UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

ATTORNEY INSTRUCTION

DIVIDING MILITARY RETIRED PAY

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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 Servicemembers Civil Relief Act (SCRA)[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 for the division of retired pay as property.[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 10 years or more while the member performed at least 10 years of service creditable towards retirement eligibility 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] It also provides a former spouse with a means of enforcing an alimony and/or child support award.[9]

II. DOCUMENTS NEEDED TO DIVIDE MILITARY RETIRED PAY.

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

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[1] McCarty v. McCarty, 453 U.S. 210 (1981)
[2] Id. at 232.
[3] *See* Servicemembers Civil Relief Act, 50 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).
[9] See 10 U.S.C. § 1408(a)(2)(B); 10 U.S.C. § 1408(d)(1).

a court ordered, ratified, or approved property settlement incident to such a decree."[10] 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 pertinent 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, 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/garnishment/ retiredmilitary.html.

III. REQUIREMENTS FOR ENFORCEABILITY UNDER USFSPA.

A. Servicemembers Civil Relief Act.

The provision of the SCRA 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] 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 SCRA grounds.[13] Thus, this provision of the SCRA does not apply to a member with an active duty divorce where the member has been retired for more than 90 days.

B. Requirements that Apply to Retired Pay as Property Awards Only

(1) The 10/10 requirement.

This is a "killer" requirement. For a division of retired pay as property award to be enforceable by direct payments 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

[10] 10 U.S.C. § 1408(a)(2).
[11] Department of Defense Financial Management Regulation (DoDFMR), volume 7B, subparagraph 290401.A. Available over the Internet at www.defenselink.mil/comptroller/fmr/07b/index.html.
[12] 50 U.S.C. App. § 521(b).
[13] 50 U.S.C. App. § 521(g)(2).

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 enforce the award by direct payments from DFAS. This is a statutory requirement for direct payments, 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 rather have DFAS pay the former spouse directly as it would lessen contact with the former spouse. Also, if DFAS pays the former spouse directly, the former spouse's USFSPA payments would be reported on her or his own Form 1099-R, instead of all taxable retired pay being reported on the member's Form 1099-R.

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, unless the marriage certificate shows otherwise.

(2) 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.[15] 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 at the time of divorce other than because of his or her military assignment, or for the court to find that the member was domiciled in the particular State at the time of the divorce. Now, the key with regard to domicile is that the court makes this determination, and it should be noted in the divorce decree.

IV. LANGUAGE DIVIDING MILITARY RETIRED PAY.

A. Fixed dollar amount or percentage awards.

The 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

[14] 10 U.S.C. § 1408(d)(2).
[15] See Baka v. United States, 74 Fed. Cl. 692,698 (2006). See also DoDFMR, vol. 7B, subparagraph 290604.A.3.

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 a retired pay as property award to be enforceable, it must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay.[16] For a fixed dollar amount award, a monthly amount needs to be provided in the court order. 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).[17] 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.[18] The authorized deductions vary based on the date of the parties' divorce.[19] The principal deductions now include retired pay waived to receive VA disability compensation, disability retired pay, and Survivor Benefit Plan (SBP) premiums where the former spouse is elected as the former spouse beneficiary. Since the United States Supreme Court has ruled that Congress authorized the division of only disposable retired pay, not gross retired pay,[20] the regulation provides that all percentage awards are to be construed as a percentage of disposable retired pay.[21]

Set-offs against the former spouse's award are not permitted.[22] 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. Also, the amount of the former spouse's award is indeterminate, and there is no way for us to set it up in the retired pay system.

