

## LAW REVIEW<sup>1</sup> 22069

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### Divorce, Military Pension Division, and the “10/10 Rule”— Questions and Answers

By Colonel Mark E. Sullivan, USA (Ret.)<sup>2</sup>

#### 5.1—Division of Military Pension Benefits upon Divorce

Dividing a military pension in a divorce case sometimes involves a term unfamiliar to clients and attorneys – the “10/10 Rule.” Judges, lawyers, and clients may have heard rumors about some requirement as to ten years of military service concurrent with ten years of marriage. And they may have heard that this somehow affects the division of military retired pay. Let’s listen in on a conversation regarding this subject between Staff Sergeant Rachel Roe, an Army Reservist, and her lawyer:

**Rachel:** I need some information about my divorce case. Will it help if we try to speed up the granting of a divorce, so that my soon-to-be ex won’t be married to me for 10 years? And what’s this *10/10 Rule* I keep hearing about?

**Attorney:** For your husband to get a garnishment for a share of your retired pay as property division, there has to be a court order which shows compliance with the “10/10 Rule.” That means that you have to be married to your husband for at least ten years during at least ten years of service toward eligibility for retired pay. At this point, Rachel, you’ve been married for 9 ½ years.

**Rachel:** Where can I find that in the law?

**Attorney:** The *10/10 Rule* is a component of the Uniformed Services Former Spouses’ Protection Act. That provision is found at Title 10, U.S. Code, at Section 1408 (d)(2).

**Rachel:** As you know, we separated two years ago. That counts for something, right? We don’t

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<sup>1</sup> We invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2,000 “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 Spouses’ Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. This article is about the USFSPA. 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.

<sup>2</sup> Mark Sullivan is a retired Army Reserve Colonel and a life member of ROA. He is the author of [THE MILITARY DIVORCE HANDBOOK](#) (Am. Bar Assn., 3<sup>rd</sup> Ed. 2019), and he often serves as a consultant to attorneys in military divorce and pension division cases. He can be reached at 919-832-8507 and [mark.sullivan@ncfamilylaw.com](mailto:mark.sullivan@ncfamilylaw.com). All of his military divorce infoletters for clients ([Legal Eagle](#)) and for attorneys ([Silent Partner](#)) may be found at the website of the North Carolina State Bar’s military committee: [www.nclamp.gov](http://www.nclamp.gov) at “Publications.”

meet the *10/10 Rule*, the way I calculate it.

**Attorney:** The Rule's requirements involve the *termination of marriage*, and that occurs on the date of divorce. It is not the date of separation, or some other date associated with the marriage, such as the date of irretrievable breakdown of the marriage or the date of commencement of the divorce case.

**Rachel:** I hear that this is a *big deal* for my husband. He wants to drag out the divorce until we've been married for ten years, and I already have a total of 15 years of Reserve service – so that means he would meet the requirements of the Rule if he can just get the court to slow things down for another six months. Why is he insisting on waiting for another half-year before the divorce?

**Attorney:** Many lawyers and clients believe that the Rule matters most to the former spouse. The retired pay center<sup>3</sup> - which is DFAS in your case – will only garnish retired pay as property division when the *10/10 Rule* has been met, and the former spouse is the one who needs the garnishment to ensure monthly payments. Without it, your husband would have to rely on state court remedies for enforcement if you are ordered to pay him and you don't do that.

But the *10/10 Rule* also benefits you. If you're ordered to make monthly payments to him out of your retired pay, then you also will want a pension-share garnishment. Garnishment means that you will be able to exclude the amount paid to him from your taxable income. Each party's share is reported as taxable income by the retired pay center to the IRS; the IRS then issues the parties a Form 1099-R each January. Based on lots of research I've done, I can tell you that I can't find any provision in the Internal Revenue Code which will guarantee you an income-exclusion unless you obtain a garnishment from DFAS. So both parties would benefit from the *10/10 Rule*.

**Rachel:** But I thought that falling short of the *10/10 Rule* meant that the military pension couldn't be divided! That's what all my friends told me, including the first sergeant at the armory where I drill. Isn't that what the Rule does?

**Attorney:** No. The Rule isn't a *jurisdictional requirement* for division of military retired pay. Contrary to some "barracks rumors," there is no limit on the number of years of marriage concurrent with military service as a prerequisite to military pension division. A military pension may be divided through a court order whether the marriage lasted for 10 years, 10 months, or 10 days during military service. The Rule's time requirements are the prerequisite to *enforcement through DFAS*.

**Rachel:** I don't like the thought of sharing my Reserve pension with my husband. Isn't there a way we can detour around that and avoid even talking about the *10/10 Rule*?

A. One possibility is known as the "present-value setoff." Courts and parties sometimes use this approach when the service member obtains a reliable estimate of the value for the pension, which is usually from a CPA, and then offers to swap some other asset for a waiver of retired pay. The valuation would involve an estimate of your retired pay, future increases due to COLAs (cost-of-

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<sup>3</sup> This is the Defense Finance and Accounting Service for the Army, Navy, Air Force and Marine Corps. The Coast Guard Pay and Personnel Center services retired pay for members of the Coast Guard and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration.

living adjustments), projections about your life expectancy, and a “discount rate.”

But this will only work when there is other property in the marital estate of substantial value to use in setting off the value of the pension. In your case, there’s no other property of substantial value to offset the probable value of your Reserve pension. There’s no house with substantial equity, and no savings or investment account which would be large enough for a trade. You’ve only been married for 9.5 years, so there wasn’t enough time to build up a large marital estate.

**Rachel: Well, I only have one more issue. What about support? Is the 10/10 Rule a requirement for that as well? If I have to pay alimony or child support, does the 10/10 Rule come into play?**

**Attorney:** DFAS doesn’t require *10/10 Rule* compliance for a garnishment for either type of support. It will comply with a court order for a child support or alimony garnishment out of retired pay (as opposed to a property division garnishment) with less than a 10/10 overlap of marriage and military service.

Another point is that payments need not be expressed in terms of a fixed dollar amount. DFAS will accept a support garnishment order which states “Rachel Roe will pay 30% of her disposable retired pay to Richard Roe as spousal support,” which means that there will be automatic adjustments for COLAs each December. A fixed dollar award captures no COLAs.

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Reserve Organization of America  
1 Constitution Ave. NE  
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<sup>4</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

<sup>5</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).