

SILENT PARTNER

MASTER CHECKLIST FOR MILITARY RETIREMENT BENEFITS

SILENT PARTNER is a 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 document.

Overview of the Military Pension Division Series

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

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

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General learning objectives – to learn how military retired pay works, understand the Survivor Benefit Plan, and learn how to accomplish the allocation and division of military benefits. Also to teach attorneys where they can find resources which explain these issues so that they can guide their clients in decision-making and can submit pension division orders which will be honored by the retired pay centers.

1. **Got "DOCs"?** Documents you need to understand military pay and retired pay, Reserve Component retirement points, accrued leave, elections for the Survivor Benefit Plan (SBP), and notification of eligibility for retirement for a Guard/Reserve member.
 - a. Leave and Earnings Statement for active-duty personnel (this is DFAS Form 702)
 - b. Retirement Points Statement for Guard/Reserve personnel
 - c. Retiree Account Statement for retired personnel (DFAS-CL Form 7220)
 - d. "20-year letter" for Guard/Reserve personnel as to SBP election
 - e. DD Form 2656-1 for SBP elections, coverage for retirees
 - f. Letter from branch of service that servicemembers (SMs) receive upon retirement (pay status), showing expected amount of retired pay and calculations
 - g. If a document cannot be obtained voluntarily or through discovery from the member, then obtain from the military by submitting a court order or a subpoena which has been signed by a judge.

2. **"Who's in charge here?"** Rules for division of military retired pay and the SBP.
 - a. Division of military pensions is authorized by USFSPA (Uniformed Services Former Spouses' Protection Act), 10 U.S.C. 1408. It is an enabling act which allows states to divide pensions but does not require it; it does not specify a method of division and contains some restrictions.
 - b. The Survivor Benefit Plan is the survivor annuity program for pension division, to allow a former spouse (FS) to continue to receive payments after the member/retiree dies. 10 U.S.C. 1447 *et seq.*

- c. Volume 7B of the Department of Defense Financial Management Regulations (DoDFMR) explains how each of these work – www.defenselink.mil/comptroller/fmr
 - d. State laws and rules exist for pension division, whether survivor annuity is available for the former spouse, what the marital fraction is, whether military leave is divisible, etc.
- 3. To play the game, know the rules!** How military retired pay works, how compensation for a retiree is calculated, and what is needed for state court jurisdiction to divide military retired pay.
- a. Active duty retirement under one of 3 systems: a) Final retired pay b) High-3 c) CSB/Redux. Details at Army Retirement Services; go to www.armyg1.army.mil – good for all branches of armed services
 - b. Reserve/National Guard retirement rules (pension based on retirement points)
 - i. In general retired pay starts when retiree attains age 60
 - ii. 20 “good years” needed to be retirement-eligible (50 points needed for a “good year”)
 - iii. Calculate marital share upon retirements points per year, not months of pension service
 - iv. Four points for a “drill weekend,” one point per day of active duty (e.g., 14 points for two weeks’ annual training or “summer camp”)
 - c. Jurisdiction rules (10 U.S.C. 1408 (c)(4)) – obtain pension division jurisdiction over SM by:
 - i. Domicile – his or her legal residence
 - ii. Consent – entry of general appearance in the lawsuit
 - iii. Residence – but not because of assignment
 - d. SCRA – When SM has not yet retired, pension order must state that court has honored SM’s rights under the Servicemembers Civil Relief Act, 50 U.S.C. Appx. 501 *et seq.*
 - e. DFAS is the retired pay center for Army, Navy, Air Force, Marine Corps (and reserve components, also Air and Army National Guard); separate pay centers for retirees of Coast Guard, Public Health Service, National Oceanographic and Atmospheric Administration
 - f. Four methods for division of retired pay (from active duty retirement) – full explanation in Attorney Guide at www.dfas.mil > Military Pay > Garnishment Military. Examples:
 - i. Fixed dollar amount - \$500 a month
 - ii. Percentage – “Mary gets 10% of Tim’s pension monthly” (use when retirement has occurred and all numbers are known)
 - iii. Formula clause – “Mary is to receive 50% of Tim’s final retired pay times 214 months of marriage during service divided by Tim’s total service when he retires” (use when SM not yet retired)
 - iv. Hypothetical - “Mary is to receive 50% of Tim’s retired pay times 214 months of marriage during service divided by Tim’s total service when he retires, with his retired pay calculated as if he had retired as a staff sergeant with 16 years of creditable service. His HIGH-3 pay amount is \$3,400 monthly.”
 - g. Reserve/Guard methods of division – same as above except that formula clause must be expressed in points, not months.
 - h. Disposable Retired Pay (DRP) = gross retired pay less any VA disability waiver and premium for SBP (for FS in this divorce). DRP is what retired pay center divides, regardless of what the order says. See also “Break a leg!” below.
 - i. COLAs – usually occur in January. Automatically included in all methods except set dollar amount, which does not allow COLAs to be included or added on.
 - j. The pension is not a “fund,” so you cannot refer to the account balance or the part of the fund acquired during the marriage or at the date of divorce. It is a defined benefit plan with monthly payments to the retiree. TSP is a fund (Thrift Savings Plan), similar to 401K plan. “What you see is what you get.” Check the account balance to see what’s there.
- 4. SBP – choose it or lose it.** How the Survivor Benefit Plan (SBP) works, its cost and benefits
- a. SBP – an annuity that continues stream of income to designated beneficiary when SM/retiree dies first; without it, the pensions stops upon death of the SM/retiree
 - b. Pays 55% of selected base amount

