SILENT PARTNER

Military Pension Division: Scouting the Terrain

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.*

The Uniformed Services Former Spouses' Protection Act (USFSPA)

Knowing the terrain is an essential part of military intelligence. This is equally true in the field of military pension division. The basic statute covering military pension division is the Uniformed Services Former Spouses' Protection Act.[1] USFSPA was passed by Congress in 1982 to make military pensions subject to division by state courts in divorce and property division proceedings. Before the statute was passed, the states had a different approaches to the treatment of military pensions, with some considering them as divisible community (or marital) property and others refusing to recognize them or considering them as mere expectancies rather than vested benefits. The federal act was passed in the wake of *McCarty v. McCarty*,[2] in which the U.S. Supreme Court held that state property division laws were preempted by federal law regarding the military retirement scheme, and that Congress could decide to change this by appropriate legislation.

What did USFSPA do? It stated that:

1. Military pension division is neither mandated nor automatic. It is up to the states to decide whether military retirement is marital or community property that is divisible upon divorce or whether it is solely the property of the SM. [All of the states now allow the division of military pensions as marital/community property]
2. It limited pension division jurisdiction to a state where the SM was domiciled, had consented to jurisdiction, or resided *not due to military assignment*. [These are the "federal jurisdiction" rules]
3. Although a state court can subject military retirement rights to division in equitable distribution proceedings, it cannot force a SM to retire. [But it can order him/her to start paying a share of the pension to the spouse before retirement!]
4. State courts can order the direct pay of pension division awards (where there is ten years' overlap between the marriage and creditable military service) through DFAS.
5. Such direct payments may not exceed 50% of the SM's disposable retired pay (in most cases).
6. And, finally, these direct payments cease upon the death of the SM or the spouse (or former spouse).

What didn't the Act do? It didn't tell how to handle military pension division. Nowhere in USFSPA is there a clear picture of how a military pension is to be divided upon divorce.

Roadblocks and Minefields: Federal Jurisdiction

One of the roadblocks in military pension division is whether a state has jurisdiction over the SM's pension. This involves a federal law question. If a state does not have jurisdiction *under federal law*, then that state may not divide the SM's pension, regardless of the spouse's wishes. The jurisdictional basis of military pension division is not found in state long-arm statutes. Rather, it is set forth specifically in the USFSPA at 10 U.S.C. 1408 (c)(4).

Federal Jurisdictional Tests. Pursuant to this section of the Act, a state may only exercise jurisdiction over a military SM's pension rights if –

- That state is his or her domicile; or
- The SM consents to the exercise of jurisdiction; or
- The SM resides there (for reasons other than military assignment in that state or territory).

These statutory provisions override the more traditional long-arm statutes, which allow the exercise of jurisdiction consistent with due process if there are sufficient minimum contacts with a state.[3]

Residence Not Due to Military Assignment. Just what do these tests mean? The third basis for military pension division jurisdiction is probably the most difficult to understand. The court must have jurisdiction over the SM by reasons of "the member's residence, other than because of military assignment in the territorial jurisdiction of the court." How could a SM reside somewhere *other than because of military orders*, when it is almost always military orders which require his moving, cause his transfer from one installation to another and require his presence in the general vicinity of the installation to which he is assigned?

Although there are no definitive cases in this area, perhaps the following case illustrates what Congress had in mind: Colonel (COL) Bill Roberts is assigned to duty in Florida at Eglin Air Force Base, which is near the Florida-Alabama state line. Although he could live on base or, if quarters were not available, off-base but in the general vicinity of the installation, he chooses instead to reside just over the state line in Alabama, where his elderly parents reside. In this way, he can take care of them after work, and he commutes back and forth between his "home" in Alabama and the Air Force installation in Florida.

Is this not an example of a SM who resides in Alabama for reasons other than because of military assignment? Alabama probably has jurisdiction over COL Roberts' pension in this case.

Domicile. Domicile is the first stated basis for jurisdiction under U.S.C. 1408(c)(4). What is domicile?

It is not, for example, the same thing as a SM's "home of record." *Home of record* is a technical term the military services use for the state where a person enters the service or reenlists. It means the place where the military must ship his or her household goods upon discharge. It is an administrative entry which is not necessarily meant to specify the *domicile* of the SM.

