

## Enforcement Options

### Collecting an awarded share of the pension

By Dalma Grandjean

Prior to 1981, the armed forces jealously guarded retirement benefits and aspired to preserve them for their members.

Spouses were relatively rarely awarded an interest in retirement benefits, with many states taking the position that military retirement benefits were not subject to division in a divorce. When a former spouse was awarded a share of her ex-spouse's military retirement benefits, enforcement was difficult and problematic.

*McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981), which the United States Supreme Court decided on June 26, 1982, was a harbinger of great change. Although the Court held that federal law precluded state courts from dividing military retired pay as a marital asset because military retirement benefits were solely the property of the individual service-member, the Court invited Congress to revisit the statutory scheme if division of retired pay with a former spouse was desired.

Congress took up the challenge and on September 8, 1982, enacted the Uniformed Services Former Spouse Protection Act (USFSPA). USFSPA overrules *McCarty* by authorizing state courts to treat disposable retired pay of uniformed service-members as marital property.

USFSPA prescribes the circumstances under which the former spouse's share of the servicemember's retirement pay can be paid directly by the appropriate uniformed services pay center, as opposed to relying on the retired servicemember to make timely and regular payments. In the case of the Army, Navy, Air Force, and Marine Corps, the pay center is the Defense Finance and Accounting Service (DFAS). There are other pay centers for the Coast Guard and the Public Health Service and the National Oceanic and Atmospheric Administration. Because most of us will deal most frequently with DFAS, the rest of this article will refer to DFAS, even if the other pay centers could also be included.

### Watch the wording

If a court order dividing military retired pay between servicemember and spouse is to be enforceable by DFAS, it must be worded so as to provide DFAS with the information necessary to calculate the respective shares. This is done by specifying either a fixed-

dollar amount or a percentage of disposable retired pay. 10 U.S.C. § 1408(a)(2)(C)(2005). The fixed-dollar amount will deprive the nonmember spouse of cost-of-living adjustments (COLAs), and could expose his or her attorney to a malpractice claim if the nonmember spouse agreed to a fixed-dollar amount without being informed of how substantial his or her share of the COLA could have been over time. See Department of Defense Financial Management Regulation (DoDFMR), ¶ 291103, Vol. 7B, ch. 29, Sept. 1999, available at [www.dod.mil/comptroller/fmr/07b/07b29.pdf](http://www.dod.mil/comptroller/fmr/07b/07b29.pdf). On the other hand, the percentage approach gives each spouse a proportional share of all COLAs.

Before the percentage is applied, DFAS subtracts authorized deductions from gross retired pay. Examples of authorized deductions include retired pay waived to receive VA disability compensation, disability retired pay, and Survivor Benefit Plan (SBP) premiums if the former spouse is the named beneficiary. 10 U.S.C. § 1408(a)(4) (2005).

Often servicemembers will seek to have the former spouse bear the cost of SBP premiums, and their attorneys will craft an order that will award the former spouse a percentage of disposable retired pay less a setoff for the SBP premium. (See also a discussion of SBP, on pages 34-35.) This makes the entire order unenforceable, for no SBP setoffs are permitted under the USFSPA. If, on the other hand, one provision of the court order awards the former spouse a percentage of disposable retired pay, and a separate provision provides for an SBP premium setoff, then the percentage award will be enforced and the setoff provision will be disregarded.

An acceptable percentage order might read simply as follows: “The former spouse is awarded X percent of the member’s disposable military retired pay.” DFAS will interpret this provision to mean that the former spouse shares in COLAs in the same percentage as in the rest of the disposable retired pay.

An acceptable fixed-dollar amount may read as follows: “The former spouse is awarded \$\_\_\_\_\_ of the member’s disposable military retired pay.” With this latter formulation, the former spouse will not share in any COLA adjustments made to the servicemember’s retired pay. DFAS will not question such an order; however, a former spouse may, once she or he realizes how comparatively small her share turns out to be.

A thornier problem arises when the divorce occurs before the service-member retires. If the spouses are divorced after retirement, the dollar amount of retired pay is known and can be divided by either a fixed sum or a percentage of the total. The court and the parties can easily ascertain how much of the retired pay was earned during the marriage by application of what is called the coverture formula, calculated using the following formula. In most states, this is the number of months of creditable service earned during the marriage, divided by the total number of months of creditable military service. This is then divided by two to determine each spouse’s share.

Application of the coverture formula gives the nonmember spouse a share of retired pay that is equivalent to the ratio of the marital portion of the time served to the total time served by the military member.

When the divorce occurs prior to retirement, the servicemember will continue to increase pay and often rank after the divorce, resulting in enhanced benefit levels postdivorce, which cannot be known for certain at the time of the divorce. Attorneys for servicemembers are advised to argue or negotiate for freezing the nonmember spouse's share as of the date of divorce, date of separation, or some other logical date. This can be done by what DFAS terms a hypothetical award.

