NEW CONCERNS
IN THE
DIVISION OF MILITARY
RETIRED PAY

American Bar
Association
Standing Committee on
Legal Assistance to
Military Personnel

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INTRODUCTION

In recent times, there have been two major changes in how military retired pay is to be divided between a service member and a former spouse. This presentation will provide you with an overview of these changes.

I’ve provided you with some materials which I feel will be helpful in understanding what has occurred and the importance of these changes, whether you represent the military member or the divorcing spouse.

I’ll begin with the legislation that “freezes” military pay for computation purposes.

AMENDMENT TO THE FORMER SPOUSES PROTECTION ACT

With his permission, let’s look at some history offered by Fred Arquilla, a retired Army Colonel, former trial judge and staff judge advocate, and my boss while he was the Chief of the Legal Assistance Division at the Office of the Judge Advocate General, Army. Colonel Arquilla’s analysis was written prior to the passage of the amendment to the Former Spouse’s Protection Act, but it is still insightful.

Fred Arquilla  
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A proposed [now passed] amendment to the Former Spouses Protection Act (FSPA) is contained in the Fiscal Year 2017 Defense Authorization Bill. This Bill, as of this writing, has been approved by both Houses of Congress, but has not yet been forwarded to or approved by the President. In my view, the likelihood that this proposed amendment to the FSPA will be further amended or deleted from the Authorization Bill is not good.

The proposed amendment to the FSPA is not retroactive. The amendment would also not affect those who divorce a military member after the member has retired or who is very near retirement.

The proposed amendment would provide that a former spouse’s entitlement to military retired pay in future divorces will be frozen effective the date of the divorce to
the rank and number of years of service of the military member at the time of the member’s divorce.

The best way to explain this change is by means of an example as to what this would mean in present day dollars if the amendment had been the law in the past.

Under the present law, if a wife after 15 years of being a military wife separated from her husband (and divorced him in Virginia) when he was a major (0-5) in 2001 and 15 years later in 2016 he retires as a colonel 0-6 with 30 years of service, she would receive 25 percent (15/30 times ½) of his military retired pay as a colonel with 30 years’ Service. Retired pay would be 75 percent of his active duty pay (ignoring for ease of the example that military retired pay is based on the average high three earnings years). This would mean that the former spouse would receive each month, under present pay scales, $2,080 ($11,094.90 active duty 0-6 pay at over 30 years times 0.75 times 0.25).

If the proposed amendment had been in effect all these years, then under the same facts the former spouse would receive each month, under present pay scales, $685 ($7,314.90 present active duty 0-4 pay times 0.375 times 0.25). The figure 0.375 is arrived at by multiplying 15 years times the retirement factor of 0.25 per year. In other words, under the example given, the former spouse would suffer a decrease of $1,395 per month after waiting 15 years for the member to retire, during which time she would receive nothing.

The earlier FY 2016 Defense Authorization Bill implemented a so-called Blended Retirement System that will take effect in 2018. Under this law, had it been effect all these years, the retirement factor of 0.25 per year would be reduced to 0.20, which would mean that in the above example the former spouse would receive $549 per month.

Obviously, the economic impact on former spouses is greatest for those who divorce members at the midpoint of their military careers. For those who divorce after members have served almost 30 years of active military duty, there will be little impact on former spouses under either the proposed amendment to the FSPA or the Blended Retirement System.

Nevertheless, family lawyers will generally find the proposed amendment to the FSPA to be very unfair to former spouses because under Federal law their entitlement to the military member’s retirement benefits is being handled much less favorably than would be their entitlement as former spouses under civilian pension systems (e.g., school teachers and police) or under other Federal pension systems. Indeed, if military former spouses are employed under such systems, as many are, they may, in some divorce situations, have to give up more to their military spouses than what they would gain under the amended FSPA.

Unfortunately, the changes passed by Congress are every bit as devastating to a former spouse as Colonel Arquilla anticipated. Mark Sullivan, a retired Army Colonel
with whom I have worked closely over the years and one of the leading experts in this field, provided some additional information which should prove useful.

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This is an explanation of my three scenarios used for comparing results for the Former Spouse (FS) under the traditional TIME RULE division, used in over 40 states, and the new Frozen Benefit Rule enacted by Congress at Sec. 641, NDAA 2017 [12/23/16]. In each case, the FS gets about 40% less under the Frozen Benefit Rule than she would have under the Time Rule.

**COMPARISON: FROZEN BENEFIT AMOUNT VS. “TIME RULE” AMOUNT**

**Case A:** E-5 with 10 years of marriage and 10 years of service divorces in 2002. Monthly pay then as an “E-5 over 10” was $2,110, and hypothetical retired pay at divorce in 2002 was $528; brought forward with COLAs (cost-of-living adjustments) to the actual date of retirement, 2012, this figure would have increased to $677. Share of FS (former spouse) @ 50% (i.e., 10 years of marriage ÷ 10 years of service X 50% spousal share) = $339.

Same servicemember retires as E-8 in 2012. Monthly retired pay is based on the pay of an E-8 over 20, or $4,767; actual retired pay is $2,384. Share of FS would have been: 10 years of marital pension service ÷ 20 years of total service X 50% spousal share = $596.

Result: FS lost 43% of the Time Rule share of pension ($596 - $339 = $257. $257 ÷ $596 = 43.12%).

**Case B:** O-4 with 16 years of marriage overlapping 16 years of service divorces in 2002. Pay then as O-4 >16 was $5,256; hypothetical retired pay at divorce was $2,012, brought forward with COLAs to $2,708 at date of actual retirement, 2016. Share of FS (former spouse) @ 50% (i.e., 16 years of marriage ÷ 16 years of service X 50% spousal share) = $1354.

In 2016 SM retires as O-6 >30 with pay of $11,095, and retired pay of $8,321. Share of FS would have been 16/30 years X 50% spousal share = $2,219.

Result: FS lost 39% of the Time Rule share of pension ($2,219 - $1,354 = $865. $865 ÷ $2,219 = 38.98%).
Case C: E-7 with 14 years of marriage and same period of service divorces in 2004. Pay then as E-7 >14 was $3,140, and hypothetical retired pay = $1,099. Brought forward = $1,429 in 2016. Share of FS (former spouse) @ 50% (i.e., 14 years of marriage ÷ 14 years of service X 50% spousal share) = $715. SM retires in 2016 as E-9 >26, with pay of $6,637, actual retired pay of $4,314. Share of FS would have been 14 years of marriage ÷ 26 years of service X 50% spousal share = $1,161.¹

Result: FS lost 38% of the Time Rule share of pension ($1,161 - $715 = $446. $446 ÷ $1,161 = 38.42%).²

Whether you represent the service member or the former spouse, it is important for you to understand these rules so you can discuss them with your client. Also, it is important that the attorney handling the divorce and allocation of military retired pay be familiar with all the new rules and understand the complexities involved in qualifying a final Decree of Dissolution of Marriage for approval by the Defense Finance and Accounting Service.

HOWELL V. HOWELL³

A second attack on the rights of former spouses was upheld by the U. S. Supreme Court in the case of HOWELL v. HOWELL, decided May 15, 2017. I’ve provided you with the syllabus of the case on the following page, and the entire decision is reproduced at the end of these materials.

What we have so far is just the slip opinion, so the full designation has not yet been assigned. You can review an official copy of the slip decision online by going to https://www.supremecourt.gov/opinions/16pdf/15-1031_hejm.pdf

¹ All pay figures above are based on actual historic pay data from military pay tables published by the Defense Finance and Accounting Service (DFAS) and located at the DFAS website, www.dfas.mil.
² Retired pay for those who entered military service on or after 9/8/80 is based on the “High Three;” that is, the average of the highest 36 months of continuous compensation. For simplicity, this estimate uses only the pay at the date of divorce and at retirement for the Retired Pay Base, not the “High Three,” which would be slightly lower. The Retired Pay Multiplier for both scenarios is years of service times 2.5%.
³ HOWELL v. HOWELL, 581 U. S. ______ (2017). See Tab A (attached)
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HOWELL v. HOWELL

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 15–1031. Argued March 20, 2017—Decided May 15, 2017

The Uniformed Services Former Spouses’ Protection Act authorizes States to treat veterans’ “disposable retired pay” as community property divisible upon divorce, 10 U. S. C. §1408, but expressly excludes from its definition of “disposable retired pay” amounts deducted from that pay “as a result of a waiver . . . required by law in order to receive” disability benefits, §1408(a)(4)(B). The divorce decree of petitioner John Howell and respondent Sandra Howell awarded Sandra 50% of John’s future Air Force retirement pay, which she began to receive when John retired the following year. About 13 years later, the Department of Veterans Affairs found that John was partially disabled due to an earlier service-related injury. To receive disability pay, federal law required John to give up an equivalent amount of retirement pay. 38 U. S. C. §5305. By his election, John waived about $250 of his retirement pay, which also reduced the value of Sandra’s 50% share. Sandra petitioned the Arizona family court to enforce the original divorce decree and restore the value of her share of John’s total retirement pay. The court held that the original divorce decree had given Sandra a vested interest in the prewaiver amount of John’s retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court’s order.

Held: A state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse’s portion of the veteran’s retirement pay caused by the veteran’s waiver of retirement pay to receive service-related disability benefits. This Court’s decision in Mansell v. Mansell, 490 U. S. 581, determines the outcome here. There, the Court held that federal law completely pre-empts the States from treating waived military retirement pay as divisible
community property. *Id.*, at 594–595. The Arizona Supreme Court attempted to distinguish *Mansell* by emphasizing the fact that the veteran’s waiver in that case took place before the divorce proceeding while the waiver here took place several years after the divorce. This temporal difference highlights only that John’s military pay at the time it came to Sandra was subject to a future contingency, meaning that the value of Sandra’s share of military retirement pay was possibly worth less at the time of the divorce. Nothing in this circumstance makes the Arizona courts’ reimbursement award to Sandra any the less an award of the portion of military pay that John waived in order to obtain disability benefits. That the Arizona courts referred to her interest in the waivable portion as having “vested” does not help: State courts cannot “vest” that which they lack the authority to give. Neither can the State avoid *Mansell* by describing the family court order as an order requiring John to “reimburse” or to “indemnify” Sandra, rather than an order dividing property, a semantic difference and nothing more. Regardless of their form, such orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. Family courts remain free to take account of the contingency that some military retirement pay might be waived or take account of reductions in value when calculating or recalculating the need for spousal support. Here, however, the state courts made clear that the original divorce decree divided the whole of John’s military pay, and their decisions rested entirely upon the need to restore Sandra’s lost portion. *Id.* at 836.

238 Ariz. 407, 361 P. 3d 936, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. GORSUCH, J., took no part in the consideration or decision of the case.
Mark Sullivan was interviewed by Arizona Public Radio, Station KJZZ shortly after this decision was announced. His interview is reproduced in its entirety below:

Interview regarding the HOWELL V. HOWELL decision:

1. What did the court decide?  
   To understand what the decision means, we need to take a look at the facts. In this case the parties divorced in Arizona in 1991. The judge awarded Mrs. Howell 50% of the husband's military retired pay.
   
   The husband, John Howell, retired in 1992 from the Air Force. His pension was split evenly between the parties.
   
   About 13 years later - in about 2005 - Mr. Howell was told by the Dept. of Veterans Affairs, or VA, that he had a shoulder injury which was service-connected. This meant that he could apply for VA disability compensation for the injury. His VA rating was 20%, and that meant that he would receive about $250/mo. from the VA.
   
   BUT, it also meant that he had to forfeit the same amount of his pension to get those tax-free VA funds. This is called the "VA waiver." It requires a forfeiture of an equal amount of retired pay for retirees whose rating is less than 50% and for those who are receiving Combat-Related Special Compensation.
   
   Mr. Howell decided to go ahead with the VA waiver. He did so without the permission of the court, and without his ex-wife's consent. That resulted in Mrs. Howell's receiving about $125/mo less of the pension; the full pension of Mr. Howell was about $1500 per month.
   
   Mrs. Howell petitioned the trial court in Ariz. to order enforcement of the original order for pension division, and to require the ex-husband to make up the payments which were lost due to his VA waiver. The trial court approved and ordered pay-back by Mr. Howell, and this was upheld by the AZ Supreme Court.
   
   Mr. Howell petitioned for review before the US Supreme Court [and] The Supreme Court reversed the AZ decision and held that, under the Uniformed Services Former Spouses' Protection Act, the judge may not order pay-back to a former spouse of funds which she or he loses because the military retiree has elected to receive VA disability compensation and to forfeit an equal amount of his retired pay.

2. Was it [the decision] surprising?  
   Yes, it was. Of the state courts which have ruled on this, all but a handful have held that it is unfair and inequitable for retirees - after the property settlement is done - to make a VA election which causes a reduction of the share or amount of retired pay that the former spouse receives.
   
   Even the United States Solicitor General viewed the issue, upon oral argument before the US Supreme Court, as one which was properly decided by the Arizona Supreme Court.
   
   It is also surprising since it allows individuals to make unilateral decisions, without the approval of the judge or the consent of the former spouse, which essentially defeat the right of a former spouse to receive the amount of retired pay awarded by the court. By making a VA election for disability compensation, the retiree effectively circumvents the ruling by the trial court in setting what the former spouse will receive.
And all of this is AFTER the court has either approved the parties' settlement or else made a division of marital or community property which is fair, just and equitable, taking into account all of the facts and factors then present.

Does this decision mean that the former spouse can now go back into court and demand a rehearing, since what he/she was awarded is now reduced in value or - in extreme cases - worth nothing at all? Will the nation's divorce court judges be able to go back and amend the property division judgments which were rendered months or years ago to set the scales at a fair division once again? [Author's Note: this appears highly unlikely]

3. How will this decision impact retirees and servicemembers from here on?
   The decision in the Howell case means that servicemembers and retirees may elect VA disability compensation "without a price tag," that is, without fear that a judge may later order a pay-back of moneys lost by the former spouse because of a VA waiver.
   And what could this mean for their former spouses?
   There are several "take-away" lessons for former spouses and their attorneys.
   First of all, the Howell case magnifies the importance of a reimbursement clause in the property settlement. About 95% of cases involving the division of marital or community property are settled. It is always a good practice for the former spouse's attorney to include language for an "indemnification clause" in the property settlement, language which requires the retiree to pay back or reimburse the former spouse for any reduction in the share or amount of retired pay that is divided.
   This can be done with a straightforward pay-back requirement, such as: "If the Defendant does anything which reduces the share of amount of retired pay which the Plaintiff receives, he will immediately reimburse and indemnify her for such a reduction."
   Or it can be done with a clause requiring alimony, spousal support or maintenance to make up the difference. Such a clause could then be enforced through a garnishment from the retired pay center.
   In many cases, the attorney may want to hold open or "reserve" the issue of alimony to allow for a possible future VA waiver, and to make sure that the former spouse is protected.
   Attorneys who represent the former spouse may also decide to forego sharing the pension in favor of a "present value set-off," that is, the valuation of the retiree's pension, the award to him or her of the present value of the marital or community share of the pension, and the award to the former spouse of other property acquired during the marriage - if any exists - of equal value.

