

2017 MILITARY RETIREMENT UPDATE

2017 AAML Advanced Family Law Conference

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I. JURISDICTION.

- A.** Personal jurisdiction over servicemember alone insufficient to divide military retirement.
- B.** Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(c)(4) requires:
 - 1.** Residence not due to military orders,
 - 2.** Domicile, or
 - 3.** Consent.
- C.** USFSPA preempts state law, and CO lacks subject-matter jurisdiction to divide retirement absent domicile or affirmative conduct of servicemember demonstrating express or implied consent. In re: Marriage of Booker, 833 P.2d 734 (Colo. 1992), In re: Marriage of Akins, 932 P.2d 863 (Colo. App. 1997).
- D.** “Consent” includes filing, owning a house, and may include, anecdotally, actively participating in dissolution proceeding.

II. AUTHORITY TO DIVIDE RETIREMENT

- A. Federal Law.** The 1982 Uniformed Services Former Spouses Protection Act, codified at 10 U.S.C. §1408(a)(4).
 - 1.** Overturned McCarty v. McCarty, 453 U.S. 210 (1981), where Supreme Court ruled that states could not divide military retirement.

2. Authorizes, but not require, states to divide “disposable retired pay”, which is total retired pay minus amounts:
 - a) Owed to U.S. due to previous retired pay overpayments.
 - b) Deducted from retired pay as result of court-martial forfeiture.
 - c) Waived to receive VA Disability.
 - d) Survivor Benefit Plan (SBP) premiums.
3. 2016 changes added “frozen benefit rule” discussed below, which limits disposable retired pay subject to division when servicemember still on active duty at time of dissolution.

B. Colorado. In re: Marriage of Gallo, 752 P.2d 47 (Colo. 1988). Military retirement is divisible property interest.

III. TYPES OF RETIREMENT

A. High 3 (Most commonly seen in DR cases)

1. Service commenced 9/8/1980 or later.
2. Each year of service worth 2.5% of average of highest 36 months of base pay. Per 10 U.S.C. §1409(b). Prior 75% cap at 30 yrs of service abolished in 2007 National Defense Authorization Act.
3. Annual COLA based upon CPI.

B. Final Pay

1. Service commenced before 9/8/1980.
2. Each year of service worth 2.5% of final base pay, no 75% cap.
3. Annual COLA based upon CPI.

C. Redux.

1. Service after 8/1/1986 AND member selected bonus.
2. 1st 20 years of service worth 2% of average of highest 36 months of base pay.
3. Each year of service beyond 20 worth 3.5%, up to 75%.
4. Annual COLA 1% below CPI, with "catch-up" recalculation at age 62.

D. Thrift Savings Plan. Same plan as civilian federal employees, participation voluntary, must elect 1% minimum to defer to Roth or Traditional. No matching except for limited reenlistment incentives, last done in 2008 More Information: <https://www.tsp.gov/index.html>

E. Blended Retirement (NEW FOR 2018). Combines the defined benefit plan with the TSP. Currently 81% of those who join leave the military with no retirement benefit.

1. **Active Duty** - mandatory for all members who join after 1/1/2018, except those with prior service must make election within 30 days. Optional for members who joined 1/1/2006 - 12/31/2017, must make election during 2018 for “legacy” or blended retirement.
2. **Reserves** - Over 4320 points must remain in “legacy” system, under 4320 points may elect, during 2018, to switch to Blended Retirement.
3. **Contribution Limit:** up to \$18.5K/yr into Roth or Traditional TSP.
4. **Government Match.**
 - a) 1% to everyone after 60 days (vests at 2 yrs), even if no member contribution,
 - b) Up to another 4% match (so 5% total) after 2 yrs
5. **Continuation Pay** at 12 yrs service, 2.5-13x monthly base pay (0.5-6.5x for reserves), depending upon duty position.
6. **Defined benefit plan reduced**, receive 2% x yrs service x high 3 instead of 2.5%.
7. **Lump Sum Election.** At retirement, can elect lump sum of 25% or 50% of present value of retirement at 20 yrs, in return for reduced monthly payments.
8. **No spousal consent required.**
9. **More Information:**
 - a) <http://militarypay.defense.gov/BlendedRetirement/>
 - b) <http://militarypay.defense.gov/Portals/3/Documents/BlendedRetirementDocuments/BRS%20Frequently%20Asked%20Questions%205.01.2017.pdf?ver=2017-05-02-095830-163>

