

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American
Judges Association

American Judges Association

2022

The Military Divorce: An Overview

Joseph A. DeWoskin

Mark E. Sullivan

Dan Wiley

Follow this and additional works at: <https://digitalcommons.unl.edu/ajacourtreview>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

The Military Divorce: An Overview

Joseph A. DeWoskin, Mark E. Sullivan & District Court Judge Dan Wiley

Your Court Review Editors asked Mark Sullivan, nationally known expert on the military divorce, to contribute an article to this journal. Mark recruited colleagues Joe DeWoskin of Kansas City, KS, a retired Army officer, and Kansas District Court Judge Dan Wiley, who presides over domestic relations cases, to assist him. What follows is their round table discussion of the key issues in a military divorce.

MILITARY BENEFITS

Judge Dan Wiley: Recognizing and dividing military benefits is essential for the court in a divorce case where one or both of the parties is in military service or retired. It's also a key skill when the case is resolved through negotiation and settlement, which occurs in about 95% of civil cases nationwide. So how can the judge get a handle on what these issues, entitlements, and benefits are?

Mark: The first thing to recognize is that there are certain items which can be allocated to the court. These include the military pension division and Survivor Benefit Plan coverage for the former spouse.

On the other hand, there are benefits which are "off-limits" for the court since they are granted by federal statute. These include military medical coverage, which means treatment at any MTF or military treatment facility, and use of TRICARE for non-military health care needs. It also includes possession of a military ID card, shopping at the commissary, and use of the base exchange, which is like a department store. All of these items are entitlements. They cannot be bargained for, they cannot be withheld, and they cannot be allocated by the court, since they are granted to an individual based on his or her meeting certain eligibility criteria under federal law, not based on a court order.

When dealing with a party in the military, it's important to have some basic information about his or her¹ service, which would include such items as rank, branch of service and domicile. A good starting point might be a checklist. Every judge needs one in a military divorce case. Here's a chart which covers the basic information needed by the court and some of the property division issues for the court to determine.

FAMILY SUPPORT

Judge: The most immediate concern for many of the parties who are in my courtroom is support, so let's start there. I've decided a number of divorces involving military members. One of the

CHECKLIST FOR THE JUDGE PROPERTY DIVISION IN THE MILITARY DIVORCE CASE		
Item	Comments	Information/ Notes
Branch of service	(e.g., Army, Coast Guard)	
Component	(e.g., active duty, National Guard, Reserves)	
Rank/Pay grade	(e.g., major/O-4)	
DIEMS (date of initial entry into military service)	(e.g., January 20, 2002)	
Breaks in service	Ask about whether there was any time that SM was not in the military (and when) If the SM is a Reservist or member of the National Guard, ask if there are any "bad years" ²	
Date of marriage		
Date of separation	(if applicable)	
Date of divorce	(if applicable)	
Domicile of servicemember	One of the jurisdictional bases for pension division is domicile. 10 U.S.C. § 1408 (c)(4)(B).	
Military pension division		
Survivor Benefit Plan (SBP)		
Military medical coverage		
Accrued leave	(if applicable)	
Thrift Savings Plan (TSP)	(if applicable)	

major issues I see is determining the income of the military member and how to calculate support. Joe, I know the military has a unique pay system. How is that reflected on the military member's paystub?

Joe: The pay statement for an active duty servicemember, reservist, or member of the National Guard is called a Leave and

AUTHOR'S NOTE: The following article is a dialogue among the authors regarding the unique aspects of military divorce, pension division, family support, and related issues when one of the litigants is in the military.

Footnotes

1. For ease of reference, the servicemember will be referred to as a male throughout this article and the former spouse will be referred to as a female.
2. A "good year" means having at least 50 retirement points. Less than that means a "bad year," that is, one which does not apply toward the 20 years needed for retirement. See 10 U.S.C. §§ 12731(a)(2), 12732(a)(2).

Earnings Statement, or LES. For a retiree it's called a RAS or Retiree Account Statement.

Judge: What about the terms and abbreviations found in the LES?

Mark: The three major money items on the LES are base pay, the Basic Allowance for Housing (BAH), and the Basic Allowance for Subsistence (BAS). Sometimes you'll also find entries for special duty pay, family separation pay, hazardous fire pay, and other forms of pay.³

Judge: I have often found attorneys and litigants confused when it comes to pay and allowances. For example, how do the tax laws operate when it comes to base pay, BAH, and BAS?

Mark: The starting point is that base pay is the same as civilian wages; this element is taxable income, except when the base pay is earned in a combat zone. BAS and BAH are not taxable.⁴ This means that, when calculating issues of child support and maintenance, I usually ask the court for a variance from the support guidelines to account for the tax-free status of the BAS and BAH.

Joe: Sometimes, a judge doesn't fully understand how to read an LES or RAS, so I need to try to educate the court through either a statement of counsel or by having my client explain the terms. You can find a good demonstrative exhibit by searching for "how to read an LES" or "how to read a RAS" on any Internet search engine.

Mark: Another good place to find that information is the Defense Finance and Accounting Service (DFAS) website.⁵ The LES of the Army, Navy, Air Force, and Marine Corps are very similar. Joe, what do you think are the most important parts of the LES?

Joe: Knowing the servicemember's grade or rank, the years of service, and the ETS, or Expiration Term of Service, is the starting point, and this is also useful when determining the military pension division amounts.

Mark: In addition, I want to review the servicemember's entitlements, that is, pay and allowances, as well as what the deductions are and the information contained in the section of the LES covering accrued and used leave or vacation time. Judge, what are your thoughts on the most important part of the LES?

Judge: I find the information on the TSP to be pretty important. I want to know whether there is a defined contribution plan which will need to be divided, and I also need to know the net monthly income for our servicemember, "Sergeant John Doe," so that I'll know how much money there is to go around in a support case.

