

Chapter 8

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

8-1 GENERAL

This section offers a general discussion of the Uniformed Services Former Spouses' Protection Act (USFSPA) in three areas: division of retired pay; Survivor Benefit Plan (SBP); and military Identification (ID) and Privilege Cards. It is not a legal brief nor does it state a legal position. It cannot be used as evidence of intent, interpretation or precedent in any legal action. The points made are not designed to answer detailed questions concerning individual cases. Individuals impacted by the USFSPA should consult a military or civilian attorney for more information.

8-2 BACKGROUND

The 1981 landmark case, *McCarty v. McCarty*, brought to the U.S. Supreme Court the issue of whether or not a court could consider military retired pay as marital property and order a division of it. The Court ruled that retired pay could not be divided as community property without Congressional authorization. In 1982, Congress provided that authority by enacting Public Law 97-252, known as the Uniformed Services Former Spouses' Protection Act, or USFSPA. With that, the stage was set for the ongoing debate over various USFSPA provisions, brief summaries of which follow.

8-3 DIVISION OF RETIRED PAY

The USFSPA granted two main authorities:

- a. That state courts may treat military retired pay as they would other marital property to permit a qualified division; and,
- b. That the appropriate government agency, Defense Finance and Accounting Service—Cleveland (DFAS-CL) could make direct payments to former spouses under certain conditions.

No Automatic Entitlement: The USFSPA does not provide for an automatic entitlement to a division of military retired pay. For example, a couple may have been married throughout a full military career, yet the USFSPA does not compel a state court to award a division of retired pay to the former spouse.

Enforcement: When a division of retired pay is court-ordered, USFSPA allows direct payments for former spouses only if the parties were married to each other for at least 10 years, during which time the member performed at least 10 years of creditable military service for retirement. To illustrate, marriages need not meet the condition that there was 10 years of marriage that overlapped with military service in order for the state court to direct that retired pay be divided. However, DFAS-CL will not make direct payments to the former spouse if these two requirements are not met. Payments would have to be established through the court or made personally by the retiree.

Child Support or Alimony: The requirement that there is 10 years of marriage that overlaps with service does not apply to direct payment of child support or alimony.

Limitations: The court order will not be honored by DFAS-CL unless the court issuing the order held jurisdiction over the member. This jurisdiction requirement, however, does not apply to child support or alimony. Further, regardless of the award made by the state court, the government restricts direct payment to the former spouse to 50 percent of the member's "disposable" retired pay. The exception to this is in enforcement of child support garnishment orders, which can raise the direct pay amount to a total of 65 percent of disposable pay.



Disposable Pay: Disposable pay is the product of the gross retired pay entitlement minus the following:

- Amounts owed by the member for previous overpayments or recoupment;
- Amounts deducted for court martial fines;
- Amounts waived under Title 38, US Code, for VA disability compensation;
- Survivor Benefit Plan (SBP) premiums (only if the former spouse to receive the pay division is also the named former spouse SBP beneficiary);
- (For post-Nov. 14, 1986 court order dates): Amounts of retired pay based on disability (per Title 10, Chap. 61);
- (For pre-Feb. 3, 1991 court order dates): Amounts owed the U.S.;
- (For post-Feb. 3, 1991 court order dates): Amounts withheld for federal and state income taxes, consistent with the member's tax liability.

Calculating Disposable Retired Pay:

For retiring Soldiers whose former spouse was awarded a division of retired pay as part of a final decree of divorce prior to Dec. 23, 2016, the retired pay will be calculated on the disposable retired pay at the time of receipt of retired pay.

In the case of a division of military retired pay that becomes final prior to the date of retirement but after Dec. 23, 2016, the member's disposable retired pay is calculated as follows:

For an active duty retirement, the member's disposable retired pay for purposes of division of retired pay cases is calculated based on the members "retired pay base" (high-3 average or final pay depending on when the member entered the service) and years of service at the time of the decree of divorce, dissolution, annulment, or legal separation awarding the division of retired pay.

For a Reserve Component Soldier who will qualify for a future non-regular retirement, the member's disposable retired pay is calculated based on what the Soldier would have been entitled using the Soldier's retired pay base (high-3 or final pay depending on when the member entered the service) and creditable service points (retirement points) on the date of the decree of divorce, dissolution, annulment, or legal separation awarding a division of retired pay.

The above calculations will be increased by the COLAs that occurred between the date of the decree of divorce, dissolution, annulment, or legal separation awarding the division of retired pay and the time of the member's retirement.

A division of retired pay award computed as a percentage of a member's disposable retired pay will be increased by the same appropriate portion of any COLAs the member receives after retirement.

Application Procedure: Only the former spouse or the former spouse's attorney – not the member -- can apply for direct pay under the USFSPA, using a DD Form 2293 (Application for Former Spouse Payments from Retired Pay). Once the process is successfully completed, payments to the former spouse begin within 90 days, in accordance with the normal retired pay cycle. If the member is not yet retired, payments begin within 90 days after date of retirement.