IV. “FROZEN BENEFIT RULE”

A. 2017 National Defense Authorization Act enacted on 12/23/2016.

B. Freezes Former Spouse Share of Retirement At Dissolution. Section 641(a) of Act modifies & restructures the definition of “disposable retired pay” in 10 U.S.C.

§1408(a)(4) to add a new (a)(4)(B) which reads: “For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be— the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order, as increased by each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.”

C. Applicable Date. Section 641(b) of the Act states it applies: “The amendments made by subsection (a) shall apply with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States Code, applies that becomes final after the date of the enactment of this Act.”

D. Applies When Still Serving. When already retired, use traditional coverture formula, as there would be no post-dissolution enhancements to pay to exclude.

E. New Formula. Requires calculation of hypothetical share servicemember would be entitled to receive at time of dissolution given rank & time of service when decree is issued, so it’s a two-step process.

- 1. **Calculate hypothetical retirement at time of decree**, ignoring inability to retire with < 20 yrs service cannot yet retire. So a servicemember with 12 years of service at retirement would be entitled to receive 30% of the high-three of his base pay at the time of dissolution (2.5% x 12 years).
- 2. **Modified Coverture Formula** to calculate spousal share based upon service through decree, NOT through retirement. Marital share, to be applied against the hypothetical retirement from step 1, is therefore:

$$\frac{\text{Months of marriage overlapping service}}{\text{Months of service at time of decree}}$$

F. Effect. Reduces spouse’s share of retirement when servicemember still on active duty (someone told me could be situation where it increases, but not provide actual example). Following examples are simplified to show effects, and do not have a precise high-three calculation nor factor in SBP costs.

G. More Information.
<https://www.dfas.mil/garnishment/usfspa/NDAA--17-Court-Order-Requirements.html>

H. Examples. (For simplicity, examples use final pay, not high-3)

Example #1: Major with 20 yrs marriage & service at dissolution, after dissolution, serves another 10 yrs and is promoted to Colonel, retiring with 30 yrs of service. *Former spouse loses \$909/mo, or \$327K over 30 years of retirement.*

Coverture:

66.67% marital share (20/30 yrs)
\$11,328 base pay of Colonel at 30 yrs
\$8496 retirement (2.5% x 30 yrs, or 75%) x \$11,328.
\$2831 Former spouse share (33.33%, or 1/2 of marital share).

Frozen Benefit:

100% marital share (20 yrs / 20 yrs)
\$7865 base pay of Major at 20 yrs
\$3843 retirement (2.5% x 20 yrs, or 50%) x \$7685
\$1922 former spouse share (50% of total, or 1/2 of marital share)

Example #2: Sergeant (E-5) with 5 yrs of marriage & service at dissolution, after dissolution serves another 23 yrs, being promoted to Sergeant Major (E-9), retires with 28 yrs of service. *Former spouse loses \$257/mo, or \$93K over 30 years of retirement.*

Coverture:

17.86% marital share (5/28 yrs).
\$6776 base pay of Sergeant Major at 28 yrs
\$4743 retirement (2.5% x 28 yrs, or 70%) x \$6776
\$424 Former spouse share (8.93%, or 1/2 of marital share).