Mark: With the RAS for a military retiree, a judge should start with "Understanding Your RAS," which can be found on the

DFAS website.⁶ The most important term is John Doe's gross pay, that is, the total retired pay to which he is entitled. Next comes the "VA waiver," which is the amount of his VA disability pay that's deducted from gross pay. The third item to examine is "SBP costs," which is the premium for the Survivor Benefit Plan, or SBP, an annuity which can be elected to pay continued income to a spouse or former spouse if the retiree dies first.

Judge: The net amount after debits for those items lets the court know John Doe's taxable monthly income. It also shows his disposable retired pay.

Joe: It also shows John's disposable retired pay. That is the retiree's gross pay less any "VA waiver" amount and the premium for the Survivor Benefit Plan covering the spouse who receives a portion of the pension.⁷ This information is important because it will allow the court to see how much of the military retirement is divisible as property.

Judge: Mark, does the RAS also reflect changes in gross pay, VA Disability payments, and SBP costs?

Mark: That is correct. There is a section on the RAS that reflects "old pay" and "new pay." This information is usually on the December RAS, showing the increase in gross pay and SBP costs that the retiree will receive due to the cost-of-living allowance increase.

Joe: Once the court determines the income of the servicemember or retiree, it can decide on child support and spousal support. The amount of monthly support is subject to garnishment by the pay center, and the court order should state a specific monthly amount to be withheld from the pay of John Doe and disbursed to the appropriate recipient, either the Child Support Enforcement Agency or, if it's spousal support, to "Jane Doe," the spouse or former spouse. The Tax Cuts and Jobs Act stated that all new awards of spousal support since January 1, 2018, are tax-free to Jane Doe and are not deductible for John.

MILITARY PENSION DIVISION

Judge: It seems to me that the most important and valuable benefit over which the court could exercise jurisdiction would be military retired pay.⁸

Joe: That is correct. For a military member, the retired pay is often the most significant asset in the marriage. In addition to monthly pension payments, there is often a Thrift Savings Plan (TSP) account to be divided, which is the equivalent of a 401(k) plan. With the new Blended Retirement System, which is mandatory for all those who enter the uniformed services⁹ after December 31,

3. *Pay*, MIL. COMP., <https://militarypay.defense.gov/pay/> (last visited June 6, 2022).

4. *Tax Exempt Allowances*, MIL. COMP., <https://militarypay.defense.gov/Pay/Tax-Information/Exempt/> (last visited June 6, 2022).

5. DEF. FIN. & ACCT. SERV., HOW TO READ AN ACTIVE DUTY ARMY LEAVE AND EARNING STATEMENT (2020), https://www.dfas.mil/Portals/98/Documents/Military%20Members/Payentitlements/aboutpay/Army_reading_your_LES.pdf?ver=2020-04-22-134400-497; and DEF. FIN. & ACCT. SERV., HOW TO READ A RESERVE AND NATIONAL GUARD LEAVE AND EARNING STATEMENT, https://www.dfas.mil/Portals/98/Documents/Military%20Members/Payentitlements/aboutpay/ResNG_reading_your_LES.pdf.

6. *Understanding Your RAS, Page 1*, DEF. FIN. & ACCT. SERV., <https://www.dfas.mil/RetiredMilitary/manage/ras/understandpage1/> (last visited June 6, 2022); *Understanding Your RAS, Page 2*, DEF. FIN.

& ACCT. SERV., <https://www.dfas.mil/RetiredMilitary/manage/ras/understandpage2/> (last visited June 6, 2022).

7. 10 U.S.C. § 1408(a)(4)(A).

8. *See, e.g., Cunningham v. Cunningham*, 173 N.C. App. 641, 619 S.E.2d 593 (2005) (ex-husband was a Marine Corps lieutenant colonel, and the former wife's estimate of the value of the pension was about \$560,000).

9. "Uniformed services" means the Army, Navy, Air Force, Marine Corps, Space Force, plus the Reserves for these branches of service, and the National Guard. The retired pay center for these is DFAS. "Uniformed services" also means the Coast Guard and the officer corps of the Public Health Service and the National Oceanic and Atmospheric Administration. The retired pay center for these elements is the Coast Guard Pay and Personnel Center.

2017, there is a TSP for every servicemember, whereas it is optional for those is “the legacy retirement system.”¹⁰

JURISDICTION

Judge: Mark, when dealing with military pension division, what do you consider the first thing that needs to be addressed?

Mark: That’s jurisdiction. This is because the retired pay center will not accept an order dividing military retirement unless the court has jurisdiction over the military member by reason of (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court.¹¹

Judge: I think that “domicile” is the easiest of these to parse. It means the state of legal residence of the servicemember. That would often be the state from which he entered military service.

Joe: That’s right. There’s no “federal definition” of domicile in the USFSPA. It’s left up to state law and cases.

Mark: Sometimes, John Doe will claim a bogus domicile in a state such as Texas or Florida, neither of which have state income taxes. It’s important for the court to scrutinize such claims to determine if John has ever lived in that state and what connections he might have to the claimed state of legal residence. I’ve written a Silent Partner infoletter on “Divorce and Domicile,” which is available at the website of the North Carolina State Bar’s military committee, www.nclamp.gov > Publication. It details all of the facts which a judge needs to explore to make an evidence-based decision on domicile.

Joe: There’s also a form which might be helpful. It’s DD Form 2058, and it’s used when Sergeant John Doe fills out his withholding paperwork at the finance office. It lists what John is claiming as his state of legal residence for tax purposes.

Judge: What about the first element, the member’s residence but not due to military orders? Can you give us an example of that, Joe?

