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   c. Retirement Points Accounting System statement for Guard/Reserve personnel
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   e. “20-year letter” (Notice of Eligibility) for Guard/Reserve personnel as when SM attained 20 creditable years of service, was notified as to SBP elections
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   g. DD Form 214 – discharge statement
   h. Thrift Savings Plan quarterly statements
   i. Letter from DFAS that servicemembers (SMs) receive upon retirement (pay status), showing expected amount of retired pay and calculations
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   b. The Survivor Benefit Plan is the survivor annuity program for pension division, to allow a former spouse (FS) to continue to receive payments after the member/retiree dies. 10 U.S.C. 1447 *et seq.*
   d. State laws and rules exist for pension division, whether survivor annuity is available for the FS, what the marital fraction is, whether military leave is divisible, etc.

3. **To play the game, know the rules!** How military retired pay works, how compensation for a retiree is calculated, and what is needed for state court jurisdiction to divide military retired pay.
   a. Active duty retirement under one of 3 systems: a) Final retired pay b) High-3 c) CSBRedux. Details at Army Retirement Services; go to [www.armygl.army.mil](http://www.armygl.army.mil) – good for all branches of armed services. The important date is DIEMS (Date of Initial Entry into Military Service), which is found on the Active Duty LES.

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**SILENT PARTNER**

*Master Checklist for Military Retirement Benefits*

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b. Reserve/National Guard retirement rules (pension based on retirement points)
   i. In general retired pay starts when retiree attains age 60
   ii. 20 “good years” needed to be retirement-eligible (50 points needed for a “good year”)
   iii. Four points for a “drill weekend,” one point per day of active duty (e.g., 14 points for two weeks’ annual training or “summer camp”)

   c. Jurisdiction rules (10 U.S.C. 1408 (c)(4)) – obtain pension division jurisdiction over SM by:
      i. Domicile – his or her legal residence
      ii. Consent – entry of general appearance in the lawsuit
      iii. Residence – but not because of assignment

   d. SCRA – When SM has not yet retired, pension order must state that court has honored SM’s rights under the Servicemembers Civil Relief Act, 50 U.S.C. Appx. 501 et seq.

   e. DFAS is the retired pay center for Army, Navy, Air Force, Marine Corps (and reserve components, also Air and Army National Guard); separate pay centers for retirees of Coast Guard, Public Health Service, NOAA

   f. Four methods for division of retired pay (from active duty retirement) – full explanation in Attorney Instructions at [www.dfas.mil](http://www.dfas.mil) > Find Garnishment Information > Former Spouses’ Protection Act. Examples:
      i. Fixed dollar amount - $500 a month
      ii. Percentage – “Mary gets 10% of Tim’s pension monthly” (use when retirement has occurred and all numbers are known)
      iii. Formula clause – “Mary is to receive 50% of Tim’s final retired pay times 214 months of marriage during service divided by Tim’s total service when he retires” (use when SM not yet retired)
      iv. Hypothetical - “Mary is to receive 50% of Tim’s retired pay times 214 months of marriage during service divided by Tim’s total service when he retires, with his retired pay calculated as if he had retired as a staff sergeant with 16 years of creditable service. His HIGH-3 pay amount is $3,400 monthly.”

   g. Reserve/Guard methods of division – same as above except that formula clause must be expressed in points, not months.

   h. Disposable Retired Pay (DRP) = gross retired pay less any VA disability waiver and premium for SBP (for FS in this divorce). DRP is what retired pay center divides, regardless of what the order says. See also “Break a leg!” below.

   i. COLAs – usually occur in January. Automatically included in all methods except set dollar amount, which does not allow COLAs to be included or added on.

   j. The pension is not a “fund,” so you cannot refer to the account balance or the part of the fund acquired during the marriage or at divorce. It is a defined benefit, governmental program (not a “qualified plan”) with monthly payments to retiree. TSP is a fund (Thrift Savings Plan), similar to 401K plan. “What you see is what you get” – check the account balance to see what’s there.

4. SBP – choose it or lose it. How the Survivor Benefit Plan (SBP) works, its cost and benefits

   a. SBP – an annuity that continues stream of income to designated beneficiary when SM/retiree dies first; without it, the pensions stops upon death of the SM/retiree

   b. Pays 55% of selected base amount

   c. FS coverage generally costs 6.5% of base amount, paid upon retirement by deduction from pension check

   d. If FS dies first, then entire pension is restored to the retiree

   e. Effectuate FS coverage through court order sent to retired pay center

   f. Base amount may be any amount from full monthly retired pay (which is the default if order or clause is silent) down to $300/mo.

5. Snooze… and you lose. Learning the limitations and deadlines which apply
a. 10/10 Rule – direct pay from retired pay center requires 10 years of service concurrent with 10 years of marriage. This is an enforcement rule, not a rule as to pension division eligibility. FS is still eligible to claim pension division if less than 10/10.

b. Never take default judgment against SM/retiree; obtain proper service, state the basis for jurisdiction in the order (see jurisdiction rules above) to get valid direct-pay order honored by retired pay center.

c. SBP is suspended for FS if she/he remarries before age 55

d. SBP deadlines – when SM/retiree makes election, must be done within one year of divorce; when FS makes “deemed election,” must be done within one year of order granting SBP coverage (use DD Form 2656-10)

e. SBP cannot be divided between present and former spouse


g. 20/20/20 health care coverage means full medical benefits for a FS – 20 years’ marriage, 20 years’ service, overlap of 20 years. This means TRICARE and space-available care at military medical facilities. If 20/20/20 not met, use CHCBP (Continued Health Care Benefit Program).

6. “Break a leg!” Understanding how disability pay can reduce the divisible pension

a. Primary types of disability payments: military disability retired pay, VA disability compensation, Combat-Related Special Compensation (CRSC)

b. Court cannot divide VA disability compensation, and only small part of military disability retired pay is subject to pension division (although disability benefits ARE usually subject to consideration in support cases).

c. When retiree has VA disability rating of less than 50%, election of VA payments means dollar-for-dollar reduction of pension; thus share for FS is reduced due to unilateral action of retiree.

d. Courts and agreements often employ indemnification language to guard against this, or else include clause providing for $1 a year modifiable alimony for the FS.

e. For details, read *Scouting the Terrain, The Servicemember’s Strategy, The Spouse’s Strategy* and *CRDP and CRSC – The Evil Twins* (SILENT PARTNERs).

SILENT PARTNER is prepared by Mark E. Sullivan, a retired Army Reserve JAG colonel and the author of *The Military Divorce Handbook* (American Bar Association, 2d Edition, Aug 2011) For revisions, comments or corrections, contact him at Sullivan & Tanner, P.A., 5511 Capital Center Drive, Suite 320, Raleigh, N.C. 27606 (919-832-8507); E-mail: mark.sullivan@ncfamilylaw.com.
Introduction: SILENT PARTNER is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association’s Family Law Section. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many SILENT PARTNER infoletters on military pension division, the survivor Benefit Plan and other aspects of military divorce. Just go to www.abanet.org/family/military (the website of the above committee) or www.nclamp.gov (the website of the military committee, N.C. State Bar).

Introduction

The waiver of military retired pay in exchange for VA disability compensation is covered in Military Pension Division: The Servicemember's Strategy. In a nutshell, here’s how the system used to work for retirees.

Veterans who have one or more service-connected disabilities, wounds, illnesses or conditions can apply to the VA (Department of Veterans Affairs) for tax-free disability compensation. Until 2004, the law allowed retirees to elect tax-free disability compensation from the VA only if they gave up the same amount of retired pay. Taking this dollar-for-dollar reduction was always beneficial to the military retiree, since it yielded a net increase in income because of the non-taxable aspect of disability compensation.

However it is taken, this election would usually wreak havoc when the retiree’s pension is subject to a garnishment order for part of “disposable retired pay” in favor of a former spouse. As soon as the election took place at the retired pay center (Defense Finance and Accounting Service for Army, Navy, Air Force and Marine Corps), the former spouse would see her share of disposable retired pay decrease, sometimes substantially. For example, assume that John Doe retired from the Army and he had disposable retired pay (without disability) of $1,500 per month. If his service-connected disability were evaluated as equivalent to $1,000 per month in VA payments, he could waive the same amount of taxable longevity pension in order to receive this amount tax-free. His monthly benefit would still total $1,500, but only $500 of this would be subject to taxes.

In addition, only this $500 which remains of his military pension would be subject to division with Mary Doe, his ex-wife. The Uniformed Services Former Spouses’ Protection Act (USFSPA), found at 10 U.S.C. §1498, excludes VA disability compensation from the definition of “disposable retired pay.” So if the military pension division order had given Mary 40% of John’s disposable retired pay, her pre-waiver share would have been $600 a month (40% X $1,500). But her post-waiver amount would be only $200 (40% X $500). Especially when rent or mortgage payments depend on the continued receipt of a stable, predictable amount of divided military retired pay, such a VA waiver by the military retiree can be catastrophic.

Congressional Developments Since 2003 – Back to the Beginning

In 2003, Congress passed legislation taking effect January 1, 2004 to allow concurrent receipt of both forms of payments – retired pay and disability benefits – for certain eligible retirees. The restoration of retired pay is known as Concurrent Retirement and Disability Pay (CRDP). It is found at 10 U.S.C.
§1414. The implementing rules are found at Chapter 64, Volume 7B of the DoDFMR (Department of Defense Financial Management Regulation). The three other uniformed services subject to USFSPA for pension division, the Coast Guard, and the commissioned corps of the Public Health Service and the National Oceanographic and Atmospheric Administration, almost always use the DFAS rules in dividing pensions.

Also beginning in 2003, Congress made a new form of special compensation available to a limited number of retirees. The benefits and definitions were expanded substantially in 2004. Called Combat-Related Special Compensation (CRSC), these payments may now, under the 2004 revised rules, be made to those retirees with a disability of at least 10% directly related to the award of the Purple Heart decoration, or else a combat-related disability rated at least 10% (such as hazardous duty or training for combat). CRSC is found at 10 U.S.C. §1413a. The CRSC rules are at Chapter 63, Volume 7B of the DoDFMR.

Both of these affect the division of military retired pay. Both are complex and misunderstood – if not unknown – by civilian practitioners as well as many judge advocates. Let’s see how they work.

**CRDP Explained**

For those who have at least 20 years of qualifying military service and a VA disability rating of at least 50%, CRDP means that full retired pay accompanies full VA payments. There is no reduction (although there was initially a ten-year phased elimination of the VA offset, ending 12/31/2013). Put in positive terms, this means that the retiree will get every dollar of retired pay that was formerly waived for VA disability compensation. The disability does not have to be combat-related. CRDP is the return of waived pension payments, so it has the attributes of those pension payments. It is taxable compensation. It also is divisible with a former spouse under a military pension division order.

**Verifying Receipt of CRDP**

How will you know if John Doe is getting CRDP? Since John is an Army retiree, his retired pay statement is from DFAS. Just read the comment at the “MESSAGE SECTION” on page 2 of his Retiree Account Statement (RAS), Form DFAS-CL 7220/148 (see ATCH 1 at the end of this Silent Partner for an example). It will look like this:

<table>
<thead>
<tr>
<th>MESSAGE SECTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS $____.</td>
</tr>
</tbody>
</table>

The RAS is posted at a secure website for uniformed services retirees (the website is [https://mypay.dfas.mil](https://mypay.dfas.mil) for those paid through DFAS) each month. If the retiree will not voluntarily produce the RAS, counsel may resort to formal discovery procedures if the matter is in litigation. DFAS will honor a request for documents so long as it is in the form of a court order or a subpoena signed by a judge. Send the order or subpoena, with the individual’s full name and Social Security Number (SSN), to:

Defense Finance and Accounting Service  
DFAS- Cleveland Center  
Records Retrieval (Code HAC)  
1240 East 9th Street, Room 2679  
Cleveland, OH 44199-2055  
Fax 216-522-6530
There is no requirement that the subpoena or order be sent by certified mail, although that is invariably a wise idea. An example of the RAS extract is at ATCH 2.

**Don’t Take “NO” for an Answer**

Sometimes the attorney for the retiree will disavow any knowledge of the existence of an RAS, or the retiree will claim that it was lost, misplaced, or “floated away in that big flood last month.” As noted above, all Defense Department retirees are eligible for a free “**myPay**” account at the DFAS website ([https://mypay.dfas.mil](https://mypay.dfas.mil)). There is a link to “**myPay**” right on the initial webpage of DFAS, [www.dfas.mil](http://www.dfas.mil) with instructions on how to create an account. Once the account is set up, all John Doe needs to do to obtain his current RAS is to enter his “LogIn ID” and password, go to the screen marked “Your Military Retiree Pay Account,” and select “Retiree Account Statement (RAS).” The late Mike McCarthy of Phoenix, a retired Air Force Reserve brigadier general, used to brag that he could usually get a court to order both attorneys and the retiree to use a computer *right there in the courtroom* to access the current or past RAS from the **myPay** website.

**When in doubt, Ask!**

Another method of finding out the retiree’s deductions is to ask DFAS. A little-known notice in the Federal Register makes this possible. Effective July 13, 2000, DFAS announced at 65 FR 43298 that it would disclose this information to a former spouse:

> In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

> To former spouses, who receive payments under 10 U.S.C. 1408, for purposes of providing information on how their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.

While it may be difficult to obtain sometimes if the person at DFAS responding to the written request is a newly hired GS-6 employee who doesn’t know about this rule, diligence and courtesy will get the former spouse through to someone in authority who will be able to assist. Be sure to include in the written request from the former spouse full identifying information on the retiree (name and SSN), the SSN for the former spouse and – if appropriate – an authorization for DFAS to provide the information to the attorney for the former spouse. The request might look like this:

```
Defense Finance and Accounting Service
DFAS- Cleveland Center
Records Retrieval (Code HAC)
1240 East 9th Street, Room 2679
Cleveland, OH 44199-2055
Fax 216-522-6530

Pursuant to the Privacy Act Routine Use set out at 65 Fed Register 43298, I hereby request that you provide to me information on the current gross retired pay, current deductions and dollar amount for each deduction used in calculating my share of the pension in regard to my former husband, John Q. Doe, SSN 987-77-6543. My former spouse payments were calculated under 10 USC 1408. [OPTIONAL: I authorize you to provide this information to my attorney, Lucinda Lopez, Lopez and Pasquale, LLP, 123 Green Street, Apex, NC 27566]

/s/
Mary P. Doe
SSN 234-56-7899
```
The average response time is several weeks. To check on the status of a request, call 216-522-5046 and be sure to have the retiree’s SSN available. The expected answer, when it arrives, will usually look like the letter at ATCH 3 at the end of this Silent Partner.

**A Few More Rules**

CRDP includes those who were retired with military disability retired pay (Chapter 61 of Title 10, U.S. Code) and also Guard/Reserve members with 20 or more “good years” toward retirement. CRDP cannot exceed gross retired pay.

Mary Doe, the former spouse, should have been receiving payments of pension division from the retired pay center DFAS since her ex-husband’s disability rating was less than 100% and he was still receiving some retired pay. In this situation, no new application is needed since her pension division order is “in the system” at DFAS. She begins receiving increased pension payments from DFAS due to the increased pension that John Doe is now receiving. A new application for garnishment of retired pay (with DFAS, this is DD Form 2293) will be needed if Mary had been receiving nothing since the VA disability pay wiped out completely the retired pay.

Garnishment for pension division through the retired pay center is only for current pension payments. There is no authority for DFAS to garnish for pension division arrears.

CRDP will go a long way toward fixing the unfairness of unilateral changes in military pension division orders by retirees who, after the divorce, obtain VA disability compensation and thus reduce the share of the former spouse. It will not, however, eliminate the problem entirely. Since it exempts those individuals whose disability rating is less than 50%, the problem will remain to some extent and may be addressed by means of the other tools and options covered in *Military Pension Division: The Spouse’s Strategy*.

**CRSC Explained**

Combat-Related Special Compensation (CRSC) is a benefit provided by Congress for those who have a combat-related disability of at least 10% under certain conditions. A disability is considered to be combat-related under 10 U.S.C. §1413a (e) if it –

1. (I) is attributable to an injury for which the member was awarded the Purple Heart; or
2. (2) was incurred (as determined under criteria prescribed by the Secretary of Defense)—
   a. (A) as a direct result of armed conflict; or
   b. (B) while engaged in hazardous service; or
   c. (C) in the performance of duty under conditions simulating war; or
   d. (D) through an instrumentality of war.

These qualifications include, by way of example, injury or illness resulting from actual combat, simulations of war (e.g., gas mask training, field training exercises, direct-fire training and “confidence courses”), hazardous duty such as diving or parachuting, and instrumentalities of war (e.g., tanks, artillery, machine guns, military helicopters or planes). These conditions are defined in the CRSC regulations in the DoDFMR. There is further general information on CRSC at the Army Human Resources Command website, [www.hrc.army.mil](http://www.hrc.army.mil). Just type “CRSC” into the Search field. Since “combat-related” is service-specific, the application is sent to the retiree’s branch of service, not to the Department of Defense.
CRSC is not longevity retired pay; it is an additional form of compensation for certain members of the armed forces. 10 U.S.C. §1413a (g) states that “[p]ayments under this section are not retired pay.” Thus payments are not divisible as property. They are, however, subject to garnishment for family support.

The CRSC rates are based on the VA tables, and they increase with the number of a retiree’s dependents (spouse, spouse and child, etc.). Thus, to use a March 2014 example, the rate for a 10% disability, no dependents, is about $131 a month. The no-dependents rate for a 20% disability rating is about $259 per month. The amount goes up to a total of about $3,390 for spouse, child and two parents (100% disability rating), and each additional child brings additional funds depending on his or her age.

**CRSC Twists and Turns**

Once a CRSC application is approved, the retired pay center (in its infinite wisdom) does the calculations and the decision-making for the retiree. Since one cannot receive both CRDP and CRSC, DFAS automatically makes the election for whichever is most financially advantageous, in that it yields the highest net cash flow. DFAS doesn’t take into account that the retiree may have a property division garnishment in effect. If CRDP is more favorable in gross dollars, then that is what’s chosen. This means, for example, that if CRSC in a particular case were $500 and CRDP for the same year were $501, then CRDP would be chosen for the retiree, even though CRDP is taxable and subject to a garnishment division with the ex-spouse.

The potential hardships for former spouses due to CRSC elections are remarkable. Using 2006 dollars, Mike McCarthy liked to use these as teaching points:

*First example: Assume an Air Force tech sergeant with 20 years of creditable service; 100% VA disability rating, all of it combat-related, and the former spouse is to receive 43% of the disposable retired pay as property division. He receives $2,979 VA disability compensation and waives ALL of his $1,299 gross military retired pay. In return, he receives $1,299 in CRSC payments. Thus he gets $4,278 per month tax-free. His ex-wife gets her share, 43%, of the pension, but the pension at this point is ZERO. She gets nothing; she has lost $558 per month.*

*Another scenario? Sure. Assume same facts except that the CRSC disability rating is 40%. The retiree gets $2,979 VA disability compensation but he must waive all of his $1,299 pension, and he gets $1,191 CRSC. Thus he gets $4,170 per month tax-free; while the ex-wife still gets NIL from disposable retired pay – there is none.*

*As a further illustration of this, assume a full colonel with 100% VA and 100% CRSC disability rating, with a 43% award to former spouse. His military pension is $6,630 before VA waiver of $2,979, so his real "disposable" pension is $3,651. He also gets the maximum amount of CRSC, $2,979. His former wife gets 43% of only $3,651, which equals $1,570, rather than 43% of the gross $6,630, or $2,850. She loses $1,280. He gets the balance of the pension ($2,081), plus the two disability benefits ($5,958) for a total of $8,039.*

CRSC payments are retroactive. The individual is entitled to CRSC back to the date of filing of the VA claim or of the enabling legislation, January 1, 2003, whichever is later. This retroactivity will cause problems for both parties. If the retiree has been getting CRDP and elects CRSC, there will be a one-time retroactive payment to him or her, and the money received under CRDP for that same period covered by the CRSC retroactive payment will be taken back. The CRDP pay-back will be subtracted from the retroactive CRSC payment that he or she receives. That means that taxable income for prior years – duly reported on federal and state tax returns – has been taken back from the taxpayer, resulting in problems for his or her tax preparer on how to treat this.
But what about the former spouse? If the retiree’s former spouse has been receiving a share of the pension as property division, the share paid from CRDP must also be collected back from her or him. There are two possible results.

First, if the CRSC election results in no further pension garnishment payments to the former spouse, then DFAS will initiate a debt collection action against her or him, since there would no longer be any continuing pension garnishment payments from which to deduct the CRDP payments made to her or him. The former spouse may petition for waiver of the indebtedness. This is done on DD Form 2789, “Waiver/Remission of Indebtedness Application.” The mailing instructions are on the face page of the form.

On the other hand, if the CRSC election does not remove all the pension share garnishment, then the former spouse will still be subject to a collection action by DFAS. DFAS will recoup the “overpaid” funds from her or him, resulting in decreased future payments until the indebtedness is fully paid; this is ordinarily done over a 36-month period. An example of an actual client’s overpayment letter (with names and identifying information changed) is at ATCH 4 at the end of this Silent Partner. This former spouse may also petition for waiver of this indebtedness.

CRSC Final Points and Charts

Here are some final points about CRSC:

- The CRSC payment cannot exceed the amount of the military retired pay waived for VA disability compensation.
- Unlike ordinary retired pay (including CRDP), CRSC is non-taxable – it is disability compensation, not retired pay.
- CRSC is available for support determinations and for garnishment for alimony and child support. This is also true of CRDP.
- The statute includes Guard and Reserve personnel who have at least 20 qualifying years for retirement purposes.

A simplified way of understanding all of this information about comparisons is –

<table>
<thead>
<tr>
<th>CRDP and CRSC — A Comparison</th>
<th>CRDP</th>
<th>CRSC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of disability required</td>
<td>Service-connected</td>
<td>Combat-related</td>
</tr>
<tr>
<td>Considered longevity retired pay</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Divisible as property</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Minimum disability rating required</td>
<td>50%</td>
<td>10%</td>
</tr>
<tr>
<td>Taxable</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Retroactive payment</td>
<td>No</td>
<td>Yes†</td>
</tr>
<tr>
<td>Increases with number of dependents</td>
<td>No</td>
<td>Yes‡</td>
</tr>
<tr>
<td>Available for support determinations, garnishments</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

†Payment is retroactive to the date of filing of the VA claim.
‡If CRSC rating is 40% or more.
CRDP and CRSC – the Election

Eligible retirees can elect either CRDP or CRSC, under 10 U.S.C. §1414 (d)(1). The election may be made once a year during the January open season, pursuant to 10 U.S.C. §1414(d)(2). This means that John Doe can alternate between CRDP and CRSC yearly. The “open season” is usually in January of each year.

Conceivably – if John Doe alternated annually between the two forms of payment – Mary could get her share of the CRDP in 2013, then be told by DFAS that no CRDP funds were available in 2014 when John switched over to CRSC. Then in 2015 he could change back to CRDP.

DFAS advises that it is treating the initial election of CRSC as a termination of former spouse payments if there is no other disposable pay available for the former spouse. This requires a new DD Form 2293 (but not the entire set of original documents submitted with the original application). Thus if John later switched back to CRDP, Mary would have to reapply to re-start the payments. DFAS does not say how Mary would know of this switch, since it will not independently inform her of the change. And John certainly won’t tell her!

If, however, John still had disposable retired pay available after his CRSC election, Mary would continue to receive her share (at a reduced rate). If he later switched back to CRDP, the payment to Mary would increase automatically.

CRDP and CRSC – Procedures, Pay Notice

John Doe retires from the Army. He is divorced and the property division order requires him to pay Mary Doe, his ex-wife, 50% of his disposable retired pay (DRP). After retirement, he goes to the nearest VA hospital for a physical evaluation. Several months after the physical (it could be up to a year, depending on backlogs), he gets a findings and ratings letter from VA. This correspondence states that he is rated X% disabled, due to hearing loss, back problems, and carpal tunnel syndrome. All of these disabilities are determined to be service-connected, but the back problem stems from a parachute jumping accident, and the hearing loss came from a career of being in airplanes for airborne operations. X represents a figure greater than 50% in this example.