And domicile isn't necessarily the place where a SM is currently stationed or living, either. A SM may be stationed far away from his or her legal home. The Servicemembers Civil Relief Act[4] allows military personnel to retain their original domiciles for voting and state tax purposes while stationed in other states.

Rather than merely the physical residence of an individual, domicile is composed of two elements:

- **Physical presence** of the SM (except for temporary absences); and
- **Intent to remain** (or return if absent), as shown by payment of state income and property taxes, voting records, bank accounts, motor vehicle titles, registration and driver's license, and the purchase of a home.[5]

The importance of the latter -- actions which demonstrate the intent of the individual -- cannot be overstated. Many servicemembers claim Florida or Texas, for example, as their domiciles because these states do not have an income tax. A close analysis of most of these claims, however, reveals that there are no actions to back them up, such as ownership of property in that jurisdiction, and also that the SM has never really resided in that state in the first place.

How do you find out a SM's domicile? Here are some starting points:

- Get a copy of his Leave and Earnings Statement (LES) -- this document, which is the bimonthly pay statement for SM, contains an entry for "State Taxes" which shows what state the SM has listed for state tax withholding.
- Check with the SM's spouse—where did he file state income taxes last year? Which state imposed real estate taxes for a residence? Where did he vote?
- Get his DD Form 2058, "State of Legal Residence Certificate," which is attached to the SM's W-4 Statement for tax withholding purposes.

If the SM is stationed in your state and domiciled there, he can be sued there for pension division. If he is domiciled elsewhere, it may be necessary to bifurcate the equitable distribution proceeding if he does not consent to the court's jurisdiction over his military retirement rights. That means that the pension would be handled in the SM's state of domicile and the other domestic issues (alimony, divorce, child support, custody, visitation and all aspects of property division except the military pension) would be handled in the spouse's state of residence, so long as there is jurisdiction there for the specific claims involved.

Consent to Jurisdiction

A SM can consent to the court's jurisdiction. This means that, knowingly or inadvertently, he may be allowing the exercise of pension jurisdiction by the court. The test for consent to jurisdiction is a matter of state law. For example, if a defendant intends to object to personal jurisdiction under the state equivalent of federal Rule 12(b)(2), the general rule is that he may not move the court for other relief in his favor.[6] In general a motion for other affirmative relief will probably constitute a general appearance.

This rule poses real problems for the SM who wants to contest some claim of the lawsuit other than military pension division -- custody or alimony, for example, or even other aspects of equitable distribution. Can he or she do so without consenting to the court's jurisdiction? Is this a waiver of one's federal rights under 10 U.S.C. 1408(c)(4)? The courts are split over whether specific consent is necessary or whether a general "implied consent" can be used to confer jurisdiction.

As stated earlier, this is a state issue. There is no federal guideline or standard, and the states make the rules in this area. As a result, there may be fifty or more different rules as to what constitutes consent to the court's power over a military SM's pension rights.

Roadblocks and Minefields – Summary

These problems show clearly the need for defensive lawyering. It is vital to ask questions -- lots of questions -- to make sure that the defense mounted for COL Roberts is on a firm footing. It is just as important to think before one acts. If there is a valid jurisdictional objection to a pension division claim filed against COL Roberts, will this be waived if he files an answer? What if he files a motion to continue, or to dismiss? The answer to these questions lies in the law of the states involved.

Be sure to check with competent counsel in the jurisdiction involved – don't try to "wing it" yourself when you're not licensed there. Even if you do hold a license for that state, it doesn't mean that you also hold the necessary level of expertise to answer these questions.

Dividing the Military Pension -- Crossing the Minefield

Once it is understood how to set up obstacles to pension division, the next step should be to understand how to overcome them and divide the pension once the court has acquired jurisdiction over it. There are generally

two methods available for pension division. The first is deferred division, often called "if, as and when" payments, which refers to payments by the pensioner when he starts receiving his pension. The second involves a present-value offset, in which property or money is traded against the present value of the pension.

Deferred Division. These latter payments are not preferred by many courts since they are seen as an undesirable postponement of the claimant's rights to a present pension division. It is hard to reconcile future payments to a nonmilitary spouse (at a time when the divorce is long past) with the present-day division of all the other marital assets. The deferred division of military pensions is usually used when a offset or trade is unavailable. Unless the SM is retired when the division occurs, such a division will usually postpone the payments to the nonmilitary spouse until the retirement of the SM.

