

UNIFORMED SERVICES FORMER SPOUSE PROTECTION ACT DIVIDING MILITARY RETIRED PAY

I. HISTORY.

The Uniformed Services Former Spouse Protection Act (USFSPA) was passed by Congress in 1982. The USFSPA gives a State court the authority to treat military retired pay as marital property and divide it between the spouses. Congress' passage of the USFSPA was prompted by the United States Supreme Court's decision in *McCarty v. McCarty* in 1981.¹

The *McCarty* decision effectively precluded state courts from dividing military retired pay as an asset of the marriage. Justice Blackmun, writing for the majority, stated that allowing a state to divide retired pay would threaten "grave harm to 'clear and substantial' federal interests."² Accordingly, the Supremacy Clause of Article VI preempted the State's attempt to divide military retired pay. Congress, by enacting the USFSPA, clarified it's intent that State courts have the power to divide what can be the largest asset of a marriage.

With the passage of the USFSPA, Congress took the opportunity to set forth various requirements to govern the division of military retired pay. Congress sought to make a fair system for military members, considering that their situation often exposes them to difficulties with civil litigation. Therefore, if a member is divorced while on active duty, the requirements of the Soldiers' and Sailors' Civil Relief Act (SSCRA)³ must be met before an award dividing military retired pay can be enforced under the USFSPA.⁴ The USFSPA contains its own jurisdictional requirement.⁵ It limits the amount of the member's retired pay which can be paid to a former spouse to 50% of the member's disposable retired pay (gross retired pay less authorized deductions).⁶ It requires that the parties must have been married for at least 10 years while the member performed at least 10 years of active duty service before a division of retired pay is enforceable under the USFSPA.⁷ It specifies how an award of military retired pay must be expressed.⁸

II. DOCUMENTS NEEDED TO DIVIDE MILITARY RETIRED PAY.

The USFSPA defines a "court order" dividing military retired pay enforceable under the Act as a "final decree of divorce, dissolution, annulment, or legal separation issued by a

¹ *McCarty v. McCarty*, 453 U.S. 210 (1981)

² *Id.* at 232.

³ *See* Soldier's and Sailor's Civil Relief Act, 10 U.S.C. App. § 501 et seq.

⁴ 10 U.S.C. §1408(b)(1)(D).

⁵ 10 U.S.C. § 1408(c)(4).

⁶ 10 U.S.C. § 1408 (e)(1).

⁷ 10 U.S.C. § 1408 (d)(2).

⁸ 10 U.S.C. § 1408 (a)(2)(C).

court, or a court ordered, ratified, or approved property settlement incident to such a decree.”⁹ This also includes an order modifying a previously issued “court order.”

Since military retired pay is a Federal entitlement, and not a qualified pension plan, there is no requirement that a Qualified Domestic Relations Order (QDRO) be used. As long as the award is set forth in the divorce decree or other court order in an acceptable manner, that is sufficient. It is also not necessary to judicially join the “member’s plan” as a part of the divorce proceeding. There is no Federal statutory authority for this. The award may also be set forth in a court ratified or approved separation agreement, or other court order issued incident to the divorce.

In order to submit an application for payments under the USFSPA, a former spouse needs to submit a copy of the applicable court order certified by the clerk of court within 90 days immediately preceding its service on the designated agent,¹⁰ along with a completed application form (DD Form 2293).¹¹ Instructions, including designated agent names and addresses, are on the back of the DD Form 2293. The Defense Finance and Accounting Service (DFAS) is the designated agent for all uniformed military services. The Form and instructions can be downloaded from our DFAS website at www.dfas.mil. Click on Money Matters, then Garnishments.

III. REQUIREMENTS FOR ENFORCEABILITY UNDER USFSPA.

a. Soldiers’ and Sailors’ Civil Relief Act.