5. Where do we go from here? Is it possible to change this outcome?
   That doesn't lie in the hands of the courts. Now that the Supreme Court has spoken, the only course for lower courts is to uphold the ruling.
   Rather, the future lies in the hands of Congress. Since Congress passed the Uniformed Services Former Spouses' Protection Act in 1982, which is the statute interpreted by the Supreme Court, only an amendment to the Act by Congress can reverse this outcome.
Another well-known family law attorney and author had these thoughts:

I'm terribly afraid that any legislative fix will be seen as an attempt to take money away from disabled service members, especially by pro-defense Republicans, who are in functional control of the Congressional agenda.

Also, the present administration is both pro-military and quick to jump to simplistic conclusions, which suggests that the administration would see any legislative fix as an attack upon disabled service members also.

The broader problem here is, military service members are politically well-organized, and former spouses generally aren't. They organized pretty well following McCarty, but they haven't been able to keep it up.

If a legislative fix is to have a chance, former spouses must organize like heck and call their Congresspeople. This has not happened with other recent horrible changes, e.g., the USFSPA changes, and realistically I don't see a lot of reason why it should happen now. The USFSPA changes had a much broader adverse effect upon former spouses.

It's just really hard to get the US Congress to do anything which has an appearance of going against the interests of military service members.

(I'm not using "pro defense" in this email as a 100% perjorative, there are MANY good things about being pro-defense and I agree with many things the pro-defense Congresspeople are saying. But some of them have been bad on former spouse issues, and I don't see any basis for assuming they will be less bad in the future.)

I'm now going to put forth a general unformed thought which I haven't fully though through, and which I might ultimately decide is wrong, but I've been thinking about it.

Part of the problem with former spouse issues is that Congress takes care of military service members, but mostly states take care of former spouses. Congress doesn't do family law, it doesn't really understand family law, and it persistently undervalues family law policies, except when there is the occasional real political uproar (e.g., the reaction to McCarty).

Because federal law trumps state law, Congress' inability to understand family law takes precedence over attempts by states to protect former spouses.

So I'm just thinking: would it be better to dump this whole problem squarely in Congress' lap? Award two military pensions, one to the service member and one to the spouse. Neither comes from the other. Both come from the federal government. That would avoid the tendency to see former spouse benefits as reducing or even "stealing from" service member benefits.

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4 These do not necessarily reflect the opinions of the presenter
E.g., BOTH service members and military spouses contribute to national defense. Both should receive pensions from the federal government.

Obviously, if we do this, state courts have to be preempted from dividing any military pension benefits. It would be extremely unwise to do this unless we trust Congress to give reasonable benefits to former spouses. Otherwise it would make the situation worse.

But the fact that former spouse benefits SUBTRACT from military service member benefits gives military service members a really strong incentive to lobby for rules which hurt their former spouses. I'm wondering whether there could be a system which joins service members and (former) spouses together with a shared interest in obtaining fair compensation for their contributions to the country.

If former spouse benefits DIDN'T reduce service member benefits, would the politics of this issue be different, and more favorable to former spouses?

It might not work, but right now the system of the states protecting former spouses and the Feds protecting service members isn't working so well, either.

After the Howell opinion was released and these comments were made, Mark Sullivan issued an update on the Howell case, citing “the first appellate decision after HOWELL v. HOWELL to ‘get it right’ about the no-indemnification rule, VA offset, election of disability compensation by retiree, dollar-for-dollar reduction in retired pay due to waiver, etc.”

He added the following NOTE: “There were two other appellate decisions issued in August – one in Illinois, one in Pa. – and they both completely missed this issue [i.e., a major federal decision as to preemption and the rules under USFSPA, expansion of the Mansell decision, etc.]. Wasn’t on their radar, no invitation for re-briefing in light of the Supreme Court’s ruling.

The case in question is WALTER R. HURT v. VERDENA JONES-HURT, No. 2328 September Term, 2014, COURT OF SPECIAL APPEALS OF MARYLAND, 2017 Md. App. LEXIS 889, August 30, 2017, Filed. The full text appears at Tab C of these materials.

This is how Judge Nazarian expressed his opinion:

When Verdena Jones-Hurt ("Wife") and Walter Hurt ("Husband"), a veteran, divorced, the Circuit Court for Baltimore City included one-third of Husband's military pension in the marital property award it ordered in Wife's favor. Years after the divorce, Husband was reevaluated for a military service disability benefit and his disability rating increased, which made him eligible for more disability benefits and allowed him to waive a portion of his pension (which is taxable and may be considered marital property) in favor of disability benefits (which are not taxable and may not, as a matter of federal law, be considered marital property). The result
was that the federal government paid Husband the same amount of money each month, but Husband retained a greater share of it than the circuit court had awarded him: Wife received one-third of a smaller pension benefit, and Husband kept two-thirds of the smaller pension and all of the disability benefits.

Wife sought a declaratory judgment seeking, in effect, a ruling that Husband's election had circumvented the divorce judgment and that awarded her the same amount she previously had been receiving. Over the course of three different orders, the court ruled that Wife was entitled to the same overall dollar amount from Husband's total military benefits, notwithstanding the reduction in his pension payout. That result was consistent with three reported decisions of this Court and the greater weight of cases across the country. Husband challenges these decisions and argues, among other things, that our cases were wrongly decided. We need not revisit our earlier decisions ourselves, though, because the Supreme Court of the United States's opinion in Howell v. Howell, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017), issued after argument in this case, effectively overrules our precedents and compels us to reverse the judgment of the circuit court.

Judge Nazarian included some additional and interesting language in his opinion:

Without Howell, our precedents would have supported a decision to affirm the judgment of the circuit court. Howell changed the superseding federal law on the question before us in this case, and compels us to reverse the circuit court.

Even so, the preemptive scope of Howell governs only the treatment of this particular asset in the analysis of marital property awards, and doesn't seem to preclude a court from considering the contingent or diminished value of a military pension in connection with other relevant decisions in divorce cases. When Congress preempts state law, it does so "against the background of the total corpus juris of the states." "[T]his is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." (citations omitted).

WHAT DO WE DO NOW?

If all this teaches us anything, it is the importance of considering the possibility of future erosions in rights and to protect against them. Whether we are looking forward to an end of marriage of the death of a testator or settlor of a trust, we need to consider all contingencies. When advising the soon to be former spouse of a military person,
especially if he or she isn’t in a 10/10 marriage where DFAS will automatically forward payment to the former spouse, consider a couple of possible work-arounds:

1. Ask the court to award a lump sum amount as the present value of a future benefit. This requires that the service member have sufficient assets to pay the FS, or the parties could even potentially structure it as a promissory note to be paid out over the specified number of months with adequate security to ensure payment.

2. Treat the payment to the FS as alimony (and/or child support), rather than a division of military retired pay. Orders for garnishment for family support do not require 10/10 for enforcement.

It is essential that you keep current on this area of the law so long as you serving as a legal assistance attorney. Personally, my greatest pleasure has always come from helping clients achieve a just and equitable resolution of their problems.

Toward that end, you will be happy to know that Defense Finance finally published the much awaited revision of Volume 7B, Chapter 29, of the Department of Defense Financial Management Regulation, entitled “Former Spouse Payments from Retired Pay,” covering the new rules fixing the benefit which can be divided. The new rules can be found at the following site:


A copy of this Chapter of the Manual is attached at Tab C of these materials.

The new rules are prospective only. The Interim Guidance issued on 3 February 2017 stated that “All cases in which the divorce was before 23 Dec 17 are under the ‘old rules.’” This includes cases in which there is a military pension division order filed on or before 23 Dec 17. Cases in which an individual is already retired, whether there is a divorce or MPDO, are also under the old rules.

Mark Sullivan is a prolific writer and has written numerous articles and handouts, mostly for the ABA, including two recent SILENT PARTNER infoletters on the Frozen Benefit Rule, one on the Howell case, and one on the Blended Retirement System. If you are practicing in this area, you need to digest all of these and the materials I’ve provided, With this wealth of information, you will be well prepared to assist your clients.
As an added bonus or two, I've included a "Checklist for Military Retirement Benefits Cases" at Tab D, and an outline of the key chapters of the DOD Financial Management Regulation, and a note from Mark Sullivan referencing an article in the October 2016 issue of THE ARMY LAWYER titled "Making the Most Out of Your Pay and Allowanced: Military Income and Tax-Free Benefits," by Major Heidi M. Steele at Tab E.

You can go to the ABA website for the Section of Family Law: Military Committee and you will untold resource, including Fact Sheets, Legal Eagle Client Handouts, information on the Servicemembers Civil Relief Act, and a slew of SILENT PARTNER Handouts and TAKE-1 Handouts that contain a wealth of valuable information.

Good luck and continue serving your nation and your clients to the best of your ability.
Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 15–1031

JOHN HOWELL, PETITIONER v. SANDRA HOWELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

[May 15, 2017]

JUSTICE BREYER delivered the opinion of the Court.

A federal statute provides that a State may treat as community property, and divide at divorce, a military veteran’s retirement pay. See 10 U. S. C. §1408(c)(1). The statute, however, exempts from this grant of permission any amount that the Government deducts “as a result of a waiver” that the veteran must make “in order to receive” disability benefits. §1408(a)(4)(B). We have held that a State cannot treat as community property, and divide at divorce, this portion (the waived portion) of the veteran’s retirement pay. See Mansell v. Mansell, 490 U. S. 581, 594–595 (1989).

In this case a State treated as community property and awarded to a veteran’s spouse upon divorce a portion of the veteran’s total retirement pay. Long after the divorce, the veteran waived a share of the retirement pay in order to receive nontaxable disability benefits from the Federal Government instead. Can the State subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran’s retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran’s waiver? The question is complicated, but the
answer is not. Our cases and the statute make clear that the answer to the indemnification question is “no.”

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The Federal Government has long provided retirement pay to those veterans who have retired from the Armed Forces after serving, e.g., 20 years or more. It also provides disabled members of the Armed Forces with disability benefits. In order to prevent double counting, however, federal law typically insists that, to receive disability benefits, a retired veteran must give up an equivalent amount of retirement pay. And, since retirement pay is taxable while disability benefits are not, the veteran often elects to waive retirement pay in order to receive disability benefits. See 10 U. S. C. §3911 et seq. (Army retirement benefits); §6321 et seq. (Navy and Marines retirement benefits); §8911 et seq. (Air Force retirement benefits); 38 U. S. C. §5305 (requiring a waiver to receive disability benefits); §5301(a)(1) (exempting disability benefits from taxation). See generally McCarty v. McCarty, 453 U. S. 210, 211–215 (1981) (describing the military’s nondisability retirement system).

In 1981 we considered federal military retirement pay alone, i.e., not in the context of pay waived to receive disability benefits. The question was whether a State could consider any of a veteran’s retirement pay to be a form of community property, divisible at divorce. The Court concluded that the States could not. See McCarty, supra. We noted that the relevant legislative history referred to military retirement pay as a “‘personal entitlement.’” Id., at 224. We added that other language in the statute as well as its history made “clear that Congress intended that military retired pay ‘actually reach the beneficiary.’” Id., at 228. We found a “conflict between the terms of the federal retirement statutes and the [state-
conferred] community property right.” Id., at 232. And we concluded that the division of military retirement pay by the States threatened to harm clear and substantial federal interests. Hence federal law pre-empted the state law. Id., at 235.

In 1982 Congress responded by passing the Uniformed Services Former Spouses’ Protection Act, 10 U.S.C. §1408. Congress wrote that a State may treat veterans’ “disposable retired pay” as divisible property, i.e., community property divisible upon divorce. §1408(c)(1). But the new Act expressly excluded from its definition of “disposable retired pay” amounts deducted from that pay “as a result of a waiver . . . required by law in order to receive” disability benefits. §1408(a)(4)(B). (A recent amendment to the statute renumbered the waiver provision. It now appears at §1408(a)(4)(A)(ii). See Pub. L. 114–328, §641(a), 130 Stat. 2164.)

In 1989 we interpreted the new federal language in Mansell, 490 U.S. 581. Major Gerald E. Mansell and his wife had divorced in California. At the time of the divorce, they entered into a “property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits.” Id., at 586. The divorce decree incorporated this settlement and permitted the division. Major Mansell later moved to modify the decree so that it would omit the portion of the retirement pay that he had waived. The California courts refused to do so. But this Court reversed. It held that federal law forbade California from treating the waived portion as community property divisible at divorce.

Justice Thurgood Marshall, writing for the Court, pointed out that federal law, as construed in McCarty, “completely pre-empted the application of state community property law to military retirement pay.” 490 U.S., at 588. He
noted that Congress could “overcome” this pre-emption “by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property.” Ibid. He recognized that Congress, with its new Act, had done that, but only to a limited extent. The Act provided a “precise and limited” grant of the power to divide federal military retirement pay. Ibid. It did not “grant[t]” the States “the authority to treat total retired pay as community property.” Id., at 589. Rather, Congress excluded from its grant of authority the disability-related waived portion of military retirement pay. Hence, in respect to the waived portion of retirement pay, McCarty, with its rule of federal pre-emption, still applies. Ibid.

B

John Howell, the petitioner, and Sandra Howell, the respondent, were divorced in 1991, while John was serving in the Air Force. Anticipating John’s eventual retirement, the divorce decree treated John’s future retirement pay as community property. It awarded Sandra “as her sole and separate property FIFTY PERCENT (50%) of [John’s] military retirement when it begins.” App. to Pet. for Cert. 41a. It also ordered John to pay child support of $585 per month and spousal maintenance of $150 per month until the time of John’s retirement.

In 1992 John retired from the Air Force and began to receive military retirement pay, half of which went to Sandra. About 13 years later the Department of Veterans Affairs found that John was 20% disabled due to a service-related shoulder injury. John elected to receive disability benefits and consequently had to waive about $250 per month of the roughly $1,500 of military retirement pay he shared with Sandra. Doing so reduced the amount of retirement pay that he and Sandra received by about $125 per month each. In re Marriage of Howell, 238 Ariz. 407,
Opinion of the Court

408, 361 P. 3d 936, 937 (2015)

Sandra then asked the Arizona family court to enforce the original decree, in effect restoring the value of her share of John's total retirement pay. The court held that the original divorce decree had given Sandra a "vested" interest in the prewaiver amount of that pay, and ordered John to ensure that Sandra "receive her full 50% of the military retirement without regard for the disability." App. to Pet. for Cert. 28a.

