

## Military Pension Division 2010: Pitfalls & Problems



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## Know the Law; Explain It to the Client

- Three types of military retirement
- USFSPA - 10 USC 1408
- 10/10 overlap = garnishment
- LEGAL EAGLE handouts for clients  
[[www.abanet.org/family/military](http://www.abanet.org/family/military) – OR –  
[www.nclamp.gov](http://www.nclamp.gov) ]

## "The Bounty after the Mutiny"



## 3 military retirement systems – KNOW them!

Final Retired Pay  
High-3  
REDUX



## 3 military retirement systems – KNOW them!

Final Retired Pay  
High-3  
REDUX

"Pre-Retirement Counseling Guide" –  
[www.armyg1.army.mil/rso/preretirement.asp](http://www.armyg1.army.mil/rso/preretirement.asp)

"Which Retired Pay Plan Are You Under?"  
– same website as above

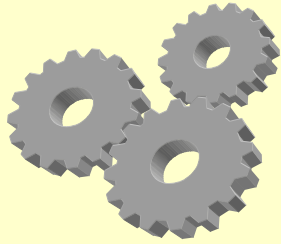
"Which System Applies to You?"  
[http://militarypay.defense.gov/retirement/ad/01\\_whichsystem.html](http://militarypay.defense.gov/retirement/ad/01_whichsystem.html)

## CSB = Career Status Bonus



# \$30,000

Know the Basics



*Know the Basics*

- Regulations
- Federal jurisdiction – three tests (domicile, consent, residence not due to military assignment), 10 U.S.C. 1408(c)(4)
- Wording of the pension division clause
- Four acceptable division methods

FORGET *LONG-ARM STATUTES...*

THROW AWAY INTERNATIONAL SHOE

**FEDERAL  
JURISDICTIONAL LIMITS:**

**10 USC 1408(c)(4)**

PENSION JURISDICTION  
IS LIMITED TO:

1. *Domicile*
2. *Consent*



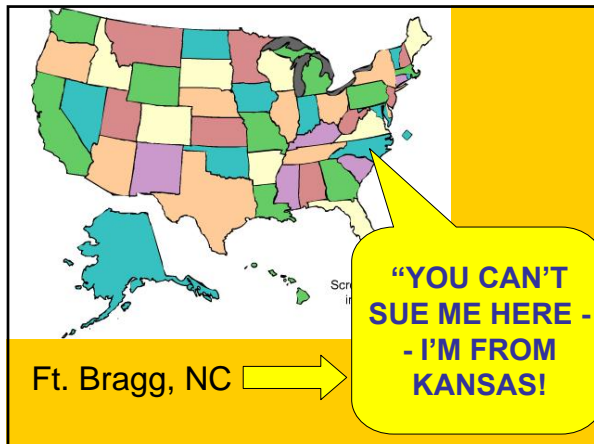
3. *Residence not due to military assignment*

Residence test: ***SM resides in State A not due to military orders***

Example: Airman Smith assigned to Eglin AFB, FL – but lives in Gulf Shores, AL to be near his parents

DOMICILE

- **PHYSICAL PRESENCE** (excluding temporary absences)
- **INTENT AS SHOWN BY...**
  - state income taxes
  - car title, registration
  - driver's license
  - voting
  - home ownership
  - in-state tuition
  - voting
  - bank accounts



### Domicile of servicemembers...

- Servicemembers Civil Relief Act – protects domicile for voting, tax purposes
- False domicile claims
- Costly to litigate in 2 states!

### Leave-and-Earnings Statement

DEFERRED FINANCE AND ACCOUNTING SERVICE MILITARY LEAVE AND EARNINGS STATEMENT		PERIOD COVERED	
ID	NAME (LAST, FIRST, MI)	SEC. SER. NO.	ORGAN. UNIT
EMPLOYMENT DATA			
TYPE	AMOUNT	TYPE	AMOUNT
BASE PAY	4,000.00	BASE PAY	4,000.00
COLLEGE PAY	0.00	COLLEGE PAY	0.00
COMBAT PAY	0.00	COMBAT PAY	0.00
DEPARTMENTAL ALLOWANCE	0.00	DEPARTMENTAL ALLOWANCE	0.00
GRATUITY	0.00	GRATUITY	0.00
TOTAL	4,000.00	TOTAL	4,000.00
LEAVE DATA			
LEAVE TYPE	AMOUNT	LEAVE TYPE	AMOUNT
UNPAID LEAVE	0.00	UNPAID LEAVE	0.00
PAID LEAVE	0.00	PAID LEAVE	0.00
TOTAL LEAVE	0.00	TOTAL LEAVE	0.00

West Virginia

State of Residence for Tax Purposes

>Filing the lawsuit... or

>Responding to it

CONSENT

### Safe havens?

- Invested pension is Sep. Prop. in ARK., IND., ALA.
- Rest of states don't require "vesting"
- Puerto Rico doesn't divide non-contributory pensions

### What is Spouse's Share?

- 50% of Pension?

*"Wife shall receive 50% of the military retirement benefits of Husband."*

### What is Spouse's Share?

- 50% of Pension?
- **ONLY** if married during SM's entire career...
- **Otherwise- 50% of marital share of pension**

### Wording the pension division clause – the marital fraction

- **Majority rule**
- **Minority rule**

### Pension division formulas

- **Majority of states: 50% X "marital fraction" X final retired pay**

### Majority Marital Fraction:

(When COL Roberts is still on active duty...)

$$\frac{\text{Yrs. Marital Military Svc.}}{\text{Yrs. Total Military Svc.}} = \frac{20}{X}$$

### Pension division formulas

- **Minority of states: 50% X "marital fraction" X retired pay earned as of divorce date**

### Minority Marital Fraction:

(When COL Roberts is still on active duty...)

$$\frac{\text{Yrs. Marital Military Svc. till divorce}}{\text{Yrs. Total Military Svc. till divorce}}$$

## "All Clauses Considered"

- SET DOLLAR AMOUNT
- (favors SM - no COLA),
- or-
- % OF DISPOSABLE RETIRED PAY
- or-

## "All Clauses Considered"

- FORMULA CLAUSE (when SM is not yet ret'd)
- or-
- HYPOTHETICAL
- (favors SM - freezes grade/ years)

## RULES FOR DIRECT PAY ORDERS

- NOT MORE THAN 50% OF DISPOSABLE RETIRED PAY
- STARTING NO EARLIER THAN 90 DAYS AFTER SERVICE ON DFAS
- ENDS AT DEATH OF RETIREE OR SPOUSE, WHICHEVER OCCURS FIRST
- PROSPECTIVE ONLY-- NO ARREARS

## RULES FOR DIRECT PAY ORDERS

- SERVE ON DFAS CERTIFIED MAIL [RET. RECEIPT REQUESTED]
- DECREE TO BE CERTIFIED WITHIN 90 DAYS OF SERVICE
- APPLICATION LETTER SIGNED BY SPOUSE [DD Form 2293, [www.dfas.mil](http://www.dfas.mil) ]

## *Know the Basics*

- **Wording, logistics**
- **Documents**
  - LES [Leave and Earnings Statement]
  - RAS [Retiree Account Statement]

Gross pay, VA waiver, SBP premium, Taxable Income

## RETIREE ACCOUNT STMT.

RETIREE ACCOUNT STATEMENT					
EFFECTIVE/TERMINATION DATE: DEC 30, 2005		NEW PAY PERIOD: FEB 01, 2006		ISS: 123-45-6789	
PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES					
Major John Q. Doe, USAF (Ret.) 222 GROSS ST. Apex, NC 27511-1234			DFAS-CL POINTS OF CONTACT DEFENSE FINANCE AND ACCOUNTING SERVICE 33 MILITARY RETIREMENT FAV 30 800 755 LONDON KY 40322 7530 COMMERCIAL (504) 922-8895 TOLL FREE 1 800 321 1000 TOLL FREE FAX 1 800-888-6755 dfafsa http://dfas.dfas.mil 1 877-832-3677		
PAY ITEM DESCRIPTION					
ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	2,760.00	2,760.00	FTYR	81.25	200.00
VA WAIVER	591.30	473.04	ALL COMBONDS	40.00	40.00
SBP COST	175.28	179.28	NET PAY	2,264.11	1,844.42
TAXABLE INCOME	1,975.42	2,091.08			
PAYMENT ADDRESS					
YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)			TAXES		
DIRECT DEPOSIT			TAXABLE INCOME: 1,975.42		
			FEDERAL INCOME TAX WITHHELD: 191.11		
TAXES					
FEDERAL WITHHOLDING STATUS:		SINGLE			
TOTAL EMPLOYERS:		01			
FEDERAL INCOME TAX WITHHELD:		200.00			
SURVIVOR BENEFIT PLAN (SBP) COVERAGE					
SBP COVERAGE TYPE:	SPOUSE AND CHILDREN	ANNUITY BASE AMOUNT:	2750.50		
SPONSOR COST:	476.76	5% ANNUITY AMOUNT:	138.25		
CHILD COST:	50	4% ANNUITY AMOUNT:	110.60		
		3% ANNUITY AMOUNT:	82.95		
		2% ANNUITY AMOUNT:	55.30		
		1% ANNUITY AMOUNT:	27.65		
		0% ANNUITY AMOUNT:	0.00		
THE ANNUITY PAYABLE IS 5% OF YOUR ANNUITY BASE AMOUNT UNDER YOUR SPOUSE REACHERS AGE 62. AT AGE 62, THE ANNUITY MAY BE REDUCED DUE TO SOCIAL SECURITY OFFSET OR UNDER THE TWO-TIER FORMULA. THAT REDUCTION MAY RESULT IN AN ANNUITY THAT IS LOWER BETWEEN 5% ANNUITY AND 5% (112.77) OF THE ANNUITY BASE AMOUNT. THE COMPARISON OF THE SBP ANNUITY AND THE SOCIAL SECURITY BENEFITS WILL PRIORITIZE TOTAL PAYMENTS FROM DFAS AND THE SOCIAL SECURITY ADMINISTRATION OF AT LEAST 5% OF YOUR BASE AMOUNT. THE ACTUAL ANNUITY PAYABLE IS DEPENDENT ON FACTORS IN EFFECT WHEN THE ANNUITY IS ESTABLISHED.					

## Know the Basics - Resources

- 6 SILENT PARTNERS re military pension division

[www.abanet.org/family/military](http://www.abanet.org/family/military)

- DFAS guide for attorneys as to military pension division, "Dividing Military Retired Pay"

<http://www.dfas.mil/garnishment/military/AttorneyInstructions-01-04-10.pdf>

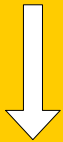
## Disability Details

- Waiver of ret'd pay for VA disability \$
- VA is tax-free, AND...



news  
to me!

## V.A. DISABILITY PAY = **NOT DIVISIBLE!**



(ditto for most of Military  
Disability Retired Pay)

## Post-Divorce VA Elections: How the states are responding

- **Go to great lengths to help former spouse**
  - Indemnification
  - Damage award
  - Re-open the property division
  - Compensatory alimony

## How to protect the non-military spouse from VA waivers

- Indemnification Clause
- **DON'T SAY** "John will take no action..."
- **DO SAY** "John will compensate Mary..."

## Indemnification Clause

- **State facts, assumptions** ["John is COL with over 18 years' service in Army, will receive pension based on longevity after at least 20 years of service."]

## Indemnification Clause

- State facts, assumptions [“John is COL with over 18 years’ service in Army, will receive pension based on longevity after at least 20 years of service”]
- **State intent [“Mary to get unreduced share of pension based on years of service”]**

## Indemnification Clause

- State facts, assumptions [“John is COL with over 18 years’ service in Army, will receive pension based on longevity after at least 20 years of service”]
- State intent [“Mary to get unreduced share of pension based on years of service”]
- **Don’t call it Disposable Retired Pay – that limits her share b/c VA is excluded from DRP**

## Indemnification Clause

- State duty of SM/retiree [“John will compensate Mary if there is any reduction in her share of the longevity pension.”]
- Include interest on unpaid amount [“The breaching party will also pay interest at the statutory rate on all unpaid amounts and damages.”]

## Indemnification Clause

- State duty of SM/retiree [“John will compensate Mary if there is any reduction in her share of the longevity pension.”]
- **Indemnify also as to expenses – not just REASONABLE [“Each party will pay for all expenses and damages incurred because of the other’s breach of this agreement.”]**



## VA with a Vengeance

CRDP and CRSC – “The Evil Twins”  
found at...

[www.abanet.org/family/military](http://www.abanet.org/family/military) > SILENT PARTNER

## CRDP to the Rescue

- **CRDP = Concurrent Retirement & Disability Pay**
- Available if  $\geq 50\%$  disability rating
- Return of waived military retired pay



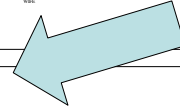
## CRDP to the Rescue

- Phased in over 10 yrs [2004-2014]
- 100% disabled = immediately vested
- Need to resubmit papers to DFAS...
- Front-loading of payments



Fig. 2 of RAS: "Based on information received from the VA, your CRDP amount is \$\_\_\_\_."

FORMER SPOUSE PROTECTION ACT DEDUCTIONS					
FASE	AMOUNT				
MISCELLANEOUS DEBITS					
DEBIT TYPE	MONTHLY DEDUCTION	PRINCIPAL AMOUNT	INTEREST AMOUNT	ACCUMULATED INTEREST	DEBIT BALANCE
ARREARS OF PAY BENEFICIARY INFORMATION					
YOU HAVE SELECTED ORDER OF PRECEDENCE. THE FOLLOWING BENEFICIARIES ARE ON RECORD:					
NAME	DATE P. DOC.	SSN	REL. STATUS	REL. STATUS	REL. STATUS
MESSAGE SECTION					
BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS: \$____.					



CRSC Pay Statement		
STATEMENT EFFECTIVE DATE SEP 01, 2004	PAYMENT DATE SEP 01, 2008	SSN 123-45-6789
RETIREE'S NAME AND ADDRESS		HOW TO CONTACT US
PLEASE REMEMBER TO NOTIFY DFAS OF YOUR ADDRESS CHANGES MAYOR JOHN Q. DOE, USAF (RET.) 123 GROUND STREET MILB, MO 63111-1234 PAYMENT ADDRESS DIRECT DEPOSIT		DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIRED PAY PO BOX 7130 LONDON, KY 40242-7130 COMMERCIAL (218) 825-6398 TOLL-FREE 1-800-472-7098 TOLL-FREE / FAX 1-800-489-6599 myPay Mia@mypay.dfas.mil 1-877-363-3677
PAYMENT INFORMATION		ENTITLEMENT INFORMATION
CRSC Payment 2,100.00	CRSC Debt Deduction 725.00	CRSC Garnishment Deduction 0
CRSC Net Pay 1,375.00	Retired Pay Before Deductions 2,100.00	Retired Pay Offset by DVA Compensation 725.00
THE DVA OR YOUR BRANCH OF SERVICE PROVIDED THE DATA		CRSC Debt Balance 0
CRSC SPECIAL MONTHLY COMPENSATION CODE UNEMPLOYABLE 80		CRSC Net Pay 1,375.00
DVA DISABILITY % 80		CRSC Special Monthly Compensation 0
COMBAT RELATED DISABILITY % 30		CRSC Special Monthly Compensation 0
PURPLE HEART % 0		CRSC Special Monthly Compensation 0
CRSC START DATE JAN 01, 2004		CRSC Special Monthly Compensation 0
SPECIAL MONTHLY COMPENSATION START DATE		CRSC Special Monthly Compensation 0
REMARKS This is your monthly CRSC statement. Please refer to myPay frequently asked questions for additional information about CRSC and this statement.		

CRSC statement is at secure "myPay" website for retirees.

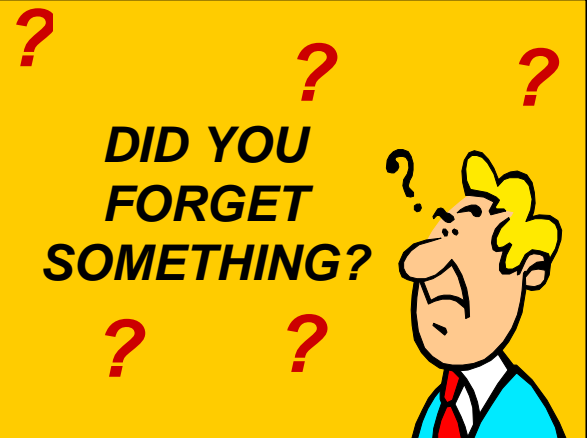
## TSP is Retirement, Too

- Thrift Savings Plan = defined contribution plan: [www.tsp.gov](http://www.tsp.gov)
- Participation? Check the LES!



## Waiver Wording

- "Mary Doe hereby waives and gives up any claim she may have to the military retired pay [and Survivor Benefit Plan] of John Doe."





## For those left behind -

- S.B.P. [Survivor Benefit Plan...?]
- or **S**ingle **B**iggest **P**roblem????



## SBP – Single Biggest Problem?

- SBP = 10 USC 1447 *et seq.*
- Benefit at death of retiree/SM = 55% of base amount
- Cost (fm retired pay) = 6.5% of base amt for “spouse/former spouse coverage”
- Benefits, disadvantages
- Checklist for judges

### SBP DEFINED

- Court can order SBP coverage
- Without it, payments to former spouse end at the retiree's death
- Unitary – cannot divide, share with your NEW spouse!

### SBP DEFINED

- Premiums come “off the top” before DRP (if court-ordered)
- Avoid SGLI as alternative (Ridgway case)

### TYPICAL CLAUSE???

**“MARY DOE SHALL RECEIVE 46.5% OF ALL THE MILITARY RETIREMENT BENEFITS OF JOHN DOE, INCLUDING EVERYTHING ATTRIBUTABLE TO HIS SERVICE IN THE MILITARY TOWARDS A PENSION, AND EVERY PENSION BENEFIT OF HIS.”**



### LIFE & DEATH

If representing SPOUSE –

- Life: SPECIFY SHARE OF PENSION
- Death: IF SM DIES AFTER DIVORCE, SBP COVERAGE TO ‘FORMER SPOUSE’
- **“MARY SHALL BE THE FORMER SPOUSE BENEFICIARY FOR JOHN’S SBP.”**

### SBP Strategies

- Shifting the premium to FS...
- SBP not available if FS remarries before 55

## "Timing Is Everything"

- The 10 Year Rule for pension division garnishment
- The TWO SBP deadlines for order submission to DFAS
- Medical care for former spouses

Dealing with Deadlines

## The "10-Year Rule"

COURT ORDER...

- + 10 YRS OF CREDITABLE SERVICE
- + 10 YRS OF MARRIAGE DURING SVC.
- = DIRECT PAYMENT FROM DFAS

**\*\*NOT a rule of divisibility!\*\***

Dealing with Deadlines

## SURVIVOR BENEFIT PLAN

- One-year deadline
  - From divorce if SM submits applies
  - From date of SBP order if FS sends the order



Dealing with Deadlines

## "20-20-20 COVERAGE"

- 20 YRS OF MARRIAGE
- + 20 YRS OF CREDITABLE SVC
- + OVERLAP OF 20 YEARS
- = MILITARY MEDICAL COVERAGE



Dealing with Deadlines

## Other Medical Coverage

- CHCBP – 10 USC 1078a
  - Premium-based
  - Normally 36 months after divorce
  - BUT INDEFINITE if:
    - Pension division OR SBP coverage in order
    - Unremarried if under 55



Whooo ya' gonna call?



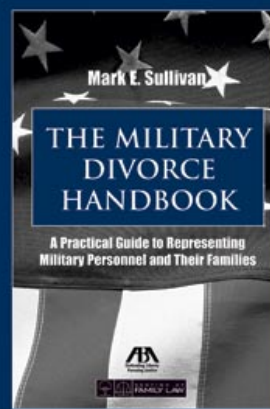
“Who ya’ gonna call?”

- ABA FAMILY LAW SECTION'S MILITARY COMMITTEE:  
[www.abanet.org/family/military/](http://www.abanet.org/family/military/)
- NC STATE BAR LAMP COMMITTEE:  
[www.nclamp.gov](http://www.nclamp.gov)



“Who ya’ gonna call?”

- DFAS WEBSITE: [www.dfas.mil](http://www.dfas.mil)
- ARMY RETIREMENT SERVICES:  
[www.armyg1.army.mil/rso/rso.asp](http://www.armyg1.army.mil/rso/rso.asp)



“Who ya’ gonna call?”



The End



# SILENT PARTNER

## MILITARY PENSION DIVISION: THE “EVIL TWINS” – CRDP AND CRSC

*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.*

### Overview of the Military Pension Division Series

There are six SILENT PARTNERS in this series.

- *Military Pension Division: Scouting the Terrain* discusses USFSPA (the Uniformed Services Former Spouses’ Protection Act), and how the question of “federal jurisdiction” is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember’s Strategy* contains information on how to assist the servicemember (hereafter “SM”) in this area.
- Helping the SM’s spouse or former spouse is the subject of *Military Pension Division: The Spouse’s Strategy*.
- *Military Pension Division: The “Evil Twins” – CRDP and CRSC* deals with the workings of Concurrent Retirement and Disability Pay (CRDP) and Combat-Related Special Compensation (CRSC).
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS*. It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- *“Lost” Military Pensions: The Ten Commandments* focuses on retrieving an apparently “lost” pension benefit for the spouse/former spouse.