In a hypothetical award made while the servicemember is still accruing creditable service, neither the parties nor the court can be sure of how many more years the servicemember will serve and with what pay and at what rank. Accordingly, a simple percentage formula may not be acceptable to both parties in that it is likely to short-sell one or the other. In fact, many state courts will not award the nonmember spouse the benefit of the member's postdivorce service.

#### Proposed rule

A proposed federal regulation was issued in 1995, allowing the use of such hypothetical awards when the military member is still on active duty at the time the award is made. See Former Spouse Payments From Retired Pay, 60 Fed. Reg. 17607 (1995) (to be codified at 32 C.F.R. pt. 63 (proposed Apr. 5, 1995)). Although this regulation has not been finalized, DFAS still follows it when deciding to approve or reject a hypothetical award. Uniformed Services Former Spouses' Protection Act Dividing Military Retired Pay, Garnishment Operations, Defense Finance and Accounting Service, Cleveland, Ohio, available at [www.agd.state.tx.us/retirement-services/PDF%20Documents/Divorce\\_Retirement.pdf](http://www.agd.state.tx.us/retirement-services/PDF%20Documents/Divorce_Retirement.pdf).

A hypothetical award allows the court to define the former spouse's share based on a retired pay that is not necessarily what it will be at the time of retirement. In other words, a hypothetical retirement date is assumed at the time of the divorce so that the former spouse's share can be defined as of that date. Most frequently, this date is at or around the date of divorce or the date of separation. Such an award would deprive the former spouse of the benefit of the servicemember's postdivorce service increases in pay and promotions, leaving the servicemember with a larger share than if the spouse had received a share of final retired pay. With this approach, it is necessary to compute what the retired pay of the servicemember would be if he or she retired on the hypothetical retirement date (e.g., the date of divorce). A court order making a hypothetical award must specify: "(1) the hypothetical retired pay base, and (2) the hypothetical years of creditable service (or reserve points, in the case of a reservist.)" *Id.* at 8.

In a hypothetical award, a fictitious retirement date is selected, and it can be used in the formula even if the servicemember is not even eligible to retire on that date. However, the 1995 proposed, but not finalized, Former Spouse Payments From Retired Pay

Regulation appears to require that the member have at least 15 years of creditable service before a hypothetical retirement date can be assumed. Accordingly, if your servicemember has less than 15 years of creditable service at the time of the divorce, contact DFAS ahead of time for an advance ruling on whether you can proceed with a hypothetical formula or not.

For the court order to specify the hypothetical retired pay, it is necessary to first ascertain the retired pay multiplier. Department of Defense Financial Management regulation (DoDFMR), ¶ 030102, Vol. 7B, Oct. 2000, available at [www.dod.mil/comptroller/fmr/07b/07B03.pdf](http://www.dod.mil/comptroller/fmr/07b/07B03.pdf). If the service entry date is prior to September 8, 1980, the retired pay base is the member's basic pay on the hypothetical date of retirement. Id. at ¶ 030102.A-C. For servicemembers entering on or after that date, the highest 36 months of basic pay prior to the hypothetical retirement date are averaged to arrive at retired pay base. Id. at ¶ 030108.C. The base is then multiplied by 2-percent for each year of the member's (real or hypothetical, as the case may be) creditable service. Id. at ¶ 030102.D. (Different rules apply to members electing to participate in the CSB/REDUX retirement system.) Pay charts are available at the Web site of the Office of the Secretary of Defense at [www.defenselink.mil/militarypay/](http://www.defenselink.mil/militarypay/).

Once a court order is issued meeting all of the requirements for direct payment of military retired pay of a servicemember to a former spouse, it is served on DFAS by mail, fax, or personal delivery, along with a properly filled out DD Form 2293. The most recent version of DD Form 2293, "Application for Former Spouse Payments From Retired Pay," is dated December 2004, and lists the address of each designated agent. Note that DD Form 2293 is to be submitted by the former spouse, who is the applicant applying for direct payment from the retired pay of the servicemember.

#### Present value alternative

One way to avoid the technicalities of DFAS distribution of divided retired pay is to perform a present-value calculation of the marital portion of the actual or projected retired pay. This approach works where the servicemember has the resources to pay a lump-sum property settlement to his spouse or to purchase an annuity that will yield a monthly payment equal to the spouse's share of the projected retired pay.

#### Statutory entitlements of former spouses

A highly prized entitlement of military dependents is the right to medical and dental care at military facilities and coverage under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). Although a decree of divorce, dissolution or annulment will disqualify a former spouse who does not meet one of the tests set forth below, a decree of separate maintenance or legal separation will not.