The Arizona Supreme Court affirmed the family court's decision. See 238 Ariz. 407, 361 P. 3d 936. It asked whether the family court could "order John to indemnify Sandra for the reduction" of her share of John's military retirement pay. Id., at 409, 361 P. 3d, at 938. It wrote that the family court order did not "divide" John's waived military retirement pay, the order did not require John "to rescind" his waiver, nor did the order "direct him to pay any amount to Sandra from his disability pay." Id., at 410, 361 P. 3d, at 939. Rather the family court simply ordered John to "reimburse" Sandra for "reducing . . . her share" of military retirement pay. Ibid. The high court concluded that because John had made his waiver after, rather than before, the family court divided his military retirement pay, our decision in Mansell did not control the case, and thus federal law did not preempt the family court's reimbursement order. 238 Ariz., at 410, 361 P. 3d, at 939.

Opinion of the Court

II

This Court's decision in *Mansell* determines the outcome here. In *Mansell*, the Court held that federal law completely pre-empts the States from treating waived military retirement pay as divisible community property. 490 U.S., at 594–595. Yet that which federal law pre-empts is just what the Arizona family court did here. App. to Pet. for Cert. 28a, 35a (finding that the divorce decree gave Sandra a "vested" interest in John's retirement pay and ordering that Sandra receive her share "without regard for the disability").

The Arizona Supreme Court, the respondent, and the Solicitor General try to distinguish *Mansell*. But we do not find their efforts convincing. The Arizona Supreme Court, like several other state courts, emphasized the fact that the veteran's waiver in *Mansell* took place before the divorce proceeding; the waiver here took place several years after the divorce proceedings. See 238 Ariz., at 410, 361 P. 3d, at 939; see also *Abernethy v. Fishkin*, 699 So. 2d 235, 240 (Fla. 1997) (noting that a veteran had not yet waived retirement pay at the time of the divorce and permitting indemnification in light of the parties' "intent to maintain level monthly payments pursuant to their property settlement agreement"). Hence here, as the Solicitor General emphasizes, the nonmilitary spouse and the family court were likely to have assumed that a full share of the veteran's retirement pay would remain available after the assets were distributed.

Nonetheless, the temporal difference highlights only that John's military retirement pay at the time it came to Sandra was subject to later reduction (should John exercise a waiver to receive disability benefits to which he is entitled). The state court did not extinguish (and most likely would not have had the legal power to extinguish) that future contingency. The existence of that contingency meant that the value of Sandra's share of military retire-
ment pay was possibly worth less—perhaps less than Sandra and others thought—at the time of the divorce. So too is an ownership interest in property (say, A's property interest in Blackacre) worth less if it is subject to defeasance or termination upon the occurrence of a later event (say, B's death). See generally Restatement (Third) of Property §24.3 (2010) (describing property interests that are defeasible); id., §25.3, and Comment a (describing contingent future interests subject to divestment).

We see nothing in this circumstance that makes the reimbursement award to Sandra any the less an award of the portion of military retirement pay that John waived in order to obtain disability benefits. And that is the portion that Congress omitted from the Act's definition of "disposable retired pay," namely, the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse. Mansell, supra, at 589. That the Arizona courts referred to Sandra's interest in the waivable portion as having "vested" does not help. State courts cannot "vest" that which (under governing federal law) they lack the authority to give. Cf. 38 U.S.C. §5301(a)(1) (providing that disability benefits are generally nonassignable). Accordingly, while the divorce decree might be said to "vest" Sandra with an immediate right to half of John's military retirement pay, that interest is, at most, contingent, depending for its amount on a subsequent condition: John's possible waiver of that pay.

Neither can the State avoid Mansell by describing the family court order as an order requiring John to "reimburse" or to "indemnify" Sandra, rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore that portion of retirement pay lost due to the postdivorce waiver. And we note that
here, the amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted.

The basic reasons *McCarty* gave for believing that Congress intended to exempt military retirement pay from state community property laws apply *a fortiori* to disability pay. See 453 U. S., at 232–235 (describing the federal interests in attracting and retaining military personnel). And those reasons apply with equal force to a veteran's postdivorce waiver to receive disability benefits to which he or she has become entitled.

We recognize, as we recognized in *Mansell*, the hardship that congressional pre-emption can sometimes work on divorcing spouses. See 490 U. S., at 594. But we note that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support. See *Rose v. Rose*, 481 U. S. 619, 630–634, and n. 6 (1987); 10 U. S. C. §1408(e)(6).

We need not and do not decide these matters, for here the state courts made clear that the original divorce decree divided the whole of John's military retirement pay, and their decisions rested entirely upon the need to restore Sandra's lost portion. Consequently, the determination of the Supreme Court of Arizona must be reversed. See *Mansell, supra*, at 594.

III

The judgment of the Supreme Court of Arizona is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*
Opinion of the Court

JUSTICE GORSUCH took no part in the consideration or decision of this case.
Opinion of THOMAS, J.

SUPREME COURT OF THE UNITED STATES

No. 15-1031

JOHN HOWELL, PETITIONER v. SANDRA HOWELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

[May 15, 2017]

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join all of the opinion of the Court except its brief discussion of "purposes and objectives" pre-emption. Ante, at 8. As I have previously explained, "[t]hat framework is an illegitimate basis for finding the pre-emption of state law." Hillman v. Maretta, 569 U. S. ___, ___ (2013) (THOMAS, J., concurring in judgment) (slip op., at 1); see also Wyeth v. Levine, 555 U. S. 555, 583 (2009) (same). In any event, that framework is not necessary to support the Court's judgment in this case.
DISPOSITION:  JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. APPELLEE TO PAY COSTS.

OPINION

Opinion by Nazarian, J.

When Verdena Jones-Hurt ("Wife") and Walter Hurt ("Husband"), a veteran, divorced, the Circuit Court for Baltimore City included one-third of Husband's military pension in the marital property award it ordered in Wife's favor. Years after the divorce, Husband was reevaluated for a military service disability benefit and his disability rating increased, which made him eligible for more disability benefits and allowed him to waive a portion of his pension (which is taxable and may be considered marital property) in favor of disability benefits (which are not taxable and may not, as a matter of federal law, be considered marital property). The result was that the federal government paid Husband the same amount of money each month, but Husband retained a greater share of it than the circuit court had awarded him: Wife received one-third of a smaller pension benefit, and Husband kept two-thirds of the smaller pension and all of the disability benefits.

Wife sought a declaratory [*2] judgment seeking, in effect, a ruling that Husband's election had circumvented the divorce judgment and that awarded her the same amount she previously had been receiving. Over the course of three different orders, the court ruled that Wife was entitled to the same overall dollar amount from Husband's total military benefits, notwithstanding the reduction in his pension payout. That result was consistent with three reported decisions of this Court and the greater weight of cases across the country. Husband challenges these decisions and argues, among other things, that our cases were wrongly decided. We need not revisit our earlier decisions ourselves, though, because the Supreme Court of the United States's opinion in Howell v. Howell, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017), issued after argument in this case, effectively overrules our precedents and compels us to reverse the judgment of the circuit court.

I. BACKGROUND

Husband served in the Army National Guard of Maryland from July 3, 1969 to June 14, 1971 and from May 15, 1985 to October 1, 1987. He suffered three injuries during his time in the service—one during the first period and two during the second. After his first injury, Husband received a ten percent disability rating that entitled [*3] him to a Wartime Disability Compensation award pursuant to 38 U.S.C. § 1110. He retired from the Army National Guard in 1998 and later applied for retirement benefits, which would kick in after he turned sixty years old.

Husband and Wife married in 1972, and divorced on October 26, 2004, via a Judgment of Absolute Divorce issued by the circuit court. Among other things, the judgment awarded Wife alimony of $600 per month for three years and "one-third of the marital share of [Husband]'s pension from the United States Army, the marital share . . . to be calculated from June 3, 1972 to April 1, 2002." Everyone agrees that at the time that it entered the Judgment of Absolute Divorce, the court was not aware that Husband was receiving disability benefits.

On January 13, 2009, Husband "filed a claim for increased evaluation" of his disability with the Department of Veterans Affairs ("DVA"). While awaiting the DVA's decision, Husband turned sixty years old and began collecting his Army pension as a reservist. See 10 U.S.C. § 12731. Because a retiree may not receive both reservist retirement and disability compensation, see 38 U.S.C. § 5305, Husband's receipt of disability benefits from the DVA automatically reduced his retirement pension [*4] from the Department of Defense on a dollar-for-dollar basis. On December 15, 2009, the DVA issued a Rating Decision that increased Husband's monthly disability entitlement and allowed him to receive thirty, rather than ten, percent of his total military benefits as disability benefits rather than pension:¹
Evaluation of right knee replacement, which is currently 10 percent disabling, is increased to 100 percent effective December 19, 2008. An evaluation of 30 percent is assigned from February 1, 2010.[1]

1 Husband has appealed his thirty percent disability rating, and his DVA appeal was still pending at the time of oral argument.

On October 26, 2011, Wife reopened the case and filed a Complaint for Entry of Qualified Domestic Relations Orders. One of the two orders she sought pertained to Husband's military pension, and would have provided that "any portion of the Service Member's Disposable Retired Pay that he waives in order to receive military disability retired pay... in lieu of Disposable Retired Pay shall be added back in, and any deficiency resulting from any such waiver that affects the amount paid directly to [Wife] by the Designated Agent shall be paid to her directly by [Husband]." Husband filed an answer stating that Wife's proposed orders were "seriously inconsistent with the October 26, 2004 order." [*5] After a hearing on February 27, 2012, the circuit court denied Wife's Motion for Entry of Qualified Domestic Relations Orders and entered an order to that effect.

2 The other order pertained to Husband's state pension.

On August 21, 2012, Wife filed a Motion for Declaratory Judgment and Ancillary Relief, requesting that the circuit court determine that she had a valid claim to Husband's pension arrears and that the court enter a Constituted Pension Order that included a provision that "[t]o the extent the Designated Agent is prohibited by law or regulation from paying the entire amount required by this order to [Wife], [Husband] shall personally pay any shortfall to [Wife]." Husband responded that "[t]he order violates federal law and deprives [Husband] of disability benefits for a disability which occurred before the marriage, worsened during the marriage. Such action by the state court is explicitly barred by federal law." The court held a hearing and determined that Wife was entitled to the same division of retirement benefits in the 2004 order:

I agree with both of you. [Husband's counsel], yes, the court can't order retirement benefits and disability benefits for -- from your client's military award, but at the same time I agree with [Wife's [*6] counsel] in terms of the Allen case and the argument that every person in the military would then file then later disability and then try and cut the spouse off completely or to a certain percentage of the disability.

I don't think that was the intent of the courts. I've looked at the -- and reviewed the judgment of divorce in 2004, and it looks like the court contemplated that [Wife] would receive one-third of all retirement benefits accrued between June 3rd, 1972 and April 2nd, 2002.

To deny her benefits that were originally for -- I'm sorry, to deny her benefits that the court originally intended for her to share today would be contrary to the intent, I believe, of the court based on the court's determination after a hotly contested trial of the testimony and the exhibits.

And of course I'm not going to demand that the military payments be paid directly to [Wife] because it would be in violation of federal law, but in principle not of contract, but out of principle of the intent of the original court that issued the absolute divorce I think and I believe that -- and I'm not in [the 2004 judge]'s head, but I think he was trying to award her one-third of the spouse's, [Husband]'s military [*7] retirement.
In terms of some sort of provision, [Wife's counsel], that you're asking the court to put in here that would limit the amount or prevent her from -- that's something in the future, and because there's no number that we have definitive now I hesitate to do that, and of course I think if there is ever a 30 percent, they stay with 30 percent or go higher I'm sure - - and this court does have jurisdiction over the parties -- that you will come back to court and ask for some relief.

After two days of hearings on April 16 and 17, 2014, the circuit court entered a Constituted Pension Order that awarded Wife "26.57% percent of [Husband]'s disposable military retired pay [and] a pro rata share of any post-retirement increases and cost of living adjustments to [Husband]'s Disposable Retired Pay."

3 The provided copy of the written order in Husband's record extract had 26.57 typed on it and 26.97 handwritten above the typed number. The original order in the record, however, does not contain the handwritten number. The correct number is 26.57.

On November 14, 2014, Husband filed a Motion to Modify or Reconsider Ruling As to Military Disability Compensation or, in the Alternative, for Judgment in Favor of Defendant and Request for Hearing. Wife responded on December 1, 2014, and in an order filed December 9, 2014, the circuit court denied Husband's motion.

4 Husband filed a notice of appeal on January 8, 2015, and the parties filed a Consent Motion to Remand or Appropriate Relief with this Court, which granted the motion, remanded the case, and stayed the appeal until now.

In March 2015, Husband filed a Motion to Amend Constituted Pension Order in which [*8] he requested that the court change the percent of the total pension to which Wife was entitled to 23.97% rather than 26.57%. The court denied Husband's motion, and on September 18, 2015, entered a nunc pro tunc order, that provided, among other things, "that the trial court intended through its Judgment of Absolute Divorce for [Wife] to receive one-third of [Husband]'s military pension benefits accrued between June 3, 1972 and April 1, 2002" and that the parties agreed that Wife's "marital share of [Husband]'s military pension is 26.6%." The court further recognized that directing the military to pay the full amount of the pension owed to Wife would contravene federal law and "[ordered] that [Husband] shall pay to [Wife] the differential between the amount [Wife] receives directly from the government once [Wife] begins to receive her portion of the pension through the Constituted Pension Order, and the full amount of the pension she is entitled to receive pursuant to the divorce judgment."

On May 16, 2016, the parties filed a Proposed Supplemental Order, which the court entered on June 14, 2016, that ordered that Husband pay Wife "26.57% of [his] military disability payments by direct [*9] payment as a result of converting a portion of his military retired pay to disability pay."

The circuit court then entered a Declaratory Judgment, dated July 15, 2016, declaring that Wife was not entitled to any portion of Husband's disability benefits and that any portions of the Judgment for Absolute Divorce requiring division of Husband's disability benefits was unenforceable. The circuit court explained in its accompanying memorandum that it "[lack[ed] authority to order division of [Husband]'s military disability benefits, where, as here, [Husband] took no steps to dilute [Wife]'s ordered share of the benefits and the parties reached no agreement regarding division of such benefits." The court, however, "[declared] that to the extent funds are available for payment of benefits to [Wife] from [Husband]'s disposable retirement pay, [Wife] is entitled to receive the benefits, up to one-third of [Husband]'s benefits as required by the Judgment of Absolute Divorce." This timely appeal followed.

5 See note 4.
II. DISCUSSION

Husband challenges the portion of his military benefits that the circuit court required him to pay to Wife after his military disability benefits increased, and that decision is grounded in legal conclusions that we review de novo. Wilson v. Wilson, 223 Md. App. 599, 609, 117 A.3d 138 (2015) (citation omitted). He offers three arguments in favor of reversal. First, he attempts to distinguish this case from three reported cases of this Court that address the division by agreement of a spouse's military retirement benefits. Second, whether or not this case is distinguishable, he argues, the earlier cases on which the circuit court relied were decided wrongly. Third, Husband argues that the circuit court considered improperly his future eligibility for military disability compensation when it considered and awarded alimony to Wife.