If the award language is otherwise acceptable, but another provision of the court order requires that a set-off amount be deducted from the former spouse's share (such as an SBP premium or the former spouse's child support obligation), 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

[16] 10 U.S.C. §1408(a)(2)(C).
[17] DoDFMR, Vol. 7B, Subparagraph 290601.C. provides for automatic COLAs only for awards expressed as a percentage of disposable retired pay.
[18] 10 U.S.C. § 1408(a)(4)(amended 1986, 1990).
[19] DoDFMR, Vol. 7B, Paragraph 290701 provides a list of the authorized deductions by divorce date.
[20] Mansell v. Mansell, 490 U.S. 581.
[21] DoDFMR, Vol. 7B, Paragraph 2906016. D.
[22] DoDFMR, Vol. 7B, Paragraphs 290610, 290903.

retired pay only as set forth by the USFSPA.[23] Thus, state court provisions not in accordance with the USFSPA are unenforceable.

There is no magic language required to express a percentage or fixed dollar award. All the divorce decree needs to say is the following:

Example 1: "The former spouse is awarded _____ percent [or dollar amount per month] of the member's disposable military retired pay."

B. Introduction to formula and hypothetical retired pay awards.

Most of the problems with award language have arisen in cases where the parties were divorced while the member was still performing military service. In these cases, the former spouse's award was indeterminate at time of divorce since the member has not yet retired. Since the parties did not know how much longer the member would remain in military service after the divorce, a straight percentage award may not have been 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 were often drafted in such a way that we could not determine the amount of the award. This caused the parties to have to go back to court and obtain a clarifying order.

A proposed regulation was issued in 1995 that provided for the use of formula and hypothetical retired pay awards to divide military retired pay when the parties were divorced prior to the member's becoming eligible to receive retired pay.[24] Although this proposed regulation was never finalized, it provided the basis for our review of these types of awards and the basic procedures for computing them. We have refined the procedures since then, and they are now incorporated into Chapter 29 of the DoDFMR.[25] We discuss these procedures below. In addition, we provide examples of acceptable award language below. These examples are also set forth in our sample Military Retired Pay Division Order, which is included as Appendix A to this Instruction, and also included as Appendix A to Chapter 29 of the DoDFMR.[26]

C. Formula Awards.

A formula award is an award expressed in terms of a marital fraction, where the numerator covers the period of the parties' marriage while the member was performing creditable military service, and the denominator covers the member's total period of creditable military service. The former spouse's award is usually calculated by multiplying the marital fraction by ½ or 50%. Since a formula award works out to a percentage of disposable retired pay, it would be a type of percentage award, and as such would automatically include a proportionate share of the member's COLAs.[27]

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

[24] 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).

[25] DoDFMR, Volume 7B, Paragraphs 290607 (formula awards) and 290608 (hypothetical retired pay awards).

[26] DoDFMR, Volume 7B, Appendix A (Figure 1).

[27] DoDFMR, Volume 7B, Subparagraph 290601.C.

For members retiring from active duty, the numerator is usually 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.[28] If the numerator is expressed in terms of years or days, we will convert it to months. We will then drop any odd days or partial months. We will supply the denominator in terms of whole months of service creditable for retirement eligibility, 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 formula given above, the former spouse would be entitled to ½ x (144/300) = 24.0000% of the members disposable retired pay.

Example 2. The following language is an example of an acceptable way to express an active duty formula award:

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

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.[29] **Failure to list the reserve points earned during the marriage in the court order will cause the court order to be rejected.** We at Garnishment Operations do not have access to a reserve member's points. DFAS will supply the member's total reserve retirement points for the denominator. All fractions will be carried out to six decimal places.

Example 3. 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."**

D. Hypothetical retired pay awards.

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[28] DoDFMR, Volume 7B, Subparagraph 290607.B.
[29] Id.

