

ENFORCEMENT AND AGREEMENTS

By COL Mark E. Sullivan

- I. Sources of BINDING obligations: orders and agreements

- II. Court orders
 - A. Consent orders -- signed by parties and their lawyers (no trial)
 - B. After trial- judge makes findings, lawyers prepare orders and exchange, judge signs.

- III. Separation agreements in NC
 - A. Full and final promises – not just a stop-gap measure till divorce
 - B. In NC a separation agreement must be signed before a notary
 - C. Don't sign before parties separate -- this may invalidate agreement (except for property terms)
 - D. No requirement for incorporation into divorce decree or registration (at Register of Deeds office)
 - E. Child-related items can always be “modified” by the court (custody, visitation, and child support)
 - F. Can bar equitable distribution (E/D) or alimony if worded properly – by specific reference to equitable distribution, alimony (*Napier v. Napier*, 135 N.C. App. 364; 520 S.E.2d 312, October 1999)
 - G. Can waive E/D even if silent: general release clause

- IV. Incorporation of agreements into divorce decree
 - A. Read *Walters*, 307 N.C. 381 (1983) -- incorporation is optional, when done it means:
 - 1. Enforcement by contempt, garnishment, etc.
 - 2. Executory promises are modifiable if change of circumstances

- V. Non-modifiable promises?
 - A. Can't do for child-related provisions
 - B. CAN DO for alimony, property division:
 - 1. Unincorporated S/A, or

- 2. Integrated promises in consent order
- VI. Military pension division
- A. Special wording required (SILENT PARTNER "Getting Military Pension Division Orders Honored By DFAS")
 - B. Cannot do this with unincorporated S/A – must be “decree of divorce or court order”
 - C. Resources: 3 SILENT PARTNERS on military pension division (“Scouting the Terrain,” “The Soldier’s Strategy,” “The Spouse’s Strategy”)
- VII. Additional topics
- A. Attorney's fees clause if breach
 - B. "Don't construe against drafter" clause
 - C. College clause (see SILENT PARTNER on child support)
 - D. Allocation of dependency exemption [and tax credit] - conditioned on compliance by payor!
 - E. Securing promises of payments against death....
 - 1. SGLI? Ridgway decision -- better to use private insurance
 - 2. Private life insurance: transfer ownership!
 - F. Getting court-ordered support [see Co-Counsel Bulletin]
 - 1. Voluntary Support Agreement (G.S. § 110-133)
 - 2. Confession of Judgment (G.S. § 1 A-1, Rule 68.1)
- VIII. Enforcement of court orders
- A. Contempt
 - B. Garnishment, involuntary allotment (see TAKE –1)
 - C. Seizure of property
 - D. License revocation
 - E. Collateral consequence: attorney's fees
- IX. Defending a contempt case
- A. What are elements of contempt? [G.S. Chapter 5A]
 - 1. Valid court order

2. Requiring specified action
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4. Without justification- “willful”
5. And has ability to comply [past & present] or take reasonable steps to do so

B. Basis for defense

1. Justification - visitation case examples
 - a) Child is sick, mom doesn't allow visitation
 - b) Dad's car breaks down, he doesn't return child Sunday night
2. Lack of ability - child support case
 - a) Dad's pay is fouled up, mom receives no support.
 - b) Mom won't let dad visit – defense to non-payment?
 - c) Dad has 2 months' visitation in summer – defense to non-payment?
 - d) What about arrears? Vested when due, cannot retroactively reduce (see below)

X. Advising the client - motions to modify custody, support, visitation

- A. Prompt motion to modify when change of circumstances – court in its discretion can go back to date of motion, cannot retroactively modify support before then (as a general rule)
- B. Consent motion to modify – see Co-Counsel Bulletin; do you need a private attorney? Can you do it yourself?
- C. Interstate cases:
 1. Support is governed by UIFSA [G.S. § 52C]
 2. Custody is governed by PKPA and UCCJEA [new Art.2, Ch. 50A]

XI. Enforcement tips

- A. Payment should be made:
 1. by income withholding (wage assignment or garnishment), and
 2. through Centralized Collections
- B. Resources for the client:

1. Child Support Enforcement office
 - a) Pro's
 - (1) Cheap
 - (2) Must help dads in paternity cases
 - (3) Tax refund intercept
 - (4) Access to info on other side's income
 - b) Con's
 - (1) You get what you pay for
 - (2) Contact is case worker, not lawyer
 - (3) "Leave a message when you hear the BEEP"
 - (4) You're one of several hundred clients/
customers
2. Parent Locator Service
3. Local pro bono programs

XII. Attorney's fees

- A. For **child support cases** -- good faith, interested party, in need of AF, refusal to pay adequate support at time claim filed.
- B. For **custody** or **child support & custody** cases -- above less "refusal"
- C. PSS, alimony: success on PSS claim, in discretion of court
- D. Equitable distribution: only for enforcement of judgment, not for preparation and trial of case or negotiations of settlements.
- E. General rule: Don't count on attorney's fees, usually "too little, too late"

XIII. International determination, enforcement of child support -- pamphlet; on this published by Institute of Government in Chapel Hill, NC, and currently posted at JAGCNET and also at www.ncbar.com/home/lamp.htm.