### Introduction

The waiver of military retired pay in exchange for VA disability compensation is covered in *Military Pension Division: The Servicemember’s Strategy*. Briefly, here’s how it works.

The law allows a retiree to elect an amount of tax-free disability compensation only if he gives up the same amount of retired pay. Taking this option is always beneficial to the military retiree, since it yields an increase in net income because of the non-taxable aspect of VA (Department of Veterans Affairs) disability compensation.

Steve Chucala, the Chief of Client Services, Ft. Belvoir, adds the following:

The election concerning VA tax-free compensation requires some clarification due to the various categories of soldier separations from military service. The following serves to clarify most issues presented since the option to elect VA compensation depends upon the status of the soldier at the time of discharge.

Servicemembers who terminate active service prior to regular retirement or retire without any disability compensation from the armed forces, and who subsequently are awarded disability compensation by the VA, automatically receive tax-free compensation. There is no election involved since all payments are from the VA only.

If a SM is awarded severance pay (normally where the percentage of disability is less than 30% and the soldier is not retirement eligible as those on active duty with 20 years of service or is a Reservist not eligible for age 60 retirement), he accepts the severance pay without any options. Should this SM subsequently be awarded additional VA disability compensation, the amount previously awarded as severance pay is deducted from the VA compensation amount.

If a SM is retired either on TDRL (temporary disability retirement list) or PDRL (permanent disability retirement list) and is later awarded VA compensation, DFAS offers the option of keeping the military disability pay or accepting the VA tax-free payments as a dollar-for-dollar offset.

However it is taken, this election usually wreaks havoc when the retiree's pension is subject to a garnishment order for part of "disposable retired pay" in favor of a former spouse due to separation or divorce. As soon as the election takes place at DFAS, the former spouse usually sees her share of divisible retired pay decrease, sometimes substantially. Thus if the military retiree, John Doe, had disposable retired pay (without disability) of \$1,500 per month and his disability were evaluated as equivalent to \$1,000 per month in VA benefits, he could waive the same amount of taxable longevity pension in order to receive this amount tax-free. His monthly benefit would still total \$1,500, but only \$500 of this would be subject to taxes if he makes this choice.

In addition, only this \$500 which remains of his military pension would be subject to division with Mary Doe, his ex-wife. The Uniformed Services Former Spouses' Protection Act exempts VA disability compensation from the definition of "disposable retired pay." So if the military pension division order had given Mary 40% of John's disposable retired pay, her pre-waiver share would have been \$600 a month (40% X \$1,500), but her post-waiver amount would be only \$200 (40% X \$500). Especially when rent or mortgage payments depend on the continued receipt of a stable, predictable amount of divided military retired pay, such a VA waiver by the military retiree can be catastrophic.

### **Congressional Developments Since 2003 – Back to the Beginning**

In 2003, Congress passed legislation taking effect January 1, 2004 to allow concurrent receipt of both forms of payments – retired pay and disability benefits – for certain eligible retirees. The restoration of retired pay is known as Concurrent Retirement and Disability Pay (CRDP); it is at 10 U.S.C. §1414.

Also beginning in 2003, Congress made a new form of special compensation available to a limited number of retirees. The benefits and definitions were expanded substantially in 2004. Called Combat-Related Special Compensation (CRSC), these payments may now, under the 2004 revised rules, be made to those retirees with a disability of at least 10% directly related to the award of the Purple Heart decoration, or else a combat-related disability rated at least 10% (such as hazardous duty or training for combat). CRSC is found at 10 U.S.C. §1413a. The CRSC regulations are at Chapter 63, Volume 7B of the Department of Defense Financial Management Regulations (DoDFMR), effective May 31, 2006, Sections 6301-6310. See the "Resources" section below for the Regulation website.

Both of these affect the division of military retired pay. Both are complex and misunderstood – if not unknown – by civilian practitioners as well as many judge advocates. Let's see how they work.

### **CRDP Explained**

For those who have at least 20 years of qualifying military service and a VA disability rating of at least 50%, CRDP authorizes a ten-year phased elimination of the VA offset. Put in positive terms, this means – unless the disability rating is 100% – a ten-year period in which the retiree will gain back every dollar of the waived retired pay that he exchanged for VA disability compensation. The disability does *not* have to be combat-related. CRDP is the return of waived pension payments, so it has the attributes of those pension payments. It is taxable compensation. It also is divisible with a former spouse under a military pension division order.

The eligible retiree will see his retirement pay increase each year until the phase-in period is complete in 2014, when the retiree will be receiving an additional amount that is equal to the amount of retired pay waived. The period of phase-in began in 2004, with the following initial amounts provided in 2004 as additional military retired pay in each month's retiree payment:

TABLE 1

Disability % Rating	2004 Amount
100%	\$750
90%	\$500
80%	\$350
70%	\$250
60%	\$125
50%	\$100

Source: 10 U.S.C. §1414 (c).

Note that the phase-in is “front-loaded,” not just 10% a year over ten years. In 2005, the individual receives the amount shown above plus 10% of the difference between his remaining retired pay waiver and the amount shown above for 2004. In 2006 he gets the amount he received in 2005, plus 20% of the difference between his remaining retired pay waiver and the 2004 amount shown above. It increases the same way until full restoration in 2014. 10 U.S.C. §1414(c). Those retiring after 2004 but before 2014 receive a larger initial monthly increment of CRDP than shown in the table above, due to the schedule of additional amounts paid between 2004 and retirement.

**How Much CRDP? An Example**

To illustrate, use the hypothetical facts in our scenario above with John Doe entitled to \$1,500 retired pay. We will ignore annual cost-of-living adjustments (COLAs). John has waived \$1,000 due to VA disability compensation. If his disability rating were 60%, here's how his payments would grow:

- In 2003, he was receiving \$500 retired pay and \$1,000 VA disability compensation.
- In 2004, he receives total retired pay of \$625 (\$500 + \$125, the 2004 amount for a 60% disability rating shown above). There is still \$875 remaining in retired pay waiver (\$1,000 - \$125). He still receives \$1,000 in VA compensation.
- In 2005, he receives \$700 in total retired pay. This is made up of \$625, the prior year amount, plus 10% of the difference between \$875, his remaining retired pay waiver amount, and \$125, the 2004 amount shown on the table above. (Let's check:  $875 - 125 = 750$ .  $750 \times 10\% = 75$ .  $625 + 75 = 700$ ). He is still receiving his VA payment of \$1,000 a month in addition to this.
- This process continues onward until full restoration of the waived \$1,000 at 2014.

**Verifying Receipt of CRDP**

CRDP increases the pension of the retiree effective January of each year, with the payment arriving on or about February 1. How will you know if John is getting CRDP? Just read the comment at the “MESSAGE SECTION” on page 2 of his Retiree Account Statement (RAS), Form DFAS-CL 7220/148 (see ATCH 1 at the end of this Silent Partner). It will look like this:

<b>MESSAGE SECTION</b>
BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS \$_____.

If the individual will not voluntarily produce his RAS, which is usually sent to him or her by e-mail from DFAS every time there is a change of pay and also posted on a secure DFAS website (see below), counsel may resort to formal discovery procedures if the matter is in litigation. DFAS will honor a request for documents so

long as it is in the form of a court order or a subpoena signed by a judge. Send the order or subpoena, with the individual's full name and Social Security Number (SSN), to:

Defense Finance and Accounting Service  
DFAS- Cleveland Center  
Records Retrieval (Code HAC)  
1240 East 9<sup>th</sup> Street, Room 2679  
Cleveland, OH 44199-2055  
Fax 216-522-6530

There is no requirement that the subpoena or order be sent by certified mail. An example of the RAS extract is at ATCH 2.

### **Don't Take "NO" for an Answer**

Sometimes the attorney for the retiree will disavow any knowledge of the existence of an RAS, or the retiree will claim that it was lost, misplaced, or "floated away in that big flood last month." You should know that all military retirees are eligible for a free "myPay" account at the DFAS website. This secure website is found at <https://mypay.dfas.mil>. Once there, it is a simple matter for a military retiree to obtain his current RAS; he just enters his "LogIn ID" and password, go to the screen marked "Your Military Retiree Pay Account," and select "Retiree Account Statement (RAS)." Phoenix attorney Mike McCarthy, a retired Air Force Reserve brigadier general, says that he has had some success in getting an order requiring both attorneys and the retiree to use a computer to access the current or past RAS from the myPay website.

Retirees receive the following e-mail message at the end of each December (a fictitious ending with X's is shown below):

*Your electronic W2 for 2005 is available on myPay at*

*<https://mypay.dfas.mil/mypay.aspx?xxxxxXXX~XXXXX>*

*The Defense Finance and Accounting Service (DFAS) implemented the myPay web-based system in March 2000. myPay delivers pay information and lets you process pay-related transactions timely, safely and securely. The Web-based system reduces the risks of identity theft associated with postal delivery by allowing members to access electronic W2, LES and other financial information. myPay matches industry standards for the highest level of encryption and security to protect myPay users.*

*If you do not have a PIN for accessing myPay, you can obtain one via email by clicking on the New PIN button on the myPay website at the web address shown above. A temporary PIN will be emailed to your official email address. If you have any questions concerning myPay, please call our contact center toll free at 1-800-390-2348. If the information posted to your W-2 is incorrect, please contact your servicing pay office or your customer service representative for assistance.*

Another method of finding out the retiree's deductions is to ask DFAS. A little-known notice in the Federal Register makes this possible. Effective July 13, 2000, DFAS announced at 65 FR 43298 that it would disclose this information to a former spouse:

*In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:*

*To former spouses, who receive payments under 10 U.S.C. 1408, for purposes of providing information on how their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.*

While it may be difficult to obtain sometimes if the person at DFAS responding to the written request is a newly hired GS-6 employee who doesn't know about this rule, diligence and courtesy will get the former spouse through to someone in authority who will be able to assist. Be sure to include in the written request from the former spouse full identifying information on the retiree (name and SSN), the SSN for the former spouse and – if appropriate – an authorization for DFAS to provide the information to the attorney for the former spouse. The request might look like this:

*Defense Finance and Accounting Service  
DFAS- Cleveland Center  
Records Retrieval (Code HAC)  
1240 East 9<sup>th</sup> Street, Room 2679  
Cleveland, OH 44199-2055  
Fax 216-522-6530*

*Pursuant to the Privacy Act Routine Use set out at 65 Fed Register 43298, I hereby request that you provide to me information on the current gross retired pay, current deductions and dollar amount for each deduction used in calculating my share of the pension in regard to my former husband, John Q. Doe, SSN 987-77-6543. My former spouse payments were calculated under 10 USC 1408. [OPTIONAL: I authorize you to provide this information to my attorney, Lucinda Lopez, Lopez and Pasquale, LLP, 123 Green Street, Apex, NC 27566]*

*\_\_\_\_\_/s/\_\_\_\_\_  
Mary P. Doe  
SSN 234-56-7899*

The average response time is several weeks. To check on the status of a request, call 216-522-5046 and be sure to have the retiree's SSN available. The expected answer, when it arrives, will usually look like the letter at ATCH 3 at the end of this Silent Partner

### **A Few More Rules**

CRDP includes Chapter 61 medical retirees and Guard/Reserve members with 20 or more "good years" toward retirement. CRDP cannot exceed gross retired pay. The National Defense Authorization Act of 2005 eliminated the nine-year phase-in for full concurrent receipt payments to eligible retirees rated as totally disabled (military disability pay and VA disability pay), as of January 1, 2005.

Mary Doe, the former spouse, should have been receiving payments of pension division from DFAS since her ex-husband's disability rating was less than 100% and he was still receiving *some* retired pay. In this situation, no new application is needed since her pension division order is "in the system" at DFAS. She begins receiving increased pension payments from DFAS due to the increased pension that John Doe is now receiving.

If, however, a former spouse has not been receiving payments because the retiree has a disability rating of 100%, then her attorney should submit the paperwork anew, including the divorce decree, military pension division order and DD Form 2293. Fax the request to DFAS at 216-522-6960 or mail it to DFAS-GAG/CL, PO Box 998002, Cleveland, OH 44199-8002.

Garnishment for pension division through DFAS will be for current retired pay division. There is no authority for DFAS to garnish for pension division arrears.

CRDP will go a long way toward ameliorating the unfairness of unilateral changes in military pension division orders by retirees who, after the fact, obtain VA disability compensation and thus reduce the share of the former spouse. It will not, however, eliminate the problem entirely. Since it exempts those individuals whose disability rating is less than 50%, and it puts off full restoration until 2014 in most cases, the problem will



remain to some extent and may be addressed by means of the other tools and options covered in *Military Pension Division: The Spouse's Strategy*.

### **CRSC Explained**

Combat-Related Special Compensation (CRSC) is a benefit provided by Congress for those who have a combat-related disability of at least 10% under certain conditions. The Defense Department estimates that about 200,000 military retirees will be eligible for CRSC.

The disability is considered to be combat-related under 10 U.S.C. §1413a (e) if it –

- (1) is attributable to an injury for which the member was awarded the Purple Heart; or
- (2) was incurred (as determined under criteria prescribed by the Secretary of Defense)—
  - (A) as a direct result of armed conflict;
  - (B) while engaged in hazardous service;
  - (C) in the performance of duty under conditions simulating war; or
  - (D) through an instrumentality of war.

These qualifications include, by way of example, injury or illness resulting from actual combat, simulations of war (e.g., gas mask training, field training exercises, direct-fire training and “confidence courses”), hazardous duty such as diving or parachuting, and instrumentalities of war (e.g., tanks, artillery, machine guns, military planes). These conditions are defined at §6302 of the CRSC regulations in the DoDFMR. There is further general information on CRSC at [www.hrc.army.mil/site/crsc/](http://www.hrc.army.mil/site/crsc/). Since “combat-related” is service-specific, the application is sent to the retiree’s branch of service, not to the Department of Defense.

CRSC is not longevity retired pay; it is an additional form of compensation for certain members of the armed forces. 10 U.S.C. §1413a (g) states that “[p]ayments under this section are not retired pay.” Thus payments are not divisible as property.

The CRSC rates come from the VA tables and increase with the number of a retiree’s dependents (spouse, spouse and child, etc.). Thus, to use a May 2006 example, the rate for a 10% disability, no dependents, is \$112 a month. The no-dependents rate for a 20% disability rating is \$218 per month. The amount goes up to a total of \$2,844 for maximum dependents and a 100% disability rating.

### **CRSC Twists and Turns**

Once a CRSC application is approved, DFAS (in its infinite wisdom) does the calculations and the decision-making for the retiree. Since one cannot receive both CRDP and CRSC, DFAS automatically makes the election for whichever is most financially advantageous, in that it yields the highest net cash flow. DFAS doesn’t take into account that the retiree may have a property division garnishment in effect. If CRDP is more favorable in gross dollars, then that’s what DFAS will choose. This means that, for example, if CRSC in a particular case were \$500 and CRDP for the same year were \$501, then DFAS would choose CRDP for the retiree, even though the CRDP is taxable and subject to a garnishment division with the ex-spouse.

The potential hardships for former spouses due to CRSC elections are remarkable. Phoenix practitioner Mike McCarthy writes:

*First example: Assume an Air Force tech sergeant with 20 years of creditable service; 100% VA disability rating, all of it combat-related, former spouse to receive 43% of the disposable retired pay as property division. He receives \$2,979 VA disability compensation and waives ALL of his \$1,299 gross military retired pay. In return, he receives \$1,299 in CRSC payments. Thus he gets \$4,278 per month tax-free. His ex-wife gets her share, 43%, of the pension, but the pension at this point is ZERO. She gets nothing; she has lost \$558 per month.*

*Another scenario? Sure. Assume same facts except that the CRSC disability rating is 40%. The retiree gets \$2,979 VA disability compensation but he must waive all of his \$1,299 pension,*

*and he gets \$1,191 CRSC. Thus he gets \$4,170 per month tax-free; while the ex-wife still gets NIL from disposable retired pay – there is none.*

*As a further illustration of this, assume a full Colonel with 100% VA and 100% CRSC disability rating, with 43% award to former spouse. His military pension is \$ 6,630 before VA waiver of \$2,979, so his real "disposable" pension is \$3,651. He also gets the maximum amount of CRSC, \$2,979. His former wife gets 43% of only \$3,651, which equals \$1,570, rather than 43% of the gross \$6,630, or \$2,850. She loses \$1,280. He gets the balance of the pension (\$2,081), plus the two disability benefits (\$5,958) for a total of \$8,039.*

A CRSC payment is retroactive to the date of filing of the VA claim or of the enabling legislation (the 2003 law for limited conditions or the 2004 expansion, for the conditions listed above), whichever is later. According to the DFAS "Retired Pay Newsletter" of August 31, 2006, potential retroactive pay is due for about 100,000 accounts, and retroactivity will cause problems for both parties. If the retiree has been getting CRDP and elects CRSC, there will be a one-time retroactive payment to him or her, and the money received under CRDP for that same period covered by the CRSC retroactive payment will be taken back. The CRDP pay-back will be subtracted from the retroactive CRSC payment that he or she receives.

But what about the former spouse? If the retiree's former spouse has been receiving a share of the pension as property division, the share paid from CRDP must also be collected back from her or him. There are two possible results.

First, if the CRSC election results in *no further pension garnishment payments* to the former spouse, then DFAS will initiate a debt collection action against her or him, since there would no longer be any continuing pension garnishment payments from which to deduct the CRDP payments made to her or him. The former spouse may petition for waiver of the indebtedness. This is done on DD Form 2789, "Waiver/Remission of Indebtedness Application." The mailing instructions are on the face page of the form.

On the other hand, if the CRSC election does not remove all the pension share garnishment, then the former spouse will still be subject to a collection action by DFAS. DFAS will recoup the "overpaid" funds from her or him, resulting in decreased future payments until the indebtedness is fully paid; this is ordinarily done over a 36-month period. An example of an actual client's overpayment letter (with names and identifying information changed) is at ATCH 4 at the end of this Silent Partner. This former spouse may also petition for waiver of this indebtedness.

### **CRSC Final Points and Charts**

Here are some final points about CRSC:

- There is no phase-in for CRSC; eligible retirees will receive full CRSC payments plus whatever VA disability compensation and unwaived retired pay they had been receiving.
- CRSC payments don't end in 2014, as CRDP payments do.
- The CRSC payment cannot exceed the amount of the military retired pay waived for VA disability compensation.
- Unlike ordinary retired pay (including CRDP), CRSC is non-taxable - it is disability compensation, not retired pay.
- CRSC is available for support determinations and for garnishment for alimony and child support. This is also true of CRDP.
- The statute includes Guard and Reserve personnel who have at least 20 qualifying years for retirement purposes.

Here is a table, downloaded June 6, 2006, for CRSC compensation rates (without dependents) –

TABLE 2

Combat related VA Disability Rating	Monthly CRSC
100%	\$2,393
90%	\$1,436
80%	\$1,277
70%	\$1,099
60%	\$873
50%	\$690
40%	\$485
30%	\$337
20%	\$218
10%	\$112

Source: www.military.com

A simplified way of understanding all of this information about comparisons is –

TABLE 3

CRDP and CRSC – A Comparison	CRDP	CRSC
Type of disability required	Service-connected	Combat-related
Considered longevity retired pay	Yes	No
Divisible as property	Yes	No
Minimum disability rating required	50%	10%
Taxable	Yes	No
Phase-in	Yes*	No
Retroactive payment	No	Yes†
Increases with number of dependents	No	Yes‡
Available for support determinations, garnishments	Yes	Yes

\*Except for 100% disability cases

†Payment is retroactive to the date of filing of the VA claim.

‡If CRSC rating is 40% or more.

### **CRDP and CRSC – the Election**

Eligible retirees can elect either CRDP or CRSC, under 10 U.S.C. §1414 (d)(1). The election may be made once a year during the January open season, under 10 U.S.C. §1414(d)(2). This means that John Doe can alternate between CRDP and CRSC yearly. DFAS guidance in this area provides that:

*If you are eligible for both CRDP and CRSC you may participate in the CRDP/CRSC Open Season. This annual Open Season lets you choose which payment you would prefer to receive (Federal law states that you can receive CRDP or CRSC; not both).*

*Beginning in late December, eligible retirees will be mailed a CRDP/CRSC Open Season Election Form. You only need to return the form if you want to change from CRDP to CRSC, or vice versa. If you prefer to keep things the way they are, do nothing. The payments you now receive will continue uninterrupted.*

*To help you make a more informed decision, the form will include a comparison of the amounts to which you would be entitled under CRDP and CRSC as well as information about the collection actions and taxes to which each type of payment is subject.*

*If you want to change from CRDP to CRSC or vice versa, your form must be received here at DFAS by January 31st. If your form is received after this date it will not be processed and the payments you now receive will continue uninterrupted.*

*The change in payment will be effective with your payment on the first business day of February. Due to our thirty-day processing timeframe, you may receive your first payment on the first business day of March and a retroactive adjustment for the payment which would have been paid on the first business day of February.*

*Your election will remain in effect unless you change from CRDP to CRSC or vice versa in a subsequent annual open season.*

Conceivably – if John Doe alternated annually between the two forms of payment – Mary could get her share of the CRDP in 2004, then be told by DFAS that no CRDP funds were available in 2005 when John switched over to CRSC. Then in 2006 he could change back to CRDP.

