

**TAKE-1**  
**UNIFORMED SERVICES FORMER**  
**SPOUSES PROTECTION ACT**

**XVIII AIRBORNE CORPS LEGAL ASSISTANCE OFFICE**



## **UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (USFSPA)**

### **1. Q. WHAT IS USFSPA?**

A. USFSPA is a law enacted by Congress in 1982 to offer some financial protection to certain former spouses of servicemembers. It allows states to divide military disposable retired pay as marital property upon divorce. It allows some former spouses (through a court order) to be awarded a share of military retired pay, either from the member or by direct payment from DFAS (Defense Finance and Accounting Service) and to obtain medical care and certain other benefits.

### **2. Q. WHAT IS DISPOSABLE RETIRED PAY?**

A. Retired pay is the total monthly pay to which a retired servicemember is entitled, less most VA disability pay, federal debt repayments, fines, forfeitures and Survivor Benefit Plan premiums.

### **3. Q. CAN I GET CHILD SUPPORT OR ALIMONY TAKEN OUT OF MY SPOUSE'S RETIRED PAY AND SENT DIRECTLY TO ME?**

A. Yes. In order to receive direct payment from a finance center for alimony and child support under the Act, you will first need to get a court order requiring the payment of child support or alimony. The court order does not have to state specifically that the award is made as direct payment of retired pay. The court order and/or other documents served with the court order must identify the military member concerned and, if possible, state his or her Social Security Number. The USFSPA provides that not more than 65% of a retired military member's retired pay can be garnished for spousal and child support.

### **4. Q. IF PART OF THE RETIRED PAY IS AWARDED AS MARITAL PROPERTY UPON DIVORCE, HOW DO I OBTAIN DIRECT PAYMENT FROM THE FINANCE CENTER?**

A. You must meet the "10-year test" to receive direct payment under the Act. You, the former spouse, must have been married to the servicemember for at least of 10 years, during which the member performed at least 10 years of creditable service for retirement purposes. Further, if you meet the test, you must get a court order specifically stating that the award shall be made as direct payment of retired pay. If these conditions are met, then you can get monthly checks from DFAS (the Defense Finance and Accounting Service) in Cleveland, Ohio.

### **5. Q. DO ALL STATES ALLOW MILITARY RETIRED PAY TO BE DIVIDED AS MARITAL OR COMMUNITY PROPERTY?**

A. Yes. Only Puerto Rico bars the division of pension rights upon divorce. All states have one method or another of granting the division of military pensions as marital property. You should check the laws of the state where you presently live and the "home state" or domicile of the

servicemember. You should also consult a military legal assistance attorney as to pension division in specific states.

#### **6. Q. HOW IS MILITARY RETIRED PAY DIVIDED?**

A. The rules for retired pay division vary from state to state. In North Carolina, for example, the court can divide the pension by ordering that a portion be paid to the non-service spouse upon the servicemember's retirement. This would be paid on a monthly basis as long as the retiree receives payments. The payments could come from the retiree or, if the "direct payment" conditions in #4 above are met, directly from DFAS so long as it is contained in a court order (not just in a separation agreement).

#### **7. Q. IS THERE ANY WAY THE COURT CAN DIVIDE THE RETIRED PAY SO I DON'T HAVE TO WAIT UNTIL MY HUSBAND RETIRES?**

A. USFSPA specifically forbids state courts from ordering a member to retire in order to divide the pension. Some states, such as California, allow payments to be made under court order while the member is still on active duty. North Carolina does not allow this. North Carolina law does, however, allow the present value of the pension to be used as a set-off or trade against other property that the non-service spouse will receive. Thus the retired pay might be traded against the marital residence if the values of each were roughly equal. If the values were not equal and the servicemember received "too much" of the marital property, the judge could order him or her to make regular payments to the other party (called a "distributive award") until the shares of the parties were adjusted as the judge ordered.