There is an exception, however; the postponement of payments doesn't occur in all states. Some have gotten around the postponement of payments until retirement by requiring the SM to begin present payments to the nonmilitary spouse or else suffer the accrual of interest on the unpaid pension rights. Examples of cases in this area are *Mattox v. Mattox* from New Mexico,[7] *Koelsch v. Koelsch* from Arizona,[8] and the California cases of *In re Luciano*,[9] *In re Marriage of Gillmore*[10] and *In re Marriage of Scott.*[11] The *Gillmore* case involved a civilian employee spouse whose pension had vested but who had elected not to retire. The California Court of Appeals applied this principle in a military case in *Scott*, where the court affirmed the trial court's award to an ex-spouse of the present value of the community share in the SM's retirement rights, notwithstanding the fact that he was still on active duty.

Deferred Division – Examples. An example of deferred division in a hypothetical case may help to illustrate how it works. Assume that a SM been married for 20 years and that, for all 20 years, he was on active duty in the U.S. Army. Also assume that his active duty pay with 20 years of service is *$7,200* per month, and that he can retire after 20 years of service with 50% of his base pay.[12] Thus, the monthly retired pay of the SM is *$3,600*.

The marital fraction in this case is 20/20. *Marital fraction* in most states means the number of years of pension service during the marriage before the valuation date over the total years of pension service. The valuation date is determined by state law -- it may be the date of irretrievable breakdown, the date of filing suit, the date of separation or the date of divorce. In this case, then, the marital share of the SM's monthly retired pay is calculated as below, and all of the pension is marital property:

$$\$3{,}600 \times \frac{\text{20 years' marital pension service}}{\text{20 years' total pension service}} = \$3{,}600 \text{ (marital part of pension = ALL)}$$

The law in many states presumes that the SM's spouse is entitled to one-half of the marital property. Also, in the case of military pensions, the USFSPA states that the spouse's share *may not exceed 50%* of the pension.[13] In this case, her one-half share would equal $1,800 per month. This is the amount the SM would have to send to her each month for an equal division of the marital pension. It is also the amount that DFAS would send to her directly out of his retired pay if the marriage overlapped the SM's creditable service by *ten* years or more and if the payment terms were set out in a qualifying court order.[14]

Let's take another example. Suppose the SM has served a total of 20 years in the Army, with *10* years of his service preceding his marriage. In this case, the marital fraction is:

$$\$3{,}600 \times \frac{\text{10 years' marital pension service}}{\text{20 years' total pension service}} = \$1{,}800 \text{ (marital part of pension)}$$

The above example assumes that 10 years of the marriage is concurrent with 10 years of the SM's service. Since only one-half of the pension is marital, then one-half is the SM's' separate property (since it accrued before the marriage), one-fourth is the spouse's share of the marital pension, and one-fourth is the SM's share of the

marital pension. Thus the spouse would receive one-fourth of each monthly pension check under a deferred division approach, or about $900 per month. The remainder of the monthly retired pay belongs to the SM.

What happens, however, when the SM is still on active duty and remains so, rather than conveniently retiring on the date of valuation? In this case, the marital fraction cannot be expressed as an absolute number. Rather, the marital fraction looks like this –

$$\frac{\text{Years of marital pension service}}{\text{Years of total pension service}} = \frac{10}{X}$$

The numerator represents 10 years of marital pension service, and the denominator is unknown, representing the total number of years of creditable service that the SM will perform.

Present Value Offset. In addition to the future division of retired pay, all states recognize a second method of pension division called a "present value offset." This represents the present value of a series of money payments over the course of the SM's life. The money payments are, of course, his or her retired pay. The present value of this retired pay is the amount that can be used for a trade or a setoff so that the SM can keep the entire pension. This results in a complete and final accounting and division, not the postponement of property division until retirement.[15]

A good economist or CPA will advise that the sum of the payments should be adjusted for the life expectancy of the SM, the inflation rate and a discount factor which represents the rate at which money can be invested. This "discount rate" is applied to reflect the ability of money to earn interest; a small amount today, when invested, will yield a larger amount in five years and, conversely, a larger amount in the future, when discounted for the effect of interest accumulation, would become a smaller amount "in hand" today.

