

## SILENT PARTNER: A Teaspoon of TSP

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Subject Index Categories:

5.1 Division of military benefits upon divorce

*Introduction: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the N.C. State Bar's military committee. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many **SILENT PARTNER** infoletters on military pension division, the Survivor Benefit Plan and other aspects of military divorce. Just go to the FOR LAWYERS tab at [www.nclamp.gov](http://www.nclamp.gov).*

### Introduction

The military retirement system does not end with the pension and the Survivor Benefit Plan. Not to be overlooked is the third deferred compensation attribute of the system, the Thrift Savings Plan (TSP).<sup>1</sup> This can be a valuable asset in property division, potentially containing tens of thousands of dollars of marital or community funds.

Current contributions to a TSP account are shown on the individual's Leave and Earnings statement (LES). A servicemember (SM) can contribute all or a percentage of base pay and any special pay, incentive pay, or bonus pay received, up to a total of \$20,500 annually, as of 2022. Incentive pay (e.g., flight pay, submarine pay, hazardous duty pay) and special pay (e.g., medical and dental officer pay, hardship duty pay, career sea pay) is identified and explained in Chapter 5, Title 37, U.S. Code.

While the SM receives no direct tax benefit from contributing pay to the TSP that has been excluded from gross income, the earnings on those contributions are tax-deferred. When the SM makes a withdrawal, money is taken from the total account balance proportionally from taxable funds and tax-exempt funds. The amount attributable to tax-exempt contributions will not be taxable. The quarterly participant statement will show the tax-exempt balance separately. Contributions to the TSP come from pre-tax dollars. SMs do not pay federal or state income taxes on contributions or earnings until they are withdrawn.<sup>2</sup>

### Dividing the TSP

A servicemember's TSP account can be divided by means of a court decree of divorce, annulment, or legal separation. It can also be distributed through a court order or court-approved property settlement agreement incident to such a decree.

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<sup>1</sup> In 2020, the Federal Retirement Thrift Investment Board transitioned to a private company, Accenture Federal Services, to manage the TSP record-keeping and to implement new plan features such as an updated participant log-in interface; a TSP mobile app; the ability to electronically sign documents and complete transactions on-line, and a procedure for uploading court orders dividing a TSP account upon divorce. Regulations were published in the *Federal Register* on May 24, 2022, at p. 31670.

<sup>2</sup> For a more complete explanation, see the TSP home page, located at <http://www.tsp.gov>.

This court order is not a QDRO (Qualified Domestic Relations Order), since QDROs involve private-sector retirement plans, not to federal retirement programs authorized by Congress. This order is called a *retirement benefits court order*, or RBCO. A court order can also be used for payment of money for child support out of the TSP account.

### **Contents of the Court Order**

“Divorce, Annulment and Legal Separation” and “Retirement Benefits Court Order” are two of the topics found at the TSP website that explain how to go about the division.<sup>3</sup> They explain that the *TSP record keeper* will review only a complete copy of the RBCO. To be complete, the order must contain all pages and attachments. It also must provide (or be accompanied by a document that provides):

- the participant’s TSP account number or Social Security number (SSN);
- the name and mailing address of each payee; and
- if the current or former spouse of the participant is a payee, the SSN of the spouse-payee.

The RBCO must meet four basic requirements set forth in 5 C.F.R. § 1653.2:

- It must be issued by a court in any of the 50 United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, or the Virgin Islands, or by any Indian court as defined by 25 U.S.C. § 1301(3).
- It must expressly relate to the Thrift Savings Plan, meaning that it must specifically contain the name “Thrift Savings Plan.” Terms such as “all retirement benefits,” “Government benefits,” or “Federal retirement benefits” are not adequate.
- If the RBCO requires a payment from a TSP account, it must clearly describe the payee’s entitlement. It can only award a specified dollar amount or a fraction or a percentage of the participant’s account as of a specific past or current date.
- The RBCO can require a payment only to the participant’s current or former spouse or to the participant’s dependents. In addition, a court order will not be honored if it demands a single payment to be made jointly (for example, \$8,000 to be divided among the participant’s ex-wife and three children).