Joe: Yes. Suppose that John Doe is assigned to Eglin Air Force Base at the western edge of the Florida Panhandle. He is not required to live on base, so he chooses to reside just over the state line in Gulf Shores, Alabama, to be near his parents. In that situation, Alabama could exercise jurisdiction over his pension since he’s not living there due to orders. It’s his choice.

Joe: I think it is important to note that this underlying issue primarily applies to those servicemembers who are still on active duty. If we are talking about a Reservist, National Guardsmen, or retiree, then the court should have jurisdiction over the pension if that individual resides within the territorial jurisdiction of the court.

Mark: The third test, “consent to the jurisdiction of the court,” does not mean that John accepts the court’s decision on dividing his military pension or even that he agrees to any pension division at all. It means that he has acted consistent with the recognition of the power of the court to order the pension division. This is sometimes called “an appearance.” If state law says that John’s actions—such as filing an answer or response to the lawsuit, asking for a continuance, or propounding discovery—

amount to a general appearance, then he has consented to the jurisdiction of the court.

Judge: The court’s order dividing military retired pay must contain a specific statement of how the court is exercising jurisdiction over the member’s pension. Just saying that the court has jurisdiction is not enough.

PENSION-SHARE GARNISHMENT

Judge: What other requirements are there to establish monthly pension-share payments for Jane Doe, the former spouse? I’ve heard some lawyers argue that there’s a “10/10 Rule” and that it limits the court’s ability to divide military retired pay.

Mark: I have the same experience. There is a common misconception about what the 10/10 Rule means. Many people believe that in order to receive any portion of the military retirement, the parties need to be married for ten years and have military service that overlaps the marriage for ten years, too. That couldn’t be any further from the truth, right, Joe?

Joe: That is correct. The 10/10 Rule simply states that the retired pay center will not do a pension-share garnishment as property division unless the parties were married for at least 10 years during which the member performed at least 10 years of service creditable toward eligibility for retired pay. If the 10/10 overlap exists, then the appropriate pay center will pay the former spouse her share of the military retirement directly.¹² Judge, in your experience, why is the 10/10 Rule so important?

Judge: Pension garnishments mean reduced future litigation because the retired pay center pays the money directly to the former spouse, has all appropriate taxes withheld at the federal and state level, and the parties will have less post-divorce contact with one another. There are also yearly adjustments for COLAs, or cost-of-living adjustments, which means that the parties don’t have to keep track of that information.

Mark: But, Joe, is there a difference between how you determine the 10/10 rule between active-duty members and those in the Guard or Reserves?

Joe: Yes. For an active-duty member, the determination is 10 actual years of active duty. However, for a member of the Reserves or National Guard, the determining factor is “ten good years.” A qualifying year for a Guard/Reserve member means one with at least 50 retirement points. If the member has one or more years with less than 50 points, then there is the possibility that although there may be ten years of marriage, the military service may not have ten good years of overlap. This would preclude direct payment from DFAS.

FROZEN BENEFIT RULE

Joe: Judge, are you familiar with the Frozen Benefit Rule?

Judge: Yes. On December 23, 2016, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017). This completely changed how military retirement was divided. For every other pension that’s divided, we use the actual retired pay of the individual, not some artificial number at the date of divorce. This new statute, however,

10. The “legacy retirement system” refers to the retirement system for those who are not covered by the BRS, or Blended Retirement System. In general, these are members who entered service before January 1,

2018, and did not “opt into” the BRS during calendar year 2017.

11. 10 U.S.C. § 1408(c)(4).

12. 10 U.S.C. § 1408(d)(2).

requires that the pension which is to be divided must be an amount equal to what John Doe would have received had he retired on the date of the divorce.¹³ Joe, what divorce cases will involve the Frozen Benefit Rule and its impact on the military retirement?

Joe: The law applies to all cases in which the divorce is granted after December 23, 2016, and—at the time of divorce—the pension is not in pay status. The parties cannot agree to “opt-out” of the Frozen Benefit Rule. It applies to everyone who meets these qualifications. State court judges do not have the authority to order DFAS to do anything that is outside of the federal statute. When the snapshot is taken, the former spouse will receive a portion of the amount the servicemember would have received had he retired on that date (with the cost-of-living allowance increases).

Mark: The statute limits what the court may divide at divorce to the hypothetical amount of retired pay of the member at that date, increased by the cost-of-living amounts granted to military retirees from the time of the divorce to the date the member retires.¹⁴ Basically, the court is now required to take a snapshot at the time of the divorce and divide the hypothetical military retirement at that point in time. Judge, what happens if you decide you want to order the retirement at a later date than the date of divorce?

Judge: The court cannot enter a valid order for division of the “final retired pay” of John Doe, that is, the actual pension amount that he would receive at the end of his career. The order entered by the court must contain two data points which allow the retired pay center to calculate the “snapshot amount” of retired pay which will be divided. Those two points are the “retired pay base” of the individual, usually known as his “High-3” amount, and the years of creditable service for the member. Both are set as of the date of divorce.

Mark: The “High-3” pay for John Doe is the average of the highest three years of compensation, based on active-duty pay tables. This requires the court to have a calculation—usually made by one of the parties or attorneys—which shows the average of the highest 36 months before the divorce date. That’s usually the most recent 36 months.

Joe: With a Guard/Reserve member, the second data point would be his Reserve/Retirement points, not his years of service.

Judge: And both of those data points are as of the divorce date. That means that the court has to receive the information as evidence and state it in the order dividing military retired pay, or else the order will be rejected.

Joe: And it is important to emphasize that the *divorce date* is what we’re talking about. Many attorneys think that it’s the data as of the date of filing the lawsuit or the date of separation. While those dates may be important items to include in a pension order, the essential data points which *must* be inserted are

those two items as of the date of divorce. Without those, the order will be rejected, and the entire case lands in the judge’s lap for a *clarifying order* that has the correct, required information in it. That’s a waste of judicial resources when it could have been done correctly in the first place.