The provision of the SSCRA that has primary application to the USFSPA and the division of military retired pay is the section concerning default judgments against active duty service members. This section requires that if an active duty defendant fails to make an appearance in a legal proceeding, the plaintiff must file an affidavit with the court informing the court of the member’s military status. The court shall appoint an attorney to represent the interests of the absent defendant.¹² Since a member has 90 days after separation from active duty service to apply to a court rendering a judgment to re-open a case on SSCRA grounds¹³, the SSCRA is not a USFSPA issue where a member has been retired for more than 90 days.

b. The 10/10 requirement.

This is a “killer” requirement. For a division of retired pay as property award to be enforceable 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

⁹ 10 U.S.C. § 1408(a)(2).

¹⁰ 32 CFR § 63.6(c)(2).

¹¹ 32 CFR § 63.6(b)(1).

¹² 10 U.S.C. App. § 520(1).

¹³ 10 U.S.C. App. § 520(4).

years of service creditable towards retirement eligibility.¹⁴ This requirement does not apply to the Court's authority to divide military retired pay, but only to the ability of the former spouse to get direct payments from DFAS. This is a statutory requirement, and not a personal right of the member that can be waived. Although this requirement was probably included in the USFSPA to protect members, we have had more complaints about it from members than from former spouses. Assuming that a member intends to meet his or her legal obligations, the member would much rather have us pay the former spouse directly rather than have to write a check each month. It would lessen contact with the former spouse, and the former spouse would receive her or his own IRS Form 1099, instead of the member being taxed on the entire amount of military retired pay.

If we cannot determine from the court order whether the 10/10 requirement has been met, we may ask the former spouse to provide a copy of the parties' marriage certificate. A recitation in the court order such as, "The parties were married for 10 years or more while the member performed 10 years or more of military service creditable for retirement purposes" will satisfy the 10/10 requirement.

c. Jurisdiction.

The USFSPA's jurisdictional requirement is found in 10 U.S.C. § 1408(c)(4). This is another "killer" requirement. If it is not met, the former spouse's application for retired pay as property payments under the USFSPA will be rejected. For a court to have the authority to divide military retired pay, the USFSPA requires that the court have "C-4" jurisdiction over the military member in one of three ways. One way is for the member to consent to the jurisdiction of the court. The member indicates his or her consent to the court's jurisdiction by taking some affirmative action with regard to the legal proceeding, such as filing any responsive pleading in the case. Simply receiving notice of filing of the divorce complaint or petition is not sufficient. Consent is the most common way for a court to have "C-4" jurisdiction over a member.

The other ways for the court to have C-4 jurisdiction is for the member to be a resident of the State other than because of his or her military assignment, or for the court to find that the member was domiciled in the particular State. Now, the key with regard to domicile is that it should be the court making this determination, and it should be noted in the divorce decree.

IV. LANGUAGE DIVIDING MILITARY RETIRED PAY.

a. Fixed dollar amount or percentage awards.

The major reason for rejecting applications for payments under the USFSPA is that the language dividing retired pay is faulty. The USFSPA states that for an award to be

¹⁴ 10 U.S.C. § 1408(d)(2).

enforceable, it must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay.¹⁵ If a fixed dollar amount award is used, the former spouse would not be entitled to any of the member's retired pay cost of living adjustments (COLA's).¹⁶ Because of the significant effect of COLA's over time, it is infrequent that an award is stated as a fixed dollar amount. The more common method of expressing the former spouse's award is as a percentage of the member's disposable retired pay. This has the benefit to the former spouse of increasing the amount of the former spouse's award over time due to periodic retired pay COLA's.

