

SILENT PARTNER

GETTING MILITARY PENSION ORDERS HONORED BY THE RETIRED PAY CENTER

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

Tip #1 – Where Do I Start?

Retired pay orders for the Army, Navy, Air Force, Marine Corps, as well as the National Guard and Reserves, are processed by the Defense Finance and Accounting Service (DFAS), located in Cleveland, Ohio. DFAS has numerous lawyers and paralegals reviewing the many decrees subpoenas and court orders which arrive there every day. There is a rejection rate of over 30% for military pension division orders.

Pension orders for members of the U.S. Coast Guard and Coast Guard Reserve are sent to the USCG Pay and Personnel Center (<http://www.uscg.mil/ppc/>), located in Topeka, Kansas. Orders for the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration are also serviced by the Coast Guard PPC.

The two basic issues in the division of retirement benefits are “pension share” and the survivor annuity. These tips tell how to write and get approved an order for division of military retired pay as property, and how to obtain coverage under the Survivor Benefit Plan. The title “retired pay center” will be used to refer to the above two offices which process applications for a division of uniformed services retired pay under USFSPA, the Uniformed Services Former Spouses' Protection Act.¹ Note that USFSPA refers to the retired pay center as the “designated agent.”²

Tip #2 – Know Your Resources.

Read closely the provisions of 10 U.S.C. 1408 to understand what the law requires for military pension division. The SBP (Survivor Benefit Plan) statute is found at 10 U.S.C. 1447 *et. seq.*

DFAS has a pension division implementing regulation, the DoDFMR (Department of Defense Financial Management Regulation).³ The Coast Guard follows DFAS guidance and there is a useful USCG pamphlet, “FSPA and SBP, 8th Edition,” at: <http://www.uscg.mil/ppc/ras/PPCPUB5825.pdf>.

The DFAS website is www.dfas.mil, and the fact sheets and application forms needed are at the “Retired Military and Annuitants” tab. At the end of Chapter 29 of Vol. 7b, DoDFMR, you'll find a sample military pension order (“Figure 1”). The practitioner can import that language into an order for pension division. Read this order closely. If you vary from the language recommended here, you'll probably have your pension order rejected. Don't make the mistake of thinking that you can write it up better than the folks

¹ 10 U.S.C. § 1408.

² 10 U.S.C. § 1408 (b)(1)(A).

³ Dep't of Defense Financial Management Regulation, DoD 7000.14-R, “Military Pay Policies and Procedures—Retired Pay.” Vol. 7b, Chapter 29, “Former Spouse Payments from Retired Pay” (July 2013) contains full details about USFSPA payments from retired pay for the Army, Navy Air Force and Marine Corps retirees. Referred to hereafter as DoDFMR, the Regulation can be accessed at <http://comptroller.defense.gov/fmr>.

at DFAS who are going to be processing the order; you probably can't. And if your order is rejected, you'll have to explain to your client why the payments are still not flowing, or the legal bill keeps going up, or you still have not finished with his or her case, although you're "trying really hard" to do so!

Note that there are two significant omissions in the sample order. First, it is silent on SBP, perhaps because the sample order was prepared by the Garnishment Operations office of DFAS in Cleveland, Ohio; SBP is managed through the DFAS office in Indianapolis, which is called "Retired and Annuitant Pay." The second omission is indemnification in the event of an election of disability pay that reduces disposable retired pay. This omission is due to the fact that DFAS is not responsible for reimbursements due to disability pay reductions. That is the responsibility of the retiree. Thus it is not something that a DFAS model order needs to contain, but it is something which the attorney for the FS certainly needs to consider. A better order, addressing both of these issues, is referenced at Tip #10 below.

Be sure to include the Social Security Number (SSN) of the servicemember (SM) or retiree in all correspondence and phone calls with the retired pay center. Providing this will ensure a more rapid response. Without the SSN, documents will be rejected and inquiries will be unanswered.

Tip #3 – Use the Right Document.

A separation agreement or property settlement, standing alone, is not the way to accomplish military pension division when the nonmilitary spouse wants to receive direct pension payments from the retired pay center. USFSPA only allows direct pension payments pursuant to a "final decree of divorce, dissolution, annulment, or legal separation issued by a court" or a property settlement that is ratified or approved by the court and issued incident to such a final decree.⁴ You can either:

- Prepare a separate military pension division order, judgment, or decree to submit to the court at the appropriate time, entered incident to the divorce, such as when the divorce occurs, or when the hearing on property division takes place.
- In the alternative, prepare a separation agreement or property settlement which can then be incorporated or merged into the decree of dissolution or divorce.