DFAS advises that it is treating the initial election of CRSC as a termination of former spouse payments if there is no other disposable pay available for the former spouse. This requires a new DD Form 2293 (but not the entire set of original documents submitted with the original application). Thus if John later switched back to CRDP, Mary would have to reapply to re-start the payments. DFAS does not say how Mary would know of this switch, since it will not independently inform her of the change. And John certainly won't tell her!

If, however, John still had disposable retired pay available after his CRSC election, Mary would continue to receive her share (at a reduced rate). If he later switched back to CRDP, the payment to Mary would increase automatically.

### **CRDP and CRSC – A Basic Scenario**

Jane Green retires in 2000 from the Army. She is divorced and her property division order requires her to pay Jack, her ex-husband, 50% of her disposable retired pay (DRP). At this point, assuming that she has \$2,000 a month in DRP, the parties would each receive \$1,000 a month.

After she retires, Jane goes to the nearest VA (Department of Veterans Affairs) hospital for a physical evaluation. Several months after the physical (it could be up to a year, depending on backlogs), she receives a *findings and ratings letter* from VA. In this correspondence, the VA states that she is rated X% disabled, due to hearing loss, back problems, and carpal tunnel syndrome. All of these disabilities are determined to be *service-connected*, but the back problem stems from a parachute jumping accident, and the hearing loss came from a career of being in airplanes for airborne operations. X represents a figure greater than 50% in this example.

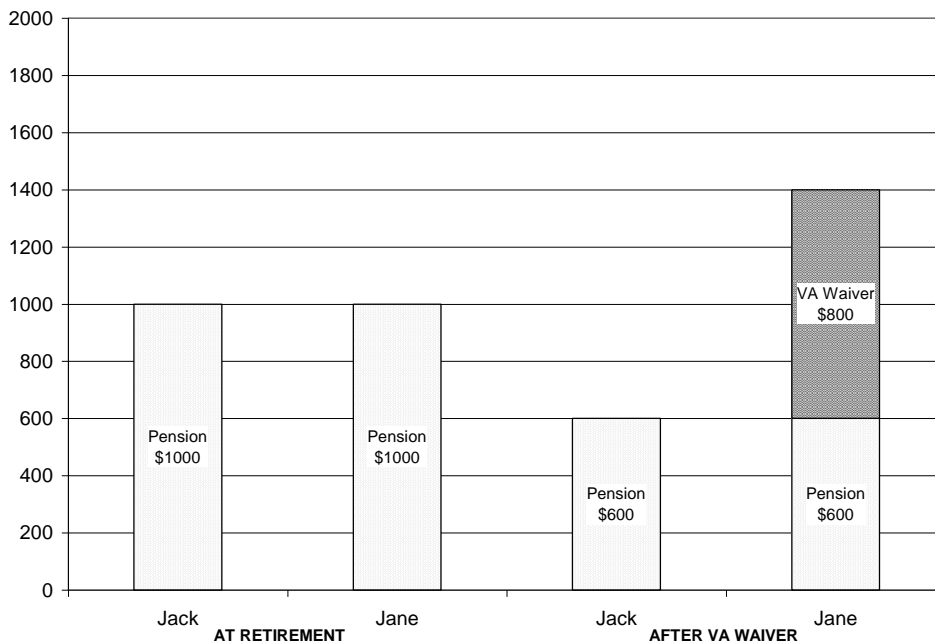
The letter informs her that the X% disability rating qualifies her for non-taxable VA disability compensation of \$800 a month. To elect this, she must waive the same amount of her retired pay.

### **Jane Gets VA Disability Compensation**

She elects VA disability compensation and agrees to waive \$800 of longevity retired pay. This means that she would have \$800 subtracted from her gross retired pay, leading to a reduction in the amount available for division as a percentage of DRP with her ex-husband. In other words, Jack gets less DRP share due to Jane's

election of VA payments. His half share is reduced from \$1,000 a month to \$600 a month, since he now is receiving half of \$1,200 a month (\$2,000 - \$800). Jane receives her share, \$600 a month, plus her untouchable, untaxable VA disability payment of \$800. Note that these calculations and the ones below ignore the annual COLA's (usually between 2% and 3%) which occur with military retired pay, and also the usual deduction for Survivor Benefit Plan premiums.

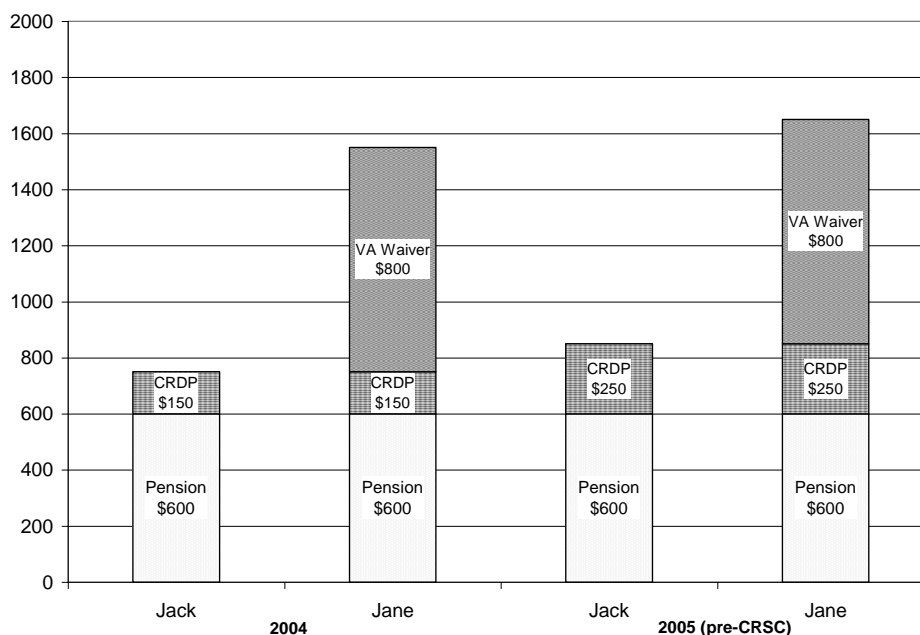
Here is what the payments to the parties look like before and after the VA disability decision:



### **Jane Receives CRDP**

This situation continues through 2003. In 2004 she begins to receive CRDP; this is automatic, and there is no need to apply for it. Assume that the amount for 2004 for X% disability rating is \$300 a month. Jane's 2004 RAS would show that she is receiving DRP of \$750 (original \$600 plus \$150 as half of CRDP) plus her \$800 VA payment, while Jack gets \$750 (\$600 + \$150 CRDP).

In 2005 she begins receiving \$500 (hypothetically) in CRDP, once again raising the DRP available for division with Jack. Now Jane is receiving \$850 in DRP (\$600 + \$250, which is half of CRDP of \$500), plus her \$800 VA payment. Jack is receiving \$850 (\$600 + \$250). Here is what the payments for the parties look like in this period of time:



### Jane Applies for CRSC

Jane decides to apply for CRSC in 2005. First of all, she gets out her VA *findings and ratings letter* from 2004, and she looks for types of disabilities which will qualify for CRSC. These would be disabilities incurred as direct result of armed conflict, hazardous duty, an instrumentality of war, or conditions simulating war.

Since applications are service-specific, Jane sends in her application form, DD Form 2860, to the Army. The entire process is retiree-driven. She must apply to be considered for CRSC; it is not automatic, like CRDP. A board will decide her case, and she sends in copies of her physicals, her medical records (active duty military, VA and private health care provider), plus statements from her and, if available, from witnesses or experts.

Several months later she receives a letter from the Army. It contains findings regarding her claims as to combat-related injuries or disabilities (e.g., “Of your X% service-connected disability rating, Y% is combat-related and qualifies for CRSC.”).

### DFAS Makes the Choice for Jane

Soon after the letter confirming her CRSC eligibility, Jane’s CRSC payments begin. The CRSC payments come from a specific table that states the amounts, and these vary according to the number of dependents that one has. As mentioned above, DFAS makes the choice for Jane – CRSC or CRDP – based on which one yields the larger total gross payment. Thus if the CRSC amount is \$400 per month (as against a present total CRDP payment in this example of \$500 monthly), DFAS will leave the CRDP payment unchanged, regardless of the fact that the \$500 is taxable and divisible with her ex-husband). She can change this election annually in the January open season if she wishes. If DFAS chooses CRDP, then there will be no change on Jane’s RAS. The comment at the MESSAGE section on page 2 remains the same as before.

If, however, CRSC payments were \$600 per month, then this is better financially for her (in the eyes of DFAS) and DFAS will select that option, issuing her a CRSC Monthly Statement. An example of a CRSC statement, not tied to this scenario, is as follows:

<b>CRSC Pay Statement</b>		
STATEMENT EFFECTIVE DATE <b>APR 21, 2006</b>	PAYMENT DATE <b>MAY 01, 2006</b>	SSN <b>123-45-6789</b>
RETIREE’S NAME AND ADDRESS PLEASE REMEMBER TO NOTIFY DFAS OF YOUR ADDRESS CHANGES		HOW TO CONTACT US DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIRED PAY PO BOX 7130 LONDON, KY 40742-7130
<b>MAJOR JOHN Q. DOE, USAF (RET.)</b>		

123 GREEN STREET APEX, NC 27511-1234		COMMERCIAL (216) 522-6398 TOLL-FREE 1-800-472-7098 TOLL-FREE FAX 1-800-469-6559	
PAYMENT ADDRESS DIRECT DEPOSIT		myPay https://myPay.dfas.mil 1-877-363-3677	
PAYMENT INFORMATION		ENTITLEMENT INFORMATION	
CRSC Payment	377.00	Retired Pay Before Deductions	2,746.00
CRSC Debt Deduction	0	Retired Pay Offset by DVA Compensation	757.00
CRSC Garnishment Deduction	0	CRSC Debt Balance	0
CRSC Net Pay	377.00	Branch of Military Service	AIR FORCE
		Garnishment Being Withheld	NO
THE DVA OR YOUR BRANCH OF SERVICE PROVIDED THE FOLLOWING			
CRSC SPECIAL MONTHLY COMPENSATION CODE	00		
UNEMPLOYABLE	NO		
DVA DISABILITY %	50		
COMBAT RELATED DISABILITY %	30		
PURPLE HEART %	00		
CRSC START DATE	JAN 01, 2004		
SPECIAL MONTHLY COMPENSATION START DATE			
REMARKS			
This is your monthly CRSC statement. Please refer to myPay frequently asked questions for additional information about CRSC and this statement.			

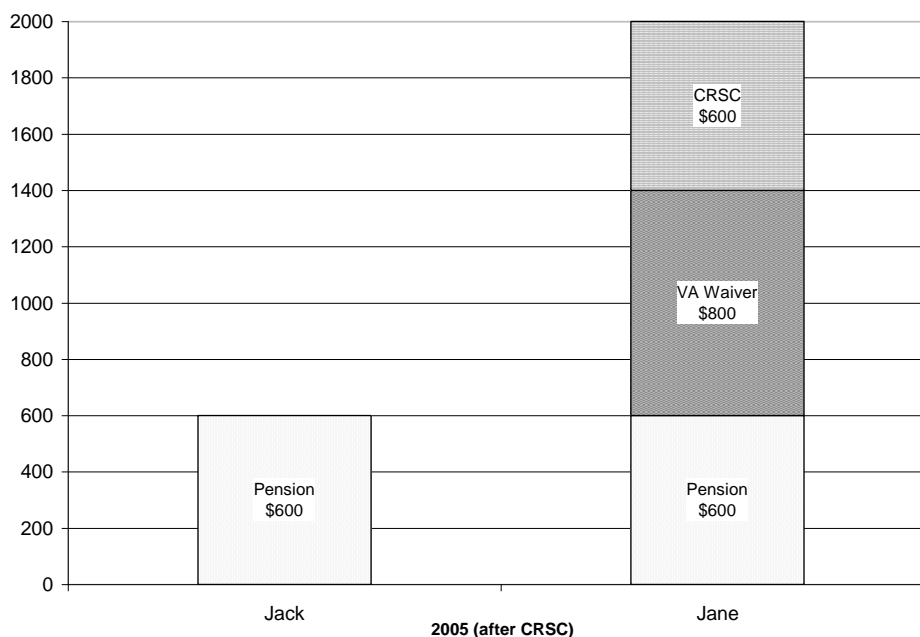
The new CRSC statement will be issued “on-line” for her and apparently will not be sent by mail. A July 2005 notice from DFAS stated the following about CRSC monthly statements:

- *DFAS is now implementing the electronic delivery of CRSC account statements; the statements will be available on a monthly basis beginning July 1, 2005 via the online pay account site, [myPay](https://myPay.dfas.mil).*
- *While retirees may continue to contact the Retired and Annuitant Contact Center by phone at 1-800-321-1080, the statement will likely answer most questions regarding the computation of CRSC payment.*
- *The CRSC monthly statement will only contain information concerning continuing monthly CRSC payments. Details about retroactive payments will be available through [myPay](https://myPay.dfas.mil) by the end of the 2005. The CRSC monthly statement will only be available through the [myPay](https://myPay.dfas.mil) Web site at <https://myPay.dfas.mil>.*
- *The Web-based system delivers personal pay information and provides the ability to process pay-related transactions timely, safely and securely for all its members. The online system eliminates the risks associated with hard copy documents by allowing members to access their electronic #1099R, Retiree Account Statement (RAS) and other financial information. [myPay](https://myPay.dfas.mil) security matches existing private industry standards with the highest level of encryption and security designed to prevent member information from being accessed by others on the Internet.*
- *DFAS is confident that providing CRSC statements on [myPay](https://myPay.dfas.mil) will be a useful addition to the information provided to retirees. We remain committed to offering the best service for our retired and annuitant customers. If you don't have a [myPay](https://myPay.dfas.mil) account, call us at 1-800-390-2348 to get a Personal Identification Number (PIN) to access your [myPay](https://myPay.dfas.mil) account on the web.*

DFAS will also issue Jane a new RAS. It will contain new retired pay figures, and the amount for retired pay will be reduced from the previous month’s amount because CRDP will have disappeared. The comment in the MESSAGE SECTION on page 2 also will be gone:

<b>MESSAGE SECTION</b>

Let’s assume that the CRSC payment to Jane is \$600 a month. In this case, the payments to both parties would look like this after the CRSC election:



### **The Impact: “A CRSC Attack”**

To understand some of the consequences of the CRSC election, remember that Jane cannot get CRDP if she is receiving CRSC at the same time. This does not mean a dollar-for-dollar waiver of CRDP for CRSC. It means she cannot receive *any* CRDP if she receives even \$1 of CRSC.

So the payments for Jane go up again, while those for her ex-husband – after going up by \$250 to \$850 monthly – will go back down. They drop to the amount they were originally before 2004 (\$600 a month, his half of \$1200 DRP), while Jane will get \$600 a month (DRP share), \$800 a month (VA), and whatever amount the CRSC payment is. If we assume that her CRSC payment is \$600 a month, then her total is \$2000 a month (\$600 DRP + \$800 VA + \$600 CRSC), against Jack’s \$600, when the original court order specified equal shares for the parties!

In fact, Jack will see even more bad news due to the CRSC retroactivity problem described above. Since Jane has received CRDP beginning in early 2004, which has been shared through DFAS with Jack, DFAS now must take back the CRDP payments, and this means collection from Jack as well. So Jack will see even less than \$600 a month in his pension division checks. DFAS will collect these CRDP payments back over a 36-month period.

The consequence for Jane is that she will have to check with her CPA or tax preparer about an adjustment on the current (in this scenario, 2005) tax returns that she files, since she will want to report an adjustment for the “pay-back” for 2004’s CRDP. The current year’s CRDP income and pay-back will be adjusted in the Form 1099 that she receives; this portion of her reported income for the current year will just be zeroed out, since she received it but then paid it back in the current year. Her only reportable income for 2005 (our “current year” in this example) would be her \$600 monthly pension share.

### **Choice Points for Jane**

At the start in some cases, CRSC will be better for the retiree because it will provide him or her more money. But as we get closer to 2014, CRDP will probably be better for many retirees because of the gradual increase in the amount of taxable retired pay, even though taxes will cause a reduction as will any division with a former spouse. In many of these cases, eventually the net CRDP will probably exceed the non-taxable CRSC. The “switch factors” over time are thus the 10-year phase-in, changes in the taxable income of the retiree, garnishment of military retired pay as pension division with a former spouse, and potential increase or decrease in disability rating.



In Jane's case, however, if the CRSC payment were at least \$400 a month, there would be no reason to switch back to CRDP (assuming all the above hypothetical numbers are frozen), since the maximum she would receive back in CRDP is her share of the waived amount (half of \$800, or \$400), and that \$400 in CRDP would be taxable. CRSC at \$400 a month is non-taxable. So long as the CRSC payment is \$400 a month or more, the choice for her is obvious.

### **Why "The Evil Twins"?**

As we have seen, the new CRSC benefit can have a significant and detrimental impact on CRDP payments. The receipt of even \$1 of CRSC acts to wipe out any CRDP payments, without notice to the former spouse. Thus Jack, after seeing the gradual increase of his payments because of CRDP, may suddenly find these gains wiped out without explanation by a CRSC election. While the retiree knows what's happening to *the former spouse's share* of the retired pay, the former spouse has no idea of what's going on with *the retiree's share*. Furthermore, Jane can elect to alternate between CRSC and CRDP once a year, a whipsaw tactic that will totally confuse and exhaust Jack and his lawyer.

Because DFAS treats the initial election of CRSC as ending former spouse payments (if there is no other disposable pay available for the former spouse), Jack would have to reapply to restart his payments if Jane switched back to CRDP when it became more advantageous financially for her to receive CRDP. How would Jack know of her switch? Jane is unlikely to tell him, and DFAS will not independently inform him of her new payment status. Conceivably – if Jane alternated annually between the two forms of payment – Jack could get her share of the CRDP in 2004, then be told by DFAS that no CRDP funds were available in 2005 when Jane switched over to CRSC. Then in 2006 she could change back to CRDP without his knowledge of the switch.

### **Practical Pointers for the Non-Military Spouse's Attorney**

First of all, it is essential that the non-military spouse (and, for that matter, the SM/retiree) obtain an attorney who knows this area of the law. This area is very complex and hidden booby traps are everywhere. The spouse should either obtain a lawyer who knows the area from past experience or, if possible, hire an attorney who is a Guard or Reserve JAG officer, a former JAG officer or a retired JAG officer. Jackey D. Nichols, the Chief of the Claims Division, Office of the Staff Judge Advocate, Ft. Dix, NJ, says, "One of the biggest tragedies I see is when a client going through a divorce picks an attorney based on price vs. one who knows all the unique issues associated with a military couple's divorce." If the current divorce attorney doesn't know the law, perhaps he or she should associate co-counsel for this particular piece of the divorce case. Since there are several different court interpretations in this complex area – and sometimes *no* judicial precedent at all – it is recommended that counsel research the laws of the jurisdiction involved as to the eligibility for recovery of retirement pay amounts waived because of these choices outlined above.

Next, the lawyer representing the servicemember's spouse must recognize that he or she can't predict much of anything before the SM's retirement. You could ask whether the SM is an active-duty trooper or a member of the Guard or Reserve. Since most of the creditable service of Guard/Reserve personnel is made up of weekend drill and two weeks of annual training, or "summer camp," you could predict that these Reserve Component SMs are less likely to suffer from disabling conditions arising from combat, hazardous duty or other qualifying causes. But remember that even Guard and Reserve members could be injured in operating a plane, helicopter or weapons system, which would likely qualify for CRSC, while on a regularly scheduled field exercise or during a six-month mobilization in the Middle East.

If you are representing the spouse of an active-duty SM, you can make some educated guesses as to whether there might be a combat-related disability or injury by assessing whether the SM might be a "Front-Line Felicia" or a "Backfill Bill." Is the servicemember a paratrooper or a Ranger, or perhaps a garrison trooper who sits at a desk all day?

Be sure to consider the job assignment or military occupational specialty as well as the unit to which Felicia or Bill belongs. If Felicia is a supply sergeant, does that mean she's unlikely to suffer combat-related injury from her military service? Suppose she is, during training missions, also a jumpmaster in charge of parachute

drops from the aircraft. Just because Bill is a Navy nurse doesn't mean that he's in the clear. What if his assignment is with Navy Seal Team 6, jumping out of helicopters and swimming to the objective?

Be sure to ask lots of questions of your client. Does the military spouse demonstrate any injuries or disabilities? Has he been in the hospital for anything related to military service? What is the state of his health?