All percentage awards are figured based on a member's disposable retired pay, which is a member's gross retired pay less authorized deductions.¹⁷ The authorized deductions vary based on the date of the parties' divorce. The principal deductions now include retired pay waived to receive VA disability compensation, disability retired pay, and Survivor Benefit Plan premiums where the former spouse is elected as the beneficiary. Since the United States Supreme Court has ruled that Congress authorized the division of only disposable retired pay, not gross retired pay,¹⁸ the regulation provides that all percentage awards are to be construed as a percentage of disposable retired pay.¹⁹

Set-offs against the former spouse's award are not permitted. If the former spouse's award is expressed in terms which require an amount to be deducted from the award, such as a percentage of disposable retired pay less some set-off amount (e.g., the Survivor Benefit Plan premium or the former spouse's child support obligation or some other debt), the entire award is unenforceable. This type of award language does not meet the statutory requirement of a fixed dollar amount or percentage. If the award language does meet the requirements of the statute and is acceptable, but has subsequent language in the court order that requires a set-off amount be deducted from the former spouse's share, only the set-off is unenforceable. These determinations are because there is no provision of the USFSPA that authorizes set-off's. State courts have authority to divide military retired pay only as set forth by the USFSPA.²⁰ Thus, state court provisions not in accordance with the USFSPA are unenforceable.

There is no magic language required to express a percentage or fixed dollar award. All the divorce decree needs to say is that: **“(Plaintiff/Defendant) is awarded ___ percent [or dollar amount] of the (Defendant/Plaintiff)’s military retired pay.”**

b. Formula and hypothetical awards for divorces while the member is on active duty.

¹⁵ 10 U.S.C. §1408(a)(2)(C).

¹⁶ 32 CFR § 63.6(h)(2) provides for automatic COLA's only for awards expressed as a percentage of disposable retired pay.

¹⁷ 10 U.S.C. § 1408(a)(4)(amended 1986, 1990).

¹⁸ Mansell v. Mansell, 490 U.S. 581.

¹⁹ 32 CFR § 63.6(c)(8).

²⁰ Mansell, 490 U.S. at 581, illustrates the general principal that state courts may deal with military retired pay only in accordance with the provisions of the USFSPA.

Most of the problems with award language have arisen in cases where the parties were divorced while the member was still on active duty. In these cases, the former spouse's award is indeterminate since the member has not yet retired. Since the parties do not know how much longer the member will remain in military service after the divorce, a straight percentage award may not be suitable. Also, many States take the approach that the former spouse should not benefit from any of the member's post-divorce promotions or pay increases based on length of service after the divorce.

A proposed regulation was issued in 1995 that allowed the use of formula and hypothetical awards to divide military retired pay when the parties were divorced prior to the member's becoming eligible to receive retired pay.²¹ This proposed regulation still governs our processing of these types of awards. These awards are often drafted in such a way that we cannot determine the amount of the award. This causes the parties to have to go back to court and obtain a clarifying order. We have draft language to make the process easier that is pending review by DoD.

1. Formula awards.

A formula award is an award expressed in terms of a marital fraction, where the numerator covers the period of the parties' marriage while the member was performing creditable military service, and the denominator covers the member's total period of creditable military service. The former spouse's award is usually calculated by multiplying the marital fraction by $\frac{1}{2}$.

(A) For members retiring from active duty, the numerator is the total period of time from marriage to divorce or separation while the member was performing creditable military service. The numerator, expressed in terms of whole months, must be provided in the court order. Days or partial months will be dropped. DFAS will supply the denominator in terms of whole months of service creditable for retirement, and then work out the formula to calculate the former spouse's award as a percentage of disposable retired pay. All fractions will be carried out to six decimal places.

For example, assume you have a marriage that lasted exactly 12 years or 144 months. The member serves for 25 years and then retires. Using the above formula, the former spouse would be entitled to $\frac{1}{2} \times (144/300) = 24.0000\%$ of the members disposable retired pay.

The following language is an example of an acceptable way to express an active duty formula award:

“The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying _____% times a fraction, the numerator of which is _____ months of marriage during the member's

²¹ Former Spouse Payments From Retired Pay, 60 Fed. Reg. 17507 (1995) (to be codified at 32 C.F.R. pt. 63)(proposed Apr 5, 1995).

creditable military service, divided by the member's total number of months of creditable military service."

