

SILENT PARTNER

Guidance for Lawyers: Military Pension Division

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military family law issues. Comments, corrections and suggestions should be sent to the address at the end of the last page.*

*This **SILENT PARTNER** was written for general guidance in the area of military pension division and the Survivor Benefit Plan, and it is adapted from the information paper, “Guidance on Dividing Military Retired Pay” (3/17/14 version) that was originally published by the Defense Finance and Accounting Service but was removed from publication in 2015. When specific information is needed, the practitioner should consult with an expert in the area of military pension division. It is also advisable to read the statutes on military pension division, specifically, 10 U.S.C. 1408 (known as the Uniformed Services Former Spouses’ Protection Act) and 10 U.S.C. 1447-1455, regarding the Survivor Benefit Plan. Rules for military pension division upon divorce are found in the Department of Defense Financial Management Regulation, or DoDFMR¹ at Vol. 7B, Chapter 29. There are several chapters in Vol. 7B which deal with the Survivor Benefit Plan and benefit payments, beneficiaries, premiums, and eligibility. The retired pay centers can also provide helpful information.² They do not, however, pre-approve military pension division orders.*

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¹ Department of Defense Financial Management Regulation, DoD 7000.14-R (DoDFMR). To locate the Regulation, just type “DoDFMR” in any search engine.

² The Defense Finance and Accounting Service (DFAS) in Cleveland, Ohio processes court orders for Army, Navy, Air Force and Marine Corps cases, while the Coast Guard Pay and Personnel Office in Topeka, Kansas processes paperwork for that service, and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration. As used in this article, “military” means the uniformed services set out above in this note. Sometimes this info-letter uses DFAS to refer to “the retired pay center.”

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I. “Some background music, maestro!”

In 1981 the U.S. Supreme Court decided in *McCarty v. McCarty*³ that state courts lacked the power to divide military retired pay as marital or community property in divorce, since Congress had preempted the field and had not indicated any room for state laws impinging on the nationwide and uniform military retirement system. In response, Congress enacted the Uniformed Services Former Spouses’ Protection Act (USFSPA) in 1982. USFSPA allows the courts of U.S. states and territories to treat military retired pay as community or marital property and to divide it between the spouses at divorce.

USFSPA allowed Congress to create rules that govern the division of military retired pay. The lawmakers sought to create a system which was fair for servicemembers (SMs), given their mobility in regular reassignments and their unavailability during deployment status. These facts of life for SMs create significant difficulties in civil litigation. To address this, USFSPA requires that if a SM is divorced while on active duty, the requirements of the Servicemembers Civil Relief Act (SCRA)⁴ must be met before the court can enter an order that divides military retired pay.⁵

Congress was also concerned about the importance of fairness in the process from the standpoint of the former spouse. A balanced approach was the course chosen by Congress, leaving to the states such issues such as vesting of pension benefits, the marital or coverture fraction, the use and valuation of a survivor annuity, and the division of “final pay” vs. division of the benefit earned at time of divorce. With certain exception (explained below), military pensions are, in many respects, divided just like any other defined benefit plan, with most of the rules set out by state law.

USFSPA sets out specific federal jurisdiction requirements that must be met for the court to divide the military pension as property.⁶ The Act also limits the amount of the SM’s pension which can be paid to a former spouse (FS) to 50% of disposable retired pay when military retired pay is divided as property.⁷

³ *McCarty v. McCarty*, 453 U.S. 210 (1981).

⁴ 50 U.S.C.App. 501 et seq.

⁵ 10 U.S.C. §1408(b)(1)(D).

⁶ 10 U.S.C. § 1408(c)(4).

⁷ 10 U.S.C. § 1408 (e)(1).

For the retired pay center to make payments to the FS out of a military pension that was divided as property (not alimony or child support), USFSPA requires the parties to have been married 10 years or more while the SM performed at least 10 years of service creditable towards retirement eligibility.⁸ Finally, USFSPA specifies how an award of military retired pay must be expressed,⁹ and it also provides the FS with a means of enforcing a court order for alimony (also called maintenance or spousal support) and/or child support.¹⁰

II. Documents Needed to Apply for Military Pension Division

To divide retired pay, a court order is needed. The original version of “*Guidance on Dividing Military Retired Pay*” contained a sample military retired pay order, and the same example is found at Figure 1 in the DoDFMR, Vol. 7B, ch. 29. Beware – these sample orders contain significant omissions. They contain no mention of former-spouse coverage under the Survivor Benefit Plan, and they omit any reference to indemnification (i.e., reimbursement of the former spouse if the retiree elects post-divorce to receive disability pay and this reduces the FS’s share or amount of the pension). A better military pension division order will be found at the end of the **SILENT PARTNER**, “Getting Military Pension Order Honored by the Retired Pay Center.”

USFSPA defines a *court order* dividing military retired pay enforceable under the Act as a “final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree.”¹¹ This also includes an order modifying a previously issued court order. Since military retired pay is a federal entitlement, and not a private pension plan administered under ERISA, the Employee Retirement Income Security Act of 1974, the order which divides military retired pay is not a qualified pension plan, and thus one does not use a Qualified Domestic Relations Order (QDRO). It is sufficient if the pension division is stated in the divorce decree or other related court order in an acceptable manner. Additionally the retired pay center is not joined as a party in the divorce or property division case.