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SILENT PARTNER

GETTING MILITARY PENSION DIVISION ORDERS HONORED

BY DFAS

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys who are stationed overseas. Without being “heavily footnoted,” it is an attempt to explain basic concepts about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

Getting a pension division order honored by DFAS (Defense Finance and Accounting Service) can sometimes be a daunting task. Located in Cleveland, Ohio, DFAS has numerous lawyers and paralegals reviewing legal documents that arrive there by the truckload everyday. They also have a rejection rate of over 30%, and they do not publish anywhere a sample pension division order for lawyers to use as a model in drafting direct payment clauses for military pension division or SBP (Survivor Benefit Plan) coverage. Here are some basic tips on how to get your property division decree or clause accepted.

1. **KNOW YOUR RESOURCES.**

Read closely the provisions of 10 U.S.C. 1408 and the implementing regulation, found at 32 C.F.R., Part 63. Did you know that DFAS has a website? It's located at **www.dfas.mil**, and it generates over 3,000 “hits” a month. All of the DFAS fact sheets are on it, and the application form as well -- why not go there and pick up some information straight from the source? Click on “Garnishment and Involuntary Allotments.” Then select the Uniform Services Former Spouses’ Protection Act Fact Sheet, “Questions and Answers,” for information regarding DFAS’ processing of applications for the direct payment of benefits.

DFAS’ Customer Service Department may be reached at (216) 522-5301, or DSN 580-5301. Be sure to include the military member’s Social Security Number (SSN) in all correspondence and phone calls with DFAS. Providing this will ensure rapid response. Without a SSN, documents will be rejected.

2. **USE THE RIGHT DOCUMENT.**

A separation agreement, standing alone, is not the way to accomplish military pension division. While you can attempt to divide a military pension in a separation agreement, there will be insurmountable problems when there is a marriage of over ten years’ duration and the nonmilitary spouse want to receive direct pension payments from DFAS. The USFSPA (Uniformed Services Former Spouses’ Protection Act) only allows direct pension payments pursuant to a “final decree of divorce, dissolution, annulment, or legal separation issued by a court” or a property settlement that is ratified or approved by the court and issued incident to such a final decree. Since an unincorporated or unmerged separation agreement is not a court order, it will not be sufficient to institute direct pension payments for the ex-spouse. You must have one of the above court documents. You can either:

- Prepare a separate military pension division order, judgment, or decree, which will then be submitted to the court at the appropriate time. This would be when the divorce occurs, or when the hearing on property division takes place. An example is shown below:
- In the alternative, prepare a separation agreement that can then be incorporated or merged into a divorce decree.

3. CAN YOU GET DIRECT PAYMENTS FROM DFAS?

A pension division order can only be used for direct payments if a unique jurisdictional requirement is met. Under 10 U.S.C. 1408(c)(4), direct payments are allowed only when the military member:

- is domiciled in the state in which the suit for the divorce or property division occurs; or
- resides in the state in which the lawsuit occurs (other than because of military assignment); or
- consents to the jurisdiction of the court in which the lawsuit occurs.

Consent usually occurs when the member is the moving party of the divorce proceeding, if the member files a motion (other than to contest jurisdiction) during the proceedings, or if the member consents by signing the order or decree. In addition, in property division cases involving the division of military retired pay incident to a divorce or separation, there is a requirement that the parties be married for at least 10 years during which time the military member performed at least 10 years of creditable military service. Without this, DFAS cannot honor an application for the direct payment of any court-ordered division of retired military pay as property.

The Soldiers and Sailors' Relief Act (SSCRA) offers protection for military members who are on active duty at the time of the divorce, and in such a case, there must be proof that the military member's rights pursuant to the SSCRA were observed and honored. This requirement does not apply in cases where the member is retired or not on active duty at the time the decree was entered.

When the application is approved, DFAS notified the member that payments will start not later than 90 days after the service date of the approved application. When the court order divides military retired pay as property, no more than 50% of the member's disposable retired pay (DRP) may be deducted. The military member remains liable for any amount still owing. In cases where there is an application for the direct payment of court-ordered division of military retired pay and a garnishment issued pursuant to 42 U.S.C. 659 (child or spousal support), DFAS is authorized to deduct up to 65% of the military member's disposable earnings.

- If the decree was filed prior to February 3, 1991, the calculation of DRP is different than for later cases. DFAS refers to the earlier orders as "old law" cases, and the more recent cases as "new law" cases.
- In "old law" cases, federal income tax, state income tax, amounts of military retired pay waived in lieu of receiving disability pay from the Veteran's Administration, the costs of the Survivor Benefit Plan (SBP) premiums (if the former spouse is the designated beneficiary), amounts waived for civil service employment, and debts owed the federal government are deducted in calculating DRP.
- In "new law" cases, taxes are not deducted but the other deductions shown above apply. The parties have taxes deducted from their respective shares.

