

SILENT PARTNER

GETTING MILITARY PENSION DIVISION ORDERS HONORED BY DFAS

INTRODUCTION: SILENT PARTNER is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.

Overview of the Military Pension Division Series

There are five SILENT PARTNERS in this series.

- *Military Pension Division: Scouting the Terrain* is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses' Protection Act), what the Act does (and doesn't do), and how the question of "federal jurisdiction" is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.
- *Military Pension Division: The Servicemember's Strategy* contains information on how to assist the servicemember (hereafter "SM") in this area, and
- *Military Pension Division: The Spouse's Strategy* covers how to help the SM's spouse.
- The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in *Getting Military Pension Division Orders Honored by DFAS*. It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.
- Retrieving an apparently "lost" pension benefit for the spouse/former spouse is covered in "*Lost*" *Military Pensions: The Ten Commandments*.

Getting a pension division order honored by DFAS can sometimes be a daunting task. Located in Cleveland, Ohio, DFAS has numerous lawyers and paralegals reviewing legal documents that arrive there by the truckload everyday. They also have a rejection rate of over 30% for military pension division orders. Here are some basic tips on how to get your property division decree or clause accepted.

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.* You will also need to look at the pension division implementing regulation.¹ Did you know that DFAS has a website? It's located at www.dfas.mil, and it generates over 3,000 "hits" a month. All of the DFAS fact sheets are on it, and the application form as well -- why not go there and pick up some information straight from the source? Go to the website, click on "Money Matters," then "Garnishment," then look for the USFSPA heading and click on "fact sheet" for information regarding DFAS' processing of applications for the direct payment of benefits. In addition, two excellent articles that explain military pension division can be found at <http://www.dfas.mil/money/garnish/fsfact.htm> and <http://www.dfas.mil/money/garnish/fs-qa.htm>.

The DFAS Customer Service Department may be reached at 1-866-859-1845. Be sure to include the SM's Social Security Number (SSN) in all correspondence and phone calls with DFAS. Providing this will ensure a more rapid response. Without the SSN, documents will be rejected.

2. USE THE RIGHT DOCUMENT.

A separation agreement, standing alone, is not the way to accomplish military pension division. While you can attempt to divide a military pension in only a separation agreement, that document alone won't suffice; there will be insurmountable problems when there is a marriage of over ten years' duration and the nonmilitary spouse wants to receive direct pension payments from DFAS. 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. Since an unincorporated or unmerged separation agreement is not a court order, it will not be sufficient to institute direct pension payments for the ex-spouse. You must have one of the above court documents. You can either:

- Prepare a separate military pension division order, judgment, or decree, which will then be submitted 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 that can then be incorporated or merged into a divorce decree.

3. CAN YOU GET DIRECT PAYMENTS FROM DFAS?

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), direct payments are allowed only when the 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 first SILENT PARTNER in this series, *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, there is a requirement that the parties be married for at least 10 years during which time the military member performed at least 10 years of creditable military service. Without this, DFAS cannot honor an application for the direct payment of any court-ordered division of retired military pay as property.

The Servicemembers Civil Relief Act (SCRA)² offers protection for military members who are on active duty at the time of the divorce, and in such a case there must be proof that the military member's rights pursuant to the SCRA were observed and honored. This requirement does not apply in cases where the member is retired or not on active duty at the time the decree was entered.

When the application is approved, DFAS will notify the member 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. When the court order divides military retired pay as property, no more than 50% of the member's disposable retired pay (DRP) may be deducted. The military member 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), DFAS is authorized to deduct up to 65% of the military member's disposable earnings.

If the decree was filed prior to February 3, 1991, the calculation of DRP is different than for later cases. DFAS refers to the earlier orders as "old law" cases, and the more recent cases as "new law" cases.

In "old law" cases, federal income tax, state income tax, amounts of military retired pay waived in lieu of receiving VA or military disability pay, the costs of the Survivor Benefit Plan (SBP) premiums (if the former spouse is the designated beneficiary), amounts waived for civil service employment, and debts owed the federal government are deducted in calculating DRP.