Frozen Benefit:

100% marital share (5 yrs / 5 yrs)
\$2669 base pay of Sergeant at 5 yrs
\$334 retirement (2.5% x 5 yrs, or 12.5%) x \$2669
\$167 former spouse share (50% of total, or 1/2 of marital share)

V. CALCULATING MARITAL SHARE

A. Coverture Formula. In re: Marriage of Hunt, 909 P.2d 525 (Colo. 1995). "Time Rule" formula, or "coverture" fraction. Spouse's share is one-half of months of marriage overlapping military service, divided by total months of creditable service at time of retirement. Still used for members already retired at dissolution, and non-military defined benefit pension plans.

B. Method of Division: Net Present Value. Authorized by Hunt, presumably still permitted. And Ct is authorized to use NPV even when pension is not yet vested

(i.e. before 20 yrs), per In re: Marriage of Riley-Cunningham, 7 P.3d 992 (Colo. App. 1999).

- C. Method of Division: Deferred Distribution.** Calculate marital share, defer distribution until retirement, per Hunt.
- D. Reserve Jurisdiction.** Wait until actual retirement.
- E. Start Payments At 20 years?** Hunt said defer payment until retirement, but gave spouse benefit of post-dissolution promotions & longevity pay. With new frozen benefit rule, time to argue In re: Marriage of Blake, 807 P.2s 1211, 1213-14 (Colo. App. 1990). “[R]equiring husband to pay wife her share of the monthly pension before actual retirement does not force husband to retire; nor does it penalize him for his decision to continue working. Rather, husband remains able solely to decide when he wishes to retire.”
- F. Reserves/National Guard.** Similar formula applies - marital share is reserve retirement points acquired during marriage divided by total reserve retirement points upon retirement. Per In re Marriage of Beckman, 800 P.2d 1376 (Colo. App. 1990), unvested reserve points are divisible.
- G. Spreadsheet to Calculate Frozen Benefit Share.** See sample at EXH I. Works only for continuous active duty, or for reserves. Original available at: https://docs.google.com/spreadsheets/d/1K38ICFhAdg-aYGpUnRmGyTI8fJo9kiWSXIXdRJU_ygA/edit?usp=sharing. Will need to copy locally to edit. 3rd tab has instructions.

VI. DIRECT PAYMENT FROM DFAS

- A. 10/10 rule.** Requires at least 10 years of marriage overlapping military service (10/10 rule).
- B. Order needs:**
 - 1. SCRA.** Indication that rights under Servicemembers Civil Relief Act were respected or waived,
 - 2. Jurisdiction.** State basis of jurisdiction over servicemember (residence, domicile, or consent),
 - 3. Marriage date,** and indication that 10/10 rule met,
 - 4. “Frozen Benefit” Data:** Current rank, years of service, and High-3 pay. Spreadsheet at EXH I will calculate High-3 with 36 months of Leave & Earnings Statements or pay stubs from:

<https://www.dfas.mil/militarymembers/payentitlements/military-pay-charts.html>

- C. **Sample Language to Divide Military Retirement.** *EXH 2*.
- D. **Send to DFAS** with DD Form 2293 and certified copies of decree & order dividing retirement.
- E. **No Deadline**, but DFAS only pays prospectively after processed (which takes about 90 days after retirement), so need mechanism for payment from servicemember in interim.
- F. **Maximum amount** DFAS pays is 50% of disposable retired pay.

VII. **DISABILITY PAYMENTS**

- A. **VA Disability.** Servicemember with service-connected disability entitled to receive disability payments.
- B. **Disability Ratings.**
 - 1. If rating under 50%, waive retired pay dollar for dollar.
 - 2. If 50% or higher rating, waiver phased out effective 2014. 10 U.S.C. §1414, unless under 20 yrs of service, in which case VA waiver still in effect (See PDRL below).
 - 3. VA payment based solely upon disability and dependents, not rank or years of service. Rate Tables at https://www.benefits.va.gov/COMPENSATION/resources_comp01.asp
 - 4. Examples:
 - a) 30% no dependents = \$409 (waiver)
 - b) 40% spouse & child = \$702 (waiver)
 - c) 80% spouse & child = \$1781 (No waiver)
 - d) 100% spouse & child = \$3197 (No waiver)
- C. **Combat-Related Special Compensation** rating of at least 10%. No waiver.
- D. **Indemnity for VA Waiver.**
 - 1. **Prejudgment VA waiver**, which existed at time of divorce, never divisible, no indemnity could be ordered. Mansell v. Mansell, 490 U.S. 581 (1989), In re: Marriage of Franz, 831 P.2d 917 (Colo. App. 1992)

