LAW REVIEW[1] 22021
April 2022

"You Can't DO That"
Stop Signs and Solutions in Military Pension Division Cases

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Introduction

A Federal statute called the Uniformed Services Former Spouse Protection Act (USFSPA) authorizes but does not require the states to divide military retired pay as property in divorce actions. There are numerous restrictions on military pension division and the Survivor Benefit Plan, many of which are hidden deep in the regulations and are absurd or illogical. This paper explains how to identify roadblocks in the statutes, regulations and cases with regard to dividing military retired pay in divorce, asserting jurisdiction over retired pay, obtaining or avoiding Survivor Benefit Plan coverage for a former spouse, the inclusion of COLAs (cost-of- living adjustments) in the divided pension, the use of alimony as a substitute for pension division, rejection of pension division orders by the retired pay center, and where to go when all the deadlines have expired. It also covers how to use two alternate calculations of the marital share in Guard/Reserve cases, and how to get back payments from the retired pay center for arrears due to the spouse.

Dividing Military Retired Pay

Q. I'm representing Mrs. Jane Doe, the ex-wife of Army Colonel John Doe, in her divorce case. He owes her about $6,000 in back payments of the military pension share. I've heard that "DFAS doesn't do arrears." Is it true that we cannot collect retroactive payments through the retired pay center for my client?

A. When the front door is closed, always look to see if there's a back door. It's true that a court order for payment of arrears will be rejected by the retired pay center (the Defense Finance and Accounting Service, or DFAS, for pension division orders for the Army, Navy, Air Force, Marines

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[1]I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

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Corps, and the National Guard and Reserves, or the Coast Guard Pay and Personnel Center for members of the Coast Guard, and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration, or NOAA). Payments made by the retired pay center are prospective only; the agency does not pay out arrears since the USFSPA does not provide for garnishment of payments missed prior to the approval of the application for a share of retired pay.

However, that does not mean that - with a little creativity - one cannot get the retired pay center to collect those arrears and pay them to Jane Doe out of John's retired pay.

If John Doe has no spare cash, no savings account, and no way to borrow the money, then waiting for a lump-sum payment from Jane Doe's ex will be an exercise in wishful thinking.

The answer for Jane is to use a "step-up order" to increase her monthly payment from the retired pay center. Since 50% of the pension is generally the maximum which can be withheld by garnishment from John's pension, Jane may be able to "bump up" her present percentage to a higher amount, not to exceed 50%, and get the missing money by increased installments each month.

The sum of $6,000 spread out over 12 months would mean an increase of $500 a month from John Doe through a pension garnishment. All that's needed is to calculate what increase in her percentage is the equivalent of $500 a month, and to set that out in a military pension division order (MPDO) to submit to the retired pay center which reflects the increased percentage for X months (12 in this case). After the payoff of the arrears is finished, the percentage will return to the original amount.

Assuming that John Doe is entitled to $6,000 a month for his disposable retired pay, and Sylvia's share was 30%, or $1,800 a month, then an increase of $500 a month would bring her payments up to $2,300, which is 38.33% of the DRP. A sample clause to implement this (inserted right after the clause which sets the pension share for her at 30%) would read as follows:

The retired pay center will pay Wife 38.33% of the Husband's retired pay for a total of 12 months, after which the percentage will reduce to 30%, the original amount garnished from his retired pay for division as marital property, pursuant to the previous paragraph.

If you cannot get the payback done in 12 months because of the 50% cap then stretch out the window to 24, 30, or 36 months.

Q. Our judge says that 1) she always writes her own orders, and 2) it's sufficient for her pension division order to state "the court has jurisdiction over military retired pay" when dividing the pension. Will DFAS divide John Doe's military pension if that's all her order says about jurisdiction?

A. Not a chance. While your judge is to be commended on her initiative, she gets a "D" on the report card for research skills. The three alternate jurisdictional bases are found at 10 U.S.C. § 1408 (c)(4), and the rules for pension division - found in the Department of Defense Financial Management Regulation (DoDFMR), Vol. 7b, ch. 29 - require that the court order must specifically state the basis for exercising jurisdiction. The Coast Guard, by the way, generally follows the rules set out in the DoDFMR to ensure uniformity of treatment in pension division among the uniformed services.