If you are trying to negotiate a settlement, draft your settlement document with an indemnification clause. Be sure that you include language that states that the military spouse will repay your client any moneys that are removed from Disposable Retired Pay due to any action of the retiree. Such an indemnification clause might read:

**The military retired pay of respondent shall be apportioned between the parties, with the petitioner receiving 39.375% of same, without regard to any reductions or setoffs due to disability compensation or any other reason except the premium for the Survivor Benefit Plan. If the respondent shall do anything – actively or passively – to reduce the share of amount of petitioner, then he shall indemnify and reimburse her for any such loss, including associated costs, expenses, attorney's fees and consequential damages.**

On the other hand, the military member might be wary of "indemnification language" or division of the gross retired pay, in which case a weaker set of words might be useful or necessary, if they will – under state law – provide sufficient protection for the nonmilitary party:

**Petitioner shall receive 39.375% of respondent's retired pay, which is at present based solely on 22 years of creditable service without any reductions. The respondent shall do nothing to reduce petitioner's share of same or interfere with her receipt of same.**

This clause attempts to identify the number of years of service as the sole measure of determining respondent's compensation in retirement. Even better would be a sentence which attempts to forecast the likely longevity retired pay of the respondent so that the judge would have a benchmark to use in case the member took actions in the future that diminished the share of the spouse. Ideally, the settlement agreement would also have a general breach clause, which is standard in most marital settlement agreements, stating that any breach of the agreement by a party entitles the other to payment of damages, costs, expenses and reasonable (or all) attorney's fees.

If the member is already retired, try this for the "strong" language clause:

**Respondent is currently receiving gross military retired pay of \$2,000 a month, with deductions of \$130 for SBP premium and \$500 for VA disability waiver. This waived retired pay is currently being reduced by \$239 a month due to his receipt of CRDP (Concurrent Retirement and Disability Pay), which means an increase of disposable retired pay from \$1,370 before CRDP (\$2,000 - \$130 - \$500) to \$1,609 presently (\$1,370 + \$239). The parties anticipate the increase of CRDP until 2014, and these payments shall be treated the same as disposable retired pay, with petitioner receiving the same share of CRDP as of disposable retired pay. If the respondent shall do anything to reduce the share or amount of petitioner as to disposable retired pay, including CRDP, then he shall indemnify and reimburse her for any such loss, including associated costs, expenses, attorney's fees and consequential damages.**

If a more diluted form of language is needed, try this:

**Respondent is receiving at present gross military retired pay of \$2,000 a month, with deductions of \$130 for SBP premium and \$500 for VA disability waiver. He is also receiving a payment of \$239 for CRDP (Concurrent Retirement and Disability Pay). The parties anticipate the increase of CRDP until 2014, and these payments shall be treated**

**the same as disposable retired pay, with petitioner receiving the same share of CRDP as of disposable retired pay. The respondent shall do nothing to reduce petitioner's share of same or interfere with her receipt of same.**

Another possibility is to hold alimony open. Consider reserving the issue of alimony or setting alimony at \$1 per year, to allow the court to make an adjustment in this area if the anticipated share of retired pay is diminished by the retiree's actions in electing CRSC over CRDP.

If the case goes to trial, make sure you draft the decree or are allowed input. The decree should, if possible, specify that the SM/retiree shall indemnify the former spouse if he does anything to reduce her share, along the lines of the above "agreement language." If your state law and cases do not allow this, or if the judge refuses this language, try to have the following inserted in the decree:

**The parties shall comply with the terms of this order and shall exercise good faith in doing nothing to interfere with the terms provided by the court herein.**

Breach of the good faith requirement, by election of CRSC, would allow the court to impose sanctions, assess damages, use the contempt power, or apply other remedies in favor of the wronged spouse.

### **Practical Pointers for the Military Spouse's Attorney**

There are only two things that the attorney for the SM or retiree should say. The first is: "Do the right thing." This means treating the former spouse fairly and not destroying the returning share of retired pay (CRDP) which she should be receiving, or else sharing the CRSC which is paid to the retiree. CRDP is the means of reconciling accounts for servicemembers and spouses in light of the VA disability compensation and the retired pay waiver. CRDP means everyone gets treated fairly, retirees get paid disability on top of retired pay, and former spouses receive their share of a pension that formerly was diminished because of the waiver. Leaving that intact is one option for the retiree. Sharing CRSC, which involved compensation without taxes, is also fair if it does not reduce the share of retired pay to which the former spouse is entitled.

The second piece of advice would be, "Get out your checkbook." This means that there will be, in all likelihood, a long, hard fight over the issue of CRDP if CRSC is elected. Since CRSC destroys CRDP, the retiree should expect to see serious litigation over this. As in the area of VA disability and the retired pay waiver, many cases will wind up in the appellate courts. And, predictably, most courts will follow the trail blazed by VA disability litigation, holding that a retiree cannot unilaterally reduce the former spouse's share or amount of returning retired pay (CRDP) by selecting CRSC. The remedies will vary – indemnification, damages, compensatory alimony, or complete revision of the property division. The result will be the same in most state courts. They will side with the former spouse and the prior judgment, decree or agreement, especially if it contains an indemnification clause.

### **Resources**

Mark E. Sullivan, *The Military Divorce Handbook* (ABA Family Law Section 2006), Chapter 8, "Pension and Property Division."

Brett R. Turner, "State Court Treatment of Military and Veteran's Disability Benefits: A 2004 Update," *Divorce Litigation* (May 2004)

Here are some helpful websites –

Interim CRSC Regulations: [http://www.dod.mil/comptroller/fmr/07b/07b\\_ic\\_r01\\_06.pdf](http://www.dod.mil/comptroller/fmr/07b/07b_ic_r01_06.pdf)

Computing VA compensation rates: <http://www.vba.va.gov/bln/21/Rates/comp01.htm>

Combined ratings Table (for several disabilities):

[http://www.warms.vba.va.gov/regs/38CFR/BOOKC/PART4/S4\\_25.DOC](http://www.warms.vba.va.gov/regs/38CFR/BOOKC/PART4/S4_25.DOC)

Computing CRDP by rate and year:

<http://www.dod.mil/dfas/retiredpay/concurrentretirementanddisabilitypay/crdppaymentrates.html>

CRSC payment rate:

<http://www.military.com/Resources/ResourcesContent/0,13964,38339,00.html#3>

Military Officers Association of America website on CRSC:

[https://www.moaa.org/controller.asp?pagename=serv\\_benefits\\_pay\\_crsc](https://www.moaa.org/controller.asp?pagename=serv_benefits_pay_crsc)

Army Human Resources Command - CRSC overview: <https://www.hrc.army.mil/site/crsc/>

DFAS website on CRDP: <http://www.dod.mil/dfas/retiredpay/concurrentretirementanddisabilitypay.html>

There are many references to CRSC and CRDP at [www.military.com](http://www.military.com).

(Rev. 1/24/08)

\* \* \*

This **SILENT PARTNER** was prepared by COL Mark E. Sullivan (USAR, Ret.) with help from MAJ Sue Darnell (USAF, Ret.), an attorney from Newport, RI. For revisions, comments or corrections, contact Mr. Sullivan at Law Offices of Mark E. Sullivan, P.A., 2626 Glenwood Avenue, Ste. 195, Raleigh, N.C. 27608 [919-832-8507] or at [mark.sullivan@ncfamilylaw.com](mailto:mark.sullivan@ncfamilylaw.com).

(Note: Four attachments follow this page)

**ATCH 1**

<b>RETIREE ACCOUNT STATEMENT</b>					
STATEMENT EFFECTIVE DATE DEC 16, 2005		NEW PAY DUE AS OF FEB 01, 2006		SSN 123 - 45 - 6789	
PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES				<b>DFAS-CL POINTS OF CONTACT</b>	
<p style="text-align: center;"><b>Major John Q. Doe, USAF (Ret.)</b>  <b>123 Green St</b>  <b>Apex, NC 27511-1234</b></p>				<b>DEFENSE FINANCE AND ACCOUNTING SERVICE</b> <b>US MILITARY RETIREMENT PAY</b> <b>PO BOX 7130</b> <b>LONDON KY 40742-7130</b>  <b>COMMERCIAL (216) 522-5955</b> <b>TOLL FREE 1-800-321-1080</b> <b>TOLL FREE FAX 1-800-469-6559</b>  <b>myPAY</b> <b><a href="https://myPay.dfas.mil">https://myPay.dfas.mil</a></b> <b>1-877-363-3677</b>	
<b>PAY ITEM DESCRIPTION</b>					
ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	2,746.00	2,746.00	FITW	191.31	209.05
VA WAIVER	591.30	473.04	ALLOTMENTS/BONDS	40.00	40.00
SBP COSTS	179.28	179.28			
TAXABLE INCOME	1,975.42	2,093.68			
			NET PAY	1,744.11	1,844.63
<b>PAYMENT ADDRESS</b>			<b>YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)</b>		
DIRECT DEPOSIT			TAXABLE INCOME:		1,975.42
			FEDERAL INCOME TAX WITHHELD:		191.31
<b>TAXES</b>					
FEDERAL WITHHOLDING STATUS:		SINGLE			
TOTAL EXEMPTIONS:		.01			
FEDERAL INCOME TAX WITHHELD:		209.05			
<b>SURVIVOR BENEFIT PLAN (SBP) COVERAGE</b>					
SBP COVERAGE TYPE:	SPOUSE AND CHILD(REN)		ANNUITY BASE AMOUNT:	2750.50	
SPOUSE COST:	176.78		55% ANNUITY AMOUNT:	1,512.77	
CHILD COST:	50		40% ANNUITY AMOUNT:	1,100.20	
			SPOUSE DOB:	12 DEC 1945	
			CHILD DOB:	13 MAR 1996	
<p>THE ANNUITY PAYABLE IS 55% OF YOUR ANNUITY BASE AMOUNT UNTIL YOUR SPOUSE REACHES AGE 62. AT AGE 62, THE ANNUITY MAY BE REDUCED DUE TO SOCIAL SECURITY OFFSET, OR UNDER THE TWO-TIER FORMULA. THAT REDUCTION MAY RESULT IN AN ANNUITY THAT RANGES BETWEEN 40% (\$1100.20) AND 55% (1512.77) OF THE ANNUITY BASE AMOUNT. THE COMBINATION OF THE SBP ANNUITY AND THE SOCIAL SECURITY BENEFITS WILL PROVIDE TOTAL PAYMENTS FROM DFAS AND THE SOCIAL SECURITY ADMINISTRATION OF AT LEAST 55% OF YOUR BASE AMOUNT. THE ACTUAL ANNUITY PAYABLE IS DEPENDENT ON FACTORS IN EFFECT WHEN THE ANNUITY IS ESTABLISHED.</p>					

<b>RETIRED SERVICEMAN FAMILY PROTECTION PLAN (RSFPP) COVERAGE</b>					
RSFPP COVERAGE TYPE	ANNUITY PAYABLE	RSFPP COST			
<b>ALLOTMENTS AND BONDS</b>					
ALLOTMENT TYPE	PAYEE	AMOUNT	BOND FACE VALUE	SERIES	DEDUCTION
INSURANCE	VGLI	40.00			
<b>TAX LEVY DEDUCTIONS</b>					
DATE OF LEVY	MONTHLY AMOUNT	BALANCE			
<b>GARNISHMENT DEDUCTIONS</b>					
PAYEE	GARNISHMENT AMOUNT	COMPLETION DATE			
<b>FORMER SPOUSE PROTECTION ACT DEDUCTIONS</b>					
PAYEE	AMOUNT				
<b>MISCELLANEOUS DEBTS</b>					
DEBT TYPE	MONTHLY DEDUCTION	PRINCIPAL AMOUNT	INTEREST AMOUNT	ACCUMULATED INTEREST	DEBT BALANCE
<b>ARREARS OF PAY BENEFICIARY INFORMATION</b>					
YOU HAVE ELECTED ORDER OF PRECEDENCE.. THE FOLLOWING BENEFICIARIES ARE ON RECORD:					
NAME		SHARE		RELATIONSHIP	
JANE P. DOE		.00		WIFE	
<b>MESSAGE SECTION</b>					
BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS \$283.96.					
***					

**ATCH 2**



**DEFENSE FINANCE AND ACCOUNTING SERVICE  
CLEVELAND CENTER  
P. O. BOX 7130  
LONDON, KY 40741-7130**

This letter is in response to your request for information from the retired pay account of the member listed below.

MAJ John Q. Doe, USAF (Retired)

Social Security Number 123-45-6789

Payment Year	2006											
Payment Date	1-Jan	1-Feb	1-Mar	1-Apr	1-May	1-June	1-Jul	1-Aug	1-Sep	1-Oct	1-Nov	1-Dec
Gross Pay	\$0.00	\$0.00	\$0.00	\$0.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00
Misc. Credit	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
FCE/DC Deduction												
FCE Pay Cap												
VA Waiver	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$83.00
Taxable Income	\$0.00	\$0.00	\$0.00	\$0.00	\$2,415.37	\$2,415.37	\$2,415.37	\$2,415.37	\$2,415.37	\$2,415.37	\$2,415.37	\$2,332.37
FITW	\$0.00	\$0.00	\$0.00	\$0.00	\$201.05	\$201.05	\$201.05	\$201.05	\$201.05	\$201.05	\$201.05	\$188.60
Add'l FITW	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
SITW	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Withholding Stats	0	0	0	0	0	0	0	0	0	0	0	0
Allotments	\$0.00	\$0.00	\$0.00	\$0.00	\$1,600.00	\$1,600.00	\$600.00	\$1,600.00	\$1,600.00	\$1,600.00	\$1,600.00	\$1,600.00
SBP	\$0.00	\$0.00	\$0.00	\$0.00	\$177.63	\$177.63	\$177.63	\$177.63	\$177.63	\$177.63	\$177.63	\$177.63
RSFPP	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Tax Levy	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Garnishment	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Former Spouse	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Misc. Deduction	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$600.00	\$600.00	\$100.00
Retired Pay Deduction	\$0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Net Pay	\$0.00	\$0.00	\$0.00	\$0.00	\$614.32	\$614.32	\$614.32	\$614.32	\$614.32	\$14.32	\$14.32	\$443.77

Comments: \_\_\_\_\_

Sincerely,

Retired and Annuity Pay Operations

ATCH 3



**DEFENSE FINANCE AND ACCOUNTING SERVICE**  
1240 East Ninth Street  
Cleveland, Ohio 44199

(DFAS-DCC/CL)

November 20, 2006

Lucinda Lopez, Esquire  
Lopez and Pasquale, LLP  
123 Green Street  
Apex, NC 27566

Dear Mr. Roe:

This letter acknowledges the request made by your client, Mary P. Doe, under the Routine Use published in the Federal Register for a calculation of her payment under the Uniformed Services Former Spouse's Protection Act from the military retired pay account of MSG John Q. Doe, USAF (Retired).

The monthly Former Spouse payment is calculated as follows:

Gross Pay	\$1,838.00
Less VA Waiver	<u>-673.92</u>
Disposable Pay	\$1,164.08
Award	<u>    x 43%</u>
Former Spouse Pmt:	\$ 500.55

These documents contain Personal Data covered by the Privacy Act of 1974. Please ensure this information is protected from unauthorized access and/or disclosure.

If I can be of further assistance, you may contact me at the above address.

Sincerely,

Mickey L. Green  
Freedom of Information Act/Privacy Act  
Office of Corporate Communications and  
Legislative Liaison



ATCH 4



DEFENSE FINANCE AND ACCOUNTING SERVICE  
Retired and Annuity Pay

4197  
August 28, 2006

Mr. Jack Green  
123 Main Street  
Apex, NC 12345

Dear Mr. Green,

A review of your former spouse pay account indicates that you have been overpaid in the amount of \$5170.74.

According to our pay records, you have been overpaid in the amount of \$5170.74 from May 1, 2005 through October 31, 2005 @ \$861.79 per month x 6 months. Your former spouse portion of the retiree's Concurrent Disability Pay is being recouped for the payment of Combat Related Special Compensation retroactive through the same period. We will be deducting \$143.63 per month until the debt is fully recovered.

If you have already paid this debt or believe it is invalid, please contact Defense Finance and Accounting Service, U.S. Military Retirement Pay, at the address indicated at the close of this correspondence. Under 37 U.S. Code 1007(c) you have the opportunity (1) to either inspect and copy or to request and receive a copy of government records related to the debt and (2) for review of the decision related to the debt.

Collection action on this total debt amount of \$5170.74, will begin with your payment dated December 1, 2005 at a monthly rate of \$143.63 and will continue until the total amount as shown above is collected in full. You will receive a Former Spouse Account Statement showing the reduction in your monthly entitlement amount.

If this method of repayment will create a financial hardship, forward the Defense Finance and Accounting Service, U.S. Military Retirement Pay, at the address indicated at the close of this correspondence, a request for a more lenient repayment plan, specifying the amount you wish to be deducted each month. Please note that the total debt is \$5170.74 cannot take longer than 36 months total to collect.

In certain circumstances, the law provides for partial or full waiver of debts which result from erroneous payments. You may request an application for waiver by contacting the Defense and Finance Accounting Service, U.S. Military Retirement Pay, at the address indicated at the close of this correspondence.

However, submission of a waiver application does not automatically guarantee forgiveness of your debt or suspend the requirement to continue collection action. If you choose to apply for a waiver, you **must** enclose a copy of this correspondence with your application.

We are interested in working with you to resolve this debt. Should you have any further questions or requests to any of the above, please contact me at Defense Finance and Accounting Service; U.S. Military Retirement Pay; P. O. Box 7130; London, KY 40742-7130; or call toll free 1-800-321-1080, commercial (216) 204-2404.

Sincerely,

Louis Roe, Military Pay Technician  
Retired and Annuity Pay

# SILENT PARTNER

## MILITARY PENSION DIVISION: SCOUTING THE TERRAIN

*INTRODUCTION: SILENT PARTNER is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

### Overview of the Military Pension Division Series

There are six SILENT PARTNERS in this series.

- *Military Pension Division: Scouting the Terrain* is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses' Protection Act), what the Act does (and doesn't do), and how the question of "federal jurisdiction" is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember's Strategy* contains information on how to assist the servicemember (hereafter "SM") in this area, and
- *Military Pension Division: The Spouse's Strategy* covers how to help the SM's spouse.
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS*. It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- Retrieving an apparently "lost" pension benefit for the spouse/former spouse is covered in *"Lost" Military Pensions: The Ten Commandments*.
- The sixth info-letter deals with the complicated world of Concurrent Retirement and Disability Pay (CRDP), service-connected disability, and Combat-Related Special Compensation. Its title is *Military Pension Division: The "Evil Twins" – CRDP and CRSC*.

### The Uniformed Services Former Spouses' Protection Act (USFSPA)

Knowing the terrain is an essential part of military intelligence. This is equally true in the field of military pension division. The basic statute covering military pension division is the Uniformed Services Former Spouses' Protection Act.<sup>1</sup> USFSPA was passed by Congress in 1982 to make military pensions subject to division by state courts in divorce and property division proceedings. Before the statute was passed, the states had a different approaches to the treatment of military pensions, with some considering them as divisible community (or marital) property and others refusing to recognize them or considering them as mere expectancies rather than vested benefits. The federal act was passed in the wake of *McCarty v. McCarty*,<sup>2</sup> in which the U.S. Supreme Court held that state property division laws were preempted by federal law regarding the military retirement scheme, and that Congress could decide to change this by appropriate legislation.

What did USFSPA do? It stated that:

1. Military pension division is neither mandated nor automatic. It is up to the states to decide whether military retirement is marital or community property that is divisible upon divorce or whether it is solely the property of the SM. [All of the states now allow the division of military pensions as marital/community property]
2. It limited pension division jurisdiction to a state where the SM was domiciled, had consented to jurisdiction, or resided *not due to military assignment*. [These are the “federal jurisdiction” rules]
3. Although a state court can subject military retirement rights to division in equitable distribution proceedings, it cannot force a SM to retire. [But it can order him/her to start paying a share of the pension to the spouse before retirement!]
4. State courts can order the direct pay of pension division awards (where there is ten years’ overlap between the marriage and creditable military service) through DFAS.
5. Such direct payments may not exceed 50% of the SM’s disposable retired pay (in most cases).
6. And, finally, these direct payments cease upon the death of the SM or the spouse (or former spouse).

What didn't the Act do? It didn't tell how to handle military pension division. Nowhere in USFSPA is there a clear picture of how a military pension is to be divided upon divorce.

### **Roadblocks and Minefields: Federal Jurisdiction**

One of the roadblocks in military pension division is whether a state has jurisdiction over the SM’s pension. This involves a federal law question. If a state does not have jurisdiction *under federal law*, then that state may not divide the SM’s pension, regardless of the spouse’s wishes. The jurisdictional basis of military pension division is not found in state long-arm statutes. Rather, it is set forth specifically in the USFSPA at 10 U.S.C. 1408 (c)(4).

Federal Jurisdictional Tests. Pursuant to this section of the Act, a state may only exercise jurisdiction over a military SM’s pension rights if –

- That state is his or her domicile; or
- The SM consents to the exercise of jurisdiction; or
- The SM 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.<sup>3</sup>

Residence Not Due to Military Assignment. Just what do these tests mean? The third basis for military pension division jurisdiction is probably the most difficult to understand. The court must have jurisdiction over the SM by reasons of “the member's residence, other than because of military assignment in the territorial jurisdiction of the court.” How could a SM reside somewhere *other than because of military orders*, when it is almost always military orders which require his moving, cause his transfer from one installation to another and require his presence in the general vicinity of the installation to which he is assigned?