To apply for payments under USFSPA, the spouse or FS needs to obtain a copy of the applicable court order, certified by the clerk of court, and submit it to the retired pay center along with the completed application form (DD Form 2293).¹² Instructions, including designated agent names and addresses, are on the back of the form. The Defense Finance and Accounting Service (DFAS) has published forms, frequently asked questions and instructions which can be downloaded from the DFAS website at www.dfas.mil.

III. USFSPA Requirements for Payments from the Retired Pay Center

A. Servicemembers Civil Relief Act (SCRA)

The provision of the SCRA¹³ that has primary application to the USFSPA and the division of military retired pay is the section concerning default judgments against active duty service members.¹⁴ This section requires that if an active-duty defendant has not made an appearance in a legal proceeding, the plaintiff must file an affidavit with the court advising as to the military status of the servicemember-

⁸ 10 U.S.C. § 1408 (d)(2).

⁹ 10 U.S.C. § 1408 (a)(2)(C).

¹⁰ See 10 U.S.C. § 1408(a)(2)(B); 10 U.S.C. § 1408(d)(1).

¹¹ 10 U.S.C. § 1408(a)(2).

¹² Department of Defense Financial Management Regulation (DoDFMR), Vol. 7B, ch. 29, § 290401.A. The Regulation is at https://comptroller.defense.gov/fmr/current/07b/Volume_07b.pdf.

¹³ *Supra* note 4

¹⁴ 50 U.S.C. App. § 521.

defendant. The court is required to appoint an attorney to represent the interests of the absent defendant.¹⁵ If the SM has grounds to ask the court for re-opening or vacating a judgment that was entered against him in violation of this section of the law, he may file such a request during active duty or within 90 days after separation from active-duty service.¹⁶ He must prove that his military duties had a material effect on his ability to defend himself and that he has a meritorious or legal defense.

B. Dividing the Military Pension as Property

(1) The “10/10” requirement

The division of military retired pay as marital or community property (not the allocation of pension payments for child support or alimony) has certain specific requirements. First and foremost is the requirement that the FS must have been married to the SM/retiree for at least 10 years during at least 10 years of service creditable toward retired pay. Logically enough, this is known as the “10/10 rule.” The retired pay center cannot make payments to the FS when retired pay is divided as property unless the “10/10 rule” is met.¹⁷

This rule doesn’t affect the power of the judge to divide military retired pay. It simply affects the enforcement powers of the court by monthly garnishment of retired pay through the retired pay center. The rule cannot be waived since it is in the federal statute. While it is always possible for the retiree to start an allotment for payments to the FS, an allotment can be stopped as easily as it can be started and the FS lacks the protection of a court-ordered payment from the retired pay center.

Another substantial advantage of “direct pay” from the retired pay center is related to taxes. If DFAS pays the former spouse directly, then those pension-share payments are reported on her or his own Form 1099-R, instead of all taxable retired pay being reported on the retiree’s Form 1099-R and being taxed to the retiree. The Retiree Account Statement each month shows “FSPA payment” which refers to the pension-share payment to the former spouse, and this sum is excluded from the taxable income of the retiree.

If the retired pay center cannot determine from the court order whether the 10/10 requirement has been met, the FS will need to provide a copy of the parties’ marriage certificate. A recitation in the court order such as, “The parties were married for 10 years or more while the member performed 10 years or more of military service creditable for retirement purposes” will satisfy the 10/10 requirement, unless the marriage certificate shows otherwise.

(2) USFSPA Jurisdiction

The terms for a court’s exercising jurisdiction under USFSPA are found at 10 U.S.C. § 1408(c)(4). This is just as important as the “10/10 rule.” If an order dividing military retired pay does not comply with this, it’s “dead in the water.” The application for direct payment of retired pay as property under the USFSPA will be rejected.

To have the authority to divide military retired pay, the court must have what DFAS garnishment employees call “(c)(4) jurisdiction” over the military member or retiree, that is, jurisdiction pursuant to 10 U.S.C. § 1408(c)(4). There are three alternative tests under this section of the statute.

The first of these is when the SM or retiree has consented to the jurisdiction of the court. Under state law rules, this would usually be when the retiree or SM indicates his or her acceptance of the

¹⁵ 50 U.S.C. App. § 521(b).

¹⁶ 50 U.S.C. App. § 521(g)(2).

¹⁷ See *Baka v. United States*, 74 Fed. Cl. 692,698 (2006). See also DoDFMR, Vol. 7B, § 290604.B.

court's authority by taking some affirmative action with regard to the legal proceeding, such as filing a motion or a pleading in the case. Simply receiving notice of filing of the divorce complaint or petition is not sufficient. Consent is the most common way for a court to have "(c)(4) jurisdiction" over a member, since – like most domestic cases – most military pension division cases are settled, not tried.