Q. The judge just ruled that my client is to get $600 a month for her share of the military pension (divided as marital or community property), and that she will also receive 50% of all cost-of-living adjustments (COLAs) in the future after the ex-husband retires. Can that be done in a court order and accepted by the retired pay center?

A. No, you can't do that. The retired pay center will accept a fixed dollar amount for the share of the pension paid to the former spouse, but it will not allow COLAs to be added on. Any attempt to combine a fixed dollar award with COLAs will result in the COLA terms being ignored and the pay center interpreting the order as one which only specifies a fixed dollar amount:

If the order contains a retired pay award, that award must be expressed as a fixed dollar amount or as a percentage of disposable retired pay. A retired pay award expressed as a percentage will automatically receive a proportionate share of the member's cost-of-living adjustment (COLA), while one expressed as a fixed amount will not. There is no authority for a retired pay award to state a fixed dollar amount and also order COLAs. Retired pay awards phased in that manner will be construed as a fixed dollar amount.

DoDFMR Vol 7b, ch 29, 290601.

Q. Isn't military pension division barred if there's no 10/10 overlap between the military service and the marriage?

A. No - that's another "urban legend." The 10/10 rule is one of enforcement - whether payments come from the retired pay center or from the retiree. It is not one of jurisdiction or divisibility. There is no limitation on the number of years of marriage overlapping military service as a prerequisite to military pension division. A military pension may be divided by court order whether the spouse has 30 years of marriage to the servicemember (SM) or 30 days of marriage. The 10/10 rule is a prerequisite to enforcement through the retired pay center, pursuant to 10 U.S.C. § 1408(d)(2). The payment mechanism of a garnishment of the SM's retired pay is not available unless this test is met. *See, e.g., Michel v. Michel*, 286 Ga. 892, 692 S.E.2d 381 (2010); *Ex parte Smallwood*, 811 So. 2d 537 (Ala.); *In re Marriage of Gurganus and Gurganus*, 34 Kan App 2d 713, 718-719; 124 P3d 92 (2005); *Warner v. Warner*, 651 So.2d 1339, 1340 (La. 1995); *Stotler v. Wood*, 687 A.2d 636, 637 n.2 (Me. 1996); and *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (Nev. 1994).

Q. I heard there are some deadlines involved in military pension division. What's the federal deadline for submission of a pension division order?

A. There is no deadline under federal law or in the DoDFMR as to when you have to submit a military pension division document (such as a divorce decree, incorporated separation agreement, or decree of legal separation) or how long a former spouse may wait before she/he is barred from obtaining pension-share garnishment payments from the retired pay center. Other than the danger of being "second in line" for payments after a later divorce by the SM (the "first-come, first-served" rule), DFAS will pay whenever the FS submits an appropriate order. In one case, the FS got DFAS payments upon submitting the application 16 years after the parties' divorce. *Koonce v. Finney*, 98 N.E.3d 1086 (Ind. App. 2017). Any deadlines that exist are the product of state laws and cases in the areas of laches and of statutes of limitation, repose, and dormancy.

Q. Let's talk about getting the plan administrator's approval; that's what I obtain when I'm doing a QDRO. Most civilian employers will let my office submit a draft order for review and approval before it's filed with the court. Does DFAS allow that?

A. No, you can't do that. The retired pay center will not provide pre-filing approval or review by the retired pay center. When the order has been signed by the judge and filed with the court, the agency will give "conditional approval" if it meets the requirements for such a document.

If the former spouse applies prior to the member receiving retired pay, the designated agent will perform a legal review of the application, and may conditionally approve it based on information available at the time of the review concerning the member's duty status (active or Reserve).

DoDFMR Vol 7b, Ch. 29, ¶290405.A.

When the individual starts receiving receive retired pay, the agency will perform a second review prior to establishing the former spouse's direct payments.

Q. Is there a "go-by" I can use to write up a good, solid, and acceptable military pension division order?

A. While you'd surely like a good, solid YES for the response, the true answer is a definite maybe. You can find sample pension text at Figures 29-1 and 29-2 at the end of Chapter 29, Volume 7b of the DoDFMR. Here are the essential data required:

1. Plaintiff's SSN

2. Plaintiff's address

3. Defendant's SSN

4. Defendant's address

5. Date of marriage

6. Date of divorce

7. County and state of divorce

8. If the divorce was granted after December 23, 2016 and, at time of divorce, the member was not receiving retired pay, then the two data points for the Frozen Benefit Rule are also required (as of date of divorce, the member's years of creditable service - or retirement points for a member of the Guard/Reserve - and also the "High-3" pay information).