4. USE THE RIGHT LANGUAGE.

Even if it were incorporated into a court order or a divorce decree, the separation agreement or property settlement document would have to contain all of the language that is required for court orders to be honored by DFAS. The pension division clauses must include:

- a. The names and addresses of the parties, as well as their SSNs;

- b. The years of marriage and of military service;
- c. The military member's grade or rank;
- d. A statement that the SSCRA rights of the member have been honored (if the member is on active duty when the decree is entered)
- e. Jurisdictional finding (domicile, consent, or residence) under 10 U.S.C. 1408 (c)(4);
- f. A statement that DFAS should pay the spouse at his/her correct address as shown therein.
- g. A statement to what DFAS will pay the spouse (see "KNOW WHAT YOU WANT" below); payments are made once a month, starting no earlier than 90 days after service of the decree on DFAS. The payments end no later than the death of the member or spouse, whichever occurs first. Payments are prospective only; no arrears allowed. The USFSPA does not provide for payment of payments missed prior to the approval of the application by DFAS.

5. **KNOW WHAT YOU WANT.**

The order may award a percentage or a fixed dollar amount to the former spouse of the military member. For example, a percentage clause might state: "Wife is granted 50% of Husband's disposable retired pay." Alternatively, a fixed dollar clause could read: "Wife is awarded \$550 per month, payable from Husband's disposable retired pay." A percentage clause automatically provides for cost-of-living adjustments (COLAs). The spouse does not get any COLAs if a fixed dollar amount is awarded.

Regulations also allow DFAS to accept awards that are not percentages or fixed dollar amounts (see 60 Fed. Reg.66, published 6 April 1995). This regulation allows DFAS to honor a court award that is expressed as a formula or a hypothetical. These are usually used if the service member is still on active duty.

- a. A formula is an award expressed as a ratio. For example, the order could state: "Wife shall receive 50% of the Husband's disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband." The court must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service. DFAS cannot guess or interpret what the court and parties have agreed upon as the months of marriage; however, DFAS can provide the total months of service. Note that if the court also provides the total months of service, DFAS will honor that number regardless of its accuracy.
- b. A hypothetical is an award based on a rank or status which is different from that which exists when the soldier retires. For example, the order might say: "Wife is granted 40% of what a staff sergeant (E-6) would earn if he were to retire with 18 years of military service." Since there's no table that shows this type of pay, DFAS would calculate the hypothetical pay amount and compute a ratio to the actual retired pay in order to calculate the amount to which the wife in this example should receive. Note that if the court order fails to specify the year of retirement, DFAS assumes the year to be the actual year of retirement, and that year's pay scale would be utilized. In addition, if the order doesn't state that the former spouse is awarded COLAs, the award will be entered as a fixed dollar amount and no COLAs will be paid. Finally, be sure to include the rank and years of service of the member when submitting a hypothetical award.

6. **WHERE AND HOW TO SERVE THE ORDER**

a. For service on DFAS, the addresses of the military finance centers are:

ARMY, NAVY, AIR FORCE, MARINES: Office of the Assistant General Counsel for Garnishment Operations, DFAS-CL/L, P.O. Box 998002, Cleveland, OH 44199-8002; (216) 522-5301.

COAST GUARD: Commanding Officer (L), Pay and Personnel Center, 444 Quincy Street, Topeka, KS, 66683-3591; (913) 357-3500.

PUBLIC HEALTH SERVICE: D.P., Parklawn Building, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857; (301) 594-2963.

b. The decree must be certified by the clerk of court within 90 days of service on DFAS.

c. An application letter to be signed by the spouse should also be included, and a copy of such a letter (DD Form 2293) can be obtained from the DFAS website. Only the recipient may sign the application, but anyone may serve the completed application upon DFAS.

d. While you should ensure delivery by sending the documents by certified mail, return receipt requested, this is not a requirement.

7. **HOW TO WORD THE PENSION DIVISION PARAGRAPHS.**

“One size fits all” doesn’t apply to military pension division orders. Here’s a checklist from DFAS to help you with the order.

MILITARY PENSION DIVISION CHECKLIST

- SERVICE OF APPLICATION (personal, certified or registered mail, return receipt requested)
- FINAL COURT ORDER OF DIVORCE, SEPARATION OR ANNULMENT -- AUTHENTICATED OR CERTIFIED WITHIN 90 DAYS PRIOR TO SERVICE
- MEMBER PROPERLY IDENTIFIED
- NAME, ADDRESS, AND SSN OF FORMER SPOUSE
- ORDER PROVIDES FOR PAYMENT OF FIXED AMOUNT \$ _____, OR FIXED PERCENTAGE ____% OF DISPOSABLE RETIRED/ RETAINER PAY, OR FORMULA OR HYPOTHETICAL CALCULATION
- FORMULA CALCULATION:
- HYPOTHETICAL CALCULATION:
- MEMBER'S RIGHTS UNDER SOLDIERS & SAILOR'S CIVIL RELIEF ACT COMPLIED WITH
- JURISDICTION MET: ___RESIDENCE ___DOMICILE ___CONSENT
- ORDER HAS NOT BEEN AMENDED, SUPERSEDED, OR SET ASIDE

- ORDER IS FINAL DECREE, NO APPEAL MAY BE TAKEN, NO APPEAL HAD BEEN TAKEN WITHIN TIME PERMITTED
- FORMER SPOUSE MARRIED TO MEMBER AT LEAST 10 YEARS DURING AT LEAST 10 YEARS CREDITABLE SERVICE:
 - RETIRED DATE: _____
 - MARRIAGE DATE: _____
 - DIVORCE DATE: _____
- MEMBER NOT IN TEMPORARY DISABILITY (FAN Codes 11-14), PERMANENT DISABILITY (FAN Codes 21-24), OR ACTIVE DUTY STATUS
- TAXES ARE PROPERLY WITHHELD (If member claiming additional withholding, he must provide evidence to establish.)
- NO VOLUNTARY ALLOTMENTS FOR THE SAME OBLIGATION
- NO GARNISHMENTS OUTSTANDING

And if you would like a set of suggested clauses, try those below.