Another way in which the court can exercise "(c)(4) jurisdiction" is for the member to be a resident of the state at the time of divorce other than because of his or her military assignment. This might be the case, for example, if the SM were stationed at Ft. Belvoir, Virginia, but he lived in Maryland to be near his parents or because the lodging was cheaper there; in this case, Maryland could exercise jurisdiction over his military pension.

A third method of exercising jurisdiction is *domicile*. The courts of the state where the SM/retiree has his state of legal residence, or domicile, may divide his military retired pay at the time of the divorce. The court decides where the individual's domicile is, according to state rules, statutes and cases. Regardless of which test is used, the court order must specify the basis for the exercise of jurisdiction.

IV. LANGUAGE DIVIDING MILITARY RETIRED PAY

A. Types of pension division awards

The amount of a former spouse's award is entirely a matter of state law. However, in order for the award to be enforceable under USFSPA, it must be expressed in a manner consistent with the USFSPA, and it must be sufficiently clear so that the retired pay center can calculate or determine the amount of the award. The Act states that for a retired pay as property award to be enforceable, it must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay.¹⁸ Additionally, pursuant to the Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Chapter 29, paragraphs 290607 and 290608, if the parties are divorced before the receipt of retired pay, the court order may state the pension division in terms of a formula or as a percentage of a hypothetical retired pay amount. The retired pay centers consider the "formula clause" and a hypothetical award to be types of percentage awards.

B. The Fixed Dollar Amount and the Percentage

The fixed dollar amount means that a specific amount per month is to be provided in the court order. Such an award might read, "John Doe will pay his wife, Jane Doe, the sum of \$400 from his retired pay as her share of the military retired pay he acquired during the marriage." This type of clause does not entitle the former spouse to any of the COLAs (cost-of-living adjustments) regularly received in regard to the member's retired pay.¹⁹ COLAs can increase the value of the pension (and the FS's share) substantially over time. This type of pension division award is uncommon.

The most common method of expressing the former spouse's award when the former member is in pay status is the "percentage award." When all the numbers are known, the share of the FS is stated as a percentage of the member's retired pay.²⁰ This benefits the former spouse of increasing the amount of his or her award over time due to COLAs.

¹⁸ 10 U.S.C. § 1408(a)(2)(C).

¹⁹ DoDFMR, Vol. 7B, § 290601.C. ("A retired pay award expressed as percentage will automatically receive a proportionate share of the member's cost-of-living adjustments, while one expressed as a fixed amount will not."). *See also* DoDFMR, Vol. 7B, § 290902.

²⁰ According to DoDFMR, Vol. 7B, § 290601.D., DFAS "will construe all percentage awards (such as a percentage of gross retired pay) as a percentage of disposable retired pay, regardless of the language in the order." Thus one can phrase the

The retired pay center calculates all percentage awards using the retiree's disposable retired pay (DRP), which is gross retired pay less authorized deductions.²¹ The primary authorized deductions presently are a) retired pay waived to receive VA disability compensation, b) military disability retired pay, and c) Survivor Benefit Plan (SBP) premiums where the FS is elected as the beneficiary.²²

If the amount of the former spouse's award is expressed as a dollar amount or percentage of disposable retired pay less the amount of some other obligation (e.g., the amount of the Survivor Benefit Plan premium or the former spouse's child support obligation), the entire award may be unenforceable. This is because such award language does not meet the statutory requirement of a fixed dollar amount or percentage. In addition, tying a FS's award to some other figure that is subject to change (such as the SBP premium), renders the former spouse's award indeterminate, which means that it cannot be established in the retired pay system.

Similarly, set-offs against the former spouse's award are not permitted.²³ Although the award language may be otherwise acceptable, if a provision of the order requires that another amount be set off from the FS's share, such as the SBP premium or another financial obligation that the former spouse owes the member, the set-off is unenforceable. This is because there is no provision in the USFSPA that authorizes enforcement of a set-off against the former spouse's retired pay as a property award.²⁴

There is no required phrasing or "magic language" for a percentage award or fixed dollar amount. All the court order needs to say is the following:

Example 1: "The former spouse is awarded _____ percent [or dollars per month] of the member's military retired pay."²⁵

general settlement, divorce decree or pension order in terms of dividing "retired pay," "pension," "retirement," or even "deferred military compensation." The retired pay center will still treat the order or decree as dividing DRP (disposable retired pay).

²¹ 10 U.S.C. § 1408(a)(4). See also DoDFMR, Vol. 7B, § 290701.

²² DoDFMR, Vol. 7B, § 290601.D. In *Mansell v. Mansell*, 490 U.S. 581, (1989), the United States Supreme Court ruled that Congress authorized the division at divorce of only disposable retired pay, not gross retired pay. Thus the regulation provides that all percentage awards are to be construed as a percentage of disposable retired pay.

²³ DoDFMR, Vol. 7B, § 290903.

