

**Guard and Reserve Pensions on the Day of Divorce:
Part Two**
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In the first part of this article, we learned of the dilemma facing Sam Green, the soon-to-be-ex of Janet Green, a Navy Reservist. Visiting his lawyer, Sam was expressing his frustration and confusion in the attempts he had made to find out about what her benefits would be, what she would receive in retired pay, how much was his share, and what he'd receive if she died before him. The first part explained what is required for a Reserve Component (RC) or "non-regular" retirement, that is, one involving the National Guard or Reserves. It covered how retirement points are acquired, what a "points statement" looks like, and how one's retired pay will be calculated.

RC Pensions and Divorce

The Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, provides the rules for military retired pay and its division upon divorce. It applies to RC and regular retirements.¹

There are two key considerations in dividing RC retirement rights. First, since RC SMs (servicemembers) usually do not begin to get paid until age 60 (regardless of when they stop drilling and apply for transfer to retired status), this deferral of payment must be taken into account in the negotiations and in any present value calculations. There will almost always be a "gap" between applying for retirement and "pay status" for the military member.

Second, the "marital fraction" should usually be computed twice – once using *marital years of service* over total years of service, and then again using *marital retirement points* over total retirement points -- to determine which computation will best benefit the client. When dealing with RC retirements, be sure to get a copy of the SM's most recent statement from the Retirement Points Accounting System (RPAS), also known as the "points statement." This will show how many total points have been acquired and how many were earned during the marriage.

Computations – An Example

An example will help illustrate what a difference this might make. Major Bill Smith has four years of active duty and 16 years of service in the Army Reserve. He married when he left active duty.

To calculate the marital fraction using points, we start by counting the points he acquired during active duty by multiplying 4 times 365 to get 1460 points. Then we count his Reserve points. During his time as a Reservist, assume that he acquired 73 points a year – 15 each year for membership, 44 points for 11 months of weekend drill, and 14 points for two weeks of annual training. This totals 1168 points for 16 years. Thus his total points at 20 years are 2628 (1460 plus 1168), of which 1168 (*or about 44%*) are marital. This should mean that 44% of his retired pay is marital, assuming retirement and date of separation both occur at year 20.

Now let's use *years* in calculating the marital fraction. He was married for 16 years out of the 20 years of creditable service. Note the result: if we use years in applying the marital fraction to his retirement pay, then the marital share of his pension is 16 divided by 20. This means that it is 80% marital.

What a difference! Recognition of these two ways of calculating the marital benefit, and the difference when Major Smith's pension is calculated, is essential to competent representation in the Guard/Reserve pension case.

The issue is complicated by the interplay between federal and state law. How to divide a pension, in general, is the province of state cases and statutes. Some states recognize the use of points for pension division, while others will only allow a “time rule” for the marital fraction.² Nothing in USFSPA says how to divide a Guard/Reserve pension or how to calculate the marital fraction, whether Guard/Reserve or active-duty. It is completely silent on this.

The retired pay center, which is usually Defense Finance and Accounting Center (DFAS), will not honor a formula clause in an RC pension division order which contains a marital fraction using months or years and the RC member is still drilling.³ There are two reasons for this.

First, in practical terms, one cannot speak of RC service in terms of months or years. The Defense Department doesn't keep track of RC service in terms of time, since RC points are the method of computing retired pay at DFAS.