(1) Introduction. A hypothetical retired pay award (or hypothetical award) is an award expressed as a percentage of a hypothetical 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. Some 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. Since a hypothetical award also works out to a percentage of disposable retired pay, it too would be a type of percentage award, and as such would automatically include a proportionate share of the member's COLAs.[30]

The basic method for computing military retired pay is to multiply the member's retired pay base times the retired pay multiplier.[31] For members entering military service before September 8, 1980, the retired pay base is the member's final basic pay.[32] 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.[33] This will usually be the last 36 months prior to retirement. The retired pay computation is rounded down to the next lower multiple of $1.[34]

The standard retired pay multiplier is the product of two and one-half percent times the member's years of creditable service.[35] 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.[36] Their retired pay is recomputed using the standard multiplier 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.[37]

A hypothetical retired pay amount is computed the same way as a member's actual military retired pay, but based on variables that apply to the member's hypothetical retirement**.** The necessary variables are shown as blanks in the following examples of acceptable award language. 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. **These variables must be provided to us in the applicable court order. Failure to do so will cause the court order to be rejected.**

For members entering military service before September 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 Web site at www.dfas.mil/militarypay/militarypaytables.html. Attorneys should be able to obtain the basic pay figure either from the member or from the applicable pay table.

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[30] DoDFMR, Volume 7B, Subparagraph 290601.C.
[31] DoDFMR, Vol. 7B, Paragraph 030102.
[32] Id. at Subparagraphs 030102.A through C.
[33] Id. at Subparagraph 030108.C.
[34] Id. At Subparagraph 030109.A.
[35] Id. at Subparagraph 030102.D.
[36] Id.
[37] Id. at Subparagraph 010301.F.

For members entering military service after September 7, 1980, the hypothetical retired pay base would normally be the average of the member's highest 36 months of basic pay prior to the hypothetical retirement 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.

The hypothetical retired pay amount is a fictional computation, since the member often does not have the required 20 years of creditable service necessary to be eligible to receive retired pay on 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 had 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 may have a reduction factor applied to his or her retired pay computation.[38] But the only time we would 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.

(2) Example of a hypothetical retired pay calculation. We will convert all awards of a percentage of a hypothetical retired pay amount into a percentage of the member's actual disposable retired pay according to the following method.

(a) First, we calculate the hypothetical retired pay amount. Assume that the court order awarded 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, 1999. *The member's hypothetical retired pay multiplier would be .025 x 18 = .45. His hypothetical retired pay would be .45 x $2,040 = $918.00.*

(b) Next, we apply retired pay COLAs to the hypothetical retired pay amount up to the member's actual retirement date to find a "present value" of the hypothetical retired pay as of the member's actual retirement date. *This adjustment does not result in the former spouse benefiting from the member's additional service time or promotions after the hypothetical retirement date.*

[38] Id. at Subparagraph 030110.A.

It simply provides the former spouse with the amount he or she would have received had the member actually become eligible to receive retired pay on the hypothetical retirement date.[39]

In our example, the member would have been eligible for the following COLAs had he retired on June 1, 1999[40]*:*

December 1, 1999	1.7%	$918.00 x 1.017 = $933.00
December 1, 2000	3.5%	$933.00 x 1.035 = $965.00
December 1, 2001	2.6%	$965.00 x 1.026 = $990.00.

Thus, if the member had retired on the hypothetical retirement date (June 1, 1999), his hypothetical retired pay would have been worth $990.00 per month at the time he actually retired on June 1, 2002.

(c) *We then convert the former spouse's award to a percentage of the member's actual disposable retired pay by multiplying the percentage awarded the former spouse times a fraction. The member's hypothetical retired pay is the numerator of the fraction, and the member's actual retired pay is the denominator.*

In our example, assume that the member later retired on June 1, 2002, as an E-7 with a retired pay base of $3,200.40 and 23 years of creditable service. The member's actual retired pay multiplier would be .025 x 23 = .575. His gross retired pay would be .575 x $3,200.40 = $1,840.00. The former spouse's actual award percentage would be: 25% times $990/$1,840 = 13.4510%. We would set up 13.4510% in the retired pay system.