In his brief, Husband phrases the issue as: "Did the Circuit Court for Baltimore City err when it ordered, originally and on reconsideration, that Major Walter Hurt must pay to his ex-wife, Verdena Jones-Hurt, 1/3rd of the marital share of his military disability benefit?"

Although it might seem like a regular family law case, this appeal poses a thorny federalism question. Marriage, divorce, and the division of marital property are quintessentially matters of state law, and pension or retirement benefits normally are considered marital property at the time of divorce. But military benefits are creatures of federal law, and the treatment of military benefits in state divorce proceedings has been a source of federal and state tension for decades.

In 1981, the Supreme Court of the United States held that the federal statute governing military benefits preempted state family law and precluded those benefits from being treated as community property in state divorce proceedings. McCarty v. McCarty, 453 U.S. 512, 232-33, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). The Court of Appeals extended the McCarty principle to marital property in this equitable distribution state soon after. Hill v. Hill, 291 Md. 615, 620-21, 436 A.2d 67 (1981). In response to McCarty, Congress passed the Uniform Services Former Spouses Protection Act ("USFSPA"), codified in pertinent part at 10 U.S.C. § 1408. That statute authorized states to treat the net disposable pay of retired service members as divisible property. Collins v. Collins, 144 Md. App. 395, 421-22, 798 A.2d 1155 (2002). The USFSPA defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled" minus certain amounts. 10 U.S.C. § 1408(a)(4). "Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits." Mansell v. Mansell, 490 U.S. 581, 585, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989) (citing 10 U.S.C. § 1408(a)(4)). "Thus, under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property." Id. at 589.

Faced with the McCarty issue under the then-new statute, the Supreme Court held in Mansell that "the [USFSPA] does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." Id. at 594-95. And in the course of explaining the differences between the two forms of benefits, the Court recognized the tax advantages of waiving retirement pay in favor of disability benefits:

Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay. The amount of retirement pay a veteran is eligible to receive is calculated according to the number of years served and the rank achieved. . . . The amount of disability benefits a veteran is eligible to receive is calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired.

In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay. Because disability benefits are exempt from federal, state, and local taxation, . . . military retirees
who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common.

_id_. at 583-84 (emphasis added) (internal citations and footnote [*13] omitted).

As to military pension benefits, though, the USFSPA "specifically overruled the Supreme Court with the intent to return to state law. 'Under Maryland law, . . . pensions generally, including military pensions, are marital property.'" _Collins_, 144 Md. App. at 422 (quoting _Andersen v. Andersen_, 317 Md. 380, 384, 564 A.2d 399 (1987)). "[A] military pension shall be considered in the same manner as any other pension or retirement benefit" when determining whether property is marital property. _Md. Code (1984, 2012 Repl. Vol.), § 8-203(b) of the Family Law Article ("FL"); see also _Collins_, 144 Md. App. at 415 ("There is no question that a pension, or rights to a pension, are part of marital property." (citations omitted)). Thus, a court "may transfer ownership of an interest in a pension, retirement, profit sharing, or deferred compensation plan, from one party to either or both parties," _FL_ § 8-205(a)(2)(i), "to the extent it was earned during the marriage," _Woodson v. Saldana_, 165 Md. App. 480, 488, 885 A.2d 907 (2005). "[T]he court has broad discretion in evaluating pensions and retirement benefits, and in determining the manner in which those benefits are to be distributed." _Id_. at 489 (quoting _Welsh v. Welsh_, 135 Md. App. 29, 54, 761 A.2d 949 (2000)).

The veteran spouse's ability to waive retirement pay in favor of disability benefits creates opportunities for disagreements and gaming, though, especially when the election comes after the property division is finalized. In earlier [*14] cases, we and other state courts reconciled this tension by treating the total military benefit as a whole. _See Allen v. Allen_, 178 Md. App. 145, 155, 941 A.2d 510 (2008) (stating that the term "pension/retirement plans" included "all retirement benefits accrued as a result of appellant's military service"); _see also Bandini v. Bandini_, 935 N.E.2d 253, 260-61 (Ind. Ct. App. 2010) (stating that the term "military retirement/pension plan" is broad and refers to the appellant's retirement benefits as one unit such that, in the absence of any limiting language, it "encompass[e]d [appellant]'s gross retirement pay, before any deductions for [his Survivor Benefit Plan] costs or amounts waived to receive [DVA] disability benefits"); _Johnson v. Johnson_, 37 S.W.3d 892, 896-97 (Tenn. 2001) (stating that where the phrase "all military retirement benefits" was undefined, it unambiguously included "all amounts to which the retiree would ordinarily be entitled as a result of retirement from the military," including amounts waived to receive disability benefits). Although the portions of a veteran's gross retirement pay waived to receive disability benefits may not be included in a marital award, _Mansell_, 490 U.S. at 594-95, several states' courts have enforced agreements--in other words, kept the non-veteran spouse whole--where the veteran elected _after the decree_ to waive all or some of a military retirement [*15] pension to receive disability benefits. _See, e.g._, _Bandini_, 935 N.E.2d at 262, 266; _Allen_, 178 Md. App. at 155-56; _Dexter v. Dexter_, 105 Md. App. 678, 680, 661 A.2d 171 (1995); _Johnson_, 37 S.W.3d at 896-97. Although the veteran was entitled as a matter of federal law to make the election, divorce courts viewed the exercise of that right as altering the parties' bargain as a matter of state law, and took steps to maintain the balance that the parties intended.

Our Court confronted this tension in three reported cases over the years. In _Dexter_, the parties reached an agreement regarding the division of one spouse's military pension, and that agreement was read into the record and incorporated into their divorce judgment. _Dexter_, 105 Md. App. at 680. Shortly thereafter, the military spouse voluntarily waived his rights to military retirement benefits in favor of disability benefits, and the non-military spouse stopped receiving pension payments. _Id_. at 680. We concluded that "[t]he inability of [the non-military spouse] to receive the benefits she bargained for [wa]s caused not by any federal statute or case law, but by [the military spouse]'s rejection, by waiver, of the retirement benefits that he had agreed were to be partially hers." _Id_. at 684. Relying on Maryland contract law, we held that the military spouse's voluntary waiver of his military retirement pension breached his contract: [*16]
where . . . the parties enter into an agreement that one spouse will receive a percentage of pension benefits, on a periodic basis, when they become payable, and when . . . they are already payable and being paid, the pensioned party may not hinder the ability of the party's spouse to receive the payments she has bargained for, by voluntarily rejecting, waiving, or terminating the pension benefits.

*Id.* at 686.

We reached similar conclusions in *Allen* and *Wilson*. In *Allen*, we determined that a military spouse who had agreed to share a pension may not take steps to dilute the other spouse's share by rejecting, waiving, or terminating pension benefits voluntarily. 178 Md. App. at 155-56. Viewing the case through a contractural lens, we concluded that the non-military spouse would be entitled to the agreed percentage of the veteran's overall military benefit "because [the military spouse]'s disability retirement benefits are paid as pension and retirement benefits and take the place of other pension and retirement benefits, [and thus,] they are subject to the division of 'pension/retirement plans.'" *Id.* And we recognized that although federal law precludes state courts from treating disability retirement benefits as marital [*17] property, the veteran spouse could discharge his obligations without spending disability benefits to do it:

[t]he circuit court's ruling on appeal does not require payment to [the spouse] of any disability benefits, thus, the court, in essence, is not treating as property divisible, payment that has been waived to receive disability benefits. When [the military spouse] was discharged from the military, he received in entirety the benefits the United States owed to him for his service. These assets have become part of [the retiree's] general assets. Accordingly, [the military spouse] can satisfy the judgment against him with any assets, thereby not violating *Mansell*. We, therefore, affirm the circuit court's determination of arrearages to be satisfied by [the military spouse] out of his general assets.

*Id.* at 153-54.

In *Wilson*, we held as well that where a party agrees to a transfer of assignable pension benefits as part of a divorce settlement, he may not frustrate that agreement by waiving those pension benefits. 223 Md. App. at 629. We noted that, as in *Allen*, 178 Md. App. at 146, the parties agreed that the spouse would receive a percentage of the marital portion of the military spouse's military retirement benefits and "that those benefits were [*18] not required to be paid by the military." 223 Md. App. at 626. After looking at *Allen* and *Dapp v. Dapp*, 211 Md. App. 323, 65 A.3d 214 (2013), we concluded that the military spouse's "anticipated military benefits were divisible and assignable at the time of contract," that "the parties' property settlement agreement was valid at the time it was executed, and the trial court had the authority to enforce the parties' agreement." *Wilson*, 223 Md. App. at 629 (citations omitted).

Our cases are consistent with the majority view in other states' courts, *i.e.*, that *Mansell* and the USFSPA did not preclude courts from requiring a military spouse to compensate a spouse when the spouse's share of retirement pay was reduced by the military spouse's unilateral waiver of retirement pay in favor of disability benefits. As in our cases, these courts proceeded from the principle that it is inequitable to allow a veteran to diminish voluntarily the military retirement benefits owed to a spouse as part of a valid and enforceable divorce judgment. *E.g.*, *In re Marriage of Krempin*, 70 Cal. App. 4th 1008, 83 Cal. Rptr. 2d 134, 143 (Cal. Ct. App. 1999); *In re Marriage of Warkocz*, 141 P.3d 926, 929-30 (Colo. Ct. App. 2006); *Black v. Black*, 2004 ME 21, 842 A.2d 1280, 1285 (Me. 2004); *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507, 509-10 (Nev. 2003); *Whitfield v. Whitfield*, 373 N.J. Super. 573, 862 A.2d
1187, 1192 (N.J. Super. Ct. App. Div. 2004); Hadrych v. Hadrych, 2007- NMCA 001, 140 N.M. 829, 149 P.3d 593, 597 (N.M. Ct. App. 2006); Resare v. Resare, 908 A.2d 1006, 1009-10 (R.I. 2006).7 Some courts distinguished pre-divorce and post-divorce waivers on the ground that Mansell's holding, i.e., that state courts may not "treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability [*19] benefits," 490 U.S. at 594-95 (emphasis added), extended only to waivers known at the time of the divorce. See, e.g., Krempin, 83 Cal. Rptr. 2d at 139. Some focused more on the non-military spouse's vested interest in the military retirement pay, and precluded the military spouse from waiving retirement pay in favor of disability benefits after the divorce judgment. E.g., Surratt v. Surratt, 83 Ark. App. 267, 148 S.W.3d 761, 767 (Ark. Ct. App. 2004); In re Marriage of Neilson & Magrini, 341 Ill. App. 3d 863, 792 N.E.2d 844, 849, 275 Ill. Dec. 369 (Ill. App. Ct. 2003); Black, 842 A.2d at 1286; Hadrych, 149 P.3d at 598; Hodge v. Hodge, 2008 OK CIV APP 96, 197 P.3d 511, 515-16 (Okla. Civ. App. 2008); Johnson, 37 S.W.3d at 897-98.8 Either way, these courts, like the circuit court in this case, recognized the federal law that creates the veteran's right to different types of benefits, but sought, in the context of state law divorce proceedings, to blunt the opportunity for veterans to game their divorce judgments through after-the-fact elections.


8 But see Pierce, 982 P.2d at 998, Morgan v. Morgan, 249 S.W.3d 226, 232-33 (Mo. Ct. App. 2008), and Youngbluth, 6 A.3d at 685-87, for instances where state courts reached the contrary conclusion.

But a new Supreme Court decision, issued since oral argument in this case, diminishes state courts' efforts to carry out state law objectives in this quintessentially state law space. In Howell v. Howell, the Supreme Court held that state law purporting to recognize a vested interest in military retirement pay is preempted by federal law, period. 137 S. Ct. 1400, 1405-06, 197 L. Ed. 2d 781 (2017) (citing Mansell, 490 U.S. at 594-95). Put another way, the veteran's ability under federal law to waive retirement pay for disability benefits, at whatever time his disability status might change, overrides [*20] (preempts!) any state law agreement he might have made, or state court judgment to which he was a party, relating to his military retirement benefits, and the parties and state court should have factored this possibility when valuing the parties' marital property:

Hence here, as the Solicitor General emphasizes, the nonmilitary spouse and the family court were likely to have assumed that a full share of the veteran's retirement pay would remain available after the assets were distributed.

Nonetheless, the temporal difference highlights only that [the veteran's] military retirement pay at the time it came to [the spouse] was subject to later reduction (should [the veteran] exercise a waiver to receive disability benefits to which he is entitled). The state court did not extinguish (and most likely would not have had the legal power to extinguish) that future contingency. The existence of that contingency meant that the value of [the spouse's] share of military retirement pay was possibly worth less—perhaps less than [the spouse] and others thought—at the time of divorce. So too is an ownership interest in property (say A's property interest in Blackacre) worth less if it is subject to [*21] defeasance or termination upon the occurrence of a later event (say, B's death).

137 S. Ct. at 1405.

Before Howell, our decisions in Allen, Dexter, and Wilson supported the circuit court's decision here. And as a matter of real-world logic, those decisions made sense. In a divorce like this, where the military spouse's pension comprises a meaningful proportion of the couple's marital property, the court
presiding over the divorce has to value the assets based on the information available at the time of trial. When Husband and Wife divorced, the trial court didn't know that Husband was receiving disability benefits, and the record before us reveals no inkling that his disability status might increase over time. Even if the parties had had such an inkling, there would have been no way to know whether the military would have granted a change in status, how much of a change it might grant, or when. Allen, Dexter, and Wilson respected the federal law defining military retirement and disability benefits, but viewed the federal law as defining the property that the divorce court was to value and divide, and allowed our courts to adapt the implementation of their marital property awards to the fluid real-life circumstances of the parties.

The potential gamesmanship and inequity are even stronger where the spouses agree on a property division, the premises of which are no longer sound. And although it is not our place to offer practice tips to the family law bar, it would seem that agreeing to a percentage of military retirement pay as part of a divorce settlement is now a much riskier gamble.

Howell effectively overrules these cases. And as a result, Husband's ability to elect disability benefits over retirement pay overrides our courts' ability to amend the marital property award to reflect post-judgment changes in circumstances. Although the circuit court could not have known this at the time, we now know that military retirement benefits are always contingent, whether or not the veteran has a disability rating at the time of divorce. The possibility of a new disability rating is always out there, and parties and courts must account for (and attempt to predict the likelihood of) these contingencies when valuing military retirement pay. To be sure, the Supreme Court recognized that its holding might work as a hardship on divorcing spouses, and "note[d] that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or . . . take account of reductions in value when it calculates or recalculates the need for spousal support." Id. at 1406. But of course, that doesn't help Wife in this case, whose "one-third of the marital share of [Husband]'s pension [*23] from the United States Army, the marital share . . . to be calculated from June 3, 1972 to April 1, 2002" was grounded on a then-valid valuation of Husband's benefit stream, but now finds herself entitled to a one-third share of a smaller pie.