In "new law" cases, taxes are not deducted but the other deductions shown above apply. The parties have taxes deducted from their respective shares.

4. USE THE RIGHT LANGUAGE.

Even if it were incorporated into a court order or a divorce decree, the separation agreement or property settlement document would have to contain all of the language that is required for court orders to be honored by DFAS. The pension division clauses must include:

- a. The names and addresses of the parties, as well as their SSN's;
- 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 honored (if the member is on active duty when the decree is entered)
- e. Jurisdictional findings (domicile, consent, or residence) under 10 U.S.C. 1408 (c)(4);
- f. A statement that DFAS should pay the spouse at his/her address as shown therein.
- g. A statement as to what DFAS will pay the spouse (see "KNOW WHAT YOU WANT" below). Payments are made once a month, starting no earlier than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later. The payments end no later than the death of the member or spouse, whichever occurs first. Payments are prospective only; no arrears are allowed. The USFSPA does not provide for garnishment of payments missed prior to the approval of the application by DFAS.

5. KNOW WHAT YOU WANT.

The order may award a percentage or a fixed dollar amount to the former spouse of the military member. For example, a percentage clause might state: "Wife is granted 43% of Husband's disposable

retired pay.” Alternatively, a fixed dollar clause could read: “Wife is awarded \$550 per month.” A percentage clause automatically provides for cost-of-living adjustments (COLAs). The spouse does not get any COLAs if a fixed dollar amount is awarded.

Regulations also allow DFAS to accept awards that are not percentages or fixed dollar amounts.³ DFAS will honor a court award that is expressed as a formula or a hypothetical. These are usually used if the service member is still on active duty.

A formula is an award expressed as a ratio. For example, the order could state: “Wife shall receive 37% 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 court must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service. DFAS cannot guess or interpret what the court and parties have determined to be the months of service during marriage (the numerator); however, DFAS 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 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 a staff sergeant (E-6) would earn if he were to retire with 18 years of military service.” 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 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.

When a Guard or Reserve pension is involved, DFAS will not only honor orders specifying division according to retirement points earned during marriage divided by total points, but it will also honor a percentage award (such as “John will pay Mary 35% of his Army Reserve disposable retired pay”). It will also accept any decree in which all the variables are filled in by the court (such as “John will pay Mary 50% of his final 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 National Guard”).

6. SBP CHECKLIST

Here is a checklist to help understand the Survivor Benefits Plan (SBP) and get coverage for the non-military spouse.

✓	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 one opportunity to make election at the 20-year mark (after 20 years of creditable Guard/Reserve service). At time of application for retired pay (about a year before member turns 60), he/she is given another opportunity. Spouse concurrence as above.	
	If representing the nonmilitary spouse, be sure to mandate former spouse coverage with member selecting full retired pay as base amount	SBP benefit payments equal 55% of the selected base amount, which can be \$300 or above, till the beneficiary turns age 62, when it reduces to 35%
	If representing the member/retiree, make sure that the base amount selected yields about the same death benefit as the lifetime benefit, so that spouse doesn't profit by retiree's death	
	If representing the member/retiree, try to negotiate a reduction of the spouse'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, payable out of retired pay, and it 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 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)	
	If spouse/former spouse applies, be sure to enclose copy of divorce decree, order for SBP coverage and "deemed election letter" within one year of order granting SBP coverage [different deadline from one year after divorce, in some cases]	There is no specific form for the letter - it just needs to explain that what is enclosed and that, since the member did not elect coverage, the enclosed order mandates SBP "former spouse" coverage
	If above deadlines are exceeded, apply to the appropriate Board for the Correction of Military Records for relief (may be available if retiree has not remarried)	
	Send SBP documents to: Defense Finance and Accounting Service, U.S. Military Retirement Pay, P.O. Box 7130, London, KY 40742-7130. Recommended to send by certified mail, return receipt requested	
	SBP is reduced by Dependency and Indemnity Compensation in certain circumstances. Go to http://www.vba.va.gov/hln/21/Milsvic/Docs/DICDec2002Eng.doc for full information, or call toll-free 1-800-827-1000.	