The letter informs him that the X% disability rating qualifies him for non-taxable VA disability compensation of $800 a month. To elect this, he must waive the same amount of his retired pay, as outlined above, if the rating is less than 50%; there is no waiver if the rating is 50% or more.

John Applies for CRSC

Some time after he gets his VA letter, John decides to apply for CRSC. First of all, he gets out his VA findings and ratings letter, and he looks for types of disabilities which will qualify for CRSC. These would be disabilities incurred as direct result of armed conflict, hazardous duty, an instrumentality of war, or conditions simulating war.

Since applications are service-specific, John sends in his application form, DD Form 2860, to the Army. The entire process is retiree-driven. He must apply to be considered for CRSC; it is not automatic, like CRDP. A board will decide his case, and he sends in copies of his physcals, his medical records (active duty military, VA and private health care provider), plus statements from him and, if available, from witnesses or experts.

Several months later he receives a letter from the Army. It contains findings regarding his claims as to combat-related injuries or disabilities (e.g., “Of your X% service-connected disability rating, Y% is combat-related and qualifies for CRSC.”).
DFAS Makes the Choice for John

Soon after the letter confirming his CRSC eligibility, John’s CRSC payments begin. The CRSC payments come from a specific table that states the amounts, and these vary according to the number of dependents that one has. As mentioned above, DFAS makes the choice for John – CRSC or CRDP – based on which one yields the larger total gross payment. Thus if the CRSC amount is $800 per month (as against a present total CRDP payment $900 monthly), DFAS will leave the CRDP payment unchanged, regardless of the fact that the $900 is taxable and divisible with his ex-wife). John can change this election annually in the January open season if he wishes. If DFAS chooses CRDP, then there will be no change on John’s RAS. The comment at the MESSAGE section on page 2 remains the same as before.

If, however, CRSC payments were $1,000 per month, then this is better financially for him (in the eyes of DFAS) and DFAS will select that option, issuing her a CRSC Monthly Statement. An example of a CRSC statement, not tied to this scenario, is as follows:

<table>
<thead>
<tr>
<th>CRSC Pay Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>STATEMENT EFFECTIVE DATE</td>
</tr>
<tr>
<td>PAYMENT DATE</td>
</tr>
<tr>
<td>SSN</td>
</tr>
<tr>
<td>RETIREE’S NAME AND ADDRESS</td>
</tr>
<tr>
<td>123 GREEN STREET</td>
</tr>
<tr>
<td>APEX, NC 27511-1234</td>
</tr>
<tr>
<td>PLEASE REMEMBER TO NOTIFY DFAS OF YOUR ADDRESS CHANGES</td>
</tr>
<tr>
<td>HOW TO CONTACT US</td>
</tr>
<tr>
<td>DEFENSE FINANCE AND ACCOUNTING SERVICE</td>
</tr>
<tr>
<td>US MILITARY RETIRED PAY</td>
</tr>
<tr>
<td>PO BOX 7130</td>
</tr>
<tr>
<td>LONDON, KY 40742-7130</td>
</tr>
<tr>
<td>COMMERCIAL (216) 522-6398</td>
</tr>
<tr>
<td>TOLL-FREE 1-800-472-7098</td>
</tr>
<tr>
<td>TOLL-FREE FAX 1-800-469-6559</td>
</tr>
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</tr>
<tr>
<td>myPay</td>
</tr>
<tr>
<td><a href="https://myPay.dfas.mil">https://myPay.dfas.mil</a></td>
</tr>
<tr>
<td>1-877-363-3677</td>
</tr>
<tr>
<td>PAYMENT INFORMATION</td>
</tr>
<tr>
<td>CRSC Payment</td>
</tr>
<tr>
<td>CRSC Debt Deduction</td>
</tr>
<tr>
<td>CRSC Garnishment Deduction</td>
</tr>
<tr>
<td>CRSC Net Pay</td>
</tr>
<tr>
<td>Retired Pay Before Deductions</td>
</tr>
<tr>
<td>Retired Pay Offset by DVA Compensation</td>
</tr>
<tr>
<td>CRSC Debt Balance</td>
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<tr>
<td>Branch of Military Service</td>
</tr>
<tr>
<td>Garnishment Being Withheld</td>
</tr>
<tr>
<td>THE DVA OR YOUR BRANCH OF SERVICE PROVIDED THE FOLLOWING</td>
</tr>
<tr>
<td>CRSC SPECIAL MONTHLY COMPENSATION CODE</td>
</tr>
<tr>
<td>UNEMPLOYABLE</td>
</tr>
<tr>
<td>DVA DISABILITY %</td>
</tr>
<tr>
<td>COMBAT RELATED DISABILITY %</td>
</tr>
<tr>
<td>PURPLE HEART %</td>
</tr>
<tr>
<td>CRSC START DATE</td>
</tr>
<tr>
<td>SPECIAL MONTHLY COMPENSATION START DATE</td>
</tr>
<tr>
<td>REMARKS</td>
</tr>
</tbody>
</table>

The new CRSC statement will be posted on-line. John Doe, our Army retiree, can access it through the secure DFAS website, https://mypay.dfas.mil.

DFAS will also issue John a new RAS. It will contain new retired pay figures, and the amount for retired pay will be reduced from the previous month’s amount because CRDP will have disappeared. The comment in the MESSAGE SECTION on page 2 also will be gone:
**Sherlock Holmes at Work**

This absence of the CRDP message is the key to understanding when CRSC is present. Suppose that Mary’s attorney discovers that there is a large VA waiver shown on John Doe’s RAS. In this case, “large” would be over $800, since $822 is, effective as of 12/1/13, the rate for a veteran with no dependents who has a 50% VA disability rating. In the absence of a CRSC statement, Mary’s attorney can still make an educated guess as to John’s receipt of CRSC. All the attorney needs to do is look at the MESSAGE SECTION on the RAS. “No message” combined with a large VA waiver means that:

A) John has a VA-rated disability  
B) He made the election to receive VA disability pay  
C) While this would ordinarily mean that he would have to waive part of his pension, the advent of CRDP means that he is entitled to his pension and his VA payment  
D) That, in turn, would mean “no VA waiver” shown on the RAS  
E) When there IS a VA waiver, it must mean that John has been approved for CRSC, which in turn means NO payment of CRDP, which in turn means that we’re back to the “old days” of dollar-for-dollar waiver of pension money for VA money.

In such a case, Mary’s attorney can be a sleuth and figure out what John’s VA rating actually is (without having his VA letter in her possession). All she has to do is to find the amount of the VA waiver and then locate that number on the VA disability compensation tables (easily found by typing “VA disability compensation tables” into any internet search engine).

**The Impact: “A CRSC Attack”**

To understand some of the consequences of the CRSC election, remember that John cannot get CRDP if he is receiving CRSC at the same time. This does not mean a dollar-for-dollar waiver of CRDP for CRSC. It means he cannot receive any CRDP if he receives even $1 of CRSC.

So the payments for John go up, while those for his ex-wife will go down. In fact, Mary Doe will see even more bad news due to the CRSC retroactivity problem. Since John has received CRDP back to the date of his VA election, which has been shared through DFAS with Mary for months (or years) before John is accepted for CRSC, DFAS now must take back all of the prior CRDP payments, and this means collection from Mary as well. So Mary will see an even larger reduction in her pension division checks. DFAS will collect these CRDP payments back over a 36-month period.

The consequence for John is that he will have to check with his CPA or tax preparer about an adjustment on the current tax returns that he files, since he will want to report an adjustment for the “pay-back” for CRDP. The current year’s CRDP income and pay-back will be adjusted in the Form 1099 that he receives; this portion of his reported income for the current year will just be zeroed out, since he received it but then paid it back in the current year. His only reportable income for the current year would be his unreduced remaining monthly pension share.

**Why “The Evil Twins”?**

As we have seen, the new CRSC benefit can have a significant and devastating impact on CRDP payments. The receipt of even $1 of CRSC acts to wipe out any CRDP payments, without notice to the former spouse. Furthermore, John can elect to alternate between CRSC and CRDP once a year, a whipsaw tactic that will totally confuse and exhaust Mary and her lawyer.
First of all, it is essential that the non-military spouse (and, for that matter, the SM/retiree) obtain an attorney who knows this area of the law. This area is very complex and hidden booby traps are everywhere. The spouse should either obtain a lawyer who knows the area from past experience or, if possible, hire an attorney who is a Guard or Reserve JAG officer, a former JAG officer or a retired JAG officer. Jackey D. Nichols, the former Chief of the Claims Division, Office of the Staff Judge Advocate, Ft. Dix, NJ, says, “One of the biggest tragedies I see is when a client going through a divorce picks an attorney based on price vs. one who knows all the unique issues associated with a military couple's divorce.” If the current divorce attorney doesn’t know the law, perhaps he or she should associate co-counsel for this particular piece of the divorce case. Since there are several different court interpretations in this complex area – and sometimes no judicial precedent at all – it is recommended that counsel research the laws of the jurisdiction involved as to the eligibility for recovery of retirement pay amounts waived because of these choices outlined above.

Next, the lawyer representing the servicemember’s spouse must recognize that he or she can’t predict much of anything before the SM’s retirement. You could ask whether the SM is an active-duty trooper or a member of the Guard or Reserve. Since most of the creditable service of Guard/Reserve personnel is made up of weekend drill and two weeks of annual training, or “summer camp,” you could predict that these Reserve Component SMs are less likely to suffer from disabling conditions arising from combat, hazardous duty or other qualifying causes. But remember that even Guard and Reserve members could be injured in operating a plane, helicopter or weapons system, which would likely qualify for CRSC, while on a regularly scheduled field exercise or during a six-month mobilization in the Middle East.

If you are representing the spouse of an active-duty SM, you can make some educated guesses as to whether there might be a combat-related disability or injury by assessing whether the SM might be a “Front-Line Felicia” or a “Backfill Bill.” Is the servicemember a paratrooper or a Ranger, or perhaps a garrison trooper who sits at a desk all day?

Be sure to consider the job assignment or military occupational specialty as well as the unit to which Felicia or Bill belongs. If Felicia is a supply sergeant, does that mean she’s unlikely to suffer combat-related injury from her military service? Suppose she is, during training missions, also a jumpmaster in charge of parachute drops from the aircraft. Just because Bill is a Navy nurse doesn’t mean that he’s in the clear. What if his assignment is with Navy Seal Team 6, jumping out of helicopters and swimming to the objective?

Be sure to ask lots of questions of your client. Does the military spouse demonstrate any injuries or disabilities? Has he been in the hospital for anything related to military service? What is the state of his health?

If you are trying to negotiate a settlement, draft your settlement document with an indemnification clause. Be sure that you include language that states that the military spouse will repay your client any moneys that are removed from Disposable Retired Pay due to any action of the retiree. Such an indemnification clause might read:

The military retired pay of respondent shall be apportioned between the parties, with the petitioner receiving 39.375% of same, without regard to any reductions or setoffs due to disability compensation or any other reason except the premium for the Survivor Benefit Plan. If the respondent shall do anything – actively or passively – to reduce the share of amount of petitioner, then he shall indemnify and reimburse her for any such loss, including associated costs, expenses, attorney’s fees and consequential damages.
On the other hand, the military member might be wary of “indemnification language” or division of the gross retired pay, in which case a weaker set of words might be useful or necessary, if they will – under state law – provide sufficient protection for the nonmilitary party:

**Petitioner shall receive 39.375% of respondent’s retired pay, which is at present based solely on 22 years of creditable service without any reductions. The respondent shall do nothing to reduce petitioner’s share of same or interfere with her receipt of same.**

This clause attempts to identify the number of years of service as the sole measure of determining respondent’s compensation in retirement. Even better would be a sentence which attempts to forecast the likely longevity retired pay of the respondent so that the judge would have a benchmark to use in case the member took actions in the future that diminished the share of the spouse. Ideally, the settlement agreement would also have a general breach clause, which is standard in most marital settlement agreements, stating that any breach of the agreement by a party entitles the other to payment of damages, costs, expenses and reasonable (or all) attorney’s fees.

If the member is already retired, try this for the “strong” language clause:

**Respondent is currently receiving gross military retired pay of $2,000 a month, with a deduction of $130 for SBP premium to cover his former spouse. If the respondent does anything to reduce the share or amount of petitioner as to disposable retired pay, including CRDP, then he will indemnify and reimburse her for any such loss, including associated costs, expenses, attorney’s fees and consequential damages.**

If a more diluted form of language is needed for the second sentence in the above paragraph, try this:

**The respondent will do nothing to reduce petitioner’s share of same or interfere with her receipt of same.**

Another possibility is to hold alimony open. Consider reserving the issue of alimony or setting alimony at $1 per year, to allow the court to make an adjustment in this area if the anticipated share of retired pay is diminished by the retiree’s actions in electing CRSC over CRDP.

If the case goes to trial, make sure you draft the decree or are allowed input. The decree should, if possible, specify that the SM/retiree shall indemnify the former spouse if he does anything to reduce her share, along the lines of the above “agreement language.” If your state law and cases do not allow this, or if the judge refuses this language, try to have the following inserted in the decree:

**The parties shall comply with the terms of this order and shall exercise good faith in doing nothing to interfere with the terms provided by the court herein.**

Breach of the good faith requirement, by election of CRSC, would allow the court to impose sanctions, assess damages, use the contempt power, or apply other remedies in favor of the wronged spouse.

**Practical Pointers – Attorney for the Servicemember/Retiree**

There are only two things that the attorney for the SM or retiree should say. The first is: “Do the right thing.” This means treating the former spouse fairly and not destroying the returning share of retired pay (CRDP) which she should be receiving, or else sharing the CRSC which is paid to the retiree. CRDP is the means of reconciling accounts for servicemembers and spouses in light of the VA disability compensation and the retired pay waiver. CRDP means everyone gets treated fairly, retirees get paid disability on top of retired pay, and former spouses receive their share of a pension that formerly was diminished because of the waiver. Leaving that intact is one option for the retiree. Sharing CRSC, which
involved compensation without taxes, is also fair if it does not reduce the share of retired pay to which the former spouse is entitled.

The second piece of advice would be, “Get out your checkbook.” This means that there will be, in all likelihood, a long, hard fight over the issue of CRDP if CRSC is elected. Since CRSC destroys CRDP, the retiree should expect to see serious litigation over this. As in the area of VA disability and the retired pay waiver, many cases will wind up in the appellate courts. And, predictably, most courts will follow the trail blazed by VA disability litigation, holding that a retiree cannot unilaterally reduce the former spouse’s share or amount of returning retired pay (CRDP) by selecting CRSC. The remedies will vary – indemnification, damages, compensatory alimony, or complete revision of the property division. The result will be the same in most state courts. They will side with the former spouse and the prior judgment, decree or agreement, especially if it contains an indemnification clause.

**Resources**


(Rev. 1/24/08)

* * *

This SILENT PARTNER was prepared by COL Mark E. Sullivan (USAR, Ret.). For revisions, comments or corrections, contact Mr. Sullivan at Sullivan & Tanner, P.A., 5511 Capital Center Drive #320, Raleigh, N.C. 27606 [919-832-8507] or at mark.sullivan@ncfamilylaw.com.

(Note: Four attachments follow this page)
**RETIREE ACCOUNT STATEMENT**

**STATEMENT EFFECTIVE DATE**
Dec 16, 2005

**NEW PAY DUE AS OF**
Feb 01, 2006

**SSN**
123-45-6789

**PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES**

Major John Q. Doe, USAF (Ret.)
123 Green St
Apex, NC 27511-1234

**DFAS-CL POINTS OF CONTACT**
DEFENSE FINANCE AND ACCOUNTING SERVICE
US MILITARY RETIREMENT PAY
PO BOX 7130
LONDON KY 40742-7130

COMMERCIAL (216) 522-5955
TOLL FREE 1-800-321-1080
TOLL FREE FAX 1-800-469-6559

myPay
https://myPay.dfas.mil
1-877-363-5677

**PAY ITEM DESCRIPTION**

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<td>ALLLOTMENTS/BONDS</td>
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**PAYMENT ADDRESS**

**YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)**

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<th>TAXABLE INCOME:</th>
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<tr>
<td></td>
<td>FEDERAL INCOME TAX WITHHELD:</td>
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**TAXES**

FEDERAL WITHHOLDING STATUS: SINGLE
TOTAL EXEMPTIONS: .01
FEDERAL INCOME TAX WITHHELD: 209.05

**SURVIVOR BENEFIT PLAN (SBP) COVERAGE**

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<th>ANNUITY BASE AMOUNT:</th>
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<td></td>
<td></td>
<td>SPOUSE DOB:</td>
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<tr>
<td></td>
<td></td>
<td>CHILD DOB:</td>
<td>13 MAR 1996</td>
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</table>

THE ANNUITY PAYABLE IS 55% OF YOUR ANNUITY BASE AMOUNT UNTIL YOUR SPOUSE REACHES AGE 62. AT AGE 62, THE ANNUITY MAY BE REDUCED DUE TO SOCIAL SECURITY OFFSET, OR UNDER THE TWO-TIER FORMULA. THAT REDUCTION MAY RESULT IN AN ANNUITY THAT RANGES BETWEEN 40% ($1100.20) AND 55% (1512.77) OF THE ANNUITY BASE AMOUNT. THE COMBINATION OF THE SBP ANNUITY AND THE SOCIAL SECURITY BENEFITS WILL PROVIDE TOTAL PAYMENTS FROM DFAS AND THE SOCIAL SECURITY ADMINISTRATION OF AT LEAST 55% OF YOUR BASE AMOUNT. THE ACTUAL ANNUITY PAYABLE IS DEPENDENT ON FACTORS IN EFFECT WHEN THE ANNUITY IS ESTABLISHED.
## RETIRED SERVICEMAN FAMILY PROTECTION PLAN (RSFPP) COVERAGE

<table>
<thead>
<tr>
<th>RSFPP COVERAGE TYPE</th>
<th>ANNUITY PAYABLE</th>
<th>RSFPP COST</th>
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## ALLOTMENTS AND BONDS

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<th>ALLOTMENT TYPE</th>
<th>PAYEE</th>
<th>AMOUNT</th>
<th>BOND FACE VALUE</th>
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<tbody>
<tr>
<td>INSURANCE</td>
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## TAX LEVY DEDUCTIONS

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<th>DATE OF LEVY</th>
<th>MONTHLY AMOUNT</th>
<th>BALANCE</th>
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## TAX LEVY DEDUCTIONS

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</table>

## GARNISHMENT DEDUCTIONS

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## FORMER SPOUSE PROTECTION ACT DEDUCTIONS

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## MISCELLANEOUS DEBTS

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<th>ACCUMULATED INTEREST</th>
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## ARREARS OF PAY BENEFICIARY INFORMATION

YOU HAVE ELECTED ORDER OF PRECEDENCE. THE FOLLOWING BENEFICIARIES ARE ON RECORD:

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<thead>
<tr>
<th>NAME</th>
<th>SHARE</th>
<th>RELATIONSHIP</th>
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<tbody>
<tr>
<td>JANE P. DOE</td>
<td>.00</td>
<td>WIFE</td>
</tr>
</tbody>
</table>

## MESSAGE SECTION

BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDF AMOUNT IS $283.96.

***

DFAS-CL 7220/148 (Rev 03-01)
This letter is in response to your request for information from the retired pay account of the member listed below.

MAJ John Q. Doe, USAF (Retired)  
Social Security Number 123-45-6789

<table>
<thead>
<tr>
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<tr>
<td>Net Pay</td>
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</tr>
</tbody>
</table>

Comments: ____________________________________________________________________________________________________

Sincerely,

Retired and Annuity Pay Operations
Lucinda Lopez, Esquire  
Lopez and Pasquale, LLP  
123 Green Street  
Apex, NC 27566

Dear Ms. Lopez:

This letter acknowledges the request made by your client, Mary P. Doe, under the Routine Use published in the Federal Register for a calculation of her payment under the Uniformed Services Former Spouse’s Protection Act from the military retired pay account of MSG John Q. Doe, USAF (Retired).

The monthly Former Spouse payment is calculated as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross Pay</td>
<td>$1,838.00</td>
</tr>
<tr>
<td>Less VA Waiver</td>
<td>-673.92</td>
</tr>
<tr>
<td>Disposable Pay</td>
<td>$1,164.08</td>
</tr>
<tr>
<td>Award</td>
<td>x 43%</td>
</tr>
<tr>
<td>Former Spouse Pmt</td>
<td>$500.55</td>
</tr>
</tbody>
</table>

These documents contain Personal Data covered by the Privacy Act of 1974. Please ensure this information is protected from unauthorized access and/or disclosure.

If I can be of further assistance, you may contact me at the above address.

Sincerely,

Mickey L. Green  
Freedom of Information Act/Privacy Act  
Office of Corporate Communications and Legislative Liaison
Mr. Jack Green  
123 Main Street  
Apex, NC 12345  

Dear Mr. Green,  

A review of your former spouse pay account indicates that you have been overpaid in the amount of $5170.74.  

According to our pay records, you have been overpaid in the amount of $5170.74 from May 1, 2013 through October 31, 2013 @ $861.79 per month x 6 months. Your former spouse portion of the retiree’s Concurrent Disability Pay is being recouped for the payment of Combat Related Special Compensation retroactive through the same period. We will be deducting $143.63 per month until the debt if fully recovered.  

If you have already paid this debt or believe it is invalid, please contact Defense Finance and Accounting Service, U.S. Military Retirement Pay, at the address indicated at the close of this correspondence. Under 37 U.S. Code 1007(c) you have the opportunity (1) to either inspect and copy or to request and receive a copy of government records related to the debt and (2) for review of the decision related to the debt.  

Collection action on this total debt amount of $5170.74, will begin with your payment dated January 1, 2014 at a monthly rate of $143.63 and will continue until the total amount as shown above is collected in full. You will receive a Former Spouse Account Statement showing the reduction in your monthly entitlement amount.  

If this method of repayment will create a financial hardship, forward the Defense Finance and Accounting Service, U.S. Military Retirement Pay, at the address indicated at the close of this correspondence, a request for a more lenient repayment plan, specifying the amount you wish to be deducted each month. Please note that the total debt if $5170.74 cannot take longer than 36 months total to collect.  

In certain circumstances, the law provides for partial or full waiver of debts which result from erroneous payments. You may request an application for waiver by contacting the Defense and Finance Accounting Service, U.S. Military Retirement Pay, at the address indicated at the close of this correspondence.  

However, submission of a waiver application does not automatically guarantee forgiveness of your debt or suspend the requirement to continue collection action. If you choose to apply for a waiver, you must enclose a copy of this correspondence with your application.  

We are interested in working with you to resolve this debt. Should you have any further questions or requests to any of the above, please contact me at Defense Finance and Accounting Service; U.S. Military Retirement Pay; P. O. Box 7130; London, KY 40742-7130; or call toll free 1-800-321-1080, commercial (216) 204-2404.  

Sincerely,  

Louis Roe, Military Pay Technician  
Retired and Annuity Pay
SILENT PARTNER
Defending Against SBP in Divorce

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.

Introduction

In many military divorce cases, the servicemember (SM) or retiree does not want the former spouse to have SBP coverage. The reasons vary, depending on the facts, finances and circumstances of the case.

- It might involve the cost of the Survivor Benefit Plan – former spouse coverage costs 6.5% of the selected base amount in active-duty cases. It is approximately 10% of the base in the case of a member of the RC (Reserve Component, or Guard/Reserve).
- The reason might involve the belief that the former spouse (FS) isn’t entitled to it, due to the short term of the marriage, the financial self-sufficiency of the FS, or the circumstances leading up to separation and divorce.
- Or the reason might be a disagreement over the benefit (55% of the base amount) in comparison to the pension share of the former spouse (almost always less than 50% of the pension).

In the sections below, we try to help John Doe, a SM or retiree, from providing coverage under the Survivor Benefit Plan (SBP) for Mary Doe, his soon-to-be ex-wife. Here are the strategies.

I. “Don't Shout – Leave It Out”

If no one says anything about SBP, then it will be lost at divorce. While a spouse is covered automatically before and after the SM's retirement (in active duty cases), former spouses are not. The divorce terminates SBP coverage.