How is present value calculated? There are several options available. When the case is definitely going to trial, one should to promptly retain a CPA, an actuary or an economist to provide expert testimony at the hearing on the present value of future pension payments over the expected lifetime of the SM. On the other hand, when a settlement is anticipated and trial testimony will not be necessary, a "mail order" evaluation is sometimes preferable. There are several businesses nationwide that perform mail-order pension valuations for $300-1,000.

There is also a second method of determining present value, and this one makes no assumptions regarding interest rates, life expectancies or inflation. It involves pricing an annuity that will yield a monthly payment equal to the pension. The way to start is to contact an insurance agent or a securities broker to get a price quote for a single-premium annuity that would pay the marital benefit of, say, $3,600 per month (using our example above) for life starting now for an individual who is currently the age of COL Roberts. This is an example of the information that must be given to the professional who is obtaining the price quote.

Single-premium annuities are an excellent measure of comparison, using the actual market price of a financial product, compared to the abstract assumptions which are always present in a present-value analysis by a CPA.

When dealing with other assets in a property settlement, the court requires the fair market value to be obtained. Whether the asset happens to be a home, a parcel of land or a group of stocks, the method of valuation follows the principle of determining the current selling price or replacement cost in the open market. **Why not use the same principle in valuing a retirement plan?** After all, a pension is simply a contract to make future payments to an individual. In the financial marketplace, insurance companies sell these contracts in the form of single premium annuity policies. When taken as a group, these companies comprise an annuity market and provide an appropriate, non-theoretical source of valuing retirement benefits.[16]

Given the same information, a securities broker or an insurance agent could come up with a price that might be even more advantageous for the client's bargaining position in this case. This approach is certainly worth pursuing when there is a serious question about the present value of the pension.

Reserve and National Guard Pension Rights. There is nothing in the USFSPA to indicate that it was intended to apply only to active-duty retirement benefits, and certain amendments made by Congress to other parts of the U.S. Code dealing with Reserve retirement and benefits imply that Congress intended the Act to cover Guard and Reserve retirement also.[17] The two ways to divide Guard/Reserve pensions, and the advantages or problems involved, are contained in the two companion SILENT PARTNERs on "The Servicemember's Strategy" and "The Spouse's Strategy."

Dividing Disposable Retired Pay. USFSPA states that the retired pay center (usually DFAS) can only divide *disposable retired pay*.[18] The U.S. Supreme Court upheld this requirement in the *Mansell* decision.[19] According to 10 U.S.C. § 1408(a)(4), "disposable retired pay" means gross retired pay minus:

- recoupments or repayments to the federal government, such as for overpayment of retired pay;
- deductions from retired pay for court-martial fines or forfeitures;
- disability pay benefits; and
- Survivor Benefit Plan premiums.

Note that disability benefits are deducted from gross pay in order to arrive at "disposable retired pay." This means that a retired SM can waive receipt of retired pay to receive an equivalent amount of VA disability benefits, and these latter benefits will be received tax-free. This tactic can be used by a SM to reduce the portion of retired pay that is divisible. And there's no way to stop a SM from taking disability pay! For more information on this, see the two above-mentioned SILENT PARTNERs. These also contain information on early-out options, leaving military service for federal civil service, and drafting clauses to protect clients in these areas.

Direct Payments from DFAS

Most clients who are entitled to a portion of retired pay benefits want to get the payments direct from the source, not from an ex-spouse. Pay garnishment for division of the pension as property is available from DFAS when:

- The retired pay is divided by a final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement [Note**:** This means that an unincorporated separation agreement, a judgment in a partition case or an order of specific performance *won't get direct payment from DFAS*];
- There is a statement in the order that the SM's rights under the Sevicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) were observed;
- The amount directly payable to the former spouse as pension division is not more than 50% of the retiree's disposable retired pay;
- The "10 year test" has to be met (there must be at least 10 years of marriage which overlap 10 years of service creditable toward retirement);
- The court order must provide for payment from military retired pay, and the amount must be in an acceptable format (using one of the four methods of pension division allowed by DFAS); and
- The order must show that the court has jurisdiction over the SM in accordance with USFSPA provisions.[20]