(B) In the case of members retiring from reserve duty, a marital fraction award must be expressed in terms of reserve retirement points rather than in terms of whole months. The numerator, which for reservists is the total number of reserve retirement points earned from marriage to divorce or separation, must be provided in the court order.²² DFAS will supply the member's total reserve retirement points for the denominator. All fractions will be carried out to six decimal places.

The following language is an example of an acceptable way to express a reserve duty formula award.

"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying ____% 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."

2. Hypothetical awards.

A hypothetical award is an award based on a hypothetical retired pay amount computed using one or more variables different from those used to compute the member's actual retired pay amount. It is usually figured using a member's rank and years of creditable service as of the date of divorce or separation. Many jurisdictions use hypothetical awards. They arrive at a specific dollar amount which in turn does not give the former spouse the benefit of any increases in pay the member receives after the divorce due to promotions or increased service time.

The basic method for computing military retired pay is to multiply the active duty basic pay for the member's rank at retirement times two and one-half percent times the years of creditable military service.²³ The years of creditable service for a reservist are computed by dividing the reserve retirement points on which the award is to be based by 360.²⁴ A hypothetical retired pay amount is computed the same way, but based on the hypothetical rank, hypothetical years of creditable service, and hypothetical retirement date, if provided.

Anyone can obtain the basic pay figures from military pay tables available at the DFAS website at www.dfas.mil, under Money Matters. According to the proposed rule, a hypothetical award must be based on at least 15 years of military service.²⁵ Also, if the

²² Id.

²³ Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Paragraph 30102.

²⁴ Id. at Subparagraph 010301.F.

²⁵ Former Spouse Payments From Retired Pay, 60 Fed. Reg. 17507, 17508 (1995) (to be codified at 32 C.F.R. pt. 63)(proposed Apr 5, 1995).

former spouse is explicitly awarded COLA's in the court order, the hypothetical award has to be converted to a proportional percentage of the member's actual disposable retired pay. If the former spouse is not awarded COLA's, then the former spouse's award is figured as a fixed dollar amount.²⁶

The principal problem we find with hypothetical awards is that one or more of the necessary variables for the hypothetical retired pay computation is often left out of the court order. This leaves us in the position of having to make assumptions about the parties' intentions, which we are reluctant to do. At the very minimum, the court order must give us a hypothetical rank and the hypothetical years of service. If we are not able to compute a hypothetical retired pay figure from the information provided, the parties will have to have the award clarified by the court.

If the order is silent as to a hypothetical retirement date, we will compute the hypothetical retired pay amount as of the member's actual retirement date (i.e., using the pay table applicable to the member's actual retirement date, but for the hypothetical rank and years of service). If the order specifies a hypothetical retirement date, we will compute the hypothetical retired pay using the pay table applicable as of that date.

In cases where the member retires from active duty military service, we will use the number of hypothetical years of service in the court order as both years of service for basic pay purposes and years of creditable service for retirement computation purposes. For hypothetical awards dividing the retired pay of members retiring from reserve duty, years of service for basic pay purposes must be stated in the court order.

We assume that the member would have been eligible to receive military retired pay as of the hypothetical retirement date, as long as the hypothetical retired pay amount is based on at least 15 years of service. In the case of reserve members (who must attain age 60 before receiving military retired pay²⁷), we will assume that the reserve member had attained age 60 as of the hypothetical retirement date.

We will convert all hypothetical awards where the former spouse is awarded COLA's into a percentage of the member's actual disposable retired pay according to the following method set forth in the proposed regulation.²⁸ Assume that the court order awards the former spouse 25% of the retired pay of an E-6 with 20 years of service retiring on the member's actual retirement date. The member later retires on June 1, 1999, as an E-7 with 25 years of service. At the time the member retires, the monthly retired pay of an E-6 with 20 years of service is \$1,086. The monthly retired pay of an E-7 with 25 years of service is \$1,736. The former spouse's award is converted to a percentage of the member's actual disposable retired pay by multiplying 25% times \$1,086/\$1,736, which equals 15.6394%. This new proportional percentage is the former spouse's award, and will be set up in the retired pay system. While the percentage

²⁶ Id.