There are several cases holding that “silence is golden” in a settlement, and the FS doesn’t get a survivor annuity if the agreement doesn’t mention it.1 These cases show the importance of stating that the

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1 Two non-military cases from New York are McCoy v. Feinman, 99 N.Y.2d 295, 755 N.Y.S.2d 693, 785 N.E.2d 714 (2002) (malpractice case) and Kazel v. Kazel, 3 N.Y.3d 331, 786 N.Y.S.2d 420, 819 N.E.2d 1036 (2004). There are several military cases involving the survivor Benefit Plan. These include Padot v. Padot, 891 So. 2d 1079 (Fla. Dist. Ct. App. 2004); In re Marriage of Lipkin, 208 Ill. App. 3d 214, 566 N.E.2d 972 (App. Ct. 1991) (court specified that SBP is a separate and distinct property interest); and In the Interest of A.E.R., 2006 WL 349695 (Tex. App.–Fort Worth) (not reported) (settlement failed to mention SBP, and court held that SBP is an additional benefit other than the bargained-for receipt of a percentage of the ex-husband’s retired pay). In Williams v. Williams, 37 So.3d 1171, 2010 Miss. LEXIS 315 (2010), an agreement stating that the wife was to have “all survivors’ benefits otherwise accorded to her by law…” did not mean, according to the appellate court, that she was entitled to Survivor Benefit Plan coverage, since SBP is a personal choice, and it is not mandated by law. The chancellor erred in requiring SBP coverage for wife since the agreement of the parties did not entitle wife to coverage. In Creech v. Creech, 2010 Ky. App. Unpub. LEXIS 194, the parties had agreed to the wife getting 50% of the marital share of pension. The agreement was not reduced to writing but was dictated into the record. Later the wife filed a motion later to get SBP, the judge denied her motion and the Court of Appeals upheld the judge’s order, stating that the wife cannot get what she failed to mention in her settlement. In Morris v. Morris, 2011 Iowa App. LEXIS 736, the appellate court found that “half of husband’s military retirement” doesn’t mean SBP coverage; in this case, the husband provided life insurance of $350,000 in the settlement, which didn’t mention SBP. The ex-wife also lost out in Kubo v. Kubo, 2013 Mo. App. LEXIS 745, a case involving a 2008 divorce decree, followed three years later by a motion made by the former spouse to include the Survivor Benefit Plan in an order dividing military retired pay which had already been submitted in 2008 to DFAS. The trial court denied relief to her, and the appellate court affirmed that decision.
former spouse is entitled to SBP coverage clearly and promptly. In In re Marriage of Hayes v. Hayes, the Oregon Court of Appeals confronted a pension division settlement containing a generally worded clause that gave the wife half of the marital share of the pension of the husband. It was silent as to SBP, death benefits, or a survivor annuity. The Court stated:

Wife, meanwhile, contends that, under the terms of the dissolution judgment, the trial court retained jurisdiction “of the division of the retirement benefits described herein so it can make any modifications to this judgment which may be necessary to accomplish the goals stated herein relating to the division of said benefits.” In her view, “the inclusion of a survivor benefit in the DRO does nothing more than ensure that Wife receives her appropriate marital share of his retirement, regardless of the possible death of [husband].”

Wife’s argument notwithstanding, nothing in the language of the 1998 judgment suggests that the court retained authority to award wife survivor benefits. Rather, the judgment provides that the court retained jurisdiction to effect the “division of the retirement benefits.” Moreover, there is no indication in the record that the parties ever contemplated that wife, as part of the dissolution proceeding, would receive a death benefit—a property interest discrete from her interest in husband’s military retired pay. Thus, to the extent that the DRO [domestic relations order] awarded wife benefits that were not part of the original property division, it erred. . . . For that reason, we reverse and remand with instructions to delete that provision of the DRO.3

Make sure that the settlement "closes the door" on any other benefits or entitlements for Mary Doe, so that she doesn't come back later claiming, "We meant for that to be in our settlement too!" There are several appellate cases in which the omission of SBP coverage has not impaired the former spouse’s attempts to demand survivor annuity coverage later on. When writing the settlement, speak broadly of “all military retirement benefits” instead of just “retired pay,” which leaves one wondering what else might there be to divide. Closing the door to other benefits means stating that “This is all she wrote” – there’s nothing else to distribute. A sample clause might read,

This is the full, final and entire distribution of John Doe’s retirement benefits that the parties have made. It covers all benefits and, whether within or outside this settlement, there is nothing else to divide or which they intend to divide or allocate.

Making sure that the settlement is silent regarding SBP is not enough. Use the “belt and suspenders” approach to ensure that the door is not only closed, but also locked and bolted.

II. "Get a Life" (Life Insurance, That Is)

Another approach is to offer to let Mary get a life insurance policy on John Doe to replace the SBP.4 The advantages of life insurance, as an alternative death benefit, are -

> It gives Mary a lump sum in hand at the time John dies (unlike SBP, which is doled out month-by-month by DFAS (the Defense Finance and Accounting Service);

> It is non-taxable (unlike monthly SBP payments); and

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2 228 Or. App. 555, 2009 208 P. 3d 1046 (Ct. App. 2009)
4 Gurnell v. Gurnell, 2011 Cal. App. Unpub. LEXIS 6643 (judge required ex-husband to provide $100,000 term life insurance for FS at her cost, appellate court affirmed).
> It isn't affected by the remarriage of the FS (compared to SBP, which is suspended if Mary Doe remarries before age 55).

The issue which remains is "Who pays for it?" Traditionally, the argument for John would be that Mary needs to pay, since it is solely for her benefit. The SBP is worthless for a SM (servicemember) or retiree. John has to be dead for it to come into existence, so why should he want it? Why should he have to pay for it or for life insurance, its substitute? The life insurance should be funded by monthly payments by Mary Doe; all John needs to do is show up for a physical.

If Mary rejects this and insists on John's paying, then make sure that his payments are tax-deductible. This is possible, even if the obligation is not called "alimony," so long as:

> the parties are not living in the same household;
> the obligation is pursuant to a written instrument;
> it is not designated as child support; and
> payments do not last beyond the death of the payee.

Such payments are deductible by the payor under Section 215 of the Internal Revenue Code, and they are included in the taxable income of the recipient under IRC Section 61 and/or 71.

### III. Put a Price Tag on It

When the former spouse, having been given these settlement options, rejects them all and demands SBP coverage, John's strategy starts with valuation of the asset.\(^5\) Under the law of most states, every asset acquired, or partially acquired, during the marriage is marital or community property. Get an expert witness to "price the SBP" so that Mary Doe is charged with that value is the grand scheme of things, as part of the division of their marital or community property items.\(^6\) If Mary is faced with the cost of this benefit, which may be $50,000, $100,000 or even more, she may be forced to rethink that simple approach of "I demand it." She will have to start thinking about a new issue: "If you want to buy it, then you'll be charged with the price on the tag" for the present value. In other words, "There's no such thing as a free lunch."\(^7\)

Failure to value the SBP can be a fatal flaw. Some courts have held that the lack of a value placed on a marital asset means that the asset cannot be divided.\(^8\) The burden is on the party who wants to include the asset in the marital estate or the community for division by the court.

### IV. Put a Price Tag on It – An Example

A 1998 Pennsylvania case, *Palladino v. Palladino*, shows the importance of insisting on valuation of the survivor annuity in a pension division case. In a divorce case, the Common Pleas Court judge found that the wife had requested that the husband elect survivor annuity (SA) coverage to continue payments to her if he died before she did. The Husband’s expert valued the survivor annuity at about

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5 *IRMO Lipkin*, 566 N.E. 972 (Ill. App. '91) (survivor annuity is a distinct property interest within the pension plan, it needs to be distributed at divorce; it has a determinable value, computed by using life expectancy tables).


7 See, e.g., *In re Marriage of Forney*, Ore. App. 405, 244 P. 2d 849 (2010) (court ruled that the Survivor Benefit Plan, even though earned by pre-marriage service, had to be valued; the trial judge had disregarded a value placed on it of $84,000 by the husband’s expert).

$57,000, and he also testified that the value of the pension with the SA was about $93,000, and the value without the SA was about $108,000.

The court found that the survivor annuity, which derived from the husband's pension, has a value independent of the pension's value. Since the wife elected to get the survivor annuity, she needed to be charged with the value of the annuity in equitable distribution. The monthly cost of the survivor annuity was about $84.

The court decided that $57,000 was the proper value of the survivor annuity, and this ought to be charged to the wife, based on the value of a single-premium annuity to purchase the equivalent survivor annuity payable to the wife. The judge refused to value the survivor annuity as the difference between the value of the pension WITH the survivor annuity and the pension WITHOUT the annuity - a differential of roughly $15,000. The judge found that the survivor annuity was marital property and charged the wife with its value ($57,000).

The Superior Court, in an opinion by Judge Patrick R. Tamilla, affirmed the trial court's decision. This meant that the wife did not get any of the husband’s pension. She only received the survivor annuity, which she had requested.

Of significance to the trial judge many have been the fact that the wife was younger - by many years - than the husband, thus improving greatly the chances of her getting payments under the survivor annuity option. Thus the husband received a fair distribution (not a windfall) regarding his pension; he kept the entire amount of his retired pay, simply because his ex-wife insisted on getting the survivor annuity. His monthly pension was cut by around $80 monthly, but the wife was not entitled to receive any of his pension during his life. Since the trial court's decision was appealed to and affirmed by the Superior Court of Pennsylvania and it was not appealed further, this case represents the state of the law (as of 1998) in Pennsylvania. 9

V. Give the Judge an Education

Make sure that the judge knows “the facts of life” when counsel for the FS tries to claim that this is a mandatory and integral part of the military retirement program. John Doe’s attorney will want to make the following argument when faced with a claim for SBP as an afterthought or an entitlement by the former spouse:

- The Survivor Benefit Plan is not a pension. A pension is earned by the employee for services rendered during his or her career, and it is a form of deferred compensation. SBP is not compensation, and it was never earned by the former spouse.
- Instead, the Survivor Benefit Plan is an annuity. It may – or may not – be chosen at the time of retirement or allocated at dissolution, depending on the intentions and plans of either or both of the parties.
- SBP doesn’t come automatically with the military pension. It must be elected, or—when the matter is before the court—adjudicated through a court order.
- The Survivor Benefit Plan is not even found in those sections of Title 10, U.S. Code, which deal with regular and non-regular (i.e., Guard/Reserve) retirement, or the section dealing with military pension division (the Uniformed Services Former Spouses’ Protection Act), 10 U.S.C. § 1408. It is located in an entirely different section. The provisions for SBP are found at 10 U.S.C. § 1447-1455.
- It cannot be said that Congress intended for spouses and former spouses to receive SBP coverage as part of the division of servicemembers’ military pensions, since the USFSPA is not a substantive law allocating rights to the parties in a divorce proceeding. Rather, it is an enabling act, making provision for the courts of the states to divide—or not divide—military pensions as

they see fit. It contains no reservation of rights and no set of spousal entitlements.

Too few judges understand that SBP is a survivor annuity which is optional. It may be elected or waived. It is usually purchased when the non-military spouse wants to continue payments after the SM/retiree dies. The SBP sections of the U.S. Code were enacted at different times over the years, and they were intended to be useful options for the military member who is planning for death and dependents, not a requirement for the SM/retiree. It is not an obligation, it is an option.

VI. Shift the Premium

Another way of "raising the price tag" for SBP is to argue to the judge (or to opposing counsel during negotiations) that Mary Doe should pay ALL of the premium associated with the SBP. As it is, the cost of SBP is taken out of John's retired paycheck before the division of the pension between the parties. This effectively means that the premium, 6.5% of the selected base amount in retirements from active duty, is shared between the parties in the same ratio as the underlying pension, such as 50-50 or 70-30. Mary can and should be ordered to pay the full cost of the premium.

This premium-shifting can be done by requiring her to reimburse John every month for the SBP cost. Of course, this is not likely to be attractive to John. He may feel that she will stop paying him or just forget about the reimbursements at some point. Yet DFAS will not honor an order that attempts to allocate the costs of SBP to one party or the other. So it must be done using a "back-door" approach.

The alternate approach for a transfer of payments to Mary must be done with a reduction in her percentage of the pension. Although the math is more complicated than presented here, the calculations result in a reduction of about 4% from the former spouse's share of the military pension in a retirement from active duty. Thus if Mary were originally entitled to 40% of John's retired pay, based on a 50% presumptive share, years of marital pension service, and total military pension service, her "adjusted share" of the pension might be about 36%. It is important to note that the math can only be accomplished when John has already retired. The most that can be done pre-retirement is a description of what will occur when John retires and all the numbers are finally known. At that point, Mary’s share of the pension will be adjusted to effectuate payment of the entire premium out of her share by lowering the share from a “nominal amount” (what it would be without the premium shift) to an “adjusted amount,” (the new percentage after the premium is taken out of her share).11

Virtually no state has a statute which articulates the requirements for payment of the cost of a survivor annuity. In fact, few states have rules in case law specifying the payment duties between the parties. In those states which do have rules, the results are inconsistent; some judges order the husband to pay in full, some order the wife to pay, and some order the division to be 50-50. For these reasons, John's attorney needs to be prepared (for the mediation, the pretrial conference or the trial) with research into state law and with arguments from fairness and equity to require the transfer to Mary of the full responsibility for payment of SBP costs. The motto to use, in effect, is that you have to "pay to play."

10 Conaway v. Conaway, 899 S.W. 2d 574 (Mo. App. '95) (former spouse is entitled to a share of survivor annuity at her own cost to ensure against future contingencies and protect her interest in marital portion of pension); In re Marriage of Moore, 251 Ill. App. 3d 41, 621 N.E. 2d 239 (Ill. App. 3rd Dist. 1993) (federal civil service case, appellate court upheld trial judge's ruling that awarded survivor annuity to wife, requiring her to compensate husband for the cost, approximately $100/mo.); In re Marriage of Sonne, Calif. Ct. of Appeals (6th Dist.), June 2010 (wife was awarded entire survivor annuity from husband’s employment and ordered to pay entire cost); Bienvenu v. Bienvenu, 72 P. 3d 531 (Haw. App. 2003) (judge ruled that wife would reimburse retiree for SBP cost; neither term was in the parties’ settlement and Court of Appeals approved wife’s advancing cost of SBP to husband); Rykken v. Rykken, 2012 Neb. App. LEXIS 17 (former spouse was ordered to pay retiree $270/mo. SBP premium from her share of the pension).

11 Weiss v. Weiss, 702 S.W. 2d 948 (Mo. App. 1986) (husband was ordered to provide wife with federal civil service survivor annuity, but court reduced her share of his pension from 44% to 38.4% so she would bear entire cost of coverage).
VII. Other Strategies

Some courts recognize the inherent unfairness of awarding the entire annuity when there has only been a short marriage. This approach, asking the court to decline to award SBP when the marriage is relatively short, may be effective in avoiding division of John Doe’s SBP.12

When a party fails to ask for SBP, sometimes the courts will bar award of the annuity, stating that it must be brought to the court’s attention so that the judge can put a value on it and consider the survivor annuity award in the entire scheme of property division.13 This means that counsel for the member or retiree must be alert at the pleadings stage of the case to spot this issue.

SILENT PARTNER is prepared by Mark E. Sullivan, a retired Army Reserve JAG colonel and the author of The Military Divorce Handbook (American Bar Association, 2d Edition, Aug 2011) For revisions, comments or corrections, contact him at Sullivan & Tanner, P.A., 5511 Capital Center Drive, Suite 320, Raleigh, N.C. 27606 (919-832-8507); E-mail – mark.sullivan@ncfamilylaw.com.

12 Pierce v. Pierce, 42 So. 3d 658 (Miss. App. 2010) (case remanded due to insufficient findings to justify SBP award in short-term marriage).
13 IRMO Griffith, 2013 Iowa App. LEXIS 370 (Non-military case in which the majority of pension was acquired before the parties’ marriage. The wife did not petition court for allocation of survivor annuity, and the appellate court agreed with the trial judge that equity does not require allocation of the survivor annuity to the wife). Wallace v. Wallace, 2007 Ariz. App. Unpub. LEXIS 1121 (Divorce petition filed before H’s retirement, but decree granted after it. Parties were married 22 years, former spouse filed motion 11 months after divorce for allocation of SBP to her, since it was omitted from decree. Judge rejected her claim that it was community property. Court of Appeals stated that, since former spouse did not raise SBP issue during divorce proceedings, judge could not evaluate the effect of ordering SBP, and cost of SBP, on overall division of property.
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.

Introduction

When you’re doing a military divorce case and it comes time to deal with the military retirement benefits, you should know in advance what documents need to be reviewed. This rule applies whether you’re the attorney for the servicemember (SM) or retiree, or you represent the spouse or former spouse. You need to have a certain number of “docs” in order to understand the process, the current or prospective retired pay of the member or retiree, and what benefits are available or at risk for the spouse/former spouse.

Active Duty and Reserve Service

When the individual (“John Doe” in this example) is currently on active duty, you’ll need the Thrift Savings Plan statement (see below) and the Leave and Earnings Statement, or LES. The latter provides information on the pay grade of John, his date of initial entry into service, his current pay, his Social Security number and other data which will help in preparation of a military pension division order. The specifics which the LES gives include the following:

1) NAME: The member’s name in last, first, middle initial format.
2) SOC. SEC. NO.: The member’s Social Security Number.
3) GRADE: The member’s current pay grade.
4) PAY DATE: The date the member entered active duty for pay purposes in YYMMDD format. This is synonymous with the Pay Entry Base Date (PEBD).
5) YRS SVC: In two digits, the actual years of creditable service.
6) ETS: The Expiration Term of Service in YYMMDD format. This is synonymous with the Expiration of Active Obligated Service (EAOS).

The LES is issued electronically twice a month to active military personnel. The second LES of the month will not have all required information, only the initial LES. The first LES shows all pay and entitlements for the month and if the SM elects to be paid twice a month, the second LES will only show the amount paid along with the basic information. Practitioners should request more than just one LES to ensure they receive all the information.
RC personnel (the RC stands for Reserve Component, which means National Guard and Reserve) will have an annual form called RPAS, or Retirement Points Annual Statement, which shows how many retirement points they have accumulated in that year and in previous years. The RPAS should, but does not always, reflect periods spent on active duty, both annual training, and also prior active duty service. Practitioners sometimes get confused when SMs have service in both the active and reserve component. SMs can obtain this from their branch of service – it’s not a public record. You can also get valuable information on what rank the RC member is, when he or she entered military service, and what the monthly pay is for periods of active duty (such as the Annual Training that each RC member serves once a year) by obtaining his or her most recent LES.

**Active-Duty Retirement**

If John Doe has already retired from active duty from the armed forces (Army, Navy, Air Force, Marine Corps or Coast Guard), here are the documents which should be available for analysis. They may be obtained either from the retiree or from the federal government:

1. Letter from DFAS showing expected amount of pay and calculations
2. All Retiree Account Statements (RAS) issued since date of retirement
3. Retirement orders
4. All disability rating decision letters from the Department of Veterans Affairs (VA)
5. DD Form 214, (Member Service Record, issued upon discharge). If SM was on active duty in the National Guard, he or she will have an NGB 22, not a DD Form 214
6. Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage, DD Form 2656-1
7. Data of Payment for Retired Personnel, DD Form 2656
8. Forms 1099-R
9. Thrift Savings Plan statements

**Letter from DFAS.** Several months before John Doe retires, he’ll get a letter from the retired pay center that shows him exactly how his retired pay is computed, how many years of creditable service were counted, and what amounts are deducted from his total retired pay (such as taxes and SBP premium). Don’t expect to find VA waiver information here; John hasn’t gotten that yet if he has not yet retired.

**Retiree Account Statement.** This is the retiree’s “pay statement.” It is issued electronically and a new one is generated on a regular basis, and always when there is any change in regard to one’s retired pay – whether it’s reduced tax withholding, a change in allotments, or an increase in the VA waiver. Every retiree can access the RAS by using the secure website of the retired pay center. For DFAS (Defense Finance and Accounting Service), which handles all of the armed services except the Coast Guard, the “MYPAY” secure website address is [https://mypay.dfas.mil](https://mypay.dfas.mil). Signing up for service is easy. Once John Doe is signed up and is looking at the web page, all that is needed is his login ID and password. It takes
less than a minute to log in, select the form involved, click on “Printer-Friendly Version,” and then print it. See ATCH 1 for an example.

You can find on the RAS the total amount of monthly retired pay, any mandatory deductions from it (e.g., VA waiver, Survivor Benefit Plan premium) to arrive at taxable retired pay, and the taxes which are withheld from retired pay. It will also show the type of SBP election and the birthdate of the beneficiary. The RAS also shows voluntary allotments and any waiver of retired pay that exists due to receipt of disability compensation from the Department of Veterans Affairs. If the individual cannot or will not produce it, then obtain it from the retired pay center using a release signed by the individual (see ATCH 2 below) or, if he’s uncooperative, a court order or subpoena signed by a judge.

**Retirement Orders.** This is a document, usually one sheet of paper, which specifies the facts regarding retirement. It might state, for example, that Major John Q. Doe, SSN 123-45-6789, was retired from the U.S. Army on May 31, 2012. Retirements always take place on the last day of the month, and the first payment arrives a little over a month later – in this case, on July 1, 2012. That’s because you have to **survive** for the month in order to be entitled to retired pay for it. This document is helpful in tracking down retroactive payments. If the individual retired on 5/31/12 and started receiving retired pay on 7/1/12, then you will be able to determine how many months (or years) he’s been collecting it without sharing any portion with your client, Mrs. John Doe!

**Disability Rating Decision Letters.** Upon retirement, John Doe can visit the nearest VA hospital for a physical. This may result in a notification that he has one or more service-connected disabilities (wounds, illnesses or other medical conditions). The notification is in the form of a letter. The decision letter from the regional office of the Department of Veterans Affairs will tell you what his disability rating is. If it’s less than 50%, then there’s a dollar-for-dollar reduction in John Doe’s retired pay, which means a similar lowering of the share apportioned to Mrs. Doe by the court. This will show up on the RAS as a “VA Waiver,” which is entered as a deduction from John Doe’s total retired pay before you get to “taxable income.”

**DD Form 214.** This is the discharge certificate for John Doe. It shows all dates of his service for his entire career.

**DD Form 2656-1.** This form is used for election of coverage under the Survivor Benefit Plan (SBP), and it shows what the SM/retiree has chosen. If the divorce is about to occur or has already been granted, this should reflect former spouse coverage so as to protect the flow of funds for Jane Doe, the ex-wife, after the death of the SM/retiree. If John Doe dies first, Jane can receive 55% of his retired pay for the rest of her life if she has “former spouse coverage” and does not remarry before age 55. A former spouse
election must be made by John on this form and it must be sent to the retired pay center within one year of the divorce.

**DD Form 2656.** This form covers the information which the retired pay center, usually DFAS, needs to process continuous payments of retired pay and former spouse payments from the pension.

**Form 1099-R.** This is the retiree’s equivalent of a W-2 form. The retired pay center issues this at the end of January of each year, covering retired pay for the previous year. John can get this from the secure DFAS website. If he’s not signed up, it comes by mail (just like a W-2 form).

**Thrift Savings Plan (TSP) statements.** This tax-deferred retirement account is similar to a 401(k) plan. Individuals who participate get a “Thrift Savings Plan Participant Statement,” which can either be an Annual Account Summary or a Quarterly Account Summary. On the bottom of the second page on the right will be found “Form TSP-8” and you can tell if it’s a *uniformed services TSP statement* (i.e., a military TSP as opposed to a federal civil service TSP statement) by checking on the first page under the account number and individual’s date of birth. You should find “Retirement Coverage: Active Duty.”

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**Guard or Reserve Retirement**

When John Doe has served in the National Guard or the Reserves, then you’re dealing with an “RC retirement.” As mentioned above, RC stands for “Reserve Component,” which means Guard or Reserve service leading to retired pay.