SUGGESTED MILITARY PENSION DIVISION CLAUSES

1. Wife is a resident of _____ County, State of _____. Husband is a resident of _____ County, State of _____. The parties were married on [date] and were divorced in _____ County, _____, on [date].
 2. Husband's military retired pay constitutes marital property to the extent it is based on active duty service performed between the date of marriage and the date the parties separated. The Wife's entitlement to retired pay accrues upon the retirement of Husband.
 3. Pursuant to state and federal law, Wife is entitled to a share of the Husband's military retirement benefits, as set out in the Decree below. The Husband assigns to the Wife this interest in his military retired pay payable from the Defense Finance and Accounting Service (DFAS) from his disposable retired pay.
 4. Wife's address is _____. Her Social Security number is _____.
 5. Husband's address is _____. His Social Security number is _____. His date of birth is _____.
 6. [if servicemember spouse is on active duty] Husband's branch of military service is _____. He began service on _____ and is still in the service. His rights under the Soldiers and Sailor's Civil Relief Act, 50 U.S.C.App. 501-548 and 560-591, have been observed and honored.
- [if member is retired, use the following language in place of the above paragraph] Husband retired from [branch of military service] on [date].
7. [use this clause to protect spouse from unexpected reduction in payments due to VA disability or federal civil service employment by member after retirement] It is intended that the Wife shall receive her full share of Husband's military retired pay, calculated as set out below and without reduction for civil service income, disability pay or any other reason. Military retired pay is deemed by the court to include:

- a. Retired pay actually paid or to which Husband would be entitled based on length of his active duty or reserve service;
- b. All payments paid or payable pursuant to Chapter 38 or Chapter 61, Title 10, U.S. Code, before any statutory, regulatory, or elective deductions are applied;
- c. All amounts of retired pay waived or forfeited in any manner and for any reason or purpose, including amounts of waived to qualify for VA benefits or forfeited due to the misconduct of Husband;
- d. All amounts waived from Husband's electing not to retire, despite being qualified for same; and
- e. Amounts by Husband in addition to or in lieu of retirement benefits, including but not limited to exit bonuses, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment of the military retirement benefits normally payable to a retired member.

8. Effective *[date]*, as division of marital property, Husband shall pay Wife:

[Option A: spouse gets 50% -- or other percent - - of member's retired pay; increases with cost of living (COLA) adjustments for member; based on final retired pay of member, including raises and grade increases; this favors spouse] % of the marital share of his disposable retired pay each month. The marital share is a fraction made up of ____ months of marital pension service, divided by the total months of Husband's military service.

[Option B: spouse gets fixed dollar amount, which may not exceed 50% of disposable retired pay; no COLA adjustments for spouse; this favors member] \$____ per month.

[Option C: spouse gets a hypothetical amount, based on the grade and years of service of member at time of separation, divorce or other date; no COLA unless specified; this clause favors the member] ____% of the disposable retired pay of a *[grad or rank]* with ____ years of creditable service.

9. Husband has served at least ten years of creditable service concurrent with at least ten years of marriage to Wife. Thus Wife is entitled to direct payments from DFAS and DFAS shall make same.

- a. Wife shall receive payments at the same time as the Husband.
- b. Until DFAS begins making these payments to Wife, Husband shall be responsible for making these payments each month to her.
- c. Furthermore, the Husband shall pay any amounts not paid to Wife in any given month, regardless of the reason, directly to her.
- d. When DFAS has determined that this order meets the requirements of the applicable federal law and is a military pension division order, then it shall carry out the provisions of this order and shall give written notice to Wife (at her address set out above) and to her attorney, *[name and address]*, that this order meets the requirements of federal law as a direct-pay military pension division order.
- e. The Wife shall notify DFAS in writing about any changes in the parties' addresses or in this agreement or the order affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.

- f. Husband shall provide promptly to Wife any information that she needs in order to have this order honored for direct payment of military pension benefits and shall keep her informed at all times of his current address.
- g. Husband shall cooperate with Wife in executing an application for direct payment to Wife from Husband's retired pay pursuant to 10 U.S.C. 1408, and he agrees to execute all documents that DFAS may require for direct payments to Wife.
- h. Wife shall tender a certified copy of this order to DFAS along with an executed DD Form 2293.

[use one of the following sections in place of entire #2 above if there is no 10-year/10-year overlap as state therein] Husband will pay Wife directly the amount specified in the preceding paragraph. Payments will be due on the first of each month, beginning *[date]*.