What about the member's Social Security Number? The SSN is often barred from publication in a court order by state law. It is permissible to leave that item out in the MPDO (military pension division order); in the alternative one might insert only the last four digits and state that the full SSN is shown on the cover sheet, DD Form 2293, which must accompany the military pension order and the divorce decree.

Be careful using these examples in the DoDFMR, however. Figures 1 and 2 entirely omit any Survivor Benefit Plan coverage, which may be one of the issues that is in the divorce settlement or the judge's property division order.

To find better text for pension division orders and clauses, see the Silent Partner infoletters on Getting Pension Orders Honored by the Retired Pay Center, and Military Pension Division:

Guidance for Lawyers, both at the website of the North Carolina State Bar's military committee, located at www.nclamp.gov > For Lawyers.

Q. I heard from the other side that their client, Sergeant Jack Smith, got a medical retirement, and that the court cannot divide any of that. Can the judge divide military disability retired pay?

A. Once again, you can't do that. Military disability retired pay is granted to individuals who are found to be unfit for service. The topic is covered at Chapter 61 of Title 10, U.S. Code. When the SM has served at least 20 years or has a disability rating from the military (NOT his VA rating!) of at least 30%, then he receives MDRP, or military disability retired pay. He is informed of this by his branch of service, which must determine how his MDRP is calculated. Jack Smith is entitled to payment of the higher of these two amounts:

· Retired pay based on his years of service (i.e., longevity retired pay), or

· Retired pay based on his percentage of disability.

Only disposable retired pay (DRP) can be divided, and Jack's DRP consists of gross pay less certain items, including "The amount of retired pay for a member retired under Title 10, Chapter 61 computed based on percentage of disability." 10 U.S.C. §1408 (a)(4)(A) (iii); DoDFMR Vol. 7b, ch. 29, ¶290701.B.5.

Thus if Jack's retired pay is $2,500 based on longevity calculations (vs. only $2,000 based on percent of disability), only $500 would be divisible as DRP, since the underlying $2,000 cannot be divided - it's excluded from the definition of DRP. If, on the other hand, Jack's retired pay is $2,500 based on percentage of disability computations (vs. only $2,000 based on years of service), then none of it can be divided. The entire amount is excluded from the definition of disposable retired pay.

Note, however, that if the parties agree on payments through the retired pay center, they can accomplish monthly garnishments through a consent order for spousal support, as shown in the following two questions.

Q. The parties have not been married for 10 years during at least 10 years of creditable military service. Does that mean there is no way to get payments through DFAS?

A. No - it simply means that you cannot get pension-share payments for the former spouse as property division through the retired pay center. 10 U.S.C. § 1408(d)(2). There is a work-around, however. There is no 10/10 overlap rule for payments made by the retired pay center as spousal support. Thus the officials at DFAS will accept and honor a "consent order for alimony," for example, which sets out all the required information and specifies that the former spouse will receive the payments (fixed dollar amount, formula, or percentage) upon the retirement of John Doe. The order should also state that the payments will be non-modifiable if there is a change of circumstances, and they will not end if Jane Doe remarries or cohabits.2

Q. I'm really upset about the Frozen Benefit Rule, which limits what my client can get to only the fixed benefit for John Doe on the "date of divorce." Is there a work-around for that too, so my client can get a share of final retired pay instead of the amount set at the divorce date?

A. Yes. You can use the "alimony alternative" above to get around the Frozen Benefit Rule so that Jane Doe gets a share of the full retired pay of John Doe, not just a share of what he would have received if he'd retired at divorce. Recall that the Frozen Benefit Rule, Sec. 641 of the National Defense Authorization Act for 2017 (and found at 10 U.S.C. § 1408 (a)(4)(B)) redefines

what “disposable retired pay” is, for the purposed of limiting what can be divided as property. Spousal support garnishments are not based on “disposable retired pay.” They are based on “remuneration for employment.” 5 C.F.R. Part 581; DoDFMR Vol. 7b, ch. 27. Thus the amount subject to spousal support garnishment is not limited to hypothetical retired pay of an individual upon divorce.