IN-KIND DIVISION

Judge: What are the ways the court can divide the military pension, Joe? I know that a judge can receive evidence about the present value of a pension and then do a set-off order, trading the pension against other marital assets. But there’s seldom enough other marital property to balance out the spreadsheet which I use. How about the “in-kind division”?

Joe: There are four different ways to divide military retirement. These are the fixed amount, the percentage, the formula clause, and the hypothetical award.

Mark: I’ve written a Silent Partner infoletter on “Getting Military Pension Orders Honored By the Retired Pay Center,” which addresses each of these.¹⁵ When the order involves a fixed dollar amount, it might read, “The court awards Jane Doe, the plaintiff, \$1,500.00 of the disposable retired pay of the defendant, John Doe.” Of the four acceptable clauses for the retired pay center, only this one excludes a cost-of-living adjustment. The flat amount never changes, and thus it benefits the servicemember or retiree.¹⁶

Joe: When the court grants a percentage award, which is usually for retirees since all the numbers are known, the order might read, “The former spouse is awarded 47% of the servicemember’s military retired pay.”

Mark: A formula award is an award expressed as a ratio.¹⁷ For example, the order could state, “Wife shall receive 50% of the Husband’s disposable retired pay times a fraction, the numerator being the months of marital pension service, and the denominator being the total months of service by Husband.” The order must then provide the numerator, which is usually the months of marriage during which time the member performed creditable military service.¹⁸ It is necessary to include as the numerator the months of service or retirement points acquired during the marriage.

Joe: If you fail to include the data for the numerator, the order will be rejected. The retired pay center, on the other hand, will provide the denominator (total months of service or retirement points) if that is left blank in the order. It is important to note that the numerator needs to be accurate; the retired pay center relies on the figures in the order and will not back-check the marital military service to ensure its accuracy. Judge, which clause do you see the most issues with on orders that come before you?

Judge: I would say that the hypothetical clause is the most difficult to draft.

Mark: Why is that?

13. 10 U.S.C. § 1408(a)(4)(B).

14. *Id.*

15. Publications of Silent Partners, LEGAL ASSISTANCE FOR MIL. PERS., <https://www.nclamp.gov/publications/silent-partners/> (last visited June 6, 2022).

16. U.S. DEP’T OF DEF., 7000.14-R, DEP’T OF DEF. FIN. MGMT.REGUL.vol. 7B, ch. 29, 290601.D (June 2021) [hereinafter DoDFMR].

17. DoDFMR, vol. 7B, ch. 29, § 290211 (June 2021).

18. Mark Sullivan, *Getting Military Pension Orders Honored by the Retired Pay Center*, LEGAL ASSISTANCE FOR MIL. PERS.: SILENT PARTNERS, <https://www.nclamp.gov/publications/silent-partners/getting-military-pension-orders-honored-by-the-retired-pay-center/>. (last visited June 6, 2022).

Judge: The hypothetical clause involves an award based on rank or status, which is different from when the servicemember retires. The order, for example, may say: “Former Spouse is granted 50% of what an Army Staff Sergeant (E-6) would receive if he were to retire with over 18 years of military service and High-3 pay of \$_____ per month as of ____ (date).”¹⁹ Since there is no table or spreadsheet that reflects this type of pay, DFAS would calculate the hypothetical pay amount and compute a ratio to the actual retired pay in order to calculate the amount to which the former spouse should receive.²⁰

Mark: Joe, what would you do if you had a National Guardsman or Reservist and you were preparing an order to tender to the judge for pension division?

Joe: When dividing that type of pension, and the servicemember is still drilling and has not submitted retirement paperwork, a “formula clause” is what is normally used. The “formula clause” is used because the final retired pay isn’t known, and the total service creditable for retirement is also unknown.

Judge: And don’t forget that in a Guard/Reserve case involving a formula clause, you are required to specify the division according to retirement points.²¹

Mark: That’s a good reminder, Judge. The usual language used refers to points earned during the marriage divided by the total points during the member’s career. It is also important to remember that you can also use a percentage clause or a fixed dollar amount clause for a still-drilling member of the Guard or Reserves.

ELEMENTS OF THE MILITARY PENSION DIVISION ORDER

Joe: Mark, we have discussed DFAS being strict about the language in a military pension division order (MPDO). What are the elements that need to be included in an MPDO?

Mark: We have already discussed the importance of stating how Court has jurisdiction over the servicemember. The order should also include the name and addresses of the parties, including their Social Security numbers (SSN). If state law or local rules prohibit the inclusion of the full SSN, you can state that they are included under separate cover. Additionally, the application document, DD Form 2293,²² requires the SSN.

Judge: The order should also include the date of marriage and years of marriage and military service (the 10/10 Rule), the military member’s grade or rank, a statement that the servicemember’s rights under the Servicemembers Civil Relief Act (SCRA)²³ has been observed and honored, and a statement as to what the pay center will pay the former spouse.

Mark: The usual language for pension division clauses is found in the Silent Partner infoletter, “Getting Military Pension Orders Honored by the Retired Pay Center.”²⁴ Joe, can you think of anything else that needs to be included?