-OR-

Husband will pay Wife by a voluntary allotment from his retired pay the amount specified in the preceding paragraph. Wife shall receive payments at the same time as the Husband. Until DFAS begins making these payments to Wife, Husband shall be responsible for making these payments each month to her.

[as another alternative, the parties may agree to payment from Husband to Wife of alimony, which is not limited by the 10/10 overlap above; in this case, an alimony order should be prepared and tendered to DFAS]

[use this in the event federal law changes to allow direct payments without the 10/10 overlap] In the event that federal law changes to allow direct payments from DFAS to Wife, then this order shall be submitted to DFAS by Wife to accomplish this.

- 10. *[to protect spouse of military member on active duty]* If Husband receives disability pay or civil service income and this event causes a reduction of Husband's disposable retired pay, thus reducing Wife's share thereof, the Husband will pay to Wife directly each month any amount that is withheld from Wife by DFAS for the above reason.
- 11. *[to protect spouse of member on active duty]* If Husband fails to retire from military service and elects to "roll over" time in his military service into other federal government service in order to get credit for same, then the Wife shall be entitled to her share if any federal retirement pay or annuity he receives based on the parties' period of marriage during Husband's period of military service. Husband is ordered to notify Wife immediately upon his termination of military service, through retirement or otherwise, and to include in said notification a copy of his military discharge certificate, DD Form 214. Husband is also ordered to notify Wife immediately if he takes a job with the federal government, and to include in said notification a copy of his employment application and his employment address. Any subsequent retirement system of Husband is directed to honor this court order to the extent of Wife's interests in the military retirement and to the extent that the military retirement is used as a basis of payments or benefits under the other retirement system, program, or plan.
- 12. *[to protect spouse if future information is needed regarding member's status, location or benefits]* Husband waives any privacy rights or other rights as may be required for Wife to obtain information relating to his date and time of retirement, current address, final rank or grade and pay, present or past retired pay, and any other information as may be required to enforce this award or required to revise this order so as to make it enforceable. He hereby authorizes Wife to request and obtain this information from the Department of Defense and from any department or agency of the U.S. Government.
- 13. The monthly payments herein shall be paid to Wife regardless of her marital status and shall not end at remarriage. Any future overpayments to Wife are recoverable and subject to involuntary collection from Wife or from the estate of Wife. Wife shall be responsible for the taxes on her share of Husband's military retired pay. Wife shall not be entitled to any portion of retired pay upon the death of either party.

14. This court retains jurisdiction over this matter to amend this order to cause it to meet the definition of a military pension division order pursuant to 10 U.S.C. 1408, without in any way reducing or increasing the benefit to which Wife is entitled so long as Husband is in compliance with this order. The court and the parties intend that this order qualify for direct payment of military pension benefits to the Wife under the Uniformed Services Form Spouses' Protection Act, 10 U.S.C. 1408 et.seq. All provisions hereof shall be interpreted liberally so as to make this order qualify.

15. *[use this if Survivor Benefit Plan is elected. If a smaller share is intended to be protected, a smaller base amount can be used. SBP benefits are 55 percent of the selected base amount, and premiums for the SBP are generally 6.5% of the base amount. SBP pays benefits to the beneficiary for her life.]* As to coverage of Wife by Husband's Survivor Benefit Plan (SBP):

- a. Wife shall be the beneficiary of Husband's SBP. The Husband stipulates that he has already selected Wife as his SBP beneficiary as set forth below. She shall remain his irrevocable beneficiary and he shall execute any documents necessary to make or extend the election of spouse as beneficiary and shall do nothing to reduce or eliminate her benefits.
- b. He shall provide a copy of said election to the Wife within thirty (30) days of this order's filing.
- c. Husband shall elect the spouse-only portion, choosing as the base amount the full amount of his monthly retired pay.

[if Husband may elect coverage at less than the full amount of his monthly retired pay, then use the following clause] Husband shall elect the spouse-only portion, choosing as the base amount the following percentage of his monthly retired pay: ___%.

- d. If Husband shall fail or refuse to comply with this provision, then an amount equal to the present value of SBP coverage for the Wife shall, at the death of Husband, become an obligation of his estate. In addition, the Wife shall be entitled to such remedies for breach as are available to her in a court of law, and DFAS shall treat this order as the "deemed election" of the Husband for SBP purposes.
- e. The parties recognize that this order must be tendered to DFAS within one year of the parties' divorce to allow DFAS to honor the SBP provisions herein.

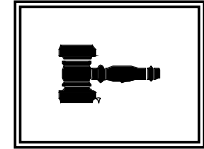
[use the following if Husband has already retired, SBP was not elected and it is desired to have the SBP in effect for Wife in the future.] If there is an open enrollment period that allows the Husband to sign up for SBP in the future, then Husband shall elect SBP, shall pay for same and shall designate Wife as the named beneficiary.