In addition, the regulation which DFAS uses requires that a formula clause containing a marital fraction must be written in terms of retirement points, not years or months:

For members qualifying for a reserve (i.e., non-regular service) retirement, retiring from Reserve duty, the numerator expressed in terms of Reserve retirement points earned during the marriage must be provided in the court order. If the numerator is not provided in the court order, then either the court will have to clarify the award or the parties will have to agree on the numerator and provide it to the designated agent in a notarized statement signed by both parties.⁴

What can the family law practitioner do if the time calculation is more favorable to the client? There is no alternative formula clause which is acceptable to DFAS when the RC member is still drilling. If, however, the member has stopped drilling and applied for retirement status, or is already in pay status, then one can use any of the four available pension share clauses which DFAS will accept: set dollar amount, percentage, formula clause (using years or points) and hypothetical clause.⁵

Thus a probable approach to pension division in the above case, assuming the RC member is not still drilling, is to use a percentage clause, not a formula clause. This is also the case when state law “fixes” the spousal interest at the date of divorce or separation, as is the case in Florida, Texas, Tennessee, Kentucky and Oklahoma. It is a simple matter to convert the marital formula into a percentage since all of the terms – spouse’s share (usually 50%), numerator and denominator of the marital fraction, and benefit to be divided – are known. A court order containing a percentage or a hypothetical award will be honored by DFAS if it leaves nothing out (other than data available to DFAS).

DFAS will also accept a set dollar amount that is specified in a military pension division order. However, the amount will not be adjusted annually for COLAs (cost of living allowance) for the non-military partner.⁶ Such an award might state: “Sam Green will receive \$400 a month from Janet Green’s Naval Reserve retired pay.”

PRACTICE TIP

These days, with the high number of Guard/Reserve mobilizations, it is increasingly possible for an RC member of the Reserve Components (RC) to accumulate enough years to consider “hanging on” for active-duty retirement after completion of 20 years of creditable service. What happens if Janet Green has eight creditable years of RC service, four initial years of active duty, and now four years of mobilized active-duty service in support of Operation Brass Key in the Duchy of Grand Fenwick? Involved in a pending divorce, what should Sam Green do when he is confronted with the almost equal possibility of her retirement from the “active side” or the “Reserve side,” in terms of an order for present pension division?

In addition to the court's reserving jurisdiction until a final decision is made, the court could enter an order which provided for *one* of the two retirements, with the parties' property settlement agreement containing the following clauses:

During 153 months of the parties' marriage, the defendant-wife has served both on active duty and as a member of the United States Naval Reserve. She either will become eligible to apply for Reserve retired status after serving 20 qualifying years of Reserve service in 2018, with Reserve military retirement payable at about age 60, or will become eligible for active duty retirement after 20 creditable years of active duty service. The parties recognize the plaintiff's rights to a percentage of whichever of these two retirements that the defendant ultimately receives.

Due to the complexity of the military retirement system and in the interest of affording plaintiff an equitable share, a formula should be used in order to divide the pension. This will cover the contingencies of defendant's continued Reserve service or a return to active duty, as well as her continued advancement in grade and time in service. Any retirement paid to plaintiff under either retirement plan is referred to as "Military Retired Pay." In either of these situations, the SBP (Survivor Benefit Plan) premium for former-spouse coverage for plaintiff will be deducted from total retired pay to arrive at Military Retired Pay.

The parties will cooperate in the drafting and entry in the District Court for Coriander County, East Virginia, of an order dividing defendant's Military Retired Pay, so that plaintiff shall receive a portion of either monthly benefit payment according to the formula set forth below. The order shall be drafted as an order dividing active duty retired pay, but shall specifically state that the parties reserve the right to enter a "clarifying order" in the event that defendant-wife retires as a Reservist. In this latter event, the parties will cooperate in the drafting and entry of a clarifying order, and the parties will equally divide the cost of drafting the clarifying order.

If defendant-wife retires from active duty, the plaintiff's share of the monthly pension benefit will be governed by the time rule and will be computed according to the following formula: 50% of the monthly benefit multiplied by a fraction, the numerator of which shall be the number of months the parties were married (153) up to the separation, and the denominator of which shall be the number of creditable months served by the defendant-wife earning the Military Retired Pay.