Joe: I would definitely recommend taking a look at the DFAS web

FORMER SPOUSES’ PROTECTION ACT CHECK SHEET	
MEMBER’S NAME:	SOCIAL SECURITY NUMBER:
<input type="checkbox"/> SERVICE OF APPLICATION (personal, certified or registered mail, return receipt requested) <input type="checkbox"/> FINAL DECREE OF DIVORCE, DISSOLUTION OR ANNULMENT OR LEGAL SEPARATION ISSUED BY A COURT – OR – A COURT ORDERED, RATIFIED OR APPROVED PROPERTY SETTLEMENT INCIDENT TO SUCH A DECREE <input type="checkbox"/> AUTHENTICATED OR CERTIFIED <input type="checkbox"/> MEMBER PROPERLY IDENTIFIED (E.G., NAME, ADDRESS, SSN) <input type="checkbox"/> NAME, ADDRESS, AND SSN OF FORMER SPOUSE <input type="checkbox"/> ORDER PROVIDES FOR ONE OF THE FOLLOWING: A) PAYMENT OF FIXED MONTHLY AMOUNT OF \$_____ B) FIXED PERCENTAGE OF _____% C) FORMULA CALCULATION (must use retirement points in Guard/Reserve case): D) HYPOTHETICAL CALCULATION:	
<input type="checkbox"/> MEMBER’S RIGHTS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT COMPLIED WITH <input type="checkbox"/> JURISDICTION MET – <input type="checkbox"/> RESIDENCE <input type="checkbox"/> DOMICILE <input type="checkbox"/> CONSENT <input type="checkbox"/> ORDER HAS NOT BEEN AMENDED, SUPERSEDED, OR SET ASIDE <input type="checkbox"/> ORDER IS FINAL DECREE, NO APPEAL MAY BE TAKEN, NO APPEAL WAS TAKEN WITHIN TIME PERMITTED <input type="checkbox"/> FORMER SPOUSE MARRIED TO MEMBER AT LEAST 10 YEARS DURING AT LEAST 10 YEARS OF CREDITABLE SERVICE	
PAY ENTRY DATE:	RETIREMENT DATE:
MARRIAGE DATE:	DIVORCE DATE:
<input type="checkbox"/> IF THE FINAL DECREE OF DIVORCE, DISSOLUTION, ANNULMENT OR LEGAL SEPARATION ISSUED BY A COURT, OR COURT-ORDERED, RATIFIED OR APPROVED PROPERTY SETTLEMENT INCIDENT TO SUCH A DECREE IS AFTER DEC. 23, 2016, AND MEMBER AT THAT DATE IS NOT RECEIVING RETIRED PAY, THIS DATA IS SHOWN FOR DATE OF DIVORCE, ETC.: <ul style="list-style-type: none"> • FOR MEMBERS ON ACTIVE DUTY - 	
YRS. OF CREDITABLE SERVICE:	HIGH-3 PAY:
<ul style="list-style-type: none"> • FOR RESERVE COMPONENT MEMBERS (I.E. NATIONAL GUARD, RESERVES) - 	
RETIREMENT POINTS:	HIGH-3 PAY:

19. See DoDFMR vol. 1, ch. 3, § 030101.A.2. (Oct. 2020) (for servicemembers entering military service on or after September 8, 1980, retired pay is calculated using the average of the member’s highest 36 months of basic pay at retirement, also known as “High-3”).
 20. *Guidance for Lawyers: Military Pension Division*, LEGAL ASSISTANCE FOR MIL. PERS.: SILENT PARTNERS, <https://www.nclamp.gov/media/>

425645/s-mp-guidance.pdf (last visited June 6, 2022) (detailed information on hypothetical clauses).
 21. DoDFMR, vol. 7B, ch. 29 § 290211.B (June 2021).
 22. DoDFMR, vol. 7B, ch. 29 § 290401 (June 2021).
 23. The SCRA is found at 50 U.S.C. §§ 3901-4043.
 24. *Supra* at note 13.

page and the sample order language shown there for a pension order.²⁵ The court could also use a checklist which DFAS uses to ensure that all the essential elements are included in the pension division order. Shown nearby is the document which the agency uses.

SURVIVOR BENEFIT PLAN

Judge: Let's change the subject. What about the Survivor Benefit Plan? SBP is an important component of a divorce settlement or property division trial as to a death benefit for Jane Doe, the servicemember's spouse. It ensures a continuous flow of income to Jane if her husband, John Doe, dies first.²⁶

Mark: And it's equally important for the other side, Joe. If I'm in court advocating for John Doe, then I want to bring two points to the judge's attention:

- First of all, it's not free. SBP involves payment of a premium out of John's retired pay, and it's not fair for him to be charged with this deduction since he needs to be dead for the benefit to appear, with money flowing to his ex-wife.²⁷
- Second, there can only be one adult beneficiary for SBP, so the court's awarding of coverage to the former spouse means that John cannot have SBP for a future spouse.

Judge: Of course, I'd take both of those positions into account, but sometimes I find that the attorneys come to the equitable distribution pretrial conference unaware of the survivor annuity or unprepared to make or defend against those arguments. It's always a good idea for the judge to determine what's being tried, and the Survivor Benefit Plan is a large part of the usual military divorce case. Assuming that the court includes SBP as an issue for trial, does the court have to award SBP to the former spouse?

Mark: If I were arguing the servicemember's case, I'd say that it does not have to do that. Especially where there is a short-term marriage,²⁸ or there's evidence that the former spouse may remarry before age 55, I think that the court should decline to allot SBP coverage to the former spouse.

Judge: Why did you mention remarriage before 55, Mark? Is there a remarriage penalty associated with the SBP?

Mark: Yes, there is. If the former spouse remarries before turning age 55, she is not eligible for SBP payments should her ex die before her. This suspension, however, would be removed if that

subsequent marriage ended in divorce, annulment, or the death of the new spouse.

Judge: Speaking of remarriage, what if the servicemember, John Doe, remarries? Can a portion of the SBP be "saved" for a new spouse in the future?

Mark: No, it can't. The SBP cannot be subdivided into two or more adult beneficiaries. It's a unitary benefit. The court needs to remember, "It's either EX or NEXT—not both."

Judge: If I were to award SBP coverage to the spouse or former spouse, what is the language that should be used, Joe?