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

A pension division order can only be used for direct payments if a unique jurisdictional test is met. Military pension division is allowed only when the retiree/military member:

- is domiciled in the state in which the suit for the divorce or property division occurs; or
- resides in the state in which the lawsuit occurs (other than because of military assignment); or
- consents to the jurisdiction of the court in which the lawsuit occurs.⁵

The order must state the jurisdictional basis for dividing military retired pay.⁶ For more detailed information on these jurisdictional tests, see the SILENT PARTNER info-letter, *Military Pension Division: Scouting the Terrain*, found at www.nclamp.gov, the website of the North Carolina State Bar's military committee, or at www.abanet.org/family/military, the website of the military committee of the ABA Section of Family Law.

In addition, in property division cases involving the retired pay center's division of military retired pay incident to a divorce or separation, the parties must be married for at least 10 years during which time the military member performed at least 10 years of creditable military service.⁷ Without this, the retired pay center cannot honor an application for the direct payment of any court-ordered division of retired military pay as property. The pension is still divisible, but the former spouse must look to the retiree for payments, not the

⁴ 10 U.S.C. § 1408(a)(2).

⁵ 10 U.S.C. § 1408(c)(4).

⁶ DoDFMR § 290605.

⁷ 10 U.S.C. § 1408(d)(2).

retired pay center.

The Servicemembers Civil Relief Act (SCRA)⁸ offers protection for military members who are on active duty at the time of the divorce. USFSPA requires a statement in the pension division order for military pension division that the military member's rights pursuant to the SCRA have been observed.⁹ Although the SCRA does not apply in cases where the member is retired or is not on active duty at the time the decree was entered, USFSPA does not make that distinction; it requires such a statement in all cases.

The pension order or divorce decree may be submitted at any time after it is entered.¹⁰ One need not wait until the SM has already applied for retirement or is in pay status. If the SM is not yet in pay status when the order is tendered to the retired pay center, a conditional approval will be made, subject to final approval at the time the individual actually starts to receive retired pay.¹¹

At the time of final approval, the retired pay center will notify the SM that payments will start not later than 90 days after the service date of the approved application or the start of retired pay, whichever is later.¹² The former spouse (FS) also gets an approval notice.¹³ When the court order divides military retired pay as property, no more than 50% of disposable retired pay (DRP) may be deducted.¹⁴ The retiree remains liable for any amount still owing.¹⁵ In cases where there is an application for the direct payment of court-ordered division of military retired pay and a garnishment issued pursuant to 42 U.S.C. § 659 (child or spousal support), the retired pay center may deduct up to 65% of the military member's disposable earnings.¹⁶

Tip #5 – Use the Right Language.

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

- a. The names and addresses of the parties, as well as their SSN's (although the latter identifier may be omitted if that is required by state law, local rules or prudent practice, since the application document, DD Form 2293,¹⁷ requires the SSN);
- 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 observed;
- e. Jurisdictional findings (domicile, consent, or residence) under 10 U.S.C. 1408 (c)(4);
- f. A statement that the FS will be paid at his/her address as shown therein; and
- g. A statement as to what the retired pay center will pay the spouse (see "Know What You Want" below).

Payments are made once a month, starting no later than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later.¹⁸ The payments end at the death of the retiree or spouse,

⁸ 50 U.S.C. § 3901 *et seq.*

⁹ 10 U.S.C. § 1408(b)(1)(D).

¹⁰ DoDFMR § 290404.

¹¹ DoDFMR § 290405.

¹² 10 U.S.C. § 1408(d)(1).

¹³ DoDFMR § 290501.

¹⁴ The award is construed as dividing "disposable retired pay" regardless of the language used. DoDFMR § 290601.D.

¹⁵ 10 U.S.C. § 1408(e)(6).

¹⁶ DoDFMR § 290901(b).

¹⁷ DoDFMR § 290401.