Without Howell, our precedents would have supported a decision to affirm the judgment of the circuit court. Howell changed the superseding federal law on the question before us in this case, and compels us to reverse the circuit court.

Even so, the preemptive scope of Howell governs only the treatment of this particular asset in the analysis of marital property awards, and doesn't seem to preclude a court from considering the contingent or diminished value of a military pension in connection with other relevant decisions in divorce cases. When Congress preempts state law, it does so "against the background of the total corpus juris of the states." Wallis v. Pan Am. Petro. Corp., 384 U.S. 63, 68, 86 S. Ct. 1301, 16 L. Ed. 2d 369 (1966) (citation omitted). "[T]his is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." De Sylva v. Ballentine, 351 U.S. 570, 580, 76 S. Ct. 974, 100 L. Ed. 1415 (1956); see also U.S. v. Yazell, 382 U.S. 341, 351, 86 S. Ct. 500, 15 L. Ed. 2d 404 (1966) (explaining that the Supreme Court's theory and precedent "teach us solicitude for state interests, [*24] particularly in the field of family and family-property arrangements"); Ex parte Burrus, 136 U.S. 586, 593-94, 10 S. Ct. 850, 34 L. Ed. 500 (1890) ("The whole subject of the domestic relations of husband and wife . . . belongs to the laws of the states, and not to the laws of the United States."). As part of our federalist bargain, Congress may preempt state law "where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." Yazell, 382 U.S. at 351 (emphasis added). "On the rare occasion when state family law has come into conflict with a federal statute," the Supreme Court's review under the Supremacy Clause is limited to "determin[ing] whether Congress 'has positively required by direct enactment' that state law be pre-empted." Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979) (quoting Wetmore v.
Markoe, 196 U.S. 68, 77, 25 S. Ct. 172, 49 L. Ed. 390 (1904)). We presume, therefore, that Congress—and by extension, the Supreme Court—preempts no more broadly than necessary, and only to the extent it has said so. C. F. Wissner v. Wissner, 338 U.S. 655, 658, 70 S. Ct. 398, 94 L. Ed. 424 (1950) (Congress must preempt state authority with "force and clarity.").

Howell dealt solely with the distribution of federal military benefits, and that is as far as we think it reaches. The Supreme Court itself has long recognized that issues of family law are "utterly incapable of being [*25] reduced to any pecuniary standard of value, as [they] rise[] superior to money considerations." Ex parte Burruss, 136 U.S. at 595 (citing Barry v. Mercein, 46 U.S. 103, 12 L. Ed. 70 (1845)). The distribution of the marital property, even the marital property of military couples, encompasses more than the proper valuation and treatment of federal benefits—it involves the consideration of equities that transcend accounting and money, a balancing analysis distinctly and historically a matter of state law. See Alston v. Alston, 331 Md. 496, 509, 629 A.2d 70 (1993); see also Ex parte Burruss, 136 U.S. at 597 ("[A] federal court cannot decide a family law case."). All the more so in Maryland, an equitable property state. See Alston, 331 Md. at 508-09 ("The Maryland Legislature specifically rejected the notion that marital property should be divided equally" (footnote omitted)).

Howell now has redefined (or maybe re-redefined) the federal retirement and disability benefits that may be considered "marital property." But a Maryland trial court's equitable division of marital property only truly begins "once property [i]s determined to be 'marital'" in the first place. See id. at 508. In other words, the Supreme Court may have shrunk the size of a slice (i.e., military pension benefits) in the marital award pie, but it is still up to our trial courts to determine the size of the pie under state law, [*26] then divide it equitably under the totality of the circumstances, and, alongside that process, to make other decisions about the parties' post-marital financial future. To posit one other example, the impact of Howell may in a particular case constitute a change in circumstances entitling a court to revisit an alimony award, which is "always subject to reconsideration and modification in the light of changed circumstances," Heinmuller v. Heinmuller, 257 Md. 672, 676-77, 264 A.2d 847 (1970), whether or not the parties or the court were aware ex ante that a spouse could elect to waive pension payments for disability benefits. We don't have any of these questions before us in this case, and Howell leaves them to be decided by trial courts—our State's trial courts—in the first instance.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. APPELLEE TO PAY COSTS.
VOLUME 7B, CHAPTER 29: “FORMER SPOUSE PAYMENTS FROM RETIRED PAY”

SUMMARY OF MAJOR CHANGES

All changes are denoted by blue font.

Substantive revisions are denoted by an asterisk (*) symbol preceding the section, paragraph, table, or figure that includes the revision.

Unless otherwise noted, chapters referenced are contained in this volume.

Hyperlinks are denoted by bold, italic, blue, and underlined font.

The previous version dated September 2015 is archived.

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<td>Updated hyperlinks, renumbered, and formatted chapter to comply with current administrative instructions.</td>
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<td>290405.B.</td>
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CHAPTER 29

FORMER SPOUSE PAYMENTS FROM RETIRED PAY

2901 GENERAL

290101. Purpose

This chapter explains how a former spouse can apply for payments from a military member’s military retired pay and how the former spouse’s payments will be administered.

290102. Authoritative Guidance

The bibliography at the end of this chapter lists the authoritative references.

2902 DEFINITIONS

290201. Alimony

Alimony is a legal obligation where a member is ordered to pay an amount for the support and maintenance of a spouse or former spouse. This definition includes attorney’s fees, interest, and court costs. Alimony does not include child support, property settlement, equitable distribution of property, or any other division of property.

290202. Child Support

Child support is a legal obligation where a member is ordered to pay an amount for the support and maintenance of a child. This definition includes costs for health care, arrears, attorney’s fees, interest, penalties, and other related relief.

290203. Court

Court means any court of competent jurisdiction of any state (in the United States), the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands and any court of the United States, as defined in Title 28, United States Code (U.S.C.), section 451. Court also includes a court of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

*290204. Court Order

Court order means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a property settlement incorporated into such an order. Court order also includes orders issued incident to a divorce, such as an order dividing military retired pay or a qualified domestic relations order (QDRO) that divides military retired pay. NOTE: A QDRO is not required but will be accepted. A court order also includes a support order as defined in section
453 of the Social Security Act and 42 U.S.C. § 653(p). A court order issued after the passage of the National Defense Authorization Act (NDAA), Fiscal Year (FY) 2017, dated December 23, 2016, for purposes of determining the member’s disposal income, means the decree of divorce, dissolution, annulment, or legal separation.

290205. Creditable Service

Creditable service means years and full months of military service creditable for the purpose of computing a member’s retired pay entitlement if the member is on active duty or the Reserve retirement points creditable if the member is a Reserve component member. See 10 U.S.C. § 1405 and 12733, Chapter 1, and Chapter 3.

290206. Designated Agent

Designated agent is the agent authorized to review applications for direct payments made. See paragraph 290403 for specific designations.

290207. Disposable Retired Pay

Disposable retired pay is defined in paragraphs 290701 and 290802.

290208. Entitlement

Entitlement is the legal right of a military member to receive military retired pay. The term refers to members who actually receive retired pay rather than those who qualify by completing the required years of service.

290209. Final Decree

A final decree is an order from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

290210. Former Spouse

Former spouse is the former husband or wife, or if the parties are legally separated, the current husband or wife, of a military member.

290211. Formula Award

A formula award computes a former spouse’s property interest in a military member’s retired pay based on the relationship of the length of the parties’ marriage during the member’s creditable service (numerator) to the member’s total service that is creditable toward retirement (denominator). A formula award is stated as a marital fraction in which the numerator and denominator are multiplied by a given percentage.
A. For members qualifying for an active duty (i.e., regular service) retirement, the numerator is typically the number of months the parties were married while the member was performing creditable military service and the denominator is the number of months of the member’s total creditable military service. The former spouse’s award is usually calculated by multiplying the marital fraction by one half or 50 percent, or any other given percentage amount.

B. For members qualifying for a Reserve (i.e., non-regular service) retirement, the numerator is typically the number of Reserve retirement points earned during the parties’ marriage, and the denominator is the member’s total number of Reserve retirement points. The former spouse’s award is usually then calculated by multiplying the marital fraction by one half or 50 percent, or any other given percentage amount.

290212. Garnishment Order

A garnishment order is an order directing an employer to issue payments from a member’s pay to satisfy a legal obligation for child support, alimony, or division of property other than a division of military retired pay.

290213. Hypothetical Retired Pay Award

Hypothetical retired pay award is an award based on a percentage of retired pay that is calculated using variables provided in a court order that are different from the member’s actual retirement variables. The retired pay calculated using the court ordered variables is called the member’s hypothetical retired pay. A hypothetical award typically attempts to define the property interest in the retired pay as if the member had retired at the time the court divided the member’s military retired pay based upon the member’s rank, or high-3 amount, and years of service accrued to that point in time. Thus, the former spouse does not benefit from the member’s pay increases due to promotions or increased service time after the divorce.

290214. Member

A member is an individual who is on active duty, one who is a reservist, or one who is retired from military service.

290215. Renounced Pay

Renounced pay is military retired pay to which a member is entitled, but which the member has waived receipt.

290216. Retired Pay

Retired pay is the statutory entitlement due a member based on conditions of the retirement law, pay grade or high-3 pay amount, years of service, and the date of retirement. Retired pay includes “retainer pay.”
290217. Retired Pay Award

Retired pay award is a portion of disposable military retired pay awarded to a former spouse or current spouse by a court of competent jurisdiction as a property division.

290218. Standard Retired Pay Multiplier

The standard retired pay multiplier used to compute retired pay is the product of two and one-half percent and the member’s years of creditable service. See Chapter 3.

290219. Uniformed Services Former Spouses’ Protection Act (USFSPA)

Public Law 97-252, enacted on September 8, 1982, states that the section of Title 10 addressing former spouse protection may be cited as the “USFSPA.” Therefore, USFSPA is used throughout and refers to the provisions of 10 U.S.C. § 1408.

2903 AWARDS THAT CAN BE COLLECTED UNDER THE USFSPA

290301. Child Support

A former spouse can collect child support if there is a court order that awards child support, and the former spouse and military member have ever been married to each other.

290302. Child Support Arrearages

To collect child support arrearages, a former spouse must submit a recent court order that lists the total arrearages. The order cannot be older than two years from the date the Defense Finance and Accounting Service (DFAS) receives it.

290303. Alimony

A former spouse can collect current alimony under the USFSPA, but not alimony arrearages.

290304. Retired Pay Award

A former spouse can collect current retired pay award payments, but not retired pay award arrearages.

290305. Property Other Than a Division of Retired Pay

A former spouse can collect a property division, other than a retired pay award, by garnishment if the order awards it to the former spouse and if the former spouse was also awarded alimony, child support, or a division of retired pay. See subparagraph 290401.B for more information.
2904 APPLICATION BY FORMER SPOUSE

290401. Application Process

A. The former spouse must submit a completed Department of Defense, (DD) Form 2293, Application for Former Spouse Payments From Retired Pay, and a certified copy of the court order awarding alimony, child support, or military retired pay. A court order for child support arrearages cannot be older than 2 years from the date the designated agent receives it. The court order must be certified by the clerk of the court that issued the order.

B. If the former spouse is applying for a property division other than a retired pay award, the former spouse must submit a garnishment order in addition to the DD 2293 and the court order.

C. The former spouse may mail the application to the appropriate designated agent given in paragraph 290403, or may fax it to the number provided in paragraph 290403. Please read the instructions and certification on the DD 2293 carefully.

290402. Additional Documentation

A former spouse may need to provide additional documentation if the designated agent cannot determine whether the former spouse is eligible for USFSPA payments based solely on the DD 2293 and the court order.

290403. Where to Send an Application for USFSPA Payments

The former spouse should send all application documents to the following designated agent for the appropriate Uniformed Service:

A. Army, Navy, Air Force, Marine Corps.
   DFAS-Cleveland (CL) Site
   DFAS-HGA/CL
   P.O. Box 998002
   Cleveland, OH 44199-8002
   Fax: 877-622-5930

B. U.S. Coast Guard
   Commanding Officer (LGL)
   Pay and Personnel Center
   444 S.E. Quincy Street
   Topeka, KS 66683-3591
   Fax: 785-339-3788
C. Public Health Services
   Submit to Coast Guard address

D. National Oceanic and Atmospheric Administration
   Submit to Coast Guard address

290404. When to Apply for USFSPA Payments

A former spouse may apply for payments any time after the court has issued a court order enforceable under the USFSPA. Although payments will not start under the USFSPA until after the member starts to receive retired pay, the designated agent can conditionally approve a former spouse’s application prior to that, and retain the application pending the member’s retirement.

*290405. Conditional Preapproval

A. If the former spouse applies prior to the member receiving retired pay, the designated agent will perform a legal review of the application, and may conditionally approve it based on information available at the time of the review concerning the member’s duty status (active or Reserve).

* B. At the time the member begins to receive retired pay, the designated agent will perform a second review prior to establishing the former spouse’s direct payments. If the former spouse’s award was based on a formula or hypothetical retired pay amount, and the member’s status has changed since the initial legal review, it may be necessary to reject the application, and require the former spouse to submit a clarifying order providing the necessary information. For example, if the formula or hypothetical award lists the Reserve retirement points, but the member retires from active duty, DFAS would need a new court order that lists the active duty formula. (Note: See paragraph 290607 concerning formula awards, and paragraph 290608 concerning hypothetical retired pay awards.)

2905 NOTIFICATION

290501. Notification to Former Spouse of Approval or Disapproval

Within 30 days of the date of receipt of a former spouse’s application, the designated agent will notify the former spouse if his or her application has been approved or disapproved. If approved, the designated agent will state the month the former spouse’s payments will tentatively begin. If the designated agent cannot approve the application, the notice will include an explanation regarding the reason(s) why.

290502. Notification to the Member of Approval of an Application

If a former spouse’s application is approved, the designated agent will notify the member affected within 30 days of the date of receipt of the application. The member will not be notified if the application is not approved.
290503. Second Notice

If the designated agent notified the member as part of a conditional preapproval more than 90 days prior to the member’s becoming entitled to receive retired pay, the designated agent will provide a second notice to the member when the designated agent establishes the former spouse’s payments at the time the member begins to receive retired pay.

290504. Contents of Notice to Member

A. The notice will explain that payments issued under the USFSPA cannot exceed 50 percent of the member’s disposable retired pay (or 65 percent of the member’s disposable pay when also withholding for an income withholding order issued pursuant to 42 U.S.C. § 659), and will contain the month that the payments will tentatively begin.