Joe: This is a situation where "magic words" need to be in the court's order. The phrase which ought to be used is this—"The defendant, John Doe, will immediately elect former-spouse SBP coverage for the plaintiff, Jane Doe, with his full retired pay as the base amount." If it's necessary to insert some more specific instructions in the order, then consider including a requirement that John complete and execute DD Form 2656-1, sending it promptly to Jane's attorney so that she can also sign it and forward it to the retired pay center with a certified copy of the divorce decree and the order providing for SBP coverage.²⁹

Judge: And what if I want to have the former spouse pay the bill for this, Mark? Can I just tell the retired pay center to "bill her for the charges," or something like that?

Mark: You could, but it wouldn't work. Due to the language in the federal statute, 10 U.S.C. § 1408(a)(4)(A)(iv), the premium must be deducted from the retiree's gross pay. It cannot be shifted to the former spouse.

Judge: Is there a "Plan B" which could be used for shifting the cost to the former spouse?

Mark: Yes, there is. You could order that "The plaintiff, Jane Doe, will promptly reimburse the defendant each month for the portion of the SBP premium which is deducted from his share of the military pension." Since such exchanges rarely work out between divorce parties, another option for the court would be to modify the percentage of the pension which Jane gets so as to have her shoulder the entire burden of the SBP premium. The calculations could be done by one of the attorneys, and the language would be, "The plaintiff will pay the entire cost of the premium for former-spouse SBP coverage, and her share of the pension will be adjusted to reflect this responsibility."³⁰

Judge: Are there some easy-to-remember rules as to ordering and implementing the Survivor Benefit Plan in a divorce case?

Mark: Yes. We call it the "3-R Rule." Joe—what's the first R?

25. DEF. FIN. & ACCT. SERV., SAMPLE ORDER LANGUAGE; MILITARY RETIRED PAY DIVISION ORDER (2020), <https://www.dfas.mil/Portals/98/Documents/Garnishments/SAMPLE%20ORDER%20LANGUAGE%202.pdf?ver=2020-01-17-093724-717>.

26. See 10 U.S.C. § 1451 (the Survivor Benefit Plan, found at Chapter 73 of Title 10 U.S. Code, pays the beneficiary 55% of the selected base amount for life. The base can be any dollar amount from full retired pay down to \$300 per month).

27. The SBP premium to cover a spouse or former spouse is 6.5% of the SBP base when the servicemember retires from active duty. It costs up to 10% for the same coverage if the retirement is from the Reserves or National Guard.

28. See, e.g., *In re Miller*, 957 N.W.2d 41 (Iowa Ct. App. 2021) (in case involving an eight-year marriage, Court of Appeals upheld trial court's denial of former-spouse Survivor Benefit Plan coverage due to

length of marriage).

29. The former spouse can also act to ensure that she is covered by executing and submitting DD Form 2656-10, the "deemed election" form, so that her request for coverage will be honored even if John fails or refuses to make the required election on time. The "deemed election" is covered at 10 U.S.C. § 1450(f)(3).

30. In a retirement from active duty, the usual reduction is about 4-4.5% from the *nominal share* that Jane would receive to the *adjusted share* she will actually get, so that she will be paying "full freight" for the SBP cost. The order should make it clear that the reduction will stop when there is no longer a premium to be paid. This occurs if the former spouse remarries before age 55, which suspends her eligibility for SBP, and also if there are 30 years of premium payments and the retiree is at least 70 years old.

Joe: It's R for Requirement. There needs to be language in the court order which requires the servicemember to elect former-spouse SBP coverage. Mark, what's the second R?

Mark: The second R stands for Request. There must be an election made for SBP coverage on the appropriate form. Just having a court order for coverage isn't enough. And the third R, Joe?

Joe: It's R for Register. You have to register the SBP election with the retired pay center within the time limits imposed by the statute. For the election made by the servicemember, it's one year from the date of the divorce. For the former spouse, a deemed election must be received by the center within one year of the order mandating the election of former-spouse SBP coverage.

Judge: As I mentioned earlier, sometimes the attorneys don't mention SBP. If it isn't presented at trial through testimony or evidence, I can't rule on the allocation of SBP coverage, and it's probably lost.³¹ In fact, some judges feel that the parties or their attorneys aren't even aware of its existence.³²

Joe: So, what's a judge to do?

Judge: I know that some judges will raise the issue in a pretrial conference. Failure to do this sometimes means that the issue and the asset are overlooked, which may mean that there would be an appeal or a motion to reopen the proceedings for new litigation of the "newly discovered asset." That takes up time which is needed for other matters.

Mark: What other factors which move the court to introduce the topic of SBP?

Judge: One would be the very real specter of malpractice. No lawyer wants to face a claim of legal negligence, and most of the lawyers who practice in my court really want to do the best for their clients. Very few people are helped when an important asset is overlooked in a property division trial. The discovery of the "missed asset" can lead to motions to amend, set aside or reconsider, grievances at the state bar, and lawsuits for malpractice. Raising the issue in pretrial proceedings can alert everyone to the existence of this hidden element, and it may, in some cases, spur the parties toward settlement.

Joe: I agree. Many attorneys are not well versed in the area of military divorce and pension division. Addressing the issues and putting everything on the table is a smart way of being sure that the court's eventual decision is informed and fair.

OTHER BENEFITS

Judge: What other benefits and entitlements should the court be concerned about?

Mark: One of them would be the valuation of accrued leave. If "John Doe," our servicemember, is on active duty, then he probably has accrued some leave time. This potential asset can be marital or community property, and it's often overlooked.

Joe: Each SM accrues 30 days of paid leave each year, regardless of rank. This leave is worth what its equivalent would be at the monthly pay rate of the SM, and one can calculate this easily by using the pay tables available on the DFAS website.³³ For example, if John's base pay is \$6,000 per month and he has 45 days of accrued leave at the date of valuation under state law (i.e., date of separation, date of filing, date of divorce), his accrued leave would be worth about \$9,000 ($45/30 \times \$6,000$).