Former Spouse Remarriage: Remarriage by the former spouse does not result in the former spouse losing entitlement to receive direct payment of retired pay, which was awarded as property, unless so specified by the court.

8-4 SURVIVOR BENEFIT PLAN (SBP)

Voluntary or Court Ordered: Since Nov. 14, 1986, state courts have been permitted to order a member to participate in SBP for the member's former spouse. This pertains both to active duty members who can be ordered to elect former

spouse coverage at retirement and to Retired Soldiers enrolled with spouse coverage. Courts cannot order a Retired Soldier to provide former spouse coverage unless the member had previously made a spouse election for them.

Similarity to Spouse Coverage: When divorce occurs after retirement, former spouse coverage will be in the same amount as spouse coverage. In active duty divorces, the specific level of coverage to be elected should be directed by the court order.

Loss of Eligibility: If the former spouse remarries before age 55, SBP eligibility is lost, participation is suspended, and no SBP costs are owed during the period of ineligibility. During this period, the former spouse retains the SBP even though ineligible to receive the annuity and the current spouse cannot be covered. However, if the former spouse remarriage ends, eligibility is restored, participation is resumed and premium costs resume. Marital status changes must be reported to DFAS-CL immediately.

General Irrevocability: Elections are generally permanent with the following exceptions:

Disenrollment Option: If the former spouse election is purely voluntary with no written agreement, the Retired Soldier may disenroll between the 25th and 36th month. If the former spouse election was voluntarily made based on a written agreement that was not incorporated into a court order, former spouse's written concurrence must be provided in order to discontinue participation in SBP. If the former spouse election was court-ordered, or an agreement to make the election was incorporated into or ratified/approved by a court order, the member must furnish a certified valid court order modifying the provisions of all previous court orders in order to terminate former spouse SBP. Former spouse written concurrence is not required in this instance.

Retired Soldier's Remarriage: If the Retired Soldier remarries, former spouse coverage may be changed to spouse coverage within one year of the marriage IF the following occurs:

- If the former spouse election is court-ordered, or an agreement to make the election is incorporated in or ratified or approved by a court order, the member furnishes a certified valid court order modifying the provisions of all previous court orders relating to the election.
- If the former spouse election is the result of a written agreement, which is NOT incorporated in or ratified or approved by a court order, the former spouse provides written concurrence with the change of election.
- If the former spouse election is purely voluntary, with no written agreement existing, the former spouse is notified.

Deemed Elections: A former spouse has one year from the date of the first court order or written agreement to make a written request to DFAS-CL for a deemed former spouse election using DD Form 2656-10 (SBP/RC-SBP Request for Deemed Election). NOTE: Providing DFAS-CL a copy of the divorce decree does not constitute a request for a deemed election. Former spouses are advised to take this action, both when the divorce occurs while the member is on active duty, and after retirement. It is the only way that a former spouse election will be made if the member fails to comply with the court order within one year of divorce for a retiree or at retirement for a divorce on active or reserve duty. For a retiree, if the court order first awarding former spouse is over one year from the date of divorce, the SBP election can only be changed to former spouse by the former spouse deeming the election within one year of the court order. All members are similarly advised to voluntarily request in writing that former spouse coverage be implemented if court-ordered, so as not to be in contempt of court. Former spouses of Reserve Component Soldiers awarded court ordered RCSBP will submit their DD Form 2656-10 for deemed former spouse RCSBP election to the Human Resource Command.

Two Common Errors: Some SBP participants mistakenly believe that SBP elections are made by the individual, rather than by category. The result of that belief often is that a member fails to notify DFAS-CL of a divorce, assuming that coverage will continue for that person by name. Costs continue to be withheld (for a nonexistent spouse beneficiary), and the Retired Soldier assumes that continued cost is for continued coverage. Too often, the grim discovery following the Retired Soldier's death is that no valid election exists and no annuity is payable, or if payable, it is to a current spouse. Or, if notification of the divorce is made, the required written request for former spouse is not, and thus the election category

is not changed from spouse to former spouse. The spouse coverage is suspended and no premiums are collected. By the same token, many former spouses are unaware that simply providing the divorce decree to DFAS-CL is not a request for a deemed election. Again, by law, a written request using DD Form 2656-10 must be made within one year after the date of the court order. Failing that timely action, future inquiry will reveal an invalid former spouse election if it was not accomplished by the member.

8-5 MILITARY IDENTIFICATION AND PRIVILEGE CARDS

The USFSPA and its subsequent amendments authorize military benefits to certain former spouses. All of the following criteria must be met in order to receive a military ID card:

- Marriage of at least 20 years
- Creditable service of at least 20 years
- Marriage and service overlap of at least 15 years

If the overlap is at least 20 years, the former spouse receives full privileges. If the overlap is at least 15, but less than 20, years, the former spouse receives medical care only for one year from the divorce. After one year, enrollment in a premium-based, temporary transitional health care program, "Continued Health Care Benefit Program" (CHCBP), is available to a former spouse who does not have employer-sponsored coverage. Former spouses in this category, whose divorces were finalized on or before April 2, 1985, were granted indefinite medical benefits.

Call your nearest military ID card office for additional information.