Be careful in using the verb “retire” when referring to RC personnel, since it can have two meanings. One meaning is when John begins to receive retired pay. This is “pay status” for him; it’s usually at age 60. Another meaning is the point in time when John stops drilling and applies for retirement. Once this occurs, he’s in what is called the “gray area,” since the ID cards for these former RC personnel used to be gray.

If John Doe is or was an RC member, then you have a different list to cover. Here are the documents which should be available. You can get them either from John Doe or from the federal government:

1) All Retirement Points Annual Statements (RPAS)
2) Notice of Eligibility (NOE or “20-Year Letter”), sent upon attainment of 20 creditable years of Guard or Reserve service
3) Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate, DD Form 2656-5
4) Application for retirement
5) Retirement orders
6) All disability rating decision letters from the Department of Veterans Affairs (VA)
7) Thrift Savings Plan statements
RPAS statements - These are issued once a year by the Reserves. They show how many AD (active duty), ADT (active duty for training) and IDT (inactive duty for training) points have been accumulated for the year by John Doe. For an explanation on how this works (which is way beyond the scope of this article!), go to: https://www.hrc.army.mil/tagd/retirement%20points%20accounting%20system%20rpas or visit the Human Resources Command (HRC) of the Army at www.hrc.army.mil, type “AR 140-185” into the search window, then click on “Retirement Points Accounting System.” If you want to estimate John Doe’s retired pay based on the number of points he acquired (and other factors), go to the above HRC website and type into the search window “retirement points calculator.”

AR 140-185 – governs the awarding and crediting of retirement points. Additionally, Department of Defense Instruction (DODI) 1215.7, 1215.9, 7000.14-R volume 7A chapter 1, and AR 140-1 supplement retirement point regulatory guidance for all military services.

National Guard soldiers have their retirement points recorded in a separate retirement point accounting system. Upon retirement, NG soldier points are not automatically fed into RPAS.

NGB Form – is used as a record of the NG duty performed by a soldier. Before a former or retired member of the National Guard can start to draw retired pay, he or she must submit a retired pay certification packet (including a summary of all retirement points earned while in the NG) to the HRC Retired Pay Office. Upon certification of retired pay, HRC forwards the certification to DFAS.

HRC no longer mails the annual or revised AHRC Form 249-2-E to Reserve soldiers. Soldiers must visit the “My Record Portal” at the secure HRC website to view and print their own personal copy of the annual points statement, AHRC Form 249-2-E. For additional assistance, soldiers may contact the Human Resource Service Center at 1-888-276-9472. HRC does not maintain a record of National Guard Retirement points. NG soldiers maintain their own personal copy of NGB 23, and they submit it along with their retired pay packet when applying for retired pay to ensure that the NGB 23 is placed in their records.

NOE - The “20-Year Letter,” as this form letter is commonly called by those in the Guard or Reserve, signifies the milestone of 20 creditable years of service. In addition, it requests a decision on what a married SM will do regarding a survivor annuity, known as the Survivor Benefit Plan (see below).

DD Form 2656-5 - This form is where John Doe makes the decision on his survivor annuity. There are three options for Survivor Benefit Plan coverage for married RC members: Option A - John can choose deferred decision (meaning he wants to wait until he attains pay status to decide); Option B - John can select deferred coverage (payments to Jane would start at “pay status,” usually age 60); or Option C - John can select immediate coverage. The first two options require Jane Doe’s written consent.
Application for Retirement - This is John’s request to stop drilling and be transferred to the Retired Reserve. It means that he will no longer be accumulating points toward retirement. Unless John decides to take a discharge (which is infrequent), which would mean that he’s not subject to recall and his pay grade and years of service are frozen, he’ll be paid – upon attainment of pay status – according to his pay grade at that time, not at the time he applies for retirement.

Retirement Orders - See above under “Active-Duty Retirement.”

Disability Rating Decision Letters - See above.

Thrift Savings Plan (TSP) statements - See above.

(Note: If John is already in pay status, then you would want to obtain the RAS and Form 1099-R, as with an active-duty retiree).

Concluding Comments

Forget your umbrella? Don’t let the “paper tiger” rain on your parade! All these papers can be your next “Excedrin headache!” If you don’t do this type of case often, you should consider associating co-counsel or a consultant. Sometimes the “sidekick” you hire will be a Guard or Reserve judge advocate; sometimes you’ll want to reach out to a military retiree who used to be a JAG officer. Wherever you go, remember that the duty to obtain competent co-counsel is an ethical requirement. A consultant for your next military case will:

- Know the statutes (the Uniformed Services Former Spouses’ Protection Act, or USFSPA, found at 10 U.S.C. 1408; the Survivor Benefit Plan, found at 10 U.S.C. 1447-1455; and the numerous military retirement sections in the U.S. Code);
- Understand the rules (the DODFMR, or Department of Defense Financial Management Regulation, and the parallel regulations for Coast Guard, Public Health Service and National Oceanographic and Atmospheric Administration, or NOAA);
- Know the law in other states (some states have NO cases or statutes on such issues as who pays for SBP, what the SBP benefit level is, and division of accrued leave; knowing what other states are doing in these areas can provide useful guidance for your trial judge);
- Have examples (samples of such documents as the Leave and Earnings Statement, the Retiree Account Statement or the TSP Quarterly Statement, so you can provide these to the other side when the opposing party professes ignorance about what document you’re talking about); and
- Know the ropes (have contact points within DFAS and other federal agencies who can answer questions).

(Rev. 1/29/13)
SILENT PARTNER is prepared by Mark E. Sullivan, a retired Army Reserve JAG colonel and the author of The Military Divorce Handbook (American Bar Association, 2d Edition, Aug 2011) For revisions, comments or corrections, contact him at Sullivan & Tanner, P.A., 5511 Capital Center Drive, Suite 320, Raleigh, N.C. 27606 (919-832-8507); E-mail – mark.sullivan@ncfamilylaw.com.
## Retiree Account Statement

**Statement Effective Date:**
DEC 16, 2005  
**New Pay Due As Of:**  
FEB 01, 2006  
**SSN:**  
123-45-6789

Please remember to notify DFAS if your address changes.

**Major John Q. Doe, USAF (Ret.)**  
123 Green St.  
Apex, NC 27511-1234

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### Pay Item Description

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### Payment Address

**Year To Date Summary (For Information Only)**

**Direct Deposit**

- **TAXABLE INCOME:** 1,975.42  
- **FEDERAL INCOME TAX WITHHELD:** 191.31

**Taxes**

- **FEDERAL WITHHOLDING STATUS:** SINGLE  
- **TOTAL EXEMPTIONS:** 01  
- **FEDERAL INCOME TAX WITHHELD:** 209.05

**Survivor Benefit Plan (SBP) Coverage**

- **SBP Coverage Type:** Spouse and Child(ren)  
- **Annuity Base Amount:** 2750.50  
- **Spouse Cost:** 176.78  
- **Child Cost:** 50  
- **55% Annuity Amount:** 1,512.77  
- **40% Annuity Amount:** 1,100.20  
- **Spouse DOB:** 12 Dec 1945  
- **Child DOB:** 13 Mar 1996

The annuity payable is 55% of your annuity base amount until your spouse reaches age 62. At age 62, the annuity may be reduced due to social security offset, or under the two-tier formula, that reduction may result in an annuity that ranges between 40% ($100.20) and 55% ($1512.77) of the annuity base amount. The combination of the SBP annuity and the social security benefits will provide total payments from DFAS and the social security administration of at least 55% of your base amount. The actual annuity payable is dependent on factors in effect when the annuity is established.
PRIVACY ACT RELEASE FORM

DATA REQUIRED BY THE PRIVACY ACT OF 1974 (5 U.S.C. 552A). AUTHORITY: Title 5 U.S.C. 552, Title 5 U.S.C. 552a, Title 5 U.S.C. 551, DoD 5400-7-R, and DoD 5200.1-R. PURPOSE: To obtain and maintain information upon which to base a reply or inquiry. ROUTINE USES: Data may be provided under any of the DoD “Blanket Routine Uses” published at http://privacy.defense.gov/notices/. Disclosure: Voluntary; however, if you fail to provide all the requested information DFAS may not be able to fulfill your request in a timely manner.

I authorize the federal government, and any agency or department thereof, to release the following documents to [ATTY NAME, ADDRESS]:

[list documents here]

Date____________________
Signature ____________________________________ Social Security Number _____________
Printed Name_________________________________
Address _____________________________________
City _______________________________ State ______________ Zip Code _____________
Home Telephone ___________________ Work Telephone _____________________
Date of Birth ________________

9
SILENT PARTNER

Mirror, Mirror, On the Wall – Survivor Benefit, Part or All?

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.

Life and Death

It was late in the day and Lester Lawyer was about ready to pack up and head home when he heard a commotion in the waiting room; one of his clients was asking to be seen right away. Ace Barker, a sergeant major in the Army, was already heading down to his office when Lester realized that he’d have “one more appointment” before this day was through.

“It’s all about the divorce and my Survivor Benefit Plan,” SGM Barker explained after the initial pleasantries were exchanged. “I just found out that Gladys wants the whole thing – the big enchilada! She wants to have her SBP based on my full retired pay, even though we’ve only been married for ten years and I might stay in the Army 30. That’s just not right, Lester!”

“What do you mean?” asked Lester.

“Here’s what I’m talking about,” responded Barker. “Suppose that my wife, Gladys, is awarded SBP coverage by the judge. That means she’d get 55% of my retired pay if I die before her. Now those ten years of marriage mean that she only gets 25% of my pension if I retire at 20 years of service, and she only gets 1/6 of my pension if I push it out to 30 years. But she gets 55% of the pension if I die first. Lester – we have to do something! She should only get part of the SBP, not all of it.”

“It sounds like you’re worth more dead than alive,” commented Lester. “But it’s not easy to make the death benefit match the life share, Ace.”

Lester went on to explain why it’s so hard to make the SBP payment for a former spouse (FS) proportionate to the military pension share which she will be getting when the servicemember (SM) retires. Here’s a summary.

Variables

The mirror-share difficulty involves the variables which go into figuring out Gladys Barker’s share of the pension in the first place. Here are the basics:

> SBP (the Survivor Benefit Plan) is anchored to a base amount, and the payment to a former spouse is always 55% of that base.

>`The 55% is fixed – it can never vary. But that's not true when it comes to the base amount, which is usually specified in dollars. It can be full retired pay down to $300 a month.

> The base can also be specified as a percentage of retired pay (e.g., 30% of retired pay, which means that the SBP payment would be 16.5% of retired pay, since 30% of 55% is 16.5%).

-1-
> If no dollar amount is specified, then the military member is defaulted into "full retired pay" as the base. And if he is married at the time of retirement, his spouse must consent in writing to any option short of "full retired pay" as the base.

To get the "right base amount," that is, the figure which - times 55% - would yield an amount that is the same as the FS’s share of the retired pay, Lester Lawyer would have to know his client’s retired pay. That’s where the problems begin.

**Amount of Retired Pay**

It's first necessary to set out some "facts of life" about servicemembers (SMs) and how their retired pay is calculated.

> It's a fact of life that no SM knows his retired pay, except for those who are in the "retirement zone" (i.e., the period of about 6 months before active-duty retirement).

> Except for these "select few" in the retirement zone, no SM knows when he or she will retire, and years of creditable service is a factor in determining what the retired pay will be. Even with the best of plans, there are sometimes "StopLoss Orders" which bar retirement for certain individuals when their services are necessary for national defense.

> No one knows what Congress will do regarding military pay in the future, and this is another factor in determining how much a SM is paid at retirement. Usually retired pay is based on the individual's "high-3" – the average pay for the highest three continuous years of compensation during his career. "High-3" pay can't be known in mid-career.

> In fact, many SMs cannot even predict what rank they will be when they retire, and this is yet another factor which determines the "high-3" amount.

**Rules in Divorce Court**

Here are some important divorce rules:

> Most states divide pensions, including military retired pay, using the "time rule" when the individual is still serving toward the pension (on active duty, in SGM Barker’s case). This means that the FS, upon the SM's retirement, gets a pension award expressed in a formula, which is usually: FS = 50% X (years of marriage during service) ÷ (years of total service) X final retired pay. So one must know the "service fraction" to find out what portion of his retired pay that the ex-wife will get, and that will not be known until retirement. It could be 50% times 10/30 if Barker were married for 10 years and served a full 30 while on active duty. Or it might be 50% times 10/20 if he were married for 10 years during a 20-year active duty career. So the marital fraction isn't known (and one’s retired pay is likewise unknown) unless the SM is on the threshold of retirement.
What Is Known, and the Numbers Needed

This means that a SM will knows only at retirement the exact value of two numbers - the marital fraction (or portion of the pension earned during marriage which is to be split with the FS) and the pension amount. It's only at that time when the choice can be made to zero in on a proportionate share or "mirror award." At any other time it's just plain guesswork, which no one likes, most ex-spouses won't agree to, and most judges don't even understand (unless they have a good background in pension division or military service). It is only the SM who is in "the retirement zone" who has full control over creating an SBP structure which allows the pension share for the former spouse to be the same as what she will receive in monthly SBP payments when the retiree dies before the former spouse. This situation involves:

a) knowing the marital fraction or percentage that the former spouse will get;

b) knowing the final retired pay of the SM;

c) using those to calculate the amount of the pension share due to the former spouse; and

d) dividing that amount due to the former spouse by .55 to arrive at the base amount which is to be chosen.

Putting Off the Decision

Ace Barker, listening to this explanation, still wasn’t satisfied. “Well then, why don't we just write up the consent order, agreement or divorce decree to say that we won't make a decision on SBP and the base amount for "former spouse coverage" till I retire? That would solve the problem, right?”

Lester explained that this wouldn’t work. “The failure to make an SBP election now means that, if you were to die before retirement, there is NO coverage for your ex-wife. Your election of former spouse coverage must be done within one year of your divorce decree. It's unlikely – nay, inconceivable – that Gladys would agree to "no coverage now" in order to obtain a proportionate amount at your retirement. Why would she want to gamble like that?”

Issues for Retirees

Ace Barker exhaled audibly. “Whew... I've already got 2½ Excedrin headaches, and I'm not even a lawyer! What about those who are divorcing when they're already retired – is it easier for them? Or for my friends in the Guard or Reserve?”

Lester patiently explained that military retirees are also in a difficult situation. In their case, the decision on SBP has already been made – either for full coverage for a spouse or, with written consent, for lesser coverage (that is, a base amount which is less than full retired pay). Once the base amount has been chosen, it generally cannot be changed. They are left with the decision that they have made, and they cannot alter the amount of the base to effect a mirror
image between the pension payment and the SBP payment. It's already been "cast in concrete," so to speak.

Guard and Reserve Members

“Concrete overshoes” similarly describes those in the Guard or Reserve, also known as members of the Reserve Component (RC). At the 20-year mark, an RC member (i.e., a member of the Guard or Reserve) is sent a form on which to choose the appropriate SBP election for the member and, if married, the spouse. There are three options and a default.

The form, which is called DD Form 2656-5, allows as Option A the postponement of the decision until the individual reaches "pay status," usually age 60. If the divorce happens to occur at this point, in the zone of several months before age 60, then it's possible to "make a match," since one can calculate the member's retired pay, the share which the former spouse will receive, and the base which is to be chosen to accomplish a mirror award of SBP. The latter is done with calculations similar to those shown in a) - d) at the above section.¹

That is ordinarily not the case, however, and the other alternatives for an RC member will not allow a match. Option B on DD Form 2656-5 involves the election of SBP coverage, to be effective for the surviving spouse only when the member turns age 60 (or, if dead, would have turned 60). This option is chosen at the 20-year mark, that is, when the RC member has 20 "good years" of service. Any selection of a lower base amount must be made then, even though the member and his spouse cannot know what the member's final retired pay will be.²

The reason for this is as follows. Even if the member requests (at the 20-year point) approval for immediate placement in the Retired Reserve or its equivalent, the rate of pay upon which his retirement amount is based will not be known till he turns 60. This is the active duty pay rate for all ranks and it's set each year by Congress. No one can possibly know that in advance of age 60 or thereabouts.³

There is a third option for RC members. It's Option C, called “RCSBP,” or the Reserve Component Survivor Benefit Plan. It entitles the member to immediate coverage of a spouse or former spouse, even if the RC member dies a week or a month after the selection. The member doesn't have to have reached 60 to reap coverage benefits under this option; the SBP payments start at the member's death. There is also a default provision – if the RC member fails to make an election, then he or she is defaulted into Option C.

But Option C won’t work in effecting a proportionate share either. The choice is made, whether it's full retired pay as the base or a lower amount (with written spousal concurrence) at the 20-year mark. Once again, there is no way of knowing at the 20-year point what one's retired pay will be at "pay status," usually age 60, if the individual chooses transfer to the Retired Reserve. And the marital fraction in the formula which is generally used, made up of marital retirement points over total retirement points, is impossible to determine since the denominator keeps on growing with each creditable year of Guard or Reserve service. These two variables

⁴
make it just as impossible to create a "mirror award" with Option C as they do with Option B for the Guard or Reserve member.

**Conclusion**

Thus seeking the “mirror award” is almost always chasing after an illusion. The conditions necessary to create it – divorce at the time of choosing what SBP benefit will apply and knowing what one’s retired pay will be – virtually never occur. Often this results in a spouse or former spouse receiving *too much* in terms of a death benefit. That benefit does not come close to matching the pension share which she or he had been getting until the death of the SM/retiree. Unless a reasonable means of sharing or shifting the cost of SBP is negotiated, the former spouse will be unnecessarily enriched.

* * *

*SILENT PARTNER* is prepared by Mark E. Sullivan, a retired Army Reserve JAG colonel and the author of *The Military Divorce Handbook* (American Bar Association, 2d Edition, Aug 2011) For revisions, comments or corrections, contact him at Sullivan & Tanner, P.A., 5511 Capital Center Drive, Suite 320, Raleigh, N.C. 27606 (919-832-8507); E-mail – mark.sullivan@ncfamilylaw.com.

1 Option A requires written consent of one’s spouse.
2 Spousal concurrence in writing is also required for Option B.
3 If the RC member didn’t choose "immediate application for retirement" when responding to the 20-year letter, then there is yet another variable to throw into the mixture. The "marital fraction" – made up of retirement points gained during the marriage, divided by total career retirement points – cannot be known until the RC member decides to apply for retirement. If that is not at the 20-year mark, then there will be additional retirement points which accumulate and there's no way of figuring the value of a fraction when the denominator keeps on increasing by 50 or more points each year.
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. 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, 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 Act4 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. 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, Koelsch v. Koelsch from Arizona, and the California cases of In re Luciano, In re Marriage of Gillmore and In re Marriage of Scott. 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. 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:

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

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. 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.

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:

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

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 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. 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. The U.S. Supreme Court upheld this requirement in the Mansell decision. 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 Servicemembers 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.

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
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:

<table>
<thead>
<tr>
<th><strong>Issue</strong></th>
<th><strong>Comments</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Check for pension division jurisdiction – must be ONE of the following:</td>
<td>Required by 10 U.S.C. 1408(c)(4)</td>
</tr>
<tr>
<td>1. Domicile in North Carolina, OR</td>
<td>Check on state income taxes, home ownership, voting, vehicle title, tags, driver’s license, in-state tuition</td>
</tr>
<tr>
<td>2. Consent to court’s jurisdiction</td>
<td>General appearance – the filing of motions or pleadings which recognize the court’s authority</td>
</tr>
<tr>
<td>3. Residence in N.C. but not due to military assignment</td>
<td>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.</td>
</tr>
<tr>
<td>Receive evidence of period of creditable service for servicemember [SM] or retiree</td>
<td>Usually this is on his LES [Leave and Earnings Statement], DD 214 [discharge statement], retirement orders, or “points statement” [for Reserve/Guard personnel]</td>
</tr>
<tr>
<td>Calculate coverture fraction</td>
<td>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.</td>
</tr>
<tr>
<td>State formula [for SM] or percentage [for retiree]</td>
<td>Usually this is 50% X coverture fraction X final retired pay</td>
</tr>
<tr>
<td>Check for “10/10” direct-pay requirements</td>
<td>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</td>
</tr>
<tr>
<td>Require direct pay by SM/retiree until DFAS begins payment</td>
<td>DFAS will not pay non-military spouse until 90 days after retired pay starts.</td>
</tr>
<tr>
<td>Check on “back payments” for retiree</td>
<td>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.</td>
</tr>
<tr>
<td>Check for “20/20/20” for medical care</td>
<td>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.</td>
</tr>
<tr>
<td>Provide SBP [Survivor Benefit Plan] for non-military spouse by:</td>
<td>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.</td>
</tr>
<tr>
<td>__ordering SM to elect [or retiree to maintain] SBP coverage;</td>
<td>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.</td>
</tr>
</tbody>
</table>
Checklist for Military Pension Division Orders in North Carolina

<table>
<thead>
<tr>
<th>☑ Issue</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>__at specific base amount (full retired pay or less);</td>
<td>SBP payments are 55% of the base amount, which can be entire retired pay down to $300.</td>
</tr>
<tr>
<td>__to be served on DFAS within deadlines; and</td>
<td>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.</td>
</tr>
<tr>
<td>__entry of order granting former spouse coverage at time of divorce</td>
<td>DFAS will only honor title designation (i.e., spouse coverage, former spouse coverage), not designation by name.</td>
</tr>
<tr>
<td>Use model military pension division order to avoid mistakes</td>
<td>Found in SILENT PARTNER, “Getting Military Pension Division Orders Honored by DFAS.”</td>
</tr>
</tbody>
</table>

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:

<table>
<thead>
<tr>
<th>☑ Advantages of Survivor Benefit Plan</th>
<th></th>
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</thead>
<tbody>
<tr>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>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).</td>
<td></td>
</tr>
<tr>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>Inflation-Proof: Payments are increased regularly by cost-of-living adjustments to keep up with inflation.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>☑ Disadvantages of Survivor Benefit Plan</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>Inflexible: As a general rule, once SBP is chosen, it cannot be canceled.</td>
<td></td>
</tr>
<tr>
<td>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.</td>
<td></td>
</tr>
</tbody>
</table>
Let's see how SBP works. For a married SM on active duty, the election for SBP must be made before or at retirement. 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. 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.

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. 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. When a separation agreement provides for SBP election, a court can order specific performance to enforce this provision.

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. It has been rejected in the rest of those state cases addressing the issue. 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. 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).

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. 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.

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:

<table>
<thead>
<tr>
<th>Website</th>
<th>URL</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA FAMILY LAW SECTION’S MILITARY COMMITTEE:</td>
<td><a href="http://www.abanet.org/family/military/">www.abanet.org/family/military/</a></td>
</tr>
<tr>
<td>NC STATE BAR MILITARY COMMITTEE:</td>
<td><a href="http://www.nclamp.gov">www.nclamp.gov</a></td>
</tr>
<tr>
<td>DFAS WEBSITE:</td>
<td><a href="http://www.dfas.mil">www.dfas.mil</a></td>
</tr>
</tbody>
</table>

**ENDNOTES**

10


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."


In re Luciano, 104 Cal. App.3d 956, 164 Cal. Rptr. 91 (1980).


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].

10 U.S.C. 1408(e)(1).


7 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.

10 U.S.C. § 1408(c)(1).


These provisions are found in the military pension division regulations, supra note 1.


10 U.S.C. 1448(b)(2).


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 survivor annuity option available with military retired pay is called SBP, the Survivor Benefit Plan. It continues a stream of income to the spouse, former spouse or other beneficiary after the death of the servicemember or retiree. When a divorce is pending or imminent, the lawyers on both sides should have a clear idea of what it is and how it works. Here’s a summary… “by the numbers.”

0 Exactly ZERO subsequent orders for SBP coverage can “restart the clock” on the one-year deadline explained below. In other words, you cannot retrieve the missed year by convincing the court to enter yet another order awarding SBP to a former spouse (FS) if it’s already been awarded in the first place.

