that is, a court order or a judge-signed subpoena). Each of the agencies has such rules, and it doesn't take long to find the location (e.g., the release of information regarding DFAS and retired pay is governed by Chapter 18 of Volume 7B of the DoDFMR).

There are also info-sheets and FAQs on-line to review. For example, the addresses and phone/fax contact information for requests for information at DFAS are found at the DFAS website, <https://www.dfas.mil> > Freedom of Information Act > How to Submit a FOIA Request.

Finally you will need to decide if you want only the records and data, or whether you will need the associated documents which would be necessary for introduction of the evidence into court. You may need to review your state rules for the business records exception or the public records exception to the hearsay rule. Will you need an affidavit from the records custodian? A declaration from an official as to the public records exception? If so, be prepared to draft the document yourself; the agency doesn't have a pile of affidavits and declarations on file to meet the requirements of each state. You may need a phone call with the officials in the records office!

The Impact of Delay

Going through the above steps may take time. And this may wind up putting off the divorce*. But the spouse's attorney should remember that the *Frozen Benefit* is measured by the hypothetical retired pay of the SM at divorce*. Thus the longer the divorce* is delayed, the higher his or her years of service will be. Perhaps there will even be a promotion in the interim, or a Congressional pay raise! If you represent the spouse, resist any attempt to bifurcate the divorce or dissolution and the entry of the pension division document. This would allow, in some cases, a SM who is eager to be single again to obtain a divorce which would freeze the benefit, and yet hold off on producing the data and records necessary for the pension division document. The two must be handled at the same time, goes the argument; Congress, federal law and military regulations have made the two inseparable. The retired pay center must have the two required data points as of the date of divorce*. If the SM cannot provide these data points, then the divorce* should be postponed, or else there will never be any incentive for production of the information.

A Tip About the Denominator

The attorney for the spouse will need pay close attention to the marital fraction, which in most states is marital pension service divided by total pension service. Since the retired pay that is divided is fixed (except for

COLAs, or cost-of-living adjustments) on the date of divorce, the court order needs to contain a fixed denominator, ending on the date of the divorce or the decree of legal separation. This may run contrary to applicable state rules (e.g., the *Majauskas* formula in New York, the *Bangs* case in Maryland or the *Seifert* formula in North Carolina), but fixing the denominator is the only way to provide for fair division of a benefit which is fixed on the divorce date; anything else would constitute a double dilution of the spouse's share of the pension. For further information, see the several Silent Partner info-letters found at the website of the military committee of the N.C. State Bar, www.nclamp.gov > For Lawyers, and see Note 1 above as to the problem in the DFAS sample order language.

(Rev. 1/27/2019)

* * *

This **SILENT PARTNER** was prepared by COL Mark E. Sullivan (USA-Ret.). For revisions, comments or corrections, contact him in Raleigh, N.C. - 919-832-8507, or at mark.sullivan@ncfamilylaw.com.

