

SILENT PARTNER

“The Clock is Ticking” – Dates and Deadlines in the Military Divorce Case

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

Introduction

Handling a military divorce case can be a confusing and painful task for the family law attorney. One of the most difficult parts of the case can be keeping track of deadlines that must be met to ensure (or exclude) the eligibility of a spouse or former spouse regarding federal and military benefits, such as the Survivor Benefit Plan and military medical care.

Military Pension Division Orders

The division of military retired pay can be done in several ways. The Uniformed Services Former Spouses’ Protection Act (USFSPA)¹ only allows courts to direct the retired pay center² to divide military retired pay and pay a portion to a former spouse when the order dividing the pension is 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.³ When done as a stand-alone order, the document effecting pension division is often termed a military pension division order (MPDO).

There is no deadline for submission of the MPDO.⁴ It may be tendered months or years after the divorce, the separation of the parties, or the retirement of the military member. “A former spouse may apply for payments anytime [sic] after the court has issued a court order enforceable under the USFSPA.”⁵

There are four potential problems when a FS (former spouse) waits too long. The first problem is that a subsequent spouse may obtain an MPDO and serve it on the retired pay center first, thus laying claim to most of the retiree’s disposable retired pay.⁶ Priority in processing is the first reason for the

¹ 10 U.S.C. § 1408.

² For the Army, Navy, Air Force and Marine Corps, garnishments are handled by Garnishment Operations at DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

³ 10 U.S.C. § 1408 (a)(2), (c)(1) and (d)(1); *see also* DoD 7000.14-R, Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay, Vol. 7B, ch. 29, § 290204.

⁴ *Potts v. Potts*, 790 A. 2d 703 (Md. 2002) (no time limit for submission of pension division order after divorce judgment); *accord Duhamel v. Duhamel*, 772 N.Y. S. 2d 437 (N.Y. App. Div. 2004) and *Jordan v. Jordan*, 147 S.W. 3d 255 (Tenn. Ct. App. 2004).

⁵ *Id.* at § 290404.

⁶ “If the designated agent is served with applications from more than one former spouse, then the designated agent will honor the applications on a first-come, first-served basis. Subsequently served USFSPA applications shall be satisfied out of the disposable retired pay that remains after the satisfaction of all court orders which have been previously served....” *Id.* at § 291002.

FS to submit promptly the MPDO instead of waiting. The order may be submitted as soon as it is entered, if it is a decree of legal separation; otherwise, it may be submitted as soon as the divorce has been granted. The sooner it is submitted, the better.

The second reason for timely submission is *arrears*. The retired pay center – whether U.S. Coast Guard or the Defense Finance and Accounting Service (DFAS) – will not collect back payments. Only current retired pay garnishments will be made.

The other two difficulties arise out of rules which apply across the board with civil lawsuits and time limitations. Prompt action in claiming pension division and submitting the military pension order to the retired pay center is necessary to avoid the possible running of a statute of limitations.⁷ And finally, the court may apply the equitable doctrine of laches to bar recovery.⁸

Survivor Benefit Plan Coverage – Double Deadlines

Many military retirees elect Survivor Benefit Plan (SBP) former-spouse coverage so that the former spouse will be covered by this survivor annuity after the parties are divorced.⁹ Retirees participating in the SBP must elect former spouse coverage *within one year of the divorce decree*.¹⁰ At the time of making this election, the retiree must provide a statement setting forth whether the election is being made pursuant to a court order. If it is not, the statement must indicate whether it is pursuant to a written agreement previously entered into voluntarily by the retiree as part of, or incident to, a divorce proceeding (and, if so, whether such written agreement has been incorporated in, ratified, or approved by a court order).¹¹ An election filed by the retiree is effective upon receipt by the retired pay center.¹² The form to use for submissions to DFAS is DD Form 2656-1; the form to submit to the Coast Guard Pay and Personnel Center is CG Form 4700.

If the servicemember (SM) is required to provide such coverage and then fails or refuses to do so, the FS can still obtain the required coverage by serving on the retired pay center a written request for implementation of the election and a certified copy of the appropriate court decree. The request must be signed by the FS and received by the center *within one year of the order providing for SBP coverage*.¹³ This is called a “deemed election.”