1 > There is only ONE year in which to send to DFAS* the election form for former-spouse SBP coverage. See #2 below for an explanation of the two deadlines.
> There is ONE DFAS office which accepts SBP application forms, and it’s located in London, KY. Transmit the forms and court papers there by registered or certified mail, return receipt requested (or by fax) to ensure that you have proof of receipt. The address is on any of the SBP forms mentioned in this SILENT PARTNER.
> Only ONE adult beneficiary is allowed for SBP. It cannot be subdivided between a current spouse and a former spouse. Tell the client to make a choice: “Your EX or your NEXT.”
> 2656-1 is the number of the form to use when the servicemember (SM) or retiree applies for former-spouse SBP coverage (DD Form 2656-1).

2 > The TWO deadlines for SBP applications are: Election by SM/retiree must be done within one year of the divorce; a “deemed election” by the FS, when the SM/retiree fails or refuses to make the election required by court order, must be submitted within one year of the order granting SBP coverage.
> TWO to three years after retired pay begins is the period in which the parties may agree to terminate SBP coverage (between the 25th and the 36th months after “pay status” for the retiree). This election cannot be reversed, and there is no refund of premiums already paid.

3 Guard and Reserve retirees have THREE options for SBP coverage when they attain 20 “good years” toward retirement and receive their NOE (notice of eligibility) or “20-year letter.” Option A is to wait till pay status (usually age 60) to decide; this means no coverage in the interim period. No interim coverage also applies to Option B, which involves election of coverage but age 60 as the effective date (or when the SM would have turned 60 if death occurs before then). Option C, the only one which doesn’t require written spousal consent, is called “RCSBP,” or Reserve Component SBP and it means immediate coverage for the Guard/Reserve member. If the member fails to return the form to DFAS, the default choice will be applied, which is Option C.

4 FOUR percent is the approximate reduction needed to the former spouse’s pension share to shift payment of the entire premium to her or him in a retirement from active duty. There are tables and an Excel spreadsheet in The Military Divorce Handbook (Am. Bar Assn., 2nd Ed 2011) which allow more precision in the calculation. Without an adjustment or a decree requiring one party to reimburse the other directly, DFAS will take the premiums “off the top” before retired pay is divided between the parties, since that’s required by federal law. Thus the premium is divided in the same ratio as the pension itself (e.g., if John gets 70% of the pension, he pays 70% of the SBP premium).

5 > FIVE-five percent (55%) of the selected base amount is the benefit paid out to the beneficiary. The base amount is the full retired pay (as the “default option”) or any amount down to $300 a month.
> FIVE-five (55) years old is the age limit for remarriage. If a former spouse remarries before then, SBP coverage is suspended. It will be reinstated if that marriage ends in death, divorce or annulment.
>2656-5 is the number of the form which is used by a Guard or Reserve member to make one of the three
<p>| | |</p>
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| 6 | **SIX** point five percent (6.5%) is the premium for those electing spouse/former spouse coverage in a retirement from active duty.  
>2656-6 is the number of the form to use for a permitted change of beneficiary, such as when a retiree remarries and there is no requirement for former-spouse coverage (DD Form 2656-6). |
| 7 | **SEVEN** words describe the single unchangeable rule for SBP when the base has been selected initially: 
“You can not change the base amount.” |
| 8 | **EIGHT** words will do it for an SBP election clause: “John will elect former spouse SBP for Mary.” |
| 9 | One four **NINE** (149) is the number of the Dept. of Defense form (DD Form 149) used to apply to the appropriate Board for the Correction of Military Records (BCMR) when a deadline has been missed and the former spouse wants to get the military to change the records to allow coverage. There are BCMR’s for the Army, Navy, Air Force, Marine Corps and Coast Guard. The time to apply is within three years of the discovery of the error. |
| 10 | > **TEN** percent is the approximate percent of base amount paid by Guard/Reserve retirees for RCSBP coverage.  
>2656-10 is the number of the form used to make a “deemed election” by the FS (DD Form 2656-10) when the SM/retiree fails or refuses to make the election required by court order. The deemed election must be submitted to DFAS within one year of the order granting former-spouse SBP coverage. |

*DFAS, the Defense Finance and Accounting Service, processes SBP applications for all of the uniformed services except the Coast Guard, and the commissioned corps of the Public Health Service and the National Oceanographic and Atmospheric Administration. Locations for the latter pay centers are found on any SBP form mentioned above.  

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SILENT PARTNER

Military Pension Division: The Servicemember’s Strategy

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.

Introduction

The battlefield in military divorces is often military pension division. An overview of the battlefield is contained in “Military Pension Division: Scouting the Terrain,” and the topics below expand that advice to help the pension recipient (SM or retiree) to cut corners, save money, and reduce or eliminate benefits for his (or her) spouse or ex-spouse.

While many SMs are vociferous in their resistance to division of the military pension, it is important to remember and remind the client of the cost of an aggressive and unyielding defense. Once they know the odds and the costs, few clients have the will or the pocketbook for diehard resistance. Few want to risk what’s at stake in visitation, child support, alimony and other matters in a case that could be settled, just to engage in “nuclear warfare” regarding the pension. All states allow military pension division. As will be outlined below, only a few U.S. jurisdictions limit military pension division based on years of service or years of marriage. The job of a good attorney is to guide the client with sage advice and serious judgment, rather than to be pulled along blindly by a client who wants to “set a precedent” – usually (as clients state it) “for the principle of the matter.” Is it worth it? Will it help the client with the rest of his (or her) case? Advice and guidance for the “big picture” along these lines is the task of the lawyer who is truly serious about helping his or her military pension division clients.

Roadblocks and Minefields

Our client in this example is Army Colonel Bill Roberts. He’s been in the Army 20 years and now he’s going through a divorce. He wants to know how to stop Mrs. Roberts from getting the courts to divide his military pension rights. He also wants to know, in the event she succeeds, what his maximum exposure is.

To advise him fully, we need to first look at the roadblocks and minefields that may be placed in Mrs. Roberts' way, blocking the division of her husband's military retirement rights. Here are the obstacles that may be discussed with COL Roberts:

Constitutionality. If COL Roberts says, "They can't do that -- it's unconstitutional," don’t get your hopes up. The constitutional attack on pension division will fail. This issue has been rejected in all state courts that have considered it. The same argument was also rejected by the Court of Appeals for the Federal Circuit in 1990 in Fern v. United States.¹

Retroactivity. In general, the claim for military pension division must be made at a time when both federal and state statutes allow for such division. As to federal law, a 1990 amendment to USFSPA limits pension division to decrees entered after June 25, 1981 (the date of McCarty v. McCarty²). It states that decrees entered before this date which did not treat (or reserve for later treatment) military retired pay as marital or community property cannot be modified to reopen the issue.³ Practitioners should check the appropriate state laws or cases to determine when military pensions became divisible.
Timeliness. The next point of analysis for COL Roberts' case is whether the claim was filed procedurally in a timely manner. This is a technical question of state law. Some states limit the filing of equitable distribution claims to the period up to the granting of a divorce or dissolution; if you wait till after that, you’re too late. Others require the filing to occur after the separation of the parties; you can’t just file suit for property division while you’re still living together. Under North Carolina law, for example, the rights of the spouses to an equitable distribution of marital property are deemed to vest at the time of the parties' separation; the right to equitable distribution does not exist if the claim for it is filed before the separation of the parties. In addition, the right to equitable distribution must be asserted in North Carolina before the final divorce judgment; a divorce judgment destroys the right to equitable distribution unless that right is asserted prior to the granting of a judgment of divorce. If such parameters exist under state law and the claim of Mrs. Roberts for equitable distribution falls outside these limits, the court will have no jurisdiction to entertain her request for an equitable distribution of marital property. This defense involves complex procedural research that is best left to the expert; consult a good civilian family law attorney or refer this kind of case to a family law specialist.

Waiver. Mrs. Roberts’ rights may have been waived. Did she sign a separation agreement or property settlement agreement? An antenuptial agreement can also waive property division rights. In some jurisdictions, such an agreement does not have to define specifically the property that is involved or that is exempted from division. In those states, even if there is no mention of the pension, a general clause in the agreement which waives the marital rights of the parties can be construed as barring a claim for equitable distribution.

Nonvested Pension Benefit. There are only a few jurisdictions which provide that, by law, a military pension may not be divided. These fall into the following categories: states where there is a “vesting requirement,” one state where ten years of marital military service is required (Alabama) and one jurisdiction (Puerto Rico) which bars division of any non-contributory pension plan.

A pension is vested when the employee is entitled to receive something upon termination of employment, whether that is in the form of a return of contributions or an early (and reduced) retirement benefit. A service member with 11 years of service, for example, would not have a vested pension because there is no right to retire after 11 years’ service. A member with 25 years of service, on the other hand, would clearly have vested retirement rights.

There are two states, Indiana and Arkansas, which clearly limit court jurisdiction over pension division to those pensions which are “vested.” The Arkansas Court of Appeals held in Holaway v. Holaway that an unvested pension is non-divisible separate property of the party who earned it. In Indiana the right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share, and the burden is on the non-employee spouse to prove that the pension is vested.

Alabama law provides a unique limitation on pension division jurisdiction. The law specifically states that retirement benefits are not divisible as marital property unless the employee or “owning spouse” has ten years of pension service during the marriage.

A third jurisdiction, Puerto Rico, refuses to allow the division of noncontributory pensions at all. Puerto Rico treats these pension rights as separate property. Thus a military pension would not be divisible there although the Thrift Savings Plan, being contributory, would be divisible by the courts.
There may be several states which could divide COL Roberts’ military pension. To minimize his exposure, COL Roberts will want to "shop around" for a jurisdiction that will either limit pension division (as with a vesting requirement), bar pension division entirely (Puerto Rico) or will otherwise allow military pension division on the best terms for him. COL Roberts can employ these divisibility provisions to his advantage in the pension division litigation. If he is stationed in Indiana, for example, he might decide to become domiciled there and then file for divorce in that jurisdiction so as to exclude his pension benefit from division. In like manner, Mrs. Roberts and her attorney will want to examine each state or territory which may have jurisdiction where she may file for division of COL Robert’s pension to see whether the laws there allow such division.

It is impossible for any individual attorney to know each of these state rules. To find out which states have vesting requirements, examine the Army JAG School’s guide to the Uniformed Services Former Spouses’ Protection Act, publication JA 274.9

The importance of this point for Mrs. Roberts' attorney is that it is vital to shop around for the jurisdiction that will allow military pension division on the best terms for Mrs. Roberts. For COL Roberts, the opposite approach would apply; he needs to find a jurisdiction which can hear his case but will deny the division of his pension. How to go about this forum-shopping, which is implicitly allowed by the triple jurisdictional approach of 10 U.S.C. 1408(c)(4), is found below.

**Type of Pension**

The pension rights contemplated by USFSPA involve non-disability "longevity retirement" under 10 U.S.C. 1401-12, not retirement for disability under Title 10, Chapter 61, or disability compensation under Title 38. In *Mansell v. Mansell*10 the U.S. Supreme Court in 1989 held that a pension, to the extent it is based on disability compensation, is not divisible under USFSPA, and that DFAS may divide only “disposable retired pay” as that term is defined in USFSPA. Disability pay is a complicated issue. A member of the military can take advantage of two different systems for disability benefits.

**Military Disability Retired Pay.** Military disability retired pay is available for those members who are sufficiently disabled that they cannot perform their assigned duties. If a member has enough creditable service, he or she may be placed on the “disability retired list” and may begin to draw disability retired pay. If a SM is able to retire with military disability pay -- if he has been rated as disabled by the military -- his amount of disability retired pay would be based on the higher of two different amounts of pay. There are three steps to this process. For the purposes of this example, assume that he has an active duty base pay of $3,000 per month, 20 years of creditable service and a disability rating of forty percent (40%).

- The first step is to calculate the SM’s normal retired pay based on his years of service, which we will assume for this example is 2.5% times his years of service times base pay. In this case, it comes to 2.5% X 20 years X $3000, or $1500.
- The next step is to multiply his base pay times his disability rating. This is achieved by multiplying $3,000 by 40%, or $1,200.
- The SM would then receive the higher of these two amounts ($1500 per month in military disability retired pay in this example).
USFSPA makes divisible only the amount of pay that is the difference between the two above amounts, that is, the difference between his gross retired pay and his disability pay based solely on the disability rating. In this example, the difference is $1,500 minus $1,200, or only $300 as divisible military retired pay. Thus although the SM’s wife might be entitled to half of $1,500, or $750 per month as her spousal share of military pension rights, a disability retirement would yield her only half of $300, or $150 per month. Her attorney should consider a provision for the agreement -- whether consent order or separation agreement -- that protects her interest in her husband’s pension against a possible disability retirement in the future. This is discussed in the SILENT PARTNER, *Military Pension Division: The Spouse’s Strategy.*

**VA Disability Benefits.** A second system of disability retirement benefits is administered by the Department of Veteran's Affairs (VA). If the extent of disability is not such as to qualify a SM for military disability retired pay, he might still elect to receive monthly payments from the VA. To qualify for these, he would have to waive an equivalent amount of his military retired pay. Almost all retirees who can make this election do so. Why? There are two distinct benefits for the military client who is contemplating a divorce:

- While taking this option doesn’t provide an increase in gross income, it does yield a net increase in pay since the VA portion of the SM’s compensation is tax-free. Thus if the SM’s pension (without disability) were $1,500 per month and his disability were evaluated as equivalent to $1,000 per month in VA benefits, he could waive the same amount of taxable longevity pension in order to receive this amount with no taxes on it. His monthly benefits would still total $1,500, but only $500 of this would be subject to taxes if he makes this choice.

- In addition, the VA benefit is not subject to division. Only the longevity-based portion of the pension is divisible in divorce court.

This latter “benefit” for the SM was the issue involved in the *Mansell* case. The Supreme Court, after reviewing the history of *McCarty* and USFSPA, proceeded to define the problem as one of statutory interpretation of 10 U.S.C. § 1408(c)(1), which allowed the division of military pensions, and Section 1408(a)(4), which exempted VA disability benefits from inclusion in the term, “disposable retired pay.” While the courts are allowed to treat disposable retired pay as community or marital property, the Court stated that they were not allowed to treat all retired pay as such -- only disposable retired pay. Thus the Supreme Court ruled that states are preempted from dividing the retired pay that a retired military member waives in order to receive VA disability pay. As 10 U.S.C. § 1408(a)(4) now reads, both these types of benefits are exempted from division to the extent stated above:

“Disposable retired pay” means the total monthly retired pay to which a member is entitled less amounts which... (C) in the case of a member entitled to retired pay under chapter 61 of this title [10 USC 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... (D) are deducted because of an election under chapter 73 of this title [10 USC 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.
Practitioners should be aware that Congress has recently taken steps to modify the VA waiver requirement. In 2003 Congress passed legislation taking effect January 1, 2004 to allow concurrent receipt of both forms of payments – retired pay and disability benefits – for certain classes of eligible retirees. The statute is Public Law 108-136, Sections 641 and 642, and the restoration of retired pay is known as Concurrent Disability Pay, or CDP.

For those who have at least 20 years of qualifying military service and have a VA disability rating of at least 50%, it authorizes a ten-year phased elimination of the Department of Veterans Affairs offset to retired pay. The disability does not have to be combat-related. The eligible retiree will see his retirement pay increase by about 10% each year until the phase-in period is complete in 2014, at which time the retiree will be receiving an additional amount that is equal to the amount of retired pay waived.

Combat-Related Special Compensation (CRSC) is a part of the concurrent receipt law, and it includes those who have a disability of at least 10% directly related to the award of the Purple Heart decoration, or else a disability rated at 10% or higher related to combat, operations or hazardous duty. CRSC is non-taxable; retired pay is taxed. There is no phase-in for CRSC; eligible retirees will receive their full retired pay plus their full authorized disability payments.

The statute includes Guard and Reserve personnel who have at least 20 qualifying years for retirement purposes. In general, it is recommended that the former spouse reapply for the start of payments. Fax the request to DFAS at 216-522-6960 or mail it to DFAS-GAG/CL, PO Box 998002, Cleveland, OH 44199-8002.

The legislation is more complicated than the brief overview given here. Those seeking further information should click on “Search” at www.dfas.mil or at www.military.com. There is also a separate SILENT PARTNER on CRSC.

**Federal Jurisdiction.** If a state does not have jurisdiction under federal law, then that state may not divide COL Roberts' pension, regardless of his wife's wishes. As set out in the USFSPA, 10 U.S.C. § 1408 (c)(4), a state may only exercise jurisdiction over a military member's pension rights if:

- That state is his or her domicile; or
- The member consents to the exercise of jurisdiction; or
- The member 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. These are explained in detail in the SILENT PARTNER, Military Pension Division: Scouting the Terrain.

How can the SM use these to his advantage? The primary way is not to allow “jurisdiction by consent” to pave the way to an easy division of his pension if he has truly decided on a course of complete resistance. This involves two possible situations:

**Merititious Issue.** Assume that the SM is domiciled in a state where division of the pension is limited or barred (see above), and his wife has sued him in a state that has no such limits on pension division. In this situation, his not consenting to military pension division could save his pension.
• The first step, due to the complexity of this subject, is to be sure he has skilled counsel in both jurisdictions. Don’t even try to make a request for a continuance (or for a stay of proceedings under the Servicemembers Civil Relief Act) while he’s “out in the field” without advice from your co-counsel. This area’s too complicated.

• Even then, don’t assume you’re “out of the woods” with the pension being defined as non-divisible. The court may decide that, because such a large asset is not divisible as marital or community property, the rest of the property should be divided unequally in favor of the nonmilitary spouse in order to compensate for this inequity.12

• And finally, DON’T let the SM tell you that you can handle this without outside help. This is too difficult for the average (or above-average) judge advocate or civilian attorney, and it isn’t worth your professional reputation (or malpractice liability) to try to disprove this.

Bluff. COL Roberts may want to make sure that his wife has to expend the maximum amount of money to get a piece of his pension. He wants to ensure a fight in two states – the state of suit and the state of his domicile -- to try to get her to back down. Or else he’s sure that she won’t spend the time or money to try to get counsel in State #2 to ask for a share of the pension, which means that you may have to do some hard bargaining to adjust the property division in light of his pension not being divided. Counsel for Mrs. Roberts would certainly want some concessions on other matters in exchange for not pursuing the military pension.

Dividing the Military Pension -- Crossing the Minefield

Overview. 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 shared payments when the retired SM starts receiving his pension. This is the most common way of allocating the pension between the spouse and SM. In the usual situation, a share of the SM’s pension is paid to the former spouse. This can be done by DFAS through garnishment if the marriage and the length of service overlap by at least 10 years; otherwise the payment must be made by the SM.

The second involves a present-value offset, in which property or money is traded against the present value of the pension. In this scenario, the house and other property go to Mrs. Roberts and the pension goes to COL Roberts (if they are approximately equal in value).

Both of these topics are covered in the SILENT PARTNER, Military Pension Division: Scouting the Terrain.

Opening the Attack

When dividing the military pension on a deferred division basis, there are four separate ways to make the division that DFAS will accept for direct payments to Mrs. Roberts. These four methods are set out in the pension division regulations.13 They are explained in detail in the SILENT PARTNER, Getting Military Pension Division Orders Honored by DFAS.
Fixed dollar amount. A fixed dollar clause could read: *Wife is awarded $550 per month, payable from Husband’s disposable retired pay.*

Percentage clause. A percentage clause might state: *Wife is granted 50% of Husband’s disposable retired pay.*

Formula clause. This is an award expressed as a fraction or a ratio, and it typically used when a SM is on active duty (or a Reservist is still drilling). It might read: *Wife shall receive 50% 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.

Hypothetical clause. This is an award based on a rank or status which is different from that which exists when the servicemember retires. For example, the order might say: *Wife is granted 40% of what a major would earn if he were to retire with 18 years of military service.* This is often used when state law requires that the share of the pension awarded to the spouse be determined according to the grade and years of service of the member at a specific date, such as the date of divorce or of separation (see below).

For COL Roberts, there is really only one advantageous way to allocate the pension: fixed dollar amount. That’s because this does not grant Mrs. Roberts a COLA (cost-of-living adjustment) each year. The fixed dollar amount simply excludes a COLA – it’s outside the definition of fixed dollar amount, in other words.

The Marital Fraction.

Assume that COL Roberts is on active duty and has 20 years of creditable service. He has been married for all 20 years. He tells his lawyer, who is inexperienced in military pension division, that he is willing to give his wife half of his pension, either because that seems fair to him or it appears to be inevitable under state law. The lawyer, taking him at his word, proceeds to draft a clause for pension division which is worded as follows:

*Husband shall pay to Wife fifty percent (50%) of the disposable retired pay he receives from the Defense Finance and Accounting Service at retirement.*

Are there any problems with this wording?

At least from COL Roberts’ point of view, the answer is yes. The clause fails to take into account the marital fraction. Defined by state law, this is usually the number of years of marital pension service divided by the years of total pension service. The fraction reflects the fact that COL Roberts will probably continue on active duty and acquire additional retired pay due to those years. These are not “marital years”—they are years after the separation or divorce. There also may be years of military service before COL Roberts married, and these non-marital years must also be taken into account.

The way to do this is with the marital fraction. In reality, Mrs. Roberts is not entitled to half of the pension; she is only entitled to half of the marital share of the pension. The above clause gives Mrs. Roberts too great a share.

How to Save a “Full Bird” $300,000
Assume, however, that the drafting lawyer is aware of the above issue and proceeds to include reference to the marital fraction in the clause, which now reads as follows:

_Husband shall pay to wife fifty percent (50%) of his disposable retired pay times 20 divided by his total years of military pension service._

While this may be an improvement for COL Roberts over the first example, there is a way to further “improve” the clause (from COL Roberts’ viewpoint). This is by “fixing” the benefit to be divided with Mrs. Roberts to that which exists, based on his grade and years of service, at the “valuation date.”

Each state has a “valuation date.” This is the date specified in state law for the classification of assets (as marital or community property or as separate property) and the determination of the fair market value of the property for purposes of division or allocation between the spouses. It may be the date of separation, date of divorce, date of irretrievable breakdown of the marriage, date of summons issuance, or some other date set by statute or by case law.

As explained above, in states where the date of divorce is the valuation date, nonmilitary spouses are limited to pension division based on the benefit accrued at that date, that is, the rank and years of service of the service member at the date of divorce. They do not share in any increase in pension benefits due to further promotions or additional years of service. For example, in _Grier v. Grier_, the Texas Supreme Court held that the wife of a major who was on the promotion list for lieutenant colonel at the time of divorce could only share in the retired pay of a major.

Drafting a pension division clause (as above) without reference to COL Roberts’ grade and years of service at the valuation date will result in DFAS dividing his pension according to his grade and years of service at retirement. This is the approach used by the majority of the states, which employ the date of retirement method of deferred division of retirement benefits.

As a result of this drafting, all post-separation service and promotions will be "tacked on" to the marital estate for pension division purposes. This gives (in COL Roberts’ view) his former wife a "free ride" on the rest of his career and future promotions. Even though Mrs. Roberts may be married to a colonel (pay grade 0-6) with 20 years of service at their date of separation, Bill Roberts may be a brigadier general (pay grade 0-7) with 30 years of service by the time he retires. At the time of his 0-7 retirement with 30 years of service, Mrs. Roberts (under the above clause) would then begin to receive her marital fractional share of his pay _at a higher grade_ and with more creditable service than that which COL Roberts had attained when they separated or divorced.

In COL Roberts’ view, the above wording would be acceptable only if he were to remain in the same pay grade that he held at the valuation date and retired in that pay grade with the same number of years of service. This is, of course, very unlikely. Once COL Roberts agrees to deferred division of the pension, he should direct his attorney to negotiate for division based on his rank and years of service at the valuation date contained in state law.

Fixing the grade and years of service is not the majority rule, as explained above. Most jurisdictions mandate the deferred division of pension benefits based on "a fixed percentage of the benefits actually received by the employee spouse at retirement" because under this method “the non-employee spouse is permitted to share in the increases in retirement benefits due to post-separation
efforts which were built on the foundation of marital effort." This has the effect of letting the wife of a colonel (at separation) share in the pension pay of a general (at retirement) because she helped him to attain the rank of colonel in the first place.

But even in those states this does not limit COL Roberts and his attorney in negotiations. When negotiating, almost anything is fair game. In this case, because Bill Roberts was a colonel with 20 years of active duty upon the parties' separation, he will want to negotiate with the other side to give Mrs. Roberts her share of his pay in the grade of colonel with 20 years of service, not a future grade with future years of service.

