

DIVIDING MILITARY RETIRED PAY UNDER THE UNIFORMED SERVICES FORMER SPOUSE'S PROTECTION ACT

BY Joan M. Burda and Michael B. Majeski

Military retired pay is often the single largest asset in divorces¹ where one party is an active or retired member of the military. With the passage of the Uniformed Services Former Spouse Protection Act (USFSPA).² Congress gave state courts the authority to divide this asset. This article explains the statute's requirements and points out potential problem areas that may be encountered.

Congress passed the USFSPA in 1982 in response to the U. S. Supreme Court's 1981 decision in *McCarty v. McCarty*.³ The *McCarty* decision prohibited state courts from dividing military retired pay as an asset of the marriage. The USFSPA preempts the Court's decision and gives state courts the authority to treat military retired pay as marital property and divide it between the spouses.

Applications for payments under the USFSPA must be served on the Defense Finance and Accounting Service, Cleveland Center (DFAS). The agency is the designated agent for service and processes all USFSPA applications for all military services. Applications are not properly served until the Cleveland Center receives the package.

The USFSPA provides for direct payment of current child support, child support arrearages, and current spousal support. The USFSPA does not permit the payment of either spousal support arrearages or past due property division payments.

The USFSPA is not a difficult statute, but it does include several statutory requirements that must be met. Failure to do so will either delay receipt of payments or may preclude a former spouse from receiving any benefits. Most of the problems that arise in USFSPA cases occur because court orders do not comply with the provisions of the USFSPA.

In order to qualify for payments, a military member must serve a required period of time. Active duty personnel must serve 20 years in order to qualify for military retired pay. If the member leaves the military with 19 years, 11 months, and 28 days of service, there is no entitlement to military retired pay. A former spouse is entitled to a portion of retired pay only if the member receives it.

There is no automatic entitlement to a portion of military retired pay. This is a marital asset subject to division by the court and the parties. There are statutory restrictions concerning the maximum percentage that can be directly paid to the former spouse, but there are no restrictions on the maximum percentage that can be awarded to the former spouse. For example, the court order can award a former spouse 100 percent of the member's military retired pay; however, DFAS can directly pay only 50 percent. The

member will be responsible for paying the other 50 percent. This is a statutory restriction and DFAS cannot exceed the 50 percent maximum.

Military retired pay is an entitlement program. It is not a pension plan. The provisions of the Employee Retirement Income Security Act (ERISA) do not apply.

Basic USFSPA Provisions

The USFSPA contains numerous requirements that must be met in order for a former spouse to receive payments.

Service of process. All applications for payments under the USFSPA must be sent to the DFAS Center in Cleveland. The statute provides that payments are to commence within 90 days of service on the designated agent. Regular U.S. mail, certified mail, or fax can be used to serve the application. Service is not effective until the designated agent receives a complete application. Garnishment Operations at the DFAS Cleveland Center is the designated agent. (See "For More Information" after the Notes section for DFAS contact information.)

The requirements for a complete application are found in 32 C.F.R. § 63.6(b). The law requires that the court order be certified within 90 days of service on the designated agent.

Disposable retired pay. Disposable retired pay is defined in the statute as gross retired pay less the authorized deductions.⁴ Court orders awarding the former spouse a portion of the member's "gross retired pay" will be calculated using disposable retired pay. There is a different definition for court orders entered before February 3, 1991. Those orders, referred to as "old law cases," include a deduction for federal income taxes. Taxes are not deducted for orders entered after February 3, 1991. Each party receives a 1099 from DFAS.

Maximum percentage. A court-ordered award can be enforced under the USFSPA up to a maximum of 50 percent of the member's disposable military retired pay.⁵ Even if the court order awards a former spouse a larger percentage, direct payments are limited to 50 percent of disposable pay. Court orders are honored on a first-come, first-served basis up to 50 percent of disposable pay.

The maximum percentage increases to 65 percent when DFAS is served with a withholding order for child or spousal support and there is an application for payments under the USFSPA.