#### **8. Q. HOW CAN I FIND OUT IF THE COURTS OF NORTH CAROLINA CAN DIVIDE MY HUSBAND'S RETIRED PAY?**

A. The answer to this questions depends on your husband's legal residence (or domicile). North Carolina has jurisdiction over the husband's pension if:

- He is a legal resident of this state; or
- He is residing in North Carolina for reasons other than because of military assignment; or
- He consents to the jurisdiction of North Carolina's courts over the division of his retired pay in an equitable distribution proceeding.
- If none of the above conditions apply, then this state's courts cannot divide his retired pay.

#### **9. Q. HOW MUCH OF THE RETIRED PAY WILL BE DIVIDED OR AWARDED TO ME?**

A. The court can only divide the "marital portion" of the pension, that is, the portion that was earned during the marriage (before the date of separation). The rest of the pension (that earned before marriage or after separation) is separate, nondivisible property. Federal law says that no

more than half of the pension can, under most circumstances, be divided. North Carolina law presumes an equal division of all marital property, including retirement rights. Other than this, there is no way of telling how much marital property will be awarded or how much of the pension will be granted to you.

**10. Q. IF I DIE, WHAT HAPPENS TO THE PENSION DIVISION AWARD?**

A. Under USFSPA, your rights to a portion of military retired pay end upon your death. Payments cannot be made to your estate, survivors or heirs.

**11. Q. DO I STILL CONTINUE TO RECEIVE THE BENEFITS AFTER THE SERVICEMEMBER DIES?**

A. It depends. Federal law states that, in the event the servicemember dies, the person receiving the award shall receive no further pension division payments. There may, however, be payments under the Survivor Benefit Plan (SBP) if that has been elected by the member. SBP payments allow the continued flow of income to a non-military spouse after the member's death (but not necessarily in the amount of payments under USFSPA). The court can order a spouse to provide SBP coverage for the non-service spouse. The order, to be effective, must be served on DFAS within one year after the divorce; otherwise it will not be honored.

**12. Q. IS THERE A MAXIMUM AMOUNT THAT I CAN RECEIVE UNDER USFSPA?**

A. Yes. USFSPA limits pension division awards to 50 percent of the member's disposable retired pay, but the maximum is raised to 65% if there are also alimony and/or child support orders against the member as well. There are also certain exceptions in the event of multiple court orders involving different spouses.

**13. Q. WHAT CAN I DO IF THE MILITARY MEMBER IS REQUIRED BY COURT ORDER TO PAY MORE THAN THE MAXIMUM ALLOWABLE AMOUNT UNDER USFSPA?**

A. If this happens, DFAS cannot help you. You will need to take action directly against the individual military member through the courts for amounts in excess of what DFAS can pay.

**14. Q. BESIDES RETIRED PAY, WHAT OTHER BENEFITS CAN I RECEIVE UNDER USFSPA?**

A. If you are a former spouse and meet certain requirements, you may be able to receive full or partial medical, dental, commissary and post exchange benefits.

**15. Q. HOW CAN I RECEIVE FULL BENEFITS?**

A. You can receive full benefits if you meet the "20/20/20 test". This three-part test requires that you must have been married to the military member for at least 20 years. The member must have performed at least 20 years of creditable service toward retirement. Finally, at least 20 years of

the marriage must overlap at least 20 years of active service. You must meet all three parts of the test.

**16. Q. DOES THE DATE OF THE DIVORCE DECREE MATTER IF I MEET THE "20/20/20 TEST"?**

A. No. If you meet the test, you are eligible to receive full benefits regardless of the date of the divorce decree.

**17. Q. IF I DO NOT MEET THE "20/20/20 TEST" FOR FULL BENEFITS, ARE THERE OTHER BENEFITS AVAILABLE?**

A. Yes. You may be able to receive permanent medical benefits if the divorce decree was final before 1 April 1985 and you meet the "20/20/15 test".

**18. Q. WHAT ARE THE CRITERIA FOR THE "20/20/15 TEST"?**

A. You must have been married to the military member for at least 20 years and the member must have performed at least 20 years of creditable service towards retirement. Finally, at least 15 years of the marriage must be during military of service. Again, as with the "20/20/20 test", you must meet all parts of the test.