Mark: There's another point worth noting. Military leave may, at the time of one's separation from the uniformed services, be cashed in or else used as terminal leave by the individual concerned.

Joe: The attorney for John may try to confuse the issue by pointing out that the non-military spouse cannot be awarded military leave, but this argument misses the point. The issue is not who can use military leave but rather whether, under applicable state law, an asset such as "vacation time" is marital or community property. All the evidence that is needed would be the SM's Leave and Earnings Statement for the applicable date under state law for classifying and valuing the marital property. A majority of states have upheld the valuation and allocation of vacation and sick leave. The Colorado Supreme Court, ruling that such item may be valued and allocated, set out a review of case law in this area in *In re Marriage of Cardona*.³⁴

MEDICAL COVERAGE

Judge: Whether it's in the context of family support or division of military benefit, our judges usually want to know about military medical care. What is it, how can the spouse and children qualify, and can the court do anything to help in obtaining it?

Mark: The first step is to check your resources. The Code of Federal Regulations is an excellent source for information. You'll find "Benefits for former spouses" at 32 CFR § 161.19, and the tables there show what spouses and former spouses may obtain, depending on the number of marital years, the years of military service, and the overlap between the two.

Joe: The "gold standard" for military medical care is labeled 20-20-20 coverage. This means that Jane Doe has been married at least 20 years, John has served at least 20 years, and there is an overlap of the two for at least 20 years. Jane Doe, as an unremarried former spouse,³⁵ can use TRICARE, a civilian health coverage program, for medical and drug expenses, and she can receive space-available care at any MTF or military treatment facility. There are, of course, copayments and an initial deductible, just like every other medical insurance policy.³⁶

Mark: If the former spouse doesn't have a long-term marriage, she may purchase a conversion health policy under the DoD's Continued Health Care Benefit Program (CHCBP). 10 USC 1086(a). The CHCBP is not part of TRICARE; it is a health insurance plan nego-

31. For cases in which silence spelled the death of former-spouse SBP, see, e.g., *Myers v. Ridgley*, 2017 Ark. App. 411, 2017 Ark. App. LEXIS 474; *Kuba v. Kuba*, 2013 Mo. App. LEXIS 745; *Hicks v. Hicks*, 348 S.W.3d 281 (Tex. App. 2011); *Williams v. Williams*, 37 So. 3d 1171 (Miss. Ct. App. 2010); *Creech v. Creech*, 2010 Ky. App. Unpub. LEXIS 194; *Dziamko v. Chuhaj*, 193 Md. App. 98, 996 A.2d 893 (2010); *Potts v. Potts*, 142 Md. App. 448, 790 A.2d 703 (Ct. Spec. App. 2002); and *Cox v. Cox*, 228 A.D. 2d 773, 644 N.Y.S. 2d 77 (N.Y. App. Div. 3rd Dep't. 1996).

32. For cases in which there is apparently no recognition of the exist-

ence of the Survivor Benefit Plan, see, e.g., *Kelly v. Kelly*, 2013 Conn. Super. LEXIS 1348; *Hicks v. Hicks*, 2012 VA. Cir. LEXIS 80; and *Wormer v. Poling*, 2012 N.J. Super. Unpub. LEXIS 2276.

33. *Pay Tables*, DEF. FIN. & ACCT. SERV., <https://www.dfas.mil/MilitaryMembers/payentitlements/Pay-Tables/> (last visited June 6, 2022).

34. *In re Marriage of Cardona*, 316 P.3d 626 (Colo. 2014).

35. This means that she can never remarry.

36. The requirements for full eligibility for Tricare are set out at 10 USC § 1072(2)(f).

GLOSSARY OF TERMS, ABBREVIATIONS AND ACRONYMS

10/10: Shorthand for overlap of ten years of military pension service and ten years of marriage. This is the requirement for direct payment of military retired pay as property to a former spouse by garnishment.

20/20/20: Shorthand for 20 years of marriage, 20 years of military pension service, and an overlap of at least 20 years. This is the requirement for an unremarried former spouse's entitlement to post-divorce medical coverage and some other privileges.

Basic Allowance for Housing (BAH): A tax-free housing allowance that is provided to a servicemember (SM) who is authorized to live off-base.

Basic Allowance for Subsistence (BAS): An allowance that is meant to offset costs for an SM's meals.

Basic Pay: The pay of a servicemember according to rank and longevity, before additional amounts are added for quarters, subsistence, flying status, overseas duty, etc.

COLA: Cost of Living Adjustment.

DEERS: Defense Enrollment Eligibility Reporting System.

DFAS: Defense Finance and Accounting Service.

Disposable Retired Pay: That portion of gross military retired pay considered by the military pay center to be subject to court orders for division as property or subject to garnishment through legal process in enforcement of a court order. See 10 U.S.C. § 1408(a)(4).

DD Form 214: An SM's discharge certificate.

LES: Leave and Earnings Statement. The pay statement of an SM showing total entitlements (pay and allowances), taxes, and other mandatory deductions, voluntary allotments, days of annual leave taken and available, state of residence for tax purposes, etc.

SBP: Survivor Benefit Plan, 10 U.S.C. § 1447 et seq.

SCRA: Servicemembers Civil Relief Act, Chapter 50 of Title 50, U.S. Code.

Separation: Discharge/release from active duty.

Servicemember (SM): An officer or enlisted member of the uniformed services.

SGLI: Servicemembers Group Life Insurance, 38 U.S.C. § 765 et seq.

TDY: Temporary duty.

TRICARE: Military health care coverage program.

Uniformed Services: The U.S. Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

USFSPA: The Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408.

tiated between the Defense Department and a private insurer. The spouse must apply for coverage within 60 days of losing TRICARE eligibility and must pay the premiums on time.