Jurisdiction. At the time Congress enacted the USFSPA, many states did not recognize pensions as a marital asset subject to division. In an attempt to prevent forum shopping by the nonmilitary spouse, the USFSPA contains special jurisdictional requirements.⁶ These requirements must be met in order for a court to have jurisdiction to divide military retired pay. They are separate from and in addition to any state or local rules. The USFSPA requires that the court have jurisdiction over the member by reason of: the member's residence, other than because of military assignment; the member's

domicile; or with the member's consent. If these special jurisdictional requirements are not met, DFAS has no authority to make direct payments to the former spouse.

10/10 Rule. In order for a former spouse to receive direct payments, the parties must be married for 10 years during 10 years of creditable military service.⁷ This requirement only affects awards of military retired pay as a division of property. Support obligations are not restricted by this rule.

An award of military retired pay as property. The USFSPA requires that a division of property be expressed as either a percentage or a fixed amount.⁸ All payments are made from disposable retired pay. This is true even if the court order provides for payments from a member's gross retired pay. Cost of living (COLA) increases are only paid for awards expressed as a percentage. There is no authority to pay COLAs on awards expressed as a fixed amount.⁹

Use of formulas. The USFSPA allows the parties to provide for a division of property using a marital fraction formula. The court order must include all elements of the formula. Specifically, the order must include the total number of months of marriage. DFAS can supply the member's years of service. If the member is a reservist, the court order must include the points earned during the marriage. DFAS will supply the total retirement points earned by a reservist if that element is missing from the formula.¹⁰ DFAS has no authority to honor an application if the required elements of the formula are not included in the court order.

A simple formula includes the number of months of marriage divided by the number of months of military service. This result is multiplied by 50 percent to arrive at a percentage, and that percentage is the former spouse's award. If the member is on active duty at the time of the divorce, DFAS can supply the months of service at the time of retirement. (Example: 144 months of marriage and 300 months of service (25 years) $(144/300) \cdot 50 = 24$ percent.)

Use of hypotheticals. In April 1995, the Department of Defense (DoD) published a proposed rule governing the use of hypotheticals.¹¹ The proposed rule amends the Code of Federal Regulations, title 32, part 63. It reflects amendments to the USFSPA to clarify the language of the federal regulation.¹² This proposed rule also governs formulas.

Hypothetical awards address the issue of a former spouse's future award when the marriage ends while the member is on active duty.¹³ A hypothetical award is one that is based on a member's rank and years of service at the time of the divorce. The hypothetical must be based on at least 15 years of service. This is because the member must be retirement eligible to have an acceptable hypothetical. DFAS has no authority to process an application when the hypothetical amount is based on a time period of less than 15 years. Hypothetical awards are converted to a percentage of the member's retired pay at the time of actual retirement. The award will be expressed as a

percentage if the court order provides for COLAs. If the order does not award COLAs, the award will be made in a fixed dollar amount only.

The elements of a hypothetical consist of three things: the rank on which the hypothetical retirement must be based; the years of creditable service to be used; and the percentage awarded to the former spouse. This allows the parties to lock in the award to the former spouse at the rank of the member at the time of divorce. Post divorce increases in rank are apportioned only to the member.

DFAS determines the former spouse's award in the following manner. The member's hypothetical retired pay amount is computed using the appropriate pay table, hypothetical rank, and hypothetical years of service. DFAS then converts the award into a percentage of the member's actual disposable retired pay. To do this, DFAS multiplies the award percentage times a fraction using the hypothetical retired pay amount as the numerator and the member's actual retired pay amount as the denominator.

Hypotheticals can only be used for members on active duty at the time of divorce. DFAS will reject court orders that use hypotheticals to divide military retired pay in cases involving retired members. There is no reason to use a hypothetical when the member is retired. The parties have all the necessary information to arrive at either a percentage or a fixed amount.