[The premium for SBP coverage is deducted from the member's gross retired pay before it is divided between the parties. This "off-the-top" deduction means that the parties share equally in the premium payment or unequally if the division of military retired pay is other than 50-50). If the parties desire to allocate SBP costs entirely to the non-military spouse, this can be difficult. DFAS will not honor such a clause under current law. The clause below sets out a way for the retired servicemember to be reimbursed by the spouse for the cost of SBP. In the alternative, one can allocate the cost of SBP premiums to the non-[military spouse by the following steps: compute the premium cost, deduct that amount from the spouse's anticipated monthly amount of retired pay, and then divide her reduced share by the total gross retired pay. The resulting percentage is approximately what she should receive to have her pay for the full SBP premium. Go back to #1 of the Decree above and insert the revised percentage in place of 50% (or other fraction) of his disposable retired pay.] Wife shall reimburse Husband within 10 days of being notified in writing that he has incurred the expense of maintaining her as the irrevocable beneficiary, for whatever portion of the premium the member paid from his benefits.

REVISED [9/29/99]



CO-COUNSEL BULLETIN



GETTING COURT-ORDERED SUPPORT

Most civilian practitioners will tell you that, in order to obtain court-ordered child support, it is necessary to prepare and file a summons and complaint in district court charging that the defendant, usually the father of the child or children, has failed to pay reasonable and adequate child support under the present circumstances. This requires, of course, a degree of specialized skill not possessed by the layman and, therefore, mandates the use of a civilian attorney.

The military attorney also recognizes that remedies such as garnishment and involuntary allotment do not exist when the support obligation is specified in a separation agreement that is not thereafter incorporated into a further court order or final decree of divorce. Involuntary allotment and/or garnishment is not available when a separation agreement, standing alone, defines the support obligation. At the same time, it is seldom wise, when the parties are mutually agreeable as to the terms of child support, to initiate unilaterally a summons and complaint against the father of the child or children; all too often this will upset the delicate balance in the negotiations and cause further expenditure of time, money and goodwill by people who can ill-afford it. A reasonable alternative for the legal assistance attorney is the use of two "equivalents" of court orders, namely, Voluntary Support Agreements (VSA's) and Confessions of Judgment.

The statutes concerning VSA's are NCGS 110-132, -133 and -136. The VSA is a preprinted form prepared by the Administrative Office of the Courts, and copies are available at each county courthouse; just ask for AOC-CV-607. Since it is preprinted, fitting in additional information (medical insurance, termination date for support, allocation of support on a per-child basis, payment for uncovered health care expenses, etc.) is pretty difficult if anything more than the amount of child support is contemplated. The form basically allows for entry of the amount of support for the children or child (but not on a per-child basis, which can benefit the custodial parent) and agreement to provide health insurance coverage when it is available at a reasonable cost, as with employer-sponsored plans or group coverage.

A Confession of Judgment, on the other hand, is prepared on the word processor or typewriter using the form shown below; infinite variations are possible—college expenses, life insurance coverage, findings as to income and expenses, annual increases in support, and so on. The statute is found at Rule 68.1, North Carolina Rules of Civil Procedure. A sample Confession of Judgment is found below.

The VSA or Confession of Judgment is used in tandem with the promises set out in a separation agreement. Typically, the language on child support in the separation agreement is simply "mirrored" in the VSA or Confession of Judgment. In this way, the promises remain the same and it is easier to persuade the non-custodial parent to sign the additional document with no child support terms modified in any way. On the other hand, the mechanism for enforcement by the custodial parent is much easier. Pursuant to the statute involved for each of these procedures, each one is treated as if it were an order of the court, which means that the usual enforcement sanctions (such as contempt of court, performance bonds, garnishment, levy upon and seizure of personal property, lien against real property, etc.) are available to the litigant upon the filing of the motion in the cause to "activate" the VSA or Confession of Judgment. There is a small filing fee for either document with the Clerk of Superior Court for the county in which the obligor resides.

It is important to have the support made payable through the Clerk of Superior Court in every case of Confession of Judgment or VSA; child support cannot be made payable through the Clerk by separation agreement. The Clerk of Court can act as the certifying official pursuant to the involuntary allotment statute

so as to allow this summary remedy to the child support recipient who would otherwise be forced to pay an attorney to litigate the matter of child support. The Clerk of Superior Court will, when directed to do so, accept payments of child support (or alimony), keep a record of such payments, and disburse the money directly to the intended recipient as set out in the Confession of Judgment or the Voluntary Support Agreement.

The statute (Rule 68.1) involving Confession of Judgment recites only that the Confession of Judgment needs to specify the terms and dollar amount of the monetary payment or debt owed. The form shown below shows much more information, and that information is indeed optional. By including, however, such matters as the incomes of the parties or the reasonable needs of the minor child, the attorney who prepares the Confession of Judgment will be better able to prevent frivolous attempts by either party to modify the support obligation upwards or downwards in the absence of some substantial proof of a change of circumstances. By laying out in detail the financial circumstances of the parties and the children, the attorney is better able to guard against efforts to change child support based merely on a "change of mind" of one of the two parties.

* * *

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. _____

Plaintiff

v.