Q. Colonel John Doe is domiciled in another state. Our judge says that doesn’t matter, since our state has long-arm jurisdiction over him because the marriage existed here in East Virginia for 15 years, the house and personal property is here, the parties were married here, and both children were born here. Is the judge right? Can we get military pension implemented through the retired pay center if John Doe doesn’t have our state as his legal residence but we have loads and loads of that “long-arm stuff”?

A. The rules are clear in this area, and the answer is a qualified NO. A state court can only exercise jurisdiction over the division of uniformed services retired pay if it’s his domicile, if he’s living there (other than because of military assignment), or if he consents to the court’s jurisdiction (which is called a “general appearance” in most states). 10 U.S.C. § 1408(c)(4). So the only way you can get jurisdiction is if you can get the defendant to enter a general appearance.

Q. I just filed the summons and complaint for Jane Doe’s divorce, and I need to get the address of the defendant to serve him. Can I get that from DFAS? After all, they send payments to him every month. Will they give the address to me without a court order?

A. Once again, you can’t do that. Since you don’t have service of process, you can’t get a judge to enter a lawful and valid order. Even if you could, the folks at DFAS probably don’t have the defendant’s address since all money transfers have been done electronically since 2013; no one sends out monthly pension checks any more. There is, of course, a chance that the files at DFAS will contain some correspondence which would show the defendant’s address, once you have service, file a motion, and get a hearing for a court order. Unless you can send DFAS a court order for release of the correspondence files, most likely you’ll need a private investigator.

Q. I’m drawing up a pension division order for Rachel Roe, a Marine Corps Reserve officer. My state says that the marital fraction is made up of years of marital pension service divided by total years of pension service. Will that fly when I send it to the retired pay center?

A. No, it won’t. When you’re using a fraction in the document (such as “pension service during the marriage divided by total pension service”), and the servicemember is in the National Guard or Reserves, the fraction has to be expressed in terms of retirement points as of the “date of divorce” (see below for the definition in this context); the retired pay center will fill in the denominator when the individual starts getting retired pay (usually at age 60).

If the court order requires DFAS Garnishment Operations to supply the denominator of a marital or coverture fraction, and the member qualifies for a Reserve (i.e., non- regular service) retirement, the formula award must be expressed in terms of Reserve retirement points. In the case of a Reserve retirement, the numerator of the formula typically is the number of Reserve retirement points earned during the marriage. This number must be provided in the court order. The denominator of the formula is typically the member’s total number of Reserve retirement points.

DoDFMR Vol. 7b, ch. 29, ¶290607.C.

Q. Does that mean that I'm stuck with points as the measure of the portion of the pension acquired during the marriage?

A. No. Sometimes it turns out that the time calculation is more favorable to the client than the points calculation. This is known for certain when the individual has stopped drilling and put in for Guard/Reserve retirement, which usually involves a transfer to the Retired Reserve.

One solution is to use a percentage clause, not a formula clause. When the Reserve/Guard SM is no longer serving in drill status, regardless of attaining age 60 and receiving retired pay, or when state law "fixes" the spousal interest at the date of divorce or separation (as Florida, Texas, Kentucky, Tennessee and Oklahoma do), it is a simple matter to convert the marital formula into a percentage since all of the factual data items are known: the months of marital pension service, the points acquired during marriage, and the total months and total points acquired as of the "date of divorce." The same is true regarding state rules for Frozen Benefit Rule pension division (see 10 U.S.C. § 1408 (a)(4)(B)) in Virginia, Maryland, and North Carolina, with the denominator of the marital fraction fixed as of the divorce date.

A court order containing a percentage will be honored by the retired pay center, even if involves a Guard/Reserve member, since it leaves nothing for the agency to calculate or interpret. "Points division" is only required when the pension division document uses a fraction with an unknown denominator, representing total applicable pension service. Nothing in the DoDFMR says that you cannot use a percentage to fix the pension-share portion for the former spouse.

Q. Once the court order or incorporated settlement is finished, setting out what share the former spouse gets, I can just send it in to the retired pay center and they'll take care of garnishing John Doe's final retired pay, right?