It is important to note that this is a *second* one-year deadline, distinct from the first one involving the member’s election. A divorce decree need not contain the terms of a property division or marital settlement. In some states, the divorce decree simply recites the facts of the marriage and enters an order dissolving it. Sometimes the court allows the divorce and reserves the remaining terms for later determination. On occasion, the decree of divorce or dissolution provides for some of the property division but leaves other terms to be resolved by agreement or court order.

⁷ See, e.g., *Terry v. Lee*, 445 S.E. 2d 435 (S.C. 1994) (attempt by former spouse to establish rights to husband’s military pension 22 years after divorce decree is barred by laches); and *Randle v. Randle*, 2015 Ala. Civ. App. LEXIS 275 (former spouse applied for share of military pension 28 years after divorce decree; appellate court upheld trial court’s denial of her application, saying that it was too late to modify divorce decree).

⁸ See, e.g., *Schaub v. Schaub*, 305 P.3d 337 (Alaska 2013) (former spouse’s claim for prospective share of retirement benefits was not barred by statute of limitations or estoppel; parties were divorced 1992, former spouse brought claim in 2010; laches barred her claim for retroactive division).

⁹ 10 U.S.C. § 1448(b)(3)(A)(i).

¹⁰ 10 U.S.C. § 1448(b)(3)(A)(iii).

¹¹ 10 U.S.C. § 1448(b)(5).

¹² 10 U.S.C. § 1448(b)(3)(E).

¹³ 10 U.S.C. § 1450(f)(3)(C).

The separate order specified above – the one for SBP coverage – may thus precede or follow the divorce decree. Counsel for the nonmilitary spouse should note carefully these deadlines on the law firm calendar to prevent a catastrophe for the spouse and a malpractice claim for the attorney.

The form for a *deemed election request* is DD Form 2656-10, and a scan for “DD Form 2656-10” on any internet search engine will result in a copy of a fillable PDF form for the attorney’s use. A letter should accompany the form, and this should include a certified copy of the court order and divorce decree.¹⁴ The use of Form 2656-10 is mandatory for a deemed election, whether for regular or Guard/Reserve retirements.

Survivor Benefit Plan Coverage – The Timing Trap

Retirement can be another deadline. Sometimes the member is divorced before retirement, but the divorce decree does not contain proper terms and acceptable language requiring him or her to make a former-spouse SBP election. Perhaps the court has severed the claims and held open the issues of military pension division and SBP for a later hearing. Maybe the attorneys have agreed on SBP but put off the writing of a supplementary order. In some cases, there is an order but the SBP language is faulty.

In any event, if the member retires and chooses no coverage or elects spouse (or spouse and child) coverage, any subsequent FS SBP order will arrive too late at the retired pay center. If the member does not make the FS election by the time of retirement, then it cannot be made afterwards. The DoDFMR makes this retirement deadline clear in two sentences:

- *If the former spouse is the member’s former spouse at the time the member becomes eligible to participate in SBP, an election for former spouse must take place at or before the member’s retirement.*

and

- *If a member has a former spouse upon becoming eligible to participate, but is not required by a court order or court-approved agreement to provide former spouse coverage, any subsequent court order that requires former spouse coverage will not be honored.*¹⁵

Thus the key warning for these cases is to watch out for the divorce impact on FS SBP when the dissolution (e.g., the “status divorce”) takes place before retirement but the related issues (such as SBP) won’t be ruled upon by the court until after retirement.¹⁶

The last issue is the member’s death. If the member dies before making an election, and the request for a court order was initiated *after* his death, then a deemed election based on such an order will not be honored. If, however, the member dies before making an election, an otherwise qualified former spouse request (even if made after the member’s death) will be honored.¹⁷

The Ten-Year Rule and Garnishment of Retired Pay

¹⁴ 10 U.S.C. § 1450(f)(3)(A).
¹⁵ DoDFMR, Vol. 7B, ch. 43, § 430504.A. For a member of the Guard or Reserve, the former-spouse election must be filed within 90 days after receipt of the Notice of Eligibility, which each Guard and Reserve member receives upon attaining 20 creditable years of service (the “20-year letter”). *Id.*
¹⁶ Note that, if both the divorce and a proper SBP order are obtained before retirement, the former spouse has one year from the date of the requiring court order to submit a deemed election, as set out above. Her deemed election will trump, for example, the member’s spousal election at retirement (e.g., he remarried and selected spouse coverage instead of former-spouse coverage which the court order required).
¹⁷ DoDFMR, Vol. 7B, ch. 43, § 430504.C.4.

