

# Division of Military Retired Pay

*DISCLAIMER: The information contained in this fact sheet is of a general nature and is provided for your assistance. It is not intended as legal advice and is not a substitute for legal counsel. If you have any questions as to how the law affects you or your legal rights, contact your civilian attorney or the Eglin AFB Legal Office at (850) 882-4611 for an appointment with a licensed attorney.*

The Uniformed Services Former Spouses Protection Act (USFSPA) gives state courts the option to treat disposable military retired pay payable after June 25, 1981 in three different ways in proceedings for divorce, dissolution of marriage, annulment, or legal separation. The pay may be treated as the member's separate property, marital property subject to equitable distribution, or community property (depending on the type of property division used in your state). If the pay is separate property, the state court will not divide it between the member and his former spouse. If the pay is marital property, the court will divide it between the member and his spouse in an "equitable" distribution, which is whatever shares the court believes each spouse is entitled to. If you do not know how your state treats military retired pay, you should make an appointment to speak to an attorney.

Most states, including Florida, have either through statutory law or through case precedent authorized the division of military retired pay as a type of marital property. That means that in Florida, the state family law judge will look at the retirement pay as part of the overall pool of property owned by both the military member and spouse, and divide the pay in an equitable manner between them. The USFSPA also allows military retirement pay to be used as a source of child support or alimony.

Florida divides property through a system of equitable distribution, which means that it will divide property equally unless the totality of the circumstances indicates that a greater award to one spouse is warranted. Florida Statute § 61.076(1) states that "all vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs are marital assets subject to equitable distribution." This includes military retirement pay, to the extent authorized by law.

## **Subject Matter and Personal Jurisdiction**

A court can only order the division of retirement pay if it has the authority to do so, which means it must have jurisdiction over both the subject matter of the case and over the parties. A court has subject matter jurisdiction over a case if it has the constitutional or legislative authority to grant the relief that a party is seeking. Subject matter jurisdiction may never be waived, and a court's lack of subject matter jurisdiction may be raised by either party at any time, including on appeal. An order issued by a court without subject matter jurisdiction is not a valid order. (Note that subject matter jurisdiction should not be confused with venue, which is a jurisdiction's method of deciding which of many courts with subject matter jurisdiction should hear a particular case. Objections to improper venue are waived if not timely raised at trial.)

A court has personal jurisdiction if it has jurisdiction over the parties to a specific case. Constitutionally, a court may only exercise personal jurisdiction over people who have some type of minimum contacts with the forum state. Traditionally, a court has proper jurisdiction over a party if they are availing themselves of the court system in the forum by bringing the proposed action, if the party is personally served within the forum state, if the party is a legal resident of the forum state, or if the party either expressly or impliedly consents to jurisdiction. However, these are not the only methods to obtain personal jurisdiction over parties to a case. For instance, most states employ a matrimonial long arm statute to obtain jurisdiction over nonresident defendants in divorce cases

whenever possible. Additionally, personal jurisdiction may be waived. Jurisdiction and venue are complicated issues, so if you have a question about whether a court has appropriate jurisdiction in a matter, you should make an appointment to speak to a lawyer.

The USFSPA limits the methods of obtaining jurisdiction to divide the military member's retirement pay to those based upon the member's legal residence or domicile in the state, his or her actual residence in the state for a reason other than military service, or his consent to the jurisdiction of the court. Therefore, if the court bases its jurisdiction over the defendant on some other method, such as personal service within the state, it will **NOT** have the power to divide military retired pay, even though it may have the authority to divide other assets between the spouses.

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 unavailability and deployment status 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) must be met before an award dividing military retired pay can be enforced under the USFSPA.

### **What Pay is Divided**

When a court does have proper jurisdiction under the laws of the forum state and under the USFSPA, it may order the division only of *disposable* retired pay, not all retired pay. As defined in 10 U.S.C. Section 1408(a)(4), disposable retired pay is all the monthly retired pay that the military member, or former member, is entitled to, including retainer pay, less the following deductions:

- (1) Amounts owed by the member to the government for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
- (2) Amounts deducted from retirement pay due to forfeitures ordered by a court-martial or as a result of a waiver of retired pay required by law to receive certain types of other compensation (authorized by Title 5 or Title 38 of the U.S. Code). Note that a member may not voluntarily waive retirement pay for other reasons in order to avoid paying a percentage to the former spouse.
- (3) Amounts that are identified as compensation for a service-related disability; and
- (4) Amounts, which are deducted because of an election to provide an annuity to a spouse or former spouse to whom payment of some portion of the member's retired pay is being made under this law.

In a 2017 court case, *Howell v. Howell*, the United States Supreme Court held that a state court *may not* consider disability pay as marital property when dividing retirement benefits. That means that the state court *both* cannot award the military member's spouse any portion of military disability pay, and cannot increase the amount of other assets the spouse receives (such as military retired pay) based on the fact that the military member is receiving disability pay. This means that if the military member is receiving or later receives military disability pay, the corresponding reduction of the retirement pension reduces the amount of pay the spouse can be awarded in the divorce. This can be waived, by agreement of the spouses. If the military member and spouse come to an agreed distribution of property, that agreement can contain a provision that states that the military member will increase the amount of retirement pay the spouse receives to make up for any change in the amount of the retirement pay caused by the member's receipt of military disability pay.

### **Award Calculation**

USFSPA states that the spouse's award of retirement pay must be expressed in either a fixed dollar amount or a percentage of the disposable retirement pay. Although the manner in which retired pay is divided is up

to the discretion of the court, most courts employ a standard formula to determine what percentage of the military member's retired pay it will award to the former spouse. This formula is only a guideline, so it is not binding on the court. The formula states:

Overlap of the number of years couple was married, and not separated, while military member in service (expressed in months) divided by number of years the military member was in service (also expressed in months) The resulting fraction is multiplied by 1/2 to give the percentage of military retired pay to which the former, non-military spouse is entitled as a division of marital property.