The "10-year test" is *not a jurisdictional requirement* for dividing military pensions. Rather, it is an "enforcement requirement," meaning that pension division cannot be enforced by direct pay from DFAS unless

this test is met.[21] For more information on the above points, see the SILENT PARTNER, *Getting Military Pension Division Orders Honored by DFAS.*

A Checklist for the Judge. Here is a checklist used in North Carolina for items that the judge (and the attorneys) should consider in military pension divorce cases. Simply replace NC with the name of *your* state:

Checklist for Military Pension Division Orders in North Carolina		
✓	**Issue**	**Comments**
	Check for pension division jurisdiction – must be ONE of the following:	Required by 10 U.S.C. 1408(c)(4)
	1. Domicile in North Carolina, OR	Check on state income taxes, home ownership, voting, vehicle title, tags, driver's license, in-state tuition
	2. Consent to court's jurisdiction	General appearance – the filing of motions or pleadings which recognize the court's authority
	3. Residence in N.C. but not due to military assignment	Example – SM assigned to naval base in southeast VA but resides in nearby Duck, NC, to care for aged parents living there; NC has pension division jurisdiction.
	Receive evidence of period of creditable service for servicemember [SM] or retiree	Usually this is on his LES [Leave and Earnings Statement], DD 214 [discharge statement], retirement orders, or "points statement" [for Reserve/Guard personnel]
	Calculate coverture fraction	Months of marital pension service [before separation] divided by total pension service [which will be "X" – unknown – for those not yet retired]. DFAS [Defense Finance and Accounting Service] will accept an order containing total military service as an unknown, will make calculations at time of retirement.
	State formula [for SM] or percentage [for retiree]	Usually this is 50% X coverture fraction X final retired pay
	Check for "10/10" direct-pay requirements	If payment to be made from DFAS [Defense Finance and Accounting Service] directly to non-military spouse, then marriage and military service must overlap by at least 10 years
	Require direct pay by SM/retiree until DFAS begins payment	DFAS will not pay non-military spouse until 90 days after retired pay starts.
	Check on "back payments" for retiree	See if credit or recoupment needed if retiree has received pension payments since separation. Part or all of these, depending on coverture fraction, belong to the non-military spouse. DFAS will not make "back payments" through garnishment in property division cases.
	Check for "20/20/20" for medical care	Non-military spouse will be entitled to full medical care benefits if there are at least 20 years of marriage [ending at divorce, not separation], 20 years of military service, and a 20-year overlap. Granting divorce too early can defeat this entitlement.
	Provide SBP [Survivor Benefit Plan] for non-military spouse by:	Without this, payments stop at SM's death. Premiums are paid out of the pension "off the top" before division between parties. Premiums are 6.5% of selected base amount for spouse/former spouse coverage.
	___ordering SM to elect [or retiree to maintain] SBP coverage;	If parties are only separated, order spouse coverage (to convert to former spouse coverage upon divorce). If parties are divorced, order former spouse coverage. Note: Court order alone does not create coverage; the application (by SM) or the service of order on DFAS (by spouse) needs to be accomplished promptly.

Checklist for Military Pension Division Orders in North Carolina		
✓	**Issue**	**Comments**
	___at specific base amount (full retired pay or less);	SBP payments are 55% of the base amount, which can be entire retired pay down to $300.
	___to be served on DFAS within deadlines; and	Deadlines: one year of divorce [if application by SM/retiree], or one year of order granting coverage [if by non-military spouse]. If deadlines are missed, coverage is lost.
	___entry of order granting former spouse coverage at time of divorce	DFAS will only honor *title designation* (i.e., spouse coverage, former spouse coverage), not designation by name.
	Use model military pension division order to avoid mistakes	Found in SILENT PARTNER, "Getting Military Pension Division Orders Honored by DFAS."