²⁴ The primary set-off or "other deduction" found in MPDO's is the shifting of the SBP premium. Orders will sometimes use language such as, "The premium for SBP coverage by the ex-wife will be deducted by DFAS from her share of the pension," or "The Plaintiff-Husband will pay the cost of former-spouse coverage for the Defendant, and he will instruct the retired pay center to subtract the full amount of the premium solely from his portion of the retired pay." Pursuant to 10 U.S.C. § 1452, the SBP premium must be deducted from the member's retired pay. The SBP premium cannot be deducted from the former spouse's portion of the member's retired pay. Any provision in a court order stating that the premium should be deducted from the former spouse's portion is unenforceable by DFAS, Garnishment Operations. The former spouse and the member may make alternate payment arrangements outside of the procedures of this Chapter, or else they may adjust their shares of the pension (if all the numbers are known) to achieve the same result.

²⁵ Throughout this info-letter, the author has used "military retired pay" instead of the term in the original DFAS publication, "disposable retired pay," or DRP, in the wording of acceptable clauses. Here is the rationale for this.

When one represents the former spouse, consider what happens if the court uses the restrictive federal statutory language, "disposable retired pay." If the servicemember makes a post-divorce election of disability pay, this may reduce the share of the FS due to the "VA waiver" found at 10 U.S.C. § 1408 (a)(4). VA disability pay received by the SM may reduce the FS's amount of the pension, and when there is no indemnification language covering this, the judge may simply rule that the FS is still getting her awarded share of the disposable retired pay, even though it's a dramatically lower number.

A far-fetched example? Think again – or do some research. Such a situation occurred in a 2009 Texas case. The appellate court denied relief to the FS when the retired pay order at divorce was expressed as a percentage of disposable retired pay, and then afterwards the retiree elected Combat-Related Special Compensation (CRSC) under 10 U.S.C. § 1413a. This

Blanks in the examples represent numbers that must be provided to implement the court order.

C. The formula clause

Except for Florida, Texas, Oklahoma, Tennessee and Kentucky, virtually all states use the “time rule” to divide defined benefit pensions. The “time rule” states that it is the actual retired pay of the member which is divided, and the share of the FS is based on the marital or coverture fraction, typically made up of the months of marital pension service divided by the member’s total pension service. This means the insertion of an algebraic formula in the pension clause, since the denominator of the marital fraction is unknown while the individual is still serving. Such a clause might read, “John pays Jane 50% of 120 months/x times his retired pay.”

The FS’s award is usually calculated by multiplying the marital fraction by ½ or 50%; the court or the parties, however, can provide a different percentage. This award will automatically include a proportionate share of COLAs.²⁶

If the court order provides a variable which is incorrect, the parties need to get the variable corrected by the court or through a notarized statement (shown below at Appendix A. The retired pay center cannot change a number specifically stated in the order. If a court order provides a formula award and also provides all the variables necessary to compute the formula, then the center will complete the calculation using those variables. If the order contains a percentage award and it also states the formula the court used to determine the percentage, the retired pay center will implement the percentage as provided in the order, regardless of how the court determined it.

Formula clauses always require the pay center to insert a variable before completing the computation. In these cases, the following DFAS guidance applies –

(1) Member Qualifying for Active-Duty Retirement

For SMs who qualify for retirement from active duty, the numerator of a marital fraction is usually the total period of time from marriage to divorce or separation (depending on state law) while the SM was performing creditable military service. The numerator of the marital fraction must be stated in whole months.²⁷ If the numerator is expressed in terms of years or days, the center will convert it to months by rounding down to the nearest whole month and dropping any odd days or partial months. **Failing to provide the number to be used in the numerator will cause the court order to be rejected.**

election meant that all of his existing VA disability compensation was subtracted from his retired pay to arrive at DRP, significantly reducing the amount that the FS would receive when compared to her amount before the CRSC election. The divorce decree made no mention of benefits other than “disposable retired or retainer pay” as divisible property. It was not written in terms of total retired pay or “gross retirement benefits.” Thus the opinion chose to divide exactly what the trial judge selected for division, “disposable retired pay.” Sharp v. Sharp, 314 S.W. 3d 22 (Tex. App. 2009). The Sharp case does not stand alone. A similar problem is found in these cases: Jackson v. Jackson, 319 S.W. 3d 76 (Tex. App. 2010); Brouillette v. Brouillette, 18 So. 3d 756 (La. Ct. App. 2009); Youngbluth v. Youngbluth, 6 A. 3d. 677 (Vt. 2010); Williams v. Williams, 167 N.C. App. 373, 605 S.E.2d 266 (2004) (unpub.); and Pierce v. Pierce, 982 P. 2d 995 (Kan. App. ‘99).

Remember that, regardless of the language employed, the retired pay center will treat what’s divided as DRP. Thus when one is representing the former spouse, “retired pay” or “the military pension” should be employed, not “disposable retired pay.”

Conversely, when one is representing the retiree or servicemember and there is to be no consideration of indemnification in a VA waiver situation, the clause should specifically state “disposable retired pay” as what is divided. And it ought to include a specific reference to 10 U.S.C. 1408 (a) (4) so that subsequent judges and appellate courts will be aware of what was intended to be deducted from total retired pay to arrive at what was supposed to be divided with the former spouse.

²⁶ DoDFMR, Volume 7B, § 290601.C

²⁷ DoDFMR, Volume 7B, § 290607.A. and B.