The court order must separately specify the dollar amount, percentage, or fraction of the award made to each person.

### **Who Pays the Piper?**

A new addition to the TSP division rules is the requirement of a payment to review the draft or

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<sup>3</sup> For basic information about the TSP, go to <https://www.tsp.gov> > Forms and Publications > Summary of the Thrift Savings Plan. Information about creating and uploading a court order may be found at this URL: <https://qoc.rk.tsp.gov/qoc/b/QdroNew010CretOrdr.htm>. Use of this process is not required; the TSP will honor any order that complies with the terms of 5 U.S.C. §8435(c) and 5 C.F.R. part 1653, subpart A. However, using this process may expedite the processing of the court order. Note that it is now possible to upload orders for transmission to the TSP record keeper, instead of the previous process of faxing or mailing them. You can find booklets on model language, procedures and child support court orders (CSCO’s) at <https://qoc.rk.tsp.gov/qoc/b/alt-flow-federal.htm?execution=e1s1>.

final order. There is a \$600 fee for processing the RBCO.<sup>4</sup> Here are the important points about this expense:

- Upon receipt of a complete draft or final RBCO, and before review of the order to determine whether it is a qualifying RBCO, the fee is deducted from the participant's account.
- The fee is charged only once per court order.
- It will not be refunded if the order is never determined to be a qualifying RBCO.
- If a qualifying RBCO specifically requires the fee to be divided between the participant and the payee, then the TSP record keeper will deduct the payee's portion from his/her payment and credit that amount back to the participant's TSP account balance.

The last point above, regarding division or allocation of the \$600 fee, bears close analysis. Note that the fee is deducted *before review begins*. That means that – if there is a fixed sum allocated to “Jane Doe,” the former spouse – she receives her share without any reduction for the fee. The entire fee winds up being borne by the SM/retiree. Counsel needs to specify how the fee is shared to avoid this “default result.” The attorney for the SM will want to insert language into the order along the following lines: “The \$600 processing fee will be divided equally between the parties,” or “The payee will pay \$400 of the \$600 processing fee, out of her share of the account,” or “The entire \$600 processing fee will be deducted from the payee's portion of the TSP account.” For Jane Doe's attorney, remember: “Silence is golden.”

On the other hand, when “Jane Doe” (the former spouse) receives a percentage or fraction of the account balance, the mathematical result is that each party is paying a share of the fee proportional to his or her share of the account balance. That's because the fee is subtracted “off the top” before the remaining balance gets divided into fractional or percentage shares. Thus if Jane Doe gets 40% of the TSP balance on a specified date, she winds up paying 40% of the \$600, since that figure is subtracted from the balance before it is divided between the parties. Jane's attorney should be cautious about agreeing to any sharing of the \$600 fee in this situation, since Jane is already sharing the fee. “She shouldn't be paying twice” is the argument for Jane's attorney.

### **Access to Information**

Spouses may access certain TSP account information pursuant to 5 U.S.C. § 552a. Upon a written request, TSP will provide to the spouse (and his or her lawyer) account information including the account balance of the participant, any loan balance on the account, a transaction history, and quarterly or annual statements. TSP will not, however, provide personal information to the spouse or spouse's attorney, such as the address, date of birth or Social Security Number of the participant. Requests must be directed to the TSP record keeper. A subpoena is not required.

To receive prompt and complete responses, requests should:

- provide the participant's name and TSP account number (or SSN);
- identify the individual requesting the information;

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<sup>4</sup> See 5 CFR § 1653.6.

- describe his or her relationship to the participant;
- describe the information needed; and
- state the purpose for which the information is being requested.