A. No - that's not going to get you an accepted pension division order. John Doe is still on active duty, and thus the pension division document - whether divorce decree, military pension division order, decree of legal separation, or incorporated separation agreement - must include two data points as of the date of the decree of divorce, annulment, or legal separation (hereafter "date of divorce"):

· The SM's retired pay base, also known as the "High-3" amount3 (i.e., the actual dollar figure); and

· The SM's years of creditable service. DoDFMR, Vol. 7B, Ch. 29, ¶290803.

The retired pay center uses these data points to calculate the hypothetical retired pay of John Doe as of the "date of divorce." This is known as the Frozen Benefit Rule since the divisible pension is "frozen" as of the divorce date. Although the data are required now, the calculations are done by the center when John starts drawing retired pay. The basic language and the methods of division are found in the Silent Partner, Getting Military Pension Orders Honored by the Retired Pay Center. Further information is in Military Pension Division: Guidance for Lawyers. It's the hypothetical retired pay at divorce which is the disposable retired pay that can be divided - NOT the final retired pay of John Doe.

Q. Can I find out John Doe's years of creditable service from DFAS? After all, I need to have that information; DFAS requires it under the Frozen Benefit Rule. Will they give it to me over the phone? Do I need to have the judge write to them? Can I sign a subpoena and send it to DFAS? What about a court order demanding the years of creditable service - will that pry loose this data?

A. Sorry, Charlie - “you can’t do that” is the answer to all of these inquiries. Data for years-of-service calculations is not the province of DFAS, although it can release documents from which the calculations may be made, such as the LES. One’s branch of service controls the records which are the primary source of creditable service information. Thus, for example, Human Resources Command at Ft. Knox has this data for soldiers (and also Army Reserve retirement points). The data for years of service is provided to DFAS for entry on the LES. How to obtain the data which is required by the Frozen Benefit Rule (the “High-3” pay of the SM and, for those on active duty, the years of creditable service) is found in the Silent Partner infoletter, Military Pension Division and the Frozen Benefit Rule: Nuts and Bolts.

Q. I’m concerned that John Doe might elect to get VA disability indemnification after he retires, which might reduce the money Jane receives from the pension division. Can I have the judge order him not to take VA payments? Or have him ordered to reimburse Jane for any money she loses?

A. No - you can’t do that! The 2017 Supreme Court case, *Howell v. Howell,* stated that a judge cannot order indemnification for Jane Doe under those circumstances. You’ll find the case summary and the underlying facts in the Silent Partner infoletter, “The Death of Indemnification?”

Q. Does that mean that NO indemnification is possible under any circumstances?

A. No - not at all. The case doesn’t address situations in which:

· The parties have consented to indemnification by the retiree if his actions cause a reduction in the pension-share payments of the former spouse, or

· The court has previously ordered indemnification and there was no appeal of the order (which means that res judicata bars any subsequent challenge to the order).

See the above-mentioned Silent Partner for details about these two work-arounds.

Survivor Benefit Plan.

Q. Once we get the divorce, can the ex-wife maintain SBP coverage?

A. Not without an order for former-spouse SBP coverage. While the coverage for a spouse during the marriage is automatic, the rules are different when it comes to post-divorce coverage.

Q. So do I just get a court order for Jane Doe’s former-spouse coverage and send it to DFAS?

A. Not quite. There is one step missing. Think of the process as R-R-R.

R - means Requirement. You need to get a court order to require the election of former-spouse SBP coverage. The essential language is: “John Doe will elect immediately former-spouse SBP coverage for Jane Doe.”

R - stands for Request. There must be an election of former-spouse coverage. The election is made by the member or retiree. John Doe must make this request by signing an SBP form selecting Jane Doe as his former-spouse beneficiary. If he fails or refuses to make the election, then Jane Doe can make a deemed election, requesting SBP as if John had properly made the request.

R - means Register. The election form, along with the court order or decree, must be served on the retired pay center. John Doe must elect the former-spouse SBP coverage and serve it on DFAS within one year of the divorce. Jane Doe can make a deemed election also; this serves to act as the member's election if he fails or refuses to make the election. The deadline for that is one year from the date of the order requiring the member to make the election. Note that this may or may not be the same as the divorce date; sometimes the court bifurcates the issues, granting the dissolution on one date and deciding on property distribution, pension division and the survivor annuity later on.