The retired pay center will supply the denominator in whole months of creditable service for multiplier purposes, and then it will work out the formula to determine the FS's award as a percentage of disposable retired pay. All computations are carried out to four decimal places.

Example 2. The following language is an example of an acceptable way to express an active duty formula award:

“The former spouse is awarded a percentage of the member’s military retired pay, to be computed by multiplying ____% times a fraction, the numerator of which is _____ months of marriage during the member’s creditable military service, divided by the member’s total number of months of creditable military service.”

For example, assume that the parties’ marriage lasted exactly 12 years (or 144 months) during the member’s military service. If the parties have agreed to use 50% as the percentage element of the formula, then the active duty formula award might read “50% times a fraction, the numerator of which is 144 months divided by the member’s total number of months of creditable military service.” If the member serves for a total of 25 years (or 300 months) and then retires, the FS would receive $\frac{1}{2} \times (144/300) = 24.0000\%$ of the member’s disposable retired pay.

(2) Guard/Reserve Retirement

If the order provides a formula award to divide a non-regular retirement (i.e., National Guard or Reserve), then it must provide the numerator of the marital fraction expressed in terms of reserve retirement points earned during the marriage.²⁸ **An order that fails to provide the numerator expressed as retirement points earned during the marriage will be rejected.** The pay center will supply the SM’s total reserve retirement points for the denominator, carrying out the computation to four decimal places.

Example 3. Here is an example of an acceptable way to express a non-regular retirement formula award:

“The former spouse is awarded a percentage of the member’s military retired pay, to be computed by multiplying ____% times a fraction, the numerator of which is _____ retirement points earned during the period of the marriage, divided by the member’s total number of reserve retirement points earned.”

D. Hypothetical retired pay awards

A hypothetical retired pay award is one that is expressed as a percentage of a hypothetical retired pay amount which is different from the member’s actual retired pay.²⁹ If the court order uses a hypothetical award, it is usually figured as if the member had retired on the date of separation or divorce. Some jurisdictions use hypothetical awards to divide military retired pay, and some parties – regardless of the state rules for dividing pensions, decide to settle using a hypothetical award. This award does not give the former spouse the benefit of any of the member’s pay increases due to promotions or increased service time after the divorce. Since a hypothetical award also works out to a

²⁸ *Id.*

²⁹ The hypothetical retired pay amount is a fictional computation, in that the member often does not have the required 20 years of creditable service necessary to be eligible to receive retired pay on the date his or her retired pay is divided. Hence, the retired pay center will compute a retired pay amount as if the member would have been eligible to retire on that date.

percentage of disposable retired pay, hypothetical awards are a type of percentage award, and as such would automatically include a proportionate share of the member's COLAs.³⁰

(1) Retired Pay Base and Multiplier

The basic method for computing military retired pay is to multiply the member's *retired pay base* times the *retired pay multiplier*.³¹ The standard *retired pay multiplier* is the product of two and one-half percent (2.5% or .025) times the member's years of creditable service.³² For example, the retired pay multiplier for an active duty member who serves 20 years will be 50% (.025 x 20 = 50%); the retired pay multiplier for an active duty member who serves 25 years will be 62.5% (.025 x 25 = 62.5%).

The years of creditable service for a reservist are computed by dividing the Guard/Reserve retirement points on which the award is to be based by 360.³³ For example, 5,258 retirement points would convert to 14.61 years of service for multiplier purposes (5,258 points/360 = 14.61 years).

There are different rules for SMs who entered military service on or after August 1, 1986, are under the age of 62, and elect to participate in the CSB/REDUX retirement system. Their retired pay multiplier is reduced one percentage point for each full year of service less than 30, and 1/12th of one percent for each full month. Retired pay is recomputed using the standard multiplier when the member attains age 62.³⁴

For members entering military service before September 8, 1980, the *retired pay base* is the member's final basic pay. This figure is determined by the pay table in effect at the time of retirement, and is based on the member's rank and years of service for pay purposes.³⁵ Parties can obtain the basic pay amounts by looking at the military basic pay tables. Basic pay tables are available at the DFAS Web site at www.dfas.mil > Military Pay > Military Pay Tables. Attorneys should be able to obtain the basic pay figure either from the member or from the applicable pay table.

For members entering military service after September 7, 1980, the retired pay base is the average of the member's highest 36 months of basic pay.³⁶ This is known as the "High-3" amount, and it is usually the last 36 months before retirement. Thus the hypothetical retired pay base would normally be the average of the member's highest 36 months of basic pay prior to the hypothetical retirement date. This information is specific to each member.

(2) Specific Pay Information, Variables

This specific pay information can be obtained from either the member during discovery or from his pay center by court order or a judge-signed subpoena. **The retired pay center garnishment office does not have access to this pay information.** It must be included in the court order dividing military retired pay. The retired pay computation is rounded down to the next lower multiple of \$1. For example, \$1,501.75 would be rounded down to \$1,501.

A hypothetical retired pay amount is computed the same way as a member's actual military retired pay, but it is based on variables that apply to the member's hypothetical retirement. Those

³⁰ DoDFMR, Volume 7B, § 290601.C.

³¹ DoDFMR, Volume 7B, § 030101.