### **Freezing Your Assets**

Finally, a court order can be used to prevent a participant from withdrawing money from his or her TSP account during a divorce action. As soon as possible after receiving a court order that is issued in an action for divorce, annulment, or legal separation, the TSP will freeze the participant's account if:

- the court order names the "Thrift Savings Plan" and provides that the participant may not obtain a TSP loan or withdrawal; or
- the court order purports to divide a participant's TSP account.

This means that there will be no withdrawals or disbursements. All other activity will be permitted, however, and this means that the participant may still change the mix of investments up to the "date of liquidation," that is, the date when the funds are transferred to her/his own account or IRA. Restrictions upon the participant's power should be stated in the court order.

While there is no such thing as "one size fits all" in pension division orders, including RBCO's, it is worth noting that the TSP record keeper provides extremely limited choices in the terms of the order. Don't try to be creative; stick with the forms and the standard language. A sample Retirement Benefits Court Order, containing alternate clauses, is found below.<sup>5</sup>

### **Sample Retirement Benefits Court Order**

*(Note: A retirement benefits court order must meet the requirements found at 5 U.S.C. §§ 8435(c) and 8467, and 5 C.F.R. part 1653, part A. The Thrift Savings Plan will honor any court order or court-approved property settlement agreement that meets these requirements. Use of the format below is not required.)*

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STATE OF \_\_\_\_\_ CASE # \_\_\_\_\_  
COUNTY OF \_\_\_\_\_ IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_  
IN RE THE MARRIAGE OF:

\_\_\_\_\_  
Petitioner/Plaintiff

and

\_\_\_\_\_  
Respondent/Defendant

#### **Retirement Benefits Court Order**

This order is entered pursuant to the authority granted under the applicable domestic relations laws of the state of \_\_\_\_\_.

#### **1. Plan**

<sup>5</sup> If the participant has both a civilian TSP account and a uniformed services TSP account, the court order must expressly identify the account to which it relates.

This order applies to the Thrift Savings Plan (the "Plan"): (check one)

\_\_\_\_ Civilian Account    \_\_\_\_ Uniformed Services Account

## 2. Participant

The name, address, Social Security number, and date of birth of the participant are as follows:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Social Security Number: See attached Addendum

Date of Birth: See attached Addendum

## 3. Payee

The person named as payee meets the requirements of the definition of payee as set forth in Section 4 of this order. The payee's name, address, Social Security number, date of birth, and relationship to the participant are as follows:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Social Security Number: See attached Addendum

Date of Birth: See attached Addendum

Relationship to Participant: \_\_\_\_\_

**The payee shall be responsible for notifying the Plan Administrator in writing of any changes in his or her mailing address subsequent to the submission of this order.**

## 4. Definitions

**Payee**—The payee is any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable under the Plan with respect to the participant.

**Date of Distribution**—The date on which the awarded benefit is distributed to the payee.

**Liquidation Date**—The liquidation date is the date the amount assigned to the payee is transferred from the participant's Vested Account Balance to a separate account established for the payee in accordance with the terms of the RBCO. An assignment as of the liquidation date assigns a portion of the participant's current Vested Account Balance.

**Plan Administrator**—Federal Retirement Thrift Investment Board ("FRTIB") is the Plan Administrator for Federal Retirement Thrift Investment Board's employee benefit plans.

**Valuation Date**—The Valuation Date is the date on which the participant's Vested Account Balance will be valued in order to determine the payee's designated portion in accordance with the terms of this order. Accounts are valued on a daily basis.

**Vested Account Balance**—The participant's Vested Account Balance is the dollar amount the participant has a nonforfeitable right to receive from the Plan.

## 5. Benefit Payable to the Payee

*(You must choose either Option A or Option B)*

### \_\_\_\_ Option A. Straight Percentage

The order assigns to the payee an amount equal to \_\_\_\_\_ % of the participant's Vested Account Balance under the Plan (identified in Section 1) as of \_\_\_\_\_ (insert applicable Valuation Date).

From the Valuation Date to the liquidation date, the amount assigned to the payee (select one):

☐ **Will** include earnings and losses ☐ **Will not** include earnings and losses.