Joe: On purchase of the CHCBP policy, Jane is entitled, on request, to medical care for 36 months after the final decree of divorce, dissolution, or annulment.³⁷

Mark: There is also another option for the former spouse who cannot satisfy the 20/20/20 rule. She may nevertheless be eligible for indefinite medical coverage through the CHCBP.³⁸ The criteria the DoD presently uses is that the former spouse must

- not have remarried before age 55;
- not be covered under Tricare' and
- either receive a portion of military retired pay or receive a survivor annuity (i.e., the SBP),³⁹ or
- have a court order for military pension division or a written agreement requiring SBP coverage for her.

THRIFT SAVINGS PLAN

Judge: What about a retirement account, Joe? The Thrift Savings

Plan, which is similar to a 401(k) plan, is sometimes a marital asset.

Joe: Yes. The court should consider this potentially valuable marital asset to the extent it was acquired during the marriage. Servicemembers can set up and contribute to their TSPs, and—for those who are in the Blended Retirement System⁴⁰—there are matching contributions by the government.

Judge: How do I determine what its value is and how much of that is marital?

Mark: To ascertain the TSP value, the court will need a copy of the TSP statement closest to the valuation date.⁴¹ If the account was set up before the marriage, a copy of the statement closest to the marriage date would also be needed.

Joe: If the account was established during the marriage, then all the court needs to do is:

- Determine the balance as of the classification date;
- Find out if there have been any loans from the account; and

37. 10 U.S.C. § 1078a(g)(1)(C). For further information regarding CHCBP coverage and benefits, one can use a search engine to look for "CHCBP," contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 740072, Louisville, KY 40201-7472 (800-444-5445).

38. This is pursuant to 10 U.S.C. § 1078a and 32 C.F.R. § 199.20.

39. It is strongly recommended that both of these be involved, not just "either/or."

40. SMs who joined the uniformed services after December 31, 2017 are covered by the Blended Retirement System (BRS), as are those who

opted into the system during calendar year 2017. For an explanation of the Blended Retirement System, see Amelia B. Kays, *The Blended Retirement System and Divorce*, LEGAL ASSISTANCE FOR MIL. PERS.: SILENT PARTNERS, <https://www.nclamp.gov/publications/silent-partners/the-blended-retirement-system-and-divorce/> (last visited June 6, 2022).

41. This is the date under state law for classification and valuation of marital or community property assets. In some states it is the date the parties separated. In others it is the date of divorce or the date of filing the divorce case.

- Find out if there have been any distributions from the account.

What is left is the marital value as the classification date. The adjustment would need to be made, of course, for passive gains and losses between that date and the date of the hearing.

Mark: If the SM sets up the TSP account before marriage, then it will be necessary for the court to receive evidence on the “incoming balance,” that is, the value at the time of the marriage. Then the court will need to determine the growth of that balance up to the classification date. This means either expert testimony or else evidence showing the monthly or quarterly growth of the account. Once the court determines how much the date-of-marriage balance was and how much that figure has grown, then it can subtract that appreciated figure from the value on the classification date, which will leave the remainder as the marital portion of the account.

Joe: The court divides a TSP account by means of a Retirement Benefits Court Order (RBCO). The rules and language can be found in a pamphlet called “Court Orders and Powers of Attorney” prepared by the TSP Legal Processing Unit. It is easily located by typing into any internet search engine, “court orders and powers of attorney TSP.”

Mark: There are two critical issues for the court to decide. The first is whether the former spouse, “Jane Doe,” is to receive a set dollar amount or a percentage of the balance in the account. The government will comply with either approach to division in the court’s order. The second issue for the court is to decide in a contested case whether Jane is to receive “earnings” on the amount that is allocated to her.

Joe: The term “earnings” means passive gains and losses. If the court states in its ruling that Jane will receive earnings on the amount awarded to her, then the TSP Legal Processing Unit will adjust the amount stated in the order for any increase or decrease in the value of the account from that date to the date of transfer to her.

Mark: Jane’s amount will be placed in a separate TSP account to be managed by Jane. She can, if she wishes, remove the funds and transfer the balance to an IRA in her name. If she takes an outright distribution, however, she will be receiving taxable money.

Judge: Can the funds in the TSP account of John Doe be garnished if he gets behind in child support?

Mark: Yes, they can. The order must state certain information to allow the account to be identified.⁴² The garnishment must be in a fixed dollar amount, not a percentage or fraction. When the proper court order is served, the account will be frozen until the government can comply with the garnishment terms.⁴³

Judge: Well, gentlemen, I think that wraps up the military divorce overview. We’ve covered pension division, family support, the Survivor Benefit Plan, and a host of other subjects. Thank you for helping to make clear to our judicial colleagues the issues and rules regarding the military divorce case.



Judge Dan Wiley graduated from the University of Kansas School of Law in 1992, with honors. He served as a Leavenworth Kansas Municipal Court Judge from 1997-2008, and as a State District Court Judge since 2009, where he primarily hears domestic relations cases. Judge Wiley is a United States Air Force veteran.



Joseph A. DeWoskin practices law in Kansas City, Kansas; he is a retired Army lieutenant colonel; he is licensed in Missouri and Kansas; and teaches CLE around the country on military issues in divorce.



Mark E. Sullivan, a retired Army colonel and author of The Military Divorce Handbook (ABA, 3rd Ed. 2019), is a family law practitioner in Raleigh, North Carolina.

42. The information on TSP accounts, child support and garnishment can be found in the booklet, “Court Orders and Powers of Attorney” (September 2014), which may be located in “Publications and Forms” at <https://tsp.gov>. In the process of dividing the TSP account at divorce, Jane Doe or her attorney can get the TSP account balance

and TSP transaction history by submitting a written request, and the court can write up the division order using the model RBCO in the booklet.

43. This information is also in the TSP booklet.