³² DoDFMR, Volume 7B, § 030101.B.1.

³³ DoDFMR, Volume 7B, § 030105.B.

³⁴ DoDFMR, Volume 7B, § 030201.B.

³⁵ DoDFMR, Volume 7B, § 290608.D.1.

³⁶ DoDFMR, Volume 7B, § 290608.D.2.

variables are shown as blanks in the following examples of acceptable award language. The principal problem DFAS encounters in hypothetical awards is that necessary variables for the hypothetical retired pay computation are left out of the court order. **These variables must be provided in the applicable court order; otherwise the court order will be rejected.** To put it another way –

- The “hypo” is the most difficult clause to write.
- It is not even required as a general rule; only five states mandate this type of clause.
- As a result, the client who demands this approach to pension division, or the attorney who insists on this type of award, should be well warned in advance. It is often necessary to hire a specialist or a consultant to help fix the defective award after it has been rejected by the retired pay center.
- To avoid these problems, counsel should stick to the approved language. This is **not** the time to “wing it” or make up your own language, to see if it’ll work with the pay center. Stick to the rules, adhere scrupulously to the approved, acceptable language. You won’t go wrong if you follow the templates. You’re almost certain to be rejected if you try to make it up as you go.

(3) CSB/REDUX and TERA

Members who elect to retire under the CSB/REDUX retirement system will have their hypothetical retired pay amount calculated using the standard retired pay multiplier, and not the reduced CSB/REDUX multiplier³⁷ (unless the court order says otherwise). Thus, the former spouse’s award will normally not be reduced as a result of the member’s electing to receive a Career Status Bonus (CSB) and a reduced retired pay amount.

A SM who is retired under TERA (Temporary Early Retirement Authority) will have less than 20 years of creditable service, which requires application of a reduction factor to the retired pay computation.³⁸ This reduction factor is completely different than the CSB/REDUX factor listed above. The only time the pay center would apply a reduction factor to the hypothetical retired pay calculation is if a reduction factor was actually used to compute the member’s military retired pay. In that case, the center would apply the same reduction factor to both computations.

(4) Example of a hypothetical retired pay calculation

The retired pay center will convert all awards of a percentage of a hypothetical retired pay amount into a percentage of the member’s actual disposable retired pay. The method is as follows:

- First, the pay center will calculate the hypothetical retired pay amount. Assume that the court order awarded the former spouse 25% of the retired pay of an E-6 with a **retired pay base** of \$2,040 and with 18 years of service retiring on June 1, 1999. The member actually retires on June 1, 2002. The member’s hypothetical **retired pay multiplier** would be computed as: $.025 \times 18 \text{ years of service} = .45$ (or 45%). His hypothetical retired pay would be $.45 \times \$2,040$ (retired pay base) = \$918.00.
- Next, unless the court order directs otherwise, the center will apply retired pay cost-of-living-allowances (COLAs) to the hypothetical retired pay amount up to the member’s actual retirement date to find a “present value” of the hypothetical retired pay as of the member’s actual retirement date.

³⁷ DoDFMR, Volume 7B, § 030110.

³⁸ DoDFMR, Volume 7B, § 030110.C. and 030211

The addition of the COLAs does not give the FS a benefit from the member's additional service time or promotions after the hypothetical retirement date. It simply provides the FS with the COLA amount he or she would have received had the member actually become eligible to receive retired pay on the hypothetical retirement date.³⁹

In the above example, the SM would have been eligible for the following COLAs had he retired on June 1, 1999:

December 1, 1999 1.7% $\$918.00 \times 1.017 = \933.00

December 1, 2000 3.5% $\$933.00 \times 1.035 = \965.00

December 1, 2001 2.6% $\$965.00 \times 1.026 = \990.00 .

Thus, if the SM had retired on the hypothetical retirement date (June 1, 1999), his hypothetical retired pay would have been worth \$990.00 per month at the time he actually retired on June 1, 2002.

(5) Example of a hypothetical retired pay calculation

The pay center will then convert the FS's award to a percentage of the member's actual disposable retired pay by multiplying the percentage awarded the FS by a fraction. The SM's hypothetical retired pay is the numerator of the fraction, and the SM's actual retired pay is the denominator.

In this example, assume that the SM later retired on June 1, 2002, as an E-7 with a retired pay base of \$3,200.40 and 23 years of creditable service. The actual retired pay multiplier would be $.025 \times 23 \text{ years} = .575$. His gross retired pay would be $.575 \times \$3,200.40 = \$1,840.00$. The court order awarded the former spouse 25% of the retired pay of an E-6 with a retired pay base of \$2,040 and with 18 years of service retiring on June 1, 1999. However, the former spouse's actual award percentage would be: $25\% \text{ times } \$990/\$1,840 = 13.4510\%$. The pay center will set up 13.4510% in the retired pay system.

While the percentage has been reduced from 25% to 13.4510%, the amount the former spouse would receive is the amount intended by the court. This is because the lower percentage would be multiplied times the higher dollar amount of the member's actual disposable retired pay. For example, in this case assume that the SM's disposable retired pay is equal to his gross retired pay. Twenty-five percent of \$990 is \$247, which equals 13.4510% of \$1,840. The retired pay system would apply 13.4510% to the member's actual disposable retired pay each month to determine the amount the former spouse receives. The FS would automatically receive a proportionate share of the SM's COLAs.