- c. Former spouse coverage generally costs 6.5% of base amount, paid upon retirement by deduction from pension check
 - d. If FS dies first, then entire pension is restored to the retiree
 - e. Effectuate through court order sent to retired pay center; court can require SBP
 - f. Base amount may be any amount from full monthly retired pay (which is the default if order or clause is silent) down to \$300/mo.
5. **Snooze... and you lose.** Learning the limitations and deadlines which apply
- a. 10/10 Rule – direct pay from retired pay center requires 10 years of service concurrent with 10 years of marriage. This is an enforcement rule, not a rule as to pension division eligibility. FS is still eligible to claim pension division if less than 10/10.
 - b. Never take default judgment against SM/retiree; obtain proper service, state basis for jurisdiction (see jurisdiction rules above) to get valid direct-pay order honored by retired pay center.
 - c. SBP is suspended for former spouse if she/he remarries before age 55
 - d. SBP deadlines – when SM/retiree makes election, must be done within one year of divorce; when FS makes “deemed election,” must be done within one year of order granting SBP coverage (use DD Form 2656-10)
 - e. SBP cannot be divided between present and former spouse
 - f. SGLI and Ridgway decision – when representing FS, do not rely on Servicemembers Group Life Insurance to secure benefits; 1981 Supreme Court decision says courts cannot enforce orders or agreements that require SGLI. *Ridgway v. Ridgway*, 454 U.S. 46 (1981).
 - g. 20/20/20 health care coverage for full medical benefits – 20 years’ marriage, 20 years’ service, overlap of 20 years. This means TRICARE and space-available care at military medical facilities. If 20/20/20 not met, use CHCBP (Continued Health Care Benefit Program).
6. **“Break a leg!”** Understanding how disability pay can reduce the divisible pension
- a. Primary types of disability payments: military disability retired pay, VA disability compensation, Combat-Related Special Compensation (CRSC)
 - b. Court cannot divide VA disability compensation, and only small part of military disability retired pay
 - c. When retiree has VA disability rating of less than 50%, election of VA payments means dollar-for-dollar reduction of pension; thus share for FS is reduced due to unilateral action of retiree.
 - d. Courts and agreements often employ indemnification language to guard against this, or else include clause providing for \$1 a year modifiable alimony for the FS.
 - e. For details, read *Scouting the Terrain*, *The Servicemember’s Strategy*, *The Spouse’s Strategy* and *CRDP and CRSC – The Evil Twins* (SILENT PARTNERS).

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