Although there are no definitive cases in this area, perhaps the following case illustrates what Congress had in mind: Colonel (COL) Bill Roberts is assigned to duty in Florida at Eglin Air Force Base (AFB), which is near the Florida-Alabama state line. Although he could live on base or, if quarters were not available, off-base but in the general vicinity of the installation, he chooses instead to reside just over the state line in Alabama, where his elderly parents reside. In this way, he can take care of them after work, and he commutes back and forth between his "home" in Alabama and the Air Force installation in Florida.

Is this not an example of a SM who resides in Alabama for reasons other than because of military assignment? Alabama probably has jurisdiction over COL Roberts' pension in this case.

Domicile. Domicile is the first stated basis for jurisdiction under U.S.C. 1408(c)(4). What is domicile?

It is not, for example, the same thing as a SM's "home of record." *Home of record* is a technical term the military services use for the state where a person enters the service or reenlists. It means the place where the military must ship his or her household goods upon discharge. It is an administrative entry which is not necessarily meant to specify the *domicile* of the SM.

And domicile isn't necessarily the place where a SM is currently stationed or living, either. A SM may be stationed far away from his or her legal home. The Servicemembers Civil Relief Act<sup>4</sup> allows military personnel to retain their original domiciles for voting and state tax purposes while stationed in other states.

Rather than merely the physical residence of an individual, domicile is composed of two elements:

- **Physical presence** of the SM (except for temporary absences); and
- **Intent to remain** (or return if absent), as shown by payment of state income and property taxes, voting records, bank accounts, motor vehicle titles, registration and driver's license, and the purchase of a home.<sup>5</sup>

The importance of the latter -- actions which demonstrate the intent of the individual -- cannot be overstated. Many servicemembers claim Florida or Texas, for example, as their domiciles because these states do not have an income tax. A close analysis of most of these claims, however, reveals that there are no actions to back them up, such as ownership of property in that jurisdiction, and also that the SM has never really resided in that state in the first place.

How do you find out a SM's domicile? Here are some starting points:

- Get a copy of his Leave and Earnings Statement (LES) -- this document, which is the bimonthly pay statement for SM, contains an entry for "State Taxes" which shows what state the SM has listed for state tax withholding.
- Check with the SM's spouse—where did he file state income taxes last year? Which state imposed real estate taxes for a residence? Where did he vote?
- Get his DD Form 2058, "State of Legal Residence Certificate," which is attached to the SM's W-4 Statement for tax withholding purposes.

If the SM is stationed in your state and domiciled there, he can be sued there for pension division. If he is domiciled elsewhere, it may be necessary to bifurcate the equitable distribution proceeding if he does not consent to the court's jurisdiction over his military retirement rights. That means that the pension would be handled in the SM's state of domicile and the other domestic issues (alimony, divorce, child support, custody, visitation and all aspects of property division except the military pension) would be handled in the spouse's state of residence, so long as there is jurisdiction there for the specific claims involved.

### Consent to Jurisdiction

A SM can consent to the court's jurisdiction, thus knowingly or inadvertently allowing the exercise of pension jurisdiction by the court. The test for consent to jurisdiction is a matter of state law. For example, if a defendant intends to object to personal jurisdiction under the state equivalent of federal Rule 12(b)(2), the general rule is that he may not move the court for other relief in his favor.<sup>6</sup> In general a motion for other affirmative relief will probably constitute a general appearance.

This rule poses real problems for the SM who wants to contest some claim of the lawsuit other than military pension division -- custody or alimony, for example, or even other aspects of equitable distribution. Can he or she do so

without consenting to the court's jurisdiction? Is this a waiver of one's federal rights under 10 U.S.C. 1408(c)(4)? The courts are split over whether specific consent is necessary or whether a general "implied consent" can be used to confer jurisdiction.

As stated earlier, this is a state issue. There is no federal guideline or standard, and the states make the rules in this area. As a result, there may be fifty or more different rules as to what constitutes consent to the court's power over a military SM's pension rights.

### **Roadblocks and Minefields – Summary**

These problems show clearly the need for defensive lawyering. It is vital to ask questions -- lots of questions -- to make sure that the defense mounted for COL Roberts is on a firm footing. 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, will this be waived if he files an answer? What if he files a motion to continue, or to dismiss? The answer to these questions lies in the law of the states involved.

Be sure to check with competent counsel in the jurisdiction involved – don't try to "wing it" yourself when you're not licensed there. Even if you do hold a license for that state, it doesn't mean that you also hold the necessary level of expertise to answer these questions.

### **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. The first is deferred division, often called "if, as and when" payments, which refers to payments by the pensioner when he starts receiving his pension. The second involves a present-value offset, in which property or money is traded against the present value of the pension.

Deferred Division. These latter payments are not preferred by many courts since they are seen as an undesirable postponement of the claimant's rights to a present pension division. It is hard to reconcile future payments to a nonmilitary spouse (at a time when the divorce is long past) with the present-day division of all the other marital assets. The deferred division of military pensions is usually used when an offset or trade is unavailable. Unless the SM is retired when the division occurs, such a division will usually postpone the payments to the nonmilitary spouse until the retirement of the SM.

There is an exception, however; the postponement of payments doesn't occur in all states. Some have gotten around the postponement of payments until retirement by requiring the SM to begin present payments to the nonmilitary spouse or else suffer the accrual of interest on the unpaid pension rights. Examples of cases in this area are *Mattox v. Mattox* from New Mexico,<sup>7</sup> *Koelsch v. Koelsch* from Arizona,<sup>8</sup> and the California cases of *In re Luciano*,<sup>9</sup> *In re Marriage of Gillmore*<sup>10</sup> and *In re Marriage of Scott*.<sup>11</sup> The *Gillmore* case involved a civilian employee spouse whose pension had vested but who had elected not to retire. The California Court of Appeals applied this principle in a military case in *Scott*, where the court affirmed the trial court's award to an ex-spouse of the present value of the community share in the SM's retirement rights, notwithstanding the fact that he was still on active duty.

Deferred Division – Examples. An example of deferred division in a hypothetical case may help to illustrate how it works. Assume that a SM been married for 20 years and that, for all 20 years, he was on active duty in the U.S. Army. Also assume that his active duty pay with 20 years of service is \$7,200 per month, and that he can retire after 20 years of service with 50% of his base pay.<sup>12</sup> Thus, the monthly retired pay of the SM is \$3,600.

The marital fraction in this case is 20/20. *Marital fraction* in most states means the number of years of pension service during the marriage before the valuation date over the total years of pension service. The valuation date is

determined by state law -- it may be the date of irretrievable breakdown, the date of filing suit, the date of separation or the date of divorce. In this case, then, the marital share of the SM's monthly retired pay is calculated as below, and all of the pension is marital property:

$$\$3,600 \times \frac{20 \text{ years' marital pension service}}{20 \text{ years' total pension service}} = \$3,600 \text{ (marital part of pension = ALL)}$$

The law in many states presumes that the SM's spouse is entitled to one-half of the marital property. Also, in the case of military pensions, the USFSPA states that the spouse's share *may not exceed 50%* of the pension.<sup>13</sup> In this case, her one-half share would equal \$1,800 per month. This is the amount the SM would have to send to her each month for an equal division of the marital pension. It is also the amount that DFAS would send to her directly out of his retired pay if the marriage overlapped the SM's creditable service by *ten* years or more and if the payment terms were set out in a qualifying court order.<sup>14</sup>

Let's take another example. Suppose the SM has served a total of 20 years in the Army, with 10 years of his service preceding his marriage. In this case, the marital fraction is:

$$\$3,600 \times \frac{10 \text{ years' marital pension service}}{20 \text{ years' total pension service}} = \$1,800 \text{ (marital part of pension)}$$

The above example assumes that 10 years of the marriage is concurrent with 10 years of the SM's service. Since only one-half of the pension is marital, then one-half is the SM's separate property (since it accrued before the marriage), one-fourth is the spouse's share of the marital pension, and one-fourth is the SM's share of the marital pension. Thus the spouse would receive one-fourth of each monthly pension check under a deferred division approach, or about \$900 per month. The remainder of the monthly retired pay belongs to the SM.

What happens, however, when the SM is still on active duty and remains so, rather than conveniently retiring on the date of valuation? In this case, the marital fraction cannot be expressed as an absolute number. Rather, the marital fraction looks like this –

$$\frac{\text{Years of marital pension service}}{\text{Years of total pension service}} = \frac{10}{X}$$

The numerator represents 10 years of marital pension service, and the denominator is unknown, representing the total number of years of creditable service that the SM will perform.

Present Value Offset. In addition to the future division of retired pay, all states recognize a second method of pension division called a "present value offset." This represents the present value of a series of money payments over the course of the SM's life. The money payments are, of course, his or her retired pay. The present value of this retired pay is the amount that can be used for a trade or a setoff so that the SM can keep the entire pension. This results in a complete and final accounting and division, not the postponement of property division until retirement.<sup>15</sup>

A good economist or CPA will advise that the sum of the payments should be adjusted for the life expectancy of the SM, the inflation rate and a discount factor which represents the rate at which money can be invested. This "discount rate" is applied to reflect the ability of money to earn interest; a small amount today, when invested, will yield a larger amount in five years and, conversely, a larger amount in the future, when discounted for the effect of interest accumulation, would become a smaller amount "in hand" today.

How is present value calculated? There are several options available. When the case is definitely going to trial, one should to promptly retain a CPA, an actuary or an economist to provide expert testimony at the hearing on the present value of future pension payments over the expected lifetime of the SM. On the other hand, when a settlement is

anticipated and trial testimony will not be necessary, a "mail order" evaluation is sometimes preferable. There are several businesses nationwide that perform mail-order pension valuations for \$300-500.

There is also a second method of determining present value, and this one makes no assumptions regarding interest rates, life expectancies or inflation. It involves pricing an annuity that will yield a monthly payment equal to the pension. The way to start is to contact an insurance agent or a securities broker to get a price quote for a single-premium annuity that would pay the marital benefit of, say, \$3,600 per month (using our example above) for life starting now for an individual who is currently the age of COL Roberts. This is an example of the information that must be given to the professional who is obtaining the price quote.

Single-premium annuities are an excellent measure of comparison, using the actual market price of a financial product, compared to the abstract assumptions which are always present in a present-value analysis by a CPA.

When dealing with other assets in a property settlement, the court requires the fair market value to be obtained. Whether the asset happens to be a home, a parcel of land or a group of stocks, the method of valuation follows the principle of determining the current selling price or replacement cost in the open market. **Why not use the same principle in valuing a retirement plan?** After all, a pension is simply a contract to make future payments to an individual. In the financial marketplace, insurance companies sell these contracts in the form of single premium annuity policies. When taken as a group, these companies comprise an annuity market and provide an appropriate, non-theoretical source of valuing retirement benefits.<sup>16</sup>

Given the same information, a securities broker or an insurance agent could come up with a price that might be even more advantageous for the client's bargaining position in this case. This approach is certainly worth pursuing when there is a serious question about the present value of the pension.

Reserve and National Guard Pension Rights. There is nothing in the USFSPA to indicate that it was intended to apply only to active-duty retirement benefits, and certain amendments made by Congress to other parts of the U.S. Code dealing with Reserve retirement and benefits imply that Congress intended the Act to cover Guard and Reserve retirement also.<sup>17</sup> The two ways to divide Guard/Reserve pensions, and the advantages or problems involved, are contained in the two companion SILENT PARTNERS on "The Servicemember's Strategy" and "The Spouse's Strategy."

Dividing Disposable Retired Pay. What is it that the courts divide? Is it gross pay or net pay of the SM? The federal statute specifies that the court can only divide *disposable retired pay*.<sup>18</sup> The U.S. Supreme Court upheld this requirement in the *Mansell* decision.<sup>19</sup> 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;
- disability pay benefits; and
- Survivor Benefit Plan premiums.

Note that disability benefits are deducted from gross pay in order to arrive at "disposable retired pay." This means that a retired SM can waive receipt of retired pay to receive an equivalent amount of VA disability benefits, and these latter benefits will be received tax-free. This tactic can be used by a SM to reduce the portion of retired pay that is divisible. And there's no way to stop a SM from taking disability pay! For more information on this, see the two above-mentioned SILENT PARTNERS. These also contain information on early-out options, leaving military service for federal civil service, and drafting clauses to protect clients in these areas.

### Direct Payments from DFAS

Most clients who are entitled to a portion of retired pay benefits want to get the payments direct from the source, not from an ex-spouse. Pay garnishment for division of the pension as property is available from DFAS when:

- The retired pay is divided by a final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement [Note: This means that an unincorporated separation agreement, a judgment in a partition case or an order of specific performance *won't get direct payment from DFAS*];
- There is a statement in the order that the SM's rights under the Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) were observed;
- The amount directly payable to the former spouse as pension division is not more than 50% of the retiree's disposable retired pay;
- The "10 year test" has to be met (there must be at least 10 years of marriage which overlap 10 years of service creditable toward retirement);
- The court order must provide for payment from military retired pay, and the amount must be in an acceptable format (using one of the four methods of pension division allowed by DFAS); and
- The order must show that the court has jurisdiction over the SM in accordance with USFSPA provisions.<sup>20</sup>

Remember that the "10-year test" is *not a jurisdictional requirement* for dividing military pensions. Rather, it is an "enforcement requirement," meaning that pension division cannot be enforced by direct pay from DFAS unless this test is met.<sup>21</sup> For more information on the above points, see the SILENT PARTNER, *Getting Military Pension Division Orders Honored by DFAS*.

A Checklist for the Judge. Here is a checklist used in North Carolina for items that the judge (and the attorneys) should consider in military pension divorce cases. Simply replace NC with the name of *your* state:

<b><u>Checklist for Military Pension Division Orders in North Carolina</u></b>	
<b>✓ Issue</b>	<b><u>Comments</u></b>
Check for pension division jurisdiction – must be ONE of the following:	Required by 10 U.S.C. 1408(c)(4)
1. Domicile in North Carolina, OR	Check on state income taxes, home ownership, voting, vehicle title, tags, driver's license, in-state tuition
2. Consent to court's jurisdiction	General appearance – the filing of motions or pleadings which recognize the court's authority
3. Residence in N.C. but not due to military assignment	Example – SM assigned to naval base in southeast VA but resides in nearby Duck, NC, to care for aged parents living there; NC has pension division jurisdiction.
Receive evidence of period of creditable service for servicemember [SM] or retiree	Usually this is on his LES [Leave and Earnings Statement], DD 214 [discharge statement], retirement orders, or "points statement" [for Reserve/Guard personnel]
Calculate coverture fraction	Months of marital pension service [before separation] divided by total pension service [which will be "X" – unknown – for those not yet retired]. DFAS [Defense Finance and Accounting Service] will accept an order containing total military service as an unknown, will make calculations at time of retirement.
State formula [for SM] or percentage [for retiree]	Usually this is 50% X coverture fraction X final retired pay
Check for "10/10" direct-pay requirements	If payment to be made from DFAS [Defense Finance and Accounting Service] directly to non-military spouse, then marriage and military service must overlap by at least 10 years



**Checklist for Military Pension Division Orders in North Carolina**

✓ <u>Issue</u>	<u>Comments</u>
Require direct pay by SM/retiree until DFAS begins payment	DFAS will not pay non-military spouse until 90 days after retired pay starts.
Check on “back payments” for retiree	See if credit or recoupment needed if retiree has received pension payments since separation. Part or all of these, depending on coverture fraction, belong to the non-military spouse. DFAS will not make “back payments” through garnishment in property division cases.
Check for “20/20/20” for medical care	Non-military spouse will be entitled to full medical care benefits if there are at least 20 years of marriage [ending at divorce, not separation], 20 years of military service, and a 20-year overlap. Granting divorce too early can defeat this entitlement.
Provide SBP [Survivor Benefit Plan] for non-military spouse by:	Without this, payments stop at SM’s death. Premiums are paid out of the pension “off the top” before division between parties. Premiums are 6.5% of selected base amount for spouse/former spouse coverage.
___ ordering SM to elect [or retiree to maintain] SBP coverage;	If parties are only separated, order <u>spouse coverage</u> (to convert to <u>former spouse coverage</u> upon divorce). If parties are divorced, order <u>former spouse coverage</u> . Note: Court order alone does not create coverage; the application (by SM) or the service of order on DFAS (by spouse) needs to be accomplished promptly.
___ at specific base amount (full retired pay or less);	SBP payments are 55% of the base amount, which can be entire retired pay down to \$300.
___ to be served on DFAS within deadlines; and	Deadlines: one year of divorce [if application by SM/retiree], or one year of order granting coverage [if by non-military spouse]. If deadlines are missed, coverage is lost.
___ entry of order granting <u>former spouse coverage</u> at time of divorce	DFAS will only honor <i>title designation</i> (i.e., <u>spouse coverage</u> , <u>former spouse coverage</u> ), not designation by name.
Use model military pension division order to avoid mistakes	Found in SILENT PARTNER, “Getting Military Pension Division Orders Honored by DFAS.”

**Extra Benefits for Consideration**

Survivor Benefit Plan. An essential component of a well-structured military pension division for the nonmilitary spouse is use of the Survivor Benefit Plan (SBP). The SBP is an annuity that lets a retired SM (active duty or Guard/Reserve) provide continued income to specified beneficiaries after his death.<sup>22</sup> The SBP is funded by premium payments from the retiree's paycheck. There is a slight tax break for the retiree in that the amount of the SBP premium is not included in the taxable portion of his or her retired pay

The death of a military retiree terminates all pension payments. When SBP is elected, however, upon the retiree's death, the designated survivor receives a lifetime annuity for 55% of the selected base amount (full retired pay or lesser figure). In addition to spouses and former spouses there is child coverage available so long as the child is of the marriage of the SM and the former spouse. The cost for spouse or former spouse coverage is a premium during the retiree’s lifetime of 6.5% of the selected base amount. Thus, for example, if the total pension payment before division is \$3,000 a month, and if that were the base amount selected, then the SBP payment would be \$1,650 a month (i.e., 55% of base amount) and the monthly premium would be \$192 (6.5% of base), to be paid out of the pension.

Here is a checklist on the benefits and disadvantages of SBP coverage:

<b>Checklist for SBP: Pro's and Cons</b>	
✓	<b>Advantages of Survivor Benefit Plan</b>
	<u>Security:</u> There is no “qualification” required; unlike commercial health insurance, no physical exam is required for the military member and coverage cannot be refused or lapse while premiums are being paid. The member/retiree cannot terminate coverage if established by court order sent to DFAS.
	<u>Life Payments:</u> Mrs. Roberts, the beneficiary, will receive payments for the rest of her life upon the retiree’s death (unless she remarries before age 55, which stops benefits so long as she is married).
	<u>Tax-Free:</u> Deductions from the retiree’s pay for SBP premiums are from his gross retired pay and thus reduce his pension income (and her share of it) for tax purposes.
	<u>Inflation-Proof:</u> Payments are increased regularly by cost-of-living adjustments to keep up with inflation.
✓	<b>Disadvantages of Survivor Benefit Plan</b>
	<u>Expense:</u> Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive (as compared to term life insurance) and premiums do go up.
	<u>Inflexible:</u> As a general rule, once SBP is chosen, it cannot be canceled.
	<u>No Cash Value:</u> Unlike whole life or variable life insurance, there is no equity build-up and no cash value for SBP. And there is no return of premiums paid if Mrs. Roberts dies before her husband.
	<u>Social Security Offset:</u> There is a reduction in benefits when Mrs. Roberts reaches age 62 (to account for Social Security benefits) or should she receive payments from the Department of Veterans Affairs.

Let’s see how SBP works. For a married SM on active duty, the election for SBP must be made before or at retirement.<sup>23</sup> An active duty SM who is entitled to retired pay is automatically enrolled in SBP at the maximum authorized level of coverage unless he or she declines (before retirement) to be covered or else chooses coverage at a lower level; if the SM is married, the spouse must consent to this choice.<sup>24</sup> A spouse loses eligibility as an SBP beneficiary upon divorce. There is no provision in the law which makes former spouse coverage an automatic benefit. The only means by which a divorced spouse may receive a survivorship annuity is if former spouse coverage is elected. A court order cannot, by itself, be used to create coverage. A signed election request must be submitted to DFAS by the member/retiree, or a court order by the former spouse, before coverage can be established. Reservists can make the election upon completion of 20 years of creditable service, and they have a second chance to elect SBP coverage upon reaching age 60.<sup>25</sup>

If a member/retiree elects former spouse coverage for a spouse who was the pre-divorce SBP beneficiary, this must be done within one year from the date the divorce becomes final. If the SM or retiree who is required to provide such coverage fails or refuses to do so, he or she shall be deemed to have made such an election if DFAS receives a written request from the former spouse asking for implementation of the election and a certified copy of the appropriate court decree. The request must be signed by the former spouse and received by DFAS within one year from the date of the decree which requires coverage. The form to use is DD Form 2656-10.

Annuity entitlement stops upon the former spouse's remarriage when this occurs before age 55. It will be reinstated if the former spouse's marriage is terminated. Annuity entitlement is unaffected if the former spouse is age 55 or older at the time of remarriage.