For those SMs who elected CSB/REDUX, the pay center computes the FS's initial percentage using the member's reduced retired pay amount as the denominator of the fraction. It would implement this percentage in the retired pay system effective through the month the member attains age 62. It would also calculate the former spouse's percentage using the retired pay amount the member would have received had the member not elected CSB/REDUX. It will also set this lower percentage up in the retired pay system effective on the first day of the month after the SM attains age 62, which is also the effective date of the re-computation of his retired pay to the amount he would have received had he not elected CSB/REDUX.⁴⁰ This adjustment prevents the former spouse from receiving more than the amount intended in the court order.

(6) Examples of active duty hypothetical awards

³⁹ DoDFMR, Volume 7B, ch. 8, Section 0804 deals with COLAs.

⁴⁰ DoDFMR, Volume 7B, § 290608.I.

The following are examples of acceptable active duty hypothetical awards.

Example 4. The following is acceptable for all active duty members, regardless of service entry date.

“The former spouse is awarded ____% of the military retired pay the member would have received had the member retired with a retired pay base* of \$ (dollar amount) and with _____ years of creditable service on _____.”

*The retired pay base is a base pay figure. As noted above, the retired pay base is the final basic pay at retirement for members entering military service before September 8, 1980, and the “High-3” amount for member’s entering military service on or after September 8, 1980.

Example 5. If a member entered military service before September 8, 1980, the following language is also acceptable because we can determine the member’s retired pay base by simply looking at the pertinent military pay table.

“The former spouse is awarded ____% of the military retired pay the member would have received had the member retired with the rank of ____ and with ____ years of creditable service on _____.”

The court order may direct the retired pay center to calculate a hypothetical retired pay amount using the pay tables in effect at the time the member becomes eligible to receive military retired pay instead of the pay table in effect at the time the court divides military retired pay. When this occurs, then the court order dividing an active duty member’s military retired pay must provide: 1) the percentage awarded the FS, 2) the SM’s rank to be used in the calculation, and 3) the years of creditable service to be used in the calculation.

The pay center will make the hypothetical retired pay calculation using the basic pay figure from the pay table in effect at the member’s retirement for the rank and years of service given in the court order, regardless of whether the member entered military service before September 8, 1980, or on or after September 8, 1980.

Example 6. The following language is an example of an acceptable active duty hypothetical award based on the pay tables in effect at the member’s retirement.

“The former spouse is awarded ____% of the military retired pay the member would have received had the member retired on his actual retirement date with the rank of _____ and with _____ years of creditable service.”

(7) Guard/Reserve hypothetical awards

These are acceptable non-regular retirement (i.e., Guard/Reserve) hypothetical awards.

Example 7. The following language is acceptable for all reserve members, regardless of service entry date.

“The former spouse is awarded ____% of the military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of \$(dollar amount) and with _____ reserve retirement points on _____.”

Example 8. The following language is also acceptable for reservists who entered military service before September 8, 1980.

“The former spouse is awarded ____% of the military retired pay the member would have received had the member become eligible to receive retired pay on _____, with the rank of

_____, with _____ reserve retirement points, and with _____ years of service for basic pay purposes.”

If the order requires calculation of a hypothetical retired pay amount using pay tables in effect at the time the SM becomes eligible to receive retired pay, it must provide: 1) the percentage awarded the former spouse, 2) the member’s rank to be used, 3) the retirement points to be used, and 4) years of service for basic pay purposes. The retired pay center will make the hypothetical retired pay calculation using the basic pay figure from the pay tables in effect at the member’s retirement for the rank and years of service given in the court order, regardless of whether the member entered military service before September 8, 1980, or on or after September 8, 1980.

Example 9. The following language is an example of an acceptable reserve hypothetical award based on the pay tables in effect at the member’s becoming eligible to receive military retired pay.

“The former spouse is awarded ____% of the military retired pay the member would have received had the member become eligible to receive retired pay on the date he [or she] attained age 60, with the rank of _____, with _____ reserve retirement points, and with _____ years of service for basic pay purposes.”

E. Unacceptable former spouse award language

Problems with award language usually occur when the parties are divorced prior to the member’s becoming eligible to receive military retired pay. The examples below represent unacceptable language which will not be honored by the retired pay center:

(1) *The former spouse is awarded 50% of the community interest in the member’s military retired pay.*

This clause doesn’t say how to calculate the community interest. Nor does it provide any of the variables necessary to make such a calculation using either a formula or hypothetical retired pay award.

(2) *The former spouse is awarded half of the member’s military retirement that vested during the time of the marriage.*

“Vesting” is a state law concept. There are no more than three states which recognize it as a factor or qualification in the divisibility of retirement benefits, including military retired pay. The retired pay center does not know when vesting occurs in the particular state which may be involved, what the rules for vesting are, or what data should be used to calculate the amount of the former spouse’s award.