The USFSPA requires that the award be expressed as either a percentage or a fixed amount unless a formula or hypothetical is used. The court order must contain all pertinent information. DFAS is not required to investigate the parties' actual intent by referring to facts or values that are not included in the court order.¹⁴

Survivor Benefit Plan (SBP). The SBP is an annuity available to a former spouse.¹⁵ The SBP benefit is paid to the former spouse-beneficiary after the death of the member. Direct payments of military retired pay terminate on the member's death. Only the member can pay the SBP premiums. When the former spouse is designated the beneficiary, the premiums are used as a deduction in calculating disposable retired pay. The premiums will be paid by the member even if the court order provides that the former spouse pay them.

One aspect of SBP coverage is extremely important. There is a one-year time limit on submitting a former spouse's deemed election as the beneficiary. This one-year time frame begins on the date of divorce. This is a mandatory time limit and there are no exceptions. The one year begins to run from the date of divorce even if the property settlement is not final. Failure to comply with the one-year rule will forever bar the former spouse from being named the beneficiary under the SBP.

Questions concerning the SBP must be directed to the Directorate of Retired Pay Operations at DFAS-Cleveland.¹⁶ Many practitioners overlook this one-year requirement. As a result, their clients are deprived of an important benefit.

Notice to member. The USFSPA requires that the member be given notice within 30 days of service on DFAS. The member has 30 days from the date the notice is mailed to submit proof that the court order is not valid.

Property award arrearages. There is no provision in the USFSPA for payment of arrearages. All payments under the USFSPA are only prospective in nature.¹⁷

USFSPA Issues

Contrary to popular belief, DFAS is not concerned with how the parties divide military retired pay. DFAS is responsible for, and concerned with, the review of court orders and applications to ensure they comply with the statute and regulation. DFAS represents neither the member nor the former spouse. DFAS does not take sides in the disputes that arise in matters involving the USFSPA. Furthermore, DFAS is not an appellate court. The agency has no authority to decide disputes between the parties involving a division of military retired pay.

There are times when one or the other party contacts DFAS and complains because the court order does not reflect what they really "meant to say." The parties must resolve disputed issues in court.

Clarifying orders. When DFAS receives a court order that is unclear, a clarifying order will be requested. Under the USFSPA, incomplete formulas must be corrected by a clarifying order. Many applications are rejected because the language dividing retired pay is faulty. The court order must clearly set forth the award as either a percentage or a fixed amount. The order can also use a formula or a hypothetical. The parties are responsible for presenting a clearly worded order.

For example, an order that contains language expressing the award as a percentage, a fixed amount, a formula, and a hypothetical will be rejected. The parties' intent cannot be determined from the order's language. The parties, not DFAS, are required to set forth the actual award. In this situation a clarifying order will be requested. DFAS will also accept a statement, signed by the parties and notarized, clarifying their intent and expressing the award as either a percentage or specific amount.

Clarifying orders are requested to prevent problems down the road. The parties and their lawyers can prevent the situation by submitting to DFAS a court order that clearly states the award.

Valuing military retired pay. Many court orders award the former spouse a portion based on the marital share. There is no "present value" of retired pay while the member is on active duty. Military retired pay does not "vest" like a private pension plan. The member does not contribute to military retired pay. There is no discernable "military retired pay pot." There are no lump-sum payments. At no time prior to retirement is the member entitled to anything. Unlike with a private pension plan, a retired member can be recalled to active service and retired pay will stop.

For example, a member may have 25 years of service (retirement can occur at 20 years) and commit an act that results in a court-martial. Upon conviction the member is

sentenced to a prison term, dishonorably discharged, and forfeits all pay and allowances. This also results in a forfeiture of retired pay. Another scenario involves a member who dies while on active duty with 20 years of service. The member did not retire; there is no entitlement to retired pay. If the member is not entitled to retired pay, neither is the former spouse.