7. WHERE AND HOW TO SERVE THE ORDER

For service on DFAS of the military pension division order,⁴ the addresses of the military finance centers are:

ARMY, NAVY, AIR FORCE, MARINES: Defense Finance and Accounting Service - Cleveland, ATTN: DFAS-GAL/CL, P.O. Box 998002, Cleveland, OH 44199-8002; (216) 522-5301.

COAST GUARD: Commanding Officer (LGL), United States Coast Guard, Human Resources Service and Information Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591; (785) 339-3415.

PUBLIC HEALTH SERVICE: ATTN: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001; (800) 638-8744.

Note that the decree must be certified by the clerk of court within 90 days of service on DFAS.

The application form for direct payments from DFAS, signed by the spouse, must also be included, with a certified copy of the order and divorce judgment (if separate order). A copy of the form (DD Form 2293) can be obtained from the DFAS website. Only the recipient may sign the application, but anyone may serve the completed application upon DFAS. 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 DFAS. To help with the latter task, here’s a checklist from DFAS:

DFAS CHECKLIST FOR MILITARY PENSION DIVISION ORDERS

✓	QUESTION	
	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 within 90 days of the date DFAS received it?	
	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?	
	For members on active duty at time of divorce, were the member’ s rights under the Servicemembers Civil Relief Act (formerly the Soldiers’ and Sailors’ Civil Relief Act) oplied with?	
	What award(s) is the former spouse attempting to enforce -- child support, alimony and/or retired pay as property?	
	Validation Questions for Retired Pay as Property Awards	
	Does the order divide military retired pay?	
	What is the member’s PEBD (pay entry base date)?	

	Was the marriage date provided? (If so, 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:	
	1. Percentage awarded.	
	2. Rank for hypothetical retired pay calculation.	
	3. Number of years of service for hypothetical retired pay calculation.	
	4. Hypothetical retirement date.	
	-OR-	
	1. Percentage awarded.	
	2. Hypothetical retired pay base (base pay figure to be used in hypothetical retired pay calculation).	
	3. 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.	
	2. Hypothetical retired pay base (base pay figure to be used in retired pay calculation).	
	3. Number of years of service for hypothetical retired pay calculation.	
	C. For Reserve/Guard members:	
	1. Percentage awarded.	
	2. Rank for hypothetical retired pay calculation.	
	3. Number of reserve retirement points for hypothetical retired pay calculation.	
	4. Number of years of service for basic pay to be used in hypothetical retired pay calculation.	
	5. Hypothetical date of eligibility to receive retired pay.	

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 --AUTHENTICATED OR 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: _____

RETIRED 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.

[Case caption here]

THIS CAUSE came before the undersigned judge upon the Plaintiff' s claim for distribution of the Defendant's military retirement benefits. 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 (hereinafter also referred to as Wife) is a resident of [County] [State]. Defendant (hereinafter also referred to as Husband) is a resident of [County] [State]. The parties were married on or about [date] and were divorced in [County] [State] on [date].
2. The marital portion of Defendant's military retired pay is subject to marital property division. Plaintiff is entitled to a share of the Defendant' s military retirement benefits, as set out in the Decree below. The 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.
3. [for military member not yet retired] Husband holds the rank of [state rank here, such as "Staff Sergeant" or "Lieutenant Commander"] with [number] creditable years of service. - OR- [for retiree] Husband retired with the rank of [state rank] and is receiving [state amount of retired pay and any deductions, such as SBP premium, federal income tax, etc.].
4. [for non-retired member or for retiree with no disability at present] There is no waiver in place at present for disability compensation, and the court bases the award to Wife set out below on these facts. -OR- [for retiree with disability rating] Husband has a disability rating of [state percentage] and this has reduced his military retired pay by [dollar amount].
5. Pursuant to state and federal law, Wife is entitled to a share of the Husband' s military retirement benefits, as set out in the Decree below.