2. **Post-Judgment - Prior law.** Majority rule, including CO, required indemnity for post-decree conversions of retirement to disability, theory was retiree was frustrating former spouse's vested retirement interest. In re: Marriage of Warkocz, 141 P.3d 926 (Colo. App. 2006).
3. **New Law - No Distinction, indemnity precluded.** Howell v. Howell, 137 S.Ct 1400 (2017). Court applied Mansell to all VA Waivers, termed "semantic" distinction between pre-decree and post-decree waiver. Recognized potential for hardship: "a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support."
4. **Unanswered questions:** Effect of pre-Howell orders? How about agreements to indemnify, pre- or post-Howell?

E. Disability is income for maintenance & child support. In re: Marriage of Nevil, 809 P.2d 1122 (Colo.App. 1991). Rose v. Rose, 481 US 619 (1987) (Facts included court counting disability as income, Court did not address issue).

F. Temporary Disability Retired List (TDRL). 10 U.S.C. §1202 & §1205

1. Servicemember who has condition which may be temporary.
2. Reviewed every 18 months, and by 5 yrs, must be either (1) returned to duty, (2) PDRL if under 20 yrs, or (3) retired if eligible.
3. Payment greater of (1) 2.5% x base pay x years of service, or (2) base pay x disability %. 10 U.S.C. §1401
4. CO Law:
 - a) Under 20 yrs, not divisible in CO. In re: the Marriage of Williamson, 205 P.2d 538 (Colo. App. 2009).
 - b) Over 20 yrs, divisible to extent payment based on longevity and exceeds normal VA disability payment. In re: the Marriage of Poland, 264 P.3d 647 (Colo. App. 2011)

G. Permanent Disability Retired List (PDRL). 10 U.S. Code §§ 1201 & 1204

1. Servicemember not returned to duty due to permanent medical condition.
2. Disability rating at least 30%
3. Under 20 years of service.

4. Payments: High 3 pay x greater of (1) disability rating (max 75%), or (2) 2.5% x yrs service.
5. Must waive disability dollar-for-dollar to receive VA disability, even for ratings of 50% or higher. 10 U.S.C. § 1414(b)(2)
6. No clear law on divisibility, “but for” test in Williamson suggests not divisible.

VIII. OTHER RECEIPTS IN LIEU OF RETIREMENT

- A. **Career Status Bonus.** See *February 2005 Army Lawyer* practice note: [https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/0/d6ee7a43130f797a85256fab005f321e/\\$FILE/TJAGLCS%20Practice%20Note.pdf](https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/0/d6ee7a43130f797a85256fab005f321e/$FILE/TJAGLCS%20Practice%20Note.pdf)
- B. **Lump-Sum Payment at Retirement** for those in Blended Retirement System.
- C. **VSI/SSB.** Divisible asset. In re: Marriage of Heupel, 936 P.2d 561 (Colo. 1997).
- D. **Disability Severance Pay.** Yrs of active service (max 12) x 2 x highest base pay. Available if not returned to service after TDRL, and disability rating 30% or lower. 10 U.S.C. § 1212.
- E. **Administrative Separation.** Full or partial separation pay may be available.

IX. SURVIVOR BENEFIT PLAN (SBP)

- A. **"Insurance policy"** on retirement. If retiree dies, pays surviving beneficiaries monthly amount equal to 55% of "designated base amount".
- B. **Maximum "designated base amount"** is base pay. Required to elect maximum spousal coverage if married, unless spouse consents. 10 U.S.C. §1448(a)(3)(A). No consent required if member already divorced at retirement.
- C. **Potential Beneficiaries:**
 1. Spouse or former spouse (latter must be unmarried if under 55), as long as at least one yr of marriage or a child. 10 U.S.C. §1447. *Can only have one beneficiary, cannot allocate payments between multiple beneficiaries.*
 2. Children if under 18 or in college and under 22, or
 3. Disabled children, if disability happened while under 18 or in college under 22.