20/20/20: Unremarried former spouses of members of the uniformed services who meet what is called the "20/20/20 test" will qualify for the full panoply of available spousal benefits: medical and dental benefits on a space-available basis at military medical

facilities, TRICARE (medical insurance) coverage, commissary, post exchange, PX/BX, and legal assistance. See 10 U.S.C. §§ 1062, 1072, 1076, 1078 (2005).

The Secretary of Defense shall prescribe such regulations as may be necessary to provide that an unremarried former spouse described in subparagraph (F)(i) of § 1072(2) of this title [10 U.S.C. § 1072(2)] is entitled to commissary and exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services. 10 U.S.C. § 1062 (2005).

Entitlement to full military health care includes TRICARE coverage (up to age 62) and in-patient and out-patient care at military treatment facilities. “20/20/20” means that the former spouse was married to the servicemember for at least 20 years, the servicemember accrued at least 20 years of creditable military service toward retirement, and at least 20 years of the marriage overlapped at least 20 years of creditable service. 10 U.S.C. § 1072(2)(F) (2005).

20/20/20 spouses lose their benefits upon remarriage. While commissary and post-exchange privileges can be revived upon termination of the subsequent marriage, health benefits cannot be revived unless the subsequent marriage is annulled.

20/20/20 spouses also lose their medical benefits if they are enrolled in an employer-sponsored health insurance plan or have reached age 65 and are eligible for Medicare (Part A). Unlike in the case of remarriage, a former spouse whose employment-related health insurance terminates (either by choice or by other circumstance) can requalify for 20/20/20 health benefits.

20/20/15: Former unremarried spouses who were married to the servicemember for 20 years, of which only 15 were during the member’s 20 years or more of creditable service, will qualify for medical benefits if they are under 65 and not yet eligible for Medicare (Part A). 10 U.S.C. § 1072(2)(G) (2005). There are three benefit tiers depending on the date of divorce, dissolution, or annulment.

1. Medical benefits are for the life of the former spouse if the decree of divorce, dissolution or annulment was final before April 1, 1985. 10 U.S.C. § 1072(2)(G) (2005).
2. For those former spouses whose decrees were final on or after April 1, 1985, but before September 30, 1988, medical coverage extends for two years or until December 31, 1988, whichever is later. 32 C.F.R. § 199.3 (b)(2)(i)(F)(2)(ii) (2005). This entitlement terminates after two years, but can be converted to a private DoD-sponsored health plan.
3. Former spouses whose decrees were final on or after September 30, 1988, qualify only for one year of medical benefits, after which they may elect to enroll in and pay for coverage under a Department of Defense health benefits program, known as the Continued Health Care Benefit Program (CHCBP).

20/20/15 former spouses who remarry or retain employer-sponsored or other private medical coverage are disqualified from 20/20/15 coverage. If private health-insurance coverage terminates, military medical benefits can be reinstated for the unused balance of the entitlement period. In contrast, termination of the subsequent marriage, whether by death, dissolution or divorce, will not revive military health-care eligibility. It is vital that the attorney representing the nonmember spouse clearly explain these limitations and restrictions.

Transitional health care is available to unremarried former spouses who pass the 20/20/15 test and are not enrolled in an employer-sponsored health insurance plan. To qualify for the second year of limited coverage, the spouse must have enrolled in the DoD Continued Health Care Benefit Program (CHCBP).

This program is the DoD version of COBRA in the private sector. It is open to anyone who loses entitlement to military health care and can afford to pay the premiums. It is designed to provide benefits mirroring those of the basic CHAMPUS program and provides for limited access to military health-care facilities. Be sure to advise clients that they have only 60 days from loss of TRICARE benefits to enroll in CHCBP.

#### Conclusion

This article skims the surface of enforcement issues regarding division of military retirement benefits. It should be abundantly clear to the reader that representation of a uniformed servicemember or the spouse should not be undertaken by a neophyte. Careful and thorough review of the relevant statutes, cases, and interpretive treatises is essential. Consultation with experienced practitioners is highly recommended.

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#### Sidebar:

#### Practice Pointer

These are federal statutory entitlements as to medical care and cannot be altered by state court decree. These rights are not negotiable, are not subject to court order, and do not require the cooperation of the servicemember. The prudent representative of a nonmember spouse will advise clients about eligibility, and will avoid malpractice by holding off filing for (or granting of) a divorce if an acceptable delay could qualify a nonmember spouse for 20/20/20 or 20/20/15 benefits.

The former spouse need only establish eligibility under the prescribed tests. Identifying information for purposes of obtaining a post-divorce ID card should be retrievable from the military computer system, and production of a marriage license and a divorce decree should suffice to establish entitlement.

—D.G.