Defendant

CONFESSION OF JUDGMENT

A. STATEMENT OF DEFENDANT

1. The Plaintiff is a resident of _____ County, North Carolina.
2. The Defendant is a resident of _____ County, North Carolina.
3. The minor children of the parties are _____ born _____, 19 ____, (and
, born _____, 19 ____.)
4. Defendant recognizes that Plaintiff is entitled to reasonable child support pursuant to Chapter 50, North Carolina General Statutes. The parties desire to reduce this obligation to a judgment by confession of judgment.
5. The terms for child support herein are consistent with the Child Support Guidelines. **[When the terms do not comply with the Child Support Guidelines, say so and give the reason for variance:** The terms for child support herein are inconsistent with the Child Support Guidelines for the following reason(s):]

NOW THEREFORE, according to Rule 68.1 of the Rules of Civil Procedure, Defendant hereby confesses judgment in favor of Plaintiff and authorizes the Clerk to endorse upon this statement and enter judgment for Plaintiff for the payment of the sums below in the manner stated:

- a. Child Support. Defendant shall pay to Plaintiff for the benefit of the minor child(ren) the monthly sum of \$_____ per child(ren), starting _____, 19 ____ and continuing on the first day of each month until each child(ren) attains age 18. Payments shall be made through the Clerk at (Clerk's address) to the Plaintiff at (address). Defendant is currently earning gross wages of about \$_____ per month. His taxes at present amount to about \$_____ each pay check. Plaintiff is currently earning about \$_____ net pay each month from her employer.
- b. Medical Expenses. As part of child support, Defendant shall maintain at all times a policy of medical and dental insurance on the minor child(ren) if they are not eligible for CHAMPUS. Defendant shall also pay the deductible amount on these policies each year. After this amount is paid, each of the parties shall be responsible for one-half (1/2) of the uncovered medical and dental expenses for the minor child(ren). Defendant shall pay to Plaintiff his one-half share within thirty days of receiving a copy of the bill from the health care provider describing the treatment necessary for the child(ren).
- c. Life Insurance. As part of child support, Defendant shall maintain a policy of insurance for so long as he owes a child support obligation with a death benefit of at least \$_____ insuring his life for the benefit of the minor child(ren). This shall be accomplished no later than thirty (30) days after the execution of this document. This shall be accomplished no later than thirty (30) days after the execution of this document. He shall immediately transfer ownership of said life insurance to Plaintiff or, if it is not transferable, execute an irrevocable assignment of beneficiary form in favor of Plaintiff for the benefit of the minor child.
- d. College Expenses. [here set out details].
- e. This judgment shall be entered as provided by Rule 68.1 of the Rules of Civil Procedure, and it shall be as fully binding on Defendant as any other judgment. It shall be subject to enforcement and modification as with any other judgments or orders entered under Chapter 50, North Carolina General Statutes.

 Defendant DATE: _____

BEFORE the undersigned Notary Public for the above stated County and State this day personally appeared _____, the above-named Defendant, who being by me duly sworn, says that he/she has read the above statement and judgment and knows its contents of this statement and judgment are true; and he/she executed this confession of judgment voluntarily this the ____ day of _____, 19 ____.

 Notary Public My Commission expires: _____

B. ENDORSEMENT AND ENTRY OF JUDGMENT

Upon the foregoing confession of judgment and verified written statement of the above-named Defendant, the undersigned Assistant Clerk of Superior Court hereby endorses it and enters judgment against the Defendant. The facts set out above are found to be true and are incorporated herein by reference.

- a. Child Support. Defendant shall pay to Plaintiff for the benefit of the minor child(ren) the monthly sum of \$_____ per child(ren), starting _____, 19 ____ and continuing on the first day of each month

until each child(ren) attains age 18. Payments shall be made through the Clerk at (Clerk's address) to the Plaintiff at (address).

6.

b. Medical Expenses. As part of child support, Defendant shall maintain at all times a policy of medical and dental insurance on the minor child(ren). Defendant shall also pay the deductible amount on these policies each year. After this amount is paid, each of the parties shall be responsible for one-half (1/2) of the uncovered medical and dental expenses for the minor child(ren). Defendant shall pay to Plaintiff his one-half share within thirty days of receiving a copy of the bill from the health care provider describing the treatment necessary for the child(ren).

7.

c. Life Insurance. As part of child support, Defendant shall maintain a policy of insurance for so long as he owes a child support obligation with a death benefit of at least, \$_____ insuring his life for the benefit of the minor child(ren). This shall be accomplished no later than thirty (30) days after the execution of this document. He shall immediately transfer ownership of said life insurance to Plaintiff or, if it is not transferable, execute an irrevocable assignment of beneficiary form in favor of Plaintiff for the benefit of the minor child.

8.

d. College Expenses. [here set out additional details].

9.

e. This judgment shall be entered as provided by Rule 68.1 of the Rules of Civil Procedure, and it shall be as fully binding on Defendant as any other judgment. It shall be subject to enforcement and modification as with any other judgments or orders entered under Chapter 50, North Carolina General Statutes.

Date:___

1. Assistant Clerk of Superior Court

[rev. 6/28/99]

* * *

THE CO-COUNSEL SERIES OF CLIENT HANDOUTS IS PREPARED BY THE OFFICE OF THE JUDGE ADVOCATE, USAREUR & 7TH ARMY. FOR REVISIONS, COMMENTS OR CORRECTIONS, CONTACT COL MARK E. SULLIVAN, USAR, 600 WADE AVENUE, RALEIGH, N.C. 27605 [919-832-8507]; E-MAIL-- LAW8507@AOL.COM.