The participant's Vested Account Balance (select one):

☐ **Will** be reduced by the value of outstanding loans before the payee's portion of the benefit is determined.

☐ **Will not** be reduced by the value of outstanding loans before the payee's portion of the benefit is determined.

**OR**

☐ **Option B. Dollar Amount**

This order assigns to the payee an amount equal to \$\_\_\_\_\_ of the participant's Vested Account Balance under the Plan (identified in Section 1) as of the liquidation date.

If the amount assigned to the payee exceeds the full vested value of the participant's account (less the amount of any outstanding loans, prior distributions, or account losses) as of the valuation date preceding the liquidation date, the entire available balance will be assigned to the payee.

#### **6. Form of Payment**

The payee shall receive the portion of the plan benefits assigned to the payee in a single lump-sum payment. Such amount shall be adjusted for earnings and losses from the liquidation date to the date of distribution to the payee.

#### **7. Commencement**

The payee shall be eligible to receive payment as soon as administratively reasonable following the determination that this order is qualified. In no event can the payee begin his or her benefit later than April 1 following the year in which the participant becomes eligible for minimum distributions.

#### **8. Death Procedures**

If the participant predeceases the payee prior to payment of the payee's assigned benefits under the RBCO, the payee's benefits will not be affected. In the event of the participant's death, the account balance, which remains the property of the participant, will be payable to the participant's designated beneficiary or in accordance with Plan provisions. This order does not require the participant to name the payee as the beneficiary for the benefits not assigned to the payee.

In case of the death of the payee prior to distribution of the payee's benefits under the RBCO, the assigned benefits will be paid to the payee's designated beneficiary or, if none, in accordance with Plan provisions.

#### **9. Retention of Jurisdiction**

This matter arises from an action for divorce or legal separation in this court under the case number set forth at the beginning of this order. Accordingly, this court has jurisdiction to issue this order.

In the event the Plan Administrator determines that this order is not a Qualified Domestic Relations Order, both parties shall cooperate with the Plan Administrator in making any changes needed for it to become qualified. This includes signing all necessary documents. For this purpose, this court expressly reserves jurisdiction over the dissolution proceeding involving the participant, the payee, and the participant's interest in the Plan.

#### **10. Limitations**

Pursuant to Section 414(p)(3) of the Code and except as provided by Section 414(p)(4), this order:

- (i) Does not require the Plan to provide any type or form of benefit, or any option, not otherwise provided under the Plan;
- (ii) Does not require the Plan to provide increased benefits; and
- (iii) Does not require the payment of benefits to a payee that is required to be paid to another payee under another order previously determined to be a Qualified Domestic Relations Order.

#### **11. Taxation**

For purposes of Sections 402 and 72 of the Code, any payee who is the spouse or former spouse of the participant shall be treated as the distributee of any distributions or payments made to the payee under the terms of the order and, as such, will be required to pay the appropriate federal, state, and local income taxes on such distributions.

## **12. Constructive Receipt**

If the Plan inadvertently pays to the participant any benefit that is assigned to the payee pursuant to the terms of this order, the participant will immediately reimburse the Plan to the extent the participant has received such benefit payments and shall forthwith pay such amounts so received to the Plan within ten (10) days of receipt.

If the Plan inadvertently pays to the payee any benefit that is actually payable to the participant, the payee must make immediate reimbursement. The payee must reimburse the Plan to the extent he or she has received such benefit payments and shall forthwith pay such amount so received to the Plan within ten (10) days of receipt.

## **13. Effect of Plan Termination**

If the Plan is terminated, the payee shall be entitled to receive his or her portion of the participant's benefits as stipulated herein in accordance with the Plan's termination provisions for participants and beneficiaries.

