



AFIT JA FACT SHEET

UNIFORMED SERVICES FORMER SPOUSE'S PROTECTION ACT

Background

Prior to the 1981 *McCarty vs. McCarty* case, state courts disagreed on whether they were authorized or constrained by federal legal precedent in dividing military retired pay in divorce-related property settlements. On June 26, 1981, the U.S. Supreme Court ruled in the *McCarty vs. McCarty* case that military retired pay could not be treated as community property in divorce cases. In response, Congress enacted the Uniformed Services Former Spouses Protection Act (USFSPA) which decreed that state courts could treat military retired pay as property in divorce cases if they so chose. The USFSPA was enacted by Public Law 97-252, September 8, 1982. It has subsequently been amended by Public Laws 98-94, September 24, 1983; 98-525, September 27, 1984; 99-145, November 8, 1985; 99-661, November 14, 1986; 100-180, December 4, 1987; 101-510, November 5, 1990; 102-484, October 23, 1992; and 104-201, September 23, 1996.

Division of Retired Pay as Property

The USFSPA allows state courts to consider military retired pay as divisible property in divorce settlements after June 25, 1981. It also establishes procedures by which a former spouse could receive all or a portion of the court settlement as a direct payment from the finance service center. Some state courts continued to divide property in divorce cases adjudicated prior to the June 1981 date. The 101st Congress took action to correct this. The FY 91 National Defense Authorization Act, November 5, 1990, permits cases so adjudicated to continue payments from November 1990 for two years and no longer. In addition, no other pre-June 25, 1981 cases can be reopened.

Understanding the distinction between the provision that authorizes a court to divide retired pay and the provision that allows direct payment of divided retired pay to a former spouse is essential. Specifically, the law does not direct state courts to divide retired pay; it permits them to. The law stipulates that only "disposable" pay may be divided. "Disposable" retired pay is defined in 10 U.S. Code, Section 1408(a) (4) of P.L. 97-252, as amended by P.L. 99-661, Nov. 14, 1986 and Section 555 of P.L. 101-510, Nov. 5, 1990. Disposable retired pay is the gross monthly pay entitlement, including renounced pay, less authorized deductions.

For divorce, dissolution of marriage, annulments, and legal separations that become effective on or after February 3, 1991, the authorized deductions are: Amounts owed to the United States for previous overpayments of retired pay and the recoupments required by law resulting from entitlement to retired pay.

- Forfeitures of retired pay ordered by court-martial.
- Amounts waived in order to receive compensation under Title 5 or 38 of USC.
- Premiums paid as a result of an election under 10 U.S. Code Chapter 73 to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order.
- The amount of the member's retired pay under 10 U.S. Code Chapter 61 computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list).



AFIT JA FACT SHEET

The law *does not* confer an entitlement to a portion of the retired pay to a former spouse as a result of length of marriage or number of years overlap in the marriage and service. However, once a court has awarded a former spouse a portion of retired pay as property, the former spouse may apply to the finance service center to receive that pay as a “direct payment.” To qualify for a direct payment, the law requires a former spouse to have been married to the member during at least 10 years of the member’s service creditable for retired pay.

The law further stipulates that Defense Finance and Accounting Service Centers may not send more than 50 percent of the member’s disposable retired pay as a direct payment unless there are additional garnishments for alimony or child support under 42 USC 659. In those cases, up to 65 percent of the disposable pay may be sent as a direct payment.

The law does not allow a court to consider military retired pay in a divorce-related property settlement unless the court has jurisdiction over the military servicemember or retiree by reason of:

- His/her residence other than by reason of military assignment in the territorial jurisdiction of the court; or
- His/her domicile in the territorial jurisdiction of the court; or
- His/her consent to the jurisdiction of the court.

For active duty members, the law also requires compliance with the provisions of the Soldiers’ and Sailors’ Civil Relief Act of 1940.

When more than one former spouse has been awarded a division of a servicemember’s retired pay, payments will be handled on a first-come, first-served basis. When conflicting court orders exist, the law instructs the service concerned to send the amount specified in the lower of the two conflicting orders (not to exceed 50 percent of disposable pay), and retain the difference until the matter is resolved.

