

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT
DIVIDING MILITARY RETIRED PAY

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UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT DIVIDING MILITARY RETIRED PAY

I. HISTORY.

The Uniformed Services Former Spouses' 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.

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).

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 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.

⁹ 10 U.S.C. § 1408(a)(2).

¹⁰ Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Subparagraph 290601.C. Available over the Internet at www.dod.mil/comptroller/fmr/.

¹¹ Id. at Paragraph 290502.

¹² 10 U.S.C. App. § 520(1).

¹³ 10 U.S.C. App. § 520(4).

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 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. USFSPA 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.

¹⁴ 10 U.S.C. § 1408(d)(2).

The amount of a former spouse's award is entirely a matter of state law. However, in order for the award to be enforceable under the USFSPA, it must be expressed in a manner consistent with the USFSPA, and the court order must provide us with all the information necessary to compute the award.

The major reason we reject applications for payments under the USFSPA is that the language dividing retired pay is faulty. The USFSPA states that for an award to be 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 (COLAs).¹⁶ Because of the significant effect of COLAs 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 COLAs.

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 amount of the former spouse's award is expressed 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 is acceptable, but another provision of the court order requires that a set-off amount be deducted from the former spouse's share, only the set-off is unenforceable. This is because there is no provision of the USFSPA that authorizes enforcement of a set-off against the former spouse's retired pay as property award. 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.

¹⁵ 10 U.S.C. §1408(a)(2)(C).

¹⁶ DoDFMR, vol. 7B, Paragraph 291103 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 DoDFMR, vol. 7B, Paragraph 290606.

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

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

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

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. 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.

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 Although this proposed regulation has never been finalized, it still provides the basis for our review of these types of 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 $\frac{1}{2}$.

(1) 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:

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).

“The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying 50% 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.”

(2) 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 during the marriage, 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 50% 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.”

c. Hypothetical awards based on the member’s pay at the time the court divides retired pay.

A hypothetical award is an award based on a retired pay amount different from the member’s actual retired pay. It is usually figured as if the member had retired on the date of separation or divorce. Many jurisdictions use hypothetical awards to divide military retired pay. Unlike a formula award, a hypothetical award does not give the former spouse the benefit of any of the member’s pay increases due to promotions or increased service time after the divorce.

(1) The basic method for computing military retired pay is to multiply the member’s retired pay base times the retired pay multiplier.²³ For members entering military service before September 8, 1980, the retired pay base is the member’s final basic pay.²⁴ For members entering military service after September 7, 1980, the retired pay base is the average of the member’s highest 36 months of basic pay.²⁵ This will usually be the last 36 months prior to retirement.

²² Id.

²³ DoDFMR, Vol. 7B, Paragraph 030102.

²⁴ Id. at Subparagraphs 030102.A through C.

²⁵ Id. at Subparagraph 030108.C.

The retired pay multiplier is the product of two and one-half percent times the member's years of creditable service.²⁶ For members who entered military service on or after August 1, 1986, who are under the age of 62, and who elect to participate in the CSB/REDUX retirement system, their retired pay multiplier is reduced one percentage point for each full year of service less than 30, and 1/12th of one percent for each full month.²⁷ Their retired pay is recomputed without the reduction when the member attains age 62. 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 360.²⁸

(2) The hypothetical retired pay amount is computed the same way as the member's actual military retired pay, but based on variables that apply to the member's hypothetical retirement date. **These variables must be provided to us in the applicable court order. Failure to do so will cause the court order to be rejected.** The court order must provide: 1) the hypothetical retired pay base, and 2) the hypothetical years of creditable service (or reserve points, in the case of a reservist). 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. If we are not able to compute a hypothetical retired pay figure from the information provided in the court order, the parties will have to have the court clarify the award.

For members entering military service before February 8, 1980, the hypothetical retired pay base is the member's basic pay at the hypothetical retirement date. Basic pay tables are available at the DFAS website at www.dfas.mil, under Money Matters. Attorneys should be able to obtain the basic pay figure either from the member or from the applicable pay table.

For members entering military service after September 7, 1980, the hypothetical retired pay base is the average of the member's highest 36 months of basic pay prior to the hypothetical retirement date. The "high 36 months" will probably be the last 36 months prior to that date. This information is specific to each member. The pay information can be obtained from either the member during discovery or from his pay center by subpoena. **We at the Garnishment Directorate do not have access to this pay information.** It must be included in the court order dividing military retired pay.