Survivor Benefit Plan

An essential component of a well-structured military pension division for the nonmilitary spouse is use of the Survivor Benefit Plan (SBP). The SBP is an annuity that lets a retired SM (active duty or Guard/Reserve) provide continued income to specified beneficiaries after his death.[22] The SBP is funded by premium payments from the retiree's paycheck. There is a slight tax break for the retiree in that the amount of the SBP premium is not included in the taxable portion of his or her retired pay

The death of a military retiree terminates all pension payments. When SBP is elected, however, upon the retiree's death, the designated survivor receives a lifetime annuity for 55% of the selected base amount (full retired pay or lesser figure). In addition to spouses and former spouses there is child coverage available so long as the child is of the marriage of the SM and the former spouse. The cost for spouse or former spouse coverage is a premium during the retiree's lifetime of 6.5% of the selected base amount. Thus, for example, if the total pension payment before division is $3,000 a month, and if that were the base amount selected, then the SBP payment would be $1,650 a month (i.e., 55% of base amount) and the monthly premium would be $195 (6.5% of base), to be paid out of the pension.

Here is a checklist on the benefits and disadvantages of SBP coverage:

	Checklist for SBP: Pro's and Cons
✓	**Advantages of Survivor Benefit Plan**
	Security: There is no "qualification" required; unlike commercial health insurance, no physical exam is required for the military member and coverage cannot be refused or lapse while premiums are being paid. The member/retiree cannot terminate coverage if established by court order sent to DFAS.
	Life Payments: Mrs. Roberts, the beneficiary, will receive payments for the rest of her life upon the retiree's death (unless she remarries before age 55, which stops benefits so long as she is married).
	Tax-Free: Deductions from the retiree's pay for SBP premiums are from his gross retired pay and thus reduce his pension income (and her share of it) for tax purposes.
	Inflation-Proof: Payments are increased regularly by cost-of-living adjustments to keep up with inflation.
✓	**Disadvantages of Survivor Benefit Plan**
	Expense: Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive (as compared to term life insurance) and premiums do go up.
	Inflexible: As a general rule, once SBP is chosen, it cannot be canceled.
	No Cash Value: Unlike whole life or variable life insurance, there is no equity build-up and no cash value for SBP. And there is no return of premiums paid if Mrs. Roberts dies before her husband.

Let's see how SBP works. For a married SM on active duty, the election for SBP must be made before or at retirement.[23] An active duty SM who is entitled to retired pay is automatically enrolled in SBP at the maximum authorized level of coverage unless he or she declines (before retirement) to be covered or else chooses coverage at a lower level; if the SM is married, the spouse must consent to this choice.[24] A spouse loses eligibility as an SBP beneficiary upon divorce. There is no provision in the law which makes former spouse coverage an automatic benefit. The only means by which a divorced spouse may receive a survivorship annuity is if former spouse coverage is elected. A court order cannot, by itself, be used to create coverage. A signed election request must be submitted to DFAS by the member/retiree, or a court order by the former spouse, before coverage can be established. Reservists can make the election upon completion of 20 years of creditable service, and they have a second chance to elect SBP coverage upon reaching age 60.[25]

If a member/retiree elects former spouse coverage for a spouse who was the pre-divorce SBP beneficiary, this must be done within one year from the date the divorce becomes final. If the SM or retiree who is required to provide such coverage fails or refuses to do so, he or she shall be deemed to have made such an election if DFAS receives a written request from the former spouse asking for implementation of the election and a certified copy of the appropriate court decree. The request must be signed by the former spouse and received by DFAS within one year from the date of the decree which requires coverage. The form to use is DD Form 2656-10.

Annuity entitlement stops upon the former spouse's remarriage when this occurs before age 55. It will be reinstated if the former spouse's marriage is terminated. Annuity entitlement is unaffected if the former spouse is age 55 or older at the time of remarriage.

SBP is a unitary and indivisible annuity; a valid former spouse election terminates any existing SBP coverage of the retiree, and former spouse coverage cannot be combined with coverage for a current spouse. An election of former spouse coverage is basically irrevocable, meaning that the member/retiree may not terminate SBP participation once it is elected; however, the law allows an eligible member/retiree to request a change in annuity coverage if he or she remarries, or acquires a dependent child, and meets the requirements for making a valid option change. Such a request must be made within one year from the date of marriage or the child's birth.

A copy of the final divorce decree must be sent to DFAS, since receipt of this is required before any adjustment to SBP can be completed. When only SBP is required in a court order, rather than the division of military retired pay, the order should be sent to: Defense Finance and Accounting Service, US Military Pay, PO Box 7130, London, KY 40742-7130.