Q. Now that my client's former-spouse SBP coverage has been validly elected and the election registered, we want to ensure that it cannot ever be lost. Can we do that?

A. Nope - you can't do that either. The entitlement to SBP payments stops upon the former spouse's remarriage if this occurs before age 55. It is suspended during that remarriage, but SBP coverage will be reinstated if the former spouse's marriage ends due to death, divorce, or annulment. 10 U.S.C. § 1450(b)(2) - (3). SBP coverage will continue if the former spouse is age 55 or older at the time of remarriage.

Q What if the deadlines are missed? Is all hope for SBP coverage lost?

A. Occasionally the former spouse learns of the lack of timely filing (or a denial by DFAS) after the one-year deadlines have passed but before the SM's death. When this happens, the former spouse may request administrative relief. If the facts justify it (as in the case of an improper denial of an SBP claim by DFAS), relief in a Defense Department case may be available through the Department of Defense Office of Hearings and Appeals (DOHA) to review the initial determination. When a case is appealed to DOHA (usually on a point of law, rather than on equity, fairness, and sympathetic facts) and there is an adverse ruling, a further appeal to the Claims Appeals Board may be considered. These remedies show that the individual has tried and exhausted his remedies within the Defense Department.

The remaining step may be an application to the Board for the Correction of Military Records, established by 10 U.S.C. § 1552. These service Boards have been established for the Army, the Navy/Marine Corps, the Air Force, and the Coast Guard. The first three are governed by Department of Defense Directive 1332.41, "Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs)." The appropriate Board may grant a petition for relief if the right facts and legal circumstances are present.

Q. My client, John Doe, says he wants to give only part of the Survivor Benefit Plan coverage to his ex-wife. The parties were only married about 10 years, and he's engaged. He wants his fiancée to be the beneficiary for at least half of the SBP once they're married. Can the judge order that? More importantly, will the retired pay center honor that allocation if the court puts it in an order?

A. No - it cannot be done. Unlike other annuities, former spouse coverage may not be shared with a current spouse to provide protection for both. There can be only one adult SBP beneficiary. You'll need to advise your client that the rule with SBP is "Your EX or your NEXT - take your pick."

Q. The ex-husband, John Doe, has decided that he doesn't want to have his full retired pay as the base amount for SBP; he wants to elect $1,000 a month as the base. Can the court order that, and will DFAS honor the order?

A. When SBP is validly elected, the base amount is the member's full retired pay if no other base is specified. Once the election is made, it is generally irrevocable. The only exception is in rare instances when there is an Open Season created by Congress to allow changes in SBP and the election of SBP if it was previously declined. Other than that, the SBP base amount remains that way so long as there is an eligible beneficiary.

Q. Jane Doe, my client, has decided that she wants to cancel her former-spouse SBP coverage. If she gets her ex-husband to go along, can that be done?

A. Yes, if it's within a narrow window of time. An election of former-spouse coverage is generally irrevocable; it cannot be terminated once it is elected. There is, however, a little known exception to the rule, which allows a retiree a one-year period in which to opt out of the SBP, as set out in the DoDFMR, Vol. 7b, ch. 43, ¶430401.B. That section states: "A member may voluntarily discontinue SBP participation during the 1-year period beginning on the second anniversary of the date of commencement of retired pay under paragraph 430701." Section 4307 contains the terms and conditions for discontinuation of participation.

Q. Can you use Servicemembers Group Life Insurance as a substitute death benefit when SBP is not available?

A. If Jane Doe is interested in life insurance instead of SBP, she should insist on private life insurance and avoid using SGLI. According to a 1981 Supreme Court decision, courts cannot enforce a court order or separation agreement that provides for SGLI to secure the payment of a divorce settlement when the SM has chosen someone else to be his or her beneficiary. *Ridgway v. Ridgway*, 454 U.S. 46 (1981).

Q. I've heard that you have to have a share of the military pension to get SBP. Is there any truth to that?

A. No - you can get an order for division of military retired pay without SBP, and you can get SBP without the division of the military pension. The two are found in different sections of the U.S. Code (pension division at 10 U.S.C. § 1408, and SBP at 10 U.S.C. § 1447-1455). In fact, there is no separate provision in the latter for acquiring jurisdiction to award SBP, so it is possible to get a court order for the Survivor Benefit Plan without having jurisdiction to divide the pension itself!