If defendant retires as a Reservist, the order dividing Military Retired Pay will be entered as soon as reasonably practicable after defendant's application for Reserve retirement. The plaintiff's share of the monthly pension benefit will be governed by the acquisition of Reserve retirement points and will be computed according to the following formula: 50% of the monthly benefit multiplied by a fraction, the numerator of which will be the number of Reserve retirement points acquired during the marriage up to the separation, which is 2,345 points, and the denominator of which will be the total number of Reserve retirement points at the date of defendant's Reserve retirement orders.

Where to Send the Court Order

The Military Pension Division Order (MPDO) is sent to the appropriate “designated agent” for payments. See DoDFMR (Department of Defense Finance Management Regulation),⁷ Vol. 7B, ch. 29, § 290403 for the names and addresses of the designated agents for each branch of service. Note that the order is not called a Qualified Domestic Relations Order (QDRO) because military retirement is a statutory governmental program, not a “qualified plan” divided by a QDRO.

Which Military Retirement Plan?

Military personnel get a monthly Leave and Earnings Statement (LES). The Active Duty LES contains blocks reading “RETPLAN” and “DIEMS,” while the Reserve and Guard LES may lack these blocks. The “RETPLAN” block tells which retirement plan the member will retire under: Final Basic Pay, High-3, or REDUX. That plan is in turn determined by the Date of Initial Entry into Military Service (DIEMS). As explained in Part One of this article, DIEMS before September 1, 1980 means Final Basic Pay. DIEMS between 1980 and 1988 means High-3. Finally, DIEMS after 1988 means CSB/REDUX. DIEMS is determined by the first date of military service. It is unaffected by a break in service and so can differ from Pay Entry Base Date, or PEBD.⁸

Other Requirements for Direct Pay of the Pension Share

The MPDO can only be used for direct payments if, pursuant to 10 U.S.C. 1408(c)(4), there is court jurisdiction because the SM –

- is domiciled in the state in which the suit for the divorce or property division occurs; or
- resides in the state in which the lawsuit occurs (other than because of military assignment); or
- consents to the jurisdiction of the court in which the lawsuit occurs.⁹

If the order states that jurisdiction is based on one of the above grounds, it must also state the basis for the finding (i.e., member’s residence, member’s domicile or member’s consent).¹⁰

Virtually every former spouse wants to receive monthly payments from the retired pay center, not from the military retiree. Pension garnishments (as property division, as opposed to

alimony or child support) require that the parties have been married for at least ten years while the military member performed at least ten years of creditable service; this is known as “the 10/10 Rule.”¹¹

Note that the "ten-year rule" is not a *jurisdictional requirement* for dividing military pensions. There is no limitation on the number of years of marriage overlapping military service as a requirement for military pension division, although this is a widely held misconception in the civilian bar. A military pension may be divided by court order whether the spouse has 30 years of marriage to the SM or 30 days of marriage. Rather, this time requirement is a prerequisite to *enforcement through DFAS*. The payment mechanism of a garnishment of the member’s retired pay is not available unless this test is met.¹²

Note that some states don’t use the term “garnishment” for support payments. But that is the terminology used in 42 U.S.C. § 659 and 5 C.F.R. Part 581, and that term should be employed when dealing with any federal pension, whether military or civilian.

When there are ten years of combined Guard/Reserve and active service, DFAS will aggregate them to allow the ten-year rule to be met.¹³ It should be noted that being in the Guard or Reserves for 10 years is not necessarily the same thing as “having ten good years” which are creditable toward retirement. A “good year” is one in which the Guard/Reserve SM has accumulated at least 50 points. A year with fewer points means that the year is not creditable toward retirement (a minimum of 20 good years) although the points in that year still count in calculating retired pay.

The order must also provide for payment from military retired pay in an acceptable clause.¹⁴ The court order must be authenticated or certified within the 90 days immediately before its service on DFAS, and it must state the eligibility of the spouse or former spouse under the “10/10 rule” stated above. The right information must be in the order (e.g., names, addresses, jurisdictional facts), and the amount for the former spouse must be within the maximum limits (i.e., 50% of disposable retired pay) for most orders). The SM remains liable for any amount still owing. In cases where there is an application for the direct payment of court-ordered division of military retired pay and a garnishment issued pursuant to 42 U.S.C. § 659 (child or spousal support), DFAS is authorized to deduct higher maximum amounts.¹⁵ The parties have taxes deducted from their respective shares before the checks are sent.