6. Wife' s address is 456 S. East Dr., Raleigh, NC 23546. Her Social Security number is 111-22-3333. Her date of birth is May 19, 1952.
7. Husband' s address is 789 West St., Goldsboro, NC 23654. His Social Security number is 444-55-6666. His date of birth is June 12, 1950.
8. Husband' s branch of military service is *[here state branch of service, such as 'U.S. Air Force' or 'Utah Air National Guard']* . His Pay Entry Base Date (PEBD) is *[here state PEBD as found on Husband' s Leave and Earnings Statement (LES)]* or *his Guard/Reserve retirement points statement]*. He is *[here state 'retired' and give date of retirement if the member has retired, whether in pay status or not, or 'not yet retired' if he is still serving and not retired]*.
9. *[for member who is not yet retired]* Husband' s rights under the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*, have been observed and honored.
10. *[use this clause to protect spouse from unexpected reduction in payments due to electing disability compensation]* It is intended that the Wife shall receive her full share of Husband' s military retired pay, calculated as set out below and without reduction for disability compensation (VA disability pay or military disability retired pay) or any other reason. Military retired pay is deemed by the court to include retired pay actually paid or to which Husband would be entitled based only on length of his creditable service.
11. Wife is entitled to former spouse coverage as the beneficiary of Husband' s Survivor Benefit Plan as set out below. *[-OR- Wife is not entitled to former spouse coverage as the beneficiary of Husband' s Survivor Benefit Plan]*.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action and the parties hereto.
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. 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. Effective [date], as division of marital property, Husband shall pay Wife [input an Option from below and insert here]. The parties acknowledge that DFAS generally does not begin payments to the former spouse until 90 days after receipt of the pension division order or the start of retired pay, whichever is later. Until DFAS begins making these payments to Wife, Husband shall be responsible for making these payments each month to her.

[Option A: spouse receives a specified percent, not to exceed 50%, of member's retired pay; this increases with cost-of-living (COLA) adjustments for member; based on final retired pay of member, including raises and grade increases; this favors spouse] _____% of his disposable retired pay each month.

[Option B: spouse gets 50% -- or other percent -- of marital share of member's retired pay; increases with cost-of-living (COLA) adjustments for member; based on final retired pay of member, including raises and grade increases; this favors spouse] ____% of the marital share of his disposable retired pay each month. The marital share is a fraction made up of ____ months of marital pension service, divided by the total months of Husband's military service.

[Option C: spouse gets fixed dollar amount, which may not exceed 50% of disposable retired pay; no COLA adjustments for spouse; this favors member] \$____ per month.

[Option D: spouse receives a hypothetical amount, based on the grade and years of service of member at time of separation, divorce or other date; no COLA unless specified; this clause favors the member] ____% of the disposable retired pay of a [grade or rank] with ____ years of creditable service. – OR -- ____% of the marital share of the disposable retired pay of a [grade or rank] with ____ years of creditable service each month. The marital share is a fraction made up of ____ months of marital pension service, divided by the total months of Husband's military service at date of [divorce, separation, etc., according to state law].

2. Husband has served at least ten years of creditable service concurrent with at least ten years of marriage to Wife. Wife is entitled to direct payments from DFAS and shall receive payments at the same time as the Husband.

[use one of the following clauses if there is no 10-year/10-year overlap as stated therein] Husband will pay Wife directly the amount specified in the preceding paragraph. Payments will be due on the first of each month, beginning [date]. -OR- Husband will pay Wife by a voluntary allotment from his retired pay the amount specified in the preceding paragraph. Wife shall receive payments at the same time as the Husband.

[as another alternative, the parties may agree to payment from Husband to Wife of alimony, which is not limited by the 10/10 overlap above; in this case, an alimony clause should be utilized]

[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 Wife, then this order shall be submitted to DFAS by Wife to accomplish this.