**19. Q. IF I RECEIVE FULL MEDICAL BENEFITS, CAN I ALSO BE COVERED BY OTHER MEDICAL INSURANCE?**

A. Under either test, if you receive full benefits you cannot be covered by any type of employer-sponsored medical coverage. However, you can refuse your employer-sponsored medical benefits and retain the military medical benefits. You would also be disqualified if you have individually obtained medical insurance.

**20. Q. MAY I RETAIN FULL MEDICAL BENEFITS IF I REMARRY?**

A. No. You must remain unmarried under either test. Any subsequent remarriage eliminates the benefits, even if you are widowed or divorced later.

**21. Q. IF I MEET THE "20/20/15 TEST", BUT MY DIVORCE DECREE IS FINAL AFTER 1 APRIL 1985, AM I STILL ELIGIBLE FOR SOME BENEFITS?**

A. Yes. You are entitled to two years of transitional benefits, after which you have the right to convert to a private health plan set up by the Defense Department. However, you must remain unmarried and not be covered under employer-sponsored medical coverage.

**22. Q. ARE THERE ANY CIVILIAN ORGANIZATIONS AVAILABLE TO HELP ME?**

A. EXPOSE is an organization that has been lobbying Congress for increased military benefits for ex-military wives. EXPOSE can be reached at (703) 941-5844 or Post Office Box 11191,

Alexandria, Virginia 22312. The American Retirees Association (ARA) is an organization that serves divorced military members--active-duty, Guard/Reserve and retired. The ARA can be reached at 2009 N. 14th Street, Suite 300, Arlington, Virginia 22201 (703-527-3065). The ARA has also published a book, "Divorce and the Military II" that covers in depth most of the issues discussed here.

**23. Q. IF I HAVE QUESTIONS ABOUT MY RIGHTS UNDER USFSPA, WHAT SHOULD I DO?**

A. Please consult a military legal assistance attorney or civilian lawyer of your choice as soon as possible. Your lawyer can answer the many questions that arise under USFSPA and help you to make a fair and intelligent decision about your options and alternatives.

**24. Q. GOD BLESS AMERICA!! THIS STUFF IS SO DARNED COMPLEX THAT I CAN'T FIND A GOOD CIVILIAN ATTORNEY THAT KNOWS ANYTHING ABOUT USFSPA AND MILITARY PENSION DIVISION. HOW CAN I GET A GOOD, COMPETENT LAWYER TO HELP ME?**

A. That's a very good question. There are lots of military cases where rights and advantages have been lost because the attorney's lack of knowledge of the subject matter. As a practical matter, there are very few attorneys in any given state who know a lot about this little corner of the law - - USFSPA and the division of military retirement benefits. And since you only get one chance to do it right, it makes sense to find the right lawyer right off the bat! Here are a couple of tips to help you on your quest:

- Ask a legal assistance attorney to help you; they will sometimes know local lawyers near the military base who specialize in "military divorce" cases.
- Ask a friend who's been through this already; if he or she has had a good attorney, this kind of "word-of-mouth" advertising may help you hook up with the right attorney.
- If you already have a lawyer, ask him (or her) how much experience he has in the area of military pension division. A good lawyer should never hesitate to answer a question like this; an honest attorney will not flinch at giving you a straightforward answer. Be careful if your lawyer is "offended" or becomes defensive, however.
- If you're generally satisfied with your current lawyer but she need some help, don't hesitate to suggest that another attorney be hired to act as co-counsel in the area of USFSPA and military pension division. The code of ethics in virtually every state requires attorneys to be competent in the area in which they practice or else to associate competent co-counsel. Maybe if your lawyer has a "silent partner" to help out when the going gets rough, your case will be settled (or tried) more effectively and fairly.
- Try to get a Reservist who practices in the field of family law as your attorney. Members of the Reserves are frequently the ones who are the most "up to speed" on current law and regulations in this area.

· Find out from the state bar or bar association if there are "certified specialists" in family law in your state. A majority of states have "specialty" designations for lawyers that concentrate their practices in a particular field, and these lawyers (although charging a premium for their services) will be more likely to be able to handle your case competently than a general practitioner.

· Contact the family law section of your state's bar association or the American Bar Association to see if they can give you the names of some attorneys who've spoken or written in the area of military divorce law.

Good luck!