SBP is a unitary and indivisible annuity; a valid former spouse election terminates any existing SBP coverage of the retiree, and former spouse coverage cannot be combined with coverage for a current spouse. An election of former spouse coverage is basically irrevocable, meaning that the member/retiree may not terminate SBP participation once it is elected; however, the law allows an eligible member/retiree to request a change in annuity coverage if he or she remarries, or acquires a dependent child, and meets the requirements for making a valid option change. Such a request must be made within one year from the date of marriage or the child’s birth.

A copy of the final divorce decree must be sent to DFAS, since receipt of this is required before any adjustment to SBP can be completed. When only SBP is required in a court order, rather than the division of military retired pay,

the order should be sent to: Defense Finance and Accounting Service, US Military Pay, PO Box 7130, London, KY 40742-7130.

State courts may order members/retirees to participate in SBP and to designate their spouses or former spouses as beneficiaries.<sup>26</sup> A current spouse will be notified of the election to provide coverage for a SM's former spouse, but she or he cannot veto that election.<sup>27</sup> When a separation agreement provides for SBP election, a court can order specific performance to enforce this provision.<sup>28</sup>

If a SM elects not to participate in the SBP upon retirement, that decision is usually irrevocable. However, Congress enacted an "open enrollment period" from March 1, 1999 to February 29, 2000, during which retirees could change their current level of SBP participation or could choose to participate in the program for the first time. Congress may again create other open enrollment periods in the future, and a good drafter will include a provision for this in an agreement or order prepared for the spouse of a SM who has already declined SBP coverage.<sup>29</sup>

Especially when deferred division is used, the attorney for the non-military spouse should insist on SBP coverage to allow continued receipt of payments if the spouse survives the member/retiree. This is a valuable tool in planning for continued income for the spouse.

#### Early-Out Options and Severance Pay

Sometimes the Department of Defense goes through a period of "downsizing" for budgeting or personnel management reasons. This often means service separations before retirement. For those who haven't yet served 20 years to become eligible for longevity retirement, the involuntary separation tools involve principally two early separation benefits, the Voluntary Separation Incentive (VSI) and the Special Separation Benefit (SSB).<sup>30</sup> The most recent Congressional enactment of VSI and SSB expired in 2001, but there are still thousands of former SM's who have left the armed forces through VSI or SSB and who may be contemplating divorce. These financial incentives are akin to severance pay and there are few reported cases interpreting them. There are two key issues which usually come up when a divorcing SM is offered one of these bonuses: Is it divisible, and is it marital property?

As to divisibility, the final answer should be that they are not divisible under federal law. The argument against division can be made as follows: The *McCarty* decision held that Congress preempted all state authority in this area when it enacted the military retirement system. USFSPA was a limited response to *McCarty*; it only allowed for the division of longevity retired pay and, in later amendments, for part of VA disability pay. The Act limits state courts to the division of "disposable retired pay" under 10 U.S.C. 1408(c)(1) and these severance pay options are not "retired pay"; they are replacements for retired pay. Their implementing statutes aren't mentioned in USFSPA. Thus they remain under the protective umbrella of *McCarty* and are exempt from division because of preemption. Representative Patricia Schroeder even sponsored an amendment to H.R. 5006, the Department of Defense Reauthorization Bill for F.Y. 1993, which would have made the Act applicable to both VSI and SSB, but it wasn't passed.

This argument has worked in only one reported case.<sup>31</sup> It has been rejected in the rest of those state cases addressing the issue.<sup>32</sup> Even if the spouse is successful in obtaining division of VSI or SSB, however, he or she will find collection difficult. DFAS will not garnish VSI or SSB under 10 U.S.C. § 1408(d) pursuant to court orders for property division. Only military retirement pay can be garnished under this statute.

If the court decides that the VSI/SSB is divisible and akin to a retirement benefit, then the question is whether the benefit is *separate* property or *marital* property.<sup>33</sup> 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).<sup>34</sup>

If, in the alternative, it is seen as an economic benefit earned during the marriage and attributable to marital work, efforts and labor, it may be viewed 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.<sup>35</sup> 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*.<sup>36</sup>

One final point should be mentioned. Even if the payment is marital property and therefore divisible, one would need to apply the marital fraction (usually years of marital service over total years of service) to the payment to arrive at the portion that is marital.

### Military Divorce Websites

Here is a list of helpful websites for military pension division:

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	ABA FAMILY LAW SECTION'S MILITARY COMMITTEE: <a href="http://www.abanet.org/family/military/">www.abanet.org/family/military/</a>
	NC STATE BAR MILITARY COMMITTEE: <a href="http://www.nclamp.gov">www.nclamp.gov</a>
	ARMY RETIREMENT SERVICES: <a href="http://www.armyg1.army.mil/rso/mission.asp">www.armyg1.army.mil/rso/mission.asp</a>
	DFAS WEBSITE: <a href="http://www.dfas.mil">www.dfas.mil</a>
	SBP RESOURCES: <a href="http://www.armyg1.army.mil/rso/sbp.asp">www.armyg1.army.mil/rso/sbp.asp</a>

### ENDNOTES

<sup>1</sup> Pub. L. 97-252 [Title X, 96 Stat. 730 (1982)], found at 10 U.S.C. 1408. *See also* regulations at Dep't of Defense, Financial Management Reg. vol. 7B, chap. 29, Former Spouse Payments from Retired Pay (Sep. 1999), *available at* <http://www.dod.mil/comptroller/fmr/07b/07b29.pdf>.

<sup>2</sup> *McCarty v. McCarty*, 453 U.S. 210 (1981).

<sup>3</sup> *See, e.g., Kulko v. Superior Court of California*, 436 U.S. 84 (1978). In *In re Hattis*, 196 Cal.App.3d 1162, 292 Cal. Rptr. 410 (1987), for example, the court held there was no federal jurisdiction under 10 U.S.C. 1408(c)(4) to partition the military retired pay of a former domiciliary despite adequate "minimum contacts."

<sup>4</sup> 50 U.S.C. App. § 500-48, 560-91.

<sup>5</sup> *See, e.g., Andris v. Andris*, 65 N.C. App. 688, 309 S.E.2d 570 (1983).

<sup>6</sup> *See, e.g., Russell v. McGinnis*, 514 P.2d 658 (Okla. 1973).

<sup>7</sup> *Mattox v. Mattox*, 105 N.M. 479, 734 P.2d 259 (N.M.Ct.App. 1987).

<sup>8</sup> *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986).

<sup>9</sup> *In re Luciano*, 104 Cal. App.3d 956, 164 Cal. Rptr. 93 (1980).

<sup>10</sup> *In re Marriage of Gillmore*, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981).

<sup>11</sup> *In re Marriage of Scott*, 156 Cal. App. 3d 251, 202 Cal. Rptr. 716 (1984).

<sup>12</sup> BASE PAY times YEARS OF SERVICE times 2.5% is the formula for members entering active duty before Sept. 8, 1980.

Those who entered service on or after 9/8/80 use the formula: BASE PAY [average for last three years of service] X YEARS OF SERVICE X 2.5%. Those who entered service after 1986 use the formula: BASE PAY [average for last three years of service] X YEARS OF SERVICE X 2.5%] - [1% for each year of service under 30 years, calculated by months].

<sup>13</sup> 10 U.S.C. 1408 (e) (1).

<sup>14</sup> 10 U.S.C. 1408 (d) (2).

<sup>15</sup> *See, e.g., Dewann v. Dewann*, 389 Mass. 754, 506 N.E.2d 879 (1987).

<sup>16</sup> J. Stacy and B. Danninger, "Seize Control of Property Settlements," *Case and Comment*, Vol. 93, No. 4 (August 1988), pp. 21-22 (emphasis in the original).

<sup>17</sup> *See K. MacIntyre*, "Division of U.S. Army Reserve and National Guard Pay upon Divorce," 102 Mil. L. Rev. 23 (1983). The formula for Reserve/National Guard retirement pay is: BASE PAY X [NUMBER OF RETIREMENT POINTS divided by 360] X 2.5%. Remember the "High-3" rules for calculating retirement base pay, set out above, for those who start their military service on or after 9/8/80.

<sup>18</sup> 10 U.S.C. § 1408 (c) (1).

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<sup>19</sup> *Mansell v. Mansell*, 490 U.S. 581 (1989).

<sup>20</sup> These provisions are found in the military pension division regulations, *supra* note 1.

<sup>21</sup> *See, e.g., Carranza v. Carranza*, 765 S.W. 2d 32 (Ky. App. 1989).

<sup>22</sup> 10 U.S.C. 1447-1455.

<sup>23</sup> 10 U.S.C. 1448 (a) (2) (A).

<sup>24</sup> 10 U.S.C. 1448 (a) (2) A).

<sup>25</sup> 10 U.S.C. 1448 (a) (2) (B).

<sup>26</sup> 10 U.S.C. 1450. (f).

<sup>27</sup> 10 U.S.C. 1448 (b) (2).

<sup>28</sup> *See, e.g., Rockwell v. Rockwell*, 77 N.C.App. 381, 335 S.E.2d 200 (1985).

<sup>29</sup> Additional resources that are helpful in understanding the Survivor Benefit Plan and the rights and entitlements of survivors of military members and retirees include Department of the Army Pamphlet 608-4, [A Guide for the Survivors of Deceased Army Members](#) (23 Feb 1989) and [SBP Made Easy](#), The Retired Officers Association, 201 North Washington St., Alexandria, VA 22314-2529. An excellent resource for information on military compensation, health care, retirement and Survivor Benefit Plan issues is the [Uniformed Services Almanac](#), published annually by USA, Inc., P.O. Box 4144, Falls Church, VA 22044; it costs about \$12 with shipping and can also be ordered on-line at [www.militaryalmanac.com](http://www.militaryalmanac.com).

<sup>30</sup> Servicemembers are eligible for SSB and VSI when they have served for more than six but less than 20 years before December 5, 1991. They must also have at least five years' continuous active duty immediately preceding the date of separation. There may be other specific requirements, as prescribed by the service secretary, such as years of service, skill or rating, rank and remaining period of obligated service. SSB is a one-time lump-sum payment. The amount is equal to: BASE PAY X YEARS OF CREDITABLE SERVICE X 15%. Servicemembers are eligible for the same transition benefits and services (found in 10 USC 1141-50) as members who are involuntarily separated. VSI is an annual payment made for twice the number of years of active duty service. 10 USC 1175. The amount is equal to BASE PAY X YEARS OF CREDITABLE SERVICE X 2.5%. Sometimes a member will be separated "15-year Retirement." This is an involuntary decision, not chosen by the individual; it is used as a manpower management tool. Retired pay is: BASE PAY X YEARS OF CREDITABLE SERVICE X 2.5% X [a reduction factor equivalent to 100% - (1% for each year under 20 years of service)]. For an excellent overview of this issue, the legal characterization of severance pay, see Polchek, "Recent Property Settlement Issues for Legal Assistance Attorneys," THE ARMY LAWYER, December 1992 at 4-12.

<sup>31</sup> *McClure v. McClure*, 647 N.E.2d 832 (Ohio 1994).

<sup>32</sup> *Diaz v. Babauta*, 66 Cal.App.4th 784, 78 Cal.Rptr.2d 281 (Cal. Ct. App. 1998); *In re Marriage of Heupel*, 936 P.2d 561 (Colo. 1997); *In re Marriage of Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994); *Kelson v. Kelson*, 675 S.2d 1370 (Fla. 1996); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Pavatt v. Pavatt*, 920 P.2d 1074 (Okla. Ct. App. 1996); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996). *Abernethy v. Fishkin*, 638 So.2d 160 (Fla. Ct. App. 1994). Ct. App., 1994); *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995).

<sup>33</sup> *See, e.g., Boger v. Boger*, 103 N.C. App 340, 405 S.E.2d 591 (1991).

<sup>34</sup> *See, e.g., In re Marriage of De Shurley*, 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).

<sup>35</sup> *See, e.g., Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).

<sup>36</sup> *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

## MILITARY PENSION DIVISION: THE SERVICEMEMBER'S STRATEGY

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

### Overview of the Military Pension Division Series

There are five SILENT PARTNERS in this series.

- *Military Pension Division: Scouting the Terrain* is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses' Protection Act), what the Act does (and doesn't do), and how the question of "federal jurisdiction" is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember's Strategy* contains information on how to assist the servicemember (hereafter "SM") in this area, and
- *Military Pension Division: The Spouse's Strategy* covers how to help the SM's spouse.
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS*. It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- Retrieving an apparently "lost" pension benefit for the spouse/former spouse is covered in *"Lost" Military Pensions: The Ten Commandments*.

### Introduction

The battlefield in military divorces is often military pension division. An overview of the battlefield is contained in "Military Pension Division: Scouting the Terrain," and the topics below expand that advice to help the pension recipient (SM or retiree) to cut corners, save money, and reduce or eliminate benefits for his (or her) spouse or ex-spouse.

While many SMs are vociferous in their resistance to division of the military pension, it is important to remember and remind the client of the cost of an aggressive and unyielding defense. Once they know the odds and the costs, few clients have the will or the pocketbook for diehard resistance. Few want to risk what's at stake in 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 U.S. jurisdictions limit military pension division based on years of service or years of marriage. The job of a good attorney is to guide the client with sage advice and serious judgment, rather than to be pulled along blindly by a client who wants to “set a precedent” – usually (as clients state it) “for the principle of the matter.” Is it worth it? Will it help the client with the rest of his (or her) case? Advice and guidance for the “big picture” along these lines is the task of the lawyer who is truly serious about helping his or her military pension division clients.

### **Roadblocks and Minefields**

Our client in this example is Army Colonel Bill Roberts. He’s been in the Army 20 years and now he’s going through a divorce. He wants to know how to stop Mrs. Roberts from getting the courts to divide his military pension rights. He also wants to know, in the event she succeeds, what his maximum exposure is.

To advise him fully, we need to first look at the roadblocks and minefields that may be placed in Mrs. Roberts' way, blocking the division of her husband's military retirement rights. Here are the obstacles that may be discussed with COL Roberts:

Constitutionality. If COL Roberts says, "They can't do that -- it's unconstitutional," don't get your hopes up. The constitutional attack on pension division will fail. This issue has been rejected in all state courts that have considered it. The same argument was also rejected by the Court of Appeals for the Federal Circuit in 1990 in *Fern v. United States*.<sup>1</sup>

Retroactivity. In general, the claim for military pension division must be made at a time when *both federal and state statutes* allow for such division. As to federal law, a 1990 amendment to USFSPA limits pension division to decrees entered after June 25, 1981 (the date of *McCarty v. McCarty*<sup>2</sup>). It states that decrees entered before this date which did not treat (or reserve for later treatment) military retired pay as marital or community property cannot be modified to reopen the issue.<sup>3</sup> Practitioners should check the appropriate state laws or cases to determine when military pensions became divisible.

Timeliness. The next point of analysis for COL Roberts' case is whether the claim was filed *procedurally in a timely manner*. This is a technical question of state law. Some states limit the filing of equitable distribution claims to the period up to the granting of a divorce or dissolution; if you wait till after that, you're too late. Others require the filing to occur after the separation of the parties; you can't just file suit for property division while you're still living together. Under North Carolina law, for example, the rights of the spouses to an equitable distribution of marital property are deemed to vest at the time of the parties' separation; the right to equitable distribution does not exist if the claim for it is filed before the separation of the parties. In addition, the right to equitable distribution must be asserted in North Carolina before the final divorce judgment; a divorce judgment destroys the right to equitable distribution unless that right is asserted prior to the granting of a judgment of divorce. If such parameters exist under state law and the claim of Mrs. Roberts for equitable distribution falls outside these limits, the court will have no jurisdiction to entertain her request for an equitable distribution of marital property. This defense involves complex procedural research that is best left to the expert; consult a good civilian family law attorney or refer this kind of case to a family law specialist.

Waiver. Mrs. Roberts' rights may have been waived. Did she sign a separation agreement or property settlement agreement? An antenuptial 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 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 (Alabama) and one jurisdiction (Puerto Rico) which bars division of any noncontributory 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 or an early (and reduced) retirement benefit.<sup>4</sup> 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 vested retirement rights.

There are two states, Indiana and Arkansas, which clearly limit court jurisdiction over pension division to those pensions which are “vested.” The Arkansas Court of Appeals held in *Holaway v. Holaway* that an unvested pension is non-divisible separate property of the party who earned it.<sup>5</sup> 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.<sup>6</sup>

Alabama law provides a unique limitation on pension division jurisdiction. The law specifically states that retirement benefits are not divisible as marital property unless the employee or “owning spouse” has ten years of pension service during the marriage.<sup>7</sup>

A third jurisdiction, Puerto Rico, refuses to allow the division of noncontributory pensions at all. Puerto Rico treats these pension rights as separate property.<sup>8</sup> 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 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. To find out which states have vesting requirements, examine the Army JAG School’s guide to the Uniformed Services Former Spouses’ Protection Act, publication JA 274, which contains a “State-by-State Analysis of Divisibility,” at Appendix B.<sup>9</sup>

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.

### **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*<sup>10</sup> the U.S. Supreme Court in 1989 held that a pension, to the extent it is based on disability retirement, is not divisible under USFSPA, and that the states may divide only "disposable retired pay" as that term is defined in USFSPA. Disability pay is a complicated issue. A member of the military can take advantage of 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. If a SM is able to retire with military disability pay -- if he has been rated as disabled by the military -- his 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 he has an active duty base pay of \$3,000 per month, 20 years of creditable service and a disability rating of forty percent (40%).

- 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 base pay. In this case, it comes to 2.5% X 20 years X \$3000, or \$1500.
- The next step is to multiply his base pay times his disability rating. This is achieved by multiplying \$3,000 by 40%, or \$1,200.
- The SM would then receive the higher of these two amounts (\$1500 per month in military disability retired pay in this example).

USFSPA makes divisible only the amount of pay that is the difference between the two above amounts, that is, the difference between his gross 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 would yield her only half of \$300, or \$150 per month. 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 the extent of disability is not such as to qualify a SM for military disability retired pay, he might still elect to receive monthly payments from the VA. To qualify for these, he would have 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 \$1,500 per month and his disability were evaluated as equivalent to \$1,000 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 \$1,500, but only \$500 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.<sup>11</sup> The Supreme Court, after reviewing the history of *McCarty* and USFSPA, proceeded to define the problem as one of statutory interpretation of Section 1408(c)(1), which allowed the division of military pensions, and Section 1408(a)(4), which exempted VA disability benefits from inclusion in the term, "disposable retired pay." While the courts are allowed to treat disposable retired pay as community or marital property, the Court stated that they were not allowed to treat all retired pay as such -- only disposable retired pay. Thus the Supreme Court ruled that states are preempted from dividing the retired pay that a retired military member waives in order to receive VA disability pay. As 10 U.S.C. 1408(a)(4) now reads, both these types of 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... (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) or... (D) are deducted because of an election under chapter 73 of this title [10 USC 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

Practitioners should be aware that Congress has recently taken steps to modify the VA waiver requirement. In 2003 Congress passed legislation taking effect January 1, 2004 to allow concurrent receipt of both forms of payments – retired pay and disability benefits – for certain classes of eligible retirees. The statute is Public Law 108-136, Sections 641 and 642, and the restoration of retired pay is known as Concurrent Disability Pay, or CDP.

For those who have at least 20 years of qualifying military service and have a VA disability rating of at least 50%, it authorizes a ten-year phased elimination of the Department of Veterans Affairs offset to retired pay. The disability does not have to be combat-related. The eligible retiree will see his retirement pay increase by about 10% each year until the phase-in period is complete in 2014, at which time the retiree will be receiving an additional amount that is equal to the amount of retired pay waived.

Combat-Related Special Compensation (CRSC) is a part of the concurrent receipt law, and it includes those who have a disability of at least 10% directly related to the award of the Purple Heart decoration, or else a disability rated at 10% or higher related to combat, operations or hazardous duty. CRSC is non-taxable; retired pay is taxed. There is no phase-in for CRSC; eligible retirees will receive their full retired pay plus their full authorized disability payments.

The statute includes Guard and Reserve personnel who have at least 20 qualifying years for retirement purposes. In general, it is recommended that the former spouse reapply for the start of payments. Fax the request to DFAS at 216-522-6960 or mail it to DFAS-GAG/CL, PO Box 998002, Cleveland, OH 44199-8002.

The legislation is more complicated than the brief overview given here. Those seeking further information should click on “Search” at [www.dfas.mil](http://www.dfas.mil) or at [www.military.com](http://www.military.com). There is also a separate SILENT PARTNER on CRSC.

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 the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*.

How can the SM use these to his advantage? The primary way is not to allow “jurisdiction by consent” to pave the way to an easy division of his pension if he has truly decided on a course of complete resistance. This involves two possible situations:

Meritorious Issue. Assume that the SM is domiciled in a state where division of the pension is limited or barred (see above), 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.