3. Any amounts not paid to Wife by DFAS in any given month, regardless of the reason, shall be paid by the Husband directly to her.
4. When DFAS has determined that this order meets the requirements of the applicable federal law and is a military pension division order, then it shall carry out the provisions of this order and shall give written notice to Wife (at her address set out above) and to her attorney, *[name and address]*, that this order meets the requirements of federal law as a direct-pay military pension division order.
5. The Wife shall notify DFAS in writing about any changes in the her address or in this document affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.
6. Husband shall provide promptly to Wife 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.
7. Wife shall tender a certified copy of this order to DFAS along with an executed DD Form 2293.
8. The parties have agreed upon a set level of payments to Wife to guarantee income to her, based upon military retired pay without any deductions for disability compensation or any other reason. *[-OR- if Husband 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 Wife to guarantee income to her, based upon Husband's military retired pay without any additional deductions for disability compensation, over and above his present percentage disability rating, or any other reason.]* They consent to the court's retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if Husband should waive military retired pay in favor of disability compensation or take any other action which reduces Wife's share or amount of his retired pay as set out herein. This retention of jurisdiction is to allow the court to adjust the Wife's share or amount to the pre-reduction level or to require payments or property transfers from Husband that would otherwise adjust the equities between the parties so as to carry out the intent of the court.
9. If Husband fails to retire from military service and elects to "roll over" time in his military service into other federal government service in order to get credit for same, then the Wife shall be entitled to her share if any federal retirement pay or annuity he receives based on the parties' period of marriage during Husband's period of military service. Husband shall notify Wife immediately upon his termination of military service, through retirement or otherwise, and shall include in said notification a copy of his military discharge certificate, DD Form 214. Husband shall also notify Wife immediately if he takes a job 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 Husband is directed to honor this court order to the extent of Wife' 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.

10. *[to protect spouse if future information is needed regarding member's status, location or benefits for modification or enforcement purposes]* If Husband breaches this order and also fails to provide Wife 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 Wife 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 - *[if Husband will not agree with the above clause]*

If Husband shall breach any terms in this document, then the court shall award to Wife any and all attorney's fees she may incur in obtaining information on the Husband from the Department of Defense and in enforcement of the provisions herein.

11. If either party shall violate this court order, then the court shall indemnify the party seeking enforcement and shall award reasonable attorney's fees to the party requesting enforcement.
12. The monthly payments herein shall be paid to Wife regardless of her marital status and shall not end at remarriage. Any future overpayments to Wife by DFAS are recoverable and subject to involuntary collection from Wife or from the estate of Wife. Wife shall be responsible for the taxes on the share received from DFAS of Husband's military retired pay. Wife shall not be entitled to any portion of retired pay upon the death of either party.
13. As to coverage of Wife by Husband's Survivor Benefit Plan (SBP):
 - a. Wife shall be the beneficiary of Husband's SBP. Upon their divorce, Wife shall be his former spouse beneficiary, with his monthly retired pay as the base amount and he shall do nothing to reduce or eliminate her benefits.
 - b. Wife shall effectuate a deemed election for former spouse coverage within one year of the entry of this order by sending this order to DFAS with a certified copy of the divorce decree and a cover letter requesting a "deemed election."

[if Husband may elect coverage at less than the full amount of his monthly retired pay, then use the following clause] Upon their divorce Husband shall elect former spouse coverage, choosing as the base amount \$_____ [or] _____% of his monthly retired pay.

14. If Husband does anything that changes the former spouse election, then an amount equal to the present value of SBP coverage for the Wife shall, at the death of Husband, become an obligation of his estate. In addition, the Wife 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 equally in the premium payment or unequally if the division of military retired pay is other than 50-50). 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 wife 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 wife'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 husband (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.] [-OR- This clause sets out a way for the retired servicemember to be reimbursed by the spouse for the cost of SBP: Wife shall reimburse Husband within 10 days of each monthly premium payment for the full cost of her SBP coverage.]

Judge Presiding

Date: _____

WE CONSENT:

[signatures of parties, preferably with acknowledgments]

[signatures of attorneys]

ENDNOTES

¹ Dep't of Defense, Financial Management Reg. vol. 7B, chap. 29, Former Spouse Payments from Retired Pay (Sep. 1999), available at <http://www.dod.mil/comptroller/fmr/07b/07b29.pdf>.

² 50 U.S.C. App. 501-548, 560-593.

³ *Supra* note 1.

⁴ There is a separate address for submitting a SBP deemed election. See the SBP checklist within this SILENT PARTNER.

[revised 7-7-04]

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