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CO-COUNSEL BULLETIN



CONSENT MODIFICATION OF CHILD SUPPORT

It is sometimes necessary to advise clients on the modification of child support in North Carolina by consent. Such a change in support might be necessary when the income of one parent changes substantially [as when a parent is about to leave military service], when the needs of a child have increased, or when other financial factors require modification of support. When both parties are in agreement, the law does not require lawyers for each side; a simple consensual modification of the agreement or order is all that is required, with the forms shown below.

Modification of Support in Separation Agreement. When the support is set out in an unincorporated separation agreement or marital settlement document, the modification should be in an amendment to the agreement, which might look like this:

.....

AMENDMENT TO SEPARATION AGREEMENT

This Amendment to Separation Agreement is made this the ___ day of _____, 20___, by and between _____, hereinafter referred to as "WIFE," and _____, hereinafter referred to as "HUSBAND."

WITNESSETH:

WHEREAS the parties hereto entered into a Separation Agreement dated _____; and

WHEREAS the parties wish to amend Paragraph ___ in regard to _____ for the following reason: _____;

NOW, THEREFORE the parties do hereby agree that Paragraph ___ of the Separation Agreement is amended by deleting it entirely and replacing it with a new paragraph as follows:

PARAGRAPH [HERE STATE TEXT OF NEW PARAGRAPH]

This Amendment shall become effective on the following date: _____. Except as modified herein, the prior Separation Agreement remains in full force and effect.

This Amendment is executed in duplicate originals with each of the parties having retained one (1) original, the day and year first above written.

[PRINT NAME OF "WIFE"]

[PRINT NAME OF "HUSBAND"]

STATE OF NORTH CAROLINA
COUNTY OF _____

On this the ___ day of _____, 20___, before me personally appeared _____ ("WIFE") and acknowledged that she executed the above Amendment to Separation Agreement for the purpose therein expressed.

WITNESS my hand and Notarial Seal, this the ___ day of _____, 20___.

NOTARY PUBLIC

My Commission Expires: _____

STATE OF NORTH CAROLINA
COUNTY OF _____

On this the ___ day of _____, 20___ before me personally appeared _____ ("HUSBAND") and acknowledged that he executed the above Amendment to Separation Agreement for the purpose therein expressed.

WITNESS my hand and Notarial Seal, this the ___ day of _____, 20___.

NOTARY PUBLIC

My Commission Expires: _____

Modification Motion for Support in Court Order. When the child support is provided in a court order, the proper format for consent modification is to first move for modification, with a motion as follows:

.....

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. _____

Plaintiff

v.

Defendant

MOTION TO MODIFY CHILD SUPPORT

The [Plaintiff/Defendant] hereby moves this court for a modification of child support under G.S. 50-13.7, showing to the court that:

1. In a prior order of this court, entered on [date], the [Plaintiff/Defendant] was ordered to pay child support as follows:[here set out pertinent parts of order] for the following minor children:_____.

2. Since entry of the prior order there has been a substantial change of circumstances such as to justify a modification of child support, namely: [here set out reason for modification, such as increase in child's needs, increase in income of non-custodial parent, decrease in income of custodial parent or all of the above].

WHEREFORE [Plaintiff/Defendant] prays that this court enter an order that:

1. Provides for an increase in child support to a reasonable amount;

[or... 1. Provides for a reduction in child support to a reasonable amount;]

2. Grants such other relief as is just and proper.

Date: _____

[Name][Plaintiff/Defendant]
PRO SE
[Address]
[Telephone Number]

Consent Order for Modification of Support. After filing the above motion, the parties should execute a consent order in substance as below:

.....

STATE OF NORTH CAROLINA
COUNTY OF

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO.

Plaintiff

v.

Defendant

ORDER MODIFYING CHILD SUPPORT

THIS CAUSE was heard before the undersigned District Court Judge on the motion of [Plaintiff/Defendant] for modification of child support. It was made to appear to the court that the parties had knowingly and voluntarily consented to the entry of this order, as shown by their signatures below. The Court makes the following:

FINDINGS OF FACT:

1. In a prior Order of this court, [Plaintiff/ Defendant] was ordered to pay \$ _____ per month as child support for the following minor child(ren):_____.

2. Since the entry of the prior order, there has been a substantial change of circumstances such as to justify a modification in child support, namely: [here set out past and current circumstances and finances, including changes in child-related needs, incomes of either parent or either parent's debts, expenses, assets or liabilities].

3. The terms of this order are fair, reasonable, adequate and necessary.

CONCLUSIONS OF LAW

1. There has been a substantial change of circumstances since entry of the last order for child support herein.

2. The terms of this order are fair, reasonable, adequate, and necessary.

3. [Plaintiff/Defendant] is entitled to a modification of child support as set out below.

DECREE

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Defendant's monthly obligation for child support shall be changed from \$_____ per month to \$_____ per month.

2. This change shall be effective as of [date].

-

DISTRICT COURT JUDGE PRESIDING

Date: _____

WE HAVE READ THE ABOVE AND CONSENT TO IT:

PLAINTIFF

DEFENDANT

[rev. 5/18/00]

* * *

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