Most former spouses want a garnishment order to obtain monthly pension-share payments from the U.S. government. They do not want to chase around the military retiree from Georgia to Japan to Germany to try to collect the monthly payments from military retired pay that is disbursed to him or her. “Direct from the source” is what the typical former spouse is likely to request.

What dates and deadlines are involved when the FS wants to obtain an order that gives her direct payments from the retired pay center? When the military pension is divided as marital or community property, there must be at least 10 years of marriage overlapping 10 years of service creditable toward retirement to obtain payments from the retired pay center.¹⁸ This is sometimes known as the “10/10 rule.”

Note that the *10/10 rule* is not a *jurisdictional requirement* for dividing military pensions.¹⁹ There is no limitation on the number of years of marriage overlapping military service as a prerequisite to military pension division, although this is a widely held misconception in the civilian bar. A military pension may be divided by court order whether the spouse has been married to the SM for 30 years or 30 days. Rather, this time requirement is a prerequisite to *enforcement through the retired pay center*. The payment mechanism of a garnishment of the SM’s retired pay is not available unless this test is met.

There are different rules for a member of the Reserve Component, or RC, which means National Guard and Reserves. When there are 10 years of combined Guard/Reserve and active service, the retired pay center will aggregate these to allow the *10/10 rule* to be met in cases of an RC retirement, but not a retirement from active duty.

Note that being in the Guard or Reserves for ten years is not necessarily the same thing as “having *ten good years*” which are creditable toward retirement. A “good year” – one which is creditable toward retirement – is one in which the RC servicemember has accumulated at least 50 points. A year with fewer retirement points means that the year is not creditable toward Guard/Reserve retirement (which requires a minimum of 20 qualifying years), although the points in that year still count in calculating retired pay.

To make it clear to the retired pay center that Reserve/Guard time and active duty time are being added together to yield ten years of creditable service, it is helpful if the divorce decree states that the *10/10 rule* has been satisfied and it shows how this test has been met. Such a recitation will usually be honored by the retired pay center unless it has contrary information.

If the court order does not state that the *10/10 rule* has been met, then counsel will need to provide information to support that contention. This includes marriage and service records of the SM. The retired pay center, whether DFAS or the Coast Guard Pay and Personnel Center, is separate from the National Guard/Reserve headquarters, so one cannot assume that the pay center has easy or instant access to such data. To avoid a delay, provide the copies of documents that the retired pay center would need to verify this assertion.

Separation and the Entitlement to Military Benefits

Does the date of separation matter? “Separation” is generally not a recognized measurement point under federal law. Whether the issue is garnishment and the 10/10 rule, ID cards or medical care,

¹⁸ 10 U.S.C. § 1408(d)(2). Creditable service is computed using the rules set out at 10 U.S.C. § 1405 and the DoDFMR, Vol. 7B, Chapter 1, Subsection 0103.

¹⁹ See, e.g., *Carranza v. Carranza*, 765 S.W.2d 32 (Ky. Ct. App. 1989).

federal and military rules in general are written with regard to the divorce decree or the judgment of dissolution, not the date when the parties separate.

Of course, the separation of the parties will also have an impact on continued entitlement to on-base housing. If there is a marital separation, the rules require the family members to check out of family housing; the SM will be assigned single quarters.

On the state level, the separation date certainly can play an important part in the military divorce case. In states such as California and North Carolina, the acquisition of community or marital property stops at the date of separation; thus that date may be an important state law issue in determining the marital or coverture fraction which is often used to divide the pension.

Commissary and Exchange Privileges

Shopping in a military base's commissary (akin to a grocery store) and exchange (i.e., department store) can be valuable for the nonmilitary spouse, since both of these provide items for sale at substantial savings and with no state sales tax. These exchange privileges are retained until the divorce of the parties.