The Hypothetical Clause

There are, in general, four acceptable methods of dividing military retired pay. The set dollar amount, percentage and formula clause have been covered above. The fourth is a hypothetical clause, which is an award based on a pay grade or term of years of service that is different from what exists when the SM actually retires. This is usually used when the parties' interests are fixed as of some specific valuation date. For example, if the parties divorced while the wife was a Navy chief petty officer with 18 years of creditable military service, the hypothetical clause might state:

Husband is granted ___% of what a chief petty officer (E-7) would earn if she were to retire with 18 years of military service with a retired pay base of \$_____.

A hypothetical clause in a military pension division order for a still-serving RC member might be worded as follows:

Husband is awarded _____% of the disposable military retired pay that wife would have received had she become eligible to receive military retired pay with a retired pay base of \$_____ and with _____ Reserve retirement points on (date).

If the wording isn't right, DFAS will return it for entry of a "clarifying order" by the court. Since there is no pre-signing review of draft MPDOs available at DFAS, counsel must get it right the first time. The "Attorney Instructions" and the sample military retired pay division order explain how to word the clauses.¹⁶

The Servicemembers Civil Relief Act

There must be a statement in the pension division order that "the member's rights under the Servicemember Civil Relief Act (50 U.S.C. App. 501 et seq.) were observed."¹⁷ The Servicemembers Civil Relief Act (SCRA) offers protection for military members who are on active duty at the time of the property division or divorce; it does not apply to retirees, but it would be a better practice to include such wording in all military pension division orders.

What protections for Janet Green are involved? A checklist for SCRA protections would include at least the following:

SCRA Checklist for Servicemember Pension Division Protections

- ___1. If the SM, Janet Green, has not entered an appearance in the divorce case, or the pension or property division lawsuit, a stay (continuance) must be granted for at least 90 days if –
 - ___a. the judge determines that there may be a defense to the action, and such defense cannot be presented in the SM’s absence, or
 - ___b. with the exercise of due diligence, counsel has been unable to contact the SM (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).
- ___2. If Janet has actual notice of the lawsuit, a similar mandatory 90-day stay (minimum) of proceedings applies if she requests it properly. 50 U.S.C. App. § 522.
- ___3. She may ask for an additional stay at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the judge will not grant an additional stay, then counsel must be appointed to represent her in the action. 50 U.S.C. App. § 522(d)(2).
- ___4. The stay request does not constitute an appearance for jurisdictional purposes in the lawsuit, and it does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. § 522(c)
- ___5. If Janet has been served but has not entered an appearance by filing an answer or otherwise, her husband may not obtain a default judgment (meaning an adverse ruling) under 50 U.S.C. App. § 521 unless the court first determines whether she is in military service. This means that Sam Green must file an affidavit stating “whether or not the defendant is in military service and showing necessary facts in support of the affidavit.” 50 U.S.C. App. § 521(c).
- ___6. If Sam Green states in the affidavit that Janet is a member of the armed forces, no default may be taken until the court has appointed an attorney for Janet in the pension division case.
- ___7. If the appointed attorney cannot locate Janet, actions by the attorney may not waive any defense she has or otherwise bind her in the pension action. 50 U.S.C. App. § 521(b)(2).
- ___8. If a default decree is entered against Janet during active duty or within 60 days thereafter and she has not received notice of the proceeding, she may move to reopen it so long as -
 - ___a. She does so while on active duty or within 90 days thereafter. 50 U.S.C. App. § 521(g); and
 - ___b. She can prove that, at the time the judgment was rendered, she was prejudiced in her ability to defend herself due to military service; and
 - ___c. She has a meritorious or legal defense to the initial claim.