(3) *The former spouse is awarded one-half of the accrued value of the member’s military retirement benefits as of the date of the divorce.*

Military retired pay is a statutory entitlement. It is not a “retirement plan,” and it has no accrued value prior to the member retiring since it is a defined benefit plan, not a defined contribution plan. As with the other examples above, this clause fails to provide any specifics as to how to calculate the amount of the former spouse’s award. In cases and clauses like this, DFAS and the Coast Guard Pay and Personnel Center do not do calculations; they implement calculations!

(4) *The former spouse is entitled to 42% of the member’s military retirement based on the amount he would have received had he retired as of the date of the divorce.*

This looks somewhat like a hypothetical award, but it does not provide the retired pay center with the data necessary to calculate a hypothetical retired pay amount. The garnishment office at DFAS does not have access to the member’s military service information, so it cannot do the calculations and

computations. Neither retired pay center has the personnel or the regulatory mandate to go and figure out what a hypothetical amount might be in a divorce case. The court order must supply the information to the retired pay center, so that it can be implemented.

(5) *The former spouse is awarded 50% of the member's military retired pay calculated according to the Bangs formula.*

Once again – as with the “vesting example” shown above – the clause assumes that the lawyers and paralegals at the retired pay center are familiar with the laws of the particular state, they know what the Bangs formula is, and they know how to implement it. In reality, none of this is correct. The retired pay center does not research individual cases to resolve ambiguities in court orders. In addition, the clause does not give the necessary variables for the calculation of the former spouse's portion.

(6) *The former spouse is awarded an amount equal to 50% of the member's disposable retired pay less the amount of the Survivor Benefit Plan Premium.*

Federal law (USFSPA) states that the SBP premium must be deducted from the gross pay of the retiree.⁴¹ That is, it comes “off the top” before disposable retired pay, or DRP, is attained. Since it is a mandatory deduction from total retired pay, the pay center cannot change this. It cannot shift the premium to the retiree or to the former spouse. It is borne by both, in the same ratio as their shares of the pension. If John Doe gets 85% of the retired pay, then he's in effect paying 85% of the SBP premium, and the 15% share allocated to Jane Doe means that she's paying 15% of the premium. One party can, of course, agree to reimburse the other “out of pocket” for the cost of that party's share of the premium, so long as it doesn't involve the retired pay center. Or they can, after some calculations, adjust the share of one of the parties downward to account for that party's paying the SBP premium. But DFAS and the Coast Guard will not do the calculations – that's a job for the lawyers or a CPA. The retired pay center will only enforce what results from the premium-shift calculations.

F. Correcting deficient awards

Everyone makes a mistake now and then. What if the judge or one of the attorneys slipped up? What if the order was rejected by the retired pay center and set back for a re-work?

If the pension order is rejected because the retired pay center cannot figure out the amount of the award to the FS from the information provided in the court order, there are two options. One alternative is for the former spouse to obtain a new court order clarifying the former spouse's retired pay as property award by expressing it in an acceptable manner. The other alternative is for the former spouse to provide the retired pay center with any missing information by submitting a notarized agreement with the required information signed by both the former spouse and member.⁴² Such a statement would indicate the fixed dollar amount or percentage of disposable retired pay the former spouse is to receive. At Appendix A below is a notarized statement format which will suffice for this purpose. Of course, each party should consult with an attorney before executing any such agreement in lieu of a clarifying order.

⁴¹ 10 U.S.C. § 1452(a)(1); DoDFMR, Vol. 7B, § 290610.

⁴² DoDFMR, Vol. 7B, Subparagraphs 290607.B. and 290608.E.

Appendix A

Notarized statement of parties clarifying court order dividing military retired pay

We, the undersigned, hereby agree to divide the military retired pay, as property, in the following manner. This agreement clarifies -

A) The final court order was entered on _____ (date) in _____ (name & location of court).

The former spouse, _____ (name of non-military spouse) is entitled to receive _____% of the disposable military retired pay of the member/retiree -OR- \$_____ paid monthly from the retiree's/member's disposable retired pay.

The parties acknowledge that this agreement is irrevocable except by subsequent court order. They also agree that the Defense Finance and Accounting Service/Coast Guard Pay and Personnel Center will make payments directly to the former spouse from the member's disposable retired pay. The parties also understand that cost of living increases (COLAs) can only be made on awards expressed as a percentage; COLAs cannot be made on awards expressed as a fixed dollar amount.

Member/retiree Date: _____, 20____
Member's Social Security Number: _____

Before me appeared _____ and showing proof of identification by _____ (method of identification) and signed his/her name at the place indicated above. Sworn before me this ____ day of _____, 20____.

Notary public Print Name.....
My commission expires: _____

Former Spouse Date: _____, 20____

Before me appeared _____ and showing proof of identification by _____ (method of identification) and signed his/her name at the place indicated above. Sworn before me this ____ day of _____, 20____.

Notary public Print Name.....
My commission expires: _____

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The **SILENT PARTNER** series of info-letters is prepared by Mark E. Sullivan (COL, USA – Ret.), a family law attorney in Raleigh, N.C.. For comments or suggested changes, contact him at mark.sullivan@ncfamilylaw.com; or 919-832-8507.