While the percentage has been reduced from 25% to 13.4510%, the amount the former spouse would receive is the amount intended by the court. This is because the lower percentage would be multiplied times the higher dollar amount of the member's actual disposable retired pay. For example, in this case assume that the member's disposable retired pay is equal to his gross retired pay. Twenty-five percent of $990 is $247, which equals 13.4510% of $1,840. The retired pay system would apply 13.4510% to the member's actual disposable retired pay each month to determine the amount the former spouse receives. The former spouse would automatically receive a proportionate share of the member's cost of living adjustments (COLAs).[41]

For CSB/REDUX members, we compute the former spouse's initial percentage using the member's reduced retired pay amount as the denominator of the fraction. We implement this percentage in the retired pay system effective through the month the member attains age 62. We also calculate the former spouse's percentage using the retired pay amount the member would have received had the member not elected CSB/REDUX. We set this lower percentage up in the retired pay system effective on the first day of the month after the member attains age 62, which is also the effective date of the recomputation of the member's retired pay to the amount the

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[39] *See DoD Report to Congress Concerning Federal Former Spouse Protection Laws, page 72, dated September 5, 2001, available at http://prhome.defense.gov/spouserev.html.*
[40] *See DoDFMR, Vol. 7B, Chapter 8, Subchapter 0804.*
[41] See DoDFMR, Vol. 7B, Paragraph 290601.C.

member would have received had the member not elected CSB/REDUX.[42] *This prevents the former spouse from receiving more than the amount intended in the court order.*

(3) Examples of active duty hypothetical awards. The following are examples of acceptable active duty hypothetical awards.

Example 4. The following language is acceptable for all active duty members, regardless of service entry date.

"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 on _____."

Example 5. If a member entered military service before September 8, 1980, the following language is also acceptable because we can determine the member's retired pay base by simply looking at the pertinent military pay table.

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired with the rank of _____ and with _____ years of creditable service on _____."

The court order may direct us to calculate a hypothetical retired pay amount using the pay tables 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.

We will make the hypothetical retired pay calculation using the basic pay figure from the pay tables in effect at the member's retirement for the rank and years of service given in the court order, for both members who entered military service before September 8, 1980, and for members who entered military service on or after September 8, 1980.

Example 6. The following language is an example of an acceptable active duty hypothetical award based on the pay tables 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."

(4) Examples of reserve hypothetical awards. The following are examples of acceptable reserve hypothetical awards.

Example 7. The following language is acceptable for all reserve members, regardless of service entry date.

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[42] DoDFMR, Vol. 7B, Subparagraph 030111.B.

"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 on _____."

Example 8. The following language is also acceptable for reservists who entered military service before September 8, 1980.

"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 _____, with the rank of _____, with _____ reserve retirement points, and with _____ years of service for basic pay purposes."

If the court order directs us to calculate a hypothetical retired pay amount using pay tables in effect at the time the member becomes eligible to receive retired pay, 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 tables in effect at the member's retirement for the rank and years of service given in the court order, for both members who entered military service before September 8, 1980, and for members who entered military service on or after September 8, 1980.

Example 9. The following language is an example of an acceptable reserve hypothetical award based on the pay tables 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.

Problems with award language usually occur when the parties are divorced prior to the member's becoming eligible to receive military retired pay. The examples given below represent common mistakes we see in court orders attempting to divide military retired pay.

(1) "The former spouse is awarded one-half of the community interest in the member's military retired pay."

Here, we are not told how to calculate the community interest. Nor are we provided with any of the variables necessary to make such a calculation using either a formula or hypothetical retired pay award.

(2) "The former spouse is awarded one-half of the member's military retirement that vested during the time of the marriage."

Military retired pay is a federal entitlement, which a member either qualifies for or does not. It does not vest in any way prior to the member's retirement. As with the above example, we are not provided with any information as to how to calculate the amount of the former spouse's award.

(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."