ATCH 1 - Leave and Earnings Statement

DEFENSE FINANCE AND ACCOUNTING SERVICE MILITARY LEAVE AND EARNINGS STATEMENT																			
ID	NAME (Last, First, MI)		SOC. SEC. NO.		GRADE	PAY DATE	YRS SVC	ETS	BRANCH	ADSN/DSSN	PERIOD COVERED								
					ES	040211	04	100210	AF		1-31 JUL 08								
ENTITLEMENTS				DEDUCTIONS				ALLOTMENTS				SUMMARY							
Type	Amount			Type	Amount			Amount											
A	BASE PAY	2247.30		FEDERAL TAXES				Y ALT	1521.00		+Amt Fwd .00								
B	BAS	294.43		FICA-SOC SECUR				AL	11.58		+Tot Ent 4266.73								
C	BAH	1725.00		FICA-MEDICARE		32.59					-Tot Ded 1570.22								
D				SGLI		27.00					+Tot Allt 1532.58								
E				AFRH		.50					+Net Amt 1163.93								
F				FAMILY SGLI		5.60					-Cr Fwd .00								
G				TSP		112.37					+EOM Pay 1163.93								
H				MID-MONTH-PAY		1164.47													
I																			
J																			
K																			
L																			
M																			
N																			
O																			
TOTAL		4266.73		1570.22		1532.58													
LEAVE		BF Bal	Emd	Used	Cr Bal	ETS Bal	Lv Lost	Lv Paid	Use/Lose	FED TAXES	Wage Period	Wage YTD	M/S	Ex	Add'l Tax	Tax YTD			
		25.5	25.0	11	39.5	85.5	.0	.0	.0		2134.93	13682.36	M	02	.00	293.01			
FICA TAXES		Wage Period	Soc Wage YTD	Soc Tax YTD	Med Wage YTD	Med Tax YTD	STATE TAXES	St	Wage Period	Wage YTD	M/S	Ex	Tax YTD						
		2247.30	14402.50	892.94	14402.50	258.83			.00	.00	N	00	.00						
PAY DATA		BAQ Type	BAQ Deph	VHA Zip	Rent Amt	Share	Stat	JFTR	Degns	2D JFTR	BAS Type	Charity YTD	TPC	PACION					
		WIDEP	5POUSE	08641	.00	1	R		0			.00							
THRIFT SAVINGS PLAN (TSP)		Base Pay Rate	Base Pay Current	Spec Pay Rate	Spec Pay Current	Inc Pay Current	Inc Pay Current	Bonus Pay Rate	Bonus Pay Current										
		5	.00	0	.00	0	.00	0	.00										
		TSP YTD Deductions				Deferred		Exempt											
		720.14				720.14		.00											
REMARKS:		YTD ENTITLE 27768.11				YTD DEDUCT 2557.92													
IF TSP ELECTION AMT EXCEEDS NET AMT DUE, TSP WILL NOT BE DEDUCTED. -LEAVE CARRYOVER INCREASED TO 75 DAYS FOR FY08. NO ACTION REQUIRED BY MEMBERS. DFAS WILL BEGIN RESTORING AFTER 1 OCT 08. -MYPAY HAS ALLOWED MBRs TO ELECT A HARD-COPY LES VIA US MAIL. AF POLICY IS TO PROVIDE AN ELECTRONIC LES. EFF 1 OCT (SEP LES). AF WILL NO LONGER PRINT LES STATEMENTS IF AVAILABLE ON MYPAY. THANK YOU FOR YOUR SUPPORT. -IF YOUR SPOUSE WANTS INFO ABOUT THE MILITARY LIFESTYLE WE INVITE HIM/HER TO JOIN US FOR THE NEXT HEART LINK SPOUSES ORIENTATION. LUNCH AND CHILD CARE ARE PROVIDED. CALL YOUR BASE AIRMAN & FAMILY READINESS CTR FOR DETAILS. -IF YOU GAMBLE WITH SAFETY...YOU BET YOUR LIFE. -ELECTIONS ARE COMING! UPDATE YOUR ADDRESS TO GET AN ABSENTEE BALLOT. REQUEST YOUR BALLOT FOR THE PRESIDENTIAL AND STATE ELECTIONS. SEE YOUR VOTING ASST. OFFICER OR WWW.FVAP.GOV. TSP 080701(183) RATE CHG SGLI 080701(183) CHANGE GRADE 080701(184) BAH BASED ON WIDEP, ZIP 08641 BANK [REDACTED] ACCT # [REDACTED]																			