- The first step, due to the complexity of this subject, is to be sure he has skilled counsel in both jurisdictions. Don't even try to make a request for a continuance (or for a stay of proceedings under the Servicemembers Civil Relief Act) while he's “out in the field” without advice from your co-counsel. This area's too complicated.
- 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.<sup>12</sup>
- And finally, DON'T let the SM tell you that you can handle this without outside help. This is too difficult for the average (or above-average) judge advocate or civilian attorney, and it isn't worth your professional reputation (or malpractice liability) to try to disprove this.

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 wants 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 else he's sure 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.

### **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. This can be done by DFAS 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. 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).

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 DFAS will accept for direct payments to Mrs. Roberts. These four methods are set out in the pension division regulations.<sup>13</sup> They are explained in detail in the SILENT PARTNER, *Getting Military Pension Division Orders Honored by DFAS*.

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

Percentage clause. A percentage clause might state: *Wife is granted 50% of Husband's disposable retired pay.*

Formula clause. This is an award expressed as a fraction or a ratio, and it typically used when a SM is on active duty (or a Reservist 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.

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 with 18 years of military service.* 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).

For COL Roberts, there is really only one advantageous way to allocate the pension: *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.

### 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 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. Defined by state law, this is usually the number of years of marital pension service divided by the years of total pension service.<sup>14</sup> 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 COL Roberts 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.

### How to Save a "Full Bird" \$300,000

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 irretrievable breakdown of the marriage, date of summons issuance, 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.<sup>15</sup> 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.<sup>16</sup>

Drafting a pension division clause (as above) without reference to COL Roberts' grade and years of service at the valuation date will result in DFAS dividing 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.

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 O-6) with 20 years of service at their date of separation, Bill Roberts may be a brigadier general (pay grade O-7) with 30 years of service by the time he retires. At the time of his O-7 retirement with 30 years of service, Mrs. Roberts (under the above clause) would then begin to receive 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 if he were to remain in the same pay grade that he held at the valuation date and retired in that pay grade with the same number of years of service. This is, of course, very unlikely. Once COL Roberts agrees to deferred division of the pension, he should direct his attorney to negotiate for 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.*"<sup>17</sup> 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.

But even in those states this does not limit COL Roberts and his attorney in negotiations. When negotiating, 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 will 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.

There is a substantial financial difference between these two approaches. The following example will illustrate just how large the gap can be.

Assume that the pay of a colonel (O-6) at 20 years of service is about \$7,500 a month and that the pay of a brigadier general (O-7) at 30 years is about \$9,400 a month. Also assume that, with 30 years of service, Bill Roberts will be 52 years of age at retirement, with a life expectancy of about 24 years. His

pension, for this hypothetical situation, is calculated by multiplying 2.5% times his years of service times his base pay.

Assume that the monthly retired pay of a brigadier general with 30 years of service is \$7,050, representing base pay of \$9,400 per month X 30 years of service X 2.5%. When this sum is multiplied times 12 months, it gives a yearly retired salary of \$84,600. One-third of this, or \$28,200, is the wife's share of the pension, assuming the parties were married 20 of the 30 years of the pension service. The wife's portion is then multiplied by 24 years, the remaining statistical life expectancy of Bill Roberts. The result is \$676,800, which represents the sum of the payments to Mrs. Roberts over the course of Bill Roberts' life expectancy (assuming he retires as a brigadier general).

For COL Roberts, the more favorable calculations (based on O-6 pay for 20 years of service at date of separation) are: \$7,500 X 20 years X 2.5% = \$3,750 per month pension. One-third of this, or \$1,250 a month, is the wife's share, and the total amount of payments to her would be \$1,250/mo. X 12 mo. X 24 years = \$360,000.

The difference between these two values, \$676,800 and \$360,000 is \$316,800. If the pension division clause were drawn as shown in the sample clause above, it would cost Bill Roberts an additional \$316,800 over his retired lifetime in payments to Mrs. Roberts. This is over and above what she was entitled to receive as her share of the marital part of the military pension of a *colonel* with *twenty* 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, the proper wording for COL Roberts might be as follows:

*Husband shall pay to Wife fifty percent (50%) of the disposable retired pay of a colonel (O-6) with twenty (20) years of service, times 20 years of marital pension service, divided by his total years of military pension service.*

Needless to say, it is not often that one can save a full colonel over \$300,000 with a single stroke of the pen.

### Dividing Disposable Retired Pay

What is it that the courts divide -- gross pay or net pay? USFSPA specifies that the court can only divide *disposable retired pay*.<sup>18</sup> 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;
- disability pay benefits; and
- Survivor Benefit Plan premiums.

Note that disability benefits 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 benefits, 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. And there's no way to stop a SM from taking disability pay! This topic is covered more fully above.

### Reserve and National Guard Pension Rights

There are *two key considerations* in dividing Guards/Reserve retirement rights. First, since Guard and Reserve personnel do not begin 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. Second, the pension must be calculated by using years and then again using retirement points. A full explanation 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 about the death of the SM and its impact on the surviving spouse. Since the military pension ends when the SM dies, the Survivor Benefit Plan is the usual issue at stake here. This is a way to continue monthly payments to the former spouse who survives.

What is the Survivor Benefit Plan? It is a survivor annuity that pays a specified beneficiary 55% of the selected base amount (up to age 62) when the SM dies first. This topic is covered in detail in the SILENT PARTNER, *Military Pension Division: Scouting the Terrain*.

The best SBP option for the SM is, of course, *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 the option for a remarriage and a new wife, if that's in his future. SBP cannot be divided between current and former spouses.

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 SBP (spouse or former spouse coverage costs 6.5% of the selected base amount), and it has the advantage of paying Mrs. Roberts in a lump-sum cash amount at his death, rather than doling out monthly payments to her. 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.

Lower Base Amount. When you can't dissuade the other side from SBP, then try to let COL Roberts select a base amount that's lower than his retired pay – say 20% or 30% of it – when he's not been married to Mrs. Roberts the entire term of his service. After all, it might not make sense to him that she should get 55% of his full retired pay when he dies if she was only married to him 10 of the 20 years he served; under these circumstances, she should only get half of 50% of his retired pay during her life (or 25%), and she should get the same amount at his death, not 55%. The death benefit should mirror the life benefit, in other words. Reduce the base amount selected so that her SBP benefit reflects the same percentage as her share of the military pension.<sup>19</sup> You'll also be saving COL Roberts money because the premium will be lower.



Who Pays the Premium? 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. You can send them 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 DFAS to take the premium out of her share. They just won’t 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 the pension is divided.

But you can accomplish the same thing by adjusting the percentage that Mrs. Roberts receives. Here’s what to do—

- 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.
- Next divide that amount by .55, since SBP is always 55% of the base amount chosen, and we’re trying to figure out the correct amount for that base.
- Then figure out the dollar amount for the SBP premium (for spouse or former spouse coverage, use 6.5% of COL Roberts’ selected base amount, which is found in the previous step).
- 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 COL Roberts’ retired pay that she receives. Note that these calculations assume NO disability pay waiver or other debits from gross pay (such as court-martial fines or forfeitures, money owed to the federal government) which are subtracted from gross retired pay to arrive at disposable retired pay.

### **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, DFAS will not garnish VSI or SSB under 10 U.S.C. § 1408(d) pursuant to court orders for property division. 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 benefit is separate or marital property. If the courts decide in favor of divisibility, how will they treat the property?<sup>20</sup> 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).<sup>21</sup>

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.<sup>22</sup> 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*.<sup>23</sup> Finally, even if the payment is marital property and therefore 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.

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## ENDNOTES

<sup>1</sup> *Fern v. United States*, 908 F.2d 955 (Fed. Cir. 1990).

<sup>2</sup> *McCarty v. McCarty*, 453 U.S. 210 (1981).

<sup>3</sup> 10 U.S.C. (c) (1).

<sup>4</sup> Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* (McGraw Hill), §6.09, p. 454 (2003 Supp.)

<sup>5</sup> *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).

<sup>6</sup> *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.

<sup>7</sup> Ala. Code § 30-2-51

<sup>8</sup> *Delucca v. Colon*, 119 P.R. Dec. 720 (1987).

<sup>9</sup> This can be found at the Army JAG School's website, [www.jagcnet.army.mil/tjagsa](http://www.jagcnet.army.mil/tjagsa). Click on "Other Publications," scroll down the menu to "Legal Assistance", then look for JA 274, which is in Adobe Acrobat format.

<sup>10</sup> *Mansell v. Mansell*, 490 U.S. 581 (1989).

<sup>11</sup> *Id.*

<sup>12</sup> *See, e.g., Atkinson v. Chandler*, 130 N.C. App. 561, 504 S.E.2d 94 (1998).

<sup>13</sup> Dep't of Defense, Financial Management Reg. vol. 7B, chap. 29, Former Spouse Payments from Retired Pay (Sep. 1999), available at <http://www.dod.mil/comptroller/fmr/07b/07b29.pdf>.

<sup>14</sup> 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.

<sup>15</sup> *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)

<sup>16</sup> *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987)

<sup>17</sup> *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).

<sup>18</sup> 10 U.S.C. § 1408 (c) (1).

<sup>19</sup> 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.

<sup>20</sup> *See, e.g., Boger v. Boger*, 103 N.C. App. 340, 405 S.E.2d 591 (1991).

<sup>21</sup> *See, e.g., In re Marriage of De Shurley*, 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).

<sup>22</sup> *See, e.g., Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).

<sup>23</sup> *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

## MILITARY PENSION DIVISION: THE SPOUSE'S STRATEGY

*INTRODUCTION: SILENT PARTNER is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

### Overview of the Military Pension Division Series

There are seven SILENT PARTNERS in this series, shown below with the topics they cover:

- *Military Pension Division: Scouting the Terrain* - summary of USFSPA (the Uniformed Services Former Spouses' Protection Act) and division of military retirement benefits.
- *Military Pension Division: The Servicemember's Strategy* and *Military Pension Division: The Spouse's Strategy* - strategies for the military member/retiree and the former spouse.
- *Military Pension Division: The "Evil Twins" – CRDP and CRSC* - Concurrent Retirement and Disability Pay (CRDP) and Combat-Related Special Compensation (CRSC).
- *Getting Military Pension Orders Honored by the Retired Pay Center* - drafting a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- *"Lost" Military Pensions: The Ten Commandments* - retrieving an apparently "lost" pension benefit for the spouse/former spouse.
- *Master Checklist for Military Retirement Benefits* - overview of benefits arising out of military service and how they may be divided between the former spouses in a divorce case.

### 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.

## **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.<sup>1</sup> 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*<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

Finally, Puerto Rico does not allow the division of noncontributory pensions at all; it treats these pension rights as separate property.<sup>5</sup> 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 an 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.<sup>6</sup>

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*<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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](http://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.<sup>10</sup> 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.<sup>11</sup>

### **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, here are some suggested responses:

- If you want SBP and do not have any interest in alternatives, then stick to that. Don’t engage in discussions about life insurance.
- 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*<sup>12</sup>, 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 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 its 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](http://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.<sup>13</sup> 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 unremarried 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.<sup>14</sup>

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 policy<sup>15</sup> 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.<sup>16</sup> 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](http://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.

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## **ENDNOTES**

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

<sup>2</sup> *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).

<sup>3</sup> *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.



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<sup>4</sup> Ala. Code § 30-2-51.

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

<sup>6</sup> 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).

<sup>7</sup> *Mansell v. Mansell*, 490 U.S. 581 (1989).

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

<sup>9</sup> 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).

<sup>10</sup> 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.

<sup>11</sup> 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."

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

<sup>13</sup> 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).

<sup>14</sup> 10 U.S.C. § 1062.

<sup>15</sup> 10 U.S.C. § 1086 (a).

<sup>16</sup> 10 U.S.C. § 1078 a (g) (1) (C).

(Rev. 10/7/10)

\* \* \*

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# SILENT PARTNER

## GETTING MILITARY PENSION DIVISION ORDERS HONORED BY DFAS

*INTRODUCTION: SILENT PARTNER is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

### Overview of the Military Pension Division Series

These are the SILENT PARTNERS covering military pension division issues:

- *Military Pension Division: Scouting the Terrain* is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses' Protection Act), what the Act does (and doesn't do), and how the question of "federal jurisdiction" is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember's Strategy* contains information on how to assist the servicemember (hereafter "SM") in this area, and
- *Military Pension Division: The Spouse's Strategy* covers how to help the SM's spouse.
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS*. It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- Retrieving an apparently "lost" pension benefit for the spouse/former spouse is covered in *"Lost" Military Pensions: The Ten Commandments*.
- The sixth info-letter deals with the complicated world of Concurrent Retirement and Disability Pay (CRDP), service-connected disability, and Combat-Related Special Compensation. Its title is *Military Pension Division: The "Evil Twins" – CRDP and CRSC*.

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Getting a pension division order honored by DFAS can sometimes be a daunting task. Located in Cleveland, Ohio, DFAS has numerous lawyers and paralegals reviewing legal documents that arrive there by the truckload everyday. They also have a rejection rate of over 30% for military pension division orders. Here are some basic tips on how to get your property division decree or clause accepted.

### 1. KNOW YOUR RESOURCES.

Read closely the provisions of 10 U.S.C. 1408 to understand what the law requires for military

pension division. The SBP (Survivor Benefit Plan) statute is found at 10 U.S.C. 1447 *et. seq.* You will also need to look at the pension division implementing regulation.<sup>1</sup> Did you know that DFAS has a website? It's located at [www.dfas.mil](http://www.dfas.mil), and it generates over 3,000 "hits" a month. All of the DFAS fact sheets are on it, and the application form as well -- why not go there and pick up some information straight from the source? Go to the website, click on "Money Matters," then "Garnishment," then look for the USFSPA heading and click on "fact sheet" for information regarding DFAS' processing of applications for the direct payment of benefits. In addition, two excellent articles that explain military pension division can be found at <http://www.dfas.mil/money/garnish/fsfact.htm> and <http://www.dfas.mil/money/garnish/fs-qa.htm>.

The DFAS Customer Service Department may be reached at 1-866-859-1845. Be sure to include the SM's Social Security Number (SSN) in all correspondence and phone calls with DFAS. Providing this will ensure a more rapid response. Without the SSN, documents will be rejected.

## 2. USE THE RIGHT DOCUMENT.

A separation agreement, standing alone, is not the way to accomplish military pension division. While you can attempt to divide a military pension in only a separation agreement, that document alone won't suffice; there will be insurmountable problems when there is a marriage of over ten years' duration and the nonmilitary spouse wants to receive direct pension payments from DFAS. 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. Since an unincorporated or unmerged separation agreement is not a court order, it will not be sufficient to institute direct pension payments for the ex-spouse. You must have one of the above court documents. You can either:

- Prepare a separate military pension division order, judgment, or decree, which will then be submitted to the court at the appropriate time. This would be when the divorce occurs, or when the hearing on property division takes place. An example is shown below.
- In the alternative, prepare a separation agreement that can then be incorporated or merged into a divorce decree.

## 3. CAN YOU GET DIRECT PAYMENTS FROM DFAS?

A pension division order can only be used for direct payments if a unique jurisdictional requirement is met. Under 10 U.S.C. 1408(c)(4), direct payments are allowed only when the 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 occurs.

For more detailed information on these jurisdictional tests, see the first SILENT PARTNER in this series, *Military Pension Division: Scouting the Terrain*.

In addition, in property division cases involving the division of military retired pay incident to a divorce or separation, there is a requirement that the parties be married for at least 10 years during which time the military member performed at least 10 years of creditable military service. Without this, DFAS cannot honor an application for the direct payment of any court-ordered division of retired military pay as property.

The Servicemembers Civil Relief Act (SCRA)<sup>ii</sup> offers protection for military members who are on active duty at the time of the divorce, and in such a case there must be proof that the military member's rights pursuant to the SCRA were observed and honored. This requirement does not apply in cases where the member is retired or not on active duty at the time the decree was entered.

When the application is approved, DFAS will notify the member 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. When the court order divides military retired pay as property, no more than 50% of the member's disposable retired pay (DRP) may be deducted. The military member remains liable for any amount still owing. 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), DFAS is authorized to deduct up to 65% of the military member's disposable earnings.

If the decree was filed prior to February 3, 1991, the calculation of DRP is different than for later cases. DFAS refers to the earlier orders as "old law" cases, and the more recent cases as "new law" cases.

In "old law" cases, federal income tax, state income tax, amounts of military retired pay waived in lieu of receiving VA or military disability pay, the costs of the Survivor Benefit Plan (SBP) premiums (if the former spouse is the designated beneficiary), amounts waived for civil service employment, and debts owed the federal government are deducted in calculating DRP.

In "new law" cases, taxes are not deducted but the other deductions shown above apply. The parties have taxes deducted from their respective shares.

#### **4. USE THE RIGHT LANGUAGE.**

Even if it were incorporated into a court order or a divorce decree, the separation agreement or property settlement document would have to contain all of the language that is required for court orders to be honored by DFAS. The pension division clauses must include:

- a. The names and addresses of the parties, as well as their SSN's;
- b. The years of marriage and of military service;
- c. The military member's grade or rank;
- d. A statement that the SCRA rights of the member have been honored (if the member is on active duty when the decree is entered)
- e. Jurisdictional findings (domicile, consent, or residence) under 10 U.S.C. 1408 (c)(4);
- f. A statement that DFAS should pay the spouse at his/her address as shown therein.

- g. A statement as to what DFAS will pay the spouse (see “KNOW WHAT YOU WANT” below). Payments are made once a month, starting no earlier than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later. The payments end no later than the death of the member or spouse, whichever occurs first. Payments are prospective only; no arrears are allowed. The USFSPA does not provide for garnishment of payments missed prior to the approval of the application by DFAS.

## 5. **KNOW WHAT YOU WANT.**

The order may award a percentage or a fixed dollar amount to the former spouse of the military member. For example, a percentage clause might state: “Wife is granted 43% of Husband’s disposable retired pay.” Alternatively, a fixed dollar clause could read: “Wife is awarded \$550 per month.” A percentage clause automatically provides for cost-of-living adjustments (COLAs). The spouse does not get any COLAs if a fixed dollar amount is awarded.

Regulations also allow DFAS to accept awards that are not percentages or fixed dollar amounts.<sup>iii</sup> DFAS will honor a court award that is expressed as a formula or a hypothetical. These are usually used if the service member is still on active duty.

A formula is an award expressed as a ratio. For example, the order could state: “Wife shall receive 37% 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. DFAS cannot guess or interpret what the court and parties have determined to be the months of service during marriage (the numerator); however, DFAS can 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 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: “Wife is granted 40% of what a staff sergeant (E-6) would earn if he were to retire with 18 years of military service.” 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. Note that if the court order fails to specify the year of retirement, DFAS assumes the year to be the actual year of retirement, and that year’s pay scale would be utilized. A COLA will automatically be awarded with a hypothetical clause. Finally, be sure to include the rank and years of service of the member when submitting a hypothetical award.

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 disposable retired pay”). It will also accept any decree in which all the variables are filled in by the court (such as “John will pay Mary 50% of his final retired pay times a fraction, the numerator of which is 240 months of marital pension service up to the parties’ date of separation, and the denominator is 280 months of total creditable military service, both active duty and National Guard”).

## 6. **SBP CHECKLIST**

Here is a checklist to help understand the Survivor Benefits Plan (SBP) and get coverage for the non-

military spouse.

4	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 one opportunity to make election at the 20-year mark (after 20 years of creditable Guard/Reserve service). At time of application for retired pay (about a year before member turns 60), he/she is given another opportunity. Spouse concurrence as above.	
	If representing the nonmilitary spouse, be sure to mandate former spouse coverage with member selecting full retired pay as base amount	SBP benefit payments equal 55% of the selected base amount, which can be \$300 or above, till the beneficiary turns age 62, when it reduces to 35%
	If representing the member/retiree, make sure that the base amount selected yields about the same death benefit as the lifetime benefit, so that spouse doesn't profit by retiree's death	
	If representing the member/retiree, try to negotiate a reduction of the spouse'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, payable out of retired pay, and it 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 member/retiree is to submit SBP election to DFAS, make sure this is done within one year of divorce; enclose divorce decree and SBP application form titled Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage (DD Form 2656-1)	
	If spouse/former spouse applies, be sure to enclose copy of divorce decree, order for SBP coverage and "deemed election letter" within one year of order granting SBP coverage [different deadline from one year after divorce, in some cases]	There is no specific form for the letter - it just needs to explain that what is enclosed and that, since the member did not elect coverage, the enclosed order mandates SBP "former spouse" coverage
	If above deadlines are exceeded, apply to the appropriate Board for the Correction of Military Records for relief (may be available if retiree has not remarried)	
	Send SBP documents to: Defense Finance and Accounting Service, U.S. Military Retirement Pay, P.O. Box 7130, London, KY 40742-7130. Recommended to send by certified mail, return receipt requested	
	SBP is reduced by Dependency and Indemnity Compensation in certain circumstances. Go to <a href="http://www.vba.va.gov/bln/21/Milsvc/Docs/DICDec2002Eng.doc">http://www.vba.va.gov/bln/21/Milsvc/Docs/DICDec2002Eng.doc</a> for full information, or call toll-free 1-800-827-1000.	