State courts may order members/retirees to participate in SBP and to designate their spouses or former spouses as beneficiaries.[26] A current spouse will be notified of the election to provide coverage for a SM's former spouse, but she or he cannot veto that election.[27] When a separation agreement provides for SBP election, a court can order specific performance to enforce this provision.[28]

Especially when deferred division is used, the attorney for the non-military spouse should insist on SBP coverage to allow continued receipt of payments if the spouse survives the member/retiree. This is a valuable tool in planning for continued income for the spouse.

Early-Out Options and Severance Pay

When the Department of Defense goes through a period of "downsizing" for budgeting or personnel management reasons, this often means service separations before retirement. For those who haven't yet served 20 years to become eligible for longevity retirement, the involuntary separation tools may involve two early separation benefits, the Voluntary Separation Incentive (VSI) and the Special Separation Benefit (SSB).

VSI and SSB are akin to severance pay and there are few reported cases interpreting them. There are two key issues which usually come up when a divorcing SM is offered one of these bonuses: Is it divisible, and is it marital property?

As to divisibility, the final answer should be that they are not divisible under federal law. The argument against division can be made as follows: The *McCarty* decision held that Congress preempted all state authority in this area when it enacted the military retirement system. USFSPA was a limited response to *McCarty*; it only allowed for the division of longevity retired pay and, in later amendments, for part of VA disability pay. The Act limits state courts to the division of "disposable retired pay" under 10 U.S.C. 1408(c)(1) and these severance pay options are not "retired pay"; they are replacements for retired pay. Their implementing statutes aren't mentioned in USFSPA. Thus they remain under the protective umbrella of *McCarty* and are exempt from division because of preemption. Representative Patricia Schroeder even sponsored an amendment to H.R. 5006, the Department of Defense Reauthorization Bill for F.Y. 1993, which would have made the Act applicable to both VSI and SSB, but it wasn't passed by Congress.

This argument has worked in only one reported case.[29] It has been rejected in the rest of those state cases addressing the issue.[30] Even if the spouse is successful in obtaining division of VSI or SSB, however, he or she will find collection difficult. DFAS will not garnish VSI or SSB under 10 U.S.C. § 1408(d) pursuant to court orders for property division. Only military retirement pay can be garnished under this statute.

If the court decides that the VSI/SSB is divisible and akin to a retirement benefit, then the question is whether the benefit is *separate* property or *marital* property.[31] Some courts have held that severance pay is not *marital* property since it takes the place of *future* compensation, rather than being payment for *past* services (like retirement pay and other deferred compensation benefits).[32]

If, in the alternative, it is seen as an economic benefit earned during the marriage and attributable to marital work, efforts and labor, it may be viewed as damages for an economic loss to the marriage. This is called the "analytic approach" and is most often applied in the personal injury area.[33] In an Arkansas case involving severance pay, the wife was granted one-half of the husband's lump-sum payment because the judge determined that the benefit was earned by *service during the marriage*.[34]

One final point should be mentioned. Even if the payment is marital property and therefore divisible, one would need to apply the marital fraction (usually years of marital service over total years of service) to the payment to arrive at the portion that is marital.

Military Divorce Websites

Here is a list of helpful websites for military pension division and SBP:

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	ABA FAMILY LAW SECTION'S MILITARY COMMITTEE: www.abanet.org/family/military/
	NC STATE BAR MILITARY COMMITTEE: www.nclamp.gov
	ARMY RETIREMENT SERVICES: www.armyg1.army.mil/rso/mission.asp
	DFAS WEBSITE: www.dfas.mil
	SBP RESOURCES: www.armyg1.army.mil/rso/sbp.asp