²⁷ DoDFMR, Volume 7B, Subparagraph 010108.B.

²⁸ Former Spouse Payments From Retired Pay, 60 Fed. Reg. 17507, 17508 (1995) (to be codified at 32 C.F.R. pt. 63)(proposed Apr 5, 1995).

number has been reduced, the amount the former spouse receives is the correct amount intended by the court, because the lower percentage is multiplied against the higher dollar amount of the member's actual disposable retired pay. The percentage will be applied each month to the member's disposable retired pay to determine the amount the former spouse receives.

The following language is an example of an acceptable way to express an active duty hypothetical award.

“The former spouse shall receive ____%* of the disposable military retired pay the member would have received had the member retired on ____ (Date) at the rank of ____ with ____ years of creditable service.”

*Percentage may be computed using a marital fraction as discussed above.

The following proposed language is an example of an acceptable way to express a reserve duty hypothetical award.

“The former spouse shall receive ____%* of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay on ____ (Date) at the rank of ____ with ____ reserve retirement points and ____ years of service for basic pay purposes.”**

*Percentage may be computed using a marital fraction.

**Assumes member has attained age 60 and is eligible to receive military retired pay. Date member actually attains age 60 may be used here.

3. Awards expressed using both a formula and hypothetical award.

The following proposed language is an example of an acceptable way to express an award using both an active duty marital fraction and an active duty hypothetical award together.

“The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying ____% 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 at retirement. For the purpose of this computation, the member's military retired pay is defined as the military retired pay the member would have received had the member retired on ____ (Date) at the rank of ____ with ____ years of creditable service.”

The following proposed language is an example of an acceptable way to express an award using both a reserve duty marital fraction and a reserve duty hypothetical award together.

“The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying _____% 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. For the purpose of this computation, the member’s military retired pay is defined as the military retired pay the member would have received had the member become eligible to receive military retired pay on _____(Date)* at the rank of _____ with _____ reserve retirement points and _____ years of service for basic pay purposes.”

*Assumes member has attained age 60 and is eligible to receive military retired pay.

c. Examples of unacceptable former spouse award language.

1. “The former spouse is awarded one-half of the community interest in the member’s military retired pay.”

Here, there is no way for us to determine the community interest unless a formula for calculating it is provided elsewhere in the court order.

2. “The former spouse is awarded one-half of the member’s military retirement that vested during the time of the marriage.”

The problem here is that there is no way for us to determine an amount or percentage. Military retired pay is a Federal entitlement, which the member either qualifies for or does not. It does not vest in any way prior to the member’s retirement.

3. “The former spouse is awarded one-half of the accrued value of the member’s military retirement benefits as of the date of the divorce.”

The problem here is similar to that above. Since military retired pay is a statutory entitlement, there is no value that accrues prior to the member’s retiring.

4. “The former spouse shall be entitled to 42% of the member’s military retirement based on the amount he would have received had he retired as of the date of the divorce.”

Since we do not have access to the member’s active duty service information, there is no way for us to determine the member’s rank or years of active duty service as of the date of divorce. Thus, there is no way for us to compute a hypothetical retired pay amount.

5. “The former spouse is awarded a portion of the member’s military retired pay calculated according to the Bangs formula.”

Here, the court order presupposes that we are familiar with that State's laws and know what the Bangs formula is, or that we are able to do legal research to resolve an ambiguity in a court order.

6. "The former spouse is awarded an amount equal to 50% of the member's disposable retired pay less the amount of the Survivor Benefit Plan Premium."

The amount of the former spouse's award must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay. This award does not meet that requirement.

This handout is prepared by the Garnishment Operations Directorate, Defense Finance and Accounting Service, Cleveland Center. It may be freely circulated, but not altered without permission. Revised 9/14/01.