B. The notice will inform the member that he or she must notify the designated agent if the court order has been amended, superseded, or set aside.

C. The notice will inform the member that if he or she submits information in response to this notice, he or she consents to the disclosure of that information.

D. The notice will include a copy of the court order.

E. The notice will advise that the member’s failure to respond within 30 days of the date that the notification is mailed may result in the payment of retired pay as set out in the notice to the member.

290505. How to Prevent USFSPA Payments from Starting

The member must provide documentary evidence that a former spouse’s court order is legally defective or has been appealed, amended, or set aside. If the designated agent determines that the documentary evidence is sufficient to bar payments to a former spouse, the designated agent will not start the payments. The designated agent will then inform the former spouse that payments will not start, and provide copies of the documentary evidence to the former spouse.

2906 COURT ORDERS

290601. Contents of Court Order

A. The court order must be regular on its face. This means that a court of competent jurisdiction issued the order and nothing on its face provides reasonable notice that it was issued without authority of law.

B. The court order must award former spouse alimony, child support, or a retired pay award. There is no requirement in Federal law that specifies how military retired pay is to be divided.
C. If the order contains a retired pay award, that award must be expressed as a fixed dollar amount or as a percentage of disposable retired pay. A retired pay award expressed as a percentage will automatically receive a proportionate share of the member’s cost-of-living adjustment (COLA), while one expressed as a fixed amount will not. There is no authority for a retired pay award to state a fixed dollar amount and also order COLAs. Retired pay awards phased in that manner will be construed as a fixed dollar amount.

D. 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.

E. If the former spouse and the member were divorced before the member became entitled to receive military retired pay, the retired pay award may be expressed as a formula or hypothetical retired pay award in accordance with paragraphs 290607 and 290608. Since the computation of formula and hypothetical retired pay awards result in a percentage, they are considered a type of percentage award, and would automatically receive a proportionate share of the member’s retired pay COLA.

290602. Divorces Finalized While the Member is Still on Active Duty

A. For court orders issued prior to December 19, 2003, the court order must show that the member’s rights under the Soldiers’ and Sailors’ Civil Relief Act of 1940 (50 U.S.C. Appendix 501 et. seq.) were complied with.

B. For court orders issued on or after December 19, 2003, the court order must show that the member’s rights under the Service Members Civil Relief Act (50 U.S.C. Appendix 501 et. seq.) were complied with.

290603. Qualified Domestic Relations Order (QDRO)

There is no requirement in USFSPA that a former spouse submits a QDRO, but the designated agent will accept one if it is submitted and if it meets the requirements of the USFSPA.

290604. Requirements Specific to a Retired Pay Award

A. In the case of a retired pay award, the designated agent must be able to determine from the application that the court dividing military retired pay had jurisdiction over the member by reason of one of the following:

1. The member resided in the territorial jurisdiction of the court at the time of the legal proceeding due to other than military assignment;

2. The court finds that member’s domicile was in the territorial jurisdiction of the court at the time of the legal proceeding; or
3. The member consented to the jurisdiction of the court. If the court order does not "explicitly" state that the member consented to the court's jurisdiction, DFAS Garnishment Operations will regard the member's participation in the legal proceeding, other than to contest the court's jurisdiction, as evidence of the member's consent to the court's jurisdiction in the proceeding dividing the member's military retired pay and making a retired pay award.

B. Also, in the case of a retired pay award, the designated agent must be able to determine from the application that the former spouse and the member were married for at least 10 years during which the member performed 10 years or more of service creditable toward retirement eligibility (the "10/10" requirement). There is no "10/10" requirement for payment of alimony or child support awards under USFSPA.

290605. State Law Jurisdiction

The satisfaction of state law jurisdictional requirements is not sufficient alone to satisfy the additional jurisdictional requirement stated in paragraph 290604. If the court states that it has USFSPA jurisdiction, it must state the basis for the finding, i.e., member's residence, member's domicile or member's consent.

290606. Member's Consent to a Separation Agreement

If the member signed a separation agreement, the designated agent will presume that the member consented to the jurisdiction of any court that at any time incorporates the agreement into a court order.

*290607. Acceptable Formula Awards

A. If the former spouse's award is expressed in terms of a formula, all the variables needed to calculate the formula must be included in the court order, with the exception of a member's total number of months of creditable service or total number of Reserve retirement points, which DFAS Garnishment Operations will provide in accordance with 290607.B and C. If the order provides all the variables needed to do the calculation, including total months of military service or total Reserve retirement points, DFAS Garnishment Operations will calculate the formula using the variables provided, even if the figure is different from the member's actual total. If the member disagrees with the number listed in the court order (i.e., the denominator), the member will have to petition the court to get the order corrected to show the member's actual total months or points of military service. If any needed variable besides the total number of months of creditable service or total number of Reserve retirement points is not provided in the order, the court will have to clarify the award. All percentages derived from formulas will be carried out to four decimal places.

B. If the court order requires DFAS Garnishment Operations to supply the denominator of a marital or coverture fraction, and the member qualifies for an active duty (i.e., regular service) retirement, the formula award must be expressed in terms of whole months. Typically, the numerator of the formula fraction is the number of months of marriage during military service. This number must specifically be provided in the court order. The denominator
of the formula is typically the member’s total number of months of creditable military service. DFAS Garnishment Operations will provide the denominator if needed to compute the formula. Any days or partial months of service will be dropped. If the award is expressed in terms of years instead of months, DFAS Garnishment Operations will convert years into whole months by rounding down to the nearest month.

C. If the court order requires DFAS Garnishment Operations to supply the denominator of a marital or coverture fraction, and the member qualifies for a Reserve (i.e., non-regular service) retirement, the formula award must be expressed in terms of Reserve retirement points. In the case of a Reserve retirement, the numerator of the formula typically is the number of Reserve retirement points earned during the marriage. This number must be provided in the court order. The denominator of the formula is typically the member’s total number of Reserve retirement points. The DFAS Garnishment Operations will provide the denominator if needed.

D. The sample Military Retired Pay Division Order (Figure 29-1) provides examples of acceptable formula award language. All the blanks in the sample awards represent variables that must be provided in the court order. The sample language is not required, but any award expressed using the applicable sample language will be acceptable. The following is an example of an active duty formula:

The court order awarded the former spouse a percentage of the member’s disposable retired pay calculated by multiplying .5 times a fraction, where the numerator is 144 months of marriage during military service, and the denominator is the member’s total months of active duty service. The member later retired after 20 years (or 240 months) of creditable service. The former spouse’s award is 30 percent of the member’s disposable retired pay (.5 x 144 months/240 months).

290608. Acceptable Hypothetical Retired Pay Awards

A. A hypothetical retired pay award is a percentage of a retired pay amount calculated using the standard method to compute retired pay, but using variables different from those used to calculate the member’s actual retired pay. It is usually calculated as if the member had become entitled to receive retired pay at the time the court divided the member’s retired pay.

B. To calculate a hypothetical retired pay award, the designated agent must first calculate the hypothetical retired pay amount. The hypothetical retired pay amount is calculated by multiplying the hypothetical retired pay multiplier times the hypothetical retired pay base. If the initial retired pay computation is not a multiple of $1, it is rounded down to the next lower multiple of $1. See Chapter 3 for retired pay calculations.

C. Retired Pay Multiplier

1. The standard retired pay multiplier is 2.5 percent times the member’s years of creditable service. For example, the retired pay multiplier for an active duty member who serves 20 years will be 50 percent (.025 x 20 years = .5). In the case of a hypothetical retired pay award, the hypothetical retired pay multiplier is determined by multiplying 2.5 percent
times the hypothetical years of creditable service provided in the court order. The resulting percentage is rounded to two decimal places. See Chapter 3 for retired pay calculations.

2. A hypothetical retired pay award for a reservist must be expressed in terms of Reserve retirement points rather than years of creditable service. The Reserve retirement points are converted into years of creditable service by dividing the Reserve retirement points on which the award is based by 360. The resultant figure is carried to three decimal places; then rounded to two. See Chapter 3. This resultant figure is used to compute the hypothetical retired pay multiplier. For example: 5,258 Reserve retirement points would convert to 14.61 years of service for multiplier purposes (5,258 points/360 = 14.61 years).

D. Retired Pay Base

1. For members entering military service before September 8, 1980, the retired pay base is the member’s basic pay at retirement. See Chapter 3. For these members, their hypothetical retired pay base would usually be their basic pay as of the hypothetical retirement date.

2. For members entering military service on or after September 8, 1980, the retired pay base is the average of the member’s highest 36 months of basic pay at retirement (high-3 amount). See Chapter 3. For these members, their hypothetical retired pay base would usually be their average basic pay for the most recent 36 months prior to the hypothetical retirement date.

E. In order to enable the designated agent to calculate the hypothetical retired pay amount, the court order must provide:

1. The percentage the former spouse was awarded;

2. The hypothetical years of creditable service, or, in the case of a reservist, the Reserve retirement points on which the hypothetical retired pay is to be based;

3. The hypothetical retired pay base. In the case of members entering military service before September 8, 1980, the court order may provide either the member’s hypothetical retired pay base or the member’s hypothetical rank and years of service for basic pay purposes; and

4. The hypothetical retirement date.

F. If the court intends that the hypothetical retired pay be calculated based on the pay tables in effect at the time the member becomes entitled to receive military retired pay, the designated agent will use as the retired pay base either the basic pay for the hypothetical rank and years of service as of the date the member becomes eligible to receive retired pay, or the member’s actual retired pay base, whichever is lower. The court order must provide:

1. The percentage the former spouse is awarded;
2. The hypothetical years of creditable service, or, in the case of a
reservist, the Reserve retirement points on which the hypothetical retired pay is to be based and
the member’s years of service for basic pay purposes;

3. The member’s hypothetical rank; and

4. An unequivocal statement that the calculation is to be made as of the
member’s actual retirement date.

G. If the award language is missing any necessary variables, the court will have
to clarify the award. See the sample Military Retired Pay Division Order (Figures 29-1 and 29-2)
for examples of acceptable hypothetical retired pay award language.

H. All percentage hypothetical retired pay awards will be converted into a
percentage of a member’s actual disposable retired pay according to the following example:

The court order awarded the former spouse 50 percent of the disposable retired pay
the member would have received had the member retired with 17 years of creditable
service, a retired pay base of $2,200.00 per month, and a hypothetical retirement
date of June 1, 1999. The member actually retired on June 1, 2002, with 20 years
of creditable service, a retired pay base of $2,400.00 per month, and an initial gross
retired pay of $1,200.00 per month (.025 x 20 years = .5; .5 x $2,400.00 =
$1,200.00).

First, the designated agent will calculate the member’s hypothetical retired pay
multiplier, which in this example is .425 (.025 x 17 years).

Next, the designated agent will calculate the hypothetical retired pay amount, which
in this example is $935.00 per month (.425 x $2,200.00).

Then, the designated agent will apply retired pay COLAs to the hypothetical retired
pay amount from the hypothetical retirement date to the date the member became
eligible to receive retired pay, unless the court order directs otherwise.

This calculation will determine the present value of the hypothetical retired pay as
of the member’s actual retirement date. In this case, if the member had become
eligible to receive retired pay on June 1, 1999, the hypothetical retirement date, the
hypothetical retired pay would have been $1,008 per month on June 1, 2002, the
actual retirement date.
In these examples, the partial annual COLAs would be as follows:

- 12/1/1999 1.7 % \( $935.00 \times 1.017 = $950.00 \) (rounded down)
- 12/1/2000 3.5 % \( $950.00 \times 1.035 = $983.00 \)
- 12/1/2001 2.6% \( $983.00 \times 1.026 = $1,008.00 \)

Finally, the designated agent will convert the former spouse’s percentage of hypothetical retired pay, which is established by the designated agent in the retired pay system, to a percentage of the member’s actual disposable retired pay as follows: \( .5 \times \frac{$1,008.00}{1,200.00} = 42\% \).

I. The actual military retired pay of a post-July 1986 member who has accepted a Career Status Bonus (CSB) is calculated using a reduced multiplier. See Chapter 3. However, the CSB member’s hypothetical retired pay will be calculated using the standard multiplier. The CSB member’s retired pay will be recomputed using a standard multiplier effective the first day of the month after the member attains age 62. The former spouse’s percentage will also be adjusted at the same time in accordance with subparagraph 290608.H, using the member’s recomputed retired pay in the denominator of the conversion fraction. This adjustment will result in a lower percentage being applied to a higher disposable pay figure, and will ensure that the former spouse continues to receive the amount intended in the court order.

290609. Orders Issued Before June 26, 1981 that Did Not Divide Retired Pay

Any court order that contains a retired pay award, which was issued before June 26, 1981 will be honored if it otherwise satisfies the requirements and conditions shown in this chapter. If the pre-June 26, 1981, decree or property settlement incident to the decree did not divide the member’s military retired pay, and did not reserve jurisdiction to divide it, DFAS Garnishment Operations cannot honor an application for payment based on an order issued on or after June 26, 1981, dividing retired pay as property.

290610. Survivor Benefit Plan (SBP) Premium

Pursuant to 10 U.S.C. § 1452, the SBP premium must be deducted from the member’s retired pay. The SBP premium cannot be deducted from the former spouse’s portion of the member’s retired pay. Any provision in a court order stating that the premium should be deducted from the former spouse’s portion is unenforceable by DFAS, Garnishment Operations. The former spouse and the member may make alternate payment arrangements outside of the stated procedures.

290611. Conflicting Retired Pay Awards

A. If the designated agent is served with court orders issued by different jurisdictions which contain conflicting awards enforceable under the USFSPA, the designated agent will deduct an amount equal to the largest amount required to be paid to the former spouse by either order, but will pay to the former spouse the least amount required to be paid. The
designated agent will retain the difference until served with an order certified by the member and former spouse to be valid, and then pay the retained funds in accordance with the order.

B. If the designated agent is served with a court order containing conflicting retired pay award language within the same court order, the designated agent will pay the former spouse the lower award amount. If one of the parties disagrees with the amount being paid, that party must provide the designated agent with a new court order stating the correct amount.

290612. Court Orders Modifying Retired Pay Awards

A. If the designated agent is served with a court order modifying or clarifying a retired pay award, the designated agent will implement the order issued most recently. The order issued most recently supersedes all prior orders.

B. If the designated agent is served with a court order modifying or clarifying a retired pay award that was issued by a court of a state other than the state that issued the prior court order, the designated agent may implement the new order only if the court issuing this order had jurisdiction over both the member and former spouse in the manner specified in subparagraph 290604.A.

290613. Conditional Awards

The designated agent cannot honor a court order that makes the former spouse’s payments conditional on the occurrence of some other event. There is no authority for the designated agent to ascertain whether a condition in a court order has been satisfied. The former spouse will need to obtain a modified court order without the condition.

