SILENT PARTNER
All Clauses Considered: Writing the Frozen Benefit Award

INTRODUCTION: The Silent Partner series of info-letters, a lawyer-to-lawyer resource for military family law issues, is a project of the military committees of the American Bar Association’s Family Law Section and the North Carolina State Bar. For others in this series, go to www.americanbar.org > Family Law Section > Military Committee, or to www.nclamp.gov > For Lawyers. Comments, corrections and suggestions should be sent to the address at the end of the last page.

Introduction

Major changes in military pension division occurred in December 2016 when the President signed the National Defense Authorization Act for Fiscal Year 2017 (NDAA 17). Section 641 of the Act contained a major revision of how military pension division orders are written and will operate for those not yet receiving retired pay. Rather than allowing the states to decide how to divide military retired pay and what formula or methodology to use, Congress imposed a single uniform method of pension division on all 50 states plus other federal jurisdictions (e.g., the District of Columbia, Guam, etc.), employing a hypothetical scenario in which the military member retires on the date of divorce.¹

Everyone who is not yet receiving retired pay is affected. This means the servicemember (SM) who goes through divorce and property division while still serving in the uniformed services:

- Members of the armed forces, which includes Army, Navy, Air Force, Marine Corps and Coast Guard;
- The commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration; and
- Those in the National Guard and Reserves who are not yet receiving retired pay (which usually begins around age 60).

The statutory revision has no impact on divorces with property division after retired pay has started.

Understanding the Frozen Benefit Rule

A “rewrite” of the military pension division rules in the Uniformed Services Former Spouses’ Protection Act, or USFSPA,² the new statute says that the “disposable retired pay” which is paid in

¹ This ignores the fact that over forty states use the “time rule” to divide a defined benefit plan, which involves a marital fraction composed of marital pension service divided by total pension service times final retired pay. Irrespective of state laws, cases and rules, the federal law applies to those still serving whose divorces or property division orders are after December 23, 2016, the date the law was enacted.
pension shares by the retired pay center is that attributable to the “High Three” amount and years of service of the military member at the time of the parties’ divorce. In effect, this means that the military will only pay the ex-spouse a share of the military member’s retired pay as it hypothetically exists on the day of divorce (i.e., if the court assumes that he or she had stopped serving and put in for retirement on that date). The only increase is COLAs (cost-of-living adjustments) pursuant to 10 U.S.C. § 1401a (b) which may occur between the time of the court order and the time of retirement.

Can the parties agree to “opt out” of this straight-jacket approach? Congress says “NO.” There are no exceptions for the parties’ agreement to vary from the new federal rule. Everyone must do it one way, regardless of what the husband and wife decide they want the settlement to say.

“Hard Times” and the Hypothetical

How should the courts write a proper court order to implement the frozen benefit rule? Guidance on military pension division rules and requirements was published at the end of June 2017 in the

---

3 For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

4 Although the statutory language refers to “the time of the order,” the Defense Finance and Accounting Service has interpreted this as the date of the decree of divorce, dissolution, annulment or legal separation, as explained below.

5 According to Lexis Advance (last checked 3-26-17), here is new text for 10 U.S.C. § 1408 (a)(4) [additions/changes in italics]: (A) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled (as determined pursuant to subparagraph (B) less amounts which--

(i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(iii) in the case of a member entitled to retired pay under chapter 61 of this title [10 USCS §§ 1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member’s disability on the date when the member was retired (or the date on which the member’s name was placed on the temporary disability retired list); or

(iv) are deducted because of an election under chapter 73 of this title [10 USCS §§ 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(B) For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be--

(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by

(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title [10 USCS § 1401a] between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.

[Note the error in the language at (B)(i) above. It says that, for purposes of this section, a member’s retired pay is his or her basic pay according to pay grade and years of service at the time of the court order. In reality, retired pay is never one’s basic pay; by law it is his “High Three” pay (average of highest three years of continuous compensation) times years of creditable service times 2.5% in most cases. Presumably this will be corrected in a forthcoming amendment.]
The “hypothetical clause” (as it is called by the Defense Finance and Accounting Service, or DFAS) is the most difficult clause to prepare. For those who entered military service on or after September 8, 1980, the current DoDFMR rule requires that the court order contain the member’s years of creditable service and his “High Three” amount (i.e., the average of the highest three years of continuous compensation before the specified division date).\(^7\)

- The court order must provide this information.\(^8\)
- This means, in effect, that the attorneys must obtain this information, in order to avoid rejection of the pension division order.
- And this, in turn, means that the attorney for the non-military spouse has to get this information or else there will be no qualified order for division of the military pension.

Because not too many attorneys are conversant with drafting such an order, the cost of military divorce will go up and counsel will start receiving rivers of rejection letters when pension orders are submitted which don’t comply with the new rule.\(^9\)

This Silent Partner will attempt to explain the writing of a clause for military pension division using the instructions contained in Chapter 29 of Volume 7B of the DoDFMR. It will discuss what’s needed from the standpoint of the member and the spouse or former spouse (FS). Essential reading is the Silent Partner, “Fixing the Frozen Benefit Rule,” which outlines the terms and data needed to comply with the new statute, where to find the information, strategies for the member and the spouse for compliance with NDAA 17, and how to dodge the impact of the new rules.

For members entering the uniformed services on or after September 8, 1980, the required data for the pension division document (e.g., military pension division order, dissolution decree, or property settlement incorporated into a divorce judgment) are years of creditable service as well as the member’s High Three figure. For Guard/Reserve members, the number of retirement points as of the divorce date will replace the years of creditable service stated in the previous sentence. In some cases, an expert may need to be employed to assemble the records and calculate the results. One thing is certain – either the member must provide records for these calculations (or sign a release to allow the other side to obtain this information) or else the court must order the federal government to supply the documents needed to

---


\(^7\) DoDFMR, Vol. 7B, ch. 29, Sec. 290608. For members of the National Guard or Reserves, any order which contains a fraction must be expressed in terms of retirement points, not months or years.

\(^8\) The order must be expressed as a fixed amount, a percentage, a formula or a hypothetical which is awarded to the FS.

\(^9\) A guide for attorneys on how to write acceptable military pension clauses may be found at the Silent Partner, “Guidance for Lawyers: Military Pension Division,” and it includes the necessary elements and language for a proper hypothetical clause.
state the years of creditable service and what the amount of *High Three* compensation would be. These requirements are spelled out in the DoDFMR, Vol. 7B, Chapter 29, which says that the court order has to state:

a) the “High-Three” amount of the member on the date of divorce (i.e., the average of the highest three years of continuous compensation), which is $______; and

b) the member’s creditable service time as of the date of divorce, which is ____ years and ___ months (or in the case of members of the National Guard or Reserves, the creditable retirement points at divorce, which is ______ points).

**Serving the Servicemember**

When counsel is representing the SM, the language employed in the order, judgment or decree must be anchored in terms which strictly adhere to the language of the NDAA 2017. This means that the order will say that the amount to be divided is “disposable retired pay,” which is what the NDAA 17 redefined in December 2016. This approach for the order limits the FS to a smaller number for division with the SM, perhaps about 60% of the previous amount to which she or he would have been entitled under the “time rule.” The smaller the disposable retired pay (which is what is divided with the FS) the smaller the amount which must be paid to the FS.

**[Wording for the servicemember]** The servicemember will pay as military pension division to the former spouse a share of his “disposable retired pay” as defined in § 641, National Defense Authorization Act for FY 2017, codified at 10 U.S.C. §1408(a)(4).

The share of the former spouse will be 50% of the marital fraction of the servicemember’s disposable retired pay. The marital fraction is marital pension service divided by total pension service. The member’s marital pension service as of the date of classification and valuation under state law is (complete one):

---

10 See “Fixing the Frozen Benefit Rule” for more information on these and how to calculate and verify the *High Three* amount.

11 The end-point for marital pension service is the date of classification and valuation of marital or community property under state law. For example, New York’s date for valuation and classification is the date of commencement of the divorce case. In California, a spouse’s share of community property stops accruing at the “final separation.” See, e.g., *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661(Cal. Ct. App. 1985). The date of final separation is also the classification and valuation date in North Carolina. N.C. Gen. Stat. § 50-20 (b)(1). In Nevada, community property stops accruing on the divorce date. See, e.g., *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983). In other states it may be the date of divorce, the date of irretrievable breakdown of the marriage, or a date in the discretion of the judge.

12 Two points need to be made. First, the denominator which is mathematically correct would be described as “total pension service as of divorce,” since divorce is the date when the pension is frozen, according to DFAS; the SM, however, may want to stretch this out to read “total pension service,” which would mean in most cases an even smaller share for the FS. Whether state rules would allow that argument is another question, since it involves the law and cases in 50 or more jurisdictions. Secondly, marital pension service is measured in months except for members of the National Guard or Reserves. According to DFAS, when a formula for pension division contains a fraction and the SM is in the Guard or Reserves, the fraction must be stated in terms of retirement points.
The servicemember’s “High Three” amount (i.e., the average of the highest 36 months of continuous compensation) is $________ as of the date of divorce.

The member’s total creditable time of service toward retirement as of the date of divorce (expressed in retirement points for members of the Guard/Reserve) is (complete one):

| _______ retirement points (Guard/Reserves) | _______ years and _______ months (all others) |

The above pension share is the sole retired pay entitlement for the spouse/former spouse. All remaining retired pay of the member will be the sole and separate property of the servicemember, to which the spouse/former spouse will have no claim or entitlement.

Support for the Spouse

The revised law doesn’t forbid entry of a time rule order. It merely states that the retired pay center (DFAS or the Coast Guard Pay and Personnel Center) will only honor “date-of-divorce division” for those still serving. Recognizing this limitation on payments from the government, the court may still enter a time rule order, noting that at the member’s retirement only a portion of the pension-share payment for the FS will come from the pay center. The court’s order would provide that the member is still responsible for the rest and will indemnify the FS for any difference between the two amounts.

The “savings clause” in the USFSPA, found at 10 U.S.C. § 1408 (e)(6), allows the courts to employ state enforcement remedies for any amounts which may not be payable through the retired pay center. That section states:

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) [e.g., 50% of disposable retired pay] has been paid….

Numerous court decisions have held that orders which require the retiree to pay more than 50% of disposable retired pay are not void or invalid; they are simply not enforceable through garnishment from the retired pay center for amounts in excess of 50%.

Avoid using “disposable retired pay” in the order to describe what is divided. Disposable retired

---

13 See also Brett R. Turner, EQUITABLE DISTRIBUTION OF PROPERTY (3rd Ed. & 2016-2017 Supp.), Sec. 6.4.
14 For a list of citations, see the Silent Partner, “Fixing the Frozen Benefit Rule.”
pay, or DRP, means the restrictive definition in the frozen benefit rule (i.e., retired pay figured on the High Three at the date of divorce) less all of the other specified deductions, such as the VA waiver and moneys owed to the federal government. The best way to word a pension clause is to provide for division of total retired pay less only the Survivor Benefit Plan (SBP) premium attributable to coverage of the former spouse. Regardless of the language used, DFAS will construe orders dividing “gross retired pay,” “total retired pay,” or any similar language as dividing DRP, but the language suggested here will be consistent with the use of indemnification if the FS’s share is reduced later.

[Wording for the spouse/former spouse] The servicemember is responsible for full payment of the funds due to the spouse/former spouse under the terms of this document.

That share is 50% of the marital fraction of the servicemember’s retired pay, less only the premium deducted for any Survivor Benefit Plan coverage for the former spouse. Note that this limitation is not for administration by the retired pay center, which must comply with federal law as to disposable retired pay, but rather for recognition of the rights and duties of the parties. “Retired pay” means the actual gross retired pay distributed to the retiree. The marital fraction is marital pension service divided by total pension service. The member’s marital pension service as of the date of classification and valuation under state law is (complete one):

<table>
<thead>
<tr>
<th>retirement points (Guard/Reserves)</th>
<th>years and months (all others)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The servicemember’s “High Three” amount (i.e., the average of the highest 36 months of continuous compensation) is $ as of the date of divorce.

The member’s total creditable time of service as of the date of divorce toward retirement (expressed in retirement points for members of the Guard/Reserve) is (complete one):

<table>
<thead>
<tr>
<th>retirement points (Guard/Reserves)</th>
<th>years and months (all others)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Federal law limits what the retired pay center can distribute to the former spouse as a share of military retired pay, pursuant to § 641, National Defense Authorization Act for FY 2017, codified at 10 U.S.C. § 1408(a)(4). The member will pay the former spouse the share set out herein and, pursuant to 10 U.S.C. § 1408(e)(6), will indemnify the former spouse for any loss or damages resulting from failure to pay as stated above. As to any differential between what is due herein and what the retired pay center disburses, the parties will decide on an appropriate method for payment (e.g., consent order for alimony garnishment through the retired pay center, inter-bank transfer, allotment, or personal check) within 30 days after the first garnishment payment to the former spouse. If the

15 DoDFMR, Vol. 7B, ch. 29, Sec. 290601.
16 See Notes 11 and 12 supra as to marital pension service and total pension service. The denominator which is mathematically correct when final retired pay is divided would be described as “total pension service,” meaning that the pay is measured as of the end of the member’s career. However, since divorce is the date when the pension is frozen by the retired pay center, the spouse may want to shrink the denominator so that it reads “total pension service as of the date of divorce,” which would mean in most cases a larger share for the FS. Whether state rules would allow that argument is another question, since it involves the law and cases in 50 or more jurisdictions.
parties cannot agree then the court will make the determination. The court reserves jurisdiction regarding enforcement of the terms herein for military pension division.

**Timing and the Separation Agreement: Deal Now, Divorce Now**

Sometimes the terms for pension division are set out in a separation agreement, property settlement agreement or marital settlement agreement. Thereafter the settlement is submitted to the court for incorporation into the divorce decree.

In states such as California and Florida, the divorce or dissolution may be granted in close proximity to the execution of the separation agreement. Since the dissolution is based upon no-fault grounds and there is no required period of separation in those states, this means that the required data shown above may be included in the agreement since it is unlikely to change if the divorce follows soon after the agreement is signed.

**Deal Now, Divorce Delayed**

A different scenario, however can face the SM or spouse in a state such as North Carolina, where grounds for divorce involve a separation period of one year (with the intent that the separation be permanent), or in another state where a waiting period is involved. In such jurisdictions, the settlement may be executed shortly after the parties separate, and yet the divorce might be granted a year later. The same situation would occur if the military member were deployed shortly after the signing of the agreement, thus delaying the filing for divorce.

If the granting of a divorce judgment is not in close proximity to the execution of the settlement, then counsel must give consideration to whether to include the data points which DFAS requires (i.e., High Three amount and years of service or retirement points at date of divorce). If these are not likely to change between the execution of the separation agreement, then they may be inserted in the agreement. However, when there is a chance that the data points will be different at the time of divorce, the agreement should make reference to the subsequent divorce and announce that the data will be submitted to the court at that time for inclusion into the divorce decree. A clause such as this may suffice:

Federal law requires that the High Three amount and years of service for the husband, Major Richard Roe, currently on active duty with the U.S. Marine Corps, be submitted to the retired pay center (in this case, the Defense Finance and Accounting Service, or DFAS) as of the date of divorce. Since that information may change between the date of execution of this document and the date of the parties’ divorce, the parties agree that Major Doe must submit verification of this information to the wife, Roberta Roe, at the time that either of them files for a judgment of absolute divorce in this state or any other jurisdiction. They further agree that this information
will be included in the divorce judgment, so that the wife can apply to DFAS for division of military retired pay.

Final Notes

The preparation of a military pension division clause or order should be done only after reading the available rules and Section 641 of NDAA 17, as well as existing state law regarding the division of military pensions and defined benefit plans. Be sure to understand the law and the cases, and contact an expert in military pension division whenever possible, even an attorney from another state.

* * *

(Rev. 7/24/17)