For members who elect to retire under the CSB/REDUX retirement system, we will compute the member's hypothetical retired pay amount using the standard retired pay multiplier, and not the reduced CSB/REDUX multiplier. Thus, the former spouse's award will not be reduced as a result of the member's electing to receive a Career Status Bonus (CSB) and a reduced retired pay amount.

²⁶ Id. at Subparagraph 030102.D.

²⁷ Id.

²⁸ Id. at Subparagraph 010301.F.

(3) We will convert all hypothetical awards into a percentage of the member's actual disposable retired pay according to the following method set forth in the proposed regulation.²⁹

Assume that the court order awards the former spouse 25% of the retired pay of an E-6 with a retired pay base of \$2,040 and with 18 years of service retiring on June 1, 1997. The member's hypothetical retired pay is $\$2,040 \times (.025 \times 18) = \918 . The member later retires on June 1, 2002, as an E-7 with a retired pay base of \$3,200.40 and 23 years of service. The member's actual gross retired pay is $\$3,200.40 \times (.025 \times 23) = \$1,840$.

The former spouse's award is converted to a percentage of the member's actual disposable retired pay by multiplying 25% times $\$918/\$1,840$, which equals 12.4728%. This converted percentage is the former spouse's award, and will be set up in the retired pay system. While the percentage 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. This percentage will be applied each month to the member's disposable retired pay to determine the amount the former spouse receives. The former spouse will automatically receive a proportionate share of the member's cost of living adjustments (COLAs).³⁰

The hypothetical retired pay amount is a fictional computation, since the member is not actually retiring as of the date his or her retired pay is divided. Our goal in computing a hypothetical retired pay award is to make the computation in a way that is reasonable and equitable to both the member and former spouse. In order to do this, we will compute the hypothetical award as if the member has enough creditable service to qualify for military retired pay as of the hypothetical retirement date, even if he or she did not.

Also, a member who retires with less than 20 years of creditable service has a reduction factor applied to his or her retired pay computation.³¹ But the only time we will apply a reduction factor to the hypothetical retired pay calculation is if a reduction factor was actually used to compute the member's military retired pay. In that case, we would apply the same reduction factor to both computations to achieve equity.

For members who elect to retire under the CSB/REDUX retirement system, we will recompute the former spouse's percentage award when the member attains age 62, and his retired pay is adjusted to the amount he would have received had the member not elected CSB/REDUX. It is the member's responsibility to provide us with his birth date to ensure that we are able to make this adjustment.

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

²⁹ 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).

³⁰ See DoDFMR, Vol. 7B, Paragraph 290606.

³¹ Id. at Subparagraph 030110.A.

“The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired with a retired pay base of _____ and with _____ years of creditable service.”

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

“The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of _____ and with _____ reserve retirement points.”

d. Hypothetical awards based on the pay table in effect at the time a member becomes eligible to receive military retired pay.

The court order may direct us to calculate a hypothetical retired pay amount using the pay table in effect at the time the member becomes eligible to receive military retired pay, instead of the pay table in effect at the time the court divides military retired pay. If this is the case, then the court order dividing an active duty member’s military retired pay must provide us with: 1) the percentage awarded the former spouse, 2) the member’s rank to be used in the calculation, and 3) the years of creditable service to be used in the calculation. For reserve retirements, the court order must provide us with: 1) the percentage awarded the former spouse, 2) the member’s rank to be used, 3) the reserve retirement points to be used, and 4) years of service for basic pay purposes.

We will make the hypothetical retired pay calculation using the basic pay figure from the pay table in effect at the member’s retirement for the rank and years of service given in the court order. This will apply whether or not the member is a “high 36” retiree.

The following language is an example of an acceptable active duty hypothetical award based on the pay table in effect at the member’s retirement.

“The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of _____ and with _____ years of creditable service.”

The following language is an example of an acceptable reserve hypothetical award based on the pay table in effect at the member’s becoming eligible to receive military retired pay.

“The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on the date he [or she] attained age 60, with the rank of _____, with _____ reserve retirement points, and with _____ years of service for basic pay purposes.”

e. 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 2/1/05.