If, at a minimum, these rights have been honored, then the court order for pension division could truthfully state that Janet Green’s rights under the SCRA had been observed. Such a statement would read:

The court has complied with the rights of the defendant, Janet Green, under the Servicemember Civil Relief Act (50 U.S.C. App. 501 et seq.).

Other Terms for Consideration

A well-written MPDO will protect Sam by stating terms for indemnification if Janet later is determined to be disabled. Disability payments received after retirement can reduce the amount which Sam Green should be receiving. An indemnification clause might read:

If Janet Green does anything that reduces the amount or share of retired pay to which Sam Green is entitled, such as the receipt of disability pay, then she will promptly make direct payments to Sam Green to indemnify him and hold him harmless from any reduction, costs or damages which he may incur.

Starting the Process

The spouse or former spouse usually starts the process of division of the military pension by notifying DFAS by facsimile or electronic submission, by mail, or by personal service; service is effective when a complete application is received by DFAS. The notification form is DD Form 2293 (“Request for Former Spouse Payments From Retired Pay”).¹⁸

Payments are made once a month, starting no earlier than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later. The payments end no later than the death of the member or spouse, whichever occurs first.¹⁹ Payments are prospective only; no arrears are allowed. USFSPA does not provide for garnishment of payments missed prior to the approval of the application by DFAS.

Survivor Benefit Plan

In regard to Sam Green’s questions about the death of Janet before him, the answers about continued payments lie in the Survivor Benefit Plan (SBP), which is a joint and survivor annuity available to active-duty and RC retirees to ensure the continuation of payments after the SM/retiree dies. The surviving spouse or ex-spouse, when this is chosen, receives 55% of the selected base amount for the rest of his life, so long as he does not remarry before age 55. This should always be considered in a settlement or trial judgment when one represents the former spouse.²⁰

When Janet got her “20-year letter,” also known as the NOE (Notice of Eligibility), she also received a form for making a decision as to SBP. Shown on DD Form 2656-5 were these options:

- Option A – defer the decision until “pay status,” which is usually age 60.
- Option B – elect coverage, but defer the payments until the SM would have attained pay status, usually at age 60.

- Option C – immediate coverage, which means that the survivor receives payments starting when the SM dies.

Any choice except Option C requires the consent of one’s spouse. If the executed form is not returned within 90 days of receipt by the SM, he or she is defaulted into Option C.

To review the form, it will be necessary to have Janet produce a copy in discovery. If that doesn’t work, then Sam must obtain a court order or a subpoena signed by a judge, for a copy of Janet’s DD Form 2656-5. The subpoena or order is sent to the address under Instructions if Janet is not yet in pay status; it is sent to DFAS in Indianapolis if she is receiving retired pay. It usually takes a month or two to obtain delivery.

There is one hitch in coverage for Sam, however. He will lose his “spouse coverage” upon divorce. If he decides to request SBP coverage, he needs to obtain a court order requiring Janet to elect “former spouse” coverage for him. His submission of such an order, along with the divorce decree and his “deemed election” (on DD Form 2656-10) within one year of the order, ensures that he will be covered. If Janet submits an election for his coverage, it must be done within one year of the divorce decree.

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¹ See Captain Karen A. MacIntyre, "Division of U.S. Army Reserve and National Guard Pay upon Divorce," 102 MIL. L. REV. 23 (1983).