Or:  $\frac{\text{Years Married and Not Separated While Member Was in Service (in months)}}{\text{Total Years Member Was in the Service (in months)}} \times 1/2$

An example illustrates how this works in practice: assume that MSgt John Doe has served in the Air Force for 20 years. He has been married to Jane Doe for 10 of those years. Aside from TDYs and unaccompanied overseas tours, which do not count as being separated, they have lived together for the entire 10 years. If they divorce, then pursuant to the above formula, Mrs. Doe may receive 25% of her husband's disposable military retired pay. She would not get this share if MSgt Doe leaves the military before retirement.  $120$  (10 years x 12 months) divided by  $240$  (20 years x 12 months) equals  $1/2$ , or  $.50$ , which when multiplied by  $.50$  equals  $.250$ , or 25%.

Note that the formula includes only the years that the couple was married *and not separated* while the military member was in service. Times that the couple was separated do not include separations due to TDY or remote assignments.

However, if the former spouse knowingly and voluntarily waives his or her right to claim a portion of the retirement pay in either a prenuptial or antenuptial agreement recognized by the court to be valid, or in the divorce decree itself, he or she may not later seek a division of the military retired pay in any form.

### **Future Retired Pay**

A court **CAN** order the division of future retired pay, even if the right to receive that pay has not yet vested. That means that the spouse will receive the specified percentage or specified dollar amount awarded to him or her by the court *when and if* the members becomes eligible for, and starts to collect, retired pay. The court **CANNOT** order a military member to retire. Nor can a court order a military member to stay in the military long enough to become retirement eligible. If the member leaves military service before becoming retirement eligible, the provision of the court order awarding part of his or her retirement awarded to the former spouse will be ineffective, since there is no retired pay to divide.

For all divorces with orders finalized after 23 December 2017, any award of future retirement pay is calculated out of, and limited to, the amount of basic pay payable to the member for the member's pay grade and years in service at the time of the court's order. As an example, if a spouse is awarded 50% of the future retirement pay of a 10 year Staff Sergeant, that spouse only gets 50% of what the pay *would have been* if the member retired as a 10 year Staff Sergeant, not the full amount received when the member eventually retires as a 20 year Senior Master Sergeant.

The share of the member's retired pay that is awarded to the former spouse is personal to the spouse, and may not be sold, transferred, or otherwise assigned. Likewise, the member's right to receive retired pay is also personal, and cannot be sold, transferred, or assigned to defeat the claims of the former spouse or for any other reason. The right to payments under the USFSPA ends upon the death of the military member or the former spouse, unless a court order terminates the payments earlier.

## **Survivor Benefit Plan**

As part of a divorce decree or court order directing the division of military retired pay, a court may order the military member to maintain, and to designate the former spouse as beneficiary, of the military Survivor Benefit Plan (SBP). The SBP is essentially a government-subsidized annuity that provides continued financial security for eligible dependents after payments of military retired pay cease because of the death of the retired member. This will ensure that the former spouse will continue to receive payments after the retired member dies, though the amount of those payments will not necessarily be the same. More detailed information on the SBP may be obtained from the base Military Personnel Flight.

## **Applying for Payment from DFAS**

In some cases, the former spouse may receive payment of the share of the member's retirement pay that he or she was awarded directly from the DFAS Finance Center in Cleveland. This option is available if:

- (a) he or she were married to the military member for at least 10 years while the member was performing at least 10 years of retirement-creditable military service (this requirement does not apply to enforcement of child support or alimony awards), and
- (b) the divorce decree or court order expresses payment of the retired pay to the former spouse in a dollar figure or as a percentage of the member's disposable military retired pay. Direct payment is also possible if the court divides the member's retired pay as alimony or child support.

To apply for payment, the former spouse must sign and complete DD Form 2293 (available from the DFAS website), attach a copy of the applicable divorce decree or court order certified by the clerk of court within the last 90 days, and send this package by facsimile or mail to:

Defense Finance and Accounting Service Cleveland  
DFAS-HGA/CL  
P.O. Box 998002  
Cleveland, Ohio 44199-8002

In the application, the former spouse should state which awards he or she is seeking to enforce (*i.e.*, alimony, child support, and/or division of retired pay as property). Without this information, only awards of retired pay will be enforced. The former spouse should also indicate the priority of the awards to be enforced in case there is not enough disposable retired pay to cover multiple awards.

Payments to the former spouse must begin within 90 days of the date of effective service upon the military service in which the retired member served. If the member has not yet retired at the time the former spouse submits his or her application, payments must begin no later than 90 days after the date on which the member first becomes entitled to receive retired pay. Direct payments to a former spouse from the Finance Center will terminate upon the earliest of:

- (a) satisfaction of the court's order (if some time limit was placed on the duration of the division of the retired pay);
- (b) the death of the retired member; or
- (c) the death of 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 the member has more than one former spouse with claims upon his retirement, the total amounts deducted

from his retired pay each month because of equitable property distribution decrees may not exceed 50%. If multiple court orders would result in a deduction of over 50% if followed, they are satisfied in a first-come, first-served manner, and the more recent decrees may not be fully satisfied. If several former spouses have claims upon the member's retirement because of child support or alimony orders, the total amount deducted to satisfy these orders cannot exceed 65% of the member's retired pay, even if this causes more recent decrees to go unsatisfied.

If you need additional information or need to find out whether a former spouse has retired, you can call DFAS at 888-DFAS411 (1-888-332-7411).

*The material in this handout represents general legal advice. Since the law is continually changing, some provisions in this pamphlet may be out of date. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.*