## **14. Certification of Necessary Information**

All payments made pursuant to this order shall be conditioned on the certification by the payee and the participant to the Plan Administrator of such information as the Plan Administrator may reasonably require from such parties to make the necessary calculation of the benefit amounts contained herein.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

By the court:

\_\_\_\_\_  
Judge's Signature

Court Certification:

**DO NOT FILE WITH COURT**

Addendum to RBCO  
Personal Information  
Thrift Savings Plan

\_\_\_\_\_  
This attachment is not required to be filed with the court. This attachment should be included with the order when it's delivered to the plan administrator. This information is required to process the RBCO.

Participant's Name: \_\_\_\_\_  
Social Security Number: \_\_\_\_\_  
Date of Birth: \_\_\_\_\_

Payee's Name: \_\_\_\_\_  
Social Security Number: \_\_\_\_\_  
Date of Birth: \_\_\_\_\_

**NOTE:** Benefit processing requires the Social Security number and date of birth of the payee. Failure to provide this information prohibits the benefit record keeper from establishing a separate benefit for the payee, which will prevent distribution of funds to the payee. Orders that do not contain this information, either in the order itself or in an addendum referenced in the order, will not be qualified.

**DO NOT FILE WITH COURT**

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**Resources and Tax Issues**

The Thrift Savings Plan is governed by U.S. Code Title 5, Chapter 84, Subchapters III–IV, as well as 5 C.F.R. Part 1653 (Subpart A for court orders dividing the TSP, and Subpart B for orders regarding alimony or child support). The website for Thrift Savings Plan orders and other forms is <http://www.tsp.gov>.

The booklet formerly published by TSP, "Court Orders and Powers of Attorney," stated the following under "Tax Treatment":

***If a payment is made to the current or former spouse of the participant, the taxable portion of the payment is reported to the Internal Revenue Service (IRS) as gross income for the recipient spouse for the tax year in which the payment is made (unless the funds are transferred to a traditional IRA, a Roth IRA, or an eligible employer plan). This is the case even if the payment is intended to satisfy child or spousal support arrears.***

***Note: The transfer option does not apply to court-ordered payments made from beneficiary participant accounts.***

***If the payment is made to someone other than the current or former spouse of the participant (e.g., a child or a support enforcement agency), the taxable portion of the payment is reported to the IRS as gross income for the participant for the tax year in which the payment is made.***

***A payment in response to a retirement benefits court order or legal process is not subject to an early withdrawal penalty tax. Such distributions are exempt from the early withdrawal penalty tax under the Internal Revenue Code.***

***For more detailed information about tax treatment of payments, see the TSP tax notice***



***“Tax Treatment of Thrift Savings Plan Payments Made Under Qualifying Orders,” available on the TSP website.***

Thus if the former spouse receives funds with which to pay her attorney under the first of these paragraphs, she will be taxed on the proceeds received. If, however, the court were to order payment of attorney fees directly from the TSP account of the SM/retiree, then the tax burden would fall upon the shoulders of the latter.

The equivalent language at page 9 of “Retirement Benefits Court Order – Model Language” states only this:

***For purposes of Sections 402 and 72 of the [Internal Revenue] Code, any payee who is the spouse or former spouse of the participant shall be treated as the distributee of any distributions or payments made to the payee under the terms of the order and, as such, will be required to pay the appropriate federal, state, and local income taxes on such distributions.***

For specific advice and information regarding taxes, consult a CPA, tax attorney or other specialist.

The TSP “Court Order Center,” found at <https://qoc.rk.tsp.gov/qoc/b/alt-flow-federal.htm?execution=e1s1>, has all the information that a participant, spouse or attorney needs about wording for the RBCO, submission of orders and other topics. The center also features three useful pamphlets, “Retirement Benefits Court Order – Model Language,” “Retirement Benefits Court Order – Procedures,” and “Child Support Court Order – Procedures.”

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**SILENT PARTNER** is prepared by Mark E. Sullivan, a retired Army Reserve JAG colonel and the author of THE MILITARY DIVORCE HANDBOOK, published by the American Bar Association. For revisions, comments or corrections, contact him at [mark.sullivan@ncfamilylaw.com](mailto:mark.sullivan@ncfamilylaw.com).

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