² For cases holding that classification of the marital part of a Reserve Component (Guard/ Reserve) pension may be based on “marital points” divided by “total points,” see *Faulkner v. Goldfuss*, 46 P.3d 993 (Alaska 2002), *Hasselback v. Hasselback*, 2007 Ohio 762, 2007 Ohio App. Lexis 644 (2007), *Woodson v. Saldana*, 165 Md. App. 480, 885 A.2d 907 (2005), *Bloomer v. Bloomer*, 927 S.W.2d 118 (Tex. App. 1996), *In re Beckman*, 800 P.2d 1376 (Colo. Ct. App. 1990) and *In re Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979), and. Some states, on the other hand, require calculation of the marital fraction based on time, not “points” or some other factor. See, e.g., N.C. Gen. Stat. § 50-20.1(d), which states, “The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment.” In Virginia, where the division of a pension is according to years instead of points, the Court of Appeals upheld a time-rule division as within the trial court’s discretion. *Jordan v. Jordan*, 2004 Va. App. LEXIS 285 (June 22, 2004).

³ The pay center, or “designated agent,” for most USFSPA pension division orders is DFAS, since it handles orders for the Army, Navy, Air Force and Marine Corps; thus that abbreviation is used throughout this article. In fact, the Coast Guard, PHS, and NOAA pay centers are separate entities. See DoDFMR (Department of Defense Finance Management Regulation), Vol. 7B, ch. 29, § 290403 for names and addresses of the designated agents for each branch of service.

⁴ DoDFMR, Vol. 7B, ch. 29, § 290607.B. Acceptable formula award language is contained in the “Military Retired Pay Division Order” at Appendix A in the chapter.

⁵ See DoDFMR, Vol. 7B, ch. 29, § 290608 for the specific DFAS rules regarding permissible and required terms in the “hypothetical retired pay award.”

⁶ DoDFMR, Vol. 7B, ch. 29, § 290601.C and 290902.

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- ⁷ The DoDFMR can be found at <http://comptroller.defense.gov/fmr>
- ⁸ Service Academy (e.g., West Point) time as a Cadet or Midshipman, while not creditable for retirement or pay, impacts DIEMS. The date the member swore into the Academy as a Cadet or Midshipman fixes DIEMS even if the member didn't graduate from the Academy. Service Academy dropouts who later re-enter military service should ensure their Academy discharge is recorded in their military record and that their Academy service is reflected in their Retirement Point Accounting System (RPAS) statements. The non-serving spouse of such a servicemember with a break in service around 1980 or 1988 will want to ensure that Academy service qualifying for the earlier retirement plan is entered into the RPAS.
- ⁹ DoDFMR, Vol. 7B, ch. 29, § 290604.A. *See also* 10 U.S.C. § 1408(c)(4).
- ¹⁰ DoDFMR, Vol. 7B, ch. 29, § 290605.
- ¹¹ DoDFMR, Vol. 7B, ch. 29, § 290604.B. *See also* 10 U.S.C. § 1408(d)(2).
- ¹² *See, e.g., Carranza v. Carranza*, 765 S.W. 2d 32 (Ky. App. 1989).
- ¹³ E-mail, Phoenix attorney Michael McCarthy, to the author, subject: 10/10 issues for your book/question re: requirements for member to delete SBP (September 2, 2004) (on file with the author).
- ¹⁴ 10 U.S.C. 1408(a)(2)(C).
- ¹⁵ DoDFMR, Vol. 7B, ch. 29, § 290901.
- ¹⁶ The Attorney Instructions may be found at www.dfas.mil > Garnishment Information > Former Spouses' Protection Act > Attorney Guidance. Also at the "Former Spouses' Protection Act" tab are notes on "Legal Overview," how to apply for payments from DFAS, the "maximum amount" rules, receipt of payments (including taxes and direct deposit information), and Frequently Asked Questions.
- ¹⁷ DoDFMR, Vol. 7B, ch. 29, § 290602.B; *see also* 10 U.S.C. § 1408(b)(1)(D).
- ¹⁸ This can be found by typing "DD Form 2293" at Google, Yahoo or any other search engine.
- ¹⁹ DoDFMR, Vol. 7B, ch. 29, § 291102.A.
- ²⁰ A full explanation of how this works is found at the www.nclamp.gov > Silent Partner > Military Pension Division: The Spouse's Strategy.