This example is similar to example (2) above. As with example (2), since military retired pay is a statutory entitlement, it has no accrued value prior to the member's retiring. Again, we are not provided with any information as to how to calculate the amount of the former spouse's award.

(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."

This appears to be intended as a hypothetical award, but it does not provide us with any of the variables needed to calculate a hypothetical retired pay amount. Since we do not have access to the member's military service information, there is no practical way for us to obtain the needed information ourselves.

(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 presumes that we are familiar with that State's laws and know what the Bangs formula is. We are not able to research individual cases to resolve ambiguities in court orders. Also, the court order does not provide us with any of the necessary variables.

(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, or as an acceptable formula or hypothetical award. This award does not meet that requirement. If the court order awarded the former spouse 50% of the member's disposable retired pay, but then later in the order it stated that the amount of the Survivor Benefit Plan (SBP) premium would be deducted from the former spouse's share, we could honor the case at 50%. The provision concerning the SBP premium would be unenforceable since Federal law provides that the SBP premium must be deducted from the member's retired pay.[43]

F. Correcting deficient awards.

[43] 10 U.S.C. § 1452(a)(1); DoDFMR, Vol. 7B, Paragraph 450601.

If we are not able to determine the amount of the former spouse's award from the information provided in the court order, the former spouse has two alternatives. One alternative is for the former spouse to obtain a new court order clarifying the former spouse's retired pay as property award by expressing it in an acceptable manner. The other alternative is for the former spouse to provide us with any missing information by submitting a notarized agreement with the information signed by both the former spouse and member.[44] If the parties wish, they may provide us with the fixed dollar amount or percentage of disposable retired pay the former spouse is to receive. We are including our standard notarized agreement form as Appendix B of this Instruction for that purpose. The parties may want to consult their attorneys before executing any such agreement in lieu of a clarifying order.

IV. ACKNOWLEDGEMENT.

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 January 4, 2010.

[44] DoDFMR, Vol. 7B, Subparagraphs 290607.B. and 290608.E.

APPENDIX A

STATE OF _____ COURT OF _____
COUNTY OF _____ CASE NO. _____

_____
PETITIONER

MILITARY RETIRED PAY DIVISION ORDER

_____
RESPONDENT

THIS CAUSE CAME BEFORE THE UNDERSIGNED JUDGE UPON THE PETITIONER/RESPONDENT'S CLAIM FOR A DISTRIBUTION OF THE RESPONDENT/PETITIONER'S MILITARY RETIRED PAY BENEFITS. THE COURT MAKES THE FOLLOWING:

FINDINGS OF FACT:

1. The Petitioner's Social Security Number is _____ and current address is _____.

2. The Respondent's Social Security Number is _____ and current address is _____.

3. The Parties were married on _____. Their marital status was terminated on _____ pursuant to a(n) _____entered in _____ County, State of _____. This current order is entered incident to the aforementioned order.

4. The parties were married for a period of ten or more years during which time the Petitioner/Respondent performed at least ten years of creditable military service.

5. If the military member was on active duty at the time of this order, Respondent/Petitioner's rights under the Servicemembers' Civil Relief Act, 50 U.S.C App. 501-548 and 560-591, have been observed and honored.

6. This court has jurisdiction over the Respondent/Petitioner by reason of [choose those that apply] (A) his or her residence, other than because of military assignment, in the territorial jurisdiction of the court, during the [divorce, dissolution, annulment, or legal separation] proceeding, (B) his or her domicile in the territorial jurisdiction of the court during the [divorce, dissolution, annulment, or legal separation] proceeding, or (C) his or her consent to the jurisdiction of the court.

CONCLUSIONS OF LAW:

1. This court has jurisdiction over the subject matter of this action and the parties hereto.

2. Petitioner/Respondent is entitled to a portion of Respondent/Petitioner's United States military retired pay as set forth herein.