The Defense Finance and Accounting Service must begin direct payment to the former spouse within 90 days of receipt of a valid court order. If a servicemember is not retired at the time of the court order, payments must begin no later than 90 days after the servicemember retires. The law does not authorize a court to order a member to apply for retirement or to retire at a specified time in order to start payment.

Remarriage of a former spouse does not stop the direct payment of retired pay as property unless the court so orders.

A former spouse can apply for direct payment by sending to the finance service center concerned a signed DD Form 2293 (Request for Former Spouse Payments From Retired Pay) or a statement that includes:

- Notice to make a direct payment to the former spouse from the servicemember’s retired pay.
- A copy of the court order and other documents dividing retired pay as property. These must be certified by an official of the court that issued them.



AFIT JA FACT SHEET

- A statement from a lawyer that the court order has not been amended, superseded, or set aside.
- Sufficient identifying information about the member to enable processing of the application. The identification should give the member's full name, Social Security number, and uniformed service.
- An agreement by the former spouse that any future overpayments are recoverable and subject to involuntary collection from the former spouse or the estate of the former spouse.
- An agreement by the former spouse to promptly notify the service concerned if the court order upon which payment is based is vacated, modified, or set aside. This shall include notice of the former spouse's remarriage (if all or a part of the payment is for alimony), or notice of a change in eligibility for child support payment, (e.g., death, emancipation, adoption, or attainment of majority) of a child whose support is provided by a former spouse through direct payments from retired pay.

Request for direct payment is not accomplished until all required information is received by the finance service center. Orders, garnishments, applications, or notifications dealing with the division of retired pay must be sent by facsimile or electronic transmission, or by mail, to the appropriate finance service center. (See list of addresses at the end of this section) Within 30 days of receiving the completed DD Form 2293, the service finance and accounting service center shall contact the servicemember with a notification which includes:

- A copy of the court order and accompanying documentation.
- An explanation of the limitations affecting direct payment to a former spouse from a servicemember's retired pay.
- A request that the servicemember submit notification to the designated agent if the court order has been amended, superseded, or set aside. The servicemember must provide an authenticated or certified copy of the operative court documents when there are conflicting court orders.
- The amount or percentage that will be deducted if the member fails to respond to the notification.
- The tentative effective date of direct payments to the former spouse.
- Notice to the servicemember that failure to respond within 30 days of the date the notice was mailed may result in the division of retired pay as provided in the notification.
- Notice that if the servicemember submits information in response to the notification, the servicemember thereby consents to the disclosure of such information to the former spouse or the former spouse's agent.

The service finance center shall not honor the court order if it is defective, modified, superseded, or set aside.

Payments to the former spouse shall begin within 90 days after the service finance center receives the completed paperwork. Payments shall conform with the normal pay and disbursement cycle of the servicemember's retired pay. Payments that are a percentage of retired pay as property will change in direct proportion to and on the effective date of future cost-of-living adjustments to retired pay, unless the court order directs otherwise. Payments will stop if the servicemember dies, the former spouse dies, or as stated in the court order, whichever occurs first.



AFIT JA FACT SHEET

In 1996, the Act was modified to strengthen the provisions concerning jurisdiction in the case of court orders involving the modification of original (or subsequent) divorce decrees. Specifically, the (Service) Secretary concerned may not accept service of a court order that is an out-of-state modification, or comply with the provisions of such a court order, unless the court issuing that order has jurisdiction in the manner specified in subsection (c) (4) of the Act over both the military member and the spouse or former spouse.

A court order is considered to be an out-of-state modification if the order:

- (a) modifies a previous order upon which payments are already being made and
- (b) is issued by a court of a State other than the court of the State that issued a previous court order.

Under the provisions of the FY 85 DoD Authorization Act, P.L. 98-525, October 19, 1984, medical, commissary, and base exchange privileges previously authorized by P.L. 97-252, have been expanded. Effective January 1, 1985, a former spouse married for 20 years to a person who had 20 years of service creditable toward retirement and who had 15 years overlap between the length of marriage and years of service (20/20/15 rule) will, under certain circumstances, be provided with military medical coverage. Being divorced after September 30, 1988—unremarried former spouses are eligible for medical care for one year from date of divorce, followed by the right to convert to Continued Health Care Benefit Program (CHCBP). The program is intended to provide benefits similar to TRICARE for a specific period of time (18-36 months) to former servicemembers and their family members, some unremarried former military spouses, and emancipated children, who enroll and pay quarterly premiums. Benefits are like those in the basic TRICARE program. If a former spouse is no longer eligible for an ID card, the retiree sponsor must notify the Defense Enrollment Eligibility Reporting System (DEERS) at 800-538-9552 (California residents at 800-334-4162; Alaska and Hawaii residents at 800-527-5602).

