

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).



Getting a pension division order honored for garnishment under the Uniformed Services Former Spouses' Protection Act can be a daunting task. What does the uniformed services pension division order contain? What does it need to say? Is there "magic language" which must be included? Where do you send the order? Who does the processing?

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 concerning U.S. Coast Guard members must be sent to the USCG Pay and Personnel Center (<http://www.uscg.mil/ppc/>). The PPC is located in Topeka, Kansas. Since it is a much smaller office, with the ability to work more closely with attorneys, military members and spouses, the rejection rate is lower. The Public Health Service and the National Oceanic and Atmospheric Administration are also covered by USFSPA. The Coast Guard services these retired pay orders.

Since the two basic issues in the division of retirement benefits are "pension share" and the survivor annuity, here are some basic tips on how to get an order for division of military retired pay as property division accepted by the retired pay center, and how to obtain coverage under the Survivor Benefit Plan. Throughout this SILENT PARTNER the title "retired pay center" will be used to refer to these two offices which process applications for a division of uniformed services retired pay under USFSPA. Note that USFSPA and the DoDFMR (see below) refer to the retired pay center as the "designated agent."

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.*

DFAS has a pension division implementing regulation, the DoDFMR (Department of Defense Financial Management Regulation).¹ 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 located at www.dfas.mil. All of the DFAS fact sheets are on it, and the application forms you'll need are there also. Go to the website and click on "Garnishment." You can find

FAQ's there as well as at the tab, "Former Spouses' Protection Act." The latter tab is also where you can find the DFAS "Attorney Instructions" guide, for use in drafting acceptable clauses for the pension division order. Read this 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 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!

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.

2. USE THE RIGHT DOCUMENT.

A separation agreement or property settlement, standing alone, is not the way to accomplish military pension division when there is a marriage of over ten years' duration and 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. You can either:

- Prepare a separate military pension division order, judgment, or decree to submit 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 or property settlement which can then be incorporated or merged into the decree of dissolution or divorce.

3. 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 requirement is met.

Under 10 U.S.C. 1408(c) (4), 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.
- For more detailed information on these jurisdictional tests, see the SILENT PARTNER, *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, 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. 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 direct payments from the retiree, not DFAS.

The Servicemembers Civil Relief Act (SCRA)² offers protection for military members who are on active duty at the time of the divorce. USFSPA requires a statement in the court order for military pension division that the military member's rights pursuant to the SCRA have been observed. 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.

When the application is approved, 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. The former spouse (FS) also gets an approval notice. When the court order divides military retired pay as property, no more than 50% of disposable retired pay (DRP) may be deducted. The retiree 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), the retired pay center may deduct up to 65% of the military member's disposable earnings.

4. **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 SSN will be required anyway for the application document, DD Form 2293);
- 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.
- 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 within 90 days after service of the decree on DFAS or the start of retired pay, whichever is later. The payments end at the death of the retiree or spouse, whichever occurs first. Payments are prospective only. No arrears are paid through the retired pay center. 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.

There is a sample military pension division order at the end of the DoDFMR, Volume 7B, Chapter 29. The practitioner can import that language into an order for pension and property division.

However, there are two significant omissions. The sample order is silent on SBP and also silent on indemnification in the event of an election of disability pay that reduces disposable retired pay.

The first of these is probably due to the fact that the sample order was prepared by DFAS-Cleveland, which only handles pension division; SBP is within the territory of the DFAS office in Indianapolis, which is called "Retired and Annuitant Pay."

The latter 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-drafted order would contain.

A better order is found below. It contains the essential elements listed above.

5. **KNOW WHAT YOU WANT.**

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

For example, a percentage clause might state: "Wife is granted 43% of Husband's military retired pay." Alternatively, a "set dollar 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 "set dollar clause." Attempting to add a COLA to a set dollar clause will result in rejection of the entire order.

The rules also allow awards that are not percentages or fixed dollar amounts.³ 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. For example, the order could state: "Wife shall receive 40% 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 is the most difficult clause 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 40% of what an Army staff sergeant (E-6) would earn if he were to retire with over 18 years of military service and 'High-3' pay of \$___ per month." 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 hypothetical 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, 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 or guess at what they might be. The order will be rejected.

Guard/Reserve pension clauses deserve separate treatment. When a Guard or Reserve pension is involved and the member has not stopped drilling and put in for retirement, a "formula clause" is typically used, since the final retired pay isn't known and the total service creditable for retirement is also unknown. In a Guard/Reserve case involving a formula clause, you must specify division according to retirement points. 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. An example might be: "John will pay Mary 50% of his Air Force Reserve 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 Air Force Reserve, as of the date of their divorce."

6. **SBP CHECKLIST**

SBP (the Survivor Benefit Plan) is an essential tool in divorce planning for the former spouse. DFAS has published an excellent resource on this topic. Go to the DFAS website, www.dfas.mil, then click on Retired Military and Annuitants, then open “Survivor Benefit Plan Overview” or “Reserve Component Survivor Benefit Plan Overview.” You should also click on the tab called Provide for Loved Ones. Here is a checklist to help 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 must be placed on the FS's side of the "property division ledger"	This may require hiring a CPA, economist or actuary.
	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/DIC_Dec2002Eng.doc for full information, or call 1-800-827-1000.

7. 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.

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 the retired pay center. In addition to the tips shown in the DFAS “Attorney Instructions” guide, here is a checklist:

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.
	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.
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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 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: _____
Retirement 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. As noted above, this is not perfect, and it's not for every case. 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, statutes and state cases in regard to division of the pension, allocation of SBP, indemnification and other matters which are important to the client.

[Case caption here]

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 the branch of service is Coast Guard, PHS or NOAA (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 order is to be filed near the end of the calendar year, add this 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 order is to be filed near the end of the calendar year, add this 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, Combat-Related Special Compensation, 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.

[When the order is entered without consent of the defendant, be sure to include facts in the above section that support court's exercise of jurisdiction under 10 USC 1408(c)(4). This means evidence of domicile in the state, general appearance (which amounts to implied consent), or residence but not due to military orders.]

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.]*

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) >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.

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 SBP 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 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 suspends her SBP coverage (thus stopping SBP premium deductions) 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) [or cite to equivalent case authority in the jurisdiction involved].

Date: _____

Judge Presiding

WE CONSENT:

[signatures of parties, preferably with acknowledgments]

[signatures of attorneys]

ENDNOTES

¹ Dep't of Defense Financial Management Regulation, Vol. 7B, Chap. 29, Former Spouse Payments from Retired Pay (July 2013).

² 50 U.S.C. App. 501 *et Seq.*

³ *Supra* note 1.

(Rev. 9.11.14)

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This **SILENT PARTNER** was prepared by COL Mark E. Sullivan (USAR, Ret.). For revisions, comments or corrections, contact him at Sullivan & Tanner, P.A., 5511 Capital Center Drive #320, Raleigh, N.C. 27606 [919-832-8507] or at mark.sullivan@ncfamilylaw.com.