Q. The judge ordered the wife to pay for the SBP premium through a deduction at DFAS from her share of the pension. Can the court order that? More importantly, can DFAS do that?

A. You can't do that, and neither can DFAS. The premium for SBP is a mandatory deduction from gross retired pay in arriving at disposable retired pay. 10 U.S.C. § 1408 (a)(4)(A)(ii). This deduction is the sole method allowed by law to obtain payment of the premium for SBP coverage. The retired pay center cannot change the rules and take the premium out of the share of one spouse or the other. In certain cases, however, it may be possible for a skilled lawyer - one with experience in military pension division - to craft an order which changes the percentage paid to the ex-wife so as to shift to her the entire cost of SBP payments. This is another example of the need to get a wingman, a consultant or co-counsel to help out if this is what the court requires.

Q. Can the court order (and DFAS implement) a requirement that Jane Doe's SBP amount must be a mirror image of the pension-share payments she gets during John's life? That is, if she's

getting $X per month for her portion of the military retired pay, can the SBP be set up so that her monthly SBP amount is also $X if John dies before her?

A. There are four possible answers, depending on John Doe's situation. The "mirror award" may be:

· Impossible... if John's still serving and the Frozen Benefit Rule didn't apply. In this case you cannot know his final retired pay, which is what Jane's pension-share payment would be based upon. And without that number, you can't do the math to come up with the base amount to use for the SBP, so that you can make her death share equal her lifetime share of the pension.

· Approximate... if John is subject to the Frozen Benefit Rule at the time of divorce, or if he was divorced in one of the fixed-benefit states (Texas, Florida, Kentucky, Tennessee, and Oklahoma). In each situation, the retired pay is known (hypothetically) at the day of divorce, and thus Jane's share is also known. Since the SBP payment is 55% of the base amount, the math is straightforward. That amount - Jane's share in dollars as of the divorce date - is divided by .55 to arrive at the SBP base to be chosen. Thus, for example, if Jane's share is $1,100 and you want her SBP benefit to be $1,100, you'd set the base for SBP at $2,000. SBP @ $2,000 X .55 = $1,100. And, to double-check: $1,100.55=$2,000. The reason this is approximate is that Jane's share is automatically increased by cost-of-living adjustments (COLAs) pursuant to 10 U.S.C. § 1401a, so the final monetary share she gets will not be known with exactness until John starts receiving retired pay. How long that would be is anyone's guess, so her attorney may want to add a little padding to ensure that the ultimate mirror share is a fair approximation at retirement, rather than only an exact calculation at divorce.

· Possible with precision... if John just happens to retire at the time he's getting divorced. In this situation, you'll know John's retired pay and can make the above calculations with exactness.

· Impossible... if John is already retired when you attempt this endeavor. His SBP base is fixed and final at the time he retires. Once chosen, it generally cannot be modified. And modifying the base is the only way to manipulate SBP into giving Jane the same money when he's dead as when he's alive (the "mirror share").

Other Issues

Q. Now I'm pretty sure that I know the answer to this. Can you garnish VA disability payments for family support? I'm thinking the answer is NO.

A. The correct answer is YES. The retired pay centers will honor an order for garnishment of VA disability compensation when the payor has waived military retired pay to receive money from the VA. 42 U.S.C. § 659. Court-ordered garnishment is also available when the military retiree is receiving military disability retired pay, Combat-Related Special Compensation, or Social Security disability payments.

Q. I've heard that you cannot proceed with a case in court when the other side is on active duty... or deployed, or something like that. Is that true?

A. No - that's not correct. Here are the rules:

· If the SM hasn't entered an appearance, the court cannot take a default against him or her without complying with the terms of the Servicemembers Civil Relief Act (SCRA). 50 U.S.C. § 3931 governs the situation where the SM has made no appearance.

· When a judgment, order or adverse ruling is sought against a party who has not made an appearance, it is the duty of the court to determine whether that party is in the military. The SCRA states that either side or the court may apply for information as to military service to the Department of Defense (DOD), which must issue a statement as to military service. 50 U.S.C. § 4012.