D. Premiums. Spouse coverage. 6.5% of designated base amount. Stop once retiree is 70 and paid 360 months of premiums. 10 U.S.C. §1452(j)

E. Premium Responsibility. DFAS deducts premium from retirement before division, but court has discretion to allocate premium separate from retirement payments (DFAS will not honor). In re: Marriage of Payne, 897 P.2d 888 (Colo. App. 1995). Typically divided equally in El Paso County, have heard second-hand of cases where courts required spouse to pay it all.

F. Deemed Election. Rather than relying upon servicemember to opt for SBP coverage, or to convert spouse to former spouse coverage, former spouse can request election directly from DFAS. Use DD Form 2656-10. *Must use to protect former spouse, and yourself from malpractice claim!*

G. Deadline. DEEMED ELECTION REQUEST, OR CONVERSION OF SPOUSE TO FORMER SPOUSE COVERAGE AFTER RETIREMENT, MUST BE WITHIN ONE YEAR OF ORDER REQUIRING SBP COVERAGE.

H. Failure to Elect.

1. Cannot later elect SBP if not selected at retirement. Will need life insurance.
2. Failure to change beneficiary from spouse to former spouse. May be able to fix by submitting *DD Form 149, Application for Correction of Military Record* to applicable Board for Correction of Military Records.

Sample Military Retirement Language

Note that this language is a superset of the language which may apply to a particular case, and will need modification to comport with the facts and agreements in a particular case.

1) Husband (hereinafter “member” for the purposes of this section) ***is/was a member of the U.S. armed forces. This Court has jurisdiction to divide the military retirement because the member consented to jurisdiction **OR resides in and maintains Colorado as ***his/her state of legal domicile. If the member is on active duty, **his/her applicable rights under the Servicemembers Civil Relief Act have been observed and honored.

***** *SUBSTITUTE POINTS IN FORMULA BELOW IF IN RESERVES***

2) Consistent with 10 U.S. Code §1408(a), the Wife’s (hereinafter “former spouse” for purposes of this section) is awarded the following percentage of the military retirement:

$$\begin{array}{rcl}
 1 & \text{*** Days/Months of marriage overlapping military service} & \\
 \text{---} & \times \frac{\text{-----}}{\text{*** Days/Months of military service through date of decree}} & = \text{ _____\%} \\
 2 & &
 \end{array}$$

***** *IF STILL IN THE MILITARY***

3) On the date of the decree, the member’s high-3 pay was \$_____ and the member had _____ years/months of creditable service. The former spouse is awarded the percentage defined above multiplied by the disposable retired pay the member would have received had the member retired with this pay and creditable service, plus COLAs.

4) The member shall advise the former spouse of a prospective retirement or separation from the military or from active duty at least 90 days in advance. Within 14 days of receipt, the member shall provide the former spouse with a copy of all documents pertaining to the separation or the receipt of any money in lieu of retirement, including retirement orders, memorandum of release from active duty, DD 214, Retiree Account Statement, Statement of Service, chronological statement of retirement points, VA Disability documents, etc.

***** *IF ALREADY RETIRED***

3) The former spouse’s share of the military retirement is calculated by taking the former spouse’s percentage defined above, and multiplying it by the member’s disposable retired pay, which is presently \$_____/mo.

4) The former spouse’s share is approximately \$_____/mo, however this is only an approximation, and the formula set forth above controls.