290614. Awards Based on Retired Pay Accrued During Marriage

The designated agent cannot honor awards based on the value of what has accrued because military retired pay does not accrue over time. Military retired pay is not a pension. Rather, it is a statutory entitlement computed at the time the member retires and it is based on the member’s rank and total years of service at the time of retirement, or member’s high-3 and total years of service.

290615. Awards of a Percentage of the Marital Portion

The designated agent cannot honor an award of a percentage of the marital portion of a member’s retired pay unless the court order also provides all variables necessary for the calculation. See paragraphs 290607 and 290608 for examples.

290616. Factual Errors in Court Orders

If a party submits documentary evidence that shows a factual error in a court order, this will not be sufficient to modify or stop payments being made pursuant to the court order. The
party asserting the error must petition the court to correct the order. The designated agent does not have the authority to correct errors in court orders.

2907 DISPOSABLE RETIRED PAY

290701. Disposable Retired Pay

Disposable retired pay is defined by the USFSPA as a member’s total monthly retired pay (gross pay) entitlement minus authorized deductions. See 10 U.S.C. § 1408(a)(4).

A. If the former spouse and member were divorced on or before February 2, 1991, then USFSPA authorizes the following deductions:

1. Amounts owed to the United States;

2. Amounts withheld as Federal and state income tax withholding, consistent with the member’s current actual tax liability;

3. Fines and forfeitures ordered by a court-martial;

4. Amounts waived in order to receive compensation under Titles 5 or 38 of the U.S.C.;

5. SBP premiums paid, but only if the former spouse applying for a retired pay award payment under USFSPA is the beneficiary of the SBP; and

6. The amount of retired pay for a member retired under Title 10, Chapter 61 computed based on percentage of disability.

B. If the former spouse and member were divorced on or after February 3, 1991, then the USFSPA authorizes the following deductions:

1. Amounts owed to the United States due to the overpayment of retired pay, or amounts required to be recouped due to the member’s entitlement to retired pay;

2. Fines and forfeitures ordered by a court-martial;

3. Amounts waived in order to receive compensation under Titles 5 or 38 of the U.S.C.;

4. SBP premiums paid but only if the former spouse applying for a retired pay award payment under USFSPA is the beneficiary of the SBP; and

5. The amount of retired pay for a member retired under Title 10, Chapter 61 computed based on percentage of disability.
290702. Other Deductions Included in Court Order

If a court order directs the use of deductions other than those authorized in paragraph 290701 to compute the former spouse’s award, that provision of the court order is unenforceable. The designated agent will use only the deductions authorized in paragraph 290701 for the computation of disposable retired pay.

*2908 DISPOSABLE RETIRED PAY UNDER NDAA FY 2017, SECTION 641

290801. Application of NDAA FY 2017, Section 641

The NDAA FY 2017, section 641 applies to cases where the former spouse and member were divorced after December 23, 2016, when the court awards the former spouse a division of property and the member has not yet retired.

290802. NDAA FY 2017 Disposable Pay Limits

In addition to the definition of Disposable Retired Pay in paragraph 290701, and the authorized deductions in subparagraph 290701.B, the NDAA also includes limitations to disposable retired pay. In cases where the former spouse and member were divorced after December 23, 2016, the court awards the former spouse a division of property, and the member has not yet retired, the NDAA limits the member’s disposable retired pay as follows:

A. The amount of retired pay is limited to that which the member would have been entitled using the member’s retired pay base and years of service on the date of the final decree of divorce, dissolution, annulment, or legal separation; and

B. COLA would be added from the date of divorce, dissolution, annulment, or legal separation to the member’s date of retirement.

290803. Variables Required to Calculate the NDAA FY 2017 Disposable Retired Pay

In order to enable the designated agent to calculate the NDAA FY 2017 disposable retired pay amount, the court order must provide the three variables listed in subparagraphs 290803.A or 290803.B:

A. If the member entered the service before September 8, 1980:

1. The fixed amount, the percentage, the formula, or the hypothetical award that the former spouse is granted;

2. The member’s pay grade at the time of divorce; and
3. The member’s years of creditable service, on the date of divorce, dissolution, annulment, or legal separation. In the case of a reservist, the Reserve retirement points, on the date of divorce, dissolution, annulment, or legal separation.

   B. If the member entered the service on or after September 8, 1980:

      1. The fixed amount, the percentage, the formula, or the hypothetical award that the former spouse is granted;

      2. The member’s retired pay base (high-3) amount at the time of divorce (the actual dollar figure); and

      3. The member’s years of creditable service, on the date of divorce, dissolution, annulment, or legal separation. In the case of a reservist, the Reserve retirement points, on the date of divorce, dissolution, annulment, or legal separation.

290804. Clarification

If the award language in the court order is missing any of the listed necessary variables in paragraph 280803, then the court will have to clarify the award.

2909 STARTING PAYMENTS

290901. Starting Payments

If the former spouse’s application is approved, payments will start no later than 90 days after the date the designated agent received the former spouse’s complete application, or no later than 90 days after the date the member becomes entitled to receive military retired pay, whichever is later.

290902. Timing of Payments

Payments will be issued in conformity with normal pay and disbursement cycles, which mean that payments will be issued monthly. Payments will be deducted from the month’s pay and paid on the first business day of the following month. For example, a payment issued for the month of March would be sent at the beginning of April.

2910 PAYMENT AMOUNT

291001. Limitations

   A. If the former spouse applies for payments under the USFSPA only, the maximum amount a former spouse can receive is 50 percent of the member’s disposable retired pay.
B. If the former spouse applies for payments under the USFSPA and there is also a garnishment order for support, the maximum amount that can be paid toward both obligations is 65 percent of the member’s disposable earnings calculated in accordance with 42 U.S.C. § 659 (child and spousal support statute) and its implementing regulation.

C. For garnishments for property other than a retired pay award, the maximum amount payable is 25 percent of disposable earnings in accordance with 15 U.S.C. § 1673.

291002. Cost-of-Living Adjustment (COLA)

If a retired pay award is expressed as a percentage of disposable retired pay, the former spouse will automatically receive a proportionate share of the member’s COLAs unless the court order states otherwise. Formula and hypothetical retired pay awards are considered a type of percentage award, and thus will automatically include a proportionate share of the member’s COLAs. If the retired pay award is a fixed amount, COLAs cannot be added, even if awarded in the court order, and the former spouse’s payments will remain fixed.

291003. Offset of Former Spouse’s Payment for Garnishment or Other Obligation

A former spouse’s payment cannot be offset or garnished by DFAS for any legal obligation, including child support owed to the member.

2911 PRIORITY OF PAYMENTS

291101. Multiple Awards

If a court order includes multiple types of awards to a former spouse, the former spouse may designate the priority of payments on the DD 2293. If the former spouse does not specify otherwise, the designated agent will pay the retired pay award first, child support second and spousal support third.

291102. Multiple Former Spouses

If the designated agent is served with applications from more than one former spouse, the designated agent will honor the applications on a first-come, first-served basis. Subsequently served USFSPA applications shall be satisfied out of the disposable retired pay that remains after the satisfaction of all court orders which have been previously served, subject to the limitations of paragraphs 290802 and 291001.

291103. Garnishment Orders for Support and Applications under USFSPA

If the designated agent is served with both a garnishment for support and an application under USFSPA, the designated agent will pay whichever is served first. If the garnishment is served first and is payable directly to the former spouse, the former spouse may reverse the priority of payments by instructing the designated agent to terminate deductions pursuant to the garnishment, and then later requesting that garnishment deductions be reestablished.
2912 STopping Payments

291201. Erroneous Payment Information from Former Spouse

The former spouse has a continuing duty to provide the designated agent with correct payment instructions. If a former spouse's payments are returned due to erroneous payment instructions (i.e., invalid address or incorrect account number for direct deposit payments), the designated agent will send notice to the last known correspondence address that, unless new payment instructions are received within 30 days of the date of the notice, payments will stop. If the former spouse submits new payment instructions after the payments have terminated, the designated agent will restart the payments on a current basis, and will not make up any missed payments.

291202. Termination and Suspension of Retired Pay Award Payments

A. Unless the court order specifies otherwise, payments will stop upon the designated agent's receipt of notice of the death of either party. Payments will be prorated for the month of the death of either party.

B. Unless the court order specifies otherwise, retired pay award payments will not stop upon the designated agent's receipt of notice of the former spouse's remarriage.

C. If the designated agent is served with an order staying payments, the designated agent will stop the payments until served with an order indicating that the former spouse's payments are to resume.

D. If the designated agent has already started payments and is served with documentation showing that an appeal of the order has been filed within the forum state's appeal timeframe, payments will stop. The designated agent will not recoup any payments already issued.

E. A former spouse may stop payments under USFSPA by sending the designated agent a letter with his or her signature notarized withdrawing their application for payments under USFSPA. (A former spouse can later reapply for payments by submitting a new DD 2293 and certified copy of the court order that awards him/her the division of military retired pay.)

291203. Termination of Child Support Payments under USFSPA

Child support payments will stop in accordance with the provisions of the court order. If the court order is silent as to when the payments should stop, payments will stop in accordance with the law of the state that issued the court order. The member has the burden of providing sufficient documentation to justify stopping payments on or before a child's age of majority. The former spouse has the burden of providing sufficient documentation to justify continuing payments after a child's age of majority.
291204. Termination of Alimony Payments under USFSPA

Alimony payments will stop in accordance with the provisions of the court order. If the court order is silent as to when the payments should stop, payments will stop in accordance with the law of the state that issued the court order, or upon receiving a court order terminating the alimony payments. (NOTE: The law of some states does not provide that an alimony obligation automatically terminates upon a former spouse’s remarriage. For such states, a court order terminating the alimony will need to be provided.) If the designated agent does not already have sufficient documentation to stop payments, additional evidence such as a marriage certificate will be required.

291205. Payments and Bankruptcy

Absent a court order, there is no authority to stop a former spouse’s retired pay award, current and arrearage child support payments, and current spousal support payments, if a member files bankruptcy.

291206. Certification of Eligibility

The designated agent may request that a former spouse submit a signed certification of continued eligibility to receive payments under USFSPA. The certificate of eligibility should include notice of a change in status or circumstance that affects eligibility, if any such change exists. If the former spouse fails or refuses to comply with the certification requirement, the designated agent may stop the payments after notice to the former spouse.

2913 RETIRED PAY ARREARS OWED A DECEASED FORMER SPOUSE

291301. Applicability

This section applies to the settlement of arrears of a property division of retired pay that may be due a deceased former spouse pursuant to a previous application for direct payment completed under section 2904. Arrears of a retired pay property division may result from prorating a member’s disposable retired pay for the month of the former spouse’s death, from checks not negotiated before the former spouse’s death, or the designated agent’s failure to establish and/or make payments to the former spouse in the correct amount prior to the former spouse’s death for a period that the former spouse was entitled to a property division.

291302. Documentation

To settle the arrears of retired pay owed a deceased former spouse, the following documentation must be on file:

A. Copy of Death Certificate. A notification of death from any source (next of kin, post office, or neighbor) is sufficient to suspend future payment of the retired pay property division. However, an official copy of a certificate of death for the former spouse is required before the arrears of a property division of retired pay are paid under this section.
B. **Written Claim.** A written claim must contain the claimant’s signature and address, or that of the claimant’s authorized agent or attorney. A *Standard Form (SF) 1174* is not required, but may be used for this purpose, as long as the claim specifies the claimant’s relationship to the deceased former spouse and documents other living relatives of the deceased former spouse.

C. **Additional Documentation as Required.** A claimant may be required to submit any additional documentation DFAS deems necessary to establish the claimant’s status and entitlement to the property division arrears including, but not limited to, marriage certificates, birth certificates, divorce decrees, or other documentation that validates the living beneficiaries of a former spouse in any class of persons entitled to the arrears pursuant to paragraph 291304.

291303. **Recoupment of Outstanding Payments**

All outstanding checks or direct deposits (not negotiated before the former spouse’s death or made after the former spouse’s death) or the proceeds thereof must be returned to DFAS-CL before a settlement of arrears may be made.

291304. **Payment of the Arrears**

Former spouse payments from retired pay are prorated in the month of the former spouse’s death. When all documentation has been received and all outstanding payments have been recouped, payment of the arrears is made to the person living on the date of the former spouse’s death who is highest on the order of precedence set forth in Chapter 30. For the purpose of payment of arrears under this paragraph, the provisions of subparagraphs 300204.C, D, and E apply, and all references to a “retiree” in subparagraphs 300204.A.2 through A.6, C, D, and E should be considered as referring to a deceased former spouse rather than a retiree.

291305. **Indebtedness Resulting From Overpayment to a Former Spouse**

Any indebtedness resulting from overpayment to a deceased former spouse must be liquidated before former spouse payment arrears can be settled.

291306. **Claim for Arrears**

A claim for arrears must be filed within the 6-year statute-of-limitation restriction. Any claim received 6 years after the date of the former spouse’s death is barred.
291307. Taxability

In the case of deceased former spouses, one or more Treasury Department (TD) Forms 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., may be used. If no former spouse arrears are paid, one TD 1099-R will be issued in the former spouse’s name to cover any entitlement through date of death. If arrears are paid, an additional TD 1099-R is issued to each claimant to whom the arrears were paid.

2914 ADMINISTRATIVE APPEAL PROCESS

291401. Either Party Disagrees

If either party disagrees with the designated agent’s determination concerning a former spouse’s entitlement to payments under the USFSPA, that party may request reconsideration by writing to the designated agent. If the party requesting reconsideration asserts that the designated agent has erroneously overpaid the other party, the request for reconsideration will be considered a claim against the designated agent. An attorney will review the request and issue a decision in writing.

291402. Party Requesting Reconsideration Disagrees

If the party requesting reconsideration disagrees with the attorney’s determination, that party may submit an appeal to the designated agent, which must be received within 30 days of the date of the initial determination. The designated agent will forward the appeal to the Defense Office of Hearings and Appeals for their decision.

291403. Additional Information

Parties are referred to Department of Defense Instruction 1340.21 for additional information concerning the submission of claims and appeals.

2915 LIABILITY

291501. Payments Made In Accordance With the USFSPA

Neither the United States nor any employee of the United States shall be liable regarding any payment made from retired pay to a retiree or former spouse pursuant to a court order that is regular on its face, if such payment is made in accordance with the USFSPA.

291502. Designated Agent Liability

If the designated agent processes a former spouse’s USFSPA application and administers the former spouse’s payments in accordance with the USFSPA and in accordance with all documentation in its files, the designated agent is not liable for any former spouse payments issued after a former spouse’s eligibility to receive payments has ended. Nor is the designated agent
liable for any payments that the former spouse may have been entitled to prior to the designated agent’s beginning direct payments pursuant to the former spouse’s USFSPA application.