A Qualified Domestic Relations Order (QDRO) is not required to divide military retired pay. QDROs are designed to divide pensions under ERISA. They are not needed under USFSPA. In fact, many QDROs, drafted under ERISA's rules, result in an application's being rejected because the order does not comply with the USFSPA. For USFSPA purposes, the award of military retired pay can be contained in a single paragraph.

For example, an order containing this language is acceptable: "The wife is awarded X percent of the husband's military retired pay, plus an equal percentage of COLAs"; or "The wife's portion of the husband's military retired pay will be determined using the following fraction: 144 months of marriage (numerator); 250 months of military service (denominator); multiplied by 50 percent." This formula results in an award of 28.8 percent.

It is very easy for the parties to complete the calculation and provide DFAS with the actual percentage. This allows both parties to understand precisely what the former spouse will receive from DFAS. It is always better for the parties to provide specifics to DFAS rather than let the agency calculate the award.

Child support and spousal support. A former spouse can collect support under the USFSPA in addition to a division of property. The maximum percentage is 50 percent of disposable retired pay. The former spouse can also use a withholding order under title 42 to garnish retired pay for support. When a withholding order is served, the USFSPA provides that the maximum percentage is 65 percent.

Child support arrearages can be collected under the USFSPA.¹⁸ Arrearages for spousal support can only be collected by using a wage withholding order under title 42. Whenever an application is made for payments under the USFSPA, the former spouse must submit a DD Form 2293.

Garnishment of property other than a division of retired pay. A court may award a former spouse property other than a portion of military retired pay. The former spouse may enforce that award through a garnishment withholding order.¹⁹ This award of property must be in addition to an award of child support or alimony or an award of retired pay as property.

This is the only situation where a separate garnishment order is allowed or required under the USFSPA. A court order that awards a division of property but does not award a portion of military retired pay as property cannot be enforced under the USFSPA.

Federal law governs the maximum percentages for these garnishments.²⁰ Military retired pay is not subject to garnishment for commercial debts. The USFSPA is the only vehicle available to the former spouse to collect a property award of military retired pay.

Disability payments. An area that causes many problems for former spouses involves disability payments. The Veteran's Administration (VA) and the DoD determine and administer disability benefits. The general purpose of disability retired pay is to authorize a continuing payment to members separated from active service because of a physical or mental disability.

The USFSPA excludes both DoD disability retired pay and VA disability compensation from the definition of "disposable retired pay." Consequently, neither is subject to allocation to a former spouse. VA disability compensation and DoD disability retired pay is excludable from the former member's gross income for federal income tax purposes.²¹

A retiree may receive disability compensation from the VA at the same time the member is receiving retired pay, including DoD disability retired pay. The member must then file a "waiver" of a portion of military retired pay (including DoD disability retired pay) equal to the amount of VA disability compensation. This results in a reduction in disposable retired pay equal to the award of VA disability compensation. The reduction automatically reduces the amount available to the former spouse. Therefore, a member can waive a portion of retired pay to receive VA disability compensation, which reduces the payment to the former spouse. This can be done without the consent of either the former spouse or the court.

For example, a member granted a 100 percent VA waiver would no longer receive military retired pay. Payments to the former spouse under the USFSPA will terminate in this situation because there is no military retired pay available. If the VA waiver is less than 100 percent, the former spouse's payment will be automatically reduced by the same percentage. An award of VA disability is usually retroactive. In those cases, the former spouse will be liable for payments made under the USFSPA. The former spouse will be expected to return the money paid unless a waiver is granted.

DFAS has no control over awards of VA disability benefits.

Joinder actions. California lawyers often serve notice of a joinder action on DFAS. These are unnecessary since military retired pay is not an employee benefit plan and these joinder actions are designed to address employee benefit plans. Military retired pay is an entitlement program, not a pension plan.

When served with a joinder motion DFAS will contact the lawyer and explain why the action is unnecessary. If the joinder action is not dismissed DFAS will then contact the U.S. Attorney and ask that the case be removed to U.S. district court. Most lawyers filing joinder actions fail to serve the U.S. Attorney. This is required since the action seeks to join the U.S. government as a party. The easiest way to avoid the cost of contesting a removal to federal court is to avoid filing joinder actions.