· When this happens, no default can be taken until the court has appointed an attorney to represent the member. If the court fails to appoint an attorney, then the judgment or decree is voidable. 50 U.S.C. § 3931(b)(2).

· When the SM has received notice of the action or proceeding and has filed an application for a stay (including an application filed within 90 days after the end of military service), 50 U.S.C. § 3932 states that the court may (upon its own motion) and shall (upon the application of a SM) enter a stay of proceedings for at least 90 days if the motion includes the information required by the statute for the court to determine whether a stay is needed. This "90-day stay" (although it can be for a longer period of time) requires four elements; the checklist below shows the requirements:

SCRA Stay Request – Checklist for the Initial 90-Day Stay

a Elements of a Valid 90-Day Stay Request. Does the request contain...

A statement as to how the SM's current military duties materially affect his ability to appear...

and stating a date when the SM will be available to appear?

A statement from the SM's commanding officer stating that the SM's current military duty prevents appearance...

and stating that military leave is not authorized for the SM at the time of the statement?

Caveat: There is no indication that a request must be in the form of an affidavit or, for that matter, in any particular format whatsoever. Apparently, a letter, a formal memo or even an e-mail message would suffice.

· A request for a stay does not constitute an appearance for jurisdictional purposes or a waiver of any defense, substantive or procedural. 50 U.S.C. § 3932(c).

· The SM may request an additional stay based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. The same information above is required. 50 U.S.C. § 3932(d)(1).

· Details may be found at A Judge's Guide to the Servicemembers Civil Relief Act, which is located at www.nclamp.gov > Additional Resources.

Q. Does that mean that the judge must always grant a stay of proceedings when the SM provides the court with a request for a stay?

A. No. The essential point is that the stay request has to comply with the SCRA. If the SM has not followed the requirements of the Act, then the court need not grant him or her a stay of proceedings. Where all four elements set out above have been properly pleaded, it is the duty of the court to grant a stay of proceedings. The court may grant a stay - it's in the court's discretion - if an essential element is missing.

Most of the time, however, the results will be unfavorable for the applicant when one or more of the required elements is omitted. Courts that are faced with failure to comply with the specific four elements that are required for a stay request will often turn down the request:

· In *In re Marriage of Bradley*, the court found that the SM was not entitled to a stay because he had failed to provide a statement as to how his current military duties materially affected his ability to appear and when he would be available to appear. In addition, he did not provide a statement from his commanding officer stating that his current military duty prevented his appearance and military leave was not authorized. 137 P.3d 1030 (Kan. 2006).

· In *Stearns v. Stearns*, the SM submitted his own letter and a letter from a military legal assistance attorney, both of which stated that the SM could not be present at the court ordered mediation or his deposition. There was no information from his commanding officer, and the denial of stay was upheld as within court's discretion. 476 S.W.3d 571 (Tex. Ct. App. 2015).

· In *Childs v. Childs*, the court denied a request for a stay because evidence was lacking about military duties precluding the SM from participation in the case, and there was no communication from his commanding officer. 310 P.3d 955 (Alaska 2013).

· And in *In re Marriage of Herridge*, after the SM failed to respond to discovery as to child support, sent a partially redacted letter to the court from his commanding officer, failed to specify a date when he would be available, and the commanding officer did not state the non-availability of leave, the court denied his motion for stay and the appellate court affirmed decision. 279 P.3d 956 (Wash Ct. App. 2012).

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ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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A note from the Reserve Organization of America (ROA) Executive Director:

ROA takes no position on whether state courts hearing divorce cases should be able to order division of military retired pay between the service member and his or her spouse. The Uniformed Services Former Spouse Protection Act, a federal statute enacted four decades ago, permits but does not require the states and state courts to order such division. All 50 states and all other United States jurisdictions except Puerto Rico divide military retired pay under some circumstances, but the details of the division vary from state to state.

Like most of our "Law Review" articles, this article is about *what the law is, not what we want it to be.* Whether you are the service member seeking to preserve your retirement to the maximum extent feasible, or whether you are the non-military spouse seeking to gain a share of that retirement, you need to understand what the law is, and you need to retain competent legal counsel to advise and represent you in this complicated and controversial field of law.

[3]Congress recently established the United States Space Force as the 8th uniformed service.