***** *ALL CASES***

5) The former spouse's share of the military retirement is reportable as income to the former spouse. Any retirement payments which the member makes directly to the former spouse shall be based upon the pre-tax disposable retired pay. Notwithstanding any provision in this agreement to the contrary, pursuant to Proctor v. Comm'r, 129 T.C. 12 (2007) such payments shall be treated as maintenance for tax purposes, with the payments being deducted from the member's tax returns and added as income to the former spouse's tax returns.

6) Because the parties were married on _____, they have more than 10 years of marriage overlapping the military service and the former spouse shall receive direct payment from DFAS, pursuant to 10 U.S.C. § 1408(d). The former spouse shall promptly apply to the Defense Finance and Accounting Service (DFAS) for ***his/her portion of the military retirement, utilizing DD Form 2293, or any other necessary form. If at any time, however, the former spouse has not received direct payment, the member shall pay the former spouse's share of the disposable retired pay within 5 days of receiving each payment.

***** OR USE FOLLOWING IF UNDER 10 YEARS OF SERVICE**

6) Because the parties do not have more than 10 years of marriage overlapping the member's military service, the member shall pay the former spouse ***his/her share of the disposable retired pay directly, within five days of receiving each payment.

7) Within 14 days of any change to the disposable retired pay, the member shall provide the former spouse with the Retiree Account Statement, VA documents, or any other documents relevant to the change. This does not apply to annual COLAs if DFAS is directly paying the former spouse's share of the retirement.

*****EDIT FOLLOWING SBP PROVISIONS AS APPROPRIATE.**

8) Prior to retirement, the member shall make an irrevocable election to participate in the Survivor Benefit Plan (SBP), designating the former spouse as the "former spouse beneficiary" for an annuity which pays an amount not less than the former spouse's share of the retired pay. The member shall provide the former spouse proof of enrollment, and any other forms pertaining to SBP within 30 days of receiving or filling out the form. The parties shall divide equally the costs of the SBP, and to the extent the member is assessed any greater portion by DFAS, the former spouse shall compensate the member for the difference every six months.

9) The calculation in this paragraph is solely intended to provide the parties with an estimate of the necessary SBP coverage; the former spouse is awarded a percentage of retirement as set forth above, and NOT a fixed dollar amount. The estimated current monthly payment of the retirement is \$_____, and the former spouse will receive ____% of that, or about \$_____/mo plus COLAs. As SBP pays 55% of the "designated base amount", that amount necessary to protect the former spouse is currently estimated to be \$_____ plus COLAs.

****NOTE – DIVIDE THE SPOUSE'S ESTIMATED DOLLAR AMOUNT BY 0.55 TO DETERMINE THE DESIGNATED BASE AMOUNT.**

10) Pursuant to 5 U.S.C. §552a(b)(11), this Order is a continuing court order directing DFAS to provide to the former spouse upon request all information pertaining to the member's retirement, including amounts, dates of service, and periodic Retiree Account Statements. Should DFAS or another agency require any further release for such information, the member shall, upon request by the former spouse which includes the release, promptly execute and return the release to the former spouse.

11) Should the member receive a reserve retirement in lieu of an active duty retirement, then the former spouse shall receive a share of the military retirement utilizing the above formula, but substituting "points" for the time specified, with one point credited for each day of creditable service during the marriage. Moreover, the member shall participate in the Reserve Component Survivor Benefit Plan (RSBP) consistent with the SBP provision above, electing Option C (Immediate Annuity) within 90 days of receiving the "20-year" letter of entitlement to Reserve retirement pay, and promptly provide the former spouse with a copy of the 20-year letter and SBP election.

12) All retirement payments due to the former spouse shall be deemed a nondischargeable "domestic support obligation" incident to divorce pursuant to 11 U.S.C. §523(a)(15).

13) The Court retains jurisdiction to implement and enforce the allocation of military retirement, including entering appropriate orders should the member receive a financial benefit in lieu of military retirement which utilizes military service accrued during marriage, or voluntarily reduces the retirement available for division by selecting Career Status Bonus, the Blended Retirement Plan, or for any other reason where indemnity is not prohibited by law.