ENDNOTES

[1] 10 U.S. C. 1408. *See also* regulations at 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] *McCarty v. McCarty*, 453 U.S. 210 (1981).
[3] *See, e.g., Kulko v. Superior Court of California*, 436 U.S. 84 (1978). In *In re Hattis*, 196 Cal.App.3d 1162, 292 Cal. Rptr. 410 (1987), for example, the court held there was no federal jurisdiction under 10 U.S.C. 1408(c)(4) to partition the military retired pay of a former domiciliary despite adequate "minimum contacts."
[4] 50 U.S.C. App. § 500-48, 560-91.
[5] *See, e.g., Andris v. Andris*, 65 N.C. App. 688, 309 S.E.2d 570 (1983).
[6] *See, e.g., Russell v. McGinnis*, 514 P.2d 658 (Okla. 1973).
[7] *Mattox v. Mattox,* 105 N.M. 479, 734 P.2d 259 (N.M.Ct.App. 1987).
[8] *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986).
[9] *In re Luciano*, 104 Cal. App.3d 956, 164 Cal. Rptr. 93 (1980).
[10] *In re Marriage of Gillmore*, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981).
[11] *In re Marriage of Scott*, 156 Cal. App. 3d 251, 202 Cal. Rptr. 716 (1984).
[12] BASE PAY times YEARS OF SERVICE times 2.5% is the formula for members entering active duty before Sept. 8, 1980. Those who entered service on or after 9/8/80 use the formula: BASE PAY [average for last three years of service] X YEARS OF SERVICE X 2.5%. Those who entered service after 1986 use the formula: BASE PAY [average for last three years of service] X YEARS OF SERVICE X 2.5%] - [1% for each year of service under 30 years, calculated by months].
[13] 10 U.S.C. 1408 (e) (1).
[14] 10 U.S.C. 1408 (d) (2).
[15] *See, e.g., Dewann v. Dewann*, 389 Mass. 754, 506 N.E.2d 879 (1987).
[16] J. Stacy and B. Danninger, "Seize Control of Property Settlements," *Case and Comment*, Vol. 93, No. 4 (August 1988), pp. 21-22 (emphasis in the original).
[17] *See* K. MacIntyre, "Division of U.S. Army Reserve and National Guard Pay upon Divorce," 102 Mil. L. Rev. 23 (1983). The formula for Reserve/National Guard retirement pay is: BASE PAY X [NUMBER OF RETIREMENT POINTS divided by 360] X 2.5%. Remember the "High-3" rules for calculating retirement base pay, set out above, for those who start their military service on or after 9/8/80.
[18] 10 U.S.C. § 1408 (c) (1).
[19] *Mansell v. Mansell*, 490 U.S. 581 (1989).
[20] These provisions are found in the military pension division regulations, *supra* note 1.
[21] *See, e.g., Carranza v. Carranza*, 765 S.W. 2d 32 (Ky. App. 1989).
[22] 10 U.S.C. 1447-1455.
[23] 10 U.S.C. 1448 (a) (2) (A).
[24] 10 U.S.C. 1448 (a) (2) A).
[25] 10 U.S.C. 1448 (a) (2) (B).
[26] 10 U.S.C. 1450. (f).
[27] 10 U.S.C. 1448 (b) (2).
[28] *See, e.g., Rockwell v. Rockwell*, 77 N.C.App. 381, 335 S.E.2d 200 (1985).
[29] *McClure v. McClure*, 647 N.E.2d 832 (Ohio 1994).
[30] *Diaz v. Babauta*, 66 Cal.App.4th 784, 78 Cal.Rptr.2d 281 (Cal. Ct. App. 1998); *In re Marriage of Heupel*, 936 P.2d 561 (Colo. 1997); *In re Marriage of Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994); *Kelson v. Kelson*, 675 S.2d 1370 (Fla. 1996); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Pavatt v. Pavatt*, 920 P.2d 1074 (Okl. Ct. App. 1996); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996). *Abernethy v. Fishkin*, 638 So.2d 160 (Fla. Ct. App. 1994).
Ct. App., 1994); *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995).
[31] *See, e.g., Boger v. Boger*, 103 N.C. App 340, 405 S.E.2d 591 (1991).
[32] *See, e.g., In re Marriage of De Shurley*, 255 Cal. Rptr. 150, 207 Cal. App. 3d 992 (1989) and *In re Marriage of Lawson*, 256 Cal. Rptr. 283, 208 Cal. App.3d 446 (1989).
[33] *See, e.g., Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).
[34] *Dillard v. Dillard*, 772 S.W.2d 355 (Ark. Ct. App. 1989). *See also Chotiner v. Chotiner*, 829 P.2d 829 (Alaska 1992).

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