IT IS THEREFORE ORDERED THAT:

[Choose and complete one of the following. Please note that all awards expressed as a percentage of disposable retired pay, including formula hypothetical awards, will automatically include a proportionate share of the member's cost-of-living adjustments (COLAs) unless this order states otherwise. Also, hypothetical retired pay amounts will be adjusted for all retired pay COLAS from the hypothetical retirement date to the member's actual retirement date, unless this order states otherwise.]

[Retired member] **"The former spouse is awarded ___ percent [or dollar amount per month] of the member's disposable military retired pay."**

[Active duty formula] **"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."**

[Reservist formula] **"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."**

[Active duty hypothetical calculated as of time of division, for all members regardless of service entry date] **"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 on _____."**

[Active duty hypothetical calculated as of time of division; may only be used for members entering service before 9/1/80] **"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired with the rank of _____ and with _____ years of creditable service on _____."**

[Active duty hypothetical calculated as of member's actual retirement date **"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."**

[Reservist hypothetical calculated as of time of division, for all members regardless of service entry date] **"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 on _____."**

[Reservist hypothetical calculated as of time of division; may only be used for members entering service before 9/1/80] **"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 _____, with the rank of _____, with _____ reserve retirement points, and with _____ years of service for basic pay purposes."**

[Reservist hypothetical calculated as of the date the member becomes eligible to receive 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."**

This _____ day of _____, 200__.

_____
JUDGE

APPENDIX B

NOTARIZED STATEMENT OF THE PARTIES CLARIFYING
THE COURT ORDER DIVIDING MILITARY RETIRED PAY

WE, THE UNDERSIGNED, MUTUALLY AGREE TO DIVIDE THE MILITARY RETIRED PAY, AS PROPERTY, IN THE FOLLOWING MANNER. THIS AGREEMENT CLARIFIES THE FINAL COURT ORDER ENTERED ON

_____.
DATE OF COURT ORDER AND NAME/LOCATION OF COURT

THE FORMER SPOUSE, _____ IS ENTITLED TO RECEIVE:
NAME OF NON-MILITARY SPOUSE

_____% OF MEMBER'S DISPOSABLE MILITARY RETIRED PAY.
PERCENTAGE

OR

$_____ PAID MONTHLY FROM THE MEMBER'S DISPOSABLE RETIRED PAY.
SPECIFIC AMOUNT

THE PARTIES ACKNOWLEDGE THAT THIS AGREEMENT IS IRREVOCABLE EXCEPT BY SUBSEQUENT COURT ORDER. THEY ALSO AGREE THAT THE DEFENSE FINANCE AND ACCOUNTING SERVICE (DFAS) WILL MAKE PAYMENTS DIRECTLY TO THE FORMER SPOUSE FROM THE MEMBER'S DISPOSABLE RETIRED PAY. THE PARTIES ALSO UNDERSTAND THAT COST OF LIVING INCREASES (COLAS) CAN ONLY BE MADE ON AWARDS EXPRESSED AS A PERCENTAGE. COLAS CANNOT **BE MADE ON AWARDS EXPRESSED AS A SPECIFIC AMOUNT.**

_____

_____
MEMBER **FORMER SPOUSE**

MEMBER'S SOCIAL SECURITY NUMBER: _____

BEFORE ME APPEARED, _____ AND SHOWING PROOF OF IDENTIFICATION (BY DRIVER'S LICENSE/GOVERNMENT/MILITARY ID) AND SIGNED HIS/HER NAME AT THE PLACE INDICATED ABOVE.
SWORN BEFORE ME THIS _____ DAY OF _____, _____

_____
NOTARY PUBLIC

BEFORE ME APPEARED, _____ AND SHOWING PROOF OF IDENTIFICATION (BY DRIVER'S LICENSE/GOVERNMENT/MILITARY ID) AND SIGNED HIS/HER NAME AT THE PLACE INDICATED ABOVE.
SWORN BEFORE ME THIS _____ DAY OF _____, _____

_____
NOTARY PUBLIC