291503. Court Order

If the court order awarding child support or alimony appears on its face to conform to the laws of the jurisdiction from which it was issued, the designated agent will not be required to ascertain whether the court had obtained personal jurisdiction over the member.
Figure 29-1. Military Retired Pay Division Order (on or before December 23, 2016)

STATE OF _____________
COUNTY OF _____________

Petitioner

Respondent

MILITARY RETIRED PAY DIVISION ORDER

(For Decree of Divorce, Dissolution, Annulment, or Legal Separation that occurs on or before December 23, 2016)

This cause came before the undersigned judge upon the petitioner/respondent’s claim for a distribution of the respondent/petitioner’s military retired pay benefits. The court makes the following:

FINDINGS OF FACT:

The Petitioner’s Social Security Number is ___________ and current address is _______________________________.

The Respondent’s Social Security Number is ___________ and current address is _______________________________.

The Parties were married on ___________. Their marital status was terminated on ___________ pursuant to a(n) ________ entered in ________ County, State of ________. This current order is entered incident to the aforementioned order.

The parties were married for a period of ten or more years during which time the Petitioner/Respondent performed at least ten years of service creditable for retirement eligibility purposes.

If the military member was on active duty at the time of this order, Respondent/Petitioner’s rights under the Service Members’ Civil Relief Act, 50 U.S.C. App. 501-548 and 560-591, have been observed and honored.

This court has jurisdiction over the Respondent/Petitioner by reason of [choose those that apply] (A) his or her residence, other than because of military assignment, in the territorial jurisdiction of the court, during the [divorce, dissolution, annulment, or legal separation] proceeding, (B) his or her domicile in the territorial jurisdiction of the court during the [divorce, dissolution, annulment, or legal separation] proceeding, or (C) his or her consent to the jurisdiction of the court.

CONCLUSIONS OF LAW:

1. This court has jurisdiction over the subject matter of this action and the parties hereto.

2. Petitioner/Respondent is entitled to a portion of Respondent/Petitioner’s U.S. military retired pay as set forth herein.

IT IS THEREFORE ORDERED THAT:

[Choose and complete one of the following. Please note that all awards expressed as a percentage of disposable retired pay, including hypothetical awards, will automatically include a proportionate share of the member’s COLA unless this order states otherwise. Also, hypothetical retired pay amounts will be adjusted for all retired pay COLA from the hypothetical retirement date to the member’s actual retirement date, unless this order states otherwise.]
Retired member: “The former spouse is awarded ___ percent (or dollar amount) of the member’s disposable military retired pay.”

Active duty formula: “The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying ___ percent times a fraction, the numerator of which is ___ months of marriage during the member’s creditable military service, divided by the member’s total number of months of creditable military service.”

Reservist formula: “The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying ___ percent times a fraction, the numerator of which is ___ Reserve retirement points earned during the period of the marriage, divided by the member’s total number of Reserve retirement points earned.”

Active duty hypothetical calculated as of time of division, for all members regardless of service entry date: “The former spouse is awarded ___ percent of the disposable military retired pay the member would have received had the member retired with a retired pay base of ___ and with ____ years of creditable service on ____.”

Active duty hypothetical calculated as of time of division; may only be used for members entering service before September 8, 1980: “The former spouse is awarded ___ percent of the disposable military retired pay the member would have received had the member retired with the rank of ___ and with ____ years of creditable service on ____.”

Active duty hypothetical calculated as of member’s actual retirement date: “The former spouse is awarded ___ percent of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of ___ and with ____ years of creditable service.”

Reservist hypothetical calculated as of time of division, for all members regardless of service entry date: “The former spouse is awarded ___ percent of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of ___ and with ____ Reserve retirement points on ____.”

Reservist hypothetical calculated as of time of division; may be used for members entering service before September 8, 1980: “The former spouse is awarded ___ percent of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on ____, with the rank of _____. with ____ Reserve retirement points, and with ____ years of service for basic pay purposes.”

Reservist hypothetical calculated as of the date the member becomes eligible to receive retired pay: “The former spouse is awarded ___ percent of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on the date he or she attained age 60, with the rank of ____, with ____ Reserve retirement points, and with ____ years of service for basic pay purposes.”

This _____ day of ____________, 20__.

__________________________________
JUDGE
*Figure 29-2. Military Retired Pay Division Order (after December 23, 2016)*

STATE OF   
COUNTY OF     

COURT OF  
Case No.  

Petitioner  

Respondent  

MILITARY RETIRED PAY DIVISION ORDER

(For Decree of Divorce, Dissolution, Annulment, or Legal Separation that occurs after December 23, 2016)

This cause came before the undersigned judge upon the petitioner/respondent’s claim for a distribution of the respondent/petitioner’s military retired pay benefits. The court makes the following:

**FINDINGS OF FACT:**

The Petitioner’s Social Security Number is ___________ and current address is __________________________________________.

The Respondent’s Social Security Number is ___________ and current address is __________________________________________.

The Parties were married on ___________. Their marital status was terminated on ___________ pursuant to a(n) ___________ entered in ___________ County, State of ___________. This current order is entered incident to the aforementioned order.

The Parties were married for a period of ten or more years during which time the Petitioner/Respondent performed at least ten years of service creditable for retirement eligibility purposes.

If the military member was on active duty at the time of this order, Respondent/Petitioner’s rights under the Service Members’ Civil Relief Act, 50 U.S.C. App. 501-548 and 560-591, have been observed and honored.

This court has jurisdiction over the Respondent/Petitioner by reason of [choose those that apply] (A) his or her residence, other than because of military assignment, in the territorial jurisdiction of the court, during the [divorce, dissolution, annulment, or legal separation] proceeding, (B) his or her domicile in the territorial jurisdiction of the court during the [divorce, dissolution, annulment, or legal separation] proceeding, or (C) his or her consent to the jurisdiction of the court.

**CONCLUSIONS OF LAW:**

This court has jurisdiction over the subject matter of this action and the parties hereto.

Petitioner/Respondent is entitled to a portion of Respondent/Petitioner’s U.S. military retired pay as set forth herein.

**IT IS THEREFORE ORDERED THAT:**

Choose and complete one of the following. (Please note that all awards expressed as a percentage of disposable retired pay, will automatically include a proportionate share of the member’s COLA after the date the member retires, unless the court order states otherwise.)

29-30
*Figure 29-2. Military Retired Pay Division Order (after December 23, 2016) (Continued)*

**Award When the Member Has Already Retired From Active or Reserve Duty**

"The former spouse is awarded _______ percent (or) $_______ (dollar amount) of the member's disposable military retired pay."

**Active Duty Awards**

Complete only one of the following:

1. Fixed Award: "The former spouse is awarded $_______ (dollar amount) of the member's disposable military retirement pay."

2. Percentage Award: "The former spouse is awarded _______ percentage of the member's disposable military retirement pay."

3. Formula Award: "The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying _______ percent times a fraction, the numerator of which is _______ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service."

4. Hypothetical Retired Pay Award for members entering military service:

   A. BEFORE September 8, 1980: "The former spouse is awarded _______ percent of the disposable military retired pay the member would have received had the member retired with the rank of _______ and with _______ years of creditable service on _______ ."

   B. ON OR AFTER September 8, 1980: "The former spouse is awarded _______ percent of the disposable military retired pay the member would have received had the member retired with a retired base (high-3) of _______ and with _______ years of creditable service on _______ ."

AND (ONE OF THE BELOW SECTIONS MUST ALSO BE COMPLETED)

1. If the member entered the service BEFORE September 8, 1980

   On the date of the decree, dissolution, annulment, or legal separation _______ (list the date), the member's military pay grade (rank) was _______ , and the member had _______ years of creditable service (list amount of years and months).

2. If the member entered the service ON OR AFTER September 8, 1980:

   On the date of the decree of divorce, dissolution, annulment, or legal separation _______ (list the date), the member's military retired pay base (high-3) was $_______ (must provide a dollar amount) and the member had _______ years of creditable service (list amount of years and months).

**Reserve Awards When the Member is Still Drilling**

1. Fixed award: "The former spouse is awarded $_______ (dollar amount) of the member's disposable military retirement pay."

2. Percentage award: "The former spouse is awarded ____ percentage of the member's disposable military retirement pay."

3. Formula award: "The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying _______ percent times a fraction, the numerator of which is _______ Reserve retirement points earned during the period of the marriage, divided by the member's total number of Reserve retirement points earned."
4. Reservist hypothetical retired pay award as of time of division;

   A. May be used for members entering service BEFORE September 8, 1980: “The former spouse is awarded _____ percent of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on ______, with the rank of ______, with ______ Reserve retirement points, and with ______ years of service for basic pay purposes.”

   B. May be used for members entering service ON OR AFTER September 8, 1980: “The former spouse is awarded _____ percent of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base (high-3) of ______ and with ______ Reserve retirement points on ______.”

AND (ONE OF THE BELOW SECTIONS MUST ALSO BE COMPLETED)

1. If the member entered the service BEFORE September 8, 1980:

   On the date of decree of divorce, dissolution, annulment, or legal separation ______ (list the date), the member’s pay grade (rank) was ______ and the member had Reserve retirement points (enter amounts), and the member had ______ years of service for basic pay purposes (list amount of years and months).

2. If the member entered the service ON OR AFTER September 8, 1980:

   On the date of the decree of divorce, dissolution, annulment, or legal separation ______ (list the date), the member’s military retired pay base (high-3) was $_______, (must provide a dollar amount) and the member had ______ Reserve retirement points (enter amount).

   This _______ day of __________, 20____.

   JUDGE
*BIBLIOGRAPHY

CHAPTER 29 – FORMER SPOUSE PAYMENTS FROM RETIRED PAY

All

USFSPA
10 U.S.C. § 1408

* NDAA FY 2017, section 641
CHECK LIST FOR MILITARY RETIREMENT BENEFITS CASES

☐ Be familiar with the two federal rules that work with, and partly supersede, state law
☐ 10 U.S.C. § 1408
☐ 32 C.F.R. § 63.6

☐ Ensure that you have jurisdiction, both under your state law and under federal law
☐ Be aware that your state court must have jurisdiction over the service member by reason of residence (other than because of military assignment), domicile, or consent to the jurisdiction of the court
☐ Be aware of some differences among courts in what constitutes "consent"; for most it is any general appearance, but for at least one other it means consent to litigation of that particular asset

☐ NEVER take default against an out-of-state military member and seek to divide the retirement benefits; you will probably end up with an unenforceable order that may not be "fixable" in any court anywhere

☐ Be sure the marriage overlapped the member's military service by at least ten years during creditable military service
☐ If not, you cannot get the military pay center to send the spousal share of a property award directly to the former spouse
☐ If you do not have a ten-year overlap of marriage and service, consider getting an alimony award instead, since that is directly payable irrespective of length of overlap

☐ Your order should recite certain necessary "magic language"
☐ Compliance with the Soldier's and Sailor's Civil Relief Act
☐ The name and Social Security Number of both the member and the former spouse

☐ Define "Military Retirement Benefits" the way you really mean to
☐ If you mean something other than current definition of "disposable pay," say so
☐ Make sure that you clearly state intention regarding future cost of living adjustment increases to the military retired pay

☐ State the spousal portion of the retired pay as a percentage of the total benefit or a fixed dollar sum
☐ Be careful not to mix fixed dollar awards and percentages, and be aware that cost of living adjustments may not accrue to fixed dollar awards
☐ Realize that the definition of "disposable pay" is sometimes changed, and may or may not be what your state court thinks it is dividing

☐ Remember that military retired pay can be used for payment of child support and alimony as well as divided as property

☐ Follow up after the divorce by serving the order on the military pay center
☐ Service must be made only by certified mail, return receipt requested
☐ The court order must be certified within 90 days of service on the military pay center

☐ If the member is still on active duty, provide for possible future contingencies
☐ Provide for what division will be made, and when, if the member takes an early retirement or elects an alternate benefit such as the Special Separation Benefit, Variable Separation Incentive, or 15-year retirement

☐ In states (such as California) that provide for division upon eligibility for retirement, provide for member's possible service after eligibility for retirement by requiring personal payments by member until actual retirement

☐ Provide for whether alimony should be possible if the member takes a disability retirement and therefore reduces or eliminates the regular retired pay that could be divided
☐ This item also applies even if the member has already retired, since members can apply for post-retirement disability ratings

ThB-D
If there is a disability, realize that a disability percentage does not directly translate into a percentage of total retired pay.

Provide for possibility of any military retired pay "rolled over" into Civil Service retirement or other pension, including any "dual receipt" limitations involved in other federal service.

Again, this item also applies to divorces occurring after retirement.

Provide for a reservation of jurisdiction to correct the form of order to comply with intentions in case statutes change or the member's service takes an unexpected turn.

Ensure that you provide for disposition of the Survivor's Benefit Plan.

The benefit is not divisible between a present and former spouse; there can only be one beneficiary.

State courts have authority to determine whether spouse is to remain post-divorce beneficiary of the survivorship interest.

The amount of the benefit can be varied, by basing it upon the full base pay amount or some lesser sum.

Be sure you separately serve the proper office at the military pay center with a deemed election of the former spouse as beneficiary within one year of the date of divorce, or the spouse gets no survivorship benefits no matter what the decree says.

Obtain information regarding military-related benefits.

I.D. cards, CHAMPUS insurance benefits and base and commissary privileges are determined according to whether the member served for twenty years, was married for 20 years, and those two periods overlapped by 20 years.

If a former spouse remarries, the medical benefits are lost permanently even if the later marriage ends.
One of the often-overlooked resources for information in a military divorce case is the Dept. of Defense Financial Management Regulation. Here are some useful chapters regarding retired pay, the Survivor Benefit Plan, domestic violence, VA waivers, how to get information from the govt., etc. Go to: http://comptroller.defense.gov/FMR/fmrvolumes.aspx. If you want an excellent overview of what the rules for military retired pay are, see Chapter 1.>>

DoDFMR – Selected Key Chapters (Vol 7B)

1 – Initial entitlements – Retirements
2 – Gross Pay Computation
4 – Recoupment of Separation Payments
8 – (adjustments to ret’d pay, including COLAs)
18 – Release of Information
23 – Special and Voluntary Incentive Pay
27 – Garnishments
29 – Former Spouse Payments from Retired Pay
42-46 – Survivor Benefit Plan (Reserve Component SBP at Ch. 54)
59 – Victims of Abuse – Retirement Eligible
60 – Victims of Abuse – Nonretirement Eligible (Transitional Compensation)
63 – Combat-Related Special Compensation
54 – Concurrent Retirement and Disability Pay

In the October 2016 issue of THE ARMY LAWYER is an article titled: Making the Most Out of Your Pay and Allowances: Military Income and Tax-Free Benefits by Major Heidi M. Steele*

If you’re interested in cases in which this might play a part in the support calculation, the article is a good starting point. Just search for THE ARMY LAWYER in your search engine.

PS – If you see this - - - - << There is a problem with this website’s security certificate.>> select CONTINUE TO THIS WEBSITE.

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