To qualify for continuation of these benefits, the unremarried spouse must meet the "20/20/20" test—that is, 20 years of creditable service by the SM, 20 years of marriage, and an overlap of 20 years between these. If a former spouse remarries, she loses the entitlement during the period of that remarriage. An unremarried former spouse of a SM may use the commissary and the post or base exchange as if she were the surviving spouse of a retired SM of the military.²⁰

ID Cards and Military Medical Coverage

A former spouse who qualifies for any of these benefits may apply for an ID card at any military ID card facility.²¹ He or she must to complete DD Form 1172, "Application for Uniformed Services Identification and Privilege Card." When an eligible family member receives an ID card, that information is transferred to the Defense Eligibility Enrollment Reporting System (DEERS) to ensure that the cardholder may utilize TRICARE and other medical benefits.

If there have been 20 years of marriage, 20 years of military service qualifying for retirement, and an overlap of at least 20 years, then an unremarried FS will qualify for full medical benefits²² as a "20/20/20" spouse. For shorter marriages, the former spouse should look into CHCBP (Continued Health Care Benefit Program) as a means of providing health insurance coverage.²³ If the FS has not remarried before age 55, she will be eligible for coverage if she pays the premium (around \$425 as of 2015) and receives either court-ordered pension division or else SBP coverage. It is recommended that she obtain *both*.

The Department of Defense designated the Air Force as the proponent agency for publishing the regulations about military privileges and entitlements. The rules about these issues, as well as regarding military ID cards for military dependents and former spouses will be found in a joint service regulation, AFI [Air Force Instruction] 36-3026. One may access a copy by using an internet search engine to search for "AFI 36-3026".

²⁰ 10 U.S.C. § 1062.

²¹ The nearest military support office for a spouse or former spouse to visit can be found at the Real-Time Automated Personnel Identification System (RAPIDS) Site Locator on the web at <http://www.dmdc.osd.mil/rsl>.

²² That is, TRICARE plus treatment on a space-available basis at military medical treatment facilities.

²³ 10 U.S.C. 1078a; *see also* 32 C.F.R. 199.20.

A judgment of divorce or dissolution will affect the privileges, legal rights, and entitlements of the nonmilitary former spouse in many ways. A table showing the benefits and entitlements of former spouses is found at the Appendix below, adapted from that found at Appendix 6-C, THE MILITARY DIVORCE HANDBOOK (American Bar Assn., 2nd Ed., 2011).

Federal Benefits, Negotiations and Advocacy

It is important to remember that most federal rights and benefits – such as medical coverage – are statutory entitlements. They should not be looked upon as bargaining tools that are given, traded, conceded, or withheld during the negotiation process. They belong to any nonmilitary spouse who meets the requirements set out in the applicable statute. As to other benefits which are dependent on length of service and the date of a court order, such as SBP coverage, constant vigilance and knowledge of the critical deadlines should be part of the attorney’s duty of advocacy for the client.

* * *

APPENDIX: FORMER SPOUSE BENEFITS CHART

[This chart and the footnotes immediately below it were prepared by the Administrative and Civil Law Department, Legal Assistance Branch, The Judge Advocate General’s Legal Center and School, Charlottesville, Virginia. They are used as part of the Basic and Advanced Officer Courses at TJAGLCS.]

Uniformed Services Former Spouses’ Protection Act^{1*}	Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes^{3*}			
	Number of Years			
Benefits for Former Spouses^{2*}	0 to <10	10 to <15	15 to <20	20 or more
Division of Retired Pay ^{4*}	X	X	X	X
Designation as an SBP Beneficiary ^{5*}	X	X	X	X
Direct Payment from Pay Center ^{6*}				
Child Support	X	X	X	X
Alimony	X	X	X	X
Property Division ^{7*}		X	X	X
Health Care ^{8*}				
Transitional ^{9*}			X	
Full ^{10*}				X
Insurance ^{11*}	X	X	X	X
Commissary ^{12*}				X
Post Exchange, Base Exchange ^{12*}				X
Dependent Abuse				
Retired Pay Property Share Equivalent ^{13*}		X	X	X
Transitional Compensation ^{14*}	X	X	X	X

FOOTNOTES

¹ Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, Pub. L. 103-160 (1993).

²* For guidance on obtaining a military identification card to establish entitlement for health care, commissary, and PX benefits, see appropriate service regulations (e.g., AR 640-3). Former spouses of reserve component members may be entitled to these benefits; see the following notes for applicable benefits.

³* Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the Armed Forces (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program [statutory authority for this program expires in 1999]).

⁴* At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired, *Konzen v. Konzen*, 103 Wash.2d 470, 693 P.2d 97, *cert denied*, 473 U.S. 906 (1985).

⁵* Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation as an SBP beneficiary.

⁶* See 10 U.S.C. §§ 1408(d) & 1408(e) and 32 C.F.R. part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the appropriate finance center.

⁷* While eligibility for *direct payment* does not extend to former spouses whose overlap of marriage and service is less than ten years, this is not a prerequisite to award of a share of retired pay as property to the former spouse (see Note 4).

⁸* To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and must not be covered by an employer-sponsored health care plan; see 10 U.S.C. §§ 1072(2)(F), 1072(2)(G) & 1072(2)(H). Department of the Army interpretation of this provision holds that termination of a subsequent marriage by divorce or death does not revive this benefit, but an annulment does. These remarriage and employer-insurance restrictions do not limit eligibility to enroll in the civilian health care insurance plan discussed in Note 11.

⁹* "Transitional health care" was created by Pub. L. 98-625, § 645(c) (not codified), as a stop-gap measure while a civilian health care plan was negotiated for former spouses and other who lose an entitlement to receive military health care (see Note 11). The program subsequently was modified and narrowed by the National Defense Authorization Act, Fiscal Year 1989, Pub. L. 100-456, Title VI, § 651, 102 Stat. 1990 (1988). Current program benefits are described at 10 U.S.C. § 1078a, titled "Continued Health Benefits Coverage." Qualifying former spouses are those who are unremarried, who have no employer-sponsored health insurance, and who meet the "20/20/15" requirement (i.e., married to the member for at least 20 years, and the member has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service). Transitional health care now includes full military health care for 1 year after the date of the divorce, and during this period the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD (see Note 11).

Note that for health care purposes, 10 U.S.C. § 1072(2)(G) treats a 20/20/15 former spouse as if he or she were a full 20/20/20 former spouse (20 years of marriage, 20 years of service, and 20 years of overlap) if the divorce decree is dated before April 1, 1995. A 20/20/15 former spouse of a reserve component retiree with a divorce decree prior to April 1, 1985, can receive full health care too, but only if the member survives to age 60 or if he or she elected to participate in the Reserve Component Survivor Benefit Program upon becoming retirement eligible.

¹⁰* "Full health care" includes health care at military treatment facilities and that provided through the TRICARE insurance program. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60th birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. § 1076(b)(2).

¹¹* The Department of Defense Continued Health Care Benefit Program (CHCBP) may be found at 10 U.S.C. § 1078a. It is a premium-based program of temporary continued health benefits coverage available to eligible beneficiaries. Medical benefits mirror those available under the standard TRICARE program, but CHCBP is *not* part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or go to <http://www.tricare.mil/chcbp>.

¹²* Pursuant to statute and service regulations, commissary and PX benefits are to be available to a former spouse "to the same extent and on the same basis as the surviving spouse of a retired member..." Pub. L. 97-252, Title X, § 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, § 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act §

1006(d)). The former spouse must be "unmarried," and, unlike the rules for health care, any termination of a subsequent marriage revives these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-3). Notwithstanding the provision of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

13* When a *retirement-eligible* member receives a punitive discharge via court-martial, or is discharged via administrative separation processing, the member's retirement benefits are lost. In certain cases where the court-martial or separation action was based on dependent abuse, eligible spouses may receive their *court-ordered* share of retired pay (divided as property) as if the member had actually retired. Authority for these payments was created in the National Defense Authorization Act, Fiscal Year 1993, § 653, Pub. L. 103-484. An overlap of marriage and service of at least ten years is a prerequisite to receipt of payments. The National Defense Authorization Act, Fiscal Year 1994, § 555, Pub. L. 103-160, clarifies that eligibility begins on the date the sentence is approved and does not have to wait until the member is actually discharged.

14* The National Defense Authorization Act, Fiscal Year 1994, § 554, Pub. L. 103-160, also creates authority for monthly transitional compensation to dependents of a non-retirement eligible member separated from the service by reason of dependent abuse.