There is a substantial financial difference between these two approaches. The following example will illustrate just how large the gap can be.

Assume that the pay of a colonel (O-6) at 20 years of service is about $7,500 a month and that the pay of a brigadier general (O-7) at 30 years is about $9,400 a month. Also assume that, with 30 years of service, Bill Roberts will be 52 years of age at retirement, with a life expectancy of about 24 years. His pension, for this hypothetical situation, is calculated by multiplying 2.5% times his years of service times his base pay.

Assume that the monthly retired pay of a brigadier general with 30 years of service is $7,050, representing base pay of $9,400 per month X 30 years of service X 2.5%. When this sum is multiplied times 12 months, it gives a yearly retired salary of $84,600. One-third of this, or $28,200, is the wife's share of the pension, assuming the parties were married 20 of the 30 years of the pension service. The wife's portion is then multiplied by 24 years, the remaining statistical life expectancy of Bill Roberts. The result is $676,800, which represents the sum of the payments to Mrs. Roberts over the course of Bill Roberts' life expectancy (assuming he retires as a brigadier general).

For COL Roberts, the more favorable calculations (based on O-6 pay for 20 years of service at date of separation) are: $7,500 X 20 years X 2.5% = $3,750 per month pension. One-third of this, or $1,250 a month, is the wife’s share, and the total amount of payments to her would be $1,250/mo. X 12 mo. X 24 years = $360,000.

The difference between these two values, $676,800 and $360,000 is $316,800. If the pension division clause were drawn as shown in the sample clause above, it would cost Bill Roberts an additional $316,800 over his retired lifetime in payments to Mrs. Roberts. This is over and above what she was entitled to receive as her share of the marital part of the military pension of a colonel with twenty years of service.

What is the better wording for COL Roberts? Assuming that state law allows for the fixing of grade and years of service at a specified date or that the other side (regardless of state law) will agree to this division, the proper wording for COL Roberts might be as follows:

_Husband shall pay to Wife fifty percent (50%) of the disposable retired pay of a colonel (O-6) with twenty (20) years of service, times 20 years of marital pension service, divided by his total years of military pension service._
Needless to say, it is not often that one can save a full colonel over $300,000 with a single stroke of the pen.

Dividing Disposable Retired Pay

What is it that the courts divide -- gross pay or net pay? USFSPA specifies that the court can only divide disposable retired pay. The U.S. Supreme Court upheld this requirement in the Mansell decision. 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." Thus 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 military member to reduce the portion of retired pay that is divisible. And there’s no way to stop a SM from taking disability pay! This topic is covered more fully above.

Reserve and National Guard Pension Rights

There are two key considerations in dividing Guards/Reserve retirement rights. First, since Guard and Reserve personnel do not begin to get paid until age 60 (regardless of when they retire), this deferral of payment must be taken into account in the negotiations and the present value calculations. Second, the pension must be calculated by using years and then again using retirement points. A full explanation is found in the SILENT PARTNER, Military Pension Division: The Spouse’s Strategy.

Survivor Benefit Plan.

After the battle comes caring for the survivors. The equivalent of this in the area of military pension division is deciding what to do about the death of the SM and its impact on the surviving spouse. Since the military pension ends when the SM dies, the Survivor Benefit Plan is the usual issue at stake here. This is a way to continue monthly payments to the former spouse who survives.

What is the Survivor Benefit Plan? It is a survivor annuity that pays a specified beneficiary 55% of the selected base amount (up to age 62) when the SM dies first. This topic is covered in detail in the SILENT PARTNER, Military Pension Division: Scouting the Terrain.

The best SBP option for the SM is, of course, silence. If no one says anything about SBP, then COL Roberts won’t have to elect coverage, which will save him money and also retain the option for a remarriage and a new wife, if that’s in his future. SBP cannot be divided between current and former spouses.

Life Insurance. If there is a discussion about SBP, then his attorney would want to deflect the conversation into death benefits in general, of which life insurance is the most obvious choice. Life
insurance for Mrs. Roberts would probably be cheaper than SBP (spouse or former spouse coverage costs 6.5% of the selected base amount), and it has the advantage of paying Mrs. Roberts in a lump-sum cash amount at his death, rather than doling out monthly payments to her. If there’s a dispute, offer to split the cost with Mrs. Roberts – each will pay half the life insurance premium. Even better, include the premium as alimony which COL Roberts pays; that way, the premium will be deductible for him at tax time each year.

**Lower Base Amount.** When you can’t dissuade the other side from SBP, then try to let COL Roberts select a base amount that’s lower than his retired pay – say 20% or 30% of it – when he’s not been married to Mrs. Roberts the entire term of his service. After all, it might not make sense to him that she should get 55% of his full retired pay when he dies if she was only married to him 10 of the 20 years he served; under these circumstances, she should only get half of 50% of his retired pay during her life (or 25%), and she should get the same amount at his death, not 55%. This is a “mirror award”; the death benefit mirrors the life benefit. Reduce the base amount selected so that her SBP benefit reflects the same percentage as her share of the military pension. You’ll also be saving COL Roberts money because the premium will be lower.

Who Pays the Premium? Often the SM says, “Why doesn’t my wife have to pay for SBP? After all, she wants it! I’ll be dead and gone by the time she gets it. She should have to pay the premium.” Unfortunately for the SM, it doesn’t work that way with DFAS. You can send them as many orders as you want – signed by judges, certified by clerks and approved by the highest court you can find – and they’ll still pay no attention if you try to shift the premium payment to Mrs. Roberts by telling DFAS to take the premium out of her share. They just won’t do it since the SBP premium, according to USFSPA, comes off the top before determining disposable retired pay. This results in the parties both paying the SBP premium in the same ratio as their share of the military pension.

But you can accomplish the same thing by adjusting the percentage that Mrs. Roberts receives. Here’s what to do—

- Figure out what dollar amount Mrs. Roberts would get each month as pension division, multiplying her spousal percentage times the gross retired pay of the member.
- Then figure out the dollar amount for the SBP premium (for spouse or former spouse coverage, use 6.5% of COL Roberts’ selected base amount, unless a lower amount has been – or will be - selected).
- Then subtract this from Mrs. Roberts’ dollar amount (or anticipated dollar amount). This yields her spousal share less the SBP premium.
- Next divide this figure by the disposable retired pay (gross pay less SBP premium) of COL Roberts and multiply it by 100.

The result is the percentage of his retired pay that she would get with her paying for SBP. You’ve effectively shifted the premium payment to her by reducing the percentage of COL Roberts’ retired pay that she receives, assuming there are no other deductions from gross pay, such as a disability pay waiver or money owed to the federal government.

You can shift the premium payment AND create a “mirror award” by following these steps:
• Figure out what dollar amount Mrs. Roberts would get each month as pension division, multiplying her spousal percentage times the gross retired pay of the member.
• Next divide that amount by .55, since SBP is always 55% of the base amount chosen, and we’re trying to figure out the correct amount for that base.
• Then figure out the dollar amount for the SBP premium (for spouse or former spouse coverage, use 6.5% of COL Roberts’ selected base amount, which is found in the previous step).
• Then subtract this from Mrs. Roberts’ dollar amount (or anticipated dollar amount). This yields her spousal share less the SBP premium.
• Next divide this figure by the disposable retired pay (gross pay less SBP premium) of COL Roberts and multiply it by 100.

**Early Out Options.**

If your client has taken early retirement through VSI (Voluntary Separation Incentive), SSB (Special Separation Bonus) or a similar program, you should argue that this is not divisible as marital property under the McCarty decision. The analysis is set out (along with counter-arguments) in the SILENT PARTNER, “Military Pension Division: Scouting the Terrain.”

Even if this argument is not successful, remind opposing counsel that, in any event, 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. Use this argument to attempt to get concessions.

A separate, but related, question is whether the benefit is separate or marital property. If the courts decide in favor of divisibility, how will they treat the property? 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).

If, on the other hand, they are seen as an economic benefit earned during the marriage and attributable to marital work, efforts and labor, they may be seen 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. 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. Finally, even if the payment is marital property and therefore divisible, one would need to apply the marital fraction (years of marital service over total years of service) to the lump-sum payment to arrive at the portion that is marital. This is necessary to reflect fairly the part of the pension earned during the marriage.

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**ENDNOTES**

1 Fern v. United States, 908 F.2d 955 (Fed. Cir. 1990).
3 10 U.S.C. (c) (1).
5 Holaway v. Holaway, 70 Ark. App. 240, 16 S.W.3d 302 (2000); see also Burns v. Burns, 312 Ark. 61, 847 S.W.2d
7  Ala. Code § 30-2-51
9  This can be found at the Army JAG School’s website, www.jagcnet.army.mil > TJAG Legal Center & School > TJAGLCS Publications.
11  Id.
14  In a minority of states, this is years of military pension service until separation (or divorce) divided by that pension service till that date. In these states, the marital fraction is multiplied by the pension benefit earned as of separation or divorce.
15  See, e.g., Berry v. Berry, 647 S.W.2d 945 (Tex. 1983) (holding that, in Texas, the valuation and apportionment of retirement benefits in divorce is to be based on the value of the community’s interest at the time of divorce)
16  Grier v. Grier, 731 S.W.2d 931 (Tex. 1987)
18  10 U.S.C. § 1408 (c) (1).
19  For example, assume that the SM’s retired pay is $1,000 a month, and that he was married 10 of his 20 years of military service. The pension benefit (during the SM’s life) for the former spouse would usually be 50% X 10/20 X $1000, or $250. To make the SBP death benefit the same, divide $250 by .55 to get the proposed base amount, which is $454.

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Military Pension Division: The Spouse’s Stategy

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.

Introduction

The battlefield in military divorces is often military pension division. It is essential to learn and understand its unique set of rules. The basic issues for the military spouse (usually the wife) in the divorce battlefield are the first topics covered below. An overview of the battlefield is contained in “Scouting the Terrain,” and the topics below expand that advice to help protect the spouse and ensure that she receives her benefits from her marriage to the servicemember (SM). It is essential for the spouse and her counsel to understand the law, to know the rules and to be alert for minefields.

It is also essential to keep records to help the spouse make the case. This includes records of taxes (state income taxes, personal and real property taxes), voting registration, home ownership, copies of the SM’s Leave and Earnings Statements, bank records and motor vehicle documents. These can help with the first part of the battle, which is the issue of domicile and residency.

Remember to help the client with costs, time and research. A fully contested equitable distribution trial or pension division trial can be costly indeed. Few clients have the will or the pocketbook for diehard resistance. Fortunately for the spouse, not many servicemembers or retirees want to risk battles over visitation, child support, alimony and other matters in a case that could be settled, just to engage in “nuclear warfare” regarding the pension. All states allow military pension division. As will be outlined below, only a few bar the division of pensions that are not vested. The job of a good lawyer is to guide the client with sage advice and serious judgment. Advice and guidance for the “big picture” along these lines is essential for those who are truly serious about helping these clients.

Roadblocks and Minefields

Our client in this example is Mrs. Roberts, the wife of Army Colonel Bill Roberts. He’s been in the Army 20 years and now they’re going through a divorce. Mrs. Roberts wants her share of the military pension. He wants to block her in the division of the pension.

There are only a few jurisdictions which bar pension division or limit it. These fall into the following categories: 1) states where there is a vesting requirement; 2) one state where ten years of marital military service is required and the pension must be vested (Alabama); and 3) one jurisdiction (Puerto Rico) which bars division of any noncontributory retirement pay.

A pension is vested when the employee is entitled to receive something upon termination of employment, whether that is in the form of a return of contributions or an early (and reduced) retirement benefit. A SM with 11 years of service, for example, would not have a vested pension because there is no right to retire after 11 years’ service. One with 25 years’ service, on the other hand, would clearly have vested retirement rights.

There are two states, Indiana and Arkansas, which limit court jurisdiction over pension division to those pensions which are “vested.” Arkansas held in Holaway v. Holaway that an unvested pension is non-divisible and thus the separate property of the party who earned it. In Indiana the right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share, and the burden is on the non-employee spouse to prove that the pension is vested.
Alabama law provides a unique limitation on pension division jurisdiction. The law specifically states that retirement benefits are not divisible as marital property unless they are vested and the employee or “owning spouse” has ten years of pension service during the marriage.4

Finally, Puerto Rico does not allow the division of noncontributory pensions at all; it treats these pension rights as separate property.5 The military pension is noncontributory, and so it would not be divisible there. The Thrift Savings Plan, however, is divisible in Puerto Rico because it is based on marital contributions.

There may be several states which could divide COL Roberts’ military pension. To minimize his exposure, COL Roberts will want to “shop around” for a jurisdiction that will either limit pension division (as with a vesting requirement), bar pension division entirely (Puerto Rico) or will otherwise allow military pension division on the best terms for him. COL Roberts can employ these divisibility provisions to his advantage in the pension division litigation. If he is stationed in Indiana, for example, he might decide to become domiciled there and then file for divorce in that jurisdiction so as to exclude his pension benefit from division. In like manner, Mrs. Roberts and her attorney will want to examine each state or territory which may have jurisdiction where she may file for division of COL Robert’s pension to see whether the laws there allow such division. It is impossible for any individual attorney to know each of these state rules. The importance of this point for Mrs. Roberts’ attorney is that it is vital to shop around for the jurisdiction that will allow military pension division on the best terms for Mrs. Roberts. For COL Roberts, the opposite approach would apply; he needs to find a jurisdiction which can hear his case but will deny the division of his pension. How to go about this forum-shopping, which is implicitly allowed by the triple jurisdictional approach of 10 U.S.C. 1408(c)(4), is found below.

**Federal Jurisdiction.**

If a state does not have jurisdiction under federal law, then that state may not divide COL Roberts’ pension, regardless of his wife’s wishes. As set out in the USFSPA, 10 U.S.C. 1408 (c)(4), a state may only exercise jurisdiction over a military member’s pension rights if:

- That state is his or her domicile; or
- The member consents to the exercise of jurisdiction; or
- The member 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. These are explained in detail in “Scouting the Terrain.”

How can Mrs. Roberts use these to her advantage? Here are the key points for the nonmilitary spouse’s attorney to remember in the jurisdiction arena:

**Find the Right Place to File Suit.** If COL Roberts is domiciled in Alaska, then sue him there. Bringing the suit in Virginia, where Mrs. Roberts is now residing, ensures that there will be a jurisdictional battle unless COL Roberts’ attorney is asleep at the wheel or else COL Roberts doesn’t care.

**Consider the “Vesting” Issue.** If vesting of the pension (or some other limitation on pension division) is required in the state of suit, and also in the state of domicile, then it probably would not make any difference where he’s sued. Likewise if neither her state nor his domicile state has a pension division limitation, it probably won’t make any difference. But if COL Roberts is domiciled in a state or territory which has a limitation on pension division (such as “vesting”), then the choice of a forum for the lawsuit could be critical if he is not vested in his pension (usually 18 or 20 years of service, depending on state law). Don’t sue him in a jurisdiction that has a limitation on pension division, such as vesting, if he isn’t vested. Find a way to sue him in a state that has no such pension division limitation. Here’s how:

- Just because domicile is required for one of the tests above doesn’t mean that you cannot sue COL Roberts in another place and acquire jurisdiction if he consents. So you will need to find a jurisdiction where you can sue him that doesn’t have a pension division limitation. If he’s domiciled
in such a limiting state, consider suing him where Mrs. Roberts lives (which, hopefully, is not such a jurisdiction). If she’s in such a state, consider suing him in his domicile (hopefully not a state that limits pension division).

- **What is the next step?** Because of the complexity of this area, get on the phone to associate competent co-counsel right away. You’ll need a good attorney to go to court for Mrs. Roberts who knows military pension issues and also jurisdiction. In other words, a good military divorce attorney who’s also knowledgeable on civil procedure issues.

- **One issue to discuss is how to get COL Roberts to file an answer or some other pleading that will be treated as a general appearance and will result in the court’s having jurisdiction over him. Consider suing first for custody and alimony, for example, to ensure that he “joins in the fight.” By filing motions or responsive pleadings, he’ll be calling upon the power of the court to adjudicate his case, which may (under the law of that jurisdiction) amount to consent to jurisdiction. Then Mrs. Roberts can amend her pleadings to add a claim for pension division (if that’s necessary under the state statutes). The issue of general appearances and specific consent is covered in more depth in the “Scouting the Terrain.”

- COL Roberts may make an request for a stay of proceedings under the Servicemember’s Civil Relief Act (SCRA) while he’s deployed in Southwest Asia or undergoing training “out in the field.” This would not subject him to the court’s jurisdiction since the SCRA specifically states that a motion for a stay does not waive any defense of the servicemember, including jurisdiction.

- Even if the pension has been defined as non-divisible because it’s not vested, (or for some other reason), don’t give up. The courts may decide that, because such a large asset is not divisible as marital or community property, the rest of the property should be divided unequally in favor of Mrs. Roberts in order to compensate for this inequity.

**Bluff.** Be aware that it may be COL Roberts’ strategy to make sure that his wife has to expend the maximum amount of money to get a piece of his pension. He may want to ensure a fight in two states -- the state of suit and the state of his domicile -- to try to get her to back down. Or perhaps he’s sure that she won’t spend the time or money to try to get counsel in State #2 to ask for a piece of the pension. If this is the case, then her attorney may have to do some hard bargaining to adjust the property division in light of his pension not being divided. As counsel for Mrs. Roberts, you would certainly want substantial concessions on other property or alimony issues in exchange for not pursuing the military pension.

**The Danger of a Default Judgment.** When there is a lawsuit pending for pension division and the SM has not filed an answer, be aware of one important matter regarding entry of a pension division order. Don’t be tempted to get a default judgment for pension division when you’re not clearly in the state of domicile of COL Roberts. If you do get one, here’s what may happen:

- You probably don’t have jurisdiction in State #1 (which is not his domicile) over the pension because you do not have his consent. Unless the SM consents to the court’s jurisdiction, which does not occur in a default divorce and property division, the judge does not have the power to divide the military pension. The only (rare) exception to this is where the court is in a state where the member resides for reasons other than military assignment.

- DFAS will examine your “perfectly good” military pension division order and then reject it for lack of jurisdiction.

- This will probably make your client very unhappy -- in terms of lost time, lost payments of pension, and wasted attorney’s fees.

- You will then probably try to sue him elsewhere, in State #2, since you can’t “fix” this order.

- And this will likely be his state of domicile.
• But you’ll have to hire an attorney there and Mrs. Roberts will wind up paying a second retainer to a lawyer in order to “do it right” this time (or you may wind up paying the retainer if she starts talking about malpractice or a bar grievance).

• And after you’ve engaged the attorney, you may find out that you cannot get pension division there. The opposing attorney will invariably argue that Mrs. Roberts went to court in State #1 where she got the court to assert jurisdiction over the pension and to divide it.

• And therefore State #2 cannot do it over again. Exclusive jurisdiction was acquired earlier by State #1. A second state cannot also assert jurisdiction over the division of the pension after the first state has already divided it. Opposing counsel will probably succeed in her motion to dismiss, and your client will have lost any rights to military pension division.

Type of Pension

The pension rights contemplated by USFSPA involve nondisability "longevity retirement" under 10 U.S.C. 1401-12, not retirement for disability under 10 U.S.C. 1201-21. In Mansell v. Mansell the U.S. Supreme Court in 1989 held that VA disability compensation is not divisible under USFSPA, and that the states may only divide “disposable retired pay” as that term is defined in USFSPA. This means that COL Roberts, by electing disability pay instead of retired pay, may defeat Mrs. Roberts’ claim to his pension benefits. A short summary of the system is found in “The Servicemember’s Strategy.”

Thus COL Roberts can, by his own actions, reduce his disposable retired pay by electing VA disability pay if his VA disability rating is less than 50%, due to a dollar-for-dollar setoff under federal law. For Mrs. Roberts’ lawyer, it should be noted that the careful drafting of a marital settlement agreement is the key to indemnifying the nonmilitary spouse when this situation might occur in the future. For a good example of this, see Owen v. Owen, a Virginia Court of Appeals case. In that case a settlement agreement provided for a guarantee/indemnification clause which required the retiree to pay the same amount of support to the spouse as was waived by the federal statute due to the retiree’s receipt of VA disability pay. This was held not to violate the mandate of the Mansell case. Such a clause might state:

\[
\text{If the husband takes any action (such as accepting disability pay) that reduces the pay the wife receives, then he shall pay her directly the amount by which her share is reduced. In addition, he hereby consents to the deduction of this amount from any periodic payments he receives (such as wages) to allow this payment to wife, and this clause may be used to show said consent when this is necessary for the entry of a garnishment, wage assignment or income withholding order.}
\]

To further protect the nonmilitary spouse, it is advisable to include in the agreement, order or judgment a provision that the division of the military retirement is based on no waivers for disability pay and consents to the continuing jurisdiction of the court on the issue of property division (in the event that the military member still elects to apply for a waiver). These are especially important ways to insulate the spouse from conduct of the member which defeats the purpose of the award by reducing the amount of disposable retired pay that is subject to division and direct payment through DFAS.9

Here are some additional pointers on the language needed for “full body armor” to protect the spouse and maximize her chances for recovery:

• State the facts and assumptions behind the settlement or clause [“John is an LTC with over 16 years’ service in Army, and he will receive a pension based on longevity after at least 20 years of service.”]
• State the intent of the agreement or order [“Mary is to receive an unreduced share of pension based on years of service”]
• Indemnify the spouse as to expenses – this can be a general statement applicable to both parties [“Each party will pay for all expenses and damages incurred because of the other’s breach of this agreement.”]
• Include interest on any unpaid amount [“The breaching party will also pay interest at the statutory rate on all unpaid amounts and damages.”]

Roadblocks and Minefields - Summary
The above discussion shows clearly the need for competent and creative lawyering. It is vital to ask questions -- lots of questions -- to make sure that the case for Mrs. Roberts is on a firm factual footing. Where is COL Roberts’ domicile? Is it in Indiana or Arkansas? If so, is his pension vested?

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, why file the lawsuit? What will be gained? Can Mrs. Roberts draw him out so he’ll have to file an answer, which will waive the jurisdictional objection? What if he files a motion to continue instead of an answer? What about a motion to dismiss? The answer to these questions lies in the law of the states involved.

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. Both of these topics are covered in “Scouting the Terrain.”

The first is deferred division, often called "if, as and when" payments. This refers to sharing payments received by the retiree. This is the most common way of allocating the pension between the spouses. In the usual situation, a share of the husband’s pension is paid to the wife. This can be done by DFAS if the marriage and the length of service overlap by at least 10 years; otherwise the payment must be made by the SM. Note that this “10-year rule” is not a federal rule of divisibility; as a matter of federal law it has nothing to do with the eligibility of Mrs. Roberts for pension division. It’s only a method of enforcement. It determines how she gets paid – by DFAS, rather than by COL Roberts. And this can be very important if he’s likely to move to another state (or country) after retirement.

The second method of division involves a present value setoff, in which property or money is traded against the present value of the pension. In this scenario, the house and other property go to Mrs. Roberts and the pension goes to COL Roberts (if they are approximately equal in value).

Opening the Attack
When dividing the military pension on a deferred division basis, there are four separate ways to allocate the division that will be accepted by DFAS for direct payments to Mrs. Roberts. These are treated at length in “Getting Military Pension Division Orders Honored by DFAS.” According to the regulations on military pension division, published in the Defense Department's Financial Management regulation (at www.dod.mil/comptroller/fmr/07b/07b29.pdf), these four methods are:

Fixed dollar amount. This might read: Jane is awarded $550 per month, payable from Bill’s retired pay.
Percentage clause. This could state: Jane is granted 50% of Bill’s retired pay.
Formula clause. This is usually used when a SM is on active duty (or a Reservist is still drilling). It is an award expressed as a percentage of a fraction. The percentage is the share Mrs. Roberts gets of the marital portion of the pension. The fraction (in the majority of states) is the period of marital pension service over the total period of pension service. For example, the order could state: Jane shall receive 50% of Bill’s
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.