Voluntary Separation Incentive (VSI). In 1993, Congress authorized the VSI program. This includes the Special Separation Bonus (SSB) option that induces members with 15 to 19 years of service to separate from active duty. Those individuals received a lump sum payment in lieu of military retired pay. SSB payments are not subject to division under the USFSPA.

Some members opted to accept VSI payments in lieu of retired pay. These are annual payments that are not subject to division under the USFSPA. Some members accepted these "buy-outs" after their divorce. The court awarded the former spouse a portion of the member's retired pay. Since the member did not retire, the former spouse is entitled to nothing.

Most court orders do not address the possibility of VA waivers, disability retirement, VSI, or SSB payments. VSI payments are subject to garnishment for support under 42 U.S.C. § 659.

Court order language. The basic rule of thumb is to keep it simple. An award of military retired pay must be expressed as either a percentage or a fixed amount. That is the language in the statute. The parties may use either a formula or a hypothetical. The simpler the language, the less chance there is that DFAS will reject the order for failure to comply with the USFSPA. There is also less chance that the parties will disagree with the outcome. It is not unusual for one or both parties to call DFAS complaining that the amount being paid is not what they expected.

The court order must include the following information:

1. Name, address and Social Security number of the parties.
2. Dates of marriage, divorce, military service, and retirement.
3. Award expressed as either a percentage or a fixed amount.
4. In the alternative, specify a formula or a hypothetical.
5. Number of reserve points earned during the marriage, if the award is based on a formula for a reservist.

The order can also include a designation of the former spouse as the SBP beneficiary. Remember that the deemed election must be made within one year of the divorce. This information is sufficient to award a division of military retired pay as property. It need not be fancy or extensive. DFAS is not concerned with how the parties or the court determine the former spouse's share of retired pay. DFAS is only concerned with ensuring compliance with the USFSPA and receiving an order with the award clearly expressed.

Why DFAS does not preapprove court orders. Many lawyers contact DFAS and request preapproval of court orders. DFAS will not preapprove court orders for several reasons. First, there is no need for a competent lawyer to seek preapproval. The USFSPA is quite clear about how to express an award of military retired pay. Another reason involves perception. The government does not represent either party in the divorce action. The government has no interest in the outcome of the divorce action. Queries seeking preapproval are usually submitted by only one of the parties.

Preapproving proposed court orders would give those orders a sort of imprimatur that muddies the water.

Government attorneys who are asked to preapprove orders risk finding themselves defending ethics complaints filed with their respective state bars by discontented members or former spouses. Family law is a highly volatile, very litigious field. Because a large number of military retirees abhor the fact that their retired pay can be divided, caution is the key word for government attorneys. The government is not required to defend any employee if it is determined that such a defense is not in the government's interest. Therefore, if a DFAS attorney is sued by an angry party for malpractice, or has an ethics complaint filed, that attorney could be responsible for funding his or her own defense.

When do payments begin? Payments under the USFSPA begin within 90 days of the member's entry on the retirement rolls. Reservists are not eligible to begin receiving retired pay until the age of 60. Former spouses may also be eligible for Social Security benefits since military personnel contribute to that system.

In situations where the divorce occurs many years before actual retirement, it is advisable for either the lawyer or the former spouse to contact DFAS when retirement occurs. DFAS does not have a tickler system to remind it of a pending USFSPA case.

When do payments end? Payments under the USFSPA terminate on the death of either party. When the member dies, the former spouse, if a beneficiary, will begin to receive payments under SBP. Payments will also terminate in accordance with the provisions of the court order. Other than death, there is no statutory provision for automatic termination.

Reading the statute and regulation. Many of the problems DFAS encounters in USFSPA cases result from the lawyer's failure to read the statute and the regulations. There are numerous cases where USFSPA applications are rejected because the court order does not comply with the statutory requirements.