7. **WHERE AND HOW TO SERVE THE ORDER**

For service on DFAS of the military pension division order,<sup>iv</sup> the addresses of the military finance centers are:

**ARMY, NAVY, AIR FORCE, MARINES:** Defense Finance and Accounting Service - Cleveland, ATTN: DFAS-GAL/CL, P.O. Box 998002, Cleveland, OH 44199-8002; (216) 522-5301.

**COAST GUARD:** Commanding Officer (LGL), United States Coast Guard, Human Resources Service and Information Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591; (785) 339-3415.

**PUBLIC HEALTH SERVICE:** ATTN: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001; (800) 638-8744.

Note that the decree must be certified by the clerk of court within 90 days of service on DFAS.

The application form for direct payments from DFAS, signed by the spouse, must also be included, with a certified copy of the order and divorce judgment (if separate order). A copy of the form (DD Form 2293) can be obtained from the DFAS website. Only the recipient may sign the application, but anyone may serve the completed application upon DFAS. While you should ensure delivery by sending the documents by certified mail, return receipt requested, this is not a requirement.

8. **A HELPFUL CHECKLIST.**

“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 DFAS. To help with the latter task, here’s a checklist from DFAS:

**DFAS CHECKLIST FOR MILITARY PENSION DIVISION ORDERS**

4	QUESTION	
	<b>General Validation Questions</b>	
	Is the member active duty, reserve/guard, or retired?	
	If retired, what is the member’s retirement date?	
	Is the member receiving temporary or permanent disability retired pay?	
	Was a final decree of divorce, dissolution, annulment or legal separation submitted?	
	Did the clerk of court certify the order within 90 days of the date DFAS received it?	
	What is the date of divorce?	
	Has the appeal time expired?	
	Was a fully completed DD Form 2293 submitted?	
	Are any additional documents required (such as a marriage certificate), or is the order/application invalid for any reason?	
	For members on active duty at time of divorce, were the member's rights under the Servicemembers Civil Relief Act (formerly the Soldiers’ and Sailors’ Civil Relief Act) complied with?	
	What award(s) is the former spouse attempting to enforce -- child support, alimony and/or retired pay as property?	
	<b>Validation Questions for Retired Pay as Property Awards</b>	
	Does the order divide military retired pay?	
	What is the member’s PEBD (pay entry base date)?	



Was the marriage date provided? (If so, the system will automatically calculate whether the 10 year overlap of marriage and service requirement was met).	
Does the court have 10 USC 1408 (c)(4) jurisdiction over the member -- by reason of residence (not due to military assignment), domicile or consent?	
Does the order provide for the payment of a percentage, fixed dollar amount, formula, or hypothetical award?	
If the division of retired pay is based on a formula (i.e., marital fraction), does the order provide the numerator? For Reserve/Guard members, is the formula expressed in reserve retirement points?	
If the division of retired pay is based on a hypothetical retired pay award, is the award language valid? Are all the variables provided?	
<b>A. For active duty members entering service before September 8, 1980, the variables are:</b>	
1. Percentage awarded.	
2. Rank for hypothetical retired pay calculation.	
3. Number of years of service for hypothetical retired pay calculation.	
4. Hypothetical retirement date.	
<b>-OR-</b>	
1. Percentage awarded.	
2. Hypothetical retired pay base (base pay figure to be used in hypothetical retired pay calculation).	
3. Number of years of service for hypothetical retired pay calculation.	
<b>B. For active duty members entering service on or after September 8, 1980 ("high 36" retirees):</b>	
1. Percentage awarded.	
2. Hypothetical retired pay base (base pay figure to be used in retired pay calculation).	
3. Number of years of service for hypothetical retired pay calculation.	
<b>C. For Reserve/Guard members:</b>	
1. Percentage awarded.	
2. Rank for hypothetical retired pay calculation.	
3. Number of reserve retirement points for hypothetical retired pay calculation.	
4. Number of years of service for basic pay to be used in hypothetical retired pay calculation.	
5. Hypothetical date of eligibility to receive retired pay.	

The additional checklist below contains some practical tips which need to be included in the pension division order.

**MILITARY PENSION DIVISION CHECKLIST**

- \_\_\_ SERVICE OF APPLICATION (recommend this be done by certified or registered mail, return receipt requested)
- \_\_\_ FINAL DECREE OF DIVORCE, SEPARATION OR ANNULMENT --AUTHENTICATED OR CERTIFIED WITHIN 90 DAYS PRIOR TO SERVICE OF PENSION ORDER
- \_\_\_ NAME, ADDRESS, AND SSN OF MILITARY MEMBER?
- \_\_\_ NAME, ADDRESS, AND SSN OF FORMER SPOUSE?
- \_\_\_ ORDER HAS NOT BEEN AMENDED, SUPERSEDED, OR SET ASIDE

\_\_\_\_\_ ORDER IS FINAL DECREE, NO APPEAL MAY BE TAKEN, NO APPEAL HAD BEEN TAKEN WITHIN TIME PERMITTED

\_\_\_\_\_ FORMER SPOUSE MARRIED TO MEMBER AT LEAST 10 YEARS DURING AT LEAST 10 YEARS CREDITABLE SERVICE:

START OF SERVICE DATE: \_\_\_\_\_  
RETIRED DATE: \_\_\_\_\_  
MARRIAGE DATE: \_\_\_\_\_  
DIVORCE DATE: \_\_\_\_\_

9. **SUGGESTED MILITARY PENSION DIVISION ORDER/CLAUSES**

Set out below is a set of model clauses to use in a military pension division order.

[Case caption here]

THIS CAUSE came before the undersigned judge upon Plaintiff's claim for distribution of Defendant's military retirement benefits. *[if entered as a consent order, add next sentence]* The parties agree to the entry of the following military pension division 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 divorced in [County] [State] on [date].

*Note: The parties must be divorced for DFAS to honor a direct-pay order for garnishment of military pension payments as property. They do not have to be divorced to enter the MPDO, just to submit it to DFAS. When branch of service is Coast Guard, Public Health Service or National Oceanographic and Atmospheric Administration (commissioned corps of either), use the appropriate finance center name instead of DFAS.*

2. Plaintiff's address is 123 Countrywide Lane, Anywhere, XX 00000. Her Social Security number is 111-22-3333. Her date of birth is May 19, 1952.
3. Defendant's address is 456 ABC Street, Whoville, XX 00000. His Social Security number is 444-55-6666. His date of birth is June 12, 1950.
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.

5. *[for military member not yet retired]* Defendant holds the rank of *[state rank here, such as "Staff Sergeant" or "Lieutenant Commander"]* in the *[here state branch of service, such as "U.S. Air Force" or "Utah Air National Guard"]* with *[number]* creditable years of service. His Pay Entry Base Date (PEBD) is *[here state PEBD as found on Defendant's Leave and Earnings Statement (LES)]* or his Guard/Reserve retirement points statement]. He is not yet retired. *[-OR- for retiree]* 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"]* with *[number]* creditable years of service 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 \_\_\_ *[here give date of retirement (whether receiving retired pay or, if Guard/Reserve, awaiting age 60)]*.

*\*\*If near the end of the year, add additional sentence:* This is expected to increase as of January 1, 20\_\_ when Defendant receives a cost-of-living adjustment (COLA).

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 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 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]*.

*\*\*If near the end of the year, add additional sentence:* This amount is expected to increase to \$\_\_\_ as of December 1, 20\_\_ when the new disability compensation rates go into effect.

*Note: this clause helps the spouse to establish a base-line for the present facts and the court's expectations and intentions in case the SM decides to waive additional military pension payments for more disability compensation in the future.*

7. *[Note: It is probably best to insert this into all orders, for SMs and retirees, although the SCRA generally does not apply to retirees]* Defendant's rights under the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*, have been observed and honored.
8. *[This clause is to protect the non-military spouse from unexpected reduction in payments due to electing disability compensation; delete if not needed]* The parties have agreed that Plaintiff shall receive her full share of Defendant's military retired pay, calculated as set out below and without reduction for disability payments (VA disability pay, disability severance pay, military disability retired pay, or any other reason). For the purposes of their settlement herein, military retired pay includes retired pay actually paid or to which Defendant would be entitled based only on length of Defendant's creditable service.

9. *[This clause is to protect the non-military spouse in cases where her pension share, for any number of reasons, is dependent upon the servicemember's gross pay or when the retiree is in receipt of disability pay and he's to indemnify former spouse for difference.]* 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 Restricted Access Personal Identification Number (PIN) for Plaintiff which, along with Defendant's Social Security Number, will allow her to view his pay information (but not to make changes). Defendant can locate instructions on how to set up a Restricted Access PIN for Plaintiff on-line at <https://mypay.dfas.mil/FAQ.htm>.
10. *[CSB/Redux – To protect spouse from SM's election of CSB/Redux bonus of \$30,000 at or around the 15-year mark for military service, thus reducing pension share upon retirement]* Defendant agrees not to elect CSB/Redux (a bonus of \$30,000 paid at or around 15 years of service, the election of which reduces the military pension), which would reduce Plaintiff's share of the retired pay. Defendant agrees to cooperate as set forth below to protect Plaintiff's interest in an unreduced share of the military pension.
11. 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.]*
12. *[Use when the former spouse's share of the pension is to be adjusted due to allocation to her of entire SBP premium].* The marital share is a fraction made up of \_\_\_ months of marital pension service, divided by \_\_\_, which represents the total months 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. 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 [6.5% of the base amount selected] 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.

### **CONCLUSIONS OF LAW**

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

***\* [in non-consent order (i.e., trial or default), be sure to include facts in the above section that support court's jurisdiction under 10 USC 1408(c)(4). This means evidence of domicile in the state or general appearance.]***

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. *[If order is entered by consent, use this clause.]* 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. For all uniformed services retired pay received after [date], Defendant shall pay Plaintiff *[choose an Option from below and insert here]*

*[Option A: The non-military spouse receives a specified percent, not to exceed 50%, of the disposable retired pay. This increases with cost-of-living adjustments (COLA) for retiree, and that is automatic under the regulations; it 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. This clause favors spouse.]* \_\_\_% of his disposable retired pay each month. *[DFAS will accept percentages carried out to four decimal places.]*

*[Option B: The spouse gets a percentage, usually 50%, of the marital share of member's retired pay. This increases with COLAs for retiree, 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. This clause favors spouse.]* \_\_\_% of the marital share of his disposable retired pay each month, not to exceed 50% of disposable retired pay. The marital share is a fraction made up of \_\_\_ *[insert #]* months of marital pension service, divided by the total months of Defendant's military service. *[Note: Order must contain number of months for numerator – DFAS will not fill that in, although DFAS will complete the denominator when calculating final retired pay.]*

*[Option C: The spouse receives a set 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 SM/retiree.]* \$\_\_ per month.

*[Option D: The spouse receives a hypothetical amount, based on the grade 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.]*

*\*For those who entered military service before September 8, 1980:*

Clause D1- \_\_\_% of the disposable retired pay that Defendant would have received had he retired with the rank of \_\_\_ and with \_\_\_ years of creditable service on his actual retirement date. - OR

Clause D2- \_\_\_% of the marital share of the disposable retired pay that Defendant would have received had he retired with a retired pay base of \$\_\_\_ and with \_\_\_ years of creditable service on his actual retirement date. The marital share is a fraction made up of \_\_\_ months of marital pension service, divided by the total months of Defendant's military service at [date] [*date of divorce, separation, etc., according to state law*].

*\*For those who entered military service after September 7, 1980, you must insert the retired pay base that Defendant would have. See Attorney Instructions on Dividing Retired Pay at DFAS website ([www.dfas.mil](http://www.dfas.mil) >Retired Pay > Garnishment) for details:*

Clause D3- \_\_\_% of the disposable retired pay that Defendant would have received had he retired with a retired pay base of \$\_\_\_ and with \_\_\_ years of creditable service on his actual retirement date.

*[If order is worded as above or does not specify a retirement year, then, DFAS will assume the year to be the actual year of retirement, and that year's pay scale will be used. SM may want to draw the order to specify "and assuming that Defendant retired on [date]." This would freeze the benefit to that which is based on the pay tables in effect on the date of valuation for the parties, not on the pay tables which exist when the SM actually retired or will retire.]*

2. *[If this is true, use the following clause to obtain direct-pay garnishment from DFAS].*  
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.

*[use one of the following clauses if there is no 10-year/10-year overlap as stated therein]*  
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]. -OR- Defendant will pay Plaintiff by a voluntary allotment from his retired pay the amount specified in the preceding paragraph.

*[as another alternative, the parties may agree to payment from Defendant to Plaintiff of alimony, which is not limited by the 10/10 overlap above; in this case, an alimony clause should be utilized which does not terminate payments at remarriage or cohabitation of Plaintiff.]*

*[use this in the event federal law changes to allow direct payments without the 10/10 overlap]*  
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.

3. Plaintiff shall 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 shall be responsible for making these payments each month to Plaintiff until DFAS begins making these payments to her, and during this interim, Defendant will pay Plaintiff directly her full share. Payments are due on the first day of each month. 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 agree that the periodic payments made by Defendant to Plaintiff for this interim period of time until direct payments commence from DFAS shall be included in Plaintiff's income under Section 61 of the Internal Revenue Code, and these payments are likewise deductible from Defendant's gross income.
4. Defendant shall provide to Plaintiff a Restricted Access PIN which she can use to access the *myPay* system through the DFAS website so that she can verify that she is, in fact, receiving her full share of Defendant's retired pay each month. Defendant shall set up Plaintiff's access to *myPay* and provide the Restricted Access PIN to her simultaneously with the signing of this Order. Defendant shall not delete Plaintiff's Restricted Access PIN without specific written approval 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 shall 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. Plaintiff shall notify DFAS in writing about any changes in her address or in this document affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.
7. Defendant shall provide promptly to Plaintiff any information that she needs in order to have this order honored for direct payment of military pension benefits and shall keep her informed at all times of his current address.
8. *[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, he shall reimburse her immediately.
9. In order to effectuate direct payments from DFAS, Plaintiff shall tender a certified copy of this order to DFAS along with a certified copy of the parties' divorce decree and an executed DD Form 2293. *[This is a requirement if Plaintiff wants to receive direct payments from DFAS.]*

10. *[Use this or next clause in a consent order to protect spouse. Attorney for SM/retiree may want to delete.]* 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 for disability payments or any other reason. *[-OR- if Defendant is retired and already receiving reduced retired pay because of disability compensation, use this sentence:* 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. The parties consent to the court's retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if Defendant should waive military retired pay in favor of disability payments or take any other action (such as receipt of severance pay, bonuses or an early-out payment) which reduces Plaintiff's share or amount herein. This retention of jurisdiction is to allow the court to adjust Plaintiff's share or amount to the pre-reduction level, to reconfigure the property division or to award compensatory alimony or damages so as to carry out the original intent of the court.

*-OR-*

The parties have agreed upon an anticipated level of payments to Plaintiff to guarantee income to her. That level is defined as *[here state specifically what is anticipated, such as Defendant's longevity retired pay will be about \$2,000 per month, and Plaintiff will receive one-half of that times 15 years marriage during military service divided by 20 years of military service.]* He hereby guarantees this and agrees to indemnify and hold Plaintiff harmless as to any breach hereof. Furthermore, if Defendant takes any action (such as waiver of retired pay in favor of disability compensation, receipt of severance pay, bonuses or an early-out payment) which reduces the amount or share Plaintiff is entitled to receive, then he shall indemnify her by paying to her directly the amounts by which her share or amount is reduced as non-modifiable spousal support which does not terminate upon her remarriage or cohabitation *[OR as additional property division payments]*. In addition, he hereby consents to the payment of this amount from any periodic payments he receives (such as wages or retired pay from any source), and this clause may be used to establish his consent (when this is necessary) for the entry of an order for garnishment, wage assignment or income withholding.

*-OR-*

*[If order is based on trial, not consent, use this to protect non-military spouse; delete if representing SM/retiree.]* The parties are responsible and accountable to this court for good faith and fair dealing in complying with the terms of this order. Defendant shall not unilaterally undertake any course of action which undermines this order or frustrates the intent of the court. He shall release, hold harmless and indemnify Plaintiff as to any actions he takes which reduce her allocated benefits. The court will retain continuing jurisdiction to modify the pension division payments or the property division specified herein, or to award compensatory alimony or damages, if Defendant should waive military retired pay in favor of disability payments or



take any other action (such as receipt of severance pay, bonuses or an early-out payment) which reduces the amount or share Plaintiff is entitled to receive. In addition, 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.

11. *[This is to protect the spouse if the SM obtains civil service employment; delete if representing the SM.]* 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. 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) 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.
  - b. 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.
  - c. 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.

- d. Defendant shall also notify Plaintiff immediately if he accepts employment with the federal government, and shall include in said notification a copy of his employment application and his employment address. 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-

*[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.

12. *[This is to protect spouse from CSB/Redux election which will reduce the military pension upon retirement.]* Based on his agreement above, Defendant shall not elect to receive a CSB/Redux bonus. If Defendant does make such an election, then –
  - a. He shall promptly provide to Plaintiff a copy of any election form he executes as to any bonus or option which affects his retired pay; and
  - b. He shall indemnify Plaintiff for any loss she incurs (including fees, costs, expenses and damages). In the event of such a loss or reduction, the court shall award Plaintiff an equitable adjustment of her pension division award herein.
  - c. The remedy shall be to increase Plaintiff's share of the pension to make up for the decrease caused by CSB/Redux, but – 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.
13. *[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 this order and also fails to provide Plaintiff with his date of retirement, last unit of assignment, final rank or grade, final pay, present and past retired pay and current address, then he authorizes Plaintiff to request and obtain this and other information from the Department of Defense and from any department or agency of the U.S. Government.

- OR - *[This is a fall-back clause if SM will not agree with the above clause]*

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 Department of Defense and in enforcement of the provisions herein.

14. If either party shall violate this court order, then the court shall indemnify the party seeking enforcement and shall award damages, interest at the statutory rate, and reasonable expenses and attorney's fees to that party.
15. The monthly payments herein shall be paid to Plaintiff regardless of her marital status and shall 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.
16. *[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 (or from Defendant directly). Plaintiff shall not be entitled to any portion of retired pay upon the death of either party.
17. *[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. Plaintiff shall be the spouse beneficiary of Defendant's SBP. Upon their divorce, Plaintiff shall be his former spouse beneficiary, with his monthly retired pay as the base amount. He shall do nothing to reduce or eliminate her benefits.
  - b. Plaintiff shall effectuate a deemed election for former spouse coverage within one year of the entry of this order by sending a certified copy of this order to DFAS along with a certified copy of the divorce decree and an executed DD Form 2656-10.

*[If Defendant may elect coverage at less than the full amount of his monthly retired pay, then use the following clause:]* Upon their divorce, Defendant shall elect former spouse coverage, choosing as the base amount \$\_\_\_\_\_. *[This may be any amount down to \$300 a month.]*

- c. 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 such remedies for breach as are available to her in a court of law.

*[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. 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 would be (for spouse or former spouse coverage, use 6.5% of the member's selected base amount).
- 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 #11.] [-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 the full cost of her SBP coverage.]

18. [Use this clause when Plaintiff's share of pension is reduced to allocate to her the full SBP premium under Finding of Fact #11]. 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).

When 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). Plaintiff may apply to the court for reversion of the pension share to the original, unadjusted portion, and Defendant hereby stipulates that Plaintiff is entitled to such adjustment when either of the above two events occurs. Plaintiff has a duty to inform Defendant immediately upon her remarriage.

19. [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].

20. *[Use this clause to attempt to give Plaintiff some protections against reduction of disposable retired pay due to election of VA disability compensation or CRSC by SM/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 the remarriage of Plaintiff before age 55, which disqualifies her for SBP coverage (thus justifying termination for Defendant of the SBP premium deduction) and election by Defendant of VA disability compensation or Combat-Related Special Compensation, either of which would diminish the available retired pay of Defendant (thus reducing the share for Plaintiff). If the Defendant takes any action to diminish the share of Plaintiff of his military retired pay, then this court reserves jurisdiction to amend the pension division terms to increase Plaintiff's share of Defendant's retired pay, pursuant to White v. White, 152 N.C. App. 588, 568 S.E.2d 283 (2002).

\_\_\_\_\_  
Judge Presiding

Date: \_\_\_\_\_

**WE CONSENT:**

[signatures of parties, preferably with acknowledgments]

[signatures of attorneys]

**ENDNOTES**

<sup>i</sup> Dep't of Defense, Financial Management Reg. vol. 7B, chap. 29, Former Spouse Payments from Retired Pay (Sep. 1999), available at <http://www.dod.mil/comptroller/fmr/07b/07b29.pdf>.

<sup>ii</sup> 50 U.S.C. App. 501-548, 560-593.

<sup>iii</sup> *Supra* note 1.

<sup>iv</sup> There is a separate address for submitting a SBP deemed election. See the SBP checklist within this SILENT PARTNER.

[revised 1/27/10]

\* \* \*

**SILENT PARTNER** is prepared by COL Mark E. Sullivan (USAR, Ret.). For revisions, comments or corrections, contact him at 2626 Glenwood Avenue, Ste. 195, Raleigh, N.C. 27608 [919-832-8507]; E-mail – [Mark.Sullivan@ncfamilylaw.com](mailto:Mark.Sullivan@ncfamilylaw.com).