DFAS Form 702, Jan 02

WWW.DFAS.MIL

ATCH 2 -Retirement Points Statement

CHRONOLOGICAL STATEMENT OF RETIREMENT POINTS									DATE		
For use of this form, see AR 135-180; the proponent agency is DCS, G-1									12JUN2017		
DATA REQUIRED BY THE PRIVACY ACT OF 1974											
AUTHORITY:		AR 135-180.									
PRINCIPAL PURPOSE:		To provide members of the Reserve Components a detailed listing of retirement points earned in the previous completed anniversary years. To assist units and Soldiers in verifying retirement points earned during the annual review. The purpose of soliciting the DOB is for positive identification. Identify the individual and his/her service record. Determine creditable service for retirement and other benefits.									
ROUTINE USE(S):		The DoD Blanket Routine Uses may apply to this collection.									
DISCLOSURE:		Voluntary. However, failure to furnish information may result in denial of retirement.									
NAME		ADDRESS				DOB		CURRENT GRADE		PEBD	
						19760310		CPT		20000120	
BEGINNING DATE YR MO DAY (1)	ENDING DATE YR MO DAY (2)	MILITARY PERSONNEL CLASS (3)	STATUS OR COMPONENT (4)	INACTIVE DUTY POINTS (5)	EXTENSION COURSE POINTS (6)	MEMBER- SHIP POINTS (7)	ACTIVE DUTY POINTS (8)	QUALIFYING FOR RETIREMENT YRS MO DAYS (9)			TOTAL POINTS CREDITABLE (10)
20150925	20160924	COM	USAR	044	003	15	0011	01	00	00	0073
20141001	20150924	COM	USAR	000	002	15	0000	00	00	00	0017
20140925	20140930	COM	RA	000	000	00	0006	00	00	00	0006
20130925	20140924	COM	RA	000	000	00	0365	01	00	00	0365
20120925	20130924	COM	RA	000	000	00	0365	01	00	00	0365
20110925	20120924	COM	RA	000	000	00	0366	01	00	00	0366
20100925	20110924	COM	RA	000	000	00	0365	01	00	00	0365
20090925	20100924	COM	RA	000	000	00	0365	01	00	00	0365
20080925	20090924	COM	RA	000	000	00	0365	01	00	00	0365
20070925	20080924	COM	RA	000	000	00	0366	01	00	00	0366
20060925	20070924	COM	RA	000	000	00	0365	01	00	00	0365
20050925	20060924	COM	RA	000	000	00	0365	01	00	00	0365
20040925	20050924	COM	RA	000	000	00	0365	01	00	00	0365
20030925	20040924	COM	RA	000	000	00	0366	01	00	00	0366
20020925	20030924	COM	RA	000	000	00	0365	01	00	00	0365
20010925	20020924	COM	RA	000	000	00	0365	01	00	00	0365
20000925	20010924	COM	RA	000	000	00	0365	01	00	00	0365
19990925	20000924	COM	RA	000	000	00	0366	01	00	00	0366
NOTHING FOLLOWS											
TOTAL				44	5	30	5496	16	00	00	5575

ATCH 3 - Sample Excel Chart

NAME: ____ <<High-3 as of Date of Divorce>>

36	Nov-17	O-4	Over 18	\$7,684.80
35	Oct-17	O-4	Over 18	\$7,684.80
34	Sep-17	O-4	Over 18	\$7,684.80
33	Aug-17	O-4	Over 18	\$7,684.80
32	Jul-17	O-4	Over 18	\$7,684.80
31	Jun-17	O-4	Over 18	\$7,684.80
30	May-17	O-4	Over 18	\$7,684.80
29	Apr-17	O-4	Over 18	\$7,684.80
28	Mar-17	O-4	Over 18	\$7,684.80
27	Feb-17	O-4	Over 18	\$7,684.80
26	Jan-17	O-4	Over 18	\$7,684.80
25	Dec-16	O-4	Over 18	\$7,526.70
24	Nov-16	O-4	Over 18	\$7,526.70
23	Oct-16	O-4	Over 18	\$7,526.70
22	Sep-16	O-4	Over 18	\$7,526.70
21	Aug-16	O-4	Over 16	\$7,449.30
20	Jul-16	O-4	Over 16	\$7,449.30
19	Jun-16	O-4	Over 16	\$7,449.30
18	May-16	O-4	Over 16	\$7,449.30
17	Apr-16	O-4	Over 16	\$7,449.30
16	Mar-16	O-4	Over 16	\$7,449.30
15	Feb-16	O-4	Over 16	\$7,449.30
14	Jan-16	O-4	Over 16	\$7,449.30
13	Dec-15	O-4	Over 16	\$7,353.60
12	Nov-15	O-4	Over 16	\$7,353.60
11	Oct-15	O-4	Over 16	\$7,353.60
10	Sep-15	O-4	Over 16	\$7,353.60
9	Aug-15	O-4	Over 16	\$7,353.60
8	Jul-15	O-4	Over 16	\$7,353.60
7	Jun-15	O-4	Over 16	\$7,353.60
6	May-15	O-4	Over 16	\$7,353.60
5	Apr-15	O-4	Over 16	\$7,353.60
4	Mar-15	O-4	Over 16	\$7,353.60
3	Feb-15	O-4	Over 16	\$7,353.60
2	Jan-15	O-4	Over 16	\$7,353.60
1	Dec-14	O-4	Over 16	\$7,280.70
Total 36 Mo. Pay:	\$269,757.90		Avg. Monthly Pay:	\$7,493.28