¹⁸ 10 U.S.C. § 1408(d)(1).

whichever occurs first.¹⁹ Payments are prospective only; no arrears are paid through the retired pay center.²⁰ The USFSPA does not provide for garnishment of payments missed prior to the approval of the application by the retired pay center. It also is not responsible for payments missed due to transmission to an incorrect or out-of-date address or bank account number.

Tip #6 – Know What You Want.

The order may award a percentage or a fixed dollar amount to the former spouse of the military member.²¹ Set out below are examples of the phrasing for these and other types of pension-division clauses.

A percentage clause might state: “Wife is granted 43% of Husband’s military retired pay.” Alternatively, a “fixed dollar amount” clause could read: “Wife is awarded \$550 per month as military pension division.” Every allowable clause automatically provides for cost-of-living adjustments (COLAs) except for the “fixed dollar amount” clause.²² Attempting to add a COLA to a fixed dollar clause will result in rejection of the entire order.

The rules also allow awards that are not percentages or fixed dollar amounts.²³ The retired pay center will honor a court award that is expressed as a formula or a hypothetical. These are usually used if the SM is still serving.

A formula is an award expressed as a ratio.²⁴ For example, the order could state: “Wife shall receive 50% of the Husband’s disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband.” The order must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service. The retired pay center cannot guess or infer what the court (or the parties) have determined to be the months of service during marriage (the numerator); however, the designated agent 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 clause²⁵ is the most difficult one to draft. It involves an award based on a rank or status which is different from that which exists when the SM retires. For example, the order might say: “Wife is granted 50% of what an Army staff sergeant (E-6) would receive if he were to retire with over 18 years of military service and ‘High-3’ pay of \$___ per month .”²⁶ 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. Detailed information on hypothetical clauses is found in the SILENT PARTNER, “Guidance for Lawyers: Military Pension Division,” found at www.nclamp.gov, the website of the North Carolina State Bar’s military committee, or at www.abanet.org/family/military, the website of the military committee of the ABA Section of Family Law.

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, as well as the “High-3 pay” of the servicemember. If there are variables which are missing, the retired pay center will not supply them; the order will be rejected.

Guard/Reserve pension clauses deserve separate treatment. When a Guard or Reserve pension is

¹⁹ 10 U.S.C. § 1408(d)(4).

²⁰ DoDFMR § 290304.

²¹ DoDFMR § 290601.C.

²² DoDFMR § 290601.C.

²³ DoDFMR § 290601.E.

²⁴ DoDFMR § 290211.

²⁵ DoDFMR § 290213 and 290608.

²⁶ For members entering military service on or after September 8, 1980, retired pay is calculated using the average of the member’s highest 36 months of basic pay at retirement, also known as “High-3.” See Chapter 3 of the DoDFMR, § 030101.A.2.

involved and the member has not stopped drilling and put in for retirement, a “formula clause” is typically used, since the final retired pay isn’t known and the total service creditable for retirement is also unknown. In a Guard/Reserve case involving a formula clause, you must specify division according to retirement points.²⁷ The usual language refers to points earned during marriage divided by total points during the member’s career.

If a formula clause is not used for a still-drilling Reserve or Guard member, then this “points over points” rule does not apply. For example, the retired pay center will honor a percentage award for any Guard or Reserve servicemember with language such as “John will pay Mary 35% of his Army National Guard retired pay.” It will also accept any decree in which all the variables are filled in by the court.

Tip #7 – A Helpful Checklist for Pension Division.

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

DFAS CHECKLIST FOR MILITARY PENSION DIVISION ORDERS

✓	General Validation Questions
	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?
	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?
	Were the member’s rights under the Servicemembers Civil Relief Act observed?
	What is the member’s PEBD (pay entry base date)?
	Was the marriage date provided? (If there is a 10/10 overlap between years of marriage and military service, 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?
	A. For active duty members entering service before September 8, 1980, the variables are:
	Percentage awarded.
	Rank for hypothetical retired pay calculation.
	Number of years of service for hypothetical retired pay calculation.
	Hypothetical retirement date.
	-OR-
	Percentage awarded.
	Hypothetical retired pay base (base pay figure to be used in hypothetical retired pay calculation).
	Number of years of service for hypothetical retired pay calculation.
	B. For active duty members entering service on or after September 8, 1980 (“high 36” retirees):
	1. Percentage awarded.

²⁷ DoDFMR § 290211.B.