**Hypothetical clause.** This 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: *Jane is granted 40% of what a major would earn if he were to retire with 18 years of military service in 2001.* This is often used when state law requires that the share of the pension awarded to the spouse be determined according to the grade and years of service of the member at a specific date (see below). A COLA (cost-of-living-adjustment) will automatically be awarded with each of these except the first.

Note that 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 retired pay”). The only time when retirement points must be used is when a “formula clause” is involved.

**Fixed Rank Division**

Sometimes the SM’s attorney will try to structure a pension division that “fixes” the rank and years of service of COL Roberts at the date of divorce or separation. Let’s see what the alternatives are. With a 20-year marriage during military service, the clause Mrs. Roberts would want usually looks like this (when COL Roberts is still on active duty):

_Husband shall pay to wife, at such time as he retires, one-half of his disposable retired pay times a fraction, the numerator of which is 20 years of marital pension service and the denominator of which is his total years of military pension service. The hypothetical date of retirement is October 1, 2001._

But the one proposed by the SM’s attorney will probably look like this:

_Husband shall pay to wife, at such time as he retires, one-half of the disposable retired pay of a colonel with 20 years of creditable service, times a fraction, the numerator of which is 20 years of marital pension service and the denominator of which is his total years of military pension service. The hypothetical date of retirement is October 1, 2001._

Avoid a division of pension that excludes future promotions and years of service (while retaining a denominator of total years of service for the marital fraction) unless your state law demands it. Always argue that the division should include future promotions and years of service. Why shouldn’t you accept such a clause? There are two reasons:

- First of all, the husband’s post-divorce promotions and continued service are based on the foundation of marital efforts in most cases. In other words, COL Roberts might never have made it to the rank of brigadier general were it not for the marital efforts of Mrs. Roberts during those years when he was a captain, a major, a lieutenant colonel and a colonel.
- The second reason is that, while we have “frozen” the rank and years of service of COL Roberts (so that Mrs. Roberts is excluded from any portion of his pay if he gets promoted to general), we have not frozen the denominator in the marital fraction. Thus the bottom part of the fraction keeps on growing, but the grade and years of service of COL Roberts are frozen, and that’s not fair. To be logical, consistent and fair about this, either the grade and years of service should go up with the total
years of military service (which is the denominator in the marital fraction), or else the denominator should be frozen along with the grade and years of service. Don’t mix apples and oranges!

**Reserve and National Guard Pension Rights**

There are two key considerations in dividing retirement rights for members of the Reserve or National Guard. First, since Guard and Reserve personnel do not begin (in general) to get paid until age 60 (regardless of when they retire), this deferral of payment must be taken into account in the negotiations and the present value calculations.

The second consideration concerns the marital fraction. In those cases where the marriage and the service career do not exactly overlap, the nonmilitary spouse usually receives one-half of the marital fraction times the SM’s pension benefit. This marital fraction should be computed twice -- once using marital years of service over total years of service, and then again using marital retirement points over total retirement points -- to determine which computation will best benefit the client.

To see what a difference this might make, let's take an example. Major Bill Smith has five years of Army active duty and 15 years of Army Reserve service. He married when he left active duty.

When dealing with Reserve or National Guard issues, be sure to ask the SM for a copy of his most recent “points statement” to see how many points have been acquired and how many were during the marriage. To calculate the marital fraction using points, calculate the points he acquired during active duty by multiplying 5 times 365 to get 1825 points. Then count his Reserve points. Assume that he acquired 60 points a year (for weekend drill, "summer camp" and membership) for 15 years, or 900 points. Thus his total points at 20 years are 2725 \( [1825 + 900] \), of which 900 (or about 33%) are marital. This should mean that 33% of his retirement pay (assuming retirement and date of separation both occur at year 20) is marital.

If we apply the marital fraction using years to his retirement pay, however, then his pension is 75% marital (15 years/20 years = 75%).

What a difference! Recognition of these two ways of calculating the marital benefit, and the difference when Major Smith's pension is calculated, is essential to competent representation in the Guard/Reserve pension case. Once again, the federal statutes do not tell us what to do, what fraction to use or what results to expect. This is state-law territory, not something set out in the USFSPA.11

**Dividing Disposable Retired Pay**

When you represent the spouse, take care in drafting the terms for pension division. What is the basis for Mrs. Roberts’ share – retired pay or “disposable retired pay”? The USFSPA states that disposable retired pay (“DRP”) means total military retired pay less certain deductions. One of these – at issue here – is a deduction for VA disability compensation, pursuant to 10 U.S.C. 1408(a)(4). An award phrased in terms of disposable retired pay, if he has or gets in the future a VA waiver, may give her 50% of the marital share of something less than his retired pay. It would give her half of the marital share of a lower number.

The husband’s lawyer might argue, “But wait – what’s the basis for the objection? Isn’t it clear that the retired pay center (DFAS or the pay centers for the Coast Guard, Public Health Service or National Oceanographic and Atmospheric Administration) will only divide disposable retired pay?”

It is true that USFSPA states that -

(d) Payments by Secretary concerned to (or for benefit of) spouse or former spouse. (1) After effective service on the Secretary concerned of a court order… with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this
section) from the disposable retired pay of the member to the spouse or former spouse… with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order.

10 U.S.C. 1408(d)(1) [emphasis added].

Doesn’t this mandate that the order state that “disposable retired pay” is what the court is dividing? Here is where the confusion arises. It's true that the uniformed services retired pay centers will only divide disposable retired pay. But that doesn’t mean that the retired pay center must have an order phrased in terms of DRP. So long as the order is otherwise clear and subject to calculation of a monetary amount, the pension division order can say just about anything regarding the money that it’s dividing. This is because the rules, at least for DFAS, state that percentage awards are construed as a share of “disposable retired pay,” regardless of how they are worded:

The designated agent will construe all percentage awards (such as a percentage of gross retired pay) as a percentage of disposable retired pay, regardless of the language in the order.


Under this rule, the order for pension division is not bound to state the benefit divided as a percentage of DRP. It can award the former spouse a percentage of the member’s retired pay using any one of several phrasings. It can describe this as military retirement benefits, pension or total military retired pay. The decree can be stated in terms of longevity deferred compensation benefits upon retirement, or it can divide gross retired pay. Conceivably the award can call for the spouse to share in the SM’s “chocolate and vanilla retired pay” and DFAS will interpret it as DRP!

But here’s the rub. If counsel for the spouse believes that the pension division order must be written in terms of DRP - whether from reading the DFAS rules or a rejection letter received from DFAS and drafts it accordingly, then the result will torpedo the spouse’s future payments if -

1. the member/retiree has a condition, injury or illness which results in disability payments through the Department of Veterans Affairs with a rating of less than 50%, or
2. the member/retiree has a rating of 50%-90% and elects compensation for certain conditions through Combat-Related Special Compensation (CRSC).

Either of these will reduce pension share payments. And such a pension reduction will reduce the money that the spouse/former spouse receives.

This bad outcome is not necessarily due to the negligence of counsel for the former spouse. In fact, it is a problem that is enhanced by the superior knowledge of the former spouse’s attorney, reminding us that “A little bit of knowledge is a dangerous thing.” The one who appears to know the rules – “DFAS only divides DRP, so phrase your order in those terms” – is the one who is penalized. The savvy attorney (for the former spouse) will write the order in terms of total pension, gross retired pay, or military retirement benefits. He or she will see the same result in the garnishment from the retired pay center (i.e., it will still be the appropriate share or percentage of DRP), but there will be a potential remedy if the retiree elects disability compensation, as mentioned above, instead of straight longevity retired pay. This is because the division of gross or total military retirement leaves a non-garnishment remedy, such as contempt or indemnification, in the hands of the spouse and the court. USFSPA, at section (e), 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) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. §1408(e).

An example might help to explain how this works. In 2010 the author was hired to testify as an expert in a Missouri case. The clause at issue read:

1) PENSION SHARE. Jane Doe, the wife, is to receive 40% of the disposable retired pay of John Doe, the husband.

2) INDEMNIFICATION. John Doe shall do nothing to reduce the share or amount due to Jane Doe from the above-stated 40% of his disposable retired pay.

The indemnification clause was worthless, because there is nothing that John can do – after DRP is calculated – to reduce Jane’s share. This is because the mischief, if any, is done “above the line.” A reduction due to his election of CRSC or taking a VA waiver (if his rating is 40% or less) occurs before the resulting DRP (thus “above the line”) – it is an operation done on total retired pay that results in its reduction, to arrive at disposable retired pay. And disposable retired pay is what DFAS will divide; it cannot pay a distribution based on some other amount.

The initial calculation (ignoring any SBP premium) looks like this:

\[
\text{Total retired pay} - \text{disability deduction} = \text{disposable retired pay.}
\]

The “disability deduction” is either a VA waiver, if the retiree has a rating of less than 50%, or the reduction caused by electing CRSC. As is explained in the SILENT PARTNER entitled *Military Pension Division: The “Evil Twins” – CRDP and CRSC*, lost pension money due to the VA waiver is gradually restored through Concurrent Retirement and Disability Pay (CRDP) when the individual has a rating of 50-90% from the Department of Veterans Affairs. Electing CRSC wipes out CRDP. You cannot receive CRDP if you elect CRSC. It not only eliminates current CRDP, but it also results in a collect-back action by DFAS for all past CRDP paid, whether to spouse or retiree.

**The “Latent Pension” - Federal Employment and Other Mischief**

Another problem arises when a SM leaves military service for a job with the federal government before he’s eligible to retire. Few civilian lawyers (and even fewer spouses!) realize that a member can “roll over” his retirement into a federal civil service job and get a year-for-year credit on civil service retirement based on the time he spent in the military. Even fewer lawyers and spouses have the foresight to anticipate this situation will occur “a few years down the road” and possess a working knowledge of the statute allowing this credit. The way to handle the problem – by anticipatory drafting -- is to include a clause that states:
If Defendant fails to retire from military service and elects to “roll over” or merge the time of his military service into federal government service in order to get credit for same, then the Plaintiff shall be entitled to her share of any federal retirement pay or annuity he receives based on the parties’ period of marriage during Defendant’s period of military service. Defendant shall notify Plaintiff 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), and, if applicable, his retirement orders and certificate. Defendant shall also notify Plaintiff immediately if he takes a job with the federal government, and will include in said notification a copy of his employment application and his employment address.

A similar problem arises if John Doe has been in the military previously, whether Guard/Reserve or on active duty, but is not in either situation when the divorce settlement occurs. Lulled to sleep by the absence of any present pension benefit, counsel for the spouse may overlook the fact that – just a few months after the case is tried or settled – John may get back into his uniform and return to military status, thus ensuring that he will have a pension down the road which he doesn’t have to share with Jane, his by-now ex-wife. If he had anything more than a few years of military service under his belt when the settlement took place, the result for Jane is the loss of many thousands of dollars in potential pension benefits, since John is using “marital years” that were over looked in the settlement as the basis, in part, for his upcoming retirement. The pension benefit is “latent” since it is not obvious at all to the ordinary practitioner. Unless there’s a crystal ball in the room, most lawyers would not be aware of this problem.

To provide some safeguard for Jane Doe in this situation, set out terms in the divorce decree or court order that allow the re-opening of the property division clause to let the court inquire into potential pension division rights which did not exist at the time of the settlement or hearing, so that the spouse may claim her marital share of these rights should he become eligible to retire from this service.

Caring for the Survivors: Survivor Benefit Plan and Life Insurance

After the battle comes caring for the survivors. Its equivalent in the area of military pension division is deciding on a replacement for the SM’s pension at his death.

The Survivor Benefit Plan is the usual issue at stake here. An overview of this survivor annuity is covered in ‘Scouting the Terrain.” Also found there is a summary of the benefits and disadvantages of SBP coverage.

Especially when deferred division is used, the attorney for the spouse of the servicemember should insist on SBP coverage to allow continued receipt of retirement benefits if the spouse survives the member. This is a valuable tool in planning for continued income for the nonmilitary spouse.

The most likely strategy for the SM in this area is silence. If no one says anything about SBP, then COL Roberts won’t have to elect coverage, which will save him money and also retain this option for a remarriage and a new wife, if that’s in his future. Thus you’ll need to speak up if you want to protect Mrs. Roberts in this area.

If there is a discussion about SBP, then the SM’s attorney will want to deflect the conversation into death benefits in general, of which life insurance is the most obvious choice. Life insurance for Mrs. Roberts would probably be cheaper than SBP (which generally cost 6.5% of the base amount selected), and it has the advantage of paying Mrs. Roberts a lump-sum cash amount at his death, rather than doling out the monthly payments to her. If there’s a dispute, they may offer to split the cost with Mrs. Roberts – each will pay half the premium. Even better for him, they may propose to include the premium in the amount of alimony, if any, that COL Roberts would pay Mrs. Roberts; that way, the premium will be deductible for him at tax time each year.
Often the SM says, “Why doesn’t my wife have to pay for SBP? After all, she wants it! I’ll be dead and gone by the time she gets it. She should have to pay the premium.” Unfortunately for the SM, it doesn’t work that way with DFAS. They won’t shift the premium to Mrs. Roberts since the SBP premium, according to USFSPA, comes off the top before determining disposable retired pay. This results in the parties both paying the SBP premium in the same ratio as the pension is divided. But the parties can accomplish the same thing by adjusting the percentage that Mrs. Roberts receives. See the “The Servicemember’s Strategy” for information on how to do this.

When the other side tries to avoid the issue or change the subject, here are some suggested responses:

- If you want SBP and do not have any interest in alternatives, then stick to that. Don’t engage in discussions about life insurance.
- If you’re interested in life insurance, make sure that you don’t use Servicemembers Group Life Insurance (SGLI). According to a 1983 Supreme Court decision called Ridgway v. Ridgway, you cannot enforce a court order or separation agreement that provides for SGLI to secure the payment of a divorce settlement.
- And if you’re interested in life insurance, be sure to transfer ownership of the policy to your client. Such provisions for life insurance are commonly funded or secured by "owned" policies which belong to the premium payor and build up cash value or equity (e.g., whole life, variable life or universal life policies), ones which belong to the payor but build up no cash value (term life insurance), and ones which have no equity/cash value and do not belong to the person who pays the premiums (group life policies).

Remember this when drafting a clause that attempts to ensure that the premium payor will not inadvertently (or intentionally) change the beneficiary to a new spouse, for example, in lieu of the beneficiary stated in the agreement. How will the other party ever know whether the intended beneficiary remains as such when the policy and all incidents of ownership remain elsewhere--with the payor or his employer? How can one prevent the payor from signing an agreement containing a life insurance clause and then immediately breaching it by designating a new beneficiary?

The answer is through policy ownership. Except in the case of group life insurance policies (including SGLI), most insurance companies allow a collateral assignment of ownership of the policy to a person other than the premium payor. The policy owner the one who designates the current beneficiary and who must consent to any proposed change in beneficiary. The owner must be informed by the company of any attempts to cancel the policy, and must also be advised as to nonpayment of premiums that would have the effect of canceling coverage. Finally the owner is the only one who, with life insurance that has cash value, can borrow against the policy. Since these are the very things which ought to be withdrawn from the premium payor--the power to borrow against the policy, cancel it or change the beneficiary--it makes sense to agree on transfer of ownership of the insurance policy.

Ownership of the policies can revert back to the original owner after the support terms have been satisfied. A transfer of ownership has the effect of protecting each party, preserving their promises and putting temptation out of the way.

Extra Benefits for Consideration. You’ll find an overview of early-out options (VSI/SSB), military medical benefits and dividing accrued leave in “Scouting the Terrain.” Here are some specific tips you need to know about representing the military spouse in regard to additional benefits.

Accrued Leave. When it comes time to do the division and distribution of marital property, one often-overlooked asset is accrued leave for the military member. Each person in the military service on active duty accrues 30 days of paid leave each year, regardless of rank. This leave is worth what it’s equivalent would be at the monthly pay rate of the servicemember, and this can be figured out by using the pay
tables available at the nearest recruiter's office or at www.dfas.mil, the DFAS website. Thus if a
servicemember is paid $4,400 gross pay per month and he has 45 days of accrued leave at the point of
evaluation (e.g., date of separation, date of filing, date of marital breakdown.), his accrued leave would
be worth about $6,600 \[45/30 \times 4,400\]. Since senior enlisted members and officers frequently carry as
much as 60 days of accrued leave from year to year, this is a significant asset to consider in the division
of marital property.

**Member’s Medical Benefits.** A separate issue that bears mentioning is the valuation of the member’s
medical benefits. If Colonel Roberts retires after 20 years of service, he will receive free medical care at
any military medical facility on a space-available basis. He also receives military medical insurance,
currently called TRICARE, for most medical expenses he incurs. All of this can be evaluated by an
expert, and this value can be attributed to COL Roberts as part of the retirement benefits he receives.\(^{13}\)
So many attorneys are concerned solely with the evaluation of retired pay that they forget the valuation
of other retirement benefits that should be included. Since this medical care for COL Roberts is part of
his retirement benefits, so the argument goes, it should be included for valuation purposes, even if the
statutory benefit cannot be transferred to Mrs. Roberts. Such an approach may yield a substantially
better settlement for Mrs. Roberts than the valuation of only her husband’s pension payments. It should
also be pointed out that this valuation approach, of course, can also be applied to Mrs. Roberts’ own
marital medical benefits and entitlements; these can also be valued and added to her share of the marital
property to the extent they were acquired during marriage.

**Spouse’s Medical Care.** Pub. L. 98-525, the Department of Defense Authorization Act of 1985,
expanded the medical (and other) privileges set out in Pub. L. 97-252 to extend certain rights and benefits
to unremarried former spouses of military members.

If the former spouse was married to a member or former member for at least 20 years during
which he performed at least 20 years of creditable service (also called “20/20/20” spouses, which refers
to 20 years of service, 20 years of marriage, and 20 years of overlap), then she is entitled to full military
medical care, including TRICARE, if she is not enrolled in an employer-sponsored health plan. She is
also entitled to commissary and exchange privileges.\(^{14}\)

If the former spouse was married to a member or former member for at least 20 years during
which he performed at least 15 years of creditable service (also called "20/20/15" spouses, for 20 years of
service, 20 years of marriage and 15 years of overlap), and the former spouse is not enrolled in an
employer-sponsored health plan, then the length of time that she is entitled to full military medical care,
including TRICARE, depends upon the date of the divorce, dissolution or annulment, as set out below.
No other benefits or privileges are available for her.

If the date of the final decree of divorce, dissolution or annulment of marriage was before April
1, 1985, then the former spouse is authorized full military medical care for life, so long as she does not
remarry. If the decree date is on or after April 1, 1985, then she is entitled to full military medical care,
including TRICARE, for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, she may purchase a
conversion health policy\(^{15}\) under the DOD Continued Health Care Benefit Program (CHCBP), a health
insurance plan negotiated between the Secretary of Defense and a private insurer, within the 60-day
period beginning on the later of the date that she ceases to meet the requirements for being considered a
dependent or such other date as the Secretary of Defense may prescribe.

Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the
date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment
occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(2)(H) (for 20/20/15
spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.\(^{16}\) Premiums must be
paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is not part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse may also obtain indefinite medical coverage through CHCBP (under 10 U.S. Code 1078a) if she or he meets certain conditions. The former spouse:

- Must be entitled to a share of the servicemember’s pension or SBP coverage;
- May not be remarried if below age 55;
- Must pay quarterly advance premiums; and
- Must meet certain deadlines for initial application.

Details regarding application for this “CHCBP-indefinite” coverage may be found at www.tricare.mil/chcbp/default.cfm. The coverage is the same as that for federal employees, and the cost is the sum of the following: premium for a federal employee, plus premium paid by the federal agency, plus 10%. This amounts to less than $350 per month as of 2010.

It is important to remember that these are statutory entitlements; they belong to the nonmilitary spouse if she or he meets the requirements of federal law set out herein. They are not terms that may be given or withheld by the military member, and thus they should not be part of the “give and take” of pension and property negotiations since the military member has no control over these spousal benefits.

* * *

ENDNOTES

6 See, e.g., Atkinson v. Chandler, 130 N.C. App. 561, 504 S.E.2d 94 (1998) (affirming judge's award of larger share of marital estate to wife of servicemember's whose pension was exempt from division because it was not vested, which was a requirement for pension division in North Carolina until October 1, 1997).
10. The document for the Army Reserve is AHRC Form 249-2E, DARC Form 249, or AGUZ Form 115. For National Guard points, see NGB Forms 22 and 23. The Air Force Reserve document is AF Form 526, and the Navy Reserve document is NAVPERS Form 1070-161. For the Coast Guard Reserve, obtain CG HQ Form 4973.
11. For cases holding that classification of the marital part of a Reserve pension could be based on "marital points" divided by "total points," see In re Poppe, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979) and In re Beckman, 800 P.2d 1376 (Colo. Ct. App. 1990). Some states, on the other hand, require calculation of the marital fraction based on time, not “points” or some other factor. See, e.g., N.C. Gen. Stat. 50-20(b), which states, “The award shall be determined using the proportion of time the marriage existed, (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment.”
13. See W. Horbatt and A. Grosman, Division of Retiree Health Benefits on Divorce: The New Equitable Distribution Frontier, 28 FAM.L.Q. 327 (Summer 1994).
15. 10 U.S.C. § 1086 (a).
16. 10 U.S.C. § 1078 a (g) (1) (C).

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SILENT PARTNER

Getting Military Pension Division Orders Honored by DFAS

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.

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. There is 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. Did you know that DFAS has a website? It's located at [www.dfas.mil](http://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](http://www.dfas.mil/money/garnish/fsfact.htm) and [http://www.dfas.mil/money/garnish/fs-qa.htm](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) 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. 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 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 will 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 in a “final retired pay” case (where the member entered service before September 8, 1980) might say: Wife is awarded 40% of the retired pay of a major (O-4) with 18 years of creditable service who retired on May 31, 2009.” 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. The order must include the rank and years of service of the member. The hypothetical award is the most complex clause of all. The rules that apply (especially for those who are in the High-3 zone, having entered service after September 7, 1980) are extensive and demanding. For answers, go to the “Attorney Instructions” found at the DFAS website, www.dfas.mil > Garnishment > Former Spouses’ Protection Act.

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 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.
<table>
<thead>
<tr>
<th>4</th>
<th><strong>Action or issue</strong></th>
<th><strong>Comments</strong></th>
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<tbody>
<tr>
<td></td>
<td>SBP is a unitary benefit, cannot be divided between current spouse and former spouse</td>
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<tr>
<td></td>
<td>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</td>
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<td>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.</td>
<td></td>
</tr>
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<td></td>
<td>If representing the nonmilitary spouse, be sure to mandate former spouse coverage with member selecting full retired pay as base amount</td>
<td>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%</td>
</tr>
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<td></td>
<td>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</td>
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</tr>
<tr>
<td></td>
<td>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</td>
<td>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</td>
</tr>
<tr>
<td></td>
<td>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)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>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]</td>
<td>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</td>
</tr>
<tr>
<td></td>
<td>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)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>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</td>
<td>SBP is reduced by Dependency and Indemnity Compensation in certain circumstances. Go to <a href="http://www.vba.va.gov/bln/21/Milsvc/Docs/DICDec2002Eng.doc">http://www.vba.va.gov/bln/21/Milsvc/Docs/DICDec2002Eng.doc</a> for full information, or call toll-free 1-800-827-1000.</td>
</tr>
</tbody>
</table>
7. **WHERE AND HOW TO SERVE THE ORDER**

For service on DFAS of the military pension division order, 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:

<table>
<thead>
<tr>
<th>QUESTION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DFAS CHECKLIST FOR MILITARY PENSION DIVISION ORDERS</strong></td>
</tr>
<tr>
<td>4</td>
</tr>
<tr>
<td>Is the member active duty, reserve/guard, or retired?</td>
</tr>
<tr>
<td>If retired, what is the member’s retirement date?</td>
</tr>
<tr>
<td>Is the member receiving temporary or permanent disability retired pay?</td>
</tr>
<tr>
<td>Was a final decree of divorce, dissolution, annulment or legal separation submitted?</td>
</tr>
<tr>
<td>Did the clerk of court certify the order within 90 days of the date DFAS received it?</td>
</tr>
<tr>
<td>What is the date of divorce?</td>
</tr>
<tr>
<td>Has the appeal time expired?</td>
</tr>
<tr>
<td>Was a fully completed DD Form 2293 submitted?</td>
</tr>
<tr>
<td>Are any additional documents required (such as a marriage certificate), or is the order/application invalid for any reason?</td>
</tr>
<tr>
<td>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) complied with?</td>
</tr>
<tr>
<td>What award(s) is the former spouse attempting to enforce -- child support, alimony and/or retired pay as property?</td>
</tr>
<tr>
<td><strong>Validation Questions for Retired Pay as Property Awards</strong></td>
</tr>
<tr>
<td>Does the order divide military retired pay?</td>
</tr>
<tr>
<td>What is the member’s PEBD (pay entry base date)?</td>
</tr>
</tbody>
</table>
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.

