

SILENT PARTNER

Military Pension Clauses: Fixed Dollar/ Fixed Percentage

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).

In Search of the "Fixed Dollar Amount"

Often a military client will ask the lawyer to find out the best way to divide a retired pay so that the former spouse (FS) receives as little as possible. For the attorney who is asked to prepare a clause which accomplishes this, the "coin of the realm" for the servicemember or retiree is one which specifies a *fixed dollar amount*.

The fixed dollar amount means that a specific amount per month is to be provided to the FS in the court order. Such an award might read, "John Doe will pay his wife, Jane Doe, the sum of \$400 from his retired pay as her share of the military retired pay he acquired during the marriage." Here are the important points:

- The pension for John Doe may be divided at the retired pay center¹ if the parties have over ten years' marriage during ten years of creditable service (the "10/10 rule").
- When the *10/10 rule* is not met, the pension may still be divided, but it cannot be distributed by the retired pay center.
- In either case, John Does always saves money when the division is done by a fixed dollar amount.

Fixed dollar division saves money because it contains no COLAs (cost-of-living adjustments).² COLAs typically amount to 1-2% each year. They take effect at the end of each December, and they mean that the value of the pension is constantly growing. COLAs can increase the value of the pension (and the FS's share) substantially over time.

When there is a fixed dollar clause for pension division, the money comes in each month, but *it never grows*. The COLAs accrue to the benefit of the retiree only. The fixed dollar clause artificially lowers the amount of the pension payment for the former spouse, since COLAs are excluded. And the retired

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

² Department of Defense Financial Management Regulation, DoD 7000.14-R (DoDFMR), Vol. 7B, § 290601.C. ("A retired pay award expressed as percentage will automatically receive a proportionate share of the member's cost-of-living adjustments, while one expressed as a fixed amount will not."). *See also* DoDFMR, Vol. 7B, § 290902.

pay center will not honor a pension division clause which attempts to add COLAs to a fixed dollar amount.³

Even if the fixed dollar amount sounds good, Jane Doe needs to be careful. The loss of COLAs over time will cost her dearly. She needs to see a good attorney to evaluate such a settlement proposal.

Fixed Percentage for the Former Spouse

But what about a clause for the former spouse which artificially boosts the pension payment? The answer is found in the fixed percentage clause, used when the member, John Doe, is still serving.

By way of background, a percentage clause is usually used when the individual is already retired and all the numbers are known. Thus in most states, the share of Jane Doe, married to retiree John Doe for the last ten years of his 20-year career, would be fixed at 25% of the pension (that is, half of the marital share of the pension, which is 10/20).

Normally the clause that is used with a still-serving employee – whether civilian or military or federal/state government – is a “formula clause.” This clause divides the pension by giving the former spouse half of the pension times the marital fraction (which is usually months of marital pension service divided by total time for pension service). In most states, it would read: *Jane Doe will receive 50% of John Doe’s retired pay times a fraction, the numerator of which is 120 months of military service during the marriage, and the denominator of which is the total number of months for John Doe’s military service.*

Writing a percentage clause for the FS means fixing Jane Doe’s percentage, even though John Doe continues to serve toward the military pension after the divorce and settlement. While the denominator in the marital fraction continues to grow with post-divorce service, the absolute value of the marital fraction shrinks with a standard “formula clause.” Not so with the fixed percentage, however – Jane Doe’s share is “set in stone.”

Assume that Jane Doe has been married to John Doe for 10 years, and that he was in the armed forces for all 10 years; the marriage completely overlaps the military service. Jane’s lawyer might argue that Jane should receive half of the military pension, and thus her share in the settlement should be written as 50%. This ignores, of course, post-divorce efforts by the husband toward increasing the value of the pension, which is why the military member should read such a settlement carefully and consult with a good lawyer before taking any action.

An example of the use of a “fixed percentage clause” is found in *Lusso v. Quiggle*,⁴ an unpublished case decided in 2015 by the Minnesota Court of Appeals. The parties agreed on the following clause (edited language) in the stipulated divorce decree:

The parties acknowledge that for 15 years of their marriage, Husband has been on active duty with the U.S. Air Force and has been accumulating retirement benefits which will be payable to him should he retire after 20 years of active military service. Accordingly, should Husband become eligible for a military pension benefit as the result of his service with the

³ See, e.g., *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113 (1993). In that case, the parties negotiated a settlement which stated that the wife would receive \$360.59 per month from the husband’s retired pay, and this amount was not to be increased or decreased for any reason, except due to the application of cost-of-living increases. The retired pay center made the fixed-dollar payments but refused to pay COLAs. It took the entry of a “clarifying order” (specifying payment of 18% of the husband’s retired pay) to obtain COLAs for the wife.

⁴ *Lusso v. Quiggle*, 2015 Minn. App. Unpub. LEXIS 28.

US Air Force, 37.5% of any such monthly pension benefits shall be and hereby is awarded to Wife from his military retired pay.

In most states, the use of a formula clause means that the longer the member serves, the lower the former spouse's share of the final pension payment would be. Thus the former spouse will sometimes try to use this language in a settlement since it fixes her percentage, even though the military partner continues to serve on active duty.

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