	Hypothetical retired pay base (base pay figure to be used in retired pay calculation).
	Number of years of service for hypothetical retired pay calculation.
	C. For Reserve/Guard members:
	Percentage awarded.
	Rank for hypothetical retired pay calculation.
	Number of reserve retirement points for hypothetical retired pay calculation.
	Number of years of service for basic pay to be used in hypothetical retired pay calculation.
	Hypothetical date of eligibility to receive retired pay.

Tip #8 – Don’t Forget the Survivor Benefit Plan.

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

The retired pay center cannot apportion the SBP premium between the parties; the premium must be deducted “off the top” before arriving at “disposable retired pay.”²⁸ DFAS resources on this topic are found at the DFAS website, www.dfas.mil, under the “Provide for Loved Ones” tab; look for “Survivor Benefit Plan” or “Reserve Component Survivor Benefit Plan.” The checklist below will help the practitioner to understand SBP and the cost and benefits of coverage for the non-military spouse.

SBP CHECKLIST

✓	Action or issue	Comments
	SBP is a unitary benefit, cannot be divided between current spouse and former spouse	
	Election: Servicemember on active duty is automatically covered; at retirement an election must be made, and spouse concurrence is necessary if member chooses no SBP, child coverage or coverage at base amount less than his/her full retired pay	
	Election - Guard/Reserve: There is opportunity to make election at the 20-year mark (i.e., after 20 years of creditable Guard/Reserve service). Spouse concurrence needed for Option A (defer decision till age 60) or Option B (elect coverage, but to start at age 60); no spouse consent needed for Option C (immediate coverage).	Option C is also called RC-SBP, or Reserve Component SBP.
	If representing the nonmilitary spouse and survivor annuity is desired, be sure order requires member/retiree to elect former spouse coverage, with full retired pay as base amount	SBP benefit payments equal 55% of the selected base amount, which can be \$300 or above
	If representing the member/retiree and SBP coverage for the FS is not desired, make sure that the base amount selected yields about the same death benefit as the lifetime benefit, so that the FS doesn’t profit by retiree’s death. Some people call this a “mirror award.”	This can only be done if the active-duty member is about to retire at the time of the court order, or if the Guard/Serve member elected Option A and the order is being entered at age 60 – since only at those points in time can one determine the retired pay of the member.
	If representing the member/retiree, try to negotiate a reduction of the FS’s share of the military pension to reflect the additional cost of the SBP premium, which is taken out of the retired pay	SBP premium is 6.5% of selected base amount (in active duty cases), payable out of retired pay before taxes. It is about 10% for Reserve Component SBP coverage. The premium is “taken off the top” and deducted before division of disposable retired pay, so both parties pay in same shares as their shares of the retired pay.
	If representing the member/retiree, ask the court to value the SBP, present evidence on this, and then argue that the present value	This may require hiring a CPA, economist or actuary.

²⁸ DoDFMR § 290610. “Disposable retired pay” is defined at 10 U.S.C. § 1408 (a)(4) and at DoDFMR § 290701.

	must be placed on the FS's side of the "property division ledger"	
	When 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)	
	When spouse/former spouse applies, be sure to enclose copy of divorce decree that includes language about SBP coverage and Survivor Benefit Plan Request for Deemed Election (DD Form 2656-10).	By federal law, the deemed election request must be received within one year of the order that requires SBP.
	Above one-year deadlines are mandated by statute.	If above deadlines are exceeded, apply to the appropriate Board for the Correction of Military Records for relief
	SBP is reduced by Dependency and Indemnity Compensation in certain circumstances.	For information, go to http://www.vba.va.gov/bln/21/Milsvc/Docs/DICDec2002Eng.doc for full information, or call 1-800-827-1000.

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

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

Tip #10 – Suggested Military Pension Division Order Clauses

For a set of model clauses to use in a military pension division order, see the sample order contained in the SILENT PARTNER info-letter, "Getting Military Pension Orders Honored by the Retired Pay Center" at www.nclamp.gov, the website of the North Carolina State Bar's military committee. While this sample order is not perfect, and it's not for every case, it will help with most military pension division cases. It should only be used in consultation with an expert in this area (if the drafting attorney is not such an expert) or after extensive review of the rules, regulations, statues and state cases in regard to division of the pension, allocation of SBP, indemnification and other matters which are important to the client.

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