One of the biggest problems concerns the failure to comply with the 10/10 rule. In some cases the parties' divorce is finalized with nine years and 11 months of marriage—just shy of meeting the 10-year requirement. That means the former spouse will never receive direct payments. Other cases are rejected because there is no compliance with the jurisdictional requirements. If those requirements are not met, DFAS has no legal authority to honor an application for direct payments.

Another example is the failure of the parties to address a reduction in retired pay because of receipt of disability pay. These are examples of problems that are avoidable if the lawyer becomes familiar with the law. Lawyers who are unfamiliar with this statute or the area of law are best advised to associate with an experienced lawyer. In some cases, the amounts lost by the former spouse are significant and the lawyer involved in the case may be held liable for those losses.

Conclusion

The fact that military retired pay is subject to division as a marital asset continues to be a divisive issue. The DoD is currently reviewing the statute. Congress ordered this review in the National Defense Authorization Act for Fiscal Year 1998 (NDAA 1998) § 643. That review is nearing completion and will then be submitted to Congress.

The USFSPA is not a complex statute, but private lawyers and judges need to familiarize themselves with the statute and the federal regulation. DFAS is charged with ensuring compliance with the USFSPA when reviewing applications and accompanying court orders. The agency has no discretion when it comes to ensuring compliance with the law.

While DFAS will not preapprove proposed court orders, agency personnel are available to answer questions and provide as much information as possible. DFAS is in the process of developing a handbook for use by lawyers, courts, military personnel, and their spouses when dealing with the USFSPA. DFAS also hopes to create a model court order that can be used by lawyers and the courts when dividing military retired pay.

Notes

1. The term divorce is used to represent all legal methods of separation possible under state law.
2. 10 U.S.C. § 1408.
3. 453 U.S. 210 (1981).
4. 10 U.S.C. § 1408(a)(4).
5. 10 U.S.C. § 1408(e)(1).
6. 10 U.S.C. § 1408(c)(4).
7. 10 U.S.C. § 1408(d)(2).
8. 10 U.S.C. § 1408(a)(C).
9. 32 C.F.R. § 63.6(h)(2).
10. 32 C.F.R. § 63.6(c)(8).
11. 32 C.F.R. § 63.6; Vol. 60, No. 66, April 6, 1995.
12. 32 C.F.R. § 63.6(c)(8).
13. 32 C.F.R. § 63.6(c)(8)(ii).
14. 32 C.F.R. § 63.6(c)(8)(iv).
15. 10 U.S.C. § 1447.
16. P. O. Box 99191, Cleveland, OH 44199-9191; 800-321-1080.
17. 32 C.F.R. § 63.6(h)(10).
18. 10 U.S.C. § 1408(d)(6).
19. 10 U.S.C. § 1408(d)(5).
20. 15 U.S.C. § 1673.
21. 38 U.S.C. § 5301.

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DFAS Contact Information – For More Information:

DFAS welcomes questions and looks forward to working with members of the bar and the courts on USFSPA issues.

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P.O. Box 998002
Cleveland, OH 44199-8002

216-522-5301 – Customer Service

216-522-6960 – Fax Gateway

<http://www.dfas.mil>; <http://www.dfas.mil/money/garnish/> (garnishment information)

If case involves a member of the active reserve, obtain information on the reservist's military retired pay from his/her point summary.

Air Force Reserve Personnel Center/DPAR

6760 E. Irvington Place, #190

Denver, CO 80280-1900

303-676-6369

Army

ARPERSCOM

ATTN: ARPC-PSP-A

9700 Page Blvd

St. Louis, MO 63132-5000

317-510-2813

Naval Reserve Personnel Center

4400 Dauphine Street

New Orleans, LA 70149-7800

(written requests only)

Marine Corps Reserve Center

1500 Bannister Road

Kansas Cit, MO 64197-0001

816-926-5264