



## **DIVORCE—MILITARY PENSIONS & BENEFITS**

Office of the Staff Judge Advocate, MacDill Air Force Base, Florida (813) 828-4422

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Uniformed Service Former Spouses' Protection Act (USFSPA)<sup>1</sup> gives spouses of military members certain rights and benefits after dissolution or divorce. There are two main parts of this law:

- The former military spouse's ability to receive a portion of the military member's retired pay; and
- The former spouse's right to receive commissary, base exchange, and medical benefits.

### **FORMER SPOUSE'S SHARE OF RETIRED PAY**

Along with the normal Florida property division laws, the federal government has enacted the USFSPA that governs how military retirement benefits are calculated and divided upon divorce. The USFSPA is the governing body that authorizes a direct payment of a portion of a military retiree's pay to the former spouse. Under USFSPA, a court must have proper jurisdiction and the spouse must have been married 10 years or longer while the member has been active duty military. These requirements are discussed in further detail below.

The formula for computing the non-military spouse's portion of the pension is:

$$\frac{\text{Years of marriage during service}}{\text{Years of service}} \times \frac{1}{2}$$

For instance, SMSgt Tough and Mrs. Tough are married for 14 years while SMSgt Tough is in the military. If SMSgt Tough serves 20 years, Mrs. Tough will likely get 35% of her retirement, if he has none of his own. This is just a presumptive amount. The court will adjust the percentage for any retirement benefits the non-military spouse has earned in the marriage and for any unequal division of other property. Additionally, these payments are not terminated by the non-military spouse's remarriage.

### **DIRECT PAYMENT TO A FORMER SPOUSE**

If a court awards a division of retired pay, the former spouse may be able to receive the payment directly from the military pay center (DFAS). Direct payment is limited to fifty (50) percent of the military member's disposable retired pay. "Disposable retired pay" is the total monthly retired pay to which a member is entitled less disability pay, federal debts, and Survivor Benefit Plan (SBP) annuity premium payments if applicable. The court is not limited to awarding fifty percent, however any portion of an award exceeding fifty percent must be paid by the military member and cannot be made through a direct payment.

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<sup>1</sup> 10 USC 1408

In order to submit an application for payments under the USFSPA, a former spouse needs to submit the applicable court order certified by the clerk of court within 90 day immediately preceding its service on the designated agent, along with a completed application form (DD Form 2293). Instructions, including designated agent names and addresses, are on the back of the DD Form 2293. The form and instructions can be downloaded from the DFAS website at <http://www.dfas.mil/militarypay/garnishment.html>. The completed form and certified court order should be sent via certified mail to DFAS.

DFAS, P.O. 998002, Cleveland, OH 44199-2087

Telephone Number: (800) 321-1080 or (216) 522-5301, fax (800) 469-6559.

**USFSPA Jurisdiction:** The USFSPA also requires the court to have proper jurisdiction over the service member. If this requirement is not met, the former spouse's application for retired pay as property payments under the Act will be rejected. The court may have jurisdiction in one of three (3) ways:

- The member consents to jurisdiction. (This can be established via the service member or his/her attorney when they take some affirmative action with regard to the legal proceeding such as filing any responsive pleading in the case. Note: If the member is an active duty, recommend that the divorce decree contains language that the Servicemembers Civil Relief Act has been complied with.)
- The service member is a resident of the State at the time of divorce (other than because of his or her military assignment).
- The court finds that the member was domiciled in that particular State at the time of the divorce. If the court makes this determination it should be so noted in the divorce decree.

**The 10/10 Requirement:** For a division of retired pay as property award to be enforceable by direct payments under the USFSPA, the former spouse must have been married to the member for a period of 10 years or more, during which the member performed at least 10 years of service creditable towards retirement eligibility. This time requirement does not apply to the court's authority to divide military retirement pay but only to the ability of the former spouse to get direct payments from DFAS.

It is sometimes difficult to determine whether the 10/10 requirement has been met. Although this can be determined with a certified copy of the marriage certificate and the divorce decree, DFAS recommends that the following language be included in the divorce decree: THE PARTIES WERE MARRIED FOR 10 YEARS OR MORE WHILE THE MEMBER PERFORMED 10 YEARS OR MORE OF MILITARY SERVICE CREDITABLE FOR RETIREMENT PURPOSES. This language will satisfy the 10/10 requirement.

A. Fixed dollar amount or percentage awards: If a fixed dollar amount is used, note the former spouse WOULD NOT be entitled to any of the member's retired pay cost of living adjustments (COLA). DFAS recommends the following language be used in divorce decrees: THE FORMER SPOUSE IS AWARDED \_\_\_\_\_ PERCENT [OR DOLLAR AMOUNT, IF USED/NOT RECOMMENDED] OF THE MEMBER'S DISPOSABLE RETIRED PAY.

B. DFAS recommends the following language for the determination of a spouse's interest in retirement pay when the member is still in military service at the time of the divorce: THE FORMER SPOUSE IS AWARDED A PERCENTAGE OF THE MEMBER'S DISPOSABLE MILITARY

RETIRED PAY, TO BE COMPUTED BY MULTIPLYING 50% 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.

C. DFAS recommends the following language be used for the determination of a spouse's interest in retirement pay when the member is retiring from reserve duty (as his/her retirement pay is based upon points): THE FORMER SPOUSE IS AWARDED A PERCENTAGE OF THE MEMBER'S DISPOSABLE MILITARY RETIRED PAY, TO BE COMPUTED BY MULTIPLYING 50% 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.

D. A hypothetical award is an award based on a retired pay amount different from the member's actual retired pay. It is usually figured as if the member had retired on the date of separation or divorce. Many jurisdictions use hypothetical awards to divide military retired pay. Unlike a formula, a hypothetical award does not give the former spouse the benefit of any the member's pay increases due to promotions or increased service time after the divorce. See <http://www.dfas.mil/militarypay/garnishment.html>. For guidance on suggested language for division of hypothetical awards of military retirement pay.

### **COMMISSARY & EXCHANGE BENEFITS**

Former spouses are entitled to commissary and BX privileges if the spouse has not remarried and the 20/20/20 rule (full benefits) is applicable. The privileges can be regained upon divorce of the remarriage.

The 20/20/20 rule is satisfied if:

- The former spouse and military member were married for at least 20 years;
- The member performed at least 20 years of retirement creditable service; and
- At least 20 years of retirement service occurred while the couple was married. (The marriage and the member's retirement creditable service overlap by at least 20 years).

### **MEDICAL BENEFITS**

Former spouses are eligible for medical care if:

- They remain unmarried (if new marriage is annulled, benefits can be reinstated);
- They are not covered by an employer-sponsored health care plan; and

They meet the requirements of the 20/20/20 rule outlined above

Former spouses that do not satisfy the 20/20/20 rule may be eligible for one year of "transitional" medical care if:

- They were married to the servicemember at least 20 years

- The servicemember had at least 20 years of creditable service, and
- There was at least a 15-year overlap between the marriage and the military service.

*The material in this handout represents general legal advice. The law is continually changing; although the information in this handout was current as of the date it was drafted, some provisions may have changed. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.*