A retiree who fails to notify DEERS that a former spouse is no longer eligible for care may be liable for the former spouse's medical care costs. Medical benefits for an unremarried former spouse whose marriage covered at least 20 years of military service will be granted regardless of the date of divorce, providing the spouse is not covered by employer-sponsored medical insurance. Commissary, exchange, and theatre privileges may be reinstated to a 20/20/20 former spouse whose remarriage ends in death, divorce, or annulment. Medical benefits are *not* restored. For further information, contact your nearest I.D. card issuing facility.

Retirees may also name a former spouse as beneficiary under the Survivor Benefit Plan (SBP) at the time of his or her retirement, even if he or she has remarried. Retirees who presently have SBP coverage for their spouse, and later divorce, have one year from the date of the divorce to elect former spouse coverage if they so desire. For divorces prior to November 14, 1986, coverage for a former spouse cannot be court ordered, but must be voluntary on the part of the member. However, former spouse coverage can be included as a part of the final divorce decree with the consent of the member. If the member fails to make that election, the former spouse has one year from the date of the court order to request a deemed SBP election. Public Law 99-661 permitted state courts to order a member to provide SBP to a former spouse (for divorces finalized after November 14, 1986). Note: Only one SBP coverage can be elected. Therefore, if a former spouse is covered by SBP, the current spouse cannot be covered.

The FY 90 Defense Authorization Act, P.L. 101-510, November 5, 1990, reemphasized that disability is *not* part of disposable retired pay. It also clarified payment of taxes on court divided retired pay and



AFIT JA FACT SHEET

requires service finance and accounting centers to issue two 1099R forms, one to each recipient which requires both to pay taxes on their respective shares.

Servicemembers, regardless of whether still on active duty or retired, may also be required by a court to provide coverage for a former spouse under the Survivor Benefit Plan (SBP). There is no length-of-marriage requirement as there is with the division of retired pay which must be satisfied before such a court order is enforceable. If a member becomes divorced while on active duty and is required by court order to elect former spouse SBP coverage upon retirement, the member must make the election (or be held in contempt of court). The court-ordered SBP election will be enforced only if the former spouse had requested that the election be deemed on the member's behalf, in writing, within one year of the date of the court order. See the section on SBP in this book for more details.

All correspondence between a former spouse and a finance and accounting service center must include the servicemember's social security number. Section (h) of the USFSPA, added in 1992 by Section 653 of P.L. 102-484 provides that the spouse or former spouse is eligible to receive payments of the retired pay of a military member whose entitlement to retired pay is terminated as a result of misconduct involving abuse of a spouse or dependent child while a member. Payments are made by the Government and continue so long as the former spouse remains unmarried. This means that, within the same Act, an apparent dichotomy exists in that payments (made by the Government) to an abused spouse cease upon remarriage while payments (made by the military member) to an ex-spouse who was not abused survive remarriage.

In 1996, Subsection (c) of Sections 8332 and 8411 of 5 USC were amended to provide for the protection of former spouses awarded military retirement pay under 10 USC in cases where the military member accepts civil service employment after retirement from the military. In such cases, military retirement pay may either:

- be reduced in accordance with regulations governing dual compensation or
- be waived in order that the military service for which retirement pay is being received may be credited for purposes of civil service retirement.

In both cases this modification to 5 USC specifies that a condition of acceptance of civil service employment is agreement that the Director of the Office of Personnel Management may deduct and withhold from the annuity payable to the former military member an amount equal to that awarded under 10 USC for payment to the former spouse. This modification is applicable to all ex-military members accepting civil service employment on and after January 1, 1997.

-From <http://www.military.com/benefits/retiree/uniformed-services-former-spouses-protection-act>