-B-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.
   4. Hypothetical retirement date.

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 DECREES 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 Plaintiff’s claim for distribution of Defendant’s military retirement benefits. *if entered as a consent order, add next sentence* 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 is a resident of [County] [State]. Defendant is a resident of [County] [State]. The parties were married on [date]. They were divorced in [County] [State] on [date].

*Note: The parties must be divorced for DFAS to honor a direct-pay order for garnishment of military pension payments as property. They do not have to be divorced to enter the MPDO, just to submit it to DFAS. When branch of service is Coast Guard, Public Health Service or National Oceanographic and Atmospheric Administration (commissioned corps of either), use the appropriate finance center name instead of DFAS.*

2. Plaintiff’s address is 123 Countrywide Lane, Anywhere, XX 00000. Her Social Security number is 111-22-3333. Her date of birth is May 19, 1952.

3. Defendant’s address is 456 ABC Street, Whoville, XX 00000. His Social Security number is 444-55-6666. His date of birth is June 12, 1950.

4. The marital portion of the uniformed services retired pay of Defendant (hereafter military pension or retired pay) is subject to marital property division. Plaintiff is entitled to a share of Defendant’s military retirement benefits, as set out in the Decree below. 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.
5. [for military member not yet retired] Defendant holds the rank of [state rank here, such as “Staff Sergeant” or “Lieutenant Commander”] in the [here state branch of service, such as “U.S. Air Force” or “Utah Air National Guard”] with [number] creditable years of service. His Pay Entry Base Date (PEBD) is [here state PEBD as found on Defendant’s Leave and Earnings Statement (LES)] or his Guard/Reserve retirement points statement. He is not yet retired. [-OR- for retiree] Defendant retired with the rank of [state rank] in the [here state branch of service, such as “U.S. Air Force” or “Utah Air National Guard”] with [number] creditable years of service and is currently receiving [state amount of retired pay and any deductions, such as SBP premium, federal income tax, etc.].** He is retired as of ___ [here give date of retirement (whether receiving retired pay or, if Guard/Reserve, awaiting age 60)].

**If near the end of the year, add additional sentence: This is expected to increase as of January 1, 20__ when Defendant receives a cost-of-living adjustment (COLA).

6. [Use this clause to protect non-military spouse of non-retired member or retiree with no disability at present. Delete if not needed.] Currently, there is no waiver in place for disability payments, and the court bases the award to Plaintiff set out below on these facts. -OR- [for retiree with disability rating] Defendant currently has a disability rating of [state percentage] and his election of disability compensation has reduced his military retired pay by [dollar amount].** [Use if parties are still married and divorce will be entered simultaneously with MPDO] This amount is based on the VA compensation table rates for veteran and spouse in effect at the time this Order is entered. Upon the parties’ divorce, the VA compensation should be recalculated based on the veteran only. This rate is currently [dollar amount].

**If near the end of the year, add additional sentence: This amount is expected to increase to $____ as of December 1, 20__ when the new disability compensation rates go into effect.

Note: this clause helps the spouse to establish a base-line for the present facts and the court’s expectations and intentions in case the SM decides to waive additional military pension payments for more disability compensation in the future.

7. [Note: It is probably best to insert this into all orders, for SMs and retirees, although the SCRA generally does not apply to retirees] Defendant’s rights under the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq., have been observed and honored.

8. [This clause is to protect the non-military spouse from unexpected reduction in payments due to electing disability compensation; delete if not needed] The parties have agreed that Plaintiff shall receive her full share of Defendant’s military retired pay, calculated as set out below and without reduction for disability payments (VA disability pay, disability severance pay, military disability retired pay, or any other reason). For the purposes of their settlement herein, military retired pay includes retired pay actually paid or to which Defendant would be entitled based only on length of Defendant’s creditable service.
9. [This clause is to protect the non-military spouse in cases where her pension share, for any number of reasons, is dependent upon the servicemember’s gross pay or when the retiree is in receipt of disability pay and he’s to indemnify former spouse for difference.] The terms below require Plaintiff to have knowledge of Defendant’s military retired pay on a regular basis. To avoid the inconvenience of monthly mail or e-mail exchanges of this information, the parties can use the myPay system available on the Defense Finance and Accounting Service (DFAS) website (https://mypay.dfas.mil/mypay.aspx). Defendant has the ability to set up a Restricted Access Personal Identification Number (PIN) for Plaintiff which, along with Defendant’s Social Security Number, will allow her to view his pay information (but not to make changes). Defendant can locate instructions on how to set up a Restricted Access PIN for Plaintiff on-line at https://mypay.dfas.mil/FAQ.htm.

10. [CSB/Redux – To protect spouse from SM’s election of CSB/Redux bonus of $30,000 at or around the 15-year mark for military service, thus reducing pension share upon retirement] Defendant agrees not to elect CSB/Redux (a bonus of $30,000 paid at or around 15 years of service, the election of which reduces the military pension), which would reduce Plaintiff’s share of the retired pay. Defendant agrees to cooperate as set forth below to protect Plaintiff’s interest in an unreduced share of the military pension.

11. Plaintiff is entitled to former spouse coverage as the beneficiary of Defendant’s Survivor Benefit Plan (SBP) as set out below [if applicable, and the Plaintiff’s share of the pension below is adjusted to account for her payment of the full SBP premium]. -OR- [Plaintiff is not entitled to former spouse coverage as the beneficiary of Defendant's Survivor Benefit Plan.]

12. [Use when the former spouse’s share of the pension is to be adjusted due to allocation to her of entire SBP premium]. The marital share is a fraction made up of __ months of marital pension service, divided by __, which represents the total months of Defendant’s military service. Based on this calculation, one-half of the marital share of the divisible retirement benefits is equal to Plaintiff receiving ___% of Defendant’s military retired pay. Since Plaintiff will be responsible for paying the entire cost of the SBP premium and DFAS will not allocate SBP premiums to either party, Plaintiff’s share of the military retired pay must be adjusted downward to account for her full payment of the premium [6.5% of the base amount selected] that is attributable to “former spouse coverage.” The shift of the premium to Plaintiff results in her share being reduced to ___% of the military retired pay.

**CONCLUSIONS OF LAW**

1. This court has jurisdiction over the subject matter of this action and the parties hereto. [in non-consent cases, state basis for jurisdiction.]
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. [If order is entered by consent, use this clause.] 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. For all uniformed services retired pay received after [date], Defendant shall pay Plaintiff [choose an Option from below and insert here]

   **[Option A]**: The non-military spouse receives a specified percent, not to exceed 50%, of the disposable retired pay. This increases with cost-of-living adjustments (COLA) for retiree, and that is automatic under the regulations; it need not be mentioned. This award is used when member has retired, and it is based on the final retired pay of SM, including post-divorce raises and grade increases. This clause favors spouse.] ___% of his disposable retired pay each month. [DFAS will accept percentages carried out to four decimal places.]

   **[Option B]**: The spouse gets a percentage, usually 50%, of the marital share of member’s retired pay. This increases with COLAs for retiree, and that is automatic; it need not be mentioned. It is based on the final retired pay of member, including post-divorce raises and grade increases. This clause favors spouse.] ___% of the marital share of his disposable retired pay each month, not to exceed 50% of disposable retired pay. The marital share is a fraction made up of ___ [insert #] months of marital pension service, divided by the total months of Defendant’s military service. [Note: Order must contain number of months for numerator – DFAS will not fill that in, although DFAS will complete the denominator when calculating final retired pay.]

   **[Option C]**: The spouse receives a set dollar amount, which may not exceed 50% of disposable retired pay. There are no COLAs for spouse, and all COLAs go to the retiree. This clause this favors SM/retiree.] $ ___ per month.

   **[Option D]**: The spouse receives a hypothetical amount, based on the grade and years of service
of the SM at time of separation, divorce or other date, according to state law or agreement of
the parties. This increases with COLAs for retiree, and that is automatic; it need not be
mentioned. This clause favors the SM/retiree.]

*For those who entered military service before September 8, 1980:
Clause D1- _% of the disposable retired pay that Defendant would have received had he retired
with the rank of ___ and with ___ years of creditable service on his actual retirement date. - OR
-
Clause D2- _% of the marital share of the disposable retired pay that Defendant would have
received had he retired with a retired pay base of $___ and with ___ years of creditable service
on his actual retirement date. The marital share is a fraction made up of ___ months of marital
pension service, divided by the total months of Defendant’s military service at [date] [date of
divorce, separation, etc., according to state law].

*For those who entered military service after September 7, 1980, you must insert the retired pay
base that Defendant would have. See Attorney Instructions on Dividing Retired Pay at DFAS
website (www.dfas.mil >Retired Pay > Garnishment) for details:
Clause D3- _% of the disposable retired pay that Defendant would have received had he retired
with a retired pay base of $___ and with ___ years of creditable service on his actual retirement
date.

[If order is worded as above or does not specify a retirement year, then, DFAS will assume the
year to be the actual year of retirement, and that year’s pay scale will be used. SM may want to
draw the order to specify “and assuming that Defendant retired on [date].” This would freeze the
benefit to that which is based on the pay tables in effect on the date of valuation for the parties, not
on the pay tables which exist when the SM actually retired or will retire.]

2. [If this is true, use the following clause to obtain direct-pay garnishment from DFAS].
Defendant has served at least ten years of creditable service concurrent with at least ten
years of marriage to Plaintiff. Plaintiff is entitled to direct payments from DFAS.

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

[as another alternative, the parties may agree to payment from Defendant to Plaintiff of
alimony, which is not limited by the 10/10 overlap above; in this case, an alimony clause should
be utilized which does not terminate payments at remarriage or cohabitation of Plaintiff.]

[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 Plaintiff, then this
order shall be submitted to DFAS by Plaintiff to accomplish this.
3. Plaintiff shall receive payments at the same time as Defendant. The parties acknowledge that DFAS is not required to begin payments to the former spouse until 90 days after receipt of an acceptable order or the start of retired pay, whichever is later. Defendant shall be responsible for making these payments each month to Plaintiff until DFAS begins making these payments to her, and during this interim, Defendant will pay Plaintiff directly her full share. Payments are due on the first day of each month. Pursuant to Pfister v. Comm’r, 359 F.3d 352, Proctor v. Comm’r, 129 T.C. 92 (2007), Mitchell v. Comm’r, T.C. Summary Opinion 2004-160, Mess v. Comm’r, 79 T.C.M. (CCH) 1443 and Eatinger v. Comm’r, 59 T.C.M. (CCH) 954, the parties agree that the periodic payments made by Defendant to Plaintiff for this interim period of time until direct payments commence from DFAS shall be included in Plaintiff’s income under Section 61 of the Internal Revenue Code, and these payments are likewise deductible from Defendant’s gross income.

4. Defendant shall provide to Plaintiff a Restricted Access PIN which she can use to access the myPay system through the DFAS website so that she can verify that she is, in fact, receiving her full share of Defendant’s retired pay each month. Defendant shall set up Plaintiff’s access to myPay and provide the Restricted Access PIN to her simultaneously with the signing of this Order. Defendant shall not delete Plaintiff’s Restricted Access PIN without specific written approval by court order. If Defendant breaches this provision, attorney’s fees shall be assessed against him under the enforcement clause below.

5. When DFAS has determined that this order meets the requirements of the applicable federal law as a military pension division order, then it shall carry out the provisions of this order and shall give written notice to Plaintiff (at her address set out above) and to her attorney, [name and address], that this order complies with said requirements.

6. Plaintiff shall notify DFAS in writing about any changes in her address or in this document affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.

7. Defendant shall provide promptly to Plaintiff 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.

8. [This is for protection of spouse; SM/retiree may reject this clause. It is not a requirement for MPDO.] If Defendant receives any amount that belongs to Plaintiff, he shall reimburse her immediately.

9. In order to effectuate direct payments from DFAS, Plaintiff shall tender a certified copy of this order to DFAS along with a certified copy of the parties’ divorce decree and an executed DD Form 2293. [This is a requirement if Plaintiff wants to receive direct payments from DFAS.]
10. [Use this or next clause in a consent order to protect spouse. Attorney for SM/retiree may want to delete.] The parties have agreed upon a set level of payments to Plaintiff to guarantee income to her, based upon Defendant’s military retired pay without any deductions for disability payments or any other reason. [-OR- if Defendant 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 Plaintiff to guarantee income to her, based upon Defendant’s military retired pay without any additional deductions for disability payments, over and above his present percentage disability rating, or for any other reason.] Defendant shall indemnify Plaintiff as to any reduction in her payments from what they would have been based solely on length of service. The parties consent to the court’s retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if Defendant should waive military retired pay in favor of disability payments or take any other action (such as receipt of severance pay, bonuses or an early-out payment) which reduces Plaintiff’s share or amount herein. This retention of jurisdiction is to allow the court to adjust Plaintiff’s share or amount to the pre-reduction level, to reconfigure the property division or to award compensatory alimony or damages so as to carry out the original intent of the court.

-OR-

The parties have agreed upon an anticipated level of payments to Plaintiff to guarantee income to her. That level is defined as [here state specifically what is anticipated, such as Defendant’s longevity retired pay will be about $2,000 per month, and Plaintiff will receive one-half of that times 15 years marriage during military service divided by 20 years of military service.] He hereby guarantees this and agrees to indemnify and hold Plaintiff harmless as to any breach hereof. Furthermore, if Defendant takes any action (such as waiver of retired pay in favor of disability compensation, receipt of severance pay, bonuses or an early-out payment) which reduces the amount or share Plaintiff is entitled to receive, then he shall indemnify her by paying to her directly the amounts by which her share or amount is reduced as non-modifiable spousal support which does not terminate upon her remarriage or cohabitation [OR as additional property division payments]. In addition, he hereby consents to the payment of this amount from any periodic payments he receives (such as wages or retired pay from any source), and this clause may be used to establish his consent (when this is necessary) for the entry of an order for garnishment, wage assignment or income withholding.

-OR-

[If order is based on trial, not consent, use this to protect non-military spouse; delete if representing SM/retiree.] The parties are responsible and accountable to this court for good faith and fair dealing in complying with the terms of this order. Defendant shall not unilaterally undertake any course of action which undermines this order or frustrates the intent of the court. He shall release, hold harmless and indemnify Plaintiff as to any actions he takes which reduce her allocated benefits. The court will retain continuing jurisdiction to modify the pension division payments or the property division specified herein, or to award compensatory alimony or damages, if Defendant should waive military retired pay in favor of disability payments or
take any other action (such as receipt of severance pay, bonuses or an early-out payment) which reduces the amount or share Plaintiff is entitled to receive. In addition, the court retains authority over this award to ensure that Plaintiff shall receive her proper share, that such other remedies as may be necessary are still available to Plaintiff, that Defendant acts in good faith in carrying out the terms of this order, that he indemnifies her in the event of any reduction of her amount or share due to his actions, and that the intent of this order will be carried out by both parties in full.

11. [This is to protect the spouse if the SM obtains civil service employment; delete if representing the SM.] If Defendant shall attempt to waive or convert any portion of his military service, whether active-duty or Guard/Reserve, into federal or state civil service time, without first obtaining Plaintiff’s consent, and the effect of this action is that her benefits would be reduced, then

a. Plaintiff shall receive either:

   i. Alimony equal to the amount or share of the military pension that she was entitled to receive before any waiver (with cost-of-living adjustments, if applicable), and not terminating at her remarriage or cohabitation; or

   ii. A portion of the federal retirement annuity (FERS) that provides Plaintiff an amount equal to what she would have received as her share of the military pension had there been no waiver to obtain an enhanced federal retirement annuity.

b. In the event of such conversion, pursuant to 5 U.S.C. § 8411(c)(5), Defendant shall authorize the Director of the Office of Personnel Management to deduct and withhold (from the annuity payable to Defendant) an amount equal to the amount that, if the annuity payment were instead a payment of Defendant’s military retired pay, would have been deducted, withheld, and paid to Plaintiff under the terms of this Order. The amount deducted and withheld under this subsection shall be paid to Plaintiff.

c. If the waiver of military pension for federal civil service retirement prevents Plaintiff’s coverage under the Survivor Benefit Plan, then Defendant will –

   i. Designate Plaintiff as beneficiary under the equivalent federal retirement survivor annuity plan and provide equivalent coverage; or

   ii. Obtain life insurance (with Plaintiff as the owner) covering his life with a death benefit equal to full SBP coverage; or

   iii. Purchase a single-premium annuity (with Plaintiff as the owner) that is equal to the benefits payable for full SBP coverage.
d. Defendant shall also notify Plaintiff immediately if he accepts employment 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 Defendant is directed to honor this court order to the extent of Plaintiff’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.

-OR-

[Use if the retiree is already employed by the federal government] Since Defendant is currently employed by the U.S. Civil Service, the terms of this paragraph are made with the purpose of ensuring that nothing involving that employment shall diminish the amount or share of Plaintiff’s pension benefit as specified in Paragraph 1 of this decree. Defendant shall not attempt to waive military retired pay to obtain credit for civil service retirement (CSRS or FERS). If he should do so, then the United States Office of Personnel Management is directed to pay Plaintiff’s share (as set out in Paragraph 1 of this decree) directly to her. The court retains authority over this award to ensure that Plaintiff shall receive her proper share, that such other remedies as may be necessary are still available to Plaintiff, that Defendant acts in good faith in carrying out the terms of this order, that he indemnifies her in the event of any reduction of her amount or share due to his actions, and that the intent of this order will be carried out by both parties in full.

12. [This is to protect spouse from CSB/Redux election which will reduce the military pension upon retirement.] Based on his agreement above, Defendant shall not elect to receive a CSB/Redux bonus. If Defendant does make such an election, then –
   a. He shall promptly provide to Plaintiff a copy of any election form he executes as to any bonus or option which affects his retired pay; and
   b. He shall indemnify Plaintiff for any loss she incurs (including fees, costs, expenses and damages). In the event of such a loss or reduction, the court shall award Plaintiff an equitable adjustment of her pension division award herein.
   c. The remedy shall be to increase Plaintiff’s share of the pension to make up for the decrease caused by CSB/Redux, but – upon application by Plaintiff – the court may allow her an equitable share of the bonus received by Defendant or award such other equitable relief as is just and proper, including the reallocation of marital/community property.

13. [This is to protect spouse if future information is needed regarding member’s status, location or benefits for modification or enforcement purposes; SM may object to this] If Defendant breaches this order and also fails to provide Plaintiff 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 Plaintiff 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 - [This is a fall-back clause if SM will not agree with the above clause]
If Defendant breaches any terms in this document, then the court shall award to Plaintiff any and all attorney’s fees she may incur in obtaining information on Defendant from the Department of Defense and in enforcement of the provisions herein.

14. If either party shall violate this court order, then the court shall indemnify the party seeking enforcement and shall award damages, interest at the statutory rate, and reasonable expenses and attorney’s fees to that party.

15. The monthly payments herein shall be paid to Plaintiff regardless of her marital status and shall not end at remarriage. Any future overpayments to Plaintiff by DFAS are recoverable and subject to involuntary collection from Plaintiff or from the estate of Plaintiff.

16. [This is not necessary but the SM/retiree usually wants to see this in writing] Plaintiff shall be responsible for the taxes on her share of Defendant’s military retired pay received from DFAS (or from Defendant directly). Plaintiff shall not be entitled to any portion of retired pay upon the death of either party.

17. [Leave this out if this is not awarded by the judge or agreed to by the parties. If you want to be certain about this and are not concerned, when a consent order is involved, about raising “red flags,” you may state: There shall be no Survivor Benefit Plan coverage for Plaintiff.] Defendant shall provide coverage for Plaintiff through the Survivor Benefit Plan (SBP) as follows:

   a. The Defendant shall immediately elect Plaintiff for “former spouse coverage” under the Survivor Benefit Plan upon divorce, with his monthly retired pay as the base amount. He shall do nothing to reduce or eliminate her benefits.

   b. Plaintiff shall effectuate a deemed election for former spouse coverage within one year of the entry of this order by sending a certified copy of this order to DFAS along with a certified copy of the divorce decree and an executed DD Form 2656-10.

   [If Defendant may elect coverage at less than the full amount of his monthly retired pay, then use the following clause:] Upon their divorce, Defendant shall elect former spouse coverage, choosing as the base amount $________. [This may be any amount down to $300 a month.]

   c. If Defendant does anything that changes the former spouse election, then an amount equal to the present value of SBP coverage for Plaintiff shall, at the death of Defendant, become an obligation of his estate. In addition, Plaintiff 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 in the premium payment (in the same ratio as the division of military retired pay). 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 Plaintiff 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 Plaintiff’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 Defendant (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. Also complete Finding of Fact #11.

OR- This clause sets out a way for the retired servicemember to be reimbursed by the spouse for the cost of SBP: Plaintiff shall reimburse Defendant within 10 days of each monthly premium payment for the full cost of her SBP coverage.

18. [Use this clause when Plaintiff’s share of pension is reduced to allocate to her the full SBP premium under Finding of Fact #11]. The adjustment herein of the military pension division share for Plaintiff, to shift to her the full premium costs for SBP, shall end upon either of the following two events, either of which would result in no premium payable for SBP:

   a. Plaintiff’s remarriage before age 55 (which suspends SBP coverage for her), or

   b. The continuous payment of SBP premiums for 360 months and Defendant’s attainment of age 70 (which results in paid-up SBP).

When either event occurs, the adjustment herein shall stop, and Plaintiff shall be entitled immediately to her full, unadjusted share of the pension (without regard to shifting payment of the SBP premium). Plaintiff may apply to the court for reversion of the pension share to the original, unadjusted portion, and Defendant hereby stipulates that Plaintiff is entitled to such adjustment when either of the above two events occurs. Plaintiff has a duty to inform Defendant immediately upon her remarriage.

19. [Use this clause when there is no SBP coverage at present, either through spousal concurrence or through lapse upon divorce. This requires the SM/retiree to elect SBP coverage for the spouse or former spouse at the next open enrollment period; note that all previous premium payments must be paid before coverage is effective, and this can be costly.] At the next open enrollment period for SBP, the Defendant agrees to elect and pay for coverage for the Plaintiff as his spouse/former spouse, using his full retired pay as the base amount [OR state other amount down to $300 a month].
20. [Use this clause to attempt to give Plaintiff some protections against reduction of disposable retired pay due to election of VA disability compensation or CRSC by SM/retiree] The parties shall comply with the terms of this order in good faith and shall notify the court and the other party if there are any substantial changes which would impact the retired pay of the Defendant. Examples of this include the remarriage of Plaintiff before age 55, which disqualifies her for SBP coverage (thus justifying termination for Defendant of the SBP premium deduction) and election by Defendant of VA disability compensation or Combat-Related Special Compensation, either of which would diminish the available retired pay of Defendant (thus reducing the share for Plaintiff). If the Defendant takes any action to diminish the share of Plaintiff of his military retired pay, then this court reserves jurisdiction to amend the pension division terms to increase Plaintiff’s share of Defendant’s retired pay, pursuant to White v. White, 152 N.C. App. 588, 568 S.E.2d 283 (2002).

________________________________________  Date:________________________
Judge Presiding

WE CONSENT:

[signatures of parties, preferably with acknowledgments]

[signatures of attorneys]

ENDNOTES

iii Supra note 1.
iv There is a separate address for submitting a SBP deemed election. See the SBP checklist within this